CASE NO. 5756 CRB-6-12-5 : COMPENSATION REVIEW BOARD
CLAIM NO. 601035350

MARY AYLWARD
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: MAY 15, 2013

CITY OF BRISTOL/
BOARD OF EDUCATION
EMPLOYER
SELF-INSURED

and

PMA
ADMINISTRATOR
RESPONDENT-APPELLANT

CIRMA
ADMINISTRATOR
RESPONDENT-APPELLEE

and

SECOND INJURY FUND
RESPONDENT-APPELLEE

APPEARANCES:

The claimant was represented by Harvey Levine, Esq., and Jennifer Levine, Esq., Levine & Levine, 754 West Main Street, New Britain, CT 06053.

The respondents City of Bristol and CIRMA were represented by Brian Prindle, Esq., PO Box 1208, Manchester, CT 06045.

The respondents City of Bristol and PMA were represented by Richard S. Bartlett, Esq., McGann, Bartlett & Brown, 111 Founders Plaza #1201, East Hartford, CT 06108.

This Petition for Review[1] from the May 4, 2012 Finding and Award/Dismissal of the Commissioner acting for the Eighth District was heard October 19, 2012 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Jodi Murray Gregg and Daniel E. Dilzer.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant and the respondent PMA Group have both appealed from a Finding and Award/Dismissal in this matter. The appeals were consolidated and heard together by this tribunal. After reviewing the legal issues presented we believe the trial commissioner's Finding failed to address certain issues which must be remanded for further consideration. While we affirm the trial commissioner's determination on the issue of the claimant's continued psychiatric and pain management treatment, as well as the issue of sanctions; we believe that a decision must be reached by the trial commissioner on the issue of concurrent employment and apportionment. We remand those issues to the trial commissioner for determination and affirm the balance of the Finding and Award/Dismissal.

The trial commissioner reached the following factual findings at the conclusion of the formal hearing. He found the claimant began working for the City of Bristol in 1999 as a school cafeteria worker. The claimant sustained compensable back injuries on June 5, 2001, January 27, 2003 and March 23, 2005. The first two injuries were the responsibility of the respondent administrator CIRMA, while the 2005 accident was the responsibility of PMA as administrator for the respondent. The commissioner found the

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

claimant had missed some time from work due to each compensable injury but returned to work each time. Her last day of work was June 20, 2005, which was the last day of that school year. The claimant was awarded a 5% permanent partial disability to her back as a result of the 2001 injury. After the 2003 injury the claimant treated for psychiatric and pain management issues with Dr. James F. Brodey for a significant period of time, which was paid by the respondent CIRMA. The trial commissioner made a finding that the claimant also had many social, family and financial issues which are unrelated to her compensable injuries. As a result of these issues, in 2005 the respondents took the position that any further psychiatric and pain management treatment under the direction of Dr. Brodey was not compensable. The claimant disagreed. The parties also disagreed as to whether the claimant, after June 20, 2005, had a work capacity. This litigation thereafter ensued.

The trial commissioner noted that the claimant had seen a number of doctors since the 2001 compensable injury. He found the majority of the credible medical opinions since 2005 indicate the claimant has a work capacity, has attained maximum medical improvement, and has been left with a permanent partial disability to her back, although opinions on same vary. He also found the claimant's employment with the City of Bristol was terminated in August-September 2005. Findings, ¶ 14. A mediation decision on this labor issue was not favorable to the claimant. The claimant wanted to return to work but was terminated because of her light duty status.

Based on these factual findings the trial commissioner concluded that he did not accept the claimant's position and determined she had not sustained her burden of proof in regards to the treatment and total disability claims. The commissioner did not accept

the testimony of the claimant or of Dr. Brodey, finding their testimony had too many inconsistencies to be persuasive. The commissioner determined that the claim for temporary total disability after June 20, 2005 should be dismissed, as he found the claimant had a work capacity and the issues presented were not related to the compensable injuries. The commissioner did find the June 25, 2007 report of Dr. Gerald Becker persuasive, and determined the claimant was entitled to a 15% permanent partial disability rating for her compensable injuries, less the 5% paid or payable for the 2001 injury. The trial commissioner recognized although that Dr. Becker opined on a repetitive trauma theory, he was persuaded the cause of the claimant's ailment were the specific traumas sustained in 2003 and 2005. The commissioner determined that half of the additional total disability was due to the 2003 injury and half to the 2005 injury. The commissioner did not set forth a compensation rate or reach a finding as to whether concurrent employment applied to her 2003 injury; stating "[t]he parties are to use their best efforts to figure out the monies that are due." Findings, ¶ 19.

The commissioner also determined the claimant was entitled to 56.1 weeks of benefits pursuant to § 31-308a C.G.S., with 18.7 weeks of benefits assigned to each of the three separate injuries. The commissioner did not establish a base rate for any of the dates of injury, stating "[t]he parties are to use their best efforts to figure out the monies that are due here as well." Findings, ¶ 20. The commissioner also determined, based on the findings reached, that the contest to the claim was reasonable and dismissed the claim for interest and attorney's fees.

Both the claimant and the respondent PMA Group filed Motions to Correct. The claimant filed a 44 page Motion to Correct seeking to reach findings supportive of

finding the claimant totally disabled, and finding her entitled to further pain management treatment. This Motion to Correct also sought to find the claimant entitled to a base rate of compensation based on her concurrent employment at the time of the 2003 injury. The Motion to Correct also sought to impose sanctions on the respondent. This Motion to Correct was denied in its entirety. The respondent PMA also filed a Motion to Correct which sought to correct the name of an attorney of record and apportion the entire permanent partial disability award against the initial date of injury and thereafter to repetitive trauma, in order to conform to Dr. Becker's opinion. The commissioner granted only the administrative correction, and denied the balance of PMA's Motion to Correct.

The two appellants offer differing reasons to overturn the Finding and Award/Dismissal. The claimant challenges the decision on a variety of fronts. She argues the medical evidence supported the continuation of her pain management and psychiatric treatment. She argues that her treating physician opined that she was totally disabled and the respondents did not challenge this opinion. She further argues that she is due temporary partial benefits based on the filing date of the respondent's Form 36. Finally, she believes that the respondents' conduct in this matter warranted the imposition of sanctions.

The appellant PMA offers a different argument as to why the trial commissioner erred. They argue that there is no probative evidence supportive of the trial commissioner's apportionment of the permanent partial disability award. They believe that as the commissioner's sole authority for the permanency rating was Dr. Becker, the commissioner should have relied on Dr. Becker's methodology that the additional level

of disability was due to repetitive trauma, or in the alternative, attributed the additional 10% of disability to the 2003 injury. They argue there is no medical evidence supportive of attributing part of the disability rating to the 2005 injury.

We finally note that both the claimant and the appellee Second Injury Fund ("the Fund") argue that the trial commissioner erred by not ruling on the issue of concurrent employment. They argue that this issue was properly presented to the commissioner for resolution, and should not have been put back in the hands of the litigants to resolve.

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). Nonetheless, while we must provide deference to the decision of a trial commissioner, we may reverse such a decision if the commissioner did not properly apply the law or reached a decision unsupported by the evidence on the record. Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

The claimant's major argument is that she presented a sufficient quantum of probative evidence to the trial commissioner to support a finding that she was still disabled due to her compensable injuries and was still benefiting from medical treatment

from these injuries. The burden of proof in a workers' compensation claim for benefits rests with the claimant. Lentini v. Connecticut College, 4933 CRB-2-05-4 (May 15, 2006) and Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440 (2001). See also Marandino v. Prometheus Pharmacy, 105 Conn. App. 669, 677-678 (2008), *aff'd in part, rev'd in part*, 294 Conn. 564 (2010). Even when it is acknowledged that a claimant has sustained a compensable injury the claimant must prove that their compensable ailment was a substantial factor in their current disability. Vitti v. Richards Conditioning Corp., 5247 CRB-7-07-7 (August 21, 2008); Weir v. Transportation North Haven, 5226 CRB-1-07-5 (April 16, 2008); and Lamontagne v. F & F Concrete Corporation, 5198 CRB-4-07-2 (February 25, 2008).

The trial commissioner found that the claimant and her treating physician did not offer persuasive testimony, finding their testimony too inconsistent to be relied upon. While the claimant argues that her treating physician's medical opinions were "uncontradicted," Claimant's Brief, p. 17, that does not mean the trial commissioner was obligated to adopt these opinions. See Do v. Danaher Tool Group, 5029 CRB-6-05-12 (November 28, 2006), "[t]here is a substantial body of law concerning Workers' Compensation in Connecticut supporting the authority of a trial commissioner to disregard evidence which he does not believe or does not find probative," *citing* Gagliardi v. Eagle Group, Inc., 4496 CRB 2-02-2 (February 27, 2003), *aff'd*, 82 Conn. App. 905 (2004)(per curiam) and Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999).[2]

[2] The claimant *cites* Safford v. Owens Brockway, 262 Conn. 526, 536 (2003) for the proposition that any finding must be based on probative evidence; and then argues her evidence should have been credited. However, in Do v. Danaher Tool Group, 5029 CRB-6-05-12 (November 28, 2006) we cited that case for

In any event, the respondents cite evidence presented by four physicians, (Dr. Stephen F. Calderon, Dr. Stephen A. Torrey, Dr. Russell Tuverson and Dr. Becker) that the claimant had a work capacity and was not totally disabled. We, therefore, do not find the commissioner's decision on this issue was arbitrary and capricious.

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.

The claimant argues that as the respondents stopped paying temporary partial benefits in 2003 in the absence of filing a Form 36, that she is entitled to retroactive benefits as a result of this failure. She *cites* Torres v. Southern Connecticut Truck & Tire

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the proposition that "[i]t is properly within the commissioner's discretion to accept *or reject all*, or part of, a medical opinion." (Emphasis added.)

Center, 3144 CRB-3-95-8 (February 5, 1997) as authority for this position. We find the specific issue dealt with in Torres was dealing with the effective date of a filed Form 36; which is not directly on point herein. The respondents argue that the reason that they discontinued payment of disability benefits was that the claimant had returned to work for the City of Bristol following her compensable injury. We note that were the claimant to be paid weekly disability benefits following her return to work it would constitute a double recovery. We cannot countenance a result which would cause a double recovery to occur. See McFarland v. Dept. of Developmental Services, 115 Conn. App. 306, 312-314 (2009), *cert. denied*, 293 Conn. 919 (2009). Therefore, we are not persuaded that the trial commissioner's determination on this issue was in error.[3]

We are persuaded by the arguments raised by the appellants on the issues of concurrent employment and apportionment of the permanent partial disability award. We find the trial commissioner simply did not rule on the concurrent employment issue and should not have delegated this matter to the litigants to resolve on their own. On the issue of apportionment, we are not persuaded by the Finding and Award/Dismissal that this methodology utilized by the trial commissioner is consistent with the evidence and the law.

The Fund argues in their brief that the issue of concurrent employment was placed on the record for adjudication, and that no finding was reached by the trial commissioner.

[3] The claimant argues that the respondent's conduct on this issue compelled the trial commissioner to levy sanctions against the respondent. Our precedent, however, indicates that a trial commissioner has broad discretion in determining whether a party's conduct warrants the imposition of sanctions. See Kuhar v. Frank Mercede & Sons, Inc., 5250 CRB-7-07-7 (July 11, 2008). We also note that the respondents prevailed on the substantive issues before the trial commissioner, which generally militates against an award of sanctions. Christy v. Ken's Beverage, Incorporated, 5157 CRB-8-06-11 (December 7, 2007). In review of the record, we are not persuaded the trial commissioner's decision herein was arbitrary or capricious by the standards delineated by In re Shaquanna M., 61 Conn. App. 592 (2001).

The claimant's post-trial brief dated January 12, 2012 clearly sought a finding that the claimant had been concurrently employed at the time of her 2003 injury. The respondent CIRMA acknowledged concurrent employment in their post-hearing brief dated January 19, 2012. The Fund's post-hearing brief dealt with this issue at length. The record contains numerous hearing notices referencing § 31-310 C.G.S.; and counsel for the Fund discussed the issue at length at the November 3, 2009 formal hearing. Based on this record, we agree with the Fund that our opinion in Distassio v. HP Hood, Inc., 4592 CRB-4-02-11 (May 5, 2004) is on point. As this issue was presented to the fact finder, and not addressed, we remand the issue of concurrent employment under § 31-310 C.G.S. to the trial commissioner for factual findings.

We turn to the issue of apportionment. The trial commissioner found Dr. Becker's June 27, 2007 report to be reliable and determined the claimant had a 15% permanent partial disability of her back. The commissioner further determined that 5% was paid or payable as a result of the initial 2001 injury suffered by the claimant. The trial commissioner, however, rejected Dr. Becker's opinion that the additional disability was the result of repetitive trauma. Based on "the totality of the circumstances" the trial commissioner determined that "the specific events of 1/27/03 and 3/23/05 are more persuasive than a finding of repetitive trauma." Findings, ¶ 19.

The Finding and Award/Dismissal contains no representation as to what probative evidence the trial commissioner relied upon in reaching this determination. We do note that the Commissioner was not obligated to accept Dr. Becker's opinions in totality. "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). On the other hand, we must be able to ascertain from the record what evidence the trial commissioner did rely upon in reaching a conclusion at odds with the balance of this witness's opinion. We note, "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). Nonetheless, in weighing such evidence, a commissioner must ensure that the opinions he or she relies on are not rooted in evidence based on "conjecture, speculation or surmise" DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132, 136-137 (2009).

There may well be probative and reliable expert opinions in the record supportive of the trial commissioner's conclusion herein. It is not our place as an appellate board to reweigh the evidence. On the other hand, we are not allowed to speculate on what evidence the trier of fact finds persuasive and reliable in the absence of the commissioner identifying such evidence. We find this situation very similar to Bazelais v. Honey Hill Care Center, 5011 CRB-7-05-10 (October 25, 2006), where we found the two physicians relied on by the commissioner were not in agreement and "[w]e also believe the verbiage used that the doctor's opinions 'in effect keep the Claimant temporarily totally disabled' is sufficiently vague as to force us to speculate as to what factors led the trial commissioner to reach that conclusion." Id. In Bazelais, we remanded the matter for an articulation as to what evidence the commissioner relied on in reaching her determination, and what theory of disability the commissioner relied upon.

We dealt with a similar situation in Risola v. Hoffman Fuel Company of Danbury, 5120 CRB-7-06-8 (July 20, 2007). In Risola, the trial commissioner issued a finding that

relied on a disability rating which was inconsistent with the opinion the same witness offered when opining as to a date of maximum medical improvement. We held "we believe it is erroneous to rely solely on evidence the witness himself no longer endorses." Id. We remanded the matter to the commissioner for additional findings to clarify the Finding and Award.

We also note parallels to the fact pattern in Safford v. Owens Brockway, 262 Conn. 526 (2003). In Safford, the respondents appealed from the commissioner's finding that the claimant was entitled to a 20% disability rating for her upper extremity, claiming this rating was not supported by an expert opinion. The Supreme Court sustained the appeal.

> It is properly within the commissioner's discretion to accept or reject all, or part of, a medical opinion. *Misenti* v. *International Silver Co.*, 215 Conn. 206, 209–10, 575 A.2d 690 (1990); *Pantanella* v. *Enfield Ford, Inc.*, 65 Conn. App. 46, 57, 782 A.2d 141, cert. denied, 258 Conn. 930, 783 A.2d 1029 (2001); *Keenan* v. *Union Camp Corp.*, 49 Conn. App. 280, 286, 714 A.2d 60 (1998). The commissioner had three ratings of impairment to a scheduled body part from which to choose: Brown's 12 percent rating, Glass' 15 percent rating or Glass' 14 percent rating applying the American Medical Association guidelines to Brown's initial assessment. Accordingly, the commissioner permissibly could have accepted or rejected any one of these impairment ratings of the plaintiff's upper extremities. The commissioner was not free, however, to substitute his own opinion that Brown's initial report rating the plaintiff as having a 20 percent impairment of the shoulders, an unscheduled body part, is, a priori, equivalent to a 20 percent impairment of the upper extremities, a scheduled body part. In the absence of evidence to support that finding, the commissioner abused his discretion.

Id., 536.

We are unable to ascertain from the Finding and Award/Dismissal what probative evidence supported the trial commissioner's determination as to the apportionment of the permanent partial disability award. Therefore, consistent with Safford, Bazelais, and

Risola, we remand the issue of apportionment to the trial commissioner for additional findings.

We remand the issues of concurrent employment and apportionment to the commissioner for further proceedings. We affirm the balance of the Finding and Award/Dismissal.[4]

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

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