CASE NO. 6452 CRB-6-21-11 CLAIM NOS. 800128948, 601091244, 601082828, 800131599 & 800133236	:	COMPENSATION REVIEW BOARD
AUDREY W. RIGGINS CLAIMANT-APPELLANT	:	WORKERS' COMPENSATION COMMISSION
v.	:	APRIL 4, 2023

STATE OF CONNECTICUT/
DEPARTMENT OF CORRECTION
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLEE

and

GALLAGHER BASSETT SERVICES, INC.
THIRD-PARTY ADMINISTRATOR

APPEARANCES:

The claimant appeared at oral argument before the board as a self-represented party.

The respondent was represented by Christopher K.C. Boyer, Esq., Assistant Attorney General, Office of the Attorney General, 165 Capitol Avenue, Suite 4000, Hartford, CT 06106.

This Petition for Review from the November 10, 2021 Finding and Dismissal of Pedro E. Segarra, Administrative Law Judge acting for the Sixth District, was heard October 28, 2022 before a Compensation Review Board panel consisting of Chief Administrative Law Judge Stephen M. Morelli and Administrative Law Judges Carolyn M. Colangelo and Toni M. Fatone.[1]

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

OPINION

STEPHEN M. MORELLI, CHIEF ADMINISTRATIVE LAW JUDGE: This appeal concerns a dispute as to the appropriate compensation the claimant was due for her permanent impairments related to her work injuries. The claimant alleged that she had been underpaid, and cited delays in receiving an additional award of permanent partial disability (PPD) benefits. After a formal hearing, however, Administrative Law Judge Pedro Segarra concluded in his November 10, 2021 Finding and Dismissal (finding) that the claimant had been paid at an inappropriate compensation rate and the respondent had actually overpaid her. The claimant appealed from this decision, arguing that it was not supported by the evidence. She noted that she was paid for many years in the absence of either an award or a voluntary agreement and sought to admit additional evidence supportive of her position. We ruled on the motion for additional evidence on August 8, 2022.[2] The respondent acknowledged that they paid the claimant for her injuries on a "without prejudice" manner for many years, but argued that, since the issue of overpayment or underpayment was a factual issue, it was not subject to appellate consideration.

Upon review of the record, we conclude that the administrative law judge addressed issues at the formal hearing beyond the scope of the notices sent to the parties prior to the hearing. In light of the fact that the claimant is not represented by counsel, we believe the administrative law judge should not have addressed the issues raised by the respondent at a hearing the claimant sought on a substantially dissimilar issue. In addition, we are concerned that an issue still exists as to whether the payments the

[2] See Ruling Re: Motion for Additional Evidence dated August 8, 2022.

claimant received for her additional permanent impairment were paid in a timely fashion and whether interest is due on those payments. The administrative law judge did not evaluate this issue in sufficient detail to allow us to rule on this question. Therefore, we vacate the entire decision and remand this matter for a *de novo* hearing at the Sixth District limited solely to the issue as to whether the claimant is entitled to an interest award upon the award for permanency benefits she had previously received.[3] If other

[3] In reviewing the claimant's file, we take administrative notice that she has had multiple workers' compensation claims.

In WCC # 800128948, the respondent issued a jurisdictional voluntary agreement for a date of injury of December 12, 2000, approved by the Commission on May 21, 2008, acknowledging that the claimant had sustained compensable injuries to her back, left foot and left leg. The base compensation rate was established at $299.12. There were no other approved voluntary agreements in this file. There was, however, a decision dated April 12, 2007, wherein it was found that the claimant had sustained a compensable injury to her lumbar spine on October 5, 2001 for which the claimant was awarded 3 percent permanent partial disability and interest for late payment. There was also a form 36 approved in 2003 which sought to convert the claimant from temporary total to temporary partial benefits, from which it could be inferred that the claimant received temporary total benefits for some time.

In WCC file # 800131599, for a date of injury of October 5, 2021, there were no jurisdictional voluntary agreement that set forth the base compensation rate. There was, however, a specific voluntary agreement for 3 percent to the lumbar spine for a date of injury of October 5, 2021 rejected by the Commission on March 30, 2008 which indicated that the compensation rate should have been 306.88.

In WCC file #8001333236, for a date of injury of February 6, 2002, there was a specific voluntary agreement for an increase of 9 percent to the lumbar spine, with a date of maximum medical improvement of April 2, 2009, which was rejected by the Commission on February 23, 2010.

In WCC #601082828, with a date of injury of December 6, 2016, the respondent issued multiple voluntary agreements, including a jurisdictional voluntary agreement approved by the Commission on July 31, 2018, acknowledging that the claimant had sustained compensable injuries to her arm, first finger of her left hand, second finger of her left hand and second finger on her right hand. The base compensation rate was $612.79. There is also a specific voluntary agreement for 3 percent of the non-master hand with a date of maximum medical improvement of August 3, 2018. There is a second specific voluntary agreement for 10 percent of the non-master arm with a date of maximum medical improvement of November 21, 2018. There is a third specific voluntary agreement for 6% of the non-master arm with a date of maximum medical improvement of November 21, 2018. The final specific voluntary agreement in this file, approved by the commission on October 27, 2020, is for 4 percent permanent partial disability to the left foot with a date of maximum medical improvement of October 28, 2019.

Finally, in WCC File #601091244, the claimant also alleged she had sustained an injury to her arm on August 26, 2019. There are no decisions or voluntary agreements in this file.

issues need to be heard and assessed in order to rule on the question of interest that may be owed to the claimant, the parties should be duly notified thereof.

The administrative law judge reached the following factual findings at the conclusion of the formal hearing, which was noticed for an initial hearing held on July 22, 2021 and continued to a second session on August 19, 2021. He found that the claimant made claims for left ankle injuries asserting two different dates of injury: December 12, 2000 and December 6, 2016. The respondent had accepted these injuries and issued voluntary agreements which had been approved. See Findings, ¶ 2 *citing* Respondent's Exhibit 1 and Respondent's Exhibit 4. The claimant alleged that she did not receive her indemnity benefits for the 10 percent PPD of the left ankle for the December 12, 2000 date of injury. She further alleged the PPD payment for the additional 4 percent disability rating for her left ankle as a result of the 2016 injury had not been paid in a timely manner. See Findings, ¶¶ 3-4.

The administrative law judge noted the voluntary agreement for the December 6, 2016 date of injury indicated a permanent partial impairment of 4 percent of the left ankle in addition to the 10 percent previously paid for the December 12, 2000 date of injury. See Findings, ¶ 5. The voluntary agreement for the 2016 date of injury was signed by the claimant and subsequently approved on October 27, 2020. The administrative law judge also noted the testimony of the respondent's witness, Linda Tulloch-Peart, an adjuster for the third-party administrator, Gallagher Bassett Services, Inc. The respondent introduced into evidence a jurisdictional voluntary agreement approved on May 21, 2008 for the 2000 date of injury, establishing a base compensation rate of $299.12. See Findings, ¶ 8, *citing* Respondent's Exhibit 4. The respondent also produced evidence that checks

totaling $6547.50 were paid directly to the claimant's legal representative, Attorney Deborah L. Nemeth, on July 22, 2002, and that an additional check for $2480.87 was sent on November 1, 2002. These checks, which the respondents contended represented payment for the 10 percent PPD left ankle payment calculated at 12.5 weeks of benefits at a compensation rate of $523.80 (although the actual rate that was later approved on the voluntary agreement was $299.12), were promptly deposited into an IOLTA account for the benefit of the claimant. See Findings, ¶ 9, *citing* August 19, 2021 Transcript, pp. 29-30 and Respondent's Exhibits 5-8. Based on the amount paid for the 2000 date of injury and the compensation rate established for this injury, the administrative law judge determined that there was an overpayment of $2808.50. See Conclusion, ¶ E.

The administrative law judge also reviewed the circumstances concerning the 2016 date of injury. The respondent presented a voluntary agreement which was approved on October 27, 2020, as well as testimony from Tulloch-Peart. See Findings, ¶¶ 11-12. Tulloch-Peart testified that, per the claimant's request of August 21, 2020, the claim file was reopened to process the additional 4 percent left ankle PPD request. See Findings, ¶ 12. The claimant indicated that she had a report from Michael Aronow, M.D., dated October 28, 2019, that assigned an additional 4 percent PPD to the left ankle.[4] Id. Tulloch-Peart testified that she was unaware of the report assigning the additional PPD until the claimant's call of August 21, 2020, and took steps to process payments as soon as she was made aware of it by the claimant. See Findings, ¶ 13. The administrative law judge found that on September 10, 2020, a check was sent to the

[4] The finding uses a 2018 date. Our review finds this report was issued in 2019. This is a harmless scrivener's error which we will accord no weight. See Hernandez v. American Truck Rental, 5083 CRB-7-06-4 (April 19, 2007).

claimant in the amount of $1838.37, followed by another check for $1225.58, sent on October 12, 2020. These checks represented payment of five weeks at a rate of $612.79 for a total of $3063.95 for payment in full of the additional 4 percent PPD of the left ankle. Said checks were received and cashed by the claimant. See Findings, ¶ 14, *citing* Respondent's Exhibits 1-3.

Based on these factual findings, the administrative law judge reached the following conclusions. He did not find the testimony of the claimant credible or persuasive and he found the testimony of Tulloch-Peart more credible and convincing. He found that the claimant failed to sustain her burden of proof that any amount due to her as compensation for her overall 14 percent PPD rate had been paid in an untimely manner, and further determined that the payment of the 10 percent PPD rate for the claimant's initial injury had been made at an incorrect compensation rate, leading to an overpayment of $2808.50.

The claimant filed a timely responsive pleading to the finding which was deemed to serve as a motion to correct. The administrative law judge granted some corrections as to scrivener's errors and struck a reference to claimant's counsel, but made no material change to the finding. The claimant then sought to add additional evidence to support her claim of error, which this tribunal addressed. She argued that, had the administrative law judge properly evaluated all the evidence, he would have found she had not been fully paid for her injuries. The respondent argued that this was merely an appeal seeking to retry the facts, which were determined in a manner adverse to the claimant.

The standard of deference we are obliged to apply to an administrative law judge's findings and legal conclusions is well settled. "The trial commissioner'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 trial commissioner 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).

It is axiomatic that all hearings before this commission must be held in a fundamentally fair manner so as not to violate the rules of due process. See Summers v. R R Donnelley Printing Company, 5914 CRB-1-14-2 (February 26, 2015), *citing* Huck v. Inland Wetlands & Watercourses Agency, 203 Conn. 525, 542 (1987) and see also Bryan v. Sheraton-Hartford Hotel, 62 Conn. App. 733 (2001). We also note that when a finder of fact orders relief on an issue that is not cited in the hearing notices, we may determine the facts warrant vacating that element of relief and holding a *de novo* hearing. See Ramsahai v. Coca-Cola Bottling Company, 5991 CRB-1-15-2 (January 26, 2016). We particularly believe that in cases such as this present case, where the claimant has had multiple claims presented to the Commission, regarding injuries with the same respondent over decades of time, and the payment history of the various claims may be unclear, that it is important to limit the scope of a specific hearing. In the present matter,

it appears the administrative law judge went beyond the original scope of the noticed issue for the hearing and, therefore, we believe the finding herein must be vacated.

The hearing notices for the initial July 22, 2021 formal hearing stated only one issue was under consideration "31-295 (c) – penalty for late payment of PPD benefits." At the initial session of the formal hearing, the administrative law judge stated "[t]he issue that has been noticed for this hearing is violation of 31-295 (c) penalty for late payment of benefits, that is the issue that I have." July 22, 2021 Transcript, p. 3. The claimant mentioned prior hearings as to her quest to ascertain the status of prior payments. See id., pp. 3-4. At that point, counsel for the respondents made no representation that he intended to present evidence the claimant had been overpaid. The administrative law judge explained the hearing process to the claimant and had her sworn in as a witness. See id., p. 7. After concluding the claimant lacked necessary documentation to proceed with her case, the administrative law judge adjourned the formal hearing. See id., pp. 10-11.

At the August 19, 2021 formal hearing, the administrative law judge stated again "[t]he issues cited for this formal hearing are 31-296 approval of Voluntary Agreement and 31-295 penalties for late payment of permanent partial disability benefits." August 21, 2021 Transcript, p. 3. Counsel for the respondents then added a number of exhibits to the record such as checks paid to the claimant to which the claimant objected as "I do not know what the check was for, which date of injury and which body part." Id., pp. 4-7. On one proposed exhibit, the claimant objected as "I have not seen that, I don't even know what it is." Id., p. 8. After offering her exhibits, the claimant was sworn in and offered a narrative as to delays in payment and inconclusive informal

hearings between 2016 and 2020, which was interrupted as the administrative law judge and respondent's counsel offered objections to alleged hearsay testimony. See id., pp. 8-17. The claimant concluded by pointing out she did not receive any additional PPD payments until she brought it to the respondent's attention. See id., pp. 18-19. On cross-examination, the claimant said she was pursuing a claim for the lateness of the additional 4 percent payment and because Commissioner Watson had told both her and Gallagher Bassett the original 10 percent payment was late. See id., p. 20.[5]

There is no indication in the record that prior to counsel for the respondent putting Tulloch-Peart on the stand, as a rebuttal witness to the claimant at the August 19, 2021 hearing, that the respondent informed the claimant they were seeking recovery of an overpayment. Our review of Tulloch-Peart's testimony offers no insight as to why this alleged overpayment occurred. See id., pp. 31-32. While the claimant was able to conduct cross-examination of this witness, we are left to ponder if she would have conducted a more through inquiry had she been advised to prepare on the issue of alleged overpayment. See id., pp. 36-41. As this tribunal held in Henry v. Ansonia, 5674 CRB-4-11-8 (August 8, 2012), "[d]ue process requires that both parties be properly advised as to the relief under consideration at the formal hearing so that they may prepare their most persuasive arguments. The trial commissioner's decision in this case prejudiced the claimant who had not prepared arguments on the heart and hypertension issue." See also Wilson v. Capitol Garage, Inc., 6109 CRB-2-16-6 (May 16, 2017). In this matter, the entry of an eleventh-hour argument that rather than having been

[5] At the hearing before our tribunal, the claimant said that the formal hearing at issue was necessary because three prior commissioners who had heard the matter at informal hearings, Watson, Dilzer and Mastropietro, had either not received paperwork from Gallagher Basset or had received inaccurate paperwork. See October 28, 2022 Compensation Review Board Transcript, pp. 21-22.

underpaid the claimant had actually been overpaid constitutes the sort of circumstances inconsistent with our precedent in Ghazal v. Cumberland Farms, 5397 CRB-8-08-11 (November 17, 2009).[6] We therefore must vacate this finding.

We note that since the original noticed issue herein was concerning late payments in 2019 and 2020 for permanent partial disability to the claimant's ankle that either the future *de novo* hearing be limited to that specific issue,[7] or the administrative law judge should hold a global hearing to determine whether the claimant was underpaid or overpaid for any of the injuries claimed for benefits in footnote 3. It is possible such an inquiry may determine there was another lapse in payment or failure to pay statutory interest occurred in one of those other open files, or that the benefits that were paid were erroneously categorized at the time they were paid. If the commission is to be asked to engage in an effort to redress prior errors made in the payment of benefits to the claimant, we believe that it would be fundamentally unfair to allow the respondent to cherry pick which mistakes it would like to rectify, see Meadow v. Winchester Repeating Arms Co., 134 Conn. 269 (1948) and Hines v. Naugatuck Glass, 4816 CRB-5-04-6 (May 16, 2005). The holding of Cormican v. McMahon, 102 Conn. 234 (1925), directs us that a global inquiry as to whether the claimant was compensated properly should occur if an inquiry

[6] See also Bennett v. Wal-Mart, 4939 CRB-7-05-5 (May 15, 2006), *citing* Palm v. Yale University, 3923 CRB-3-98-10 (January 7, 2000).

[7] We note that in Conclusion, D, the administrative law judge concluded that the claimant failed to prove that any portion of the 14 percent PPD due as the claimant was paid in an untimely manner, but the findings do not address whether the third-party administrator, Gallagher Bassett Services, Inc., acted reasonably by closing the file in 2019 at a date subsequent to the issuance of the Aronow report without acting upon the report. See August 19, 2021 Transcript, pp. 18-20 and pp. 33-34. This factual record creates an open issue as to whether the respondent's actions were reasonable within the scope of General Statutes § 31-295 (c), as it is apparent the respondent took no action to pay the claimant until she brought this to their attention. At the *de novo* hearing subsequent to the remand, the administrative law judge must determine if payment of interest herein is compelled pursuant to precedent in Schenkel v. Richard Chevrolet, Inc., 4639 CRB-8-03-3 (March 12, 2004), *aff'd*, 123 Conn. App. 55 (2010) (per curiam) and Hernandez v. American Truck Rental, 5083 CRB-7-06-4 (April 19, 2007).

extends beyond the specific issue raised by the claimant of statutory compliance with payment of her most recent permanency award.

Therefore, we vacate the entire decision and remand this matter for a *de novo* hearing at the Sixth District.

Administrative Law Judges Carolyn M. Colangelo and Toni M. Fatone concur in this Opinion.