CASE NO. 5745 CRB-7-12-4 : COMPENSATION REVIEW BOARD
CLAIM NO. 700154510

MICHAEL A. MADDEN, JR.
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

: APRIL 22, 2013

DANBURY HOSPITAL
EMPLOYER

and

PMA CUSTOMER SERVICE CENTER
ADMINISTRATOR
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by Brian P. Kenney, Esq., Early, Lucarelli, Sweeney & Meisenkothen, LLC, One Century Tower, 11th Floor, 265 Church Street, PO Box 1866, New Haven, CT 06508-1866.

The respondents were represented by Maribeth McGloin, Esq., Williams Moran, LLC, 268 Post Road, PO Box 550, Fairfield, CT 06824.

This Petition for Review from the April 9, 2012 Finding and Award of the Commissioner acting for the Seventh District was heard September 28, 2012 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Daniel E. Dilzer and Ernie R. Walker.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondent has appealed from a Finding and Award that determined that the claimant sustained a compensable repetitive trauma shoulder injury. The respondent argues that the trial commissioner applied an incorrect legal standard to the evidence on the record, which in their view, established the claimant's employment played too inconsequential a role in his disability to create legal liability. We have reviewed the factual record and the law governing the standard of causation under Chapter 568. We are satisfied that the trial commissioner had a sufficient quantum of probative evidence presented to support an award to the claimant under the appropriate legal standard. We affirm the Finding and Award.

The trial commissioner reached seventy findings of fact after a lengthy formal hearing. These findings may be summarized as follows. The claimant was hired by the respondent in 1984 as an apprentice electrician and worked for the next 25 years doing electrical work at Danbury Hospital. The claimant said as an apprentice he did little overhead work, but after getting his journeyman electrician's license in 1988 his work was primarily overhead work, including as much as 80 to 90% of his workload. The claimant testified that he used a variety of heavy tools such as drills and hacksaws on concrete and drywall. One of the drills, a hammer drill, could weigh 50 to 60 pounds.

After 1999 the claimant said his workload was strictly construction work in the Renovations Department. This involved a great deal of demolition work pulling out ceilings and sheet rock and using a sledgehammer on concrete blocks. The claimant also testified to installing overhead pipe, as well as pulling out 800 feet of wire which were

difficult to remove due to the presence of dried lubricants. The claimant testified that overtime was plentiful and that he often worked 60 to 70 hours per week.

The claimant also testified as to his recreational activities. He didn't play any organized sports in high school, but later played slow-pitch softball and lifted weights. He said that in 2004 his shoulder began aching a lot and he was examined by Dr. David Weinshel. During that time the claimant said he was playing softball two or three times a week during the summer and his shoulder was causing trouble with his throwing, causing him to change positions. He said he stopped playing softball approximately in 2006. The claimant also said after 2006 he coached his son in Little League baseball and in about 2008 he could no longer throw the ball with his right arm. The claimant said he played in a golf league for about ten years but it disbanded and he no longer played. He also described his weight lifting activities, which included the use of a universal gym and a Bowflex machine. The claimant said he did not like to do overhead lifts, and denied he had been injured weightlifting.

The claimant also testified as to his medical history. He testified that he started feeling shoulder strain on a more regular basis after 2004, and advised his supervisor, John Sterry, about his condition about that time. The claimant's strain transitioned to pain one day while he was working on a project in one of the hospital's operating rooms. He remembers pulling wire and holding a pipe on his shoulder and feeling pain. The claimant continued to work through the year 2009 as the pain increased; his job duties never changed. The claimant testified that the pain started in his right, dominant hand and shoulder and then progressively moved to the left shoulder. The claimant said his wife worked for Connecticut Family Orthopedics where three physicians who have

opined on his condition practice. The claimant said he had not worked a second job while at Danbury Hospital. He testified to have injured his left elbow while working with Danbury Hospital, treating at corporate health with Dr. David Elfenbein, and receiving a 1% permanency rating for this injury. The claimant denied having separated his shoulders twenty years earlier, and denied he informed treating physician, Dr. James W. Depuy, of this. He acknowledged he did not treat for his shoulder injury between 2005 and 2008 and said Dr. Depuy did not advise him at that time he was a candidate for shoulder replacement.

John Sterry testified on behalf of the respondent. Mr. Sterry is a project manager in the respondent's Facilities Department and has worked for the respondent for 24 years. He admitted he is not a licensed electrician. The claimant has worked under Mr. Sterry since 1999. Mr. Sterry testified as to the claimant's job duties and the various types of equipment he used on the job. He testified as to the time the claimant spent on testing, training, inspections, meetings and other duties. He also demonstrated various tools used by the claimant, and noted newer tools had gotten lighter. The claimant testified that the tools presented by Mr. Sterry were newer than the ones he had used. Mr. Sterry testified that an electrician would not spend 85% of his workday on overhead work, and estimated that the actual amount would be about 35% of the time spent working; although the witness also said that in a given day an electrician might spend 90% of the day doing overhead work. Mr. Sterry also confirmed the claimant often worked more than 40 hours per week and that overhead work was an essential part of his job and he only performed spot checks as to the claimant's work.

A number of medical witnesses testified. One of the claimant's treating physicians, Dr. David H. Elfenbein, testified at his deposition he has been treating the claimant's bilateral shoulder problems since June 18, 2008. His initial diagnosis was that the claimant suffered from degenerative arthritis and labral tearing in his right shoulder. He states that the problems started in his right shoulder and then moved to the left shoulder resulting in two right shoulder arthroscopic surgical procedures. Dr. Elfenbein acknowledges the results of MRIs of both shoulders which confirm the degenerative nature of the claimant's shoulder pathology, despite the fact that the claimant denies a history of shoulder trauma, a family history of shoulder arthritis and the use of steroids. He states that it is rare for a 45 year old man to have shoulder arthritis without some sort of trauma being part of the equation. He points out that the claimant has been an electrician for the respondent for about 25 years, that it is a manual job and that it frequently requires heavy overhead work. In Dr. Elfenbein's opinion the claimant's bilateral shoulder arthritis is a direct result of his work for the respondent. He is emphatic in his belief that the claimant's predisposition, in combination with his heavy duty, overhead electrical work, was a significant contributing factor to the development of bilateral shoulder arthritis.

Dr. Elfenbein reviewed the report of Dr. Silver, the commissioner's examiner, and said it was "naïve" to lump sports and weight lifting in with the work that the claimant performed for the respondent, as softball was not a risk factor for the development of arthritis in the absence of trauma and the weight lifting is not a known risk factor for glenohumeral or shoulder joint arthritis; it may, however, be a risk factor for rotator cuff problems and/or AC joint arthritis. Findings, ¶ 56. Dr. Elfenbein also noted the disparity

in time spent between weight lifting and work in considering the weight of the two factors. The witness related the mechanism of work injuries as being more relevant, due to the prolonged use of an overhead drill, relating in part a conversation he had with the claimant around 2008 where the claimant said that he had been working on the operating room for three weeks, constantly working overhead and that his shoulder was killing him.

One of the claimant's other treating physicians, Dr. James W. Depuy, states that the claimant suffers from bilateral, repetitive trauma of the shoulders with severity in the right shoulder more than the left. Dr. Depuy states "[i]t is my opinion that Mr. Madden's shoulder pain issues are directly related to working as an electrician over a 25 year period. The constant use of his upper extremities above his head doing heavy manual labor has taken its toll." Findings, ¶ 60. Dr. Depuy said the claimant has developed right rotator cuff tendonitis impingement and degenerative joint disease of the right shoulder. The claimant has had two surgical procedures, decompression and debridement and none of this has relieved the claimant's symptoms. Dr. Depuy further opined that the claimant's work as an electrician over a 25 year period was a significant contributing factor in the development of his bilateral shoulder injuries and the shoulder issues were "industrial related." Findings, ¶ 61.

The respondent's examiner, Dr. Edward M. Staub, opined that the claimant's employment was not a substantial contributing factor in the claimant's shoulder problems, relative to his need for a shoulder replacement. Noting the absence of a specific trauma during the claimant's work at Danbury Hospital, Dr. Staub said he had difficulty ascribing any cause to the claimant's arthritis. Dr. Staub suggested that softball could cause a series of minor traumas to a shoulder due to sliding or diving, and the

weightlifting was a risk factor in developing shoulder arthritis. Dr. Staub, however, also testified that over a period of many years, overhead electrical work could be a risk factor for developing a shoulder injury. His rationale for discounting this possibility was that the claimant did not report an injury to his employer. He also testified that based on the claimant's position "every electrician in this country would require a shoulder replacement" noting many other electricians did not suffer arthritis after a similar work career. Findings, ¶ 66. On the other hand, he agreed that shoulder arthritis might be triggered or accelerated by a worker who is predisposed to developing shoulder arthritis. Dr. Staub disagreed with Dr. Elfenbein's assessment that the claimant had bilateral shoulder arthritis, and in his opinion, the claimant had arthritis of the AC joint but not of the shoulder. Dr. Staub, however, indicated that his opinion was not based on a reasonable medical probability. Findings, ¶ 68.

The commissioner's examiner, Dr. Marc D. Silver, testified "In terms of the causation of his current shoulder problems, I feel that his basic problem is an arthritic problem in both his shoulders and I feel that *this could be due to multiple factors both genetic as well as other physical factors that he subjects his shoulder to, such as sports, weight lifting as well as his job*. I feel however that the fact that he has bilateral shoulder arthritis and although at a young age, I feel that *it is unlikely that you could blame his job as electrician alone* for this problem." [Emphasis added by the trial commissioner.] Findings, ¶ 69. Dr. Silver further stated that, in his opinion, "the claimant's job as an electrician, although did not help the problem he has with his shoulder, it was not the major factor in contributing to developing bilateral shoulder arthritis and the subsequent surgeries." Findings, ¶ 70.

Based on these factual findings, the trial commissioner reached the following conclusions.

A. There is no requirement that the claimant's work-related activities be the sole factor in the development of his bilateral shoulder problems. Further, there is no requirement that a trial commissioner tease apart, with mathematical precision, the degree each contributing factor bears to one another in order to single out the most predominate contributing factor in the development of the claimant's work-related condition.

B. The Connecticut Worker's Compensation system adheres to the "eggshell plaintiff theory." According, the respondent takes the claimant herein with any predisposition to arthritis or other condition. C.G.S. Sec. 31-349.

C. Under Connecticut law, "the substantial factor causation standard simply requires that the employment, or the risks incidental thereto, contribute to the development of the injury *in more than a de minimis way*." Birnie v. Electric Boat Corporation, 288 Conn. 392, 412-13 (2008).

D. Given the sheer length of the claimant's 24 year work history with the respondent; given the fact that he worked, at bare minimum, eight hours per day, five days per week and often with overtime, and; given the fact that a fair percentage of his work was carried on above the overhead ceiling tiles of the respondent hospital; I find that the claimant's work as an electrician contributed to the claimant's bilateral shoulder condition in more than a *de minimis* way and, therefore, was a substantial factor in the development of his bilateral shoulder condition.

E. The claimant's bilateral, repetitive trauma shoulder claim arose out of and in the course of his employment with the respondent.

Based on those conclusions, the trial commissioner ordered the respondent to accept responsibility for the claimant's shoulder injuries, along with all indemnity benefits and medical expenses linked to this injury. The respondent filed a Motion to Correct the Finding and Award. This motion sought to remove Conclusion, ¶ C and replace this with a conclusion restating the substantial factor test in a manner more favorable to the respondent. The trial commissioner denied this correction. The respondent also filed a Motion for Articulation seeking a clarification as to which

medical witnesses the trial commissioner relied upon in her decision, which the trial commissioner denied. In response, the respondent pursued this appeal. The gravamen of their appeal is that the trial commissioner committed reversible error by misapplying the legal standard promulgated in Birnie, supra, which they claim has been superseded by the standard delineated in Sapko v. State, 305 Conn. 360 (2012).

The standard of deference we are obliged to apply to a trial commissioner's findings and legal conclusions is well-settled. "The trial commissioner's factual findings and conclusions must stand unless they are without evidence, contrary to law or based on unreasonable or impermissible factual inferences." Russo v. Hartford, 4769 CRB-1-04-1 (December 15, 2004), *citing* Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Moreover, "[a]s 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." Burton v. Mottolese, 267 Conn. 1, 54 (2003). "This presumption, however, can be challenged by the argument that the trial commissioner did not properly apply the law or has reached a finding of fact inconsistent with the evidence presented at the formal hearing." Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

The respondent cites additional arguments in their appeal besides the trial commissioner's asserted misapplication of Birnie, supra. They argue that the entire standard of "substantial contributing factor" as used in Chapter 568 litigation is "unconstitutionally vague." Respondents' Brief, pp. 21-22. We are not empowered to rule on the constitutionality of a statute. See Giaimo v. New Haven, 257 Conn. 481, 490 n.8 (2001). However, we do draw attention to the fact that the standard being challenged

herein has been the operable standard for nearly a century of Connecticut jurisprudence, see Norton v. Barton's Bias Narrow Fabric Co., 106 Conn. 360 (1927) and Madore v. New Departure Mfg. Co., 104 Conn 709 (1926). We therefore have a substantial body of appellate decisions which have previously interpreted this concept to rely on herein.

The respondent also challenges the evidentiary adequacy of the basis for the trial commissioner's decision. In their brief they discuss at length alleged shortcomings in the testimony of the claimant and the treating physicians. Respondent's Brief, pp. 7-21. We are not persuaded by this argument for a number of reasons. We first note that the respondent failed to seek to correct any of these allegedly erroneous factual findings in their Motion to Correct. The appropriate vehicle to respond when one believes a trial commissioner's factual determinations are erroneous is to file a Motion to Correct seeking to have the trial commissioner substitute conclusions the party believes conform to the record. The respondent's Motion to Correct did not do so. We have previously held, in the absence of the appellant having filed a Motion to Correct, that the factual findings of the case were given conclusive effect. Stevens v. Raymark Industries, Inc., 5215 CRB-4-07-4 (March 26, 2008), *appeal dismissed*, A.C. 29795 (June 26, 2008). In any event, the argument herein appears to be that the trial commissioner failed to properly weigh the evidence they presented concerning the claimant's work schedule and tool use. As we pointed out in O'Connor v. Med-Center Home Healthcare, Inc., 4954 CRB-5-05-6 (July 17, 2006) "[t]here are few principles of jurisprudence more fundamental than the principle that a trier of fact must be the one party responsible for finding the truth amidst conflicting claims and evidence." We cannot revisit a determination as to what evidence the trial commissioner concluded was more persuasive

and probative. Arnott v. Taft Restaurant Ventures, LLC, 4932 CRB-7-05-3 (March 1, 2006). Even accepting the respondent's argument that the claimant worked only 35% of the time doing overhead work and used lighter tools than he said he had used, we find no inconsistency with the trial commissioner's reasoning herein when considering the medical evidence. [1]

We outlined the standard for determining when evidence establishes causation of a compensable injury in Love v. William W. Backus Hospital, 5255 CRB-2-07-8 (June 24, 2008). We find our explanation of that standard cogent to the issues herein.

> It is well settled that the responsibility rests with the trial commissioner to determine whether the facts admitted into a trial record establish causation. "Before he can make a valid award the trier must determine that there is a direct causal connection between the injury, whether it be the result of accident or disease, and the employment. The question he must answer is, was the employment a proximate cause of the disablement, or was the injured condition merely contemporaneous or coincident with the employment?" McDonough v. Connecticut Bank & Trust Co., 204 Conn. 104 (1987)] supra, 117, quoting Madore v. New Departure Mfg. Co., 104 Conn. 709, 713 (1926). Thus, "[W]hen the board reviews a commissioner's determination of causation, it may not substitute its own findings for those of the commissioner." Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 451 (2001)], supra, 451, quoting O'Reilly v. General Dynamic Corp./Electric Boat Div., 52 Conn. App. 813 (1999)], supra, 819. "A commissioner's conclusion regarding causation is conclusive, provided it is supported by competent evidence and is otherwise consistent with the law. Id., 451, quoting Funaioli v. New London, 61 Conn. App. 131, 136 (2000). The trial commissioner is charged with assessing the credibility of the evidence before him, and his "findings of basic facts *and* his finding as to whether those facts

[1] In Strajkowski v. Pratt & Whitney, 5251 CRB-1-07-7 (August 27, 2008) the trial commissioner reviewed the record and determined that for the purposes of ascertaining the timeliness of a repetitive trauma claim, the claimant had not performed "overhead work" during the year prior to filing his claim. We deferred to the trial commissioner's determination of what constituted "overhead work" in that decision as a matter of fact-finding prerogative. We believe we should afford similar deference to the fact finding prerogative of the trial commissioner in the present case.

> support an inference that the plaintiff's injury arose from his employment are subject to a highly deferential standard of review." Blakeslee v. Platt Bros. & Co., 279 Conn. 239, 253-254 (2006) (emphasis in the original.)

Both of the treating physicians cited by the trial commissioner in the Finding and Award opined unequivocally that the claimant's work was a substantial contributing factor in the development of his shoulder arthritis. These opinions were rendered to the standard delineated in Struckman v. Burns, 205 Conn. 542 (1987) and therefore we need not engage in reviewing "the entire substance of testimony" as proved necessary in Voronuk v. Electric Boat Corporation, 5167 CRB-8-06-12 (January 17, 2008), *aff'd*, 118 Conn. App. 248 (2009). In addition, as stated in O'Reilly, supra, it is the trial commissioner's responsibility "to assess the weight and credibility of medical reports and testimony. . . ." Id., 818.

We do find Voronuk relevant in considering the testimony of the commissioner's examiner and the respondent's expert witness. Neither witness ruled the claimant's employment out completely as a causative factor in his current medical condition. In reviewing the "entire substance of testimony" we find the trial commissioner cited testimony from both witnesses which was equivocal on causation. In Findings, ¶ 66 the commissioner cited testimony from Dr. Staub wherein he stated that if the claimant was predisposed to developing shoulder arthritis, that work could have triggered or accelerating the process. The commissioner's examiner, Dr. Silver, noted that the claimant's arthritis "could be due to multiple factors" and "it was unlikely you could blame his job alone for this problem." Findings, ¶ 69.[2]

[2] The trial commissioner noted in Conclusion, ¶ B "The Connecticut Worker's Compensation system adheres to the 'eggshell plaintiff theory.'" We note that the respondent's expert witness opined that the

The respondent argues the trial commissioner committed error by not relying on the opinions of the commissioner's examiner in this matter. We may properly infer that the commissioner found the opinions of the claimant's treating physicians more credible and persuasive. In a "dueling expert" case that is her 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 trial commissioner had a proper basis supporting her conclusion.[3]

We do, however, note that our precedent concerning the importance of commissioner examiners was not followed in this finding. It is long standing precedent that when a trial commissioner does not rely on the opinions of a commissioner's examiner, the trial commissioner should generally explain in the text of their decision why they found another expert witness more persuasive. "While the trial commissioner was not bound to accept Dr. Mushaweh's opinion, generally he would need to proffer a

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claimant's pre-existing degenerative arthritis might increase his possibility of suffering a workplace injury. Findings, ¶ 66. In Huertas v. Coca Cola Bottling Company, 5052 CRB-1-06-2 (January 22, 2007), we pointed out "the tenet that one 'takes the employee in the state of health in which it finds the employee."' Gartrell v. Dept. of Correction, 259 Conn. 29, 40 (2002). Id. See also Miller v. Thyssen Krupp Elevator Corporation, 5669 CRB-7-11-7 (August 29, 2012). "It is a long standing principle of our Workers' Compensation law that you take the claimant as you find him." Glenn v. Stop & Shop, Inc., 168 Conn. 413 (1975); Cashman v. McTernan School, Inc., 130 Conn. 401, 409 (1943); Hartz v. Hartford Faience Co., 90 Conn. 539, 543 (1916). Id.

[3] The respondent appears to argue the medical evidence suggests recreational injuries were a substantial factor in creating the claimant's need for surgery. Respondent's Brief, pp. 12-13. Nonetheless, the record does not suggest any specific noncompensable injury was the proximate cause of the claimant's ailment; unlike cases such as Loehfelm v. Stratford-Board of Education, 5710 CRB-4-11-12 (November 14, 2012); Nicotera v. Hartford, 5381 CRB-1-08-9 (September 2, 2009); or Seiler v. Ranco Collision, LLC, 5377 CRB-1-08-9 (August 27, 2009). There is no medical record of the claimant being treated for any recreational injuries. In addition, as noted in Sapko v. State, 305 Conn. 360 (2012), Connecticut law does not require a claimant to prove his or her employment was a sole proximate cause of their current disability to confer compensability.

reason why he found another expert more persuasive. See Ben-Eli v. Lowe's Home Improvement Center, 5006 CRB-3-05-10 (November 16, 2006); Torres v. New England Masonry Company, 5289 CRB-5-07-10 (January 6, 2009); and Alvarez v. Wal-Mart Stores, Inc., 5378 CRB-5-08-9 (July 27, 2009)." Carroll v. Flattery's Landscaping, Inc., 5385 CRB-8-08-10 (September 24, 2009). Given the totality of the evidence herein, we are satisfied that this omission constitutes harmless error. Peters v. Corporate Air, Inc., 14 Conn. Workers' Comp. Rev. Op. 91, 1679 CRB-5-93-3 (May 19, 1995).

We now turn to the trial commissioner's allegedly erroneous reliance on Birnie, supra. We agree with the respondent that the Supreme Court's opinion in Sapko, supra, has called into question the precedential value of some of the verbiage stated in the Birnie opinion. However, after reviewing the Sapko opinion it is clear the Supreme Court did **not** change the standard governing the determination of causation in Chapter 568 claims, which we conclude has not been materially modified since the decisions in Madore, supra, and Norton, supra, almost a century ago.

> ….in reaching our conclusion in *Birnie*, we undertook an in-depth examination of the contributing and substantial factor standards to facilitate a comparison of the two tests. It was in this context that we observed that the substantial factor test requires that the employment contribute to the injury ''in more than a de minimis way.'' Id., 413. The ''more than . . . de minimis'' language is preceded, however, by statements explaining that ''the substantial factor standard is met if the employment *materially or essentially contributes* to bring about an injury''; (emphasis in original) id., 412; which, by contrast, ''does *not* connote that the employment must be the *major* contributing factor in bringing about the injury . . . nor that the employment must be the *sole* contributing factor in development of an injury.'' (Citation omitted; emphasis in original.) Id.
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> Thus, it is evident that we did not intend to lower the threshold beyond that which previously had existed.

Sapko, supra, 391.

The Supreme Court in Sapko then cited the Appellate Court's opinion in Voronuk, which the respondent believes delineated the appropriate standard to determine causation under Chapter 568. This citation pointed out that Birnie, supra, was a case dealing with the federal Longshore and Harbor Workers' Act, and hence, dealt with issues inapposite to claims solely based on Connecticut law.

> As a result, it is clear that the court's aim was not to clarify - much less alter - the substantial factor test but to explicate it in such a way as to facilitate a fair comparison with the federal test in question. The substantial factor test remains as it was prior to *Birnie* . . . .' *Voronuk* v. *Electric Boat Corp*., 118 Conn. App. 248, 255, 982 A.2d 650 (2009).

Id., 391-392.

The Sapko opinion further points out the discretion a finder of fact must have in determining when a claimant's employment rises to the level of being a "substantial contributing factor" to the claimant's medical condition, *citing* Mahoney v. Beatman, 110 Conn. 184 (1929).

> 'The criticism . . . usually leveled at the [substantial factor] test . . . is that . . . it is too general. . . . The answer is that the formula cannot be reduced to any lower terms. . . . It presents a question of fact. . . . The answer to any such [question] when proposed to [the commissioner] must be found by the [commissioner] after a consideration of all the facts that bear upon it.'

Id., 392.

The Sapko opinion states that the standard of determining causation was not modified by the Birnie decision. Therefore, we look to one of our decisions rendered prior to the Supreme Court's Birnie decision for guidance. We find the circumstances in Weir v. Transportation North Haven, 5226 CRB-1-07-5 (April 16, 2008) instructive. In Weir, the claimant asserted his need for surgery was due to a work related injury. The

trial commissioner found the respondent's expert opined there was a minimal relationship between employment and the need for surgery and the commissioner's examiner assigned 70% of the need for surgery on degenerative factors, with work being the third and least weighty factor. The claimant appealed a dismissal of his claim to this panel on the grounds that the evidence proved his employment was a substantial factor in the need for surgery. We reiterated the standard then last stated in Dixon v. United Illuminating Co., 57 Conn. App. 51 (2000) that the test is not whether a work related condition is the sole cause of injury, it is the claimant's burden to prove it is among the "substantial contributing factors." However, we pointed out it is the commissioner's prerogative after weighing the evidence to determine whether this standard was met.

> It is clear that the commissioner's examiner attributed the least weight to the September 2004 injury of the three factors at hand. We also note that claimant's counsel may have inadvertently defined the issue before this panel when, at Dr. Langeland's deposition, counsel explained the "substantial factor" test to the witness.
> And there's no percentage. You know, it's not that it has to be more than 50 percent to be a substantial factor. It just needs to be substantial and *it's really for the Workers' Comp. Commissioner to determine what is or is not substantial*. Joint Exhibit, p. 22. (Emphasis added.)
> Counsel herein was entirely correct. Whether or not a factor behind the need for surgery is "substantial" is a matter left to the discretion of the trial commissioner, as "it is the trial commissioner's function to assess the weight and credibility of medical reports and testimony. . . ." O'Reilly, supra, 818.

Weir, supra.

We look to the circumstances in the present case and apply the holding of Weir. Both cases involved multiple factors behind the claimant's ailment, some work related, some degenerative in nature. The trial commissioner in Weir relied on the commissioner's examiner, who believed the work factor to be the least responsible factor

in the claimant's ailment. In the present case, it is apparent the trial commissioner relied on the claimant's treating physicians who unequivocally considered the claimant's employment the primary reason for his shoulder arthritis and stated that opinion to a substantial medical certainty. We believe the conclusion herein was reasonable and not arbitrary, capricious or unsupported by probative evidence.

A trial commissioner must often act in a manner akin to a sports referee. In football a referee must ascertain if a player has crossed the plane of the goal line before awarding a touchdown. In determining the question of causation, a trial commissioner must determine if the claimant's evidence on causation is legally sufficient to cross the threshold of being a "substantial contributing factor" before awarding benefits. In the present case, we believe the testimony of the claimant and his supervisor (see e.g. Findings, ¶ 52) as to the claimant's extensive overhead work, as well as the opinions of the treating physicians making this employment the primary factor in his injury, were sufficient to achieve that status. While we believe the *"*more than *de minimis"* standard should not be utilized in the wake of Sapko, the Finding and Award stands after review.

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