CASE NO. 5780 CRB-5-12-9 : COMPENSATION REVIEW BOARD
CLAIM NO. 500153624

TRICIA WILSON
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

: AUGUST 28, 2013

COSTCO WHOLESALE CORPORATION
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLANT

and

HELMSMAN MANAGEMENT SERVICES, INC.
ADMINISTRATOR

APPEARANCES:

The claimant was represented by Prescott W. May, Esq., Law Offices of Prescott W. May, 12 Bank Street, Seymour, CT 06483.

The respondent was represented by Nicholas W. Francis, Esq., Law Office of Jonathan M. Zajac, LLC, 152 Simsbury Road, PO Box 699, Avon, CT 06001-0699.

This Petition for Review from the September 11, 2012 Finding and Award of the Commissioner acting for the Fifth District was heard March 22, 2013 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Peter C. Mlynarczyk and Stephen B. Delaney.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondent in this matter has appealed from a Finding and Award issued to the claimant for injuries to her foot. They claim there was an insufficient quantum of evidence presented to establish the injury was compensable. We find that the trial commissioner could reasonably rely on the testimony of the commissioner's examiner in this matter. We affirm the Finding and Award.

The trial commissioner reached the following facts at the conclusion of the formal hearing. She found the claimant had worked for Costco for about ten years prior to July 10, 2010. On that date the claimant was employed in the photo department and testified she sustained an injury when she was loading photograph paper into a magazine. She testified the magazine weighs 15 to 30 pounds, and 40 to 45 pounds when full. She testified that in order to load the magazine she was required to stand on her tiptoes. She said she sat down for a moment after loading the machine and when she stood up, she testified that it felt like she had stepped on a spike and felt a crack in her foot. Thinking the pain would subside, she worked through her shift. She said she had foot aches for about five years prior to this incident which she treated by soaking and massaging after work.

The claimant said she did not originally report the injury to her employer because of fear that she would lose her job. She did not file a workers' compensation claim until she determined her medical insurance would not pay for foot surgery. After the claimant returned home, she tried soaking and massaging her foot, but nothing helped; the pain did not go away, and a few days later she went to a podiatrist. The claimant testified that she

had never treated with a podiatrist prior to this injury. On July 14, 2010, the claimant first sought medical treatment with Dr. Robert P. Matusz, a podiatrist. The claimant testified she did not give Dr. Matusz a history of the work incident. Dr. Matusz treated the claimant on five occasions in July and August 2010, signing off on the claimant's application for short-term disability benefits and ultimately diagnosing severe arthritis, left medial navicular and referring the claimant to Dr. Marc R. Bernbach for surgery.

On August 25, 2010, the claimant had her first visit with Dr. Bernbach. Dr. Bernbach states the claimant presents with "chief concern of pain of the medial aspect left foot as well as painful bunion area left foot. The condition has been present for several years with continued progression noted. Approximately three months ago, the condition significantly intensified." Findings, ¶ 3. Dr. Bernbach sent the claimant for an MRI of the left ankle, which showed a torn posterior tibial tendon. Dr. Bernbach's recommendation was that the tendon should at least be given time to repair itself, and he gave her a boot which she wore for six weeks. On September 17, 2010, Dr. Bernbach performed the first of the claimant's surgeries for a diagnosis of hallux valgus and mid-foot exostosis left foot. Following surgery, the claimant continued to complain of pain in the posterior tibial tendon of the left foot, and physical therapy was prescribed.

Following the surgery the claimant was placed in a pneumatic cam cast immobilization, which had the effect of causing the posterior tibial tendon tear of the left foot to remain stable. The claimant resumed partial weight bearing on November 2, 2010, but by November 16, 2010, it was evident that the tendon did not cure itself and Dr. Bernbach prescribed physical therapy. On December 1, 2010, the claimant began physical therapy at Access Rehab Center. Under the heading of "Mechanism of injury,"

the report states, “Pain in foot worsening up to 7/12/2010 mostly with work-related activities.” Findings, ¶ 7. The claimant was unable to tolerate the physical therapy, and it was discontinued.

On January 4, 2011, Dr. Bernbach indicated that the claimant needed a second operation to repair the posterior tibial tendon. On January 14, 2011, the claimant underwent a second surgical procedure with Dr. Bernbach for a diagnosis of posterior tibial tendonitis with posterior tibial tendon tear in the left foot. Within a week of the second surgery, the claimant was informed that her insurance had lapsed the day before the surgery. Therefore, the operation, the surgeon's fees, and all subsequent care were not covered. The claimant subsequently utilized a cam cast immobilization on her left foot and had physical therapy recommended, but did not pursue this treatment due to lack of insurance. The claimant continued to treat with Dr. Bernbach for some time thereafter and testified since the work-related incident of July 10, 2010, the pain that the claimant has experienced in the tendon area of the left foot has subsided very little.

The commissioner noted that a Form 43 was filed by the respondent on May 20, 2011 and a Form 30C filed by the claimant on May 26, 2011. On August 31, 2011, the claimant underwent a respondent's medical examination with Dr. Scott Gray, a board-certified orthopedic surgeon. Dr. Grey opined the claimed suffered from a failed posterior tibial surgical procedure and stated that her foot has been inadequately addressed surgically. He said the claimant’s subjective complaints about her foot were consistent with the objective findings. Dr. Gray opines that the claimant's condition was not causally related to the injury or work accident. Dr. Gray based his opinion on the fact that the claimant has had at least five years of gradual increase in flat foot deformity and

that the work-related event possibly aggravated the pre-existing condition, but ". . . I do not believe this is the *incidental primary cause* of her condition." Findings, ¶ 17b. Dr. Gray opined the claimant would need further treatment on her foot as the surgical procedures were inadequate.

On November 28, 2011, Dr. Enzo J. Sella, an orthopedic surgeon, examined the claimant at the request of the Commissioner. Dr. Sella recounted the claimant's narrative of having trouble with her foot for five years prior to the incident which was treatable by soaking and massaging and having foot pain after July 2010. Dr. Sella noted the claimant had an ongoing condition prior to July 2010 which she treated conservatively but ". . .[t]he reported injury of 7/10/10 when she went to get up from a stool and put pressure on the left foot and pushed off aggravated the underlying arthritis and made her symptoms worse." Findings, ¶ 18b. He further opined the MRI done in September 2010 showed a partial tear of the posterior tibial tendon which was most likely related to the July injury. He opined "[t]he mechanism of injury of getting up from a sitting position and pushing off the arthritic foot and feeling a snap and severe pain as she reported is consistent with some partial tear of the posterior tibial tendon, the area of preexisting arthritis, . . ." Id.

The trial commissioner noted that the claimant testified at the formal hearing and counsel for the respondent sought to establish inconsistencies in her narrative. The claimant testified she applied for short-term disability but did not tell the disability carrier she had suffered a work injury, as she would not have qualified for the disability benefits. Eventually the short-term was converted to long-term disability in February of 2011.

Based on these subordinate facts the trial commissioner concluded the claimant's testimony was persuasive that she did not initially report the injury to her employer

because she feared she would lose her job. The trial commissioner found the July 10, 2010 accident occurred in the manner described by the claimant. After evaluating the opinions of Dr. Gray and Dr. Sella, the commissioner determined that she found the opinion of Dr. Sella credible and persuasive in this matter. Based on the totality of the evidence submitted, she found the July 10, 2010 left foot injury compensable, and found that the July 10, 2010 injury is a substantial factor in the claimant's need for the September 17, 2010 and January 14, 2011 surgeries and related treatment for same.

The respondent filed a Motion to Correct seeking 13 corrections of the Finding and Award, all consistent with finding the claim noncompensable. The trial commissioner denied all but one of the corrections, which did not materially change the decision. The respondent then pursued the instant appeal. The gravamen of their appeal is based on their belief that the claimant's narrative of her mechanism of injury was insufficient to prove causation of a compensable injury.

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). 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.)

The respondent argues that this case is factually and legally congruent with the circumstances we ruled on in Loehfelm v. Stratford-Board of Education, 5710 CRB-4-11-12 (November 14, 2012). In Loehfelm, the claimant asserted that her back injury was the result of a fall sustained at her workplace. The trial commissioner concluded that based on the evidence in that case the claimant's injury "did not arise out of the employment." Id. We affirmed that decision as the trial commissioner concluded the claimant's injury was only ". . . .contemporaneously or coincidently with the employment", *citing* Madore v. New Departure Mfg. Co., 104 Conn. 709, 714-15 (1926). We may distinguish Loehfelm, supra, from the instant case in one decisive manner, however. The trial commissioner in the present case, unlike the trial commissioner in Loehfelm, was persuaded by the claimant's evidence that her injury arose out of the employment.[1] If there was probative evidence on the record wherein the trial commissioner could reach this conclusion, we must affirm the commissioner's decision.

[1] As we pointed out in Madden v. Danbury Hospital, 5745 CRB-7-12-4 (April 22, 2013), the record in Loehfelm v. Stratford-Board of Education, 5710 CRB-4-11-12 (November 14, 2012) suggested that a noncompensable injury was the proximate cause of the claimant's condition. In the present case, the commissioner's examiner specifically opined the work injury aggravated a pre-existing arthritic condition.

In reviewing our recent cases involving contested orthopedic injuries, we note the similarities between this case and the fact pattern in Buonafede v. UTC/Pratt & Whitney, 5499 CRB-8-09-9 (September 1, 2010). In Buonafede, the claimant testified that she was at work reaching over a cardboard box and she felt her right shoulder pop and experienced pain. The respondents focused much of their appellate arguments on alleged discrepancies between the claimant's narrative of injury and the opinions stated by an expert witness. We concluded that semantic differences between the two accounts were not material in nature, and that the trial commissioner could properly rely on the opinions of the expert witness. We believe this precedent is dispositive of the respondent's argument in the present case that Dr. Sella's opinion should be disregarded as being reliant on the amount of force applied on the claimant's foot at the time of the injury. Respondent's Brief, p. 8. We also find that Buonafede *cited* Marandino v. Prometheus Pharmacy, 294 Conn. 564 (2010) for the proposition that a trial commissioner may "consider medical evidence *along with all other evidence* to determine whether an injury is related to the employment." Marandino, supra, at 595. (Emphasis in the original.)

In the present case the trial commissioner found the claimant offered a persuasive explanation that her foot injury occurred at work shortly after exerting herself to put a heavy object into a machine elevated off the floor. Dr. Sella opined that this mechanism of injury was most likely responsible for the claimant's partial tear of her posterior tibial tendon. Claimant's Exhibit F. Dr. Sella opined specifically that " . . . the need for further surgery is in my opinion related to the injury of July 2010." Id. We believe this

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See Claimant's Exhibit F. This is consistent with such precedent as Gartrell v. Dept. of Correction, 259 Conn. 29, 40 (2002).

constitutes a sufficient quantum of probative evidence to satisfy the standard delineated in Marandino, supra, especially as the trial commissioner relied on the opinion of the commissioner's examiner. See Damon v. VNS of CT/Masonicare, 5413 CRB-4-08-12 (December 15, 2009).[2]

"When 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., 52 Conn. App. 813 (1999), supra, 819. In the present case we believe the trial commissioner could have reasonably found, from the record presented, that the claimant sustained an injury that arose out of her employment with the respondent, and that injury was responsible for her present need for surgery.[3] Therefore, we affirm the Finding and Award.

Commissioners Peter C. Mlynarczyk and Stephen B. Delaney concur in this opinion.

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[2] The respondent did not depose Dr. Sella. Therefore, the trial commissioner was permitted to rely on his report "as-is," and draw any reasonable conclusions therein. Berube v. Tim's Painting, 5068 CRB-3-06-3 (March 13, 2007).

[3] The respondent filed a Motion to Correct in which the trial commissioner denied 12 of the 13 proposed corrections. Insofar as our review of the proposed corrections indicates the respondent was primarily engaged in an attempt ". . . to have the commissioner conform his findings to the [respondent's] view of the facts," D'Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003), we find no error in the trial commissioner's refusal to grant those corrections. "The [respondent] cannot expect the commissioner to substitute the [respondent's] conclusions for his own." Id.