CASE NO. 5713 CRB-6-11-12 : COMPENSATION REVIEW BOARD
CLAIM NO. 601035825

CHRISTINE M. REIS-PEREIRA
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: MAY 20, 2013

GOODRICH PUMP & ENGINE CONTROL SYSTEMS, INC.
EMPLOYER
RESPONDENT-APPELLEE

and

SPECIALTY RISK SERVICES
ADMINISTRATOR

APPEARANCES:

The claimant was represented by Michael J. Reilly, Esq., and Angelo Cicchiello, Esq., Cicchiello & Cicchiello, LLP, 364 Franklin Avenue, Hartford, CT 06114.

The respondent was represented by Kenneth R. Plumb, Esq., Metzger, Lazarek & Plumb, 56 Arbor Street, Suite 202, Hartford, CT 06106.

This Petition for Review[1] from the October 14, 2011 Finding and Dismissal of the Commissioner acting for the Eighth District was heard November 30, 2012 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Jodi Murray Gregg and Daniel E. Dilzer.

[1] We note that postponements and extensions of time were granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has appealed from a Finding and Dismissal determining that the claimant's 2003 back injury was not compensable. The claimant has appealed arguing that she submitted an overwhelming amount of evidence supporting her claim for benefits. She further argued the trial commissioner should not have relied on an expert witness who opined her medical condition was unrelated to the alleged work injury. We find this decision was based on the trial commissioner's evaluation of contested testimony and opinions. The trial commissioner determined the claimant did not meet her burden of persuasion to establish she sustained a compensable injury. Since the decision is based upon a factual determination on appeal, we sustain the Finding and Dismissal.

The trial commissioner reached the following factual findings at the conclusion of the formal hearing. He found the claimant was hired on September 2, 1997 by the respondent to work as a computer systems administrator. Prior to joining the respondent the claimant was employed by Aetna in various clerical and office positions. The claimant argues that repetitive work related to computers and other computer products led to her back problem, which necessitated a 2008 fusion surgery by Dr. Bruce Chozick, a neurosurgeon. The claimant suffers from a congenital spinal condition known as spondylothesis; which predates the September 19, 2003 accident which is referred to in the claim. The claimant says her pre-existing condition was asymptomatic prior to her employment and work-related repetitive trauma at her employment aggravated her condition permanently. The claimant cited the opinions of Dr. Chozick and Dr. William Lewis as supporting her position.

The trial commissioner determined that these witnesses were unreliable as their opinion was based upon on the claimant's description of events. The commissioner found too many inconsistencies and discrepancies in the claimant's testimony to find it reliable. The commissioner noted the claimant did not start treating with Dr. Chozick until 2007, and was not examined by Dr. Lewis until that year. The commissioner noted the claimant had been treated by a number of physicians prior to 2007. He noted that one of those physicians, Dr. David Kruger, had treated the claimant starting in 2004 and had opined that the claimant's medical problem was due to her pre-existing condition and has no relationship to her job duties with the respondent.

Based on those subordinate facts the trial commissioner found that the claimant's position in this matter was not credible. He found that Dr. Kruger's opinion was the most reasonable and credible when it came to the issue of medical causation. He dismissed the claim on the merits.

The claimant filed a Motion to Correct seeking to have the trial commissioner reach findings supportive of finding the claimant sustained a compensable injury. The trial commissioner rejected this motion in its entirety. The claimant then pursued this appeal. Her principal argument is that her supportive evidence on causation of her injury was overwhelming and that Dr. Kruger's testimony was inadequate based on the precedent in DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132 (2009).

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 Compensation Review Board cannot retry the facts of the case and may only overturn the findings of the trial commissioner if they are without evidentiary support, contrary to the law, or based on unreasonable or impermissible factual inferences. Kish v. Nursing and Home Care, Inc., 248 Conn. 379 (1999) and Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). In addition, the burden of proof in a workers' compensation claim for benefits rests with the claimant. Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440 (2001).

We also note that it is the burden of the claimant to establish their medical condition is causally related to their employment. Marandino v. Prometheus Pharmacy, 105 Conn. App. 669, 677-678 (2008), *aff'd in part, rev'd in part*, 294 Conn. 564 (2010). In addition, an appellate panel such as ours cannot revisit a credibility assessment reached by a fact-finder after observing a witness testify.

> 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.

Burton v. Mottolese, 267 Conn. 1, 40 (2003).

The trial commissioner had an opportunity to consider the claimant's live testimony. She testified at four sessions of the formal hearing (February 25, 2010, April 6, 2010, June 8, 2010, and September 7, 2010). After hearing the claimant testify at length as to the circumstances she believed caused her ailments, and the treatment

regimen responsive to these ills, the trial commissioner found her testimony too inconsistent to be reliable. When a trial commissioner finds a claimant's testimony to be unreliable, the commissioner may find any and all medical evidence which is reliant on the claimant's narrative to be equally unreliable. See Abbotts v. Pace Motor Lines, Inc., 4974 CRB-4-05-7 (July 28, 2006), *aff'd*, 106 Conn. App. 436 (2008), *cert. denied*, 287 Conn. 910 (2008) and Do v. Danaher Tool Group, 5029 CRB-6-05-12 (November 28, 2006).

The claimant argues that the circumstances of her September 2003 injury were undisputed and that she testified her increased lifting duties at work led to increasingly severe symptoms of her back ailment. Claimant's Brief, pp. 11-13.[2] This is not dispositive of the issues herein. Generally, expert medical evidence is required to establish causation of an injury unless the circumstances are such that it is unnecessary to rely on such evidence. Marandino, supra, *citing* Murchison v. Skinner Precision Industries, Inc., 162 Conn. 142, 151 (1972). The trial commissioner found the claimant's medical evidence unpersuasive. We note that the fact an injury has occurred at one's place of employment does not confer jurisdiction on this commission unless a nexus is established between the employment and the injury. Vitti v. Richards Conditioning Corp., 5247 CRB-7-07-7 (August 21, 2008). We also note that when a claimant later has surgery, even when the surgery involves a body part which has sustained a compensable injury it is the claimant's burden to prove the compensable injury was a substantial factor in the need for surgery, Weir v. Transportation North Haven, 5226 CRB-1-07-5 (April

[2] At oral argument before this panel, the parties disputed whether the trial commissioner cited the correct date of injury.

16, 2008). "The personal injury must be the result of the employment and flow from it as the inducing proximate cause. The rational mind must be able to trace resultant personal injury to a proximate cause set in motion by the employment and not by some other agency, or there can be no recovery." (Internal quotation marks omitted.) Ryker v. Bethany, 97 Conn. App. 304, 309, *cert. denied*, 280 Conn. 932 (2006).

The respondent argues that the claimant did not immediately report sharp pain from the 2003 incident to her supervisor. They also argue that the claimant's description of her medical condition at the formal hearing was not congruent with the medical history she provided to her treating physicians. The respondent also points to the claimant identifying "low back pain" as a medical issue on her 1997 job application. Respondent's Brief, pp. 13-16. We conclude the trial commissioner could reasonably conclude the claimant's testimony attributing her current ailments to work-related lifting was not reliable.

The trial commissioner found the medical opinions of Dr. Kruger to be the most persuasive and reliable opinion as to the causation of the claimant's medical condition. The trial commissioner found Dr. Kruger opined that the claimant's medical condition was due to her pre-existing condition and was unrelated to her job duties for the respondent. The claimant challenges the commissioner's reliance on Dr. Kruger's opinion. She argues, pursuant to DiNuzzo, supra, that the witness lacked a sufficient foundation of knowledge to offer such an opinion. She also argues that her work-related injury aggravated her pre-existing condition and that notwithstanding Dr. Kruger's opinion she established her need for surgery and that her back ailment was compensable.

It is black letter law that it is the trial commissioner's responsibility "to assess the weight and credibility of medical reports and testimony. . . ." O'Reilly v. General Dynamic Corp., 52 Conn. App. 813, 818 (1999). The commissioner found Dr. Kruger offered the more persuasive opinion and in a "dueling expert" case that is his prerogative. Dellacamera v. Waterbury, 4966 CRB-5-05-6 (June 29, 2006), n.1. See also Strong v. UTC/Pratt & Whitney, 4563 CRB-1-02-8 (August 25, 2003), "[i]f on review this board is able to ascertain a reasonable diagnostic method behind the challenged medical opinion, we must honor the trier's discretion to credit that opinion above a conflicting diagnosis."

The record indicates that Dr. Kruger commenced treating the claimant on January 9, 2004 and subsequently treated her on February 27, 2004, April 26, 2004 and May 6, 2005. Claimant's Exhibit N. The January 9, 2004 report reflects that Dr. Kruger reviewed an MRI presented to him by the claimant. In the May 6, 2005 report, Dr. Kruger diagnosed the claimant as suffering from "endstage degenerative disk disease at L5-S1." Id. At his deposition, Dr. Kruger explained that spondylothesis was a condition that generally first presented itself during adolescence. Respondent's Exhibit 1, June 25, 2009 Deposition of Dr. David Kruger, pp. 18-20. Dr. Kruger described the claimant's condition as "chronic." Id., p. 21. The witness said he did not recommend surgery to the claimant. Id., p. 23. He said the claimant's condition could become symptomatic for no specific reason and did not require a triggering trauma to have occurred. Id., p. 22. Dr. Kruger described end stage degenerative disc disease as a condition that could become symptomatic in middle age requiring intervention. Id., pp. 27-28. Dr. Kruger testified that to a reasonable degree of medical probability that the claimant's employment did not cause her spondylothesis. Id., p. 32.

On cross-examination at his deposition Dr. Kruger reiterated that spondylothesis could become symptomatic without any specific triggering event. Id., p. 42. He testified that he was not familiar with the notion that repetitive trauma could make spondylothesis symptomatic. Id., p. 43. After being apprised by claimant's counsel as to the mechanism of the claimant's 2003 injury Dr. Kruger testified "I don't see that lifting those boxes was a major cause of her problems." Id., p. 47. Dr. Kruger further testified that "…she has an event at work that increased her discomfort of her preexisting condition that was self-limiting and resolved…." Id., p. 49. Dr. Kruger further said the claimant "had already been symptomatic for several years by 9-23-03." Id., p. 52, and "…there was a work injury on 9-23, with a minor self-limiting exacerbation, and then when I saw her a couple more times she was fine." Id., p. 54.

Having reviewed this testimony we conclude that a treating physician expressly opined that the claimant's employment was not a factor in the claimant's spondylothesis and that any exacerbation of the condition was short lived and self-limiting. We therefore find that Finding, ¶ 17 was supported by an expert opinion the trial commissioner decided to credit. While the claimant argues this witness's unwillingness to review certain documents at his deposition makes the precedent in DiNuzzo, supra, applicable, we disagree. We find our precedent in Burns v. Southbury, 5608 CRB-5-10-11 (November 2, 2011) to be on point both factually and legally.

In Burns, that claimant had experienced a traumatic injury at work and then asserted his subsequent need for surgery was due to this compensable injury. One of his treating physicians opined that an unrelated degenerative hip disease was the responsible factor in the need for surgery, and did not consider the work injury a major factor. The

trial commissioner relied on this opinion and we affirmed this decision on appeal. "The trial commissioner's Conclusion, ¶ E--that the 2001 accident was not a substantial cause of the claimant's hip condition--was thus grounded in competent evidence he found persuasive." Id.[3]

The trial commissioner did not find the claimant credible and was not persuaded by the evidence she presented. "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." Wierzbicki v. Federal Reserve Bank of Boston, 4147 CRB-1-99-11 (December 19, 2000), *appeal dismissed*, A.C. 21533 (2001). We are bound by the precedent in Wiezbicki to affirm the Finding and Dismissal.[4]

Commissioners Jodi Murray Gregg and Daniel E. Dilzer concur in this opinion.

[3] Even if we were to conclude that Dr. Kruger's testimony was too equivocal to warrant reliance by the trial commissioner in accordance with DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132 (2009), we would affirm the Finding and Dismissal. As we recently pointed out in Vaughan v. North Marine Group, 5695 CRB-4-11-11 (January 4, 2013), when a trial commissioner finds a claimant not credible then he or she could properly find the claimant's medical evidence unreliable. *Citing* Toroveci v. Globe Tool & Metal Stamping Co., Inc., 5253 CRB 6-07-7 (July 22, 2008) and Warren v. Federal Express Corp., 4163 CRB-2-99-12 (February 27, 2001) we reiterated "if a trial commissioner chose to believe none of the witnesses in a given case, and found all of the documentary evidence to be untrustworthy, the employer would essentially prevail by default." Id.

[4] We uphold the trial commissioner's denial of the claimant's Motion to Correct. We conclude he did not find the evidence cited in this motion was probative or persuasive. See Brockenberry v. Thomas Deegan d/b/a Tom's Scrap Metal, Inc., 5429 CRB-5-09-2 (January 22, 2010), *aff'd,* 126 Conn. App. 902 (2011) (Per Curiam) and Vitti v. Richards Conditioning Corp., 5247 CRB-7-07-7 (August 21, 2008).