CASE NO. 5769 CRB-6-12-7 : COMPENSATION REVIEW BOARD
CLAIM NO. 601049289

GIUSEPPE PREVITI
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: JUNE 25, 2013

MONRO MUFFLER BRAKE, INC.
EMPLOYER

and

TRAVELERS INSURANCE
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Jennifer B. Levine, Esq., and Harvey L. Levine, Esq., Levine & Levine, 754 West Main Street, New Britain, CT 06053.

The respondents were represented by Anne Kelly Zovas, Esq., Pomeranz, Drayton & Stabnick, 95 Glastonbury Boulevard, Suite 216, Glastonbury, CT 06033-4453.

This Petition for Review[1] from the July 3, 2012 Finding and Award of the Commissioner acting for the Second District was heard January 18, 2013 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Charles F. Senich and Peter C. Mlynarczyk.

[1] We note that an extension of time was granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has appealed from a Finding and Award and a subsequent decision on a Motion to Correct. The appeal is brought on the basis that the trial commissioner improperly determined various issues pertaining to attorneys' fees due as a result of ordering sanctions against the respondent. On review, we find the trial commissioner acted within the purview of his broad discretion in determining these issues. We find no error, and affirm the Finding and Award as corrected.

The issues on appeal emanate from a dispute between the claimant and the respondent on the issues of temporary partial disability benefits and pain management treatment. The claimant also argued that the respondents had unreasonably contested liability or unduly delayed payments of benefits. The formal hearing commenced March 9, 2010. The trial commissioner summarized the rest of the proceedings as follows.

> The case was transferred to the Second District where another session was held on October 5, 2010, at which time additional evidence was taken. The record was left open to give claimant time to review materials that were produced by the respondent, at which point claimant was to advise as to the need for further proceedings. Ultimately, the commissioner, *sua sponte*, assigned the matter for another formal hearing session on October 4, 2011, for the purpose of closing the record. That was rescheduled at the request of claimant's counsel and a formal hearing took place on December 5, 2011 at the Norwich office, at which point the evidence was closed. On February 6, 2012 the claimant filed written argument. The respondents responded with proposed findings on March 6, 2012. The record was closed at a formal hearing session on March 6, 2012 and the matter submitted to the undersigned for decision.

At the conclusion of the formal hearing the trial commissioner reached decisions on the substantive issues in this matter which are beyond the scope of this appeal.[2] After a recitation of the subordinate facts the trial commissioner reached the following conclusions which are relevant to our consideration.

> V. The claimant has failed to prevail at the formal hearing on the questions of pain management and psychiatric care. However, the claimant has prevailed on the question of temporary partial disability benefits and I find the respondents' contest of liability to pay benefits between May 19, 2009 and December 11, 2009 was unreasonable.
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> W. I find the fair measure of attorney time relative to that issue on which the claimant prevailed to be the time actually spent at the formal hearing sessions of March 9, 2010 (2.5 hours) and October 5, 2010 (3.0 hours), and at the deposition of Dr. Kruger on May 6, 2010 (2.5 hours).
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> X. Based on the nature of the issues presented and the lack of any complex legal issues, I find the reasonable hourly rate for the time of the claimant's attorney to be $185.00.
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> Y. The underpayment of benefits in the first instance was the fault of the claimant in that he filed an incorrect Form 1-A. However, the respondent was aware the proper filing status as of the August 31, 2009 informal hearing. The failure to make the $821.16 adjustment payment until 13 months thereafter represents an undue delay due to the fault and/or neglect of the respondent and warrants an award of interest in accordance with C.G.S. Section 31-300. Interest on the unpaid amount, at the rate of 10% as set out in C.G.S. Section 31-37-3a, amounts to $88.96.
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> Z. Regarding the late payment of the $821.16 adjustment, I find no attorney time expended outside the context of the formal hearing sessions, which time is compensated elsewhere in this award (above). Therefore, I find the reasonable attorney fee associated with this delayed payment to be $1.00.

[2] The claimant originally included issues related to the substantive issues in this Finding and Award in his Reasons for Appeal. The claimant did not brief these issues; hence, we deem them abandoned on appeal. Christy v. Ken's Beverage, Incorporated, 5157 CRB-8-06-11 (December 7, 2007).

Based on those conclusions the trial commissioner order the respondent to pay $1,481.00 in attorney fees to the claimant as a sanction pursuant to § 31-300 C.G.S. The claimant filed a Motion to Correct seeking substantive changes in the relief granted. The trial commissioner denied these corrections. The Motion to Correct also argued that the award of sanctions in the Finding and Award was inadequate. The claimant sought to delete the order awarding the claimant $1,481.00 in attorneys' fees and replace it with a new order, directing that an additional hearing be held to ascertain the reasonable attorney's fee to be awarded in this case. On August 3, 2012 the trial commissioner ruled on the Motion to Correct, denying the corrections sought pertaining to the substantive relief ordered in the Finding and Award. As for the issue of attorneys' fees, the trial commissioner determined that the award should be vacated. However, he also determined that the issue had been properly noticed and that the claimant had failed to proffer the necessary evidence prior to the closure of the record to sustain an award. While the commissioner concluded he was forced to agree with the claimant as the record did not include subordinate facts supporting the award of attorneys' fees; he also concluded that evidence supporting such an award could not be submitted at an additional hearing, citing the proscription against piecemeal litigation. Accordingly, the trial commissioner corrected the Finding and Award as follows:

a. CONCLUSION W is hereby deleted and replaced with the following:

> "V. "The claimant has failed to put forth any evidence of the hours he claims his attorney expended in light of the respondent's unreasonable contest of the temporary partial disability claim. Indeed, the claimant has put forth no evidence of attorney time expended on the case at all."

b. CONCLUSION X is hereby deleted and replaced with the following:

"X. The claimant has put forth no evidence as to the hourly rate at which his attorney would normally bill his time for workers compensation matters, or even articulated the rate at which he claims he should be compensated for whatever time might have been expended in furtherance of temporary partial benefits."

c. CONCLUSION Z must be modified to comport with the above changes. As the issue of fees for undue delay in payment or adjustment falls under a different part of Section 31-300 (i.e., not the unreasonable contest clause), if interest is awarded for undue delay then some award of attorney's fee award must be made. This presents a problem in that I cannot simply deny attorneys fees altogether based on a failure of proof. As a result, I have gone back over the record to see if I could find any indication that claimant-attorney time was spent on this particular issue between the time the corrected Form 1-A was agreed upon and provided on August 31, 2009 and when the adjustment check was sent by Travelers in September of 2010. It is clear that the issue of the $821.16 underpayment was a minor concern relative to the lost wages and discogram. Indeed, at the start of first hearing it is clear the claimant's attorney had not spent much time thinking about the compensation rate issue. [See, e.g., 03/09/12 trans. At 14.] Thereafter, the evidence shows that the issue of the underpayment was going to be wrapped up as part of stipulation-to-date on the other, more pressing issues, so I cannot assume that any time was spent on that issue between March 9, 2009 and the point at which the settlement discussions fell apart in May of 2009. Thereafter, the record is devoid of anything to suggest claimant's counsel spent any time on this issue until after the payment had been made, at which point the time expended on that issue was in furtherance of fees and penalties, not the benefit. In the absence of time records I simply cannot find a basis for an attorney's fee award on the delay in paying the $821.16, so I will make a nominal award.

Conclusion Z is hereby replaced with the following:

"Z. Regarding the late payment of the $821.16 adjustment, the claimant has failed to put forth any

> **evidence of any time he claims his attorneys expended in response to the respondent's undue delay in making this adjustment. Indeed, the claimant has put forth no evidence of attorney time expended on the case at all, or as to what he would claim as a reasonable hourly rate.** Therefore, I conclude the reasonable attorney fee associated with this delayed payment to be $1.00."
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> c. Order III is hereby deleted and replaced with the following:
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> **"III. The claimant having failed to prove his claim for attorney's fees on account of unreasonable contest, the claim for attorney's fee on that account is DENIED. The claimant having successfully proved undue delay in adjustment of the compensation rate but having failed to prove expenditure of attorney time on that issue, the respondent is ORDERED to pay the claimant, through the office of his attorney, the sum of $1.00 in attorney's fees, pursuant to C.G.S. Section 31-300."**

The claimant subsequently filed a Motion for Articulation. The trial commissioner granted an articulation of his reasoning in a four page ruling issued on August 17, 2012. The gravamen of his reasoning was as follows "…it was the claimant's burden to bring forth competent evidence that would support an award of fees." As the claimant did not present this evidence this amounted to a "failure of proof" making such relief unworkable. The claimant then pursued this instant appeal.

The claimant argues in his brief that since he established that the respondents had violated their obligations under § 31-300 C.G.S., in regards to unreasonable contest and undue delay, that an attorney fee award of $1.00 constituted an abuse of discretion. He *cites* Regan v. Torrington, 4456 CRB-5-01-11 (October 25, 2002), as precedent for a trial commissioner holding additional proceedings to correct an allegedly inequitable determination as to the amount of attorneys' fees to award as a sanction. The claimant

believes that since the trial commissioner originally found sanctions appropriate, that to reduce them in this fashion was an abuse of discretion rising to the standard proscribed by In re Shaquanna M., 61 Conn. App. 592, 603 (2001). The claimant restates the public policy agenda enunciated by Duffy v. Greenwich Board of Education, 4930 CRB-7-05-3 (May 15, 2006) and Hummel v. Marten Transport, Ltd., 5303 CRB-5-07-11 (May 14, 2008), *aff'd*, 114 Conn. App. 822 (2009), *cert. denied*, 293 Conn. 907 (2009) as supporting the use of monetary sanctions to penalize respondents for misconduct.

On appeal, we generally extend deference to the decisions made by the trial commissioner. "As 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." Daniels v. Alander, 268 Conn. 320, 330 (2004). The Compensation Review Board cannot retry the facts of the case and may only overturn the findings of the trial commissioner if they are without evidentiary support, contrary to the law, or based on unreasonable or impermissible factual inferences. Kish v. Nursing and Home Care, Inc., 248 Conn. 379 (1999) and Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). We note that our precedent in regards to whether sanctions should be upheld on appeal has generally extended great latitude to a trial commissioner, see Kuhar v. Frank Mercede & Sons, Inc., 5250 CRB-7-07-7 (July 11, 2008). Such sanctions have been set aside on appeal primarily when there were due process concerns, Ghazal v. Cumberland Farms, 5397 CRB-8-08-11 (November 17, 2009); or when the factual predicate to sustain sanctions could not be ascertained from the record, McFarland v. Dept. of Developmental Services, 115 Conn. App. 306 (2009). In the present case, the commissioner concluded that sanctions were

appropriate, but after consideration of the evidentiary basis for the amount of sanctions, awarded only a nominal amount. We must determine if this conclusion was so unreasonable as to warrant appellate intervention.

The record shows that the issue of sanctions was continuously noticed for each hearing held before this commission. The record also indicates that the claimant first sought to essentially bifurcate the issue of sanctions from the other issues before the commissioner in the 114 page post-hearing brief he filed on February 6, 2012, which included no documentation as to attorney time expended as a result of the respondent's improper conduct. While the claimant disputed the methodology utilized by the trial commissioner to calculate sanctions in the Finding and Award, he affixed no documentation as to what he believed was an appropriate sanction for this misconduct to his Motion to Correct. He is now aggrieved by the trial commissioner's decision to rely on the evidence that was submitted on the record.

However, the Regan decision which the claimant relies on in this appeal is factually too dissimilar to persuade us that the commissioner's decision herein was in error. In Regan, the respondents challenged the award of sanctions on appeal and we reminded them '"[w]e have repeatedly held that whether to award attorney's fees and interest for [undue] delay and unreasonable contest pursuant to § 31-300 is a discretionary decision to be made by the trial commissioner.' Sharkey v. Stamford, 4068 CRB-7-99-6 (Nov. 17, 2000); McMullen v. Haynes Construction Co., 3657 CRB-5-97-7 (Nov. 12, 1998)." Id. We also note that in Regan, the claimant presented rather detailed documentation supporting his claim for sanctions. "With respect to the amount of the $32,400 attorney's fee award, the respondents question the appropriateness of the trier's

finding regarding time spent on this matter, in light of the trier's acknowledgement of the claimant's attorney as being entitled to a high hourly rate ($250.00) due to his experience and reputation. An eight-page affidavit appended to the claimant's trial brief as Exhibit M lists the amount of time that counsel spent on various matters, totaling 129.6 hours." Id.

We noted in Regan that "[a] trier has relatively broad discretion to set the amount of such a fee, but a party may still appeal such an award and attempt to show an abuse of that discretion. Cirrito v. Resource Group Ltd. of Conn., 4248 CRB-1-00-6 (June 19, 2001). It follows that the trier's decision must be detailed enough to enable this board to ascertain the method of calculation that he used in setting counsel's fee, particularly where the fee substantially differs from the fee regulations that this Commission has promulgated. Id.; see also July 20, 2001 Memorandum No. 2001-03, 'Claimant's Attorney's Fee Guidelines."' Nonetheless, we remanded the matter for a new hearing so that the **respondents** could be heard on their challenge to the amount of the sanction. (Emphasis ours.) "We have also held that the respondents must be afforded a meaningful opportunity to question a claimant's attorney regarding the accuracy of his figures, where they articulate a desire to cross-examine in that regard. Cirrito, supra, citing, Lapia v. Stratford, 47 Conn. App. 399-401 (1997)." Regan, supra.

In the present matter there is no evidence the respondents made any effort to question the initial sanction award ordered by the trial commissioner, as they did not file either a Motion to Correct or a Petition for Review. In addition, we find that the trial commissioner in his determination of the claimant's Motion to Correct concluded that the claimant had failed to make a prima facia case sustaining an award for any amount above

nominal sanctions. We find Regan stands for the principle that one must provide due process to an opposing litigant to challenge the factual findings of a trial commissioner. We do not extend the holding of Regan to absolve litigants of the need to present their case to the commissioner before the record of a hearing closes.[3]

It is well established that when a party files a Motion to Correct, the trial commissioner is entitled to correct the Finding so as to have it conform to the evidence presented on the record. See Rizzo v. Stanley Works/Hand Tools Division, 5106 CRB-6-06-6 (November 21, 2007), *citing* Wooten v. UTC/Pratt & Whitney, 3674 CRB-6-97-9 (May 7, 1999). In Rizzo, we found that the trial commissioner appropriately modified the effective date of maximum medical improvement to conform to the testimony of the treating physician. In the present case, the trial commissioner concluded after examining the record that it did not support his original determination as to the amount of attorney time the claimant's counsel had expended in response to the respondent's improper conduct. In both matters the trial commissioner corrected the Finding to conform to the evidence presented on the record. We will affirm a Motion to Correct that is supported by the evidentiary record. Rizzo, supra.

The claimant argues that a reasonable result can be reached only by bifurcating the sanction issue from the substantive issues in this case. However, it is black letter law that a litigant is not entitled to obtain the bifurcation of a legal proceeding as a matter of

[3] Parties should not proceed under the belief this appellate body will remedy an unfavorable result resulting from an advocate's ineffective factual presentation. As the Appellate Court held in McGuire v. McGuire, 102 Conn. App. 79, 83 (2007), "[w]e have made it clear that we will not permit parties to anticipate a favorable decision, reserving a right to impeach it or set it aside if it happens to be against them, for a cause which was well known to them before or during the trial."

right. We dealt with very similar issues in Martinez-McCord v. State/Judicial Branch, 5055 CRB-7-06-2 (February 1, 2007). In Martinez-McCord, the claimant appealed from the trial commissioner's decision to bifurcate proceedings and hold additional hearings on the claimant's psychiatric issues. We affirmed the trial commissioner's decision.

> We have upheld the right of trial commissioners to determine a party failed to advance elements of their claim in a timely fashion. Schreiber v. Town & Country Auto Service, 4239 CRB-3-00-5 (June 15, 2001); Hines v. Naugatuck Glass, 4816 CRB-5-04-6 (May 16, 2005). These cases do not limit the discretion of a trial commissioner who determines the interests of justice require a matter be bifurcated.
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> "Bifurcation of trial proceedings lies solely within the discretion of the trial court; (Citations omitted) and appellate review is limited to a determination of whether this discretion has been abused." Swenson v. Sawoska, 18 Conn. App. 597, 601 (1989). The claimant offers no material evidence pertaining to an abuse of discretion in this matter.

Martinez-McCord, supra.

See also Saczynski v. Saczynski, 109 Conn. App. 426 (2008), which cited Swenson, supra, as authority. "Given the interests served by bifurcation, we cannot conclude that the court abused its discretion." Id., 429. The claimant points to no precedent which would mandate as a matter of law that a trial commissioner must grant a motion for a bifurcated hearing. The determination in this case was solely within the trial commissioner's discretion.

In reviewing the trial commissioner's response to the claimant's Motion to Correct and Motion for Articulation we are satisfied that the trial commissioner reached a reasoned decision based on the record. His decision is not based on matters outside the record or otherwise acts to vitiate logic. The commissioner concluded the claimant

should have submitted his evidence as to a proposed sanction within the scope of the hearing record. While the result herein may be disappointing to the claimant, the decision is not irrational or arbitrary, especially given the broad discretion trial commissioners are afforded under precedent such as Kuhar, supra, to address the appropriateness of sanctions.

The Finding and Award, as corrected, is herein affirmed.

Commissioners Charles F. Senich and Peter C. Mlynarczyk concur in this opinion.