

CASE NO. 5734 CRB-7-12-2
CLAIM NO. 700159396

: COMPENSATION REVIEW BOARD

DALE DORENBOSCH, SR.
CLAIMANT-APPELLEE

: WORKERS' COMPENSATION
COMMISSION

v.

: FEBRUARY 14, 2013

HOFFMAN LANDSCAPES
EMPLOYER

and

UTICA NATIONAL INSURANCE
INSURER
RESPONDENTS-APPELLANTS

APPEARANCES

The claimant was represented by Mathias J. Deangelo, Esq., and Thomas Galvin Cotter, Esq., The Cotter Law Firm, LLC, 2563 Main Street, Stratford, CT 06615.

The respondents were represented by Michael M. Buonopane, Esq., McGann, Bartlett & Brown, LLC, 111 Founders Plaza, Suite 1201, East Hartford, CT 06108.

This Petition for Review from the February 6, 2012 Finding and Orders of the Commissioner acting for the Fourth District was heard on August 17, 2012 before a Compensation Review Board panel consisting of Commission Chairman John A. Mastropietro and Commissioners Jodi Murray Gregg and Daniel E. Dilzer.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondents have petitioned for review from the February 6, 2012 Finding and Orders of the Commissioner acting for the Fourth District. We find no error and accordingly affirm the decision of the trial commissioner.

The trial commissioner made the following factual findings which are pertinent to our review. The claimant testified that on June 14, 2010, he fell from a ladder which caused compartment syndrome to his right leg, a contusion to the tibia and the splintering of several bones. The respondents accepted the claim and paid for the claimant's medical treatment and indemnity benefits. The claimant testified that he had two surgeries as a result of the injury, including the release of a compartment and the peroneal nerve, followed by skin grafts. The claimant has taken a variety of pain medications and testified that he has no feeling in his right leg. He testified that he underwent injections at the site of the surgical scar and developed a necrotic wound that started as a small black freckle and became bigger, blacker and deeper over time. James DePuy, M.D., who administered the injections, performed follow-up wound care by scraping out the dead tissue. The claimant indicated that the wound has reopened more than thirty times and required follow-up care on three or four occasions.

On December 9, 2010, Dr. DePuy reported that the original wound was "healing nicely." Respondents' Exhibit 1. On December 10, 2010, Prashant Soni, M.D., indicated that the wound had healed, there was no discharge, and the skin graft had taken completely. *Id.* On April 21, 2011, Randy Trowbridge, M.D., noted that the wound had healed and there was no infection. *Id.* The claimant testified that on April 26, 2011, the wound reopened when he hit his leg on a nail protruding from his bathroom door. The claimant received treatment at the Danbury Hospital Emergency Department, and on April 29, 2011, Vincent Carlesi, M.D., identified the new wound as located on the original wound site and noted it was a new perforation of the wound area. The claimant testified that the wound eventually became necrotic and he underwent a skin graft. The

wound area healed after three months but periodically will blister, pop open, leak and re-close. On July 29, 2011, Henry Backe, M.D., stated that the claimant has a chronic non-healing wound on his right leg which is related to the injury he sustained when he fell from the ladder.

The trial commissioner concluded that the claimant was credible and persuasive. The trier also found persuasive Dr. Backe's opinion that the claimant's chronic non-healing wound to his right leg was related to the accepted injury sustained on June 14, 2010 when the claimant fell from the ladder. Having determined that the claimant did not sustain a new injury on April 26, 2011, the trial commissioner ordered the respondents to continue to pay all medical and indemnity benefits associated with the June 14, 2010 claim, including the benefits which the respondents had contested after the claimant's wound reopened on April 26, 2011.¹

The respondents filed a Motion to Correct which was denied in its entirety, and this appeal followed. On appeal, the respondents contend that the trial commissioner erred when he determined that the injury sustained by the claimant on April 26, 2011 was related to the compensable injury of June 14, 2010. The respondents also assert the trial commissioner erroneously failed to address their argument that the trier lacked the jurisdiction to review the claimant's claim because the claimant failed to establish that he was an employee of the respondent when he sustained his injury on April 26, 2011. Finally, the respondents claim as error the trial commissioner's denial of their Motion to Correct.

¹ In light of the concerns expressed by several of the claimant's treaters regarding the claimant's use of pain medication, the trial commissioner also ordered a commissioner's examination with Jerrold Kaplan, M.D., in order to assess whether the claimant's current pain medication regimen is appropriate and to determine future pain management options.

The standard of deference we are obliged to apply to a trial commissioner's findings and legal conclusions is well-settled.

... 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 factfinder 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. Blakeslee Prestress, Inc., 3651 CRB-3-97-7 (July 17, 1998).

McMahon v. Emsar, Inc., 5049 CRB-4-06-1 (January 16, 2007).

We begin with an analysis of the respondents' challenge to the trial commissioner's finding of credibility relative to the opinion of Dr. Backe as expressed in his report of July 29, 2011 stating that the claimant suffered from a chronic, non-healing wound in his right leg as a result from the fall he had sustained from the ladder on June 14, 2010. Conclusions, ¶¶ d, e. The respondents aver that contrary to the trier's findings, the medical evidence and the claimant's testimony indicate the injury of April 26, 2011 constituted an identifiable new injury that was not medically connected to the original wound, and the trial commissioner engaged in "compensation by association"

in finding to the contrary. Appellants' Brief, p. 15. Having reviewed the entirety of the evidentiary record, we find the respondents' contentions in this regard without merit.

In his office note of July 29, 2011, Dr. Backe indicated that he had diagnosed a “[c]hronic open wound right proximal lateral leg,” and that the wound “has been problematic since [the claimant’s] original injury.” Claimant’s Exhibit C. The doctor noted that the claimant “has had intermittent opening of this wound as well as drainage for the last five months.” Id. Dr. Backe also stated that the claimant’s original injury – compartment syndrome which required a fasciotomy – “did not heal and [the claimant] developed a chronic wound which required skin grafting.” Id. During his examination, the doctor found “a chronic ulcer over the fibular head of the right leg” with “some slight active bleeding.” Id. The doctor’s assessment cited a “[c]hronic nonhealing wound, right leg,” which was “also related to his injury ... when he fell from the ladder. He has had problems with his wound since. The injury sustained when the legs [sic] hit the door only mildly exacerbated the wound.” Id.

The trier specifically stated that he found this report credible, Conclusion, ¶ d, and we find that the report provides more than adequate evidentiary support for the trier’s determination that the claimant’s injury of April 26, 2011 was related to the injury of June 14, 2010. “It is the quintessential function of the finder of fact to reject or accept evidence and to believe or disbelieve any expert testimony. The trier may accept or reject, in whole or in part, the testimony of an expert.” (Internal citations omitted.) Tartaglino, supra. However, the respondents contend that there is a “blatant inconsistency” between the claimant’s testimony at trial and the “false and misleading history” he allegedly gave to Dr. Backe. Appellants’ Brief, p. 16. As a result, the

respondents challenge the opinion of Dr. Backe as expressed in this report, essentially alleging that the report was “derivative of the claimant’s narrative.” Do v. Danaher Tool Group, 5029 CRB-6-05-12 (November 28, 2006).

We recognize that the claimant was not entirely consistent in his explanation of how the injury of April 26, 2011 occurred; i.e., whether he banged his leg on a doorway (Claimant’s Exhibit C; Respondents’ Exhibit 1 [June 3, 2011 report of St. Vincent’s Health Services]); a cabinet (Claimant’s Exhibit J; Respondents’ Exhibit 1 [May 13, 2011 report of St. Vincent’s Emergency Department]); or a dresser drawer (Respondents’ Exhibit 1 [April 26, 2011 report of Danbury Hospital Emergency Department]); or whether he tore it on a protruding nail in his bathroom (Claimant’s Exhibits F, G).² However, given that the trial commissioner found the claimant credible, it may be reasonably inferred that the trial commissioner deemed the inconsistencies in the claimant’s description of the mechanism of injury “a distinction without a difference” in light of the complications caused by the injury and the medical treatment which it ultimately required. “Inconsistencies in the evidence must be resolved by the trier, and she may give credit to all, part or none of the testimony given by a lay or expert witness, while also retaining the authority to reject evidence that superficially may appear to be uncontradicted.” Gagliardi v. Eagle Group, Inc., 4496 CRB 2-02-2 (February 27, 2003); *aff’d*, 82 Conn. App. 905 (2004)(per curiam).

In addition, we note that none of the claimant’s treaters, including Dr. Backe, were deposed; as such, “[h]aving forsaken their opportunity to challenge this evidence, as

² We note that the May 16, 2011 report from St. Vincent’s Emergency Department relays that the claimant injured his lower right leg with a nail gun. Claimant’s Exhibit I. At trial, the claimant denied ever owning, borrowing or operating a nail gun or that he had injured himself with a nail gun. November 29, 2011 Transcript, pp. 17-18.

a result the respondents must accept the testimony ‘as is,’ as well as the permissible inferences which the trial commissioner drew from it.” Berube v. Tim’s Painting, 5068 CRB-3-06-3 (March 13, 2007). Given, then, that the trier found the claimant credible, as was his prerogative, Burton v. Mottolese, 267 Conn. 1, 40 (2003), it may be reasonably inferred that the trier concluded that the history relied upon by Dr. Backe as conveyed by the claimant was likewise reliable and did not unduly taint the doctor’s opinion.

We recognize the evidentiary record is devoid of medical reports which would substantiate the claimant’s contention that the wound continued to trouble him between January 2011 and April 2011. However, we also note that the claimant testified that he did not always seek medical attention every time the wound re-opened. November 29, 2011 Transcript, p. 17. Rather, he indicated that from the date of the first surgery to the date of the trial, the wound had reopened over thirty times, *id.*, at 16, for which he had sought treatment perhaps three or four times. *Id.*, at 19. The claimant stated that it took three months for the wound to heal following the April 26, 2011 incident, *id.*, at 20, and that every other week, he still develops a blister in the same place which pops open, leaks for a few days, and then closes. *Id.*

The medical record also indicates that on October 5, 2010, a little less than four months after the original injury of June 14, 2010 but prior to the injury of April 26, 2011, the claimant received treatment from Soni Prashant, M.D., for a right lateral leg open wound which had “shown no improvement with debridement.” Claimant’s Exhibit K. Dr. Prashant scheduled an excision of the wound in preparation for a skin graft. *Id.* On October 14, the claimant underwent a skin graft, and presented to Dr. Prashant on October 21, 2010 with a complete skin graft take, albeit with a dried-out graft site. *Id.*

On October 27, 2010, the doctor noted that the skin graft was “consolidating well;” *id.*; however, on November 8, 2010, the doctor noted a “greenish discharge” from the wound site and indicated he was concerned about the possibility of pseudomonas. *Id.*

On November 18, 2010, the claimant was seen by Dr. DePuy, who noted that although the wound was better, there was still a “mild drain.” Respondents’ Exhibit 1. On December 2, 2010, Soheli M. Islam, M.D., reported that the skin graft was “clean and dry” and there was “no redness or discharge” but noted a “superficial abrasion” over the graft site. *Id.* On December 10, 2010, Dr. Soni indicated that the wound had healed, the skin graft take was complete, and there was no discharge from the wound site; however, on January 17, 2011, the claimant presented with pain, bleeding and discharge from the graft site; Dr. Soni noted that the wound area was “very dry and excoriated.” Claimant’s Exhibit K. Finally, we note that all of the submitted records from Advanced Specialty Care dated prior to the April 26, 2011 injury cite under the section entitled “Assessment/Diagnosis” an open wound of the knee/leg. *Id.*

Despite the rather considerable weight of the foregoing evidence to the contrary, the respondents assert that it was simply a coincidence that on April 26, 2011, the claimant incurred a new injury which happened to be at the same site as the original injury of June 14, 2010. Such an inference is simply not supported by the medical record, which clearly demonstrates that the claimant experienced ongoing issues with his right leg prior to the injury of April 26, 2011 and then continued to experience similar symptoms and complications following the second injury as he had from the first injury.³

³ See, e.g., May 13, 2011 St. Vincent’s Emergency Department report diagnosing chronic ulcer of the right leg and a “small 1cm skin defect with yellow drainage but no erythema,” Claimant’s Exhibit J; May 16, 2011 St. Vincent’s Emergency Department report noting an open wound measuring “1.5 cm circumferentially and 1cm deep with fresh pink granulation tissue, no drainage, no surrounding edema or

Moreover, although Dr. Backe, in his report of September 16, 2011, stated that the claimant's wound did eventually heal, Claimant's Exhibit A, neither party elicited additional testimony from Dr. Backe relative to the actual point in time at which this might have happened.⁴ We are therefore inclined to agree with the claimant that the trial commissioner, having reviewed the totality of the evidence, evidently concluded that "but for" the original injury and its complications, the second injury would not have resulted in the complications that it did. Appellee's Brief, p. 1. In light of the evidentiary record, we do not find this determination erroneous, and will not overturn it on appeal. "It is ... immaterial that the facts permit the drawing of diverse inferences. The [commissioner] alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court. Fair v. People's Savings Bank, 207 Conn. 535, 540 (1988), quoting Del Vecchio v. Bowers, 296 U.S. 280, 287 (1935).

The respondents have also challenged the trial commissioner's subject matter jurisdiction. The respondents assert that because the claimant "failed to establish that he was an employee of the respondent at the time of his injury on April 26, 2011, there is no jurisdiction to review this latest injury." Appellants' Brief, p. 10. Moreover, given that the trier did not address this issue in his Finding and Orders despite the fact that the

erythema," Claimant's Exhibit I; May 19, 2011 St. Vincent's Wound Care Center report finding "[a] well-circumscribed ulcer that is slightly raised and has a scarred-in appearance," Claimant's Exhibit H; May 20, 2011 report of Dr. Carlesi noting that the wound was "perforated and infected" with a "foul-smelling exudate," Claimant's Exhibit F; May 24, 2011 report of Dr. Backe stating that skin graft had broken down and recommending continued wound care with the possibility of additional debridement, Respondents' Exhibit 1; June 15, 2011 and July 12, 2011 reports of Dr. Carlesi indicating claimant's wound was infected with "exudates/foul-smelling material exiting his wound," Claimant's Exhibit B; July 8, 2011 St. Vincent's Emergency Department report noting that claimant had "had several recurrent injuries to the same area ..." and "has grown pseudomonas but not MRSA," Claimant's Exhibit D; August 9, 2011 report of Dr. Carlesi indicating that Dr. Backe had previously cauterized the wound and was considering additional debridement as he "believes the infection is extensive." Claimant's Exhibit B.

⁴ As previously mentioned herein, the claimant testified that it took three months for the injury of April 26, 2011 to heal. November 29, 2011 Transcript, p. 20.

respondents raised it in their brief, the respondents therefore assert that the Finding and Orders must be reversed. We are not so persuaded.

It is of course axiomatic that jurisdiction “is confined by the [Workers’ Compensation] Act and limited by its provisions. Unless the Act gives the Commissioner the right to take jurisdiction over a claim, it cannot be conferred upon [the commissioner] by the parties either by agreement, waiver or conduct.” Jester v. Thompson, 99 Conn. 236, 238 (1923). Moreover,

[t]he entire statutory scheme of the Workers' Compensation Act is directed toward those who are in the employer-employee relationship as those terms are defined in the act and discussed in our cases. That relationship is threshold to the rights and benefits under the act; a claimant or his representative who is not an employee has no right under this statute to claim for and be awarded benefits. The act is not triggered by a claimant until he brings himself within its statutory ambit.

Castro v. Viera, 207 Conn. 420, 433 (1988).

In the instant matter, the record indicates that the claimant sustained the contested injury to his right lower extremity while at home during the evening of April 26, 2011.⁵ Had the trial commissioner determined that the claimant sustained a new injury at this time, then an inquiry into whether the injury actually “arose out of and in the course of the claimant’s employment” would not only have been appropriate but unavoidable. Section 31-275(1) C.G.S. However, given that the trial commissioner found that the claimant did not sustain a new injury on April 26, 2011 but, rather, sustained an injury which constituted a sequela to the accepted injury of June 14, 2010, a speculative excursion into the issue of whether the trial commissioner had subject matter jurisdiction

⁵ The claimant testified that the incident occurred at 10:00 p.m. in his bathroom. November 29, 2011 Transcript, p. 16.

over the injury of April 26, 2011 was not warranted and we find no error in the trier's refusal to embark on one.

Finally, the respondents contend that the trier's failure to grant their Motion to Correct constituted error. In this motion, the respondents contend that the trial commissioner incorrectly interpreted Dr. Backe's July 29, 2011 report as to causation because the trier failed to apprehend that Dr. Backe had drawn a distinction between the claimant's chronic neurogenic pain and his chronic non-healing wound. We have reviewed this report and remain unpersuaded that the trier's interpretation of Dr. Backe's opinion was in any way faulty. Given, then, that the respondents would seem to be merely reiterating an argument made at trial which ultimately proved unavailing, we find no error in the trier's decision to deny the respondents' Motion to Correct. D'Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003).

Having found no error, the February 6, 2012 Finding and Orders of the Commissioner acting for the Fourth District is hereby affirmed.

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