

CASE NO. 4974 CRB-4-05-7
CLAIM NO. 400055227

: COMPENSATION REVIEW BOARD

LEONARD J. ABBOTTS
CLAIMANT-APPELLANT

: WORKERS' COMPENSATION
COMMISSION

v.

PACE MOTOR LINES, INC.
EMPLOYER

: JULY 28, 2006

and

AIG
INSURER
RESPONDENTS-APPELLEES

APPEARANCES

The claimant was represented at the trial level by Steven Cousins, Esq., 324 Elm Street, Suite 201B, Monroe, CT 06468.

On appeal the claimant was represented by Robert J. Sciglimpaglia, Jr., Esq., Shepro & Blake, 2051 Main Street, Stratford, CT 06615.

The respondents were represented by Jason M. Dodge, Esq., Pomeranz, Drayton & Stabnick, 95 Glastonbury Boulevard, Glastonbury, CT 06033.

This Petition for Review filed from the July 22, 2005¹ Finding & Dismissal of the Commissioner acting for the Fourth District was heard February 24, 2006 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Donald H. Doyle, Jr., Nancy E. Salerno.

¹ We note extensions of time were granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. In this appeal, the claimant appeals from the Finding and Dismissal by the Commissioner acting for the Fourth District. We uphold the trial commissioner in this matter since it is the claimant's burden to convince the trial commissioner that a compensable injury occurred. The claimant having fallen short in his burden of persuasion, this Board now lacks any remedial authority regarding this claim.

There are a number of facts in dispute, and both parties have asserted that the opponent's witnesses were not credible. The trial commissioner found the following facts. The claimant is employed by the respondent as a truck driver, and on March 25, 2003 delivered a load of fittings to Graybar Electric in Taunton, Massachusetts. Findings, ¶ 4. There is a dispute as to the time of the claimant's arrival at Graybar, and also a dispute as to whether duplicate time logs were prepared by Pace drivers. Findings, ¶ 7. The claimant was met at the Graybar facility by its employee, Dave Kinzer, who refused to accept the shipment in the condition it was in, and directed the claimant to reload the material. Findings, ¶¶ 6, 8, 10-11. The claimant reloaded the shipment while at Graybar. Findings, ¶ 11. Kinzer testified that the claimant complained of back pain while at Graybar. Findings, ¶ 14. The claimant said he called the terminal that afternoon to report an injury. The respondents' logs do not reflect this conversation occurred, and no First Report of Injury appears of record. Findings, ¶¶ 11, 12, 17. The claimant continued on after his delivery at Graybar to another delivery in Mansfield, MA. Findings, ¶ 15.

The attendance logs for the respondent indicate the claimant continued to work without complaint through April 7, 2003. Findings, ¶ 13. On Tuesday April 8, the claimant was scheduled to pick up a load for the respondent on or about 6:30 a.m., but contacted an employee of the respondent, Jack Tetreau, on or about 9:30 a.m. to say that he had overslept. Findings, ¶ 18. Mr. Tetreau also testified to a later phone call from the claimant on April 9 he was told by the claimant he had fallen on ice at home and hurt his back. Findings, ¶ 21. A former employee of the respondent, Robert Schultz, also testified that he had received a call from the claimant saying he had fallen on ice and could not report for work on April 10. Findings, ¶ 19. The claimant denies he said this. Findings, ¶ 20. Neither party submitted evidence regarding the presence of ice on or about April 9, 2003. Findings, ¶ 22.

The claimant commenced his medical treatment for his back problems on April 10, 2003. At his initial visit with Dr. Dawe, he advised of “three weeks of severe back pain” but “denies any specific injury.” Findings, ¶ 30. On April 26, 2003, an MRI revealed a disc herniation at L4-5. Findings, ¶ 31. A May 3, 2003 patient history by Dr. Dawe indicated “no prior history of back injuries.” Findings, ¶ 32. A May 8, 2004 Pace Absentee Report indicated that the claimant was out of work due to a non-work related back injury. Findings, ¶ 24. The claimant remained on the Pace payroll for a time thereafter. Findings, ¶ 25-26. On June 3, 2003 he was examined by Dr. Lipow whose medical report indicated the claimant has suffered from many years of back pain, with no mention of any specific date of injury. Findings, ¶ 33. On June 6, 2003, the claimant underwent back surgery. Findings, ¶ 34.

The commissioner found that the claimant's fiancée, Marilyn O'Malley, commenced employment with the treating physician, Dr. Lipow in September 2003. Findings, ¶ 35. In October 2003 the claimant filed his Form 30C, attributing his back injury to the March incident at Graybar. The part owner of Pace Motor Lines, Robert Pacelli, testified that was the first time the firm had been advised the claimant was contending he suffered a work related accident. Findings, ¶ 27. Following that date, on February 2, 2004, Dr. Lipow issued a report which causally linked the claimant's disc herniation to the "March 22, 2003 (sic) Massachusetts trip." Findings, ¶ 36.

Based on those subordinate findings of fact, the trial commissioner concluded that the testimony of Kinzer regarding the claimant suffering back pain on March 25, 2003 was credible (Findings, ¶¶ A and B); that the claimant failed to provide contemporaneous evidence to his treating physicians that he suffered an injury on that date (Findings, ¶¶ C and D) and the nature of a disc herniation was inconsistent with the claimant completing his work schedule that day following such an injury (Findings, ¶ E). The trial commissioner credited the three witnesses produced by the respondents on the issue of whether the claimant called Pace to advise of a non-work related fall. She particularly credited Schultz's testimony as that of a witness with no bias in the outcome. (Findings, ¶ F, G and H). She discounted Marilyn O'Malley's testimony and deemed Dr. Lipow's report flawed based on an inaccurate patient history. (Findings, ¶¶ I and M) Her ultimate conclusion was the claimant's March 25, 2003 back pain was transitory and the most likely cause of the disc herniation was a fall on ice at home on April 9, 2003 (Findings, ¶¶ K and L).

As a result, she concluded that the claimant failed to prove he suffered an injury in the course of employment, and dismissed the claim (Findings, ¶ N and (1)). The claimant has taken this appeal from that dismissal.

At the outset, we must outline the respective obligations of the parties. It is the duty of the claimant to prove to the trial commissioner that his injuries were the result of his employment. Our jurisdiction is limited only to those injuries which occurred arising out of and in the course of one's employment. Section 31-275(1) states,

“Arising out of and in the course of his employment” means an accidental injury happening to an employee or an occupational disease of an employee originating while the employee has been engaged in the line of the employee's duty in the business or affairs of the employer upon the employer's premises, or while engaged elsewhere upon the employer's business or affairs by the direction, express or implied, of the employer, . . .

Our Supreme Court is unequivocal that it is the claimant's obligation to prove his injuries fall within this statutory foundation “[t]he [claimant] has the burden of proving that the injury claimed arose out of the employment and occurred in the course of the employment.” Kish v. Nursing and Home Care, Inc., 248 Conn. 379, 382 (1999); Parisi v. Yale University, 89 Conn. App. 716, 723 (2005).

Once a trial commissioner makes a determination as to whether an injury was sustained in the course of employment, the Compensation Review Board has a limited scope of review over that determination. As we recently held in Dudley v. Radio Frequency Systems, 4995 CRB-8-05-9 (July 17, 2006).

The scope of review of a trial court's factual decision on appeal is limited to a determination of whether it is clearly erroneous in view of the evidence and pleadings Conclusions are not erroneous unless they violate law, logic or reason or are inconsistent with the subordinate facts A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed,

(Citations omitted; internal quotation marks omitted.) citing Moutinho v. Planning and Zoning Commission, 278 Conn. 660, 665-666 (2006).

To reverse the trial commissioner under these circumstances, we must determine that her conclusion was not grounded in the facts presented as evidence or was a result of an improper application of the law. In their briefs, neither party presents an argument that the actions of the trial commissioner were in contravention of statutory authority. Cf. Pizzuto v. State/DMR, 4959 CRB-5-05-7 (June 23, 2006) (respondent successfully argues trial commissioner lacked authority to award additional § 31-308a benefits). The factual dispute in this matter is centered primarily on the conflicting accounts of witnesses, which necessitates a finding that one version of events is credible and one version is not. Despite the vociferous argument of claimant's counsel that an appellate board can reevaluate such testimony and question the conclusions of a trier of fact, Connecticut precedent makes such evidentiary findings particularly impervious to appeal. As we held in Liano v. City of Bridgeport, 4934 CRB 4-05-4 (April 13, 2006).

Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom As a practical matter, it is inappropriate to assess credibility without having watched a witness testify, because demeanor, conduct and other factors are not fully reflected in the cold, printed record. (Internal quotation marks omitted.) Briggs v. McWeeny, 260 Conn. 296, 327 (2002). Burton v. Mottolese, 267 Conn. 1, 40 (2003).

Claimant's counsel raises two due process arguments which we must address. He asserts that various documents introduced into evidence and the testimony of Robert Schultz constitutes hearsay evidence in violation of Rule 8-7 of the Connecticut Code of Evidence. Respondents' counsel denies that this evidence amounts to inadmissible

hearsay. This dispute is not material; however, as it has been long standing law in Connecticut the trial commissioner is not strictly bound to the rules of evidence as applied to judicial proceedings. “The commissioner is not bound by common law or statutory rules of evidence or procedures. He may make inquiry in the manner best calculated to do so to ascertain the rights of the parties” Delgaizo v. Veeder-Root, Inc., 133 Conn. 664, 667-668 (1947); Parisi, supra. See also Baldino v. Corcoran & Son Landscaping & Paving, 4275 CRB-4-00-8 (July 23, 2001) and Paige v. Hartford Insurance Co., 4594 CRB-2-02-12 (January 9, 2004). There is no assertion the claimant was prevented from challenging the testimony presented, hence under the standards delineated in Balkus v. Terry Steam Turbine Co., 167 Conn. 170, 177 (1974) and Paige, supra, we find no error.²

The claimant also states that the trial commissioner failed to consider a repetitive trauma theory of injury, thus denying him due process rights. The difficulty herein is the claimant originally pursued this case as a single incident case. Had the claimant sought a finding that he had suffered a repetitive trauma, he could have submitted proposed findings of fact to establish this claim. He did not do so, nor did he submit in his Motion to Correct a proposed finding of repetitive trauma. Our precedent in Hines v. Naugatuck Glass, 4816 CRB-5-04-6 (May 16, 2005) bars this theory of recovery. “We have often stated that a party is not entitled to present his case in a “piecemeal” fashion, with a

² Claimant also makes an argument that the finding concerning the possible existence of duplicate logbooks constitutes “reversible error.” We fail to understand the significance of this finding. First, the commissioner did find that the complainant suffered back pain in Taunton, MA on March 25, 2003, and the trip to Taunton was the only issue for which the logbooks would have had evidentiary value. Second, her central finding was the most likely cause of the disc herniation was due to a domestic accident on or about April 9, 2003. The logbooks were irrelevant to this finding. At most, this finding constitutes harmless error. See Peters v. Corporate Air, Inc., 1679 CRB-5-93-3 (May 19, 1995).

second bite at the apple forthcoming after failing to meet his burden of proof on the first try.” Id.

We thus return to the claimant and his evidence. The bottom line is the trial commissioner did not believe the claimant when he testified that his disc herniation was due to the March 25, 2003 incident in Taunton. She cited specific reasons for her incredulity, i.e. the lack of an incident report contemporaneous to the event, his continued work both later that day and for another 12 days, the lack of immediate medical treatment, and the failure to advise his treating physicians of the incident in his initial medical history. She also found the testimony of a number of witnesses credible as to whether the claimant told them of a non-work related injury. This is the central point here. As we pointed out in Liano, supra, all credibility determinations are reserved for the trial commissioner.³

Consequently, her decision not to credit the medical report of Dr. Lipow is understandable. The trial commissioner could decide to disregard the totality of a medical report, even if it was undisputed by the respondents.

It is properly within the commissioner’s discretion to accept *or reject all*, or part of, a medical opinion. Misenti v. International Silver Co., 215 Conn. 206, 209-10, 575 A.2d 690 (1990); Pantanella v. Enfield Ford, Inc., 65 Conn. App. 46, 57, 782 A.2d 141, *cert. denied*, 258 Conn. 930, 783 A.2d 1029 (2001); Keenan v. Union Camp Corp., 49 Conn. App. 280, 286, 714 A.2d 60 (1998). (Emphasis added) Safford v. Owens Brockway, 262 Conn. 526, 536 (2003).

The trial commissioner found the claimant failed to advise his treating physician of the alleged injury when he commenced treatment. Findings, ¶ M. We believe this

³ Accordingly, it is a digression for claimant’s counsel to parse the exact verbiage of the Finding and Dismissal for ostensible inconsistency with the verbatim testimony of Robert Schulz. Whether or not the exact location of the alleged April 9, 2003 incident was at home or not or upon ice or not is not material. The bottom line is the trial commissioner believed the claimant told a number of witnesses he was **not** injured at work. Once that threshold is reached, the commission lacks jurisdiction over the injury pursuant to § 31-275(1) C.G.S.

justifies skepticism on the commissioner's part in regards to the later determination of causation.

Our holding in Wierzbicki v. Federal Reserve Bank of Boston, 4147 CRB-1-99-11 (December 19, 2000) is dispositive of this appeal. "If the trier is not persuaded by the claimant's evidence, there is nothing that this board can do to override that decision on appeal."

The appeal is dismissed. Commissioners Donald H. Doyle, Jr., and Nancy E. Salerno concur in this opinion.