CASE NO. 6422 CRB-2-21-5 CLAIM NO. 200191322	:	COMPENSATION REVIEW BOARD
CAROLYN CHALIFOUX CLAIMANT-APPELLEE	:	WORKERS' COMPENSATION COMMISSION
v.	:	APRIL 4, 2022

CROSSINGS EAST HEALTH
& REHAB CENTER
EMPLOYER

and

PMA MANAGEMENT CORPORATION
INSURER
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by Eric J. Garofano, Esq., and Brian K. Estep, Esq., Conway, Londregan, Sheehan & Monaco, P.C., 38 Huntington Street, New London, CT 06320. At the trial level and at the initiation of this appeal, the claimant was represented by Ralph J. Monaco, Esq., Conway, Londregan, Sheehan & Monaco, P.C., 38 Huntington Street, New London, CT 06320. Attorney Estep waived oral argument and the matter was considered on the papers.

The respondents were represented by Diane D. Duhamel, Esq., and David C. Davis, Esq., McGann, Bartlett & Brown, LLC, 111 Founders Plaza, Suite 1201, East Hartford, CT 06108. Attorney Duhamel waived oral argument and the matter was considered on the papers.

This Petition for Review from the March 29, 2021 Finding and Award by Soline M. Oslena, the Administrative Law Judge acting for the Second District, was heard December 17, 2021 before a Compensation Review Board panel consisting of Chief Administrative Law Judge Stephen M. Morelli and Administrative Law Judges Brenda D. Jannotta and Maureen E. Driscoll.[1]

[1] Effective October 1, 2021, the Connecticut Legislature directed that the phrase "Administrative Law Judge" be substituted when referencing a workers' compensation commissioner. See Public Acts 2021, No. 18, § 1.

OPINION

STEPHEN M. MORELLI, CHIEF ADMINISTRATIVE LAW JUDGE. The respondents have appealed from a Finding and Award issued to the claimant by Administrative Law Judge Soline M. Oslena on March 29, 2021. The administrative law judge in this case determined that the claimant was entitled to benefits pursuant to General Statutes § 31-308a resulting from a compensable back injury she sustained on August 25, 2015.[2] The respondents appealed, arguing that evidentiary support for the award was inadequate and the claimant's decision to voluntarily stop working during the COVID-19 pandemic made her ineligible for benefits. Upon review of the record, we are satisfied that there was sufficient evidence to award the claimant benefits. In addition, we find that the award of § 31-308a benefits is highly discretionary, especially in light of the extraordinary circumstances created by the pandemic which caused numerous

[2] General Statute § 31-308a states: "(a) In addition to the compensation benefits provided by section 31-308 for specific loss of a member or use of the function of a member of the body, or any personal injury covered by this chapter, the commissioner, after such payments provided by said section 31-308 have been paid for the period set forth in said section, may award additional compensation benefits for such partial permanent disability equal to seventy-five per cent of the difference between the wages currently earned by an employee in a position comparable to the position held by such injured employee prior to his injury, after such wages have been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act in accordance with section 31-310, and the weekly amount which such employee will probably be able to earn thereafter, after such amount has been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act in accordance with section 31-310, to be determined by the commissioner based upon the nature and extent of the injury, the training, education and experience of the employee, the availability of work for persons with such physical condition and at the employee's age, but not more than one hundred per cent, raised to the next even dollar, of the average weekly earnings of production and related workers in manufacturing in the state, as determined in accordance with the provisions of section 31-309. If evidence of exact loss of earnings is not available, such loss may be computed from the proportionate loss of physical ability or earning power caused by the injury. The duration of such additional compensation shall be determined upon a similar basis by the commissioner, but in no event shall the duration of such additional compensation exceed the lesser of (1) the duration of the employee's permanent partial disability benefits, or (2) five hundred twenty weeks. Additional benefits provided under this section shall be available only to employees who are willing and able to perform work in this state.
(b) Notwithstanding the provisions of subsection (a) of this section, additional benefits provided under this section shall be available only when the nature of the injury and its effect on the earning capacity of an employee warrant additional compensation."

Commission procedures to be relaxed or waived. Accordingly, we affirm the Finding and Award.[3]

The administrative law judge found the following facts which are pertinent to our consideration. She found the claimant was employed by the respondents in their medical records department for approximately fifteen years when she sustained her compensable back injury in 2015. The claimant had two years of college education in early childhood education but, besides a relatively short time working for a daycare, had worked in nursing homes, with medical records and in central supply. Her employment with the respondent required her to lift heavy boxes. After her injury, the claimant underwent a L4-5 and L5-S1 laminectomy on February 16, 2016, performed by a neurosurgeon, C.G. Salame. On February 21, 2017, Salame performed an anterior lumbar interbody fusion at L5-S1. The administrative law judge took administrative notice that, after these procedures, the claimant was assigned a 26 percent permanent partial disability rating to her back by Salame, which the respondents paid.

The claimant testified that the respondents eliminated her position in March of 2017 and she was terminated. She asserted a claim for § 31-308a benefits based on her employment history subsequent to June 4, 2017, providing records of employment contacts. See Claimant's Exhibit A. She testified that she worked for her sister at a youth camp from June 2019 through August 2019, where she was paid $12 per hour. See October 9, 2020 Transcript, pp. 13-14, 23. The claimant also testified to working at Dunkin Donuts for a short period of time from approximately December 2019 until March 2020, earning $11 or $12 per hour, averaging approximately 18 hours per week.

[3] We note that three motions for extension of time and a motion for continuance were granted during the pendency of this appeal.

See id., pp. 14-15, 22. She stopped working at Dunkin Donuts at the beginning of the COVID-19 pandemic because her husband had heart and breathing conditions which made him a high-risk person, thereby resulting in her need to quarantine. See id., pp. 15-16. In addition, the summer camp she had worked at the year before was closed in 2020 due to the pandemic. See id., p. 14.

The claimant testified that she liked to work and was eager to work, even at minimum wage. She testified that she had sought employment with approximately 100 applications for jobs and had approximately ten interviews throughout the years, but when respective employers saw her restrictions, they seemed to lose interest in hiring her. See id., pp. 13, 16-17. These restrictions were issued by the claimant's treating physician Patrick F. Doherty, on May 22, 2019, and included directions to avoid lifting more than ten pounds; avoid bending and prolonged sitting; frequent breaks; and the ability to work six hours daily, up to five days per week. See Claimant's Exhibit C. The claimant further testified that she was limited in the types of jobs that she could acquire because she required frequent breaks and could not sit or stand for extended periods of time. She said that oftentimes she could not straighten up and needed to sit on a heating pad every day. See October 9, 2020 Transcript, pp. 13, 17-18.

The claimant alleged entitlement to payment of § 31-308a benefits for an equivalent number of weeks of her permanency benefits at her full base compensation rate. The respondents, on the other hand, argued that the claimant had not met her burden in establishing that she was entitled to § 31-308a benefits. The administrative law judge concluded that the claimant had met her burden and reached the following conclusions which were determinative of her decision:

E. The Claimant throughout the years has applied to numerous jobs, underwent numerous job interviews that were fruitless and did manage to secure employment on two separate occasions for a few months, which came to a halt due to Covid.

F. The Claimant continues to suffer daily from back pain and has a reduced earning capacity due to her substantial restrictions and limited experience.

G. The Claimant has established that she has a diminished work capacity as a result of the August 25, 2015 back injury and has demonstrated that despite being willing and able to perform restricted work, no suitable employment is available.

H. The Claimant's testimony was very credible and persuasive, especially with regard to the fact that she is ready, willing, and able to work. The Claimant has made diligent effort and consistent efforts to find work with potential employers, e.g., the numerous job contacts, interviews, and her actions in securing two positions demonstrates a credible willingness to work.

I. The Claimant having suffered a loss in her earning capacity as a result of her compensable injury, and in light of her efforts and willingness to work, has adequately met her burden establishing entitlement to § 31-308a benefits.

Conclusions, ¶¶ E-I.

Based on those conclusions, the administrative law judge awarded the claimant 97.24 weeks of temporary partial disability benefits pursuant to § 31-308a at the rate of $300 per week, commencing on April 1, 2020.[4] The respondents filed a motion to correct seeking to strike evidence which they believed should not have been introduced via a motion to re-open the record and to substitute findings that the claimant failed to prove her case for benefits, including a finding that the claimant's decision to stop working at Dunkin Donuts barred her from obtaining § 31-308a benefits. The

[4] The voluntary agreement approved March 5, 2020, established that the claimant was entitled to 97.24 weeks of permanent partial disability benefits at a compensation rate of $358.07 per week.

administrative law judge denied this motion in its entirety.[5] She also denied a motion for articulation filed by the respondents. On February 25, 2021, the claimant also filed a motion to re-open the record to admit a medical note from Doherty. This motion was granted over the objection of the respondents. This appeal was pursued by the respondents. The focus of their appeal is their belief that the claimant failed to introduce sufficient evidence to sustain an award and, even had she done so, her decision to quit working at Dunkin Donuts barred any compensation. We are not persuaded by these arguments.

The standard of deference we are obliged to apply to an administrative law judge's findings and legal conclusions on appeal is well-settled. "The [trier's] factual findings and conclusions must stand unless they are without evidence, contrary to law or based on unreasonable or impermissible factual inferences." Russo v. Hartford, 4769 CRB-1-04-1 (December 15, 2004), *citing* Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Moreover, "[a]s with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial court could have reasonably concluded as it did." Burton v. Mottolese, 267 Conn. 1, 54 (2003), *quoting* Thalheim v. Greenwich, 256 Conn. 628, 656 (2001). "This presumption, however, can be challenged by the argument that the [trier] did not properly apply the law or has reached a finding of fact inconsistent with the evidence presented at the formal hearing." Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

[5] This administrative law judge's denial of the respondents' motion to correct was not briefed on appeal and we will, therefore, deem it abandoned. See St. John v. Gradall Rental, 4846 CRB-3-04-8 (August 10, 2005), *appeal withdrawn*, A.C. 26883 (February 14, 2006) and Christy v. Ken's Beverage, Incorporated, 5157 CRB-8-06-11 (December 7, 2007).

The respondents argued herein that the award of benefits to the claimant by the administrative law judge constituted an abuse of her discretion and was inadequately supported by the evidence. We have reviewed cases where respondents have raised a similar challenge to the award of benefits such as Gfeller v. Big Y Foods, 6322 CRB-2-19-5 (April 8, 2020) and Lopez v. Lowe's Home Improvement Center, 4922 CRB-6-05-3 (March 29, 2006), and affirmed the award of benefits even after the claimant had been terminated from employment. We believe that these cases stand for the broad discretion of a fact finder to evaluate the totality of the circumstances to ascertain if an award of benefits is warranted under the circumstances in an individual case.

In addition, during the applicable time period, the global COVID-19 pandemic was fully ongoing and constituted a medical crisis unprecedented in recent history which had already claimed thousands of lives in Connecticut.[6] The impacts of this pandemic were widespread and pervasive throughout our economy, health care system and government, and required numerous responsive executive orders by the governor. Several of these orders, particularly Executive Order Nos. 7K and 7JJJ, pertained to the workers' compensation system. See Executive Order No. 7K (March 23, 2020) and Executive Order No. 7JJJ (July 24, 2020). Our commission chairman also issued numerous memorandums responsive to the disruption occasioned by the pandemic, including one which waived job searches for claimants. See Commission Memorandum No. 2020-02, Temporary Emergency Guidelines in Response to COVID-19 Outbreak dated March 19, 2020. Although these orders have expired, the overall focus of them was to provide greater flexibility and discretion in the workers' compensation process responsive to the unanticipated challenges posed by the pandemic.

[6] See https://portal.ct.gov/coronavirus (last visited February 8, 2022).

We now turn to the facts of this case. We have reviewed the claimant's testimony. She testified that she was terminated by her employer after her first surgery and attempted to return to the workforce after her second surgery. The claimant further testified that, despite applying for about 100 jobs and attending ten job interviews, when she told employers she had a limit of six working hours per day and thirty hours per week, she was not offered a job. The claimant was unemployed until her sister hired her at a summer camp. See October 9, 2020 Transcript, p. 13. She testified she would have worked at the summer camp again in 2020, but it was closed due to COVID-19. See id., p. 14. The claimant also testified as to her work at Dunkin Donuts, which she described as "horrible" because of the need to recover the next day from the pain she suffered being on her feet. Id., p. 14. Nonetheless, she continued to work there until the COVID-19 pandemic, when she left the job because she believed working in a job with extensive contact with the general public would endanger her husband's compromised health. See id., pp. 15-16. Finally, the claimant testified to having continued interest in working, that she continued to search for jobs and that, despite her need for pain medication, she wanted to obtain further employment. See id., pp. 16, 19-20.

The administrative law judge heard testimony from the claimant which she found credible and persuasive with respect to the claimant's desire to work at all relevant times as well as her significant and ongoing limitations to her work capacity that hindered her ability to obtain gainful employment. As for the claimant's decision to stop working at Dunkin Donuts after the pandemic began, we note that termination from employment is not a bar to the award of § 31-308a benefits. See our analysis in Gfeller, supra.

> We are not persuaded that the factual scenario in Donovan [v. United Technologies Corp., 7 Conn. Workers' Comp. Rev. Op. 5,

632 CRD-4-87 (June 9, 1989)] is particularly relevant to the appeal at bar. Somewhat more pertinent to our consideration of this matter is Levey v. Farrel Corp., 3649 CRB-4-97-7 (July 30, 1998), in which this board affirmed the denial of temporary partial disability benefits to a claimant who was terminated for cause while working light duty following his return to employment after being injured. In Levey, we stated:

'Where a claimant is terminated for cause, the trier has the discretion to consider such a dismissal from employment tantamount to a refusal to perform a suitable light duty position for the purposes of § 31-308 (a). If not for his own actions, the claimant in this case would have been able to earn the same salary he was earning before his injury, and would not have been entitled to temporary partial disability benefits.'

Id.

However, in a case involving similar considerations, albeit under General Statutes § 31-308a, this board affirmed an award of partial disability benefits to a claimant who had been terminated for cause. See Lopez v. Lowe's Home Improvement Center, 4922 CRB-6-05-3 (March 29, 2006). The claimant in that case had been accommodated with light duty but stopped working, telling his employer he had suffered an increase in symptoms. His employer told him [he] needed to produce a disability note, which the claimant said he was unable to secure, and his employment was terminated for violating the company's attendance policies. Some months later, after collecting permanent partial disability benefits, the claimant sought additional lost earnings benefits pursuant to § 31-308a, which the respondent contested on the basis that the claimant had been terminated for cause and was not willing and able to work. The claimant argued he had been willing to work but was prevented from doing so by the company's insistence on a doctor's note. The commissioner awarded the benefits and the respondent appealed. This board affirmed the award, noting that the trial commissioner had weighed the circumstances surrounding the claimant's failure to return to work and had 'accepted the claimant's position that his failure to return was based on … a bureaucratic barrier to performance.' Id.

This board also noted that the Lopez respondents had placed 'virtually exclusive reliance' on Levey, supra, in order to justify their defense of the claim. However, we pointed out that 'the actual text of the Levey opinion makes the circumstances of termination not a legal bar to recovery, but an issue for the trial

> commissioner to consider in deciding whether to award benefits.' Id. As such, the 'determination of the claimant's status as "able and willing" to work is ultimately a question of fact for the trial commissioner and [the respondents'] arguments related to termination for nonattendance are relevant but not dispositive.' Id.

Gfeller, supra. Footnote omitted.

Given this precedent, the claimant's testimony that she was seeking and would have considered alternative employment, as well as the claimant's testimony that she would have worked at a summer camp had they been open (see Executive Order No. 7PP, May 18, 2020), we believe that the administrative law judge could reasonably have found that the claimant was entitled to § 31-308a benefits. Therefore, we believe that the administrative law judge could have awarded the claimant benefits under the statute.

The respondents also argued that the § 31-308a compensation rate set forth by the administrative law judge in her decision was in error. They filed a motion for articulation seeking clarification as to the methodology she utilized in setting that rate, which she denied.

Section 31-308a gives an [administrative law judge] discretion to award compensation,

> based upon the difference between the prevailing wage for a position comparable to that held by the injured employee prior to her injury, and 'the weekly amount which such employee will probably be able to earn thereafter . . . to be determined by the [administrative law judge] based upon the nature and extent of the injury, the training, education and experience of the employee, the availability of work for persons with such physical condition and at the employee's age.'

McCarthy v. Hartford Hospital, 5079 CRB-1-06-3 (2007), *aff'd*, 108 Conn. App. 370 (2008), *cert. denied*, 289 Conn. 910 (2008).

The caveat is that the rate cannot be "more than one hundred percent, raised to the next even dollar, of the average weekly earnings of production and related workers in manufacturing in the state, as determined in accordance with the provisions of section 31-309." General Statutes § 31-308a.

In assessing an administrative law judge's award, this board will apply a deferential standard of review because of the discretionary nature of § 31-308a benefits. "As long as the [administrative law judge] considers the factors required by the statute, this board will not reverse the trier's decision absent an abuse of discretion." McCarthy, supra, *citing* Bowman v. Jack's Auto Sales, 54 Conn. App. 289, 295 (1999). In the current action, the administrative law judge noted that the claimant was a 59-year-old female with two years of college in early childhood education, who had worked in medical records and central supply and nursing homes for most of her career. See findings, ¶¶ 2-3. The administrative law judge further noted that the claimant had a 26 percent permanent partial disability to the back and that Doherty had assigned restrictions of avoiding lifting of more than ten pounds, no bending and/or prolonged sitting, the need for frequent breaks, as well as restrictions regarding the number of hours she could work per day. See findings, ¶¶ 9, 20. Based on this criterion, the administrative law judge awarded the claimant § 31-308a benefits at a rate of $300.00 per week for 97.24 weeks as compared to the claimant's base compensation rate of $358.07. This rate is clearly within the parameters of the statute and the discretion of the administrative law judge. Thus, although it may have been beneficial had she addressed the question raised in the motion for articulation, viewing the matter in totality, she was not required to do so and it does not constitute reversible error.

It is black-letter law that "[t]he purpose of the Workers' Compensation Act is remedial in nature and should be construed to accomplish its humanitarian purpose. Dubois v. General Dynamics [Corporation], 222 Conn. 62, 67 (1992); Syphers v. Dedicated Logistic Services, 3711 CRB-1-97-10 (November 16, 1998)." Scott v. City of Bridgeport, 4637 CRB-4-03-2 (February 24, 2004). In light of the wide discretion accorded to administrative law judges in awarding of § 31-308a benefits, and the extraordinary circumstances the COVID-19 pandemic created for injured workers, we do not find error in this case.[7]

The March 29, 2021 Finding and Award of Soline M. Oslena, the Administrative Law Judge acting on behalf of the Second District, is accordingly affirmed.

Administrative Law Judges Brenda D. Jannotta and Maureen E. Driscoll concur in this opinion.

[7] We affirm the administrative law judge's denial of the motion to correct. We may reasonably infer that she did not find the evidence cited in those proposed corrections either probative or persuasive. See Brockenberry v. Thomas Deegan d/b/a Tom's Scrap Metal, Inc., 5429 CRB-5-09-2 (January 22, 2010), *aff'd*, 126 Conn. App. 902 (2011) (per curiam); and Vitti v. Richards Conditioning Corp., 5247 CRB-7-07-7 (August 21, 2008), *appeal withdrawn*, A.C. 30306 (September 29, 2009).