CASE NO. 03309 CRB-01-96-03
CLAIM NO. 0100031199 : COMPENSATION REVIEW BOARD

SANTOS DIAZ
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

ROBERT W. BAKER NURSERY, INC.
EMPLOYER : MARCH 5, 1998

and

ITT HARTFORD INSURANCE GROUP
INSURER
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by John Connor, Esq., Connor, Sandman & Weisser, 2 South Bridge Dr., Agawam, MA 01001.

The respondents were represented by Joseph E. Skelly, Jr., Esq., Edward M. Henfey & Associates, 55 Farmington Ave., Hartford, CT 06105.

This Petition for Review from the March 6, 1996 Finding and Award of the Commissioner acting for the First District was heard June 13, 1997 before a Compensation Review Board panel consisting of the Commission Chairman Jesse M. Frankl and Commissioners James J. Metro and John A. Mastropietro.

OPINION

JESSE M. FRANKL, CHAIRMAN. The respondents have appealed from the March 6, 1996 Finding and Award of the Commissioner acting for the First District. In that decision the trier concluded that the claimant sustained a compensable injury to his

back during his employment with the respondent employer. In support of their appeal, the respondents contend that the commissioner improperly admitted, and relied upon, a medical report written by Dr. James Rich. In addition, the respondents contend that the evidence does not support the trial commissioner's determination that the claimant's back condition was caused by his employment.

The main issue raised by the respondents is the trial commissioner's admission of the June 27, 1995 medical report by Dr. Rich which was the result of an independent medical examination ("IME") made at the request of the respondents. In support of their appeal, the respondents rely on Lee v. City of Norwalk, 13 Conn. Workers' Comp. Rev. Op. 23, 1626 CRB-7-93-1 (Nov. 7, 1994). In that decision the Board stated:

> "It is incumbent upon the employer who requests an IME pursuant to § 31-294f to pay not only for the IME, but also to properly introduce the results of that examination into evidence. Thus, a subpoena or deposition of the examining physician should be arranged by the party seeking to introduce his or her testimony as evidence. To require a claimant to pay for the cost of the subpoena or deposition of an independent examiner in order to cross-examine him would unfairly burden the claimant."
> Lee v. City of Norwalk, 13 Conn. Workers' Comp. Rev. Op. 23, 25, 1626 CRB-7-93-1 (Nov. 7, 1994).

Subsequently, in Giovino v. Town of West Hartford, 14 Conn. Workers' Comp. Rev. Op. 74, 76, 1912 CRB 1-93-12 (May 12, 1995), the Board explained that the decision in Lee was limited to the specific factual circumstances of that case. In Giovino, as in the instant case, the claimant was the party offering the IME report. The Board explained in Giovino, supra, that:

> (T)he party objecting to the medical report is not denied the opportunity to cross-examine a medical witness merely because the party offering the report fails to subpoena the medical witness or conduct a deposition. Rather, *the objecting party must act with due diligence by obtaining a deposition or by subpoenaing the medical witness to appear at the formal hearing*. If the objecting party chooses

> not to call the medical witness to testify or to be deposed, he assumes a calculated risk in presenting his evidence, and cannot wait until a decision is reached by the commissioner to complain on appeal that he was not afforded the opportunity to cross-examine the medical witness.
> Giovino, supra, at 77.

In the instant case, the June 27, 1995 medical report by Dr. Rich was the result of an IME which was conducted "at the request of the respondents." (Respondents' Brief at p. 3). At the formal hearing, when the claimant offered the IME report into evidence, the respondents' attorney stated, "I'm not sure I was going to offer that, Commissioner, to be quite honest with you. He (the claimant) can always take the doctor's deposition if he wants." (12/4/95 TR. at p. 25). Subsequently, when the trial commissioner asked the respondents' attorney if the case would be completed that day, he replied, "Well, except that *I may take the deposition of my doctor* now that it's been admitted into evidence. I wasn't planning on submitting it into evidence, I wasn't planning to take his deposition, but now that it's been admitted, *I may have to do that*." (12/4/95 TR. at p. 45, emphasis added). However, the respondents' attorney specifically decided to rest its case. (12/4/95 TR. at p. 67).

Accordingly, as the respondents in this case decided not to pursue a deposition or subpoena of Dr. Rich, we cannot now find that they were denied due process. See Giovino, supra, see also Straub v. Bolt Technology Corp., 9 Conn. Workers' Comp. Rev. Op. 212, 1130 CRD-3-90-11 (Sept. 12, 1991), Ruh v. Della Construction Co., 9 Conn. Workers' Comp. Rev. Op. 269, 1034 CRD-7-90-6 (Dec. 5, 1991), Diogostine v. Somers Thin Strip, 3 Conn. Workers' Comp. Rev. Op. 139, 282 CRD-5-83 (Jan. 22, 1987). Although we note that there may be difficulties in securing the testimony of an out-of-state physician, the respondents in the instant case do not allege that they made any

attempt whatsoever in this regard. We certainly stress the importance of using physicians who are licensed in Connecticut. See § 31-294d; § 31-280-1. However, in the instant case, the choice of the IME physician was made *by the respondents*. After choosing a Massachusetts physician, the respondents should not now be able to object to said doctor merely because he is out-of-state, without having made any attempt to obtain a deposition.

In further support of their appeal, the respondents contend that the evidence does not support the trial commissioner's determination that the claimant sustained a compensable injury. The respondents are essentially requesting that this board retry the evidence, which this board may not do. Rogers v. Laidlaw Transit, Inc., 45 Conn. App. 204, 206 (1997) per curiam. Whether an injury arose out of and in the course of the employment requires a factual determination. McDonough v. Connecticut Bank & Trust Co., 204 Conn. 104, 117 (1987). The power and duty of determining the facts rests on the 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 determined that the claimant's testimony was credible regarding his allegation that he sustained injuries to his back

while lifting trees for the employer on July 23, 1993. The trial commissioner's determination is supported by the medical opinion issued by Dr. Rich. (Finding No. 13). Where, as here, the commissioner's determination is based upon the weight and credibility that he has accorded the evidence, we will not disturb such a determination. Dickey v. Harris Graphics, 12 Conn. Workers' Comp. Rev. Op. 218, 1481 CRB-2-92-8 (March 22, 1994).

This decision of the trial commissioner is affirmed.

Commissioners James J. Metro and John A. Mastropietro concur.