CASE NO. 5732 CRB-3-12-2
CLAIM NO. 300053656

PAGE PUTNEY CLAIMANT-APPELLANT	: COMPENSATION REVIEW BOARD
v.	
TOWN OF GUILFORD EMPLOYER	: WORKERS' COMPENSATION COMMISSION
and	
CONNECTICUT INSURANCE GUARANTY ASSOCIATION INSURER RESPONDENTS-APPELLEES	: FEBRUARY 5, 2013

The claimant was represented by Susan King Shaw, Esq., King & Shaw, LLC, Granite Square, 700 State Street, Suite 304, New Haven, CT 06511.

The respondents were represented by William Snyder, Esq. and Claudia A. Baio, Esq., Baio & Associates, P.C., 15 Elm Street, Rocky Hill, CT 06067.

This Petition for Review from the January 25, 2012 Finding and Order of the Commissioner acting for the Third District was heard August 17, 2012 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Murray Gregg and Daniel E. Dilzer.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN: The claimant in this matter has appealed from a Finding and Order which determined that she had reached maximum medical improvement from a compensable injury and had not proven her current symptoms were the result of that injury. The gravaman of her appeal is based on her position the trial commissioner erred in her determination of a date of maximum medical improvement. In reviewing the record and the text of the commissioner's decision, we are satisfied the commissioner's decision is sound. We affirm the Finding and Order.

The trial commissioner reached the following findings of fact which are relevant to our consideration. As there was no Motion to Correct filed in this case we may give these facts conclusive effect. Stevens v. Raymark Industries, Inc., 5215 CRB-4-07-4 (March 26, 2008), *appeal dismissed*, A.C. 29795 (June 26, 2008).

The claimant was injured on November 16, 1999 and the respondents accepted injuries to the claimant's bilateral arms. The claimant's treater, Rowland Mayor, M.D., initially diagnosed bilateral epicondylitis and he treated the claimant with a combination of injections and physical therapy with limited and temporary improvement. In June 2000 the claimant had a right elbow lateral epicondyle debridement and repair surgery, unfortunately with no notable improvement. Following that procedure the claimant's symptoms continued, despite more physical therapy and more injections. Her shoulders, elbows and hands were all painful from time to time.

In December 2000 the claimant was evaluated by Dr. Paul Straznicky as a Respondent's Medical Examiner. He diagnosed bilateral epicondylitis and right carpal tunnel. The claimant was not at maximum medical improvement and an impairment

rating was not assigned. Dr. Straznicky recommended injections, possible carpal tunnel surgery and only limited therapy; and also believed a referral to pain management might be necessary. Dr. Straznicky released the claimant to light duty work with no lifting over ten pounds with the right hand and no more than twenty pounds with the left.

In 2001 the claimant had a left lateral epicondyle debridement and repair. Subsequent to the left arm surgery the claimant had some relief of pain, but her right elbow and wrist became painful. Several times over the course of his treatment Dr. Mayor wrote that he had nothing more to offer the claimant. Dr. Mayor referred her to Dr. Mark Altman in 2000 for her hand complaints. Dr. Altman performed an injection, with no lasting relief. In 2003 Dr. Mayor assigned two permanent partial disability ratings: 18% right upper extremity and 9% left upper extremity.

In 2005 the claimant returned to Dr. Mayor with burning pain and discomfort in her elbows and wrists. She was also referred again to Dr. Altman for an examination. Dr. Altman recommended very limited physical therapy and returned the claimant to Dr. Mayor's care. In October 2005 the claimant was referred to Dr. John Daigneault, a shoulder expert. Dr. Daigneault suggested a repeat neurologic evaluation but beyond that had nothing more to offer the claimant. He returned her to Dr. Mayor's care. By February 2006 the claimant had been diagnosed with the following: lateral epicondylitis, joint contracture, brachial plexus paralysis, ligament strain of radius and ulna distal, tendonitis of wrist, thoracic outlet syndrome, arm neuralgia, and contracture of the elbows. The claimant's impairment ratings were unchanged as of April 2006 and her work restrictions were no lifting over five pounds and no pushing or pulling, according to Dr. Mayor.

In October 2006 the claimant had her first consultation with Dr. Lloyd Saberski with the Advanced Diagnostic Pain Treatment Centers, P.C. of New Haven. The assessment was: decreased range of motion of right elbow and right wrist with uncertain etiology, and extensive upper extremity myofascial pain syndrome because of decreased range of motion right elbow and wrist. In January 2007 Dr. Saberski diagnosed neuropathic pain due to a swollen radial nerve. Dr. Saberski wrote the claimant's work capacity was limited by the total disability of her right arm, despite her intelligence and prior job skills. Dr. Saberski's treatment was medication management as he prescribed Cymbalta and Lidoderm patches. The claimant declined additional surgery for the swollen radial nerve. In an August 13, 2007 report, Dr. Saberski stated the claimant had reached maximum medical improvement. He wrote he would provide a disability rating if asked. He recommended a Functional Capacity Exam to determine work capacity.

On January 29, 2007, the claimant had a Respondent's Medical Examination with Dr. Kirk Watson. Dr. Watson stated the claimant had reached maximum medical improvement. He recommended full unrestricted work and assigned a five (5) percent rating to the right arm and a three (3) percent to the left. On October 10, 2007 Dr. Marvin Arons examined the claimant as a Commissioners' Examination. Dr. Arons noted the claimant's long treatment and multiple diagnoses since her injury. He did not think the claimant was malingering, exaggerating, or not being truthful. Dr. Arons assigned a 24% impairment of the right master upper extremity and a 12% impairment of the left upper extremity. Dr. Arons said the claimant had reached maximum medical improvement and that she required "…no further formal treatment by anyone professionally." Dr. Arons believed the claimant was employable. On the left side he

opined the claimant had a medium work capacity; on the right side he opined she had a light work capacity.

In January 2007 the claimant returned to Dr. Mayor who wrote, "[w]hether she has any useful work capacity fundamentally depends on one's definition of the terms." He thought her useful work capacity was so limited "she should likely be considered to be totally disabled." There was some discussion of further surgery at this examination, but Dr. Mayor did not decide that question and referred the claimant back to Dr. Saberski for medication management. In February 2009 the claimant returned to Dr. Mayor's office and was examined by David Leake, PA-C. The office note states the claimant was also examined by Dr. Mayor and a plan was agreed to that the claimant would return to Dr. Saberski for pain management; as Dr. Mayor did not have any orthopedic procedure which "would benefit Ms. Putney and provide significant improvement in her condition."

In 2008 Commissioner Cohen inquired with Dr. Arons as to the claimant continuing the Cymbalta and the Lidoderm treatment. Commissioner Cohen advised Dr. Arons the claimant "has continued on these medications under the management of her physician at Advanced Diagnostic Pain Treatment Center." Dr. Arons did not specifically recommend continued treatment with Cymbalta for her upper extremity pain. He noted the Federal Drug Administration had approved the drug for major depressive disorder, diabetic peripheral neuropathic pain, and general anxiety disorder. The claimant was not diabetic; therefore Dr. Arons recommended that if she were diagnosed with depression or anxiety she should be treated by a psychiatrist.

At the formal hearing the claimant testified she has been experiencing new symptoms of her left hand "locking up." When this happens she cannot straighten her

fingers. June 15, 2011 Transcript, pp. 30-32. There were no medical reports documenting this condition. The claimant sought authorization from the commissioner to return to Dr. Saberski and to Dr. Mayor.

Based on this evidence the trial commissioner concluded Dr. Rowland Mayor, and his associates, Drs. Altman and Daigneault, despite their efforts, were unable to make substantial, permanent improvements in the claimant's condition over a course of at least six (6) years. The commissioner also concluded Dr. Mayor, as happened several times earlier in his treatment of the claimant, had no recommendations for her other than referral to another doctor. The commissioner found there is no medical evidence of the claimant's new symptoms in her left hand, nor is there any medical evidence to connect those symptoms to her original work injury in 1999. On the issue of maximum medical improvement from the original injury the commissioner deemed Dr. Watson's methodology unusual and noted his opinions differed from that of the claimant's treaters.

The trial commissioner noted that Dr. Saberski (August 13, 2007), Dr. Arons (October 10, 2007) and Dr. Watson (January 29, 2007) have all determined the claimant has reached maximum medical improvement but at different dates. Conclusion, ¶ F. The commissioner found Dr. Arons' report the most persuasive and likely because of its place in time, the most complete review of the claimant's symptoms, treatment and work capacity. Conclusion, ¶ G. The commissioner also noted Dr. Arons did not disagree with Dr. Saberski's date of maximum medical improvement. Conclusion, ¶ H. The trial commissioner also noted that the claimant had two Voluntary Agreements approved in 2009 acknowledging permanency benefits for right and left epicondylitis; 24% and 12% specific disability, respectively.

The trial commissioner found the claimant was not eligible for temporary total disability benefits after August 13, 2007, the date of maximum medical improvement according to Dr. Saberski. The commissioner found no further medical treatment was warranted, and the claimant would need to present her prima facie case for the new left hand symptoms, as there was not medical evidence in the record relating this ailment to the compensable injury.

As we noted, the claimant did not file a Motion to Correct the facts found by the trial commissioner. The claimant instead argues the trial commissioner reached an erroneous conclusion of law. She argues that the trial commissioner could not find the commissioner's examiner the most persuasive expert witness while choosing to rely on Dr. Saberski's date of maximum medical improvement. This, as the claimant views the record, constitutes a conclusion inconsistent with the subordinate facts found by the commissioner.

The respondent argues that the record herein clearly supports the trial commissioner's decision. They also argue that as an administrative matter that the appeal should be dismissed pursuant to Practice Book §85-1 as the claimant failed to file timely Reasons for Appeal. The respondent argues that as the claimant was represented by counsel she should not receive the level of deference this panel has generally extended to litigants who file appeals with procedural deficiencies. See Vitoria v. Professional Employment & Temps, 5217 CRB-2-07-4 (April 4, 2008).

Nonetheless we deny the respondent's Motion to Dismiss. The appeal was commenced with a timely Petition for Review. The claimant's brief, clearly delineates what her legal arguments were for reversing the commissioner's decision, and was

presented with sufficient amount of time left prior to the hearing to enable the respondent to present a cogent argument against the appeal. When an appellant fails to delineate what their claims of legal error are, the appellees may reasonably argue that they have been prejudiced by the manner in which the appeal has been prosecuted. Lopez v. EC Tree, LLC, 5698 CRB-8-11-11 (October 11, 2012). We do not find these circumstances, where the appellant did provide a cogent explanation of their ground for appeal, prejudiced the respondent. We believe the circumstances herein are similar to Roussel v. Village Gate of Farmington, 4918 CRB-6-05-2 (February 28, 2006) as the respondents were not prejudiced by the claimant's delays.

We turn to the merits of the appeal. The claimant essentially argues that once the trial commissioner determined that she would rely on the opinions of the commissioner's examiner in general, she was obligated to adopt the opinion of the commissioner's examiner on every issue. We do not believe this position is consistent with our precedent. In Alvarez v. Wal-Mart Stores, Inc., 5378 CRB-5-08-9 (July 27, 2009) we pointed out "[t]he trial commissioner may choose to give greater weight to the opinions of the commissioner's examiner than the treating physician, Gagliardi v. Eagle Group, Inc., 4496 CRB-2-02-2 (February 27, 2003), *aff'd*, 82 Conn. App. 905 (2004)(per curiam), but he is not required to do so." In Alvarez we affirmed a trial commissioner who explained their decision not to rely on the opinion of a commissioner's examiner. We must examine the record herein to see if it is consistent with Alvarez, bearing in mind appellate review requires every reasonable presumption in favor of the action. Daniels v. Alander, 268 Conn. 320, 330 (2004). We must also bear in mind "[w]e 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).

The trial commissioner outlined her reasoning in her conclusions. In Conclusion, ¶ F she noted all the relevant experts agreed the claimant had reached maximum medical improvement. In Conclusion, ¶ G she indicated that she found the commissioner's examiner in general the most persuasive expert witness. In Conclusion, ¶ H she indicated that Dr. Arons did not dispute Dr. Saberski's date of maximum medical improvement. We may clearly infer that the trial commissioner found Dr. Saberski, who treated the claimant, more persuasive on this issue. In reading the actual October 10, 2007 report by Dr. Arons, we note that on page 9 he states the claimant had reached maximum medical improvement but does not specifically state a date, and therefore one would ascribe the date of MMI to the date of the report in the absence of an affirmative representation to the contrary. See Respondent's Exhibit 2. We have reviewed Claimant's Exhibit A and conclude Dr. Saberski as the claimant's treater presented a detailed rationale for his determination of a date of maximum medical improvement. August 13, 2007 report of Lloyd Saberski, M.D. Therefore, as the trial commissioner is entitled to review the totality of the evidence (see O'Reilly v. General Dynamics Corp., 52 Conn. App. 813 (1999)) we do not believe it was unreasonable for her to conclude Dr. Saberski offered the more accurate date of maximum medical improvement for the claimant. Having stated her reasoning, and finding the evidentiary record supportive of this conclusion, this panel may not usurp the fact finding province of the trial commissioner.

We find no error in the Finding and Order. We affirm this decision.

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