CASE NO. 6483 CRB-4-22-9 CLAIM NOS. 400066083, 400072886, and 400110175	:	COMPENSATION REVIEW BOARD
RUDY RECINOS CLAIMANT-APPELLEE	:	WORKERS' COMPENSATION COMMISSION
v.	:	JUNE 23, 2023

STATE OF CONNECTICUT/
DEPARTMENT OF TRANSPORTATION
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLANT

and

GALLAGHER BASSETT SERVICES
THIRD-PARTY ADMINISTRATOR

APPEARANCES:

The claimant was represented by Steven Howe, Esq., D'Agosto & Howe, LLC, 738 Bridgeport Avenue, Shelton, CT 06484.

At proceedings below, the respondent was represented by Ksenya C. Hentisz, Esq., Assistant Attorney General, Office of the Attorney General, 165 Capitol Avenue, Hartford, CT 06106. At oral argument, the respondent was represented by Trevor White, Esq., Assistant Attorney General, Office of the Attorney General, 165 Capitol Avenue, Hartford, CT 06106.

This Petition for Review from the August 29, 2022 Finding and Award of Michelle D. Truglia, Administrative Law Judge acting for the Fourth District, was heard January 27, 2023 before a Compensation Review Board panel consisting of Chief Administrative Law Judge Stephen M. Morelli and Administrative Law Judges Toni M. Fatone and Soline M. Oslena.

OPINION

STEPHEN M. MORELLI, CHIEF ADMINISTRATIVE LAW JUDGE. The respondent has appealed from the August 29, 2022 Finding and Award of Michelle D. Truglia, Administrative Law Judge acting for the Fourth District, wherein she determined the respondent was entitled to a credit for permanent partial disability payments made to the claimant pursuant to a 2007 voluntary agreement. The respondent's appeal is based on the contention that the administrative law judge improperly calculated this credit and her failure to provide a larger credit to the respondent was inconsistent with our precedent in Ouellette v. New England Masonry Company, 5424 CRB-7-09-2 (January 14, 2010). The claimant argued that another case on the issue of credits for a prior permanency award is more applicable to the facts herein and the administrative law judge's decision is consistent with that precedent. See Peralta-Gonzalez v. First Student, 6160 CRB-7-16-12 (November 16, 2017). After our consideration, we determine that the claimant's position is more persuasive, and we affirm the Finding and Award.

The administrative law judge found the following facts in her Finding and Award. She noted that the parties submitted a joint stipulation of facts. The most pertinent elements of this joint stipulation were that the claimant suffered three compensable back injuries in 2006, 2008, and 2017. In regard to the initial injury, the claimant's treater, William Lewis, M.D., issued a 7.5 percent impairment rating to the claimant's lumbar spine while the respondent's examiner, David Brown, M.D., issued a zero percent rating to the claimant's lumbar spine. The parties then entered into a voluntary agreement under file number 400066083 with a date of injury of August 3, 2006, which was approved on June 27, 2007 by then-Commissioner Charles F. Senich, see Joint Stipulation of Facts

dated July 20, 2022 [Exhibit A], wherein the claimant was paid the equivalent of 3.75 percent permanent partial disability of the claimant's lumbar spine pursuant to the June 27, 2007 voluntary agreement. In 2009, the claimant's new treater, Michael Opalak, M.D., issued a subsequent rating of 10 percent permanent partial disability of the lumbar spine, which resulted in a second voluntary agreement under which the respondent paid benefits to the claimant and are entitled to a credit. After subsequent surgeries in 2018 and 2020, on February 26, 2021, Opalak assigned a 20 percent rating to the claimant's lumbar spine, inclusive of all prior ratings, with January 5, 2021 identified as the date of maximum medical improvement.[1]

Based on these facts, the administrative law judge concluded that the respondent was entitled to a credit for prior permanency payments, as outlined herein.

> A. To date, the respondent has paid Thirteen and three-quarters percent (13.75%) permanent partial disability to the claimant on account of the claimant's 2006 and 2008 dates of injury.
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> B. Dr. Opalak's February 26, 2021, Twenty percent (20%) permanent partial disability rating was expressly stated to be inclusive of all prior ratings.
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> C. The respondent is entitled to take a Thirteen and three-quarters percent (13.75%) credit against the Twenty percent (20%) rating of Dr. Opalak, leaving a balance of Six and one-quarter percent (6.25%) owing to the claimant.

Conclusion, ¶¶ A-C.

The respondent filed a motion to correct the August 29, 2022 finding and award. Corrections were sought as to certain dates and amounts, which the administrative law judge granted. It also sought more extensive corrections consistent with finding that the

[1] The initial Finding and Award dated August 29, 2022 was the subject of a motion to correct dated September 8, 2022, to which the administrative law judge granted two corrections on September 26, 2022, to correct inaccurate dates and amounts in the original Finding and Award. We have incorporated the corrected findings herein.

respondent was entitled to a credit against the 7.5 percent permanency rating set forth in the 2007 voluntary agreement and that the respondent was now entitled to a credit for 17.5 percent of the claimant's present 20 percent permanency rating. The administrative law judge denied those material corrections and the respondent pursued this appeal claiming that, notwithstanding the fact that the claimant was not paid the entire 7.5 percent permanency award he was potentially entitled to at the time of the 2007 voluntary agreement, the entire sum was payable within the meaning of General Statutes § 31-349 (a),[2] as interpreted in Ouellette v. New England Masonry Company, 5424 CRB-7-09-2 (January 14, 2010).

In opposition to the respondent's argument, the claimant contended that the holding of Peralta-Gonzalez v. First Student, 6160 CRB-7-16-12 (November 16, 2017), governed based on the facts in this case. We find the claimant's position more meritorious than the respondent's position.

We note that in considering an appeal, we generally offer significant deference to the determination of an administrative law judge, even when the facts are not in dispute. As our Supreme Court has noted "[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."

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[2] General Statutes § 31-349 (a) states: "The fact that an employee has suffered a previous disability, shall not preclude him from compensation for a second injury, nor preclude compensation for death resulting from the second injury. If an employee having a previous disability incurs a second disability from a second injury resulting in a permanent disability caused by both the previous disability and the second injury which is materially and substantially greater than the disability that would have resulted from the second injury alone, he shall receive compensation for (1) the entire amount of disability, including total disability, less any compensation payable or paid with respect to the previous disability, and (2) necessary medical care, as provided in this chapter, notwithstanding the fact that part of the disability was due to a previous disability. For purposes of this subsection, "compensation payable or paid with respect to the previous disability" includes compensation payable or paid pursuant to the provisions of this chapter, as well as any other compensation payable or paid in connection with the previous disability, regardless of the source of such compensation."

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).

The arguments advanced by the respondent are essentially based on their definition of the term "payable." The respondent argued that, consistent with our holding in Ouellette, supra, the entire 7.5 percent permanency rating at issue at the time of the 2007 voluntary agreement was "payable," notwithstanding the decision to compromise that rating to 3.75 percent in the actual agreement. See Respondent's Brief, pp. 8-9. The respondent also argued that the administrative law judge erred as allegedly she reached no findings as to the terms of the 2007 voluntary agreement. See Respondent's Brief, p. 6.[3] The respondent argued that the entire permanency rating which was contested in 2007 is "payable" even if the claimant, due to a compromise between the parties, is "paid" a lower amount of permanency benefits. Finally, the respondent argued that the 2007 voluntary agreement herein is functionally indistinguishable from the stipulation to date, which was the focus of our decision in Ouellette, supra. Nowhere in the 2007

[3] We find that the respondent brought this issue to the attention of the administrative law judge in their motion to correct in proposed correction, ¶ 3, which states, "[t]he specific Voluntary Agreement approved on 6/27/2007 in association with WCC File No. 400066083 indicates a 3.75% loss of the lumbar spine and specifies 'Dr. Lewis 7.5%, IME Brown 0% = compromise 3.75%'" and proposed correction, ¶ 4, which states, "deleting 'respondent has paid Thirteen and three-quarters percent (13.75%) permanent partial disability to the claimant' and replacing it with 'claimant has received compensation for permanent partial disability ratings payable or paid in the amount of Seventeen and a Half Percent (17.5%) permanent partial disability.'" The administrative law judge denied these corrections and by implication addressed the terms of the voluntary agreement. Furthermore, findings ¶¶ 2.e-f of the August 29, 2022 decision make note of the 2007 voluntary agreement, thereby negating the respondent's argument. Therefore, our inquiry shall focus on whether the trier of fact properly rejected the respondent's interpretation of this agreement.

voluntary agreement, however, does it state that the claimant will not be entitled to any additional specific benefits until he exceeds the 7.5 percent permanent impairment.

The claimant contended that, in seeking to enforce a credit against a new award, the respondent bears the burden of proving the amount of the prior credit, see Rodriguez v. Remington Products, 16 Conn. Workers' Comp. Rev. Op. 115, 3069 CRB-4-95-5 (November 25, 1996), and the respondent was unable to meet this burden for the entire amount of the contested permanency rating in 2007. The claimant also argued that the respondent's position is inconsistent with our holding in Peralta-Gonzalez, supra, where this tribunal distinguished a similar case from Ouelette, supra. The claimant finally pointed to a material factual distinction between this case and Ouelette. In Ouelette, the level of disability at the time the claimant executed a stipulation to date was undisputed as there was only one disability rating in the record. In the present case, there was an ongoing dispute as to the claimant's level of disability which was resolved via a compromise memorialized within the terms of the voluntary agreement.

An examination of our actual decisions in Ouelette, supra and Peralta-Gonzalez, supra, is in order, and in our minds clarifies these issues. In Ouelette, supra, the claimant presented a 20 percent disability rating initially, executed a stipulation to date, received payment consistent with the stipulation and subsequently received a disability rating of 32 percent. He subsequently argued that he had been paid substantially less for his permanency rating than the 20 percent rating cited in the stipulation and the respondent should only receive a credit against what they actually paid at the time. We affirmed the decision reached at the formal hearing that the respondent was entitled to the full 20 percent credit because "the question for the trial commissioner to consider is not the

amount of compensation the claimant actually received, but to ascertain what was the level of compensation which was *payable* to the claimant at that time." (Emphasis in the original.) Ouellette v. New England Masonry Company, 5424 CRB-7-09-2 (January 14, 2010). We also noted that:

> In the present case, we find there is a certain level of ambiguity in the stipulation. While it clearly breaks out which parties are to pay the $37,500 received by the claimant, the agreement fails to itemize how the benefits are allocated against the various forms of compensation due to the claimant. What we find is **not** ambiguous is the agreement clearly was intended to be a full and final settlement of the claimant's permanent partial disability claim as of 2002. We note the agreement stated it was in payment of "all . . . permanent partial disability indemnity, to the date of the approval of this agreement."

(Emphasis in the original.) Id.

We concluded that the respondent was entitled to the full 20 percent credit cited in the stipulation for the following reasons.

> We find the trial commissioner's conclusion that the entire 20% prior disability rating was "payable" at the time of the 2002 stipulation to be a reasonable conclusion based on the four corners of the document itself. While the claimant argues that his temporary total disability award depleted the amount he should have received for his permanency award, we must presume that at the time he executed this agreement he believed the net sum of $37,500 offered fair and just compensation for all his injuries. Had the claimant sought to protect his right to receive full payment of the entire 20% permanency rating the document should have been drafted so as to accomplish this goal, and it was not.

Id.

This precedent was extensively examined by our tribunal in Peralta-Gonzalez v. First Student, 6160 CRB-7-16-12 (November 16, 2017). In that case, the claimant had sustained a prior injury and two different physicians had issued separate permanent disability ratings, one at 20 percent, the other at 17 percent. At an informal hearing, the

claimant and the respondents agreed upon a compromised rate of 18.5 percent, which was paid to the claimant. Years later, the claimant sustained additional impairment and the respondents argued that they were entitled to the 20 percent disability from the initial injury as “payable” to the claimant and, therefore, this was the appropriate credit against further payments. This position prevailed at the formal hearing but on appeal this tribunal reversed that decision. “The claimant also argues that the trial commissioner erred in concluding that the 20 percent permanent partial disability rating assigned by Dr. Staub constituted ‘payable’ compensation as contemplated by General Statutes § 31-349.” Id. The claimant contends that this rating:

> was not considered ‘payable’ before the parties’ agreement, as the claimant did not enjoy a present and enforceable right to demand payment at this rate until such time the parties agreed to payment at that rate. At no time did the parties agree to payment at the 20% rate, thus this was never a ‘payable’ obligation, and instead only potential in nature.

Id., see Appellant’s Brief, p. 8.

> We agree. The instant record is devoid of any written agreements documenting the payment of either the 20 percent rating assigned by Dr. Staub or the 17 percent rating assigned by Dr. Shea. As such, this appeal can be distinguished from other matters in which this board has previously examined a respondent’s entitlement to a credit for permanent partial disability benefits.

Id.

In Peralta-Gonzalez, we distinguished the case from Ouelette, supra, on the facts, noting that in Ouelette,

> although we did find ‘a certain level of ambiguity in the stipulation,’ . . . we held that because the agreement was clearly intended to be a full and final settlement of the claimant’s permanency claim in 2002, the trial commissioner had reasonably determined, based on the ‘four corners,’ . . . of the stipulation

> document, that the 20% permanency rating was 'payable' and the respondents were therefore entitled to a credit of 20 percent.

Peralta-Gonzalez, supra.

However, in the Peralta-Gonzalez case, as the level of prior disability had never been memorialized in a voluntary agreement or a stipulation, this tribunal found that it was impossible to determine what was the "payable" level of prior disability from the four corners of a written agreement. This situation left the actual payment against an 18.5 percent disability level the only applicable benchmark from which to credit the respondents. As a result, we overturned the prior decision awarding the respondents a 20 percent credit.

In the present case, we find that the level of the claimant's prior disability was contested, compromised and memorialized in a written agreement at a specific amount of 3.75 percent. See Joint Stipulation of Facts dated July 20, 2022 [Exhibit A]. To the extent the prior claim for a 7.5 percent level of disability existed and was ever "payable", the parties agreed to a different level of disability within the four corners of the voluntary agreement without any indication that the parties were in agreement that no additional specific benefits would be owed until the claimant's disability exceeded 7.5 percent. This circumstance is materially different than Ouellette, supra, where the level of disability appears to have been uncontested, yet the claimant accepted compensation in the stipulation to date which was less than what the sole permanency rating on the record indicated was "payable" to him at the time.[4] In the present case, the parties agreed as to

[4] We also believe that there is a material difference between a stipulation to date, where the parties agree to resolve a disputed level of compensation with a specific sum of money, and a voluntary agreement wherein the parties generally agree as to the specific components of the compensation owed to the claimant but do not expand upon the impact of that agreement upon the claimant's future eligibility to benefits. It is apparent that in Ouellette v. New England Masonry Company, 5424 CRB-7-09-2 (January 14, 2010), the

what was “payable” to the claimant, and he was indeed paid that amount. It is also different from Peralta-Gonzalez, supra, but not in a manner beneficial to the respondent’s position. Here the parties agreed to execute a document that specifically memorialized the level of permanent disability the parties agreed upon and which the claimant was paid.[5] It is also noteworthy that the respondent accepted and paid the ten percent rating in 2009 without litigating any alleged credit from the 2007 voluntary agreement.

This is why the respondent’s reliance on Milewski v. Town of Stratford, 5483 CRB-4-09-7 (July 20, 2010), is unpersuasive. In Milewski, we clearly established that “[i]n Ouellette and Francis [v. Rushford Centers, Inc., 5428 CRB-8-09-2 (February 8, 2010)], we upheld a determination by the trial commissioner that what constitutes a ‘payable’ obligation must be determined from the agreements that document the award or agreement.” The unequivocal evidence herein from the agreement that documents the award is that the parties agreed to compromise the claimant’s permanent partial disability rating in 2007 at 3.75 percent. See Joint Stipulation of Facts dated July 20, 2022 [Exhibit A]. As we also pointed out in Milewski, supra, “[a]s we held in Ben-Eli v. Lowe’s Home Improvement Center, 5006 CRB-3-05-10 (November 16, 2006), ‘[o]ne can only expect the trier of fact to render a decision based on what evidence actually says, not what it should have said.’” If the result herein is not what the respondent intended, then a different agreement should have been drafted.

We also are perplexed at the respondent’s “double recovery” argument. Respondent’s Brief, pp. 10-11. The respondent does not challenge the administrative law

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parties did not specify how the sum of $37,500 paid to the claimant was allocated between the claimant’s permanent and temporary disability, and it could be reasonably inferred the claimant acceded to and was paid less than the “payable” level of disability in order to resolve the matter at that time.

[5] The relevant language in the Joint Stipulation of Facts dated July 20, 2022 [Exhibit A] is as follows: “Dr. Lewis 7.5%, IME Dr. Brown 0% = Compromise 3.75%.”

judge's finding that the claimant has now sustained a 20 percent permanent partial disability but argued that by receiving a lesser permanency rating in the past, he should not receive the full benefits he is entitled to now. Had the respondent agreed to the prior 7.5 percent disability rating in 2007, or had this been the sole disability rating available and a compromised level of compensation agreed to, as in Ouellette, supra, this would be a viable argument. It is apparent that the parties contested the impact of the 2007 injury and agreed that a 3.75 percent rating was appropriate at that time. The respondent could have contested that injury at a formal hearing and if they had prevailed, the respondent would have no credit at all today against the current award. Consequently, to essentially apply a credit today consistent with what would have been paid had the respondent acceded to the *claimant's* position, which the respondent contested at that time, would be incompatible with the humanitarian and remedial purpose of chapter 568. See Quinones v. R.W. Thompson Co., 188 Conn. App. 93, 98-99 (2019), *quoting* Kinsey v. World PAC, 152 Conn. App. 116, 124 (2014).[6] A situation which causes the claimant to receive the entire amount of disability benefits, which the uncontested current medical evidence supports, does not constitute a double recovery.

The other arguments presented by the respondent are also not meritorious. The respondent argued that the claimant failed to protect his right to future payment of

[6] We also believe that the "law of the case" doctrine supports the administrative law judge's position in this matter, as she could have relied on the negotiated 3.75 percent 2007 permanency rating, approved previously by the commission, as a settled fact. As we held in Gilbert v. Ansonia, 5342 CRB-4-08-5 (May 14, 2009), "[t]he 'law of the case' doctrine stands for the proposition that '[w]here a matter has previously been ruled upon interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case, if it is of the opinion that the issue was correctly decided, in the absence of some new or overriding circumstance.' In essence [the doctrine] expresses the practice of judges generally to refuse to reopen what (already) has been decided. . . ." Breen v. Phelps, 186 Conn. 86, 99 (1982). "New pleadings intended to raise again a question of law which has been already presented on the record and determined adversely to the pleader are not to be favored. . . ." Id., *quoting* Wiggin v. Federal Stock & Grain Co., 77 Conn. 507, 516 (1905).

compensation in the 2007 voluntary agreement. This position seems to ignore the unequivocal terms of General Statutes § 31-349, which were not required to be recited within the four corners of the agreement. It also asserts an ambiguity which we simply do not discern within the four corners of the agreement. It was also argued that it was error for the administrative law judge to deny the proposed corrections she declined to grant. The administrative law judge is not obligated to adopt the legal opinions and factual conclusions of a litigant, and we conclude the administrative law judge could reasonably have denied those corrections. See D'Amico v. Dept. of Correction, 73 Conn. App. 718 (2002), *cert. denied*, 262 Conn. 933 (2003), and Liano v. Bridgeport, 4934 CRB-4-05-4 (April 13, 2006).

We believe there is no error and based on the record presented herein, the August 29, 2022 Finding and Award of Michelle D. Truglia, Administrative Law Judge acting for the Fourth District, is accordingly affirmed.

Administrative Law Judges Toni M. Fatone and Soline M. Oslena concur in this Opinion.