CASE NO. 5755 CRB-5-12-5 : COMPENSATION REVIEW BOARD
CLAIM NO. 500111025

HEYWARD SELLERS
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: JUNE 12, 2013

SELLERS GARAGE
EMPLOYER

and

TRAVELERS INSURANCE CO.
f/k/a ROYAL INSURANCE COMPANY
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant appeared without legal representation at oral argument.

The respondents were represented by Richard T. Stabnick, Esq., Pomeranz, Drayton & Stabnick, LLC, 95 Glastonbury Boulevard, Glastonbury, CT 06033-1112.

This Petition for Review[1] from the April 30, 2012 Finding and Orders of the Commissioner acting for the Fourth District was heard March 22, 2013 before a Compensation Review Board panel consisting of Commissioners Stephen B. Delaney, Ernie R. Walker and Daniel E. Dilzer.

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

OPINION

STEPHEN B. DELANEY, COMMISSIONER. The claimant has appealed from the Finding and Orders issued on April 30, 2012. The gravamen of his appeal is based on his argument that opinions of his treating physicians should have been credited by the trial commissioner and that his continued treatment was curative in nature and should not have been discontinued. We find these arguments involve factual issues which the trial commissioner determined in a manner adverse to the claimant's arguments. We find the trial commissioner did not act arbitrarily or capriciously in reaching this decision. As we may not retry a case on appeal, we affirm the Finding and Orders.

The following findings are relevant to the instant appeal. The commissioner noted that the claimant had had a number of formal hearings before this commission and had taken a number of prior appeals to the Compensation Review Board.[2] The commissioner noted that a 2002 Finding and Award issued by Commissioner Doyle and a 2003 Finding and Dismissal by Commissioner Vargas dealt with the date of injury under consideration at the present formal hearing. The claimant sustained a compensable injury on March 21, 1997 when he was hit by a transmission frame and was diagnosed with central pain syndrome, myofacial pain syndrome and tension headaches. He was awarded a 10% permanent partial disability to the cervical spine with a date of maximum

[2] See Sellers v. Sellers Garage, Inc., 4391 CRB-5-01-5 (April 26, 2002), *aff'd,* 80 Conn. App. 15 (2003), *cert. denied*, 267 Conn. 904 (2003); Sellers v. Sellers Garage, Inc., 4762 CRB-5-03-12 (February 3, 2005), *aff'd,* 92 Conn. App. 650 (2005); Sellers v. Sellers Garage, 5090 CRB-5-06-5 (May 11, 2007), *aff'd,* 110 Conn. App. 110 (2008) and Sellers v. Work Force One, 4807 CRB-5-04-5 (March 3, 2005), *aff'd,* 92 Conn. App. 683 (2005).

medical improvement of December 11, 1997. A voluntary agreement was approved by this Commission on September 14, 1998.

The trial commissioner reviewed the medical evidence regarding the claims. The respondent's examiner, Dr. James O. Donaldson, examined the claimant in 2002 and opined that the claimant did not sustain a concussion, suffer post-concussive syndrome or develop a traumatic brain injury as a result of his injury. Dr. William H. Druckemiller conducted a Commissioner's examination of the claimant on October 27, 2010. He noted the claimant's complaints of pain were greater than what he would expect from the findings, but determined the claimant was suffering from degenerative changes typical for a man his age. Dr. Druckemiller found the claimant at maximum medical improvement, opined that surgery would not be beneficial and recommended the claimant avoid overhead work and continuous use of his neck.

Dr. Jerrold L. Kaplan, who had previously conducted a Commissioner's examination in 2000, examined the claimant again on September 11, 2011. While noting the claimant's memory problems were an issue which confused the claimant's history, Dr. Kaplan's report indicated the claimant developed headaches, confusion and neck problems after the 1997 accident. Dr. Kaplan separated the issues regarding the claimant's bilateral upper extremities, such as pain management, from the claimant's issues involving cognitive impairment and neck pain. Dr. Kaplan stated the neuropsychological testing he had recommended in 2000 had not been done, and he recommended it be done now so as to differentiate between cognitive impairment due to possible depression or from side effects related to his medication. He also recommended an EMG/Nerve Conduction Study be performed to differentiate between the relative

degree of cervical versus peripheral neuropathy; after which additional recommendations might be forthcoming.

The claimant's treating physician, Dr. Steven C. Levin, testified via deposition. Dr. Levin testified that he is treating the claimant with medications and that the claimant has a light sedentary work capacity. The medications assist with the claimant's subjective complaints regarding activities of daily living but do not help the claimant to continue working. The trial commissioner also considered notes of Commissioner Salerno from two 2011 hearings outlining the claimant's bid for reimbursement of various treatment co-pay's, pharmacy bills, therapy bills and mileage reimbursements.

Based on this evidence the trial commissioner concluded Dr. Kaplan offered a persuasive medical opinion that the treatment for the claimant's cognitive impairments, headaches and neck pain were related to the 1997 compensable injury. The trial commissioner directed the claimant to undergo neuropsychological testing to ascertain the extent of any possible cognitive impairment, and further directed that the claimant undergo an EMG/Nerve Conduction Study to differentiate the degree of cervical radiculopathy versus peripheral radiculopathy. Following these studies they were to be forwarded to Dr. Kaplan to review and to update his recommendations in the September 20, 2011 Commissioner's Examination report. The trial commissioner found Dr. Levin persuasive that the medications he prescribed assisted the claimant in activities of daily living but not to continue working. Therefore, he found the treatment palliative and not curative, and therefore not reasonable and necessary medical treatment after May 6, 2011. The trial commissioner issued orders regarding reimbursements due for treatment for the claimant. The commissioner also determined that Dr. Levin was the sole

authorized treating physician, and the other physicians who treated the claimant, including Dr. Mark Kraus and Dr. James K. Sabshin were outside the chain of referral and were unauthorized medical treatment which the respondents were not responsible for.

The claimant and the respondents both filed a Motion to Correct. The respondent's Motion, which sought various administrative clarifications as to the Finding and Orders, was granted by the trial commissioner. The claimant's Motion to Correct, which sought to substitute findings as to medical treatment and extent of impairment more favorable to the claimant, was denied by the trial commissioner in its entirety. Both the respondent and the claimant initially took appeals from the Finding and Orders. The respondents later withdrew their appeal, and the claimant has proceeded with his appeal. The gravamen of his appeal is that he presented evidence that his continued treatment was due to the compensable 1997 injury. As the claimant views the record, he should be able to continue his present treatment and have the respondents pay for this treatment.

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). We also note a trial commissioner has a great deal of discretion in evaluating medical evidence. "It is the trial

commissioner's function to assess the weight and credibility of medical reports and testimony. . . . " O'Reilly v. General Dynamics Corp., 52 Conn. App. 813, 818 (1999). In the present case the trial commissioner concluded that Dr. Kaplan and Dr. Levin were the medical witnesses which were reliable and the Finding and Orders reflect reliance on their opinions. We believe the trial commissioner acted within his prerogative as fact finder to reach those conclusions.

We note that the trial commissioner rejected the claimant's Motion to Correct. In considering this issue we are bound by the precedent in 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), where this tribunal held as follows:

> When a party files a Motion to Correct this is an effort to bring factual evidence to the trial commissioner's attention in an effort to obtain a Finding that is consistent with such facts. When a trial commissioner denies such a motion, we may properly infer that the commissioner did not find the evidence submitted probative or credible. Vitti v. Richards Conditioning Corp., 5247 CRB-7-07-7 (August 21, 2008). On appeal, our inquiry is limited to ascertaining if this decision was arbitrary or capricious. Id. The leading case on this point is Beedle v. Don Oliver Home Improvement, 4491 CRB-3-02-2 (February 28, 2003).

The trial commissioner in the present matter was not persuaded by the claimant's evidence. We note that the claimant has the burden of persuasion before the trial commissioner. Wierzbicki v. Federal Reserve Bank of Boston, 4147 CRB-1-99-11 (December 19, 2000), *appeal dismissed*, A.C. 21533 (2001). The trial commissioner was not persuaded by the claimant's evidence. We note that we have traditionally provided a great deal of deference to a trial commissioner in deciding when a modality of medical treatment is appropriate to treat a compensable illness. As we pointed out in Montenegro

v. Palmieri Food Products, 5701 CRB-3-11-11 (November 15, 2012), a trial commissioner must be persuaded that a modality of treatment will yield a positive result for the claimant, as the precedent in Cervero v. Mory's Association, Inc., 5357 CRB-3-08-6 (May 19, 2009), *aff'd*, 122 Conn. App. 82 (2010), *cert. denied*, 298 Conn. 908 (2010) points out. "A claimant cannot prevail on a contested issue of further medical treatment merely by proffering a medical opinion that the treatment is worthy of attempt. The trial commissioner retains discretion to approve or deny surgery based on the medical opinions he or she finds persuasive. The commissioner relied on expert opinions she found persuasive in determining further surgery was unwarranted." Montenegro, supra.

The claimant further argues that the pain management treatment he was receiving was responsive to his compensable injury, and the trial commissioner erred by deciding to discontinue such treatment. In his Finding and Orders the trial commissioner cited the opinions of Dr. Levin, the claimant's treating physician that the pain management treatment was not assisting the claimant in an effort to return to work. We find the facts in this case therefore indistinguishable from the situation in Aylward v. Bristol/Board of Education, 5756 CRB-6-12-5 (May 15, 2013) and are compelled to reach the same result. We find this passage from our Aylward opinion directly on point.

> The claimant had the burden of establishing that the modality of treatment she sought was responsive to the compensable injury. Weir, supra. She also needed to persuade the trial commissioner that this treatment was curative in nature, and not palliative. Bowen v. Stanadyne, Inc., 2 Conn. Workers' Comp. Rev. Op. 60, 232 CRD-1-83 (June 19, 1984). The record indicated that the claimant was not employed and was not seeking to return to the work force. The reports of the claimant's treating physician also cite she faced numerous stress factors unrelated to the

> compensable injury. We have generally extended great deference to the trial commissioner to determine when medical treatment is "reasonable or necessary." For example, see Palumbo v. Bridgeport, 4991 CRB-4-05-9 (September 7, 2006), "we have in past cases addressed the subject of the 'curative/palliative' distinction upon which the compensability of his medical treatment hinges, and have explained that it is a *factual matter* as to whether medical care satisfies the 'reasonable and necessary' standard of § 31-294d C.G.S. (Emphasis added.)" The trial commissioner had sufficient evidence on the record to support his decision.

Id.

The trial commissioner reached the factual determination that further pain management treatment would not assist the claimant in returning to work. We find that this factual determination was consistent with evidence on the record and are compelled to uphold this determination.

The claimant also argues that the trial commissioner should not have determined his treatment with various medical professionals outside the chain of referral was unauthorized treatment for his compensable injuries. However, we find that this situation is akin to the fact pattern in Bond v. The Monroe Group, LLC, 5093 CRB-3-06-5 (May 3, 2007). In Bond, the claimant sought approval of the trial commissioner to treat with a physician outside the chain of referral, and was denied this approval. We affirmed this decision on appeal.

> We also uphold the trial commissioner in regards to whether Dr. O' Donoghue is an authorized treating physician. We have recently pointed out that a claimant who initiates treatment with a new physician without obtaining a referral from a treating physician or prior authorization from the Commission assumes the risk the trial commissioner will not retroactively authorize such treatment at a later date. See Anderson v. R&K Spero Company, 4965 CRB-3-05-6 (February 21, 2007)[*aff'd,* 107 Conn. App. 608 (2008)].

Id.

We find no error in the trial commissioner determining that Dr. Levin was the claimant's sole treating physician. The facts herein are essentially the same as the facts in Bond, supra, and Anderson, supra. We are compelled to affirm the trial commissioner's conclusion on this issue.

In summary, the trial commissioner's findings were all supported by evidence in the record.[3] Accordingly, we affirm the trial commissioner's Finding and Orders.

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

[3] In his brief, the claimant argues that the trial commissioner should have considered sanctions against the respondents. The Motion to Correct filed by the respondents and granted by the trial commissioner confirmed that this issue was not considered at the formal hearing. We cannot raise such a factual issue on appeal if it was not considered by the trial commissioner.