CASE NO. 5757 CRB-8-12-6 : COMPENSATION REVIEW BOARD
CLAIM NOS. 800001049
800166756

BARBARA A. DSUPIN (Dependent Widow) of JOSEPH DSUPIN (Deceased)
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: NOVEMBER 1, 2013

TOWN OF WALLINGFORD
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLEE

and

WORKERS' COMPENSATION TRUST
ADMINISTRATOR

APPEARANCES:

The claimant was represented by William T. Shea, Esq., Shea & Cook, LLC, 290 Pratt Street, Meriden, CT 06450.

The respondents were represented by Renee W. Dwyer, Esq., Gordon, Muir & Foley, LLP, Hartford Square North, Ten Columbus Boulevard, Hartford, CT 06106-1976.

This Petition for Review[1] from the May 16, 2012 Finding and Dismissal of the Commissioner acting for the Eighth District was heard May 31, 2013 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Charles F. Senich and Peter C. Mlynarczyk.

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

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant in this matter, Barbara Dsupin, the dependent widow of the decedent Joseph Dsupin, appeals from a Finding and Dismissal of her claim for § 31-306 C.G.S. benefits. She argues that the trial commissioner was presented with probative evidence that his compensable injury was a substantial factor in his death and the commissioner erred by not crediting this expert. The respondent argues that the expert witnesses they presented offered an opposing opinion and the trial commissioner decided that their opinion was more reliable. We find that this case required the trial commissioner to make a judgment call as to conflicting evidence and that no legal error is present. We affirm the Finding and Dismissal.

The trial commissioner reached the following factual findings at the conclusion of the formal hearing. The decedent was employed by the Wallingford Police Department (hereinafter "Respondent") beginning in 1959 until his retirement in 1982, attaining the rank of lieutenant. The claimant sustained a myocardial infarction in 1982. It is undisputed the decedent was receiving indemnity benefits at the time of his death for a compensable heart condition. The decedent had been married to the claimant for 51 years at the time of his death on September 15, 2009. The claimant testified that the decedent had been a smoker prior to the 1982 myocardial infarction, but did not smoke thereafter. The decedent was diagnosed with lung cancer in May of 2008.

Prior to the decedent's final admission to the hospital he complained to the claimant that he was experiencing tightness in his chest. The claimant called a relative with medical training who went to the home of the decedent and drove him and the claimant to the hospital that day. Subsequent to the decedent's death the claimant

retained the services of Dr. Robert M. Najarian of Boston, Massachusetts to review the medical records of the decedent in order to render an opinion as to whether or not the decedent's cardiac disease played a role in his death. Dr. Najarian was a graduate of Boston University Medical School in 2005 and is a staff pathologist with Beth Israel Deaconess Medical Center and is an instructor in pathology at Harvard Medical School. Dr. Najarian issued a report in which he concluded that the decedent's cardiac disease played a contributing role in his death. Dr. Najarian, at the formal hearing, explained that the decedent presented with shortness of breath at the Emergency Room on August 26, 2009. At that time the decedent's troponin level, which is a cardiac enzyme specific for the muscle in the heart, was abnormally elevated – meaning "there is some cardiac damage occurring, and during the admission while on presentation he had a cardiac troponin that was just above the upper limit of normal at 0.04." April 6, 2011 Transcript, p. 28. The measurable troponin level "can go as high as . . . 10 or 20," according to Dr. Najarian. Id. The level during the decedent's hospitalization reached 0.17.

The cause of death, according to Dr. Najarian, was "multifactorial" given that the decedent had several conditions that were serious and potentially life-threatening "namely a malignancy of the lung. He also had . . . extensive cardiac disease, coronary artery disease that began back in 1981 with his first myocardial infarction . . . interstitial lung disease which was documented by thoracic oncology as well as pulmonologists." April 6, 2011 Transcript, pp. 27-28. The decedent's pulmonary embolism brought him to the hospital on August 26, 2009. April 6, 2011 Transcript, pp. 29-30. Dr. Najarian believes the pulmonary embolism was caused by the malignancy. April 6, 2011 Transcript, p. 30. The heart condition did not, in Dr. Najarian's opinion, play a part in

the forming of the pulmonary embolism. April 6, 2011 Transcript, p. 32. It was the combination of the pulmonary embolism coupled with damage to the decedent's heart that was related to the decedent's original work injury that caused the decedent's death. April 6, 2011 Transcript, pp. 33-34. Even though the decedent's heart disease was stable in August of 2009, Dr. Najarian believes the stress from the acute pulmonary embolism coupled with the weakened condition of the decedent's heart hastened his death.

The trial commissioner noted in his findings that Dr. Najarian only spent one hour of time reviewing the decedent's medical records before issuing his original opinion, and had not reviewed a number of medical records beyond the Yale New Haven discharge summary. He also noted Dr. Najarian had only been at his current post for three months at the time of his report and he did not treat patients, and he had never treated or managed the care of a patient who suffered from a pulmonary embolism, lung cancer or cardiac conditions. Dr. Najarian conceded that the Yale New Haven discharge summary, upon which he rendered his August 20, 2010 report and conclusion, contained factual errors. He indicates that since his initial report he has reviewed all the records and his opinion remains unchanged.

The respondent presented two expert witnesses to challenge this opinion. They offered the opinion of Dr. Mark Lewis Metersky, M.D., a Professor in the Division of Pulmonary and Critical Care Medicine with the University of Connecticut School of Medicine and a graduate of New York University Medical School. Currently, Dr. Metersky spends approximately 80% of his time providing and managing patient care with extensive experience with patients suffering from multisystem diseases, including patients suffering from pulmonary embolisms, lung cancer, pulmonary fibrosis and

emphysema in both outpatient and critical care settings since 1989, and critically ill cardiac patients and he frequently provides care to patients such as the decedent. After reviewing the relevant records, Dr. Metersky opined that "there was no evidence that Mr. Dsupin's stable, pre-existing cardiac issues contributed to his death. He died from complications from acute, severe pulmonary embolism in the setting of pre-existing underlying pulmonary comorbidities which included emphysema, stage IV lung cancer and fibrotic lung disease." Respondent's Exhibit 3.

Dr. Metersky testified that the decedent's stage four lung cancer was inoperable and had spread beyond his chest. August 4, 2011 Transcript, p. 10. He agreed that the decedent had a history of coronary heart disease prior to the August 2009 hospital admission, but believed as of 2008 it was stable, and believed Dr. Najarian's conclusion that the decedent had unstable angina at the time of his August 2009 hospital admission was unsupported by contemporaneous records. The decedent's August 26, 2009 hospital admission disclosed a preliminary diagnosis of pulmonary embolism which is not a cardiac issue. August 4, 2011 Transcript, p. 15. The embolism was caused by the lung cancer. Id., p. 16. Dr. Metersky opined that it "was mostly septic shock, perhaps due to ventilator-associated pneumonia, even though the exact cause of the sepsis could not be defined. His shock and respiratory failure led to multisystem organ failure. This is what caused his death." Respondent's Exhibit 3, p. 4. Moreover, Mr. Dsupin, according to Dr. Metersky, would not have survived regardless of whether he had pre-existing coronary heart disease. He also opined the abnormal troponin levels Dr. Najarian opined as due to cardiac damage "almost surely related to strain on the heart related to the pulmonary embolism, and there is extensive literature that looks at troponin as a measure of severity

of pulmonary embolism and it has nothing to do with coronary artery disease or heart attacks." August 4, 2011 Transcript, p. 27. The witness noted the decedent had previously had an elevated level of troponin after a coronary event and was released from the hospital the next day. Finally, Dr. Metersky described the death certificate, which listed myocardial infarction as a significant cause of the claimant's death, as being inaccurate.

The respondent also offered the opinion of Dr. Brian Swirsky, M.D., on the issue of whether the decedent's pre-existing coronary artery disease played a significant factor in his demise. He specializes in cardiology and interventional cardiology and is an Assistant Clinical Professor at Yale School of Medicine and Tulane University School of Medicine. Dr. Swirsky testified that he had treated many patients over the past several years, many with problems similar to Mr. Dsupin's and the decedent's pre-existing cardiac condition, in Dr. Swirsky's opinion, did not in any way set in motion the pulmonary embolus. It is his opinion that the decedent's presentation on August 26, 2009 to the emergency room was the result of pulmonary embolism not angina. The significant contributing factors in Mr. Dsupin's death were his significant history of smoking – he had a 100-pack year history of cigarette smoking – which created the substrate for him to develop interstitial lung disease, emphysema and lung cancer. Dr. Swirsky disputed Dr. Najarian's assessment as to the significance of the troponin levels in the decedent, believing that if a significant heart attack had been the cause of death the levels would have been considerably higher. He also testified that Medicare regulations might have led to citing myocardial infarction as a cause of death on the death certificate.

Based on this evidence the trial commissioner concluded it was undisputed the decedent had compensable pre-existing coronary artery disease, but also concluded he had significant comorbid conditions including lung cancer and interstitial lung disease at the time of his demise. The trial commissioner did not find the opinion of Dr. Najarian credible or persuasive; but did find the opinions of Dr. Metersky and Dr. Swirsky credible and persuasive. In particular, he adopted Dr. Swirsky's opinion that "the presence of coronary artery disease did not play a role in leading up to the causation of the pulmonary embolism, nor played a role in the subsequent demise from respiratory insufficiency." Findings, ¶ 30. As the trial commissioner found the pulmonary embolus was caused by the decedent's lung cancer, not his pre-existing coronary artery disease, he dismissed the claim for survivor's benefits.

The claimant filed a Motion to Correct, which sought to add findings that Dr. Najarian's opinion as to causation should be credited and to add findings that the decedent's treating oncologist had said the decedent's cardiac issues would cause his death. The trial commissioner denied this motion and the claimant has pursued this appeal. Her principal argument is that both Dr. Najarian's testimony and the death certificate offer sufficient grounds to find that that the decedent's compensable cardiac ailments were a substantial cause in his death, and the trial commissioner erred by not relying on this evidence.

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 that in cases wherein causation of an injury is contested the trial commissioner's "findings of basic facts *and* his finding as to whether those facts 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.)

We dealt at length with the concept of proximate cause of an injury in Madden v. Danbury Hospital, 5745 CRB-7-12-4 (April 22, 2013). In Madden, we reviewed the recent precedent in Sapko v. State, 305 Conn. 360 (2012). In Sapko, the claimant sought benefits under § 31-306 after the demise of her husband, but the trial commissioner concluded that the cause of his death was due to an overdose of prescription medication unrelated to the decedent's compensable injury. This tribunal affirmed that decision and it was upheld by the Supreme Court, id., 386-388. In the present case, the trial commissioner concluded the evidence he found more persuasive was the proximate cause of the decedent's death was due to a pulmonary embolism which was the result of his noncompensable lung cancer. We also note that in Sapko, the Supreme Court clarified the standard of what constitutes a substantial contributing factor. Id., 390-392. We applied this precedent in Madden to affirm the trial commissioner's decision that the

claimant in that case presented a sufficient quantum of evidence that his employment substantially contributed to his injury.

We also noted in Madden that the trial commissioner had a great deal of discretion in ascertaining what constituted a substantial contributing factor, *citing* Weir v. Transportation North Haven, 5226 CRB-1-07-5 (April 16, 2008). In Weir we held that when a claimant presented three causes for surgery to the trial commissioner, and the work related cause was the least significant of the three, the trial commissioner, did not, as a matter of law, have to find the least weighty cause was "significant." "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 v. General Dynamics Corp., 52 Conn. App. 813, 818 (1999). Weir, supra.

Our precedent in Weir is relevant to the claimant's argument that the trial commissioner needed to give conclusive effect to the death certificate in this matter. We have reviewed the death certificate (Claimant's Exhibit A) and we note that it lists four factors in the decedent's death, and further notes that it lists the "Underlying Cause (disease or injury that initiated the events resulting in death) Last." While the document does cite "cardiac arrest" as the immediate cause of death and "myocardial infarction/heart failure" as a cause, the underlying cause cited for the death was "pulmonary embolism." Pursuant to Weir, we do not find the trial commissioner was obligated to find that this evidence established that, as a matter of law, the compensable cardiac injury was a substantial factor in the death of Mr. Dsupin.

The respondent has cited the case relied on by the claimant, Stevens v. Raymark Industries, Inc., et al., 5215 CRB-4-07-4 (March 26, 2008), as standing for the discretion of a trial commissioner to choose to rely on a death certificate in ascertaining if a death was due to a compensable injury. We agree with this characterization. In Stevens we *cited* Samaoya v. William Gallagher, 4951 CRB-7-05-6 (April 26, 2006), *aff'd*, 102 Conn. App. 670 (2007) for the proposition "a trial commissioner *may* place greater credence on official records than testimony from witnesses challenging such documents." (Emphasis added.) Stevens does **not** stand for the proposition that the commissioner is obligated to rely on a death certificate, and the claimant's argument to the contrary misinterprets this precedent.

The trial commissioner cited the testimony of the respondent's expert witnesses as being credible and persuasive. Both witnesses disputed the opinions advanced by Dr. Najarian supportive of finding this death was due to a compensable cardiac disease. These witnesses offered a rather detailed explanation for reaching a differing opinion from the claimant's expert witness. Dr. Metersky opined that the decedent's cardiac condition was stable at the time of his hospitalization and that the pulmonary episode was going to be fatal even in the absence of cardiac issues. Dr. Swirsky opined that the decedent's troponin levels were inconsistent with a major heart attack, and the decedent's final hospitalization was entirely due to pulmonary issues emanating from his lung cancer and emphysema. The claimant argues that the trial commissioner should have relied on Dr. Najarian's opinion, as he was a pathologist, but the trial commissioner cited substantive reasons for finding Dr. Metersky and Dr. Swirsky qualified expert witnesses, and we find that conclusion reasonable.

The trial commissioner in this case was presented with opposing expert witnesses and chose to find the respondent's witnesses more credible and persuasive. In a "dueling expert" case that is his or 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 his conclusion that a compensable injury was not a substantial factor in the death of the decedent.

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). The burden is on the claimant to prove they are entitled to benefits. Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 447 (2001). The trial commissioner concluded the claimant did not meet this burden, and as probative evidence supports this conclusion, it must be upheld.[2] We affirm the Finding and Dismissal.

[2] We finally note that the appellant believes that her Motion to Correct should have been granted. Those corrections sought to interpose the claimant's conclusions as to the law and the facts presented. The trial commissioner was legally empowered to deny this motion, as we may properly infer that the commissioner did not find the evidence submitted probative or credible. 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), D'Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003) and Liano v. Bridgeport, 4934 CRB-4-05-4 (April 13, 2006).

Commissioners Peter C. Mlynarczyk and Charles F. Senich concur with this opinion.