

CASE NO. 5431 CRB-7-09-2
CLAIM NO. 700139251

: COMPENSATION REVIEW BOARD

ANTHONY DiDONATO
CLAIMANT-APPELLEE

: WORKERS' COMPENSATION
COMMISSION

v.

TOWN OF GREENWICH
BOARD OF EDUCATION
EMPLOYER

: MAY 18, 2010

and

CIRMA
INSURER
RESPONDENTS-APPELLANTS

APPEARANCES

The claimant was represented by Christina Smith Hanna, Esq., The Berkowitz Law Firm, LLC, 1010 Washington Boulevard, Ninth Floor, Stamford, CT 06901.

The respondents were represented by Heather K. Porto, Esq., Pomeranz, Drayton & Stabnick, 95 Glastonbury Boulevard, Glastonbury, CT 06033.

This Petition for Review¹ from the February 9, 2009 Finding of the Commissioner acting for the Seventh District was heard November 20, 2009 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Peter C. Mlynarczyk and Randy L. Cohen.

¹ We note that a postponement and extensions of time were granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondents in this matter appeal from a Finding dated February 9, 2009 awarding the claimant temporary total disability benefits and approving detoxification on the basis of the claimant having sustained psychiatric injuries. The respondents argue that the claimant did not seek temporary total disability benefits on that basis, and the issue of psychiatric injuries was never properly noticed as an issue before this Commission. The claimant argues that since the basis for this award was medical evidence submitted by the respondents' witnesses, the award should stand. While we do understand the respondents' concerns herein, we conclude that based on the record in this case they were provided a sufficient forum to discuss the issue of detoxification; and therefore, were not denied due process. On the other hand, we are not satisfied that we understand the basis for the trial commissioner's conclusion that the claimant is temporarily totally disabled due to psychiatric injuries. We remand this issue to the trial commissioner for further proceedings.

The trial commissioner noted three issues were presented for consideration: a) whether the claimant should have additional surgery authorized; b) whether the claimant had reached maximum medical improvement and whether a Form 36 should be approved, and c) whether, if the Form 36 was denied, the claimant should be deemed totally or temporarily partially disabled? She reached the following findings of facts. The claimant was injured September 24, 2003 while lifting a garbage can. He presented immediately thereafter at Greenwich Hospital and underwent a left L3-4 laminectomy and facetectomy. The claimant developed delayed progressive mechanical low back pain

three months after the surgery. On April 22, 2004 the claimant felt a pop in his back when picking up a piece of mail and complained of severe pain to the back and right leg. On July 2, 2004 he underwent an L2-3 and L3-4 posterolateral arthodesis and instrumentation with pedal screws and rods. The claimant's treating physician, Katrina S. Firlick, M.D., referred the claimant to Dr. David Y. Xiong for pain management issues. On January 10, 2005 Dr. Xiong administered a right L5-S1 interlaminar epidural steroid injection to the claimant.

The respondent had the claimant examined by Dr. Gerard A. Sava on March 28, 2005. Dr. Sava found the claimant displayed symptom amplification and that stretch reflexes were symmetrical and the muscle groups showed no objective evidence of weakness or atrophy; nor were there signs or symptoms suggestive of residual nerve root involvement. Dr. Sava opined there was no clinical or radiologic basis for the claimant's proclaimed disability and no evidence of need for further investigative studies, surgery or pain management. He opined further pain management would risk a return to drug abuse for the claimant.

Dr. Xiong continued pain management during 2005 and 2006. This regimen included the installation of a spinal cord stimulator, which Dr. Xiong removed on August 8, 2006 due to fear of infection. On September 14, 2006 Dr. Jarob Mushaweh performed an examination of the claimant at the direction of the commissioner. The claimant was asked to bring all imaging studies to the examination, but Dr. Mushaweh stated this did not occur. Dr. Mushaweh opined that the prior surgeries had healed and that no further surgeries were indicated. He diagnosed the claimant with "failed back syndrome" and noted the failure of pain management. Dr. Mushaweh, also expressed concern with the

claimant's narcotic use and suggested a morphine or Dilaudid pump was not advisable. Dr. Mushaweh recommended the claimant undergo a functional capacity examination.

On December 21, 2006 Rob D. Wright of Wright2Work conducted a functional capacity examination of the claimant. Dr. Mushaweh reviewed the results and on May 14, 2007 opined that "for prudence purposes, I would send him, at least for the foreseeable future, to a sedentary type of work." On May 31, 2007 an orthopedic surgeon, Dr. Marc D. Silver, examined the claimant on behalf of the respondent. Dr. Silver described the claimant's surgical incisions as "well healed" and noted he was walking independently with a normal gait pattern. Dr. Silver diagnosed the claimant with chronic low back pain and disabled him from returning to work as a custodian, but recommended job retraining so that the claimant could work with a light duty capacity.

During this period, the claimant continued treating with Dr. Xiong. Dr. Xiong treated the claimant with narcotic pain medications including Duragesic patch, Oxycodone, Fentora and Valium. In 2007 the claimant received two interlaminar epidural steroid injections from Dr. Xiong.

The claimant was examined on August 6, 2007 by Dr. Ronald A. Ripps. Dr. Ripps asked for imaging studies to be brought to the exam, which the claimant failed to provide. Dr. Ripps had his own studies performed. The claimant exhibited jerky and guarded movements at the exam, but did straight leg raising without pain. Dr. Ripps found the claimant's level of reported disability was so disproportionate to his impairment as to indicate behavioral overlay and symptom magnification. The claimant also related what Dr. Ripps considered an unrealistic self report of depression. Surveillance video viewed by Dr. Ripps showed the claimant getting in and out of a car and carrying groceries without impairment. Dr. Ripps determined the claimant's physical

findings and imaging studies did not substantiate his claimed disability. Dr. Ripps rated the claimant with a 22% permanent partial disability rating and a light duty work capacity. He agreed with Dr. Sava that the claimant's high narcotic use was not helping him.

On August 20, 2007 Dr. Xiong determined the claimant was totally disabled and referred him to Dr. Krishn Sharma. On September 20, 2007 Dr. Sharma determined the claimant had a number of back problems including a possible new herniation, lumbar degenerative disc disease and "most likely a pseudoarthrosis." Dr. Sharma at that time suggested further surgical intervention might be considered. On October 10, 2007 Dr. Sharma opined that disc material was compressing the L5 nerve root. He opined a morphine pump would only mask the problem and suggested an instrumented fusion be performed which he suggested would cause a 60 to 70% improvement in the claimant's pain syndrome. On November 6, 2007 Dr. Sharma noted this surgery would require five to six hours of operative time and six months of recuperation.

Dr. Ripps and Dr. Mushaweh opined against the proposed surgery. Dr. Ripps called the idea a "huge surgical adventure" to which he gave only a 30% chance of success. Dr. Mushaweh did not believe that it would yield a positive result, as it would "throw more surgeries at a patient with a straightforward failed back syndrome" which he believed would compound the problem, not fix it. Dr. Mushaweh also opined that the claimant did not have herniated discs and had no nerve root compression. He suggested a new direction was needed with a neuropsychiatrist or psychiatrist.

Based on the aforementioned subordinate facts the trial commissioner determined that the August 23, 2007 Form 36 should be granted and the claimant had reached maximum medical improvement and had a 22% permanent partial disability rating of his

lumbar spine. She determined the weight of the evidence was against surgical intervention. She determined the weight of the evidence was the claimant had signs of symptom magnification, but in Finding, ¶ D she stated “we do not, however, have enough medical information at this point to make a decision on this aspect of the claimant’s case.” She found the claimant had a light duty capacity but needed detoxification. Therefore, in Finding, ¶ E she determined the claimant was temporarily totally disabled on account of his psychiatric condition. She ordered the respondent to pay for detoxification and pay temporary total disability benefits.²

The respondents filed a Motion to Correct seeking to remove Finding, ¶ E and removing the orders from the Finding. The trial commissioner denied this motion. She argued that the respondents’ medical examiners had identified the issue of drug detoxification and that this should have constituted adequate notice to the respondent of the issue before the tribunal. The respondents have now pursued this appeal, citing Mosman v. Sikorsky Aircraft Corp., 4180 CRB-4-00-1 (March 1, 2001) as their authority for their position they have been denied due process.

The issue herein is one of whether the trial commissioner’s actions were consistent with due process. While we must provide deference to the decision of a trial commissioner, we may reverse such a decision if the commissioner did not properly apply the law or reached a decision unsupported by the evidence on the record. Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007) The respondents argue that since the issue of psychiatric injury was not placed before the trial

² We note that the February 9, 2009 Finding has two paragraphs entitled “E.” We believe this is a scrivener’s error. For this purpose of this decision we will treat the two paragraphs as a single paragraph.

commissioner at the formal hearing, she should not have fashioned a remedy based on a theory of the case neither party advanced.

The parties to this matter agree that the various hearing notices did not provide a specific reference to whether the issue of detoxification or psychiatric injury would have been addressed by the trial commissioner. However, our review of the various hearing notices indicates that at all times the issue of whether the claimant was entitled to benefits for temporary total disability was properly before the trial commissioner. Both parties therefore had prior knowledge as to what relief was under consideration. Therefore the dispute herein is whether the trial commissioner could properly award these benefits based on a theory of recovery not initially pursued by the claimant.

We have noted that on occasion, at the commencement of a formal hearing either the advocates or the trial commissioner will state on the record that an issue not specified on the hearing notice will be considered. See Valiante v. Burns Construction Company, 5393 CRB-4-08-11 (October 15, 2009) and Goulbourne v. State/Department of Correction, 5192 CRB-1-07-1 (January 17, 2008). A review of the hearing transcript herein indicate that the dispute presented to the trial commissioner for adjudication centered on whether or not the claimant should be authorized to have additional surgery. The argument presented by claimant's counsel linked the claimant's continued disability as the result of his need for surgery. The claimant's attorney did not make an unambiguous statement that they had revised their prayer for relief; nor did the trial commissioner specifically address that she was focusing on the issue of detoxification; nor had the trial commissioner ordered, prior to the closing of the record, a commissioner's examination on the specific issue of whether the claimant needed detoxification, as in Mana v. Sarah, Inc., 5073 CRB-3-06-3 (March 22, 2007). Therefore,

the trial commissioner did not provide the parties the same notice which occurred in Valiante.³

Nonetheless, we believe that during a formal hearing the trial commissioner is permitted to follow the evidence where it leads. Vetre v. State/Department of Children and Youth Services, 3443 CRB-6-96-10 (November 28, 2000). The question is whether the respondent had “fair notice” that the claimant could have been found totally disabled by virtue of his narcotic intake. As we held in Palm v. Yale University, 3923 CRB-3-98-10 (January 7, 2000), this amounts to the ability to properly defend the claim.

This board has repeatedly held that “(i)t is fundamental in proper judicial administration that no matter shall be decided unless the parties have fair notice that it will be presented in sufficient time to prepare themselves upon the issue.” Cummings v. Twin Tool Manufacturing, 13 Conn. Workers’ Comp. Rev. Op. 225, 2008 CRB-1-94-4 (April 12, 1995), *appeal dismissed* June 29, 1995, A.C. 14747, quoting Connolly v. Connolly, 191 Conn. 468, 475-76 (1983), (internal quotations omitted); see also Casertano v. Shelton, 3329 CRB-4-96-4 (Sept. 16, 1997); Fusco v. TRW Geometric Tool, 4 Conn. Workers’ Comp. Rev. Op. 132, 134, 472 CRD-3-86 (1987).

Palm, *supra*.

As claimant’s counsel points out, the medical evidence concerning the claimant’s excessive medications was not presented to the tribunal at the 11th hour. Indeed, this evidence could be adduced by reliance on reports by the commissioner’s examiner and doctors who examined the claimant on behalf of the respondent.⁴ These reports were

³ In Valiante v. Burns Construction Company, 5393 CRB-4-08-11 (October 15, 2009) the hearing notice did not contain a specific representation that the trial commissioner would consider a request to depose a witness. Upon convening the formal hearing the trial commissioner then announced on the record that the sole purpose of the formal hearing would be to consider the deposition request and adjourned the hearing for two weeks to enable the respondent to present a defense. Therefore, we concluded “[a]ny confusion as to the scope of the issues and the remedy under consideration by the tribunal was clearly resolved on the record prior to the conclusion of the formal hearing.” Valiante. *Id.*

⁴ This evidence included Respondents’ Exhibit 4, dated August 6, 2007 wherein Dr. Ripps stated the claimant “needs to be detoxified” and the report of the Commissioner’s examination, Respondents’ Exhibit

presented well prior to the commencement of the formal hearing and we may distinguish this case from Ghazal v. Cumberland Farms, Inc., 5397 CRB-8-08-11 (November 17, 2009) where the report was generated on the eve of the formal hearing. In the present case, the respondents had the opportunity to familiarize themselves with the issue of detoxification and present a cogent response.

In reviewing the Hearing Transcript, we note that the various issues supportive of the commissioner's Finding were discussed at length by respondents' counsel. Counsel for the respondent cross-examined the claimant at length concerning his use of such narcotics as Oxycodone, Xanax and Valium; which was a colloquy in which the trial commissioner asked her own questions. February 25, 2008 Transcript, pp. 54-58. The claimant continued to discuss issues of pain and medical prescriptions at the May 20, 2008 formal hearing, where he was cross-examined again by respondents' counsel. May 20, 2008 Transcript, pp. 35-37. Counsel for the respondents specifically asked whether the claimant had been told he "should be detoxed or weaned off of your medications" Id. We therefore conclude that the issue of detoxification should not have been a complete surprise to the respondents at the conclusion of the formal hearing.

We also note herein that a trial commissioner is permitted to rely in part on the demeanor of the witness when determining whether the claimant is totally disabled Leandres v. Mark IV Construction, Inc., 5159 CRB-4-06-11 (October 22, 2007).

Towards the end of the February 25, 2008 session the claimant was asked as to the discussion he had with the commissioner's examiner, Dr. Mushaweh, as to his back pain. At this point the trial commissioner noted the claimant was "sitting ready to pass out" and

6, dated September 14, 2006; wherein Dr. Mushaweh expressed concern as to the claimant's narcotics intake.

directed claimant's counsel to "speed it up." February 25, 2008 Transcript, pp. 86-87.

The trial commissioner's Finding herein is consistent with her observations on the record as to the claimant's demeanor during the formal hearing.

In addition, we also note that the parties discussed whether or not certain medical evidence supportive of the trial commissioner's Finding should be considered as evidence. At the hearing held May 20, 2008 the respondents' counsel voiced an objection to Claimant's Exhibit E, which was an IME report prepared by Dr. Ripps. May 20, 2008 Transcript, p. 12. A lengthy discussion between counsel then ensued as to whether Dr. Ripps was using the appropriate definition of "symptom magnification." *Id.*, at 12-20. The trial commissioner's subsequent discussion as to the impact of symptom magnification on the claimant's ability to work therefore did not arise spontaneously after the conclusion of the formal hearing; rather the import of this issue was the focus of involved discussion between counsel.

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 evidence on the record herein clearly established that the claimant was in need of detoxification and that provision of such medical treatment was warranted pursuant to § 31-294d C.G.S. The commissioner clearly could have concluded the claimant's narcotic use for pain was a sequelae of his compensable injury. We cannot conclude the respondents suffered any prejudice by the outcome of this issue.

We are not willing to reach this same conclusion on the issue of temporary total disability and psychiatric injury, however. The problem herein is not only were these

issues not directly addressed in the hearing notice or the advocate’s initial statements, but the trial commissioner did not place the parties on notice before closing the record that she was considering awarding benefits under this theory of recovery. In addition, the terms of the Finding and Award which award temporary total disability benefits require us to speculate as to what medical evidence or reasoning establishes the claimant’s right to temporary total disability benefits for psychiatric injuries.

We note that the claimant had sought temporary total disability at all times relevant to this discussion.⁵ Nonetheless, the manner in which the trial commissioner appears to have dealt with the etiology of the claimant’s pain is puzzling. In Finding, ¶ D, the trial commissioner stated that the claimant’s condition “may encompass feigned or real pain, or a combination thereof. We do not, however, have enough medical information at this point to make a decision on this aspect of the claimant’s case.” The terms of the initial Finding, ¶ E are also equivocal. “The claimant has a light duty capacity but needs detoxification coordinated with appropriate psychiatric or neuropsychiatric treatment prior to attempting to return to work”. The final portion of Finding, ¶ E, then, in contrast to the previous findings, makes an unequivocal—but inconsistent—statement that the claimant is temporarily totally disabled due to “his psychiatric condition.”

⁵ As a result, we find Bennett v. Wal-Mart Stores, 4939 CRB-7-05-5 (May 15, 2006) instructive. In Bennett, we found that the trial commissioner had awarded temporary partial disability benefits following a hearing notice that only stated temporary total disability benefits were under consideration. The insufficiency of notice in Bennett, along with the insufficient evidentiary findings to sustain a § 31-308(a) C.G.S. award, caused this panel to vacate that element of relief. We remanded the issue of temporary partial disability benefits back to the trial commissioner for further proceedings. In the present case, while the parties were on notice as to the issue of temporary total disability benefits and those were the benefits awarded, we simply find the ultimate award herein similar to Bennett due to the absence of necessary findings which supports the ultimate award.

As best as we can discern, the trial commissioner may have commingled the concepts of detoxification and psychiatric injury. Perhaps the trial commissioner believed that the claimant is unable to pursue gainful employment until after he completed detoxification. It is not our job to put words into the trial commissioner's mouth, however. Bazelais v. Honey Hill Care Center, 5011 CRB-7-05-10 (October 25, 2006). We herein remand this issue back to the trial commissioner for an articulation as to what her rationale was to award temporary total disability benefits to the claimant.⁶

We also note that pursuant to our holding in Donaldson v. Continuum of Care, Inc., 4581 CRB-3-02-10 (October 6, 2004) that additional hearings will be necessary to develop an optimal treatment regimen for the claimant. The parties to this matter are entitled to offer their position as to what would constitute reasonable and necessary treatment for the claimant going forward.⁷

Therefore, we affirm the Finding as related to medical treatment. We remand the issue of temporary total disability to the trial commissioner for an articulation as to her reasoning.

Peter C. Mlynarczyk and Randy L. Cohen concur in this opinion.

⁶ To the extent "psychiatric injuries" are injuries not directly linked to the claimant's need for detoxification, we cannot uphold the Finding. While the parties were clearly placed on notice that the claimant's narcotic intake was an issue in the formal hearing, we cannot reach that conclusion as to other psychiatric issues. We find that Palm v. Yale University, 3923 CRB-3-98-10 (January 7, 2000) stands for the proposition there was inadequate notice as to these issues to enable the respondents to present a thorough defense. We also question whether the supporting probative evidence on the record met the standard delineated in Marandino v. Prometheus Pharmacy, 294 Conn. 564, 587-597 (2010) to establish causation based on that theory of recovery, particularly in light of Finding, ¶ D. A further evidentiary hearing would be an essential prerequisite to awarding benefits on this issue.

⁷ We uphold the trial commissioner's denial of the respondents' Motion to Correct. This motion sought to interpose the respondents' conclusions as to the law and the facts presented. Liano v. Bridgeport, 4934 CRB-4-05-4 (April 13, 2006) and D'Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002).