

CASE NO. 5114 CRB-3-06-7
CLAIM NO. 300064800

: COMPENSATION REVIEW BOARD

TIMOTHY GREENE
CLAIMANT-APPELLANT

: WORKERS' COMPENSATION
COMMISSION

v.

ACES ACCESS
EMPLOYER

: JULY 2, 2007

and

CHWCT
INSURER
RESPONDENTS-APPELLEES

APPEARANCES

The claimant was represented by Steven J. DeFrank, Esq. Levy, Leff & DeFrank P.C. 129 Church Street, Suite 712, New Haven, CT 06510.

The respondents were represented by Anthony R. Kornacki, Esq. Letizia, Ambrose & Falls, P.C. One Church Street, New Haven, CT 06510.

This Petition for Review from the March 30, 2006 Finding and Dismissal by the Commissioner acting for the Third District was heard December 15, 2006 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Donald H. Doyle, Jr. and Nancy E. Salerno.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant in this matter, a former college basketball player, asserts that his disc herniation is the result of an incident he suffered at work lifting a patient in a wheelchair. The respondents have disputed this claim and after the formal hearing, the trial commissioner agreed with the respondents. On appeal, we conclude this matter is simply a matter of the weighing of competing evidence and we are compelled to uphold the trial commissioner.

The trial commissioner found the following facts. The claimant began working for the respondent, ACES Access as a full time job coach on December 3, 2002. On December 18, 2002 he reported an injury when he lifted a patient in a wheelchair over a ramp. The claimant filed an incident report but did not report a “pop” in his back or radiating leg pain, to which he has testified. Following the December 18, 2002 incident the claimant’s supervisor, Jerry Katona, recommended the claimant treat at The Orthopaedic and Sports Medicine Center. On December 19, 2002 the claimant was examined there by a physician’s assistant who took a medical history.

The report from the December 19, 2002 examination did not contain a reference to a December 18, 2002 injury, rather it stated “for the past month the back pain has been getting worse with radiation down his right leg which is newer.” The report also stated the claimant’s internist, Dr. Joseph Quaranta had previously scheduled him for an MRI, which was performed on December 23, 2002. The claimant had been examined by Dr. Quaranta on November 25, 2002 and on December 13, 2002 and had complained of back pain at these examinations. At the November 25 examination he attributed the pain to

playing basketball. He also had been examined by Dr. Quaranta on June 25, 2002 at which time the report indicated he had been involved in a motor vehicle accident.

The December 23, 2002 MRI report indicated the claimant had a disc herniation at L4-L5 and a disc protrusion at L5-S1. He continued to treat at Orthopaedic and Sports Medicine Center and was examined there on February 24, 2003 by Dr. Joseph Girasole. Dr. Girasole's February 24, 2003 report ascribed the back ailments to the claimant's narrative of having been active playing basketball. On March 25, 2003 the claimant was examined again by Dr. Girasole and at that examination the claimant related his back ailment on the December 2002 wheelchair lifting incident. Dr. Girasole later adopted this narrative and opined that the December 2002 wheelchair lifting incident made the claimant's back ailments substantially worse.

The claimant was also examined by a neurosurgeon, Dr. James K. Sabshin, to whom the claimant received a referral from Dr. Quaranta. Dr. Sabshin first examined the claimant on July 19, 2003 declaring him totally disabled, releasing him to light duty on October 29, 2003. The claimant underwent another MRI and a CT scan which confirmed disc herniation. Based on a narrative provided by the claimant, Dr. Sabshin opined that the December 2002 wheelchair lifting incident was the "most likely" cause of the disc herniation.

While both Dr. Girasole and Dr. Sabshin had recommended surgery in 2003 it had not been performed. On April 4, 2005 the claimant had another MRI, which showed a disc protrusion at L4-L5 with mild compression of the right lateral recess and potential compression of the right L5 nerve root. The disc protrusion at L5-S1 showed no

significant compression. This new MRI caused Dr. Sabshin to determine surgery was no longer necessary.

The respondents had the claimant examined by their expert, Dr. William Druckemiller, on March 8, 2004. Dr. Druckemiller opined that the December 2002 wheelchair lifting incident was not a significant contributing factor to the claimant's current back condition. He later testified at a deposition that the medical reports of Dr. Quaranta were consistent with the claimant having had a disc herniation prior to the December 2002 wheelchair lifting incident.

The trial commissioner found that claimant is presently employed by ARC of Meriden full time at a job that involves lifting a minimum of 50 pounds. The claimant continues to play basketball a couple of times per week.

Based on these subordinate factual findings the trial commissioner concluded that the Commission had jurisdiction over the injury, but the testimony of the claimant was not credible and persuasive to the issues presented. Therefore, he deemed the opinions of the claimant's physicians, Dr. Girasole and Dr. Sabshin were not based on an accurate or credible history and did not credit their opinions regarding the causation of the disc herniation. The trial commissioner concluded that Dr. Druckemiller's opinion that the claimant's symptoms prior to the December 2002 wheelchair lifting incident were consistent with a L4-5 disc herniation was credible and persuasive.

Therefore, the trial commissioner determined the claimant's lower back condition and low back pain were not related to the December 2002 wheelchair lifting incident, and the claimant failed to sustain his burden of proof that he suffered a compensable injury on December 18, 2002. The claimant filed a Motion to Correct which was denied in its

entirety. The claimant appealed, primarily based on a claim that pursuant to § 31-349(a) C.G.S. the claimant was entitled to an award based on the alleged aggravation he suffered to a pre-existing injury.

We had the opportunity last year to delineate the standard of review in a case where the claimant asserts a work related accident aggravated a pre-existing injury. Our holding in Lentini v. Connecticut College, 4933 CRB-2-05-4 (May 15, 2006) is illustrative of the relevant scope of inquiry.

The burden of proof in a Workers' Compensation claim for benefits rests with the claimant. Dengler v. Special Attention Health Svcs., Inc., 62 Conn. App. 440 (2001). In this matter, conflicting medical evidence was presented to the trial commissioner. Where the medical opinions are in conflict, the trial commissioner's determination must stand so long as there is evidence to support it. Carney-Bastrycki v. Hospital for Special Care, 4722 CRB-6-03-9 (September 3, 2004). In this matter, the trial commissioner chose not to credit the claimant's medical evidence as to causation. As previously noted, the commissioner's review of the facts led to his conclusion the claimant's employment was not the source of the aggravation to her elbow. The power and duty of determining the facts rests with the commissioner, the trier of facts, Czeplicki v. Fafnir Bearing Co., 137 Conn. 454, 457 78 A2d 339 (1951). The conclusions drawn by him from the facts must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. Tovish v. Gerber Electronics, 32 Conn. App. 595, 603 (1993).

In Lentini the claimant advanced a similar argument to the claimant in the present case, asserting that precedent in Epps v. Beiersdorf, 41 Conn. App. 430 (1996) compelled the trial commissioner to reach a finding the claimant suffered a compensable injury. In our decision in Lentini we distinguished Epps, *supra*. In Epps "there was uncontradicted medical testimony that the claimant had suffered an aggravation to a pre-existing condition due to exposure to industrial chemicals" whereas in Lentini medical evidence contesting that claim was presented to the trial commissioner. The trial commissioner in

the present case concluded Dr. Druckemiller's testimony similarly contested the claimant's medical evidence.

The claimant also cites our decision in Kisson v. Shawmut National Bank, 4188 CRB-5-00-2 (March 16, 2001) as requiring this board to at a minimum remand the matter to the trial commissioner for additional findings as to whether the claimant should receive an award under § 31-349(a) C.G.S. Kisson is easily distinguishable from this case. In Kisson the trial commissioner's finding included a finding of an aggravation of a prior injury. Our opinion cited his finding “Prior to the Claimant's November 23, 1999 surgery her work aggravated her right lateral epicondylitis producing symptoms, as opposed to a new injury, bringing the Claimant to the point where she decided not to live with these symptoms and elected surgery.” Id., ¶ G.” Id. As a result this board concluded in Kisson “[b]ecause the trial commissioner in the instant case does not appear to have considered the probable relevance of Epps to the set of facts before him, we believe that the proper solution is to remand this case to him so that he may readdress his conclusions in light of the language of Epps.” Id.

The trial commissioner herein did not find the presence of an aggravating injury. We must review the evidence to ascertain if this was a reasonable conclusion, bearing in mind, “As the finder of fact, the trier has the sole authority to decide what evidence is reliable and what is not” Byrd v. Bechtel/Fusco, 4765 CRB-2-03-12 (December 17, 2004).” Arnott v. Taft Restaurant Ventures, LLC, 4932 CRB-7-05-3 (March 1, 2006).

The trial commissioner determined the claimant's present low back condition is not a result of the alleged December 18, 2002 incident. The trial commissioner specifically relied on the testimony of Dr. Girasole and Dr. Druckemiller who testified

that the symptoms of a disc herniation were present prior to the date of accident. The office notes from Dr. Girasole's assistant the day after the incident do not mention a work related accident. At his deposition Dr. Girasole testified in regards to the symptoms observed by Dr. Quaranta on November 25, 2002 that these symptoms were consistent with a herniated disc. Claimant's Exhibit G, pp. 24-25.¹ Dr. Druckemiller's testimony was that the symptoms reported in Dr. Quaranta's November 25, 2002 report and his December 13, 2001 report were consistent with a disc herniation. Respondents' Exhibit 4, pp. 14-17.

Apart from the medical evidence the trial commissioner found credible, he found the claimant's testimony not fully credible. This determination is reserved for the trial commissioner and cannot be reversed on appeal. Liano v. Bridgeport, 4934 CRB-4-05-4 (April 13, 2006). Therefore, he discounted the opinions of his treating physicians who relied on what the trial commissioner determined was an inaccurate patient history. The reports of Dr. Girasole in December 2002 and February 2003 do not document a work related injury. The first report of injury form also indicates the claimant did not miss work due to the injury, and that there were no witnesses to the reported injury. Claimant's Exhibit B. This provided an objective basis for the trial commissioner's incredulity that the December 18, 2002 incident caused or aggravated a disc herniation. As we held in Abbotts, *supra*, a trial commissioner need not credit medical evidence which he believes relied on an unreliable patient history.

¹ The claimant argues that since the trial commissioner also found that Dr. Girosole testified to a reasonable level of medical probability that the December 2002 incident made the claimant's back problem materially and substantially worse (Finding, ¶ 32) that the commissioner was bound to adopt this "uncontroverted report." Claimant's Brief, p. 12. Our precedent is to the contrary. A trial commissioner may accept part of an expert's testimony while discounting other portions. Lopez v. Lowe's Home Improvement Center, 4922 CRB-6-05-3 (March 29, 2006). A trial commissioner may also decide to disregard the totality of a medical report, even if it is undisputed. Abbotts v. Pace Motor Lines, Inc., 4974 CRB-4-05-7 (July 28, 2006).

We note many similarities between this case and another case we adjudicated in late 2006, Do v. Danaher Tool Group, 5029 CRB-6-05-12 (November 28, 2006). In both cases the claimant asserted a back injury occurred at work and the trial commissioner deemed the claimant was not fully credible, in part because the claimant did not discuss the professed injury with their treating physicians in a contemporaneous manner.² We determined we were compelled to uphold the Finding and Dismissal because it was the claimant's burden to prove their injury was work-related “[i]f the trier is not persuaded by the claimant's evidence, there is nothing that this board can do to override that decision on appeal” citing Wierzbicki v. Federal Reserve Bank of Boston, 4147 CRB-1-99-11 (December 19, 2000).³ We are compelled in this case to reach the same decision for the same rationale as we adopted in Do, *supra*.

Therefore, we affirm the trial commissioner's Finding and Dismissal and dismiss this appeal.

Commissioners Donald H. Doyle, Jr. and Nancy E. Salerno concur in this opinion.

² A similar fact pattern occurred in Abbotts, *supra*, and Donahue v. Veridiem, Inc., 5074 CRB-6-06-3 (March 28, 2007) where we upheld the dismissals reached by the trial commissioner.

³ As the claimant's Motion to Correct sought to interpose his legal theories and factual conclusions for that of the trial commissioner, we find no error in its denial. See Liano, *supra*.