CASE NO. 4305 CRB-8-00-10
CLAIM NO. 800119603 : COMPENSATION REVIEW BOARD

CARLA LAPIERRE
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

UTC/PRATT & WHITNEY : OCTOBER 23, 2001
EMPLOYER

and

AIG CLAIM SERVICES, INC.
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Ross T. Lessack, Esq., Dodd, Lessack, Ranando & Dalton, L.L.C., Westgate Office Center, 700 West Johnson Avenue, Suite 305, Cheshire, CT 06410.

The respondents were represented by Michael McAuliffe, Esq., and James Pomeranz, Esq., Pomeranz, Drayton & Stabnick, 95 Glastonbury Boulevard, Glastonbury, CT 06033-4412.

This Petition for Review from the October 6, 2000 Finding and Award of the Commissioner acting for the Eighth District was heard June 22, 2001 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners George A. Waldron and Ernie R. Walker.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has petitioned for review from the October 6, 2000 Finding and Award of the trial commissioner acting for the Eighth District. In that decision the trial commissioner concluded that the claimant sustained a compensable injury to her right shoulder, but concluded that she did not sustain her burden of proof regarding her claim of an injury to her left shoulder. In support of her appeal, the claimant contends that the trial commissioner erred in denying her claim of a left shoulder injury. Furthermore, the claimant argues that the trial commissioner erred by awarding temporary partial disability benefits under § 31-308(a) limited to the period for which the claimant had documented work search efforts. Additionally, the claimant argues that the trial commissioner erred in finding that the claimant was temporary totally disabled for only four weeks. We find no error.

The trial commissioner found the following relevant facts. The claimant was employed at Pratt & Whitney for approximately twenty years. The claimant claimed that she injured her right shoulder on March 12, 1999 while operating an air flow machine, and that she sustained a left shoulder injury two days later due to overuse of her left arm. Specifically, the claimant alleged that on March 13th and 14th, she pulled the air flow machine levers "hundreds of times" using her left shoulder rather than her right shoulder, which created the symptomatology of her left shoulder. Findings, ¶¶ 9 and 16. The claimant subsequently amended this contention, noting that she did not work on March 13th or 14th and further noting that the number of times she worked on the parts on the air flow machine were much less on a daily basis- approximately 20 to 30 rather than

"hundreds." The claimant's treating physician, Dr. Schutzer, was never informed of the claimant's amended work history. Dr. Schutzer's opinion that the claimant's left shoulder injury was caused by her employment was based upon the claimant's history of her job responsibilities. Finding ¶ 27. The claimant's history to Dr. Schutzer distorted the facts regarding her use of the air flow machine and her other job duties. Finding ¶ 36.

The determination of whether an injury arose out of and in the course of the employment requires a factual determination by the trial commissioner. McDonough v. Connecticut Bank & Trust Co., 204 Conn. 104, 117 (1987); O'Reilly v. General Dynamics Corp., 52 Conn. App. 813, 816 (1999). The power and duty of determining the facts rests on the trial commissioner as the trier of fact. This fact-finding authority "entitles the commissioner to determine the weight of the evidence presented and the credibility of the testimony offered by lay and expert witnesses." Webb v. Pfizer, Inc., 14 Conn. Workers' Comp. Rev. Op. 69, 70, 1859 CRB-5-93-9 (May 12, 1995) (citing Tovish v. Gerber Electronics, 32 Conn. App. 595, 599 (1993), *appeal dismissed*, 229 Conn. 587 (1994)). We will not disturb such determinations unless they are found without evidence, based on impermissible or unreasonable factual inferences or contrary to law. Fair v. People's Savings Bank, 207 Conn. 535 (1988).

In the instant case, the trial commissioner found that the claimant's testimony regarding her left shoulder injury had changed during the course of the formal hearing, and that her treating physician was not provided with an accurate history of said injury. Certainly, the trial commissioner's evaluation of the claimant's claim involved the credibility of the evidence presented. In the instant case, it was clearly within the

discretion of the trial commissioner, as the trier of fact, to conclude that the claimant's left shoulder was not caused by her employment. Webb, supra; Fair, supra.

We will next address the claimant's contention that the trial commissioner erred by limiting the award of temporary partial disability benefits under § 31-308(a) to the period for which the claimant had documented work search efforts. Specifically, the trial commissioner awarded temporary partial benefits between April 14, 1999 (the claimant's last day of work) and September 13, 1999 (the date of the right shoulder surgery) limited to those weeks for which the claimant had documented work searches. In her appeal, the claimant states that she attempted to return to her employment by requesting light duty work from the respondent employer, and that she subsequently "began performing job searches and recording her job contact[s] as of the week of June 15, 1999 and continued… up until… the end of August." Claimant's Brief at p. 15. The claimant argues that work search documentation is not required under § 31-308(a), and thus requests § 31-308(a) benefits from April 14, 1999 to September 13, 1999.

Whether a claimant has satisfied the statutory criteria for § 31-308(a)[1] wage differential benefits is a factual determination for the trial commissioner. Wright v. Institute of Professional Practice, 13 Conn. Workers' Comp. Rev. Op. 262, 1790 CRB-3-

[1] Section 31-308(a) provides in part:

If any injury for which compensation is provided under the provisions of this chapter results in partial incapacity, the injured employee shall be paid a weekly compensation 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 the injured employee before his injury… and the amount he is able to earn after the injury… except that when (1) the physician attending an injured employee certifies that the employee is unable to perform his usual work but is able to perform other work, (2) the employee *is ready and willing to perform other work* in the same locality and (3) no other work is available, the employee shall be paid his full weekly compensation...."
Section 31-308(a) (emphasis added).

93-8 (April 18, 1995). Although our statutes do not require a claimant to perform a work search, it has been accepted as one evidentiary basis to demonstrate willingness to work and the availability of suitable light duty employment. Shimko v. Ferro Corp., 40 Conn. App. 409, 414 (1996); Goncalves v. Cornwall & Patterson, 10 Conn. Workers' Comp. Rev. Op. 43, 1111 CRD-4-90-9 (Jan. 28, 1992). It is the claimant's burden to prove the claimant's eligibility for § 31-308(a) benefits. Christman v. State/Dept. of Correction, 4134 CRB-1-99-10 (Oct. 16, 2000). In the instant case, it was within the discretion of the trial commissioner to require documentation of job search efforts in order to demonstrate that the claimant was "ready and willing" to perform light duty work, especially where, as here, the credibility of the claimant's testimony was at issue.

Next, we will consider the claimant's argument that the trial commissioner erred in finding that the claimant was temporary totally disabled for only four weeks following the September 13, 1999 surgery on her right shoulder. In support of her appeal, the claimant contends that after the September 13, 1999 surgery, Dr. Schutzer never informed her that she was released to any type of work, and therefore she believed that she was totally disabled up until the formal hearings in the instant matter. Claimant's Brief at p. 17.

Whether a claimant is totally disabled is a factual question for the trier to determine. When a claimant asserts that she is totally incapacitated, the burden of proving such a disability falls on her. Wierzbicki v. Federal Reserve Bank of Boston, 4147 CRB-1-99-11 (Dec. 19, 2000), citing Cummings v. Twin Tool Mfg., 40 Conn. App. 36, 42 (1996). In the instant case, the trial commissioner's determination that the claimant was temporarily totally disabled for only four weeks following the September

13, 1999 surgery is fully supported by the deposition testimony of Dr. Schutzer. Respondents' Exh. 1, March 9, 2000 Deposition, p. 25.

We note that the claimant argues in her appeal that in the absence of a Form 36 having been filed, the claimant is entitled to temporary total disability benefits through the date of the formal hearings in the instant matter. We disagree. Section 31-296 C.G.S. states that an employer cannot discontinue or reduce payment on account of total or partial incapacity under any compensation agreement unless "the employer, if it is claimed by or on behalf of the injured person that his incapacity still continues, [notifies] the commissioner and the employee, by certified mail, of the proposed discontinuance or reduction and the reason therefor, and, such discontinuance or reduction shall not become effective unless specifically approved in writing by the commissioner."

We have repeatedly held that the earliest date that a termination of benefits may become effective is the date on which the Form 36 is filed. Jones v. Maaco of Greater Bridgeport, 3634 CRB-4-97-4 (Aug. 5, 1998). In the instant case, there was no evidence presented that the claimant was receiving ongoing temporary total disability benefits, nor was there any evidence that the respondents agreed to pay such benefits, and thus the record does not support the need for a Form 36 to have been filed. See § 31-296; see also Findings, ¶ J.

Finally, we will consider the claimant's argument that the trier erred in denying her Motion to Correct. In reviewing this contention, it is apparent that the Motion to Correct involves findings of fact and factual inferences made by the trier based upon his assessment of the evidence, including the credibility of the testimony. For instance, the claimant seeks to change findings regarding the incorrect history provided by the

claimant and its effect upon Dr. Schutzer's medical opinion. It is axiomatic that the trial commissioner is the fact finder in any workers' compensation case, and as such his duty is to consider the testimony and exhibits in the record, assess their credibility, and draw inferences and legal conclusions that are based on his impressions. Sendra v. Plainville Board of Education, 3961 CRB-6-99-1 (Jan. 20, 2000). When reviewing a Motion to Correct, the trier must evaluate the proposed changes in that capacity. Id. Accordingly, we find no error in the denial of the claimant's Motion to Correct. See Sendra, supra. Additionally, we find no error as the requested changes would not necessarily change the outcome of the trier's decision. Id.

The trial commissioner's decision is affirmed.

Commissioners George A. Waldron and Ernie R. Walker concur.