CASE NO. 5731 CRB-7-12-2
CLAIM NO. 700125974

ANNIE M. OLWELL CLAIMANT-APPELLANT	: COMPENSATION REVIEW BOARD
v.	
STATE OF CONNECTICUT/ DEPARTMENT OF DEVELOPMENTAL SERVICES EMPLOYER SELF-INSURED RESPONDENT-APPELLEE	: WORKERS' COMPENSATION COMMISSION
and	
GAB ROBINS NORTH AMERICA ADMINISTRATOR	
	: FEBRUARY 14, 2013

APPEARANCES:

The claimant was represented by Kenneth E. Taylor, Esq., Cramer & Anderson, LLP, 51 Main Street, New Milford, CT 06776.

The respondent was represented by Kenneth Kennedy, Esq., Assistant Attorney General, 55 Elm Street, P.O. Box 120, Hartford, CT 06141.

The Petition for Review[1] from the January 23, 2012 Finding and Denial of the Commissioner acting for the Seventh District was heard August 17, 2012 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Daniel E. Dilzer and Ernie R. Walker.

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

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN: The claimant has appealed from a Finding and Denial that determined that her present disability was not caused by her compensable injury. The claimant argues that the trial commissioner failed to properly consider the evidentiary record presented at the formal hearing, and that had this evidence been applied properly, she would have been adjudged entitled to §31-307 C.G.S. benefits. We have reviewed the recent case law on total disability. These cases stand for the proposition that to award benefits under Chapter 568 a trial commissioner must ascertain if a claimant's disability is a sequalae of their work-related injury. After reviewing the evidence, we conclude that there was a sufficient evidentiary foundation supportive of the trial commissioner's decision to affirm her Finding and Denial.

The trial commissioner reached the following findings of fact at the conclusion of the formal hearing. On January 12, 2001, the claimant sustained compensable injuries to her right ankle, left ankle and back while working for the respondent. She then sustained a compensable injury on November 27, 2005 to her left shoulder when she fell on her left arm after having a back spasm. At the time of her injuries the claimant was employed as a registered nurse working with developmentally disabled adults. The claimant is treating with Dr. Daniel George, an orthopedic surgeon and Dr. David Kloth, a pain management specialist. Both physicians opine that the claimant is totally and temporarily disabled and this disability status dates back to 2009. The claimant testified that over the past three years she is and has been bed ridden 23 hours per day with her

only activity of the day being the use of the bathroom. The claimant further testified that it takes her two days to recover from going to the doctor.

The claimant presented for Commissioner's examinations in 2008 and 2010. In 2008 the claimant was examined by Dr. Gordon Zimmerman, an orthopedic surgeon. The doctor reports that the claimant has a 15% permanent partial disability to her left shoulder and relates the claimant's low back spasm and low back pain to the original date of injury. The doctor assigned a light to sedentary work capacity to the claimant. Findings, ¶ 7. The 2010 exam was performed by Dr. Enzo J. Sella. The doctor opined the claimant has reached medical maximum improvement in regards to her back, left shoulder and ankle. The doctor assigned a 5% impairment rating to the left ankle, a 15% impairment rating to the left shoulder and no impairment to the back. Dr. Sella further reported at that time that the claimant was permanently disabled and unemployable. Findings, ¶ 8.

On December 1, 2010, Dr. Zimmerman testified at his deposition that in theory the claimant could be capable of sedentary work, however, due to the fact that she cannot sit for long periods of time she is not employable. However, the doctor further testified that it is possible for her to have a very sedentary type of job such as reviewing medical reports if her medication is adjusted. Findings, ¶ 9. On December 15, 2010, Dr. Sella testified at his deposition that the claimant's "current" back condition is not related to the 2001 compensable injury and that the claimant's back symptoms have progressed because of degenerative disk disease. Findings, ¶ 10. The doctor further testified that the claimant has a work capacity in regards to her compensable injuries that she sustained in 2001, but the reasons for the claimant being unemployable and totally disabled from work are from unrelated health conditions.

> Considering only the injuries of 2001, yes, she could go back and be a nurse, certainly a psychiatric nurse, but there were many, many other issues after that that in my opinion would prevent her from working now; namely multiple sclerosis, severe depression and psychosocial problems. She could not put in a full day I don't think. I found her to be totally disabled, unemployable.

Findings, ¶ 11. December 15, 2010, Deposition of Enzo J. Sella, M.D., p. 15.

Dr. Sella indicated that as an orthopedic surgeon he did not feel he was qualified to render an opinion on psychological issues in his report, but testified at his deposition the main reason the could not work was due to psychosocial issues. Findings, ¶ 12-13. Deposition of Enzo J. Sella, M.D., p. 26-27.

Based on these subordinate facts the trial commissioner concluded the 's testimony and medical evidence were not persuasive. The commissioner did not find the opinions of Dr. Kloth or Dr. George as to the claimant's work capacity to be persuasive. The commissioner found the 2008 report and 2010 deposition of Dr. Zimmerman to be credible and persuasive in regards to the claimant having a light duty to sedentary work capacity as it relates to the left shoulder. The commissioner did not find Dr. Sella's April 9, 2010 medical report to be persuasive. The commissioner did find the December 15, 2010 deposition testimony of Dr. Sella to be credible and persuasive in regards to the claimant having a work capacity as it relates to her compensable injuries to her back, left shoulder and left ankle. The commissioner found that based on the totality of the evidence that the claimant was not able to prove she was totally disabled as a result of her compensable injuries.

The claimant filed a Motion to Correct which was denied in its entirety. The claimant filed a Motion to Articulate which the commissioner granted. She articulated her reasoning for her conclusions as follows. She indicated that Dr. Zimmerman's opinions

were limited to the compensable shoulder injury, for which the witness ascribed a limited sedentary work capacity. She noted that the claimant's back was a compensable body part, but relied on Dr. Sella's opinions that the claimant's disability status was not the result of the 2001 accident. The commissioner also noted that Dr. Sella was not qualified to render an opinion on psychological issues, but was qualified to render an opinion on whether disability was the result of orthopedic injuries.

The claimant's appeal is based on her belief that the evidence presented to the trial commissioner was inconsistent with her legal conclusions. As the claimant views the record the trial commissioner's conclusion as to the claimant's work capacity cannot be reconciled with the subordinate facts on the record. The claimant believes that the trial commissioner erred in choosing to find certain testimony of Dr. Zimmerman and Dr. Sella persuasive, since in her opinion both physicians opined the claimant did not, based on her overall medical condition, have a present work capacity.

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). We reiterated in Clarizio v. Brennan Construction Company, 5281 CRB-5-07-10 (September 24, 2008) the level of deference we must extend to a fact finder's prerogative to find facts.

> We begin by stating that the role of this board on appeal is not to substitute its own findings for those of the trier of fact. Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 451 (2001). The trial commissioner's role as fact-finder encompasses the authority to determine the credibility of the evidence, including the testimony of witnesses and the documents introduced into the

> record as exhibits. Burse v. American International Airways, Inc., 262 Conn. 31, 37 (2002); Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999). If there is evidence in the record to support the factual findings of the trial commissioner, the findings will be upheld on appeal. Duddy v. Filene's (May department Stores Co.), 4484 CRB-7-02-1 (October 23, 2002); Phaiah v. Danielson Curtain (C.C. Industries), 4409 CRB-2-01-6 (June 7, 2002). This board may disturb only those findings that are found without evidence, and may also intervene where material facts that are admitted and undisputed have been omitted from the findings. Burse, supra; Duddy, supra. We will also overturn a trier's legal conclusions when they result from an incorrect application of the law to the subordinate facts, or where they are the product of an inference illegally or unreasonably drawn from the facts. Burse, supra; Pallotto v. Blakesles Prestress, Inc., 3651 CRB-3-97-7 (July 17, 1998).

Id.

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*, 294 Conn. 564 (2010). To that extent, the question is not whether the claimant suffered orthopedic injuries or a different form of compensable injury. The claimant must prove that their compensable ailment was a substantial factor in their current disability. Weir v. Transportation North Haven, 5226 CRB-1-07-5 (April 16, 2008); Lamontagne v. F & F Concrete Corporation, 5198 CRB-4-07-2 (February 25, 2008) and Vitti v. Richards Conditioning Corp., 5247 CRB-7-07-7 (August 21, 2008).

In recent years the Appellate and the Supreme Court have delved into the issue of what constitutes an appropriate standard to determine when a claimant is totally disabled and when this injury was the result of a compensable injury. Much of the recent precedent is rooted in the Appellate Court's 2001 opinion in Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440 (2001). In Dengler the claimant suffered a

compensable injury, and later asserted her total disability was due to that injury. The Compensation Review Board concluded, however, that the evidence did not establish a causal connection between the compensable injury and the claimant's disability. The Appellate Court affirmed this decision, noting that the record indicated there was "an independent, intervening and superseding legal cause of the [leg] injury." Id, at 446.

The Supreme Court reiterated the vitality of the Dengler precedent in Sapko v. State, 305 Conn. 360 (2012). In Sapko the decedent, who had sustained a previous compensable injury, died as a result of an overdose of two prescription drugs, and the trial commissioner concluded the chain of causation between his compensable injury and his death had been broken by an intervening event. The Supreme Court affirmed this decision, pointing out that a compensation award hinges "on the issue of whether there exists the requisite causal connection between the primary injury and the subsequent injury". Id, at 386.

We do note that in two recent Appellate Court cases, O'Connor v. Med-Center Home Health Care Inc., 140 Conn. App. 542 (2013) and Bode v. Connecticut Mason Contractors, The Learning Corridor, 130 Conn. App. 672 (2011) found claimants had proven they were totally disabled from their compensable injuries. In neither case however does it appear the respondents argued that there was an alternative basis for the claimant's disability. Indeed, in O'Connor the Appellate Court specifically distinguished Dengler from the issues considered in their opinion.

> At issue in *Dengler* was not merely whether the plaintiff was totally disabled, but whether the subsequent injury to her leg, for which causation had not been established, was a cause of her total disability. The analysis in *Dengler* involved a combined question of causation and whether the plaintiff was totally disabled and the court held only that direct medical evidence is required where the

> claim involves any dispute over causation. Accordingly, we conclude that *Dengler* is inapposite to the present case.

O'Connor, supra, 552.

The O'Connor opinion engaged in an extensive review of the decision in Bode, supra. The Appellate Court found Bode stood for a standard that "the evaluation of whether a claimant is totally disabled is a holistic determination of work capacity, rather than a medical determination". Id, at 554. As the trial commissioner in Bode focused solely on the claimant's lack of a medical opinion of total disability, and failed to consider his vocational evidence supportive of a finding of no work capacity, the decision of the trial commissioner was overturned by the Appellate Court. Bode, supra, 687.

The present circumstances are far more akin to Dengler than to O'Connor or Bode. The central dispute is not about whether the claimant is now totally disabled. The issue before the trial commissioner was whether this disability was the result of the compensable injury the claimant sustained. The trial commissioner found evidence in the record which she found persuasive that the claimant's present disability was due to factors other than the compensable injury. We must ascertain if this conclusion is supported by this evidence.

The trial commissioner placed her reliance on the deposition testimony of Dr. Zimmerman and Dr. Sella. "We have held that it is within the discretion of the trial commissioner to accept some, but not all, of a physician's opinion." See Williams v. Bantam Supply Co., 5132 CRB-5-06-9 (August 30, 2007) and Lopez v. Lowe's Home Improvement Center, 4922 CRB-6-05-3 (March 29, 2006). Dr. Zimmerman did testify at his deposition regarding the claimant's work capacity that "in theory she could be capable of some sort of sedentary work" but that she could not sit for an extensive period

of time. December 1, 2010, Deposition of Dr. Gordon A. Zimmerman, M.D., p. 16. He testified it would be possible for the claimant to review medical records, id., but this would be dependent on the claimant's level of analgesic medications. Id, at 17. Dr. Zimmerman further confirmed to claimant's counsel that his conclusions about the claimant's work capacity were "solely with regard to your examination of her left shoulder and the records you reviewed concerning her back and her ankle" id., at 18, and he had not examined her back or her ankle. Id.

In Dr. Sella's deposition he was asked if the claimant was exaggerating her symptoms. He testified that she had psychosocial problems and depression. December 15, 2010, Deposition of Dr. Enzo Sella, p.10. He also testified that the claimant's level of medication was not a barrier to light duty employment. Id, at 11-12. Dr. Sella further testified from examining the claimant's X-rays that she had preexisting spinal conditions and degenerative disk disease. Id, at 13. Dr. Sella specifically opined that considering the injuries of 2001 she could go back to being a psychiatric nurse "but there were many, many other issues after that that in my opinion would prevent her from working now; namely multiple sclerosis, severe depression and psychosocial problems".
Id, at 15. Dr. Sella opined that in the absence of these conditions the claimant would have a work capacity. Id, at 16.

On cross-examination Dr. Sella testified that the claimant's multiple sclerosis was not caused or exacerbated by the compensable injury. Id, at 17. On redirect examination Dr. Sella restated his opinion that the compensable injuries the claimant sustained would not have taken away her work capacity. Id, at 23. Dr. Sella testified that the claimant's

psychosocial issues were unrelated to her fall, id., and that the degenerative disc disease the claimant suffered from would have progressed in the absence of her fall at work. Id, at 22.

The claimant argues that due to Dr. Sella's lack of expertise in the field of psychology that his testimony as to the claimant's depression and psychosocial issues should have been discounted by the trial commissioner. We do note that medical opinions based on surmise or conjecture may not be relied on by trial commissioners. DiNuzzo v. Dan Perkins Chevrolet Geo. Inc., 294 Conn. 132 (2009). Nonetheless, we believe that this witness, who was the Commissioner's examiner, had sufficient familiarity with the claimant's condition to opine that matters other than the compensable injuries were the substantial factor behind her present disability. The claimant argued at oral argument before this tribunal that Dr. Sella's deposition testimony was not coherent and was inconsistent with his prior opinions. However, we have reviewed Dr. Sella's April 9, 2010 report and are unable to discern the wide discrepancy between this report and the deposition testimony alleged by the claimant.

We find that Dr. Sella's report outlined the claimant's lengthy medical history and specifically references her history of depression, her preexisting multiple sclerosis, and her degenerative disc disease. The report's conclusion states "[c]onsidering the patient's multiple orthopaedic injuries that is shoulder, right ankle and foot and low back and *also her multiple sclerosis*, I would consider the patient to be unemployable and permanently disabled". (Emphasis added). Therefore, this report offers alternative explanations for the claimant's disability. At his deposition, Dr. Sella clarified his opinion as to what he believed was the cause of the claimant's current medical condition. This testimony

consistently offers his opinion that matters beyond the claimant's compensable orthopedic injuries were the cause of the claimant's present disability.

We note that it is the claimant's duty to prove to the trial commissioner that their medical condition is the result of a compensable injury. Marandino, supra. The claimant's argument is that since Dr. Sella in her view changed his opinion as to causation at the deposition, the later testimony must be discounted as unreliable. We do not share this view of the testimony. Moreover, were we to find that Dr. Sella's testimony in its totality to be too inconsistent to warrant reliance by the trial commissioner, we would be forced to determine that none of his conclusions could be relied upon. See Toroveci v. Globe Tool & Metal Stamping Co., 5253 CRB 6-07-7 (July 22, 2008) and Warren v. Federal Express Corporation, 4163 CRB-2-99-12 (February 27, 2001), "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.

The claimant's argument is basically that Dr. Sella's opinions favorable to finding her disability was due to a compensable injury were reliable and his unfavorable opinions were unreliable. To reverse the Finding and Denial on these grounds would force this appellate panel to reweigh the witness's testimony, which would be inconsistent with precedent in O'Reilly v. General Dynamics Corp., 52 Conn. App. 813 (1999) where the trial commissioner is responsible for evaluating the weight and probative value of medical evidence. The trial commissioner rejected the claimant's testimony as unpersuasive and found the claimant's treating physicians unpersuasive. In the absence of Dr. Sella's testimony there are no witnesses whom the trial commissioner found

persuasive which would provide a basis to award the claimant total disability benefits. See Toroveci, supra.[2]

We find the trial commissioner had a sufficient quantum of evidence which she found probative to support her conclusions in the Finding and Denial. Therefore, we affirm the Finding and Denial.

Commissioners Daniel E. Dilzer and Ernie R. Walker concur in this opinion.

[2] We uphold the trial commissioner's denial of the claimant's Motion to Correct. We conclude she did not find the evidence cited in this motion was probative or persuasive. See Vitti v. Richards Conditioning Corp., 5247 CRB-7-07-7 (August 21, 2008) and 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).