CASE NO. 5790 CRB-2-12-10 : COMPENSATION REVIEW BOARD
CLAIM NO. 200157358

PAUL BRASSARD : WORKERS' COMPENSATION
CLAIMANT-APPELLANT COMMISSION

v. : OCTOBER 18, 2013

THE ERECTORS, LLC
EMPLOYER

and

CHARTIS CLAIMS
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant appeared without legal representation at oral argument. In the proceedings before the trial commissioner, the claimant was represented by James F. Aspell, Esq., Law Offices of James F. Aspell, Esq., 61 South Main Street, Suite 310, West Hartford, CT 06107.

The respondents were represented by Jason T. LaMark, Esq., Adelson, Testan, Brundo & Jimenez, P.C., 2080 Silas Deane Highway, Suite 304, Rocky Hill, CT 06067.

This Petition for Review from the September 17, 2012 Finding and Award of the Commissioner acting for the Second District was heard on April 26, 2013 before a Compensation Review Board panel consisting of Commission Chairman John A. Mastropietro and Commissioners Charles F. Senich and Peter C. Mlynarczyk.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has petitioned for review from the September 17, 2012 Finding and Award of the Commissioner acting for the Second District. We find no error and accordingly affirm the decision of the trial commissioner.[1]

The trial commissioner issued his Finding and Award in this matter after presiding over four formal hearings. Of particular relevance to our inquiry are the following factual findings. On August 14, 2006, the claimant, who was employed by the respondent employer as an iron worker, injured his back while moving a heavy metal structural beam. The claimant first presented for medical treatment for back pain on the morning of the incident. X-rays taken at the Day Kimball Hospital Emergency Department did not indicate a fracture or dislocation but did show minor degenerative spurring at the L4 and L5 levels with well-maintained disc space and "mild rotator levoscoliosis." Claimant's Exhibit C. Hospital personnel diagnosed the claimant with a lumbrosacral muscle strain, gave him prescriptions for Percocet and Flexeril, and recommended that he follow up with an orthopedic surgeon. The claimant was cleared for light duty that would not involve lifting, bending or driving but was advised to avoid situations where his use of pain medication would be a risk. The claimant again sought treatment on August 21, 2006 at the Day Kimball Emergency Department; he had a pending appointment with an orthopedic surgeon but had run out of medication. He was given refills of Percocet and Flexeril to tide him over until he could get in to see the orthopedic surgeon.

[1] We note that two motions for extension of time were granted during the pendency of this appeal.

Following the claimant's presentations at the Day Kimball Emergency Department in August 2006, and continuing until January 2012, the claimant sought consultations with and/or treatment from a vast array of medical specialists. In addition to the claimant's ongoing quest for medical treatment from a number of different practitioners, the trier's findings indicate that the claimant presented for multiple respondents' medical examinations, a commissioner's examination, and several vocational assessments. Throughout this time period, the claimant also consistently pursued a pain management regimen with several practitioners. The respondents accepted the compensability of the claim, and the parties stipulated that the claimant sustained a fifteen-percent permanent partial disability to his back in accordance with the opinion of Gerald Becker, M.D., as set forth in his Commissioner's Examination report of May 18, 2009. However, no voluntary agreement for the permanency had been approved as of the close of the record because the claimant asserts that he continues to be totally incapacitated and therefore entitled to disability benefits pursuant to § 31-307 C.G.S.[2] The trier also found that despite the respondents' acceptance of the compensability of the claim, during the period spanned by the instant record, the respondents filed on at least four occasions a "Notice of Intention to Reduce or Discontinue Benefits" ("Form 36") and on at least two occasions a "Notice to Compensation Commissioner and Employee of Intention to Contest Employee's Right to Compensation Benefits" ("Form 43").

[2] Section 31-307(a) C.G.S. (Rev. to 2005) states: "If any injury for which compensation is provided under the provisions of this chapter results in total incapacity to work, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of his average weekly earnings as of the date of the injury, calculated pursuant to section 31-310, after such earnings have been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act made from such employee's total wages received during the period of calculation of the employee's average weekly wage pursuant to section 31-310…."

Having reviewed the evidentiary record, the trier determined that the claimant had "reported no significant, lasting improvement with any treatment modality," Conclusion, ¶ C, and that the claimant's treatment had primarily consisted of high levels of narcotic medication which had been "prescribed largely based upon his subjective complaints and the lack of any other effective modality." Id. Noting that the claimant's "complaints of extreme pain are disproportionate to any objective findings relative to his spine," Conclusion D, the trier also concluded that the claimant was not a surgical candidate. The trier determined, pursuant to the opinions of Michael Karnasiewicz, M.D., and Gerald Becker, M.D., that the claimant had reached maximum medical improvement on October 14, 2008 and, pursuant to the opinion of Becker, had sustained a fifteen-percent permanent partial disability to the back.

However, the trier also determined that the claimant, despite reaching maximum medical improvement on October 14, 2008, remained totally incapacitated until June 21, 2010. The trier, noting that John Paggioli, M.D., had begun reducing the claimant's pain medication on May 6, 2010, found persuasive the opinion of Jerrold Kaplan, M.D., that the claimant, as of June 21, 2010, once again "was capable of some light work on a full-time basis…." Conclusion, ¶ K. In light of this determination, the trier dismissed the claimant's claim for temporary total disability benefits subsequent to June 21, 2010. Rather, the trial commissioner awarded the claimant permanent partial disability benefits for 56.1 weeks commencing on June 21, 2010, subject to a credit for any payments made during that time period.

The claimant has appealed this decision, asserting that "[t]he Trial Commissioner has been presented with ample medical evidence that the claimant is medically

temporarily totally disabled pursuant to Connecticut General Statutes Section 31-307 secondary to low back pain, chronic debilitating testicular pain, and chronic longstanding opiate pain medication dependency." Appellant's Brief, p. 8. The claimant contends that he has provided "substantial non-medical evidence in the nature of vocational expert testimony and lay witness testimony" id., attesting to the limitations on his activities of daily living and the efforts he has made to secure gainful employment. The claimant is requesting that this board "reclassify" his disability from permanent partial disability to permanent total disability and adjust any compensation paid or payable to reflect the appropriate cost-of-living adjustments in accordance with § 31-307a C.G.S.[3]

We begin our analysis with the well-settled standard of deference we are obliged to apply to a trial commissioner's findings and legal conclusions.

> … the role of this board on appeal is not to substitute its own findings for those of the trier of fact. Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 451 (2001). The trial commissioner's role as factfinder encompasses the authority to determine the credibility of the evidence, including the testimony of witnesses and the documents introduced into the record as exhibits. Burse v. American International Airways, Inc., 262 Conn. 31, 37 (2002); Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), cert. denied, 251 Conn. 929 (1999). If there is evidence in the record to support the factual findings of the trial commissioner, the findings will be upheld on appeal. Duddy v. Filene's (May Department Stores Co.), 4484 CRB-7-02-1 (October 23, 2002); Phaiah v. Danielson Curtain (C.C. Industries), 4409 CRB-2-01-6 (June 7, 2002). This board may disturb only

[3] Section 31-307a(a) C.G.S. (Rev. to 2005) states, in pertinent part: "The weekly compensation rate of each employee entitled to receive compensation under section 31-307 as a result of an injury sustained on or after October 1, 1969, and before July 1, 1993, which totally disables the employee continuously or intermittently for any period extending to the following October first or thereafter, shall be adjusted annually as provided in this subsection as of the following October first, and each subsequent October first, to provide the injured employee with a cost-of-living adjustment in his weekly compensation rate as determined as of the date of the injury under section 31-309…. The cost-of-living increases provided under this subsection shall be paid by the employer without any order or award from the commissioner. The adjustments shall apply to each payment made in the next succeeding twelve-month period commencing with the October first next succeeding the date of the injury."

> those findings that are found without evidence, and may also intervene where material facts that are admitted and undisputed have been omitted from the findings. Burse, supra; Duddy, supra. We will also overturn a trier's legal conclusions when they result from an incorrect application of the law to the subordinate facts, or where they are the product of an inference illegally or unreasonably drawn from the facts. Burse, supra; Pallotto v. Blakeslee Prestress, Inc., 3651 CRB-3-97-7 (July 17, 1998).

McMahon v. Emsar, Inc., 5049 CRB-4-06-1 (January 16, 2007).

The claimant did not file a Motion to Correct; as a result, "we must accept the validity of the facts found by the trial commissioner and this board is limited to reviewing how the commissioner applied the law." Corcoran v. Amgraph Packaging, Inc., 4819 CRB-2-04-6, 4948 CRB-2-05-5 (July 26, 2006). Turning to the merits of the appeal, we note at the outset that it is of course axiomatic that a "plaintiff is entitled to total disability benefits under General Statutes § 31-307 (a) only if he can prove that he has a 'total incapacity to work.'"[4] D'Amico v. Dept. of Correction, 73 Conn. App. 718, 724 (2002), *cert. denied*, 262 Conn. 933 (2003). "The plaintiff [bears] the burden of proving an incapacity to work, and 'total incapacity becomes a matter of continuing proof for the period claimed.'" Dengler, supra, at 454, *quoting,* Cummings v. Twin Tool Mfg. Co., 40 Conn. App. 36, 42 (1996).

However, from its inception, the Workers' Compensation Act "carved out" certain injuries from the general rule governing total incapacity and indicated that such injuries "shall be considered as causing total incapacity and compensation shall be paid accordingly." Section 31-307(c) C.G.S. (Rev. to 2005) The statutorily enumerated injuries which presumptively confer permanent total disability are:

[4] See footnote 2, supra.

> (1) Total and permanent loss of sight of both eyes, or the reduction to one-tenth or less of normal vision; (2) the loss of both feet at or above the ankle; (3) the loss of both hands at or above the wrist; (4) the loss of one foot at or above the ankle and one hand at or above the wrist; (5) any injury resulting in permanent and complete paralysis of the legs or arms or of one leg and one arm; (6) any injury resulting in incurable imbecility or mental illness.

Id.

Generally, a claimant seeking temporary total disability benefits is expected to proffer medical evidence substantiating that claim. If, however, the medical evidence provided suggests that the claimant may have a work capacity, a claimant can also establish eligibility for temporary total disability benefits via an "Osterlund" claim, which evolved out of the following observation articulated by our Supreme Court in Osterlund v. State, 135 Conn. 498 (1949):

> A finding that an employee is able to work at some gainful occupation within his reasonable capacities is not in all cases conclusive that he is not totally incapacitated. If, though he can do such work, his physical condition due to his injury is such that he cannot in the exercise of reasonable diligence find an employer who will employ him, he is just as much totally incapacitated as though he could not work at all.

Id., at 506-507.

Thus, when deciding whether a particular claimant has demonstrated temporary total disability under the Osterlund doctrine, it is expected that a trier will look beyond the medical evidence and examine other factors which may affect the claimant's employability.

> Whether a claimant is realistically employable requires an analysis of the effects of the compensable injury upon the claimant, in combination with his preexisting talents, deficiencies, education and intelligence levels, vocational background, age, and any other factors which might prove relevant…. A commissioner always

> must examine the impact of the compensable injury upon the particular claimant before him.

Bode v. Connecticut Mason Contractors, The Learning Corridor, 130 Conn. App. 672, 681 (2011), *cert. denied*, 302 Conn. 942 (2011), *quoting* R. Carter et al., 19 Connecticut Practice Series: Workers' Compensation Law (2008 Ed.) § 8:40, p. 301.

Turning to the matter at bar, it is immediately obvious that the instant record does not support a claim for permanent total disability benefits pursuant to § 31-307(c) C.G.S. given that the claimant did not suffer any of the statutorily enumerated injuries required for an award of those benefits. As such, the trier's analysis in this matter was properly confined to an examination of whether the claimant successfully established his eligibility for temporary total disability benefits pursuant to § 31-307(a) C.G.S. In reaching his decision to dismiss the claimant's claim for temporary total benefits subsequent to June 21, 2010, the trier indicated that he relied on a Respondents' Medical Exam performed on that date by Jerrold Kaplan, M.D., wherein Kaplan stated that the claimant's "work capacity is difficult to determine given his current pain behavior and narcotic dependency; however, based on the objective pathology, he should have at least a light physical capacity for a [sic] full-time work." Claimant's Exhibit K, p. 3.[5] We note that the record also contains correspondence from John Paggioli, M.D., dated October 11, 2009 wherein the doctor indicated that "in [the claimant's] present state he is capable of light duty sedentary work that does not involve frequent lifting or bending, with the ability to change positions often." Claimant's Exhibit G.

[5] It should be noted that the trier expressly rejected Kaplan's opinion indicating that the claimant had not yet attained maximum medical improvement. Instead, the trier found more persuasive the opinion of Karnasiewicz, as set forth in his Respondents' Medical Examination report of October 14, 2008, Respondents' Exhibit 7, and confirmed by Becker in his Commissioner's Examination of May 18, 2009, Claimant's Exhibit H, that the claimant had reached maximum medical improvement as of the date of Karnasiewicz' examination.

There is no question that the record contains a significant number of medical opinions attesting to the claimant's lack of work capacity. See, e.g., correspondence of Zofia Mroczka, M.D., dated May 12, 2010, Claimant's Exhibit C; disability slips of Alvin Chua, M.D., dated September 5, 2008 and December 10, 2008, Claimant's Exhibit B; Respondents' Medical Examination of Gerald Lawrence, M.D., dated November 21, 2006, Respondents' Exhibit 4, p. 4; a medical report of Christian Dee, M.D., dated August 23, 2006, Respondents' Exhibit 3, p. 2; and correspondence in support of the claimant's claim for disability dated May 18, 2011 from Kara Anastasiou, APRN, Claimant's Exhibit S. "However, the quantity of evidence presented is not critical to a trial commissioner's decision. It is the weight the commissioner places on the evidence presented on the record that is decisive." Jodlowski v. Stanley Works, 5609 CRB-6-10-11 (November 16, 2011), *citing* Arnott v. Taft Restaurant Ventures, LLC, 4932 CRB-7-05-3 (March 1, 2006).

In addition, all of the reports cited, except for the note from Anastasiou, precede June 21, 2010, and the trial commissioner expressly rejected the opinion of Anastasiou citing "her late introduction into the claimant's case and her heavy reliance on the claimant's subjective complaints," Conclusion ¶ N, as well as the claimant's level of activity in 2011. This board is not empowered to assign probative weight to the evidence submitted into a record. "It is the quintessential function of the finder of fact to reject or accept evidence and to believe or disbelieve any expert testimony. The trier may accept or reject, in whole or in part, the testimony of an expert." (internal citations omitted) Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999).

With specific regard to the viability of the claimant's Osterlund claim, the record reflects that the trial commissioner relied on a vocational assessment performed on May 9, 2011 by Kerry A. Skillin, a Certified Rehabilitation Counselor for CRC Services, LLC. Following this assessment, which consisted of a lengthy records review, an interview with the claimant, and a series of vocational tests, Skillin opined that the claimant was not capable of returning to his former employment because it required "either heavy lifting or prolonged postures." Respondents' Exhibit 9, p. 32. However, Skillin concluded that "the claimant possesses transferable skills to other forms of work and is capable of performing a number of entry-level occupations," id., such as "automotive service writer, automotive parts clerk, non-emergency dispatcher, assembler, inspector, sorter, ticket seller and parking lot attendant." Id. Moreover, Skillin stated that "[b]ased upon my labor market analysis such jobs exist in the greater North Grosvenordale, CT area and are within the claimant's vocational and physical capacity." Id., at 33.

It is indisputable that the record contains a great deal of testimony by the claimant attesting to the difficulties attendant on performing the activities of daily living. The claimant testified at length regarding his constant pain and reliance upon narcotic medication for basic functioning, the necessity to utilize a cane to walk any significant distance, his inability to drive, the restrictions on his recreational pastimes and former hobbies, and the financial difficulties experienced by him and his wife since the accident. Nevertheless, the claimant's apparent perception of his abilities was clearly at variance with the opinion propounded by Skillin in her vocational assessment. We also note that the record contains several instances where a medical provider reported symptom

magnification and/or symptoms inconsistent with objective findings. See, e.g., Respondents' Medical Examination of Mark Lorenze, M.D., dated February 5, 2007, Respondents' Exhibit 5, p. 3; Respondents' Medical Examination of A. Louis Mariorenzi, M.D., dated May 16, 2007, Respondents' Exhibit 6, p. 2; and Respondents' Medical Examination of Jerrold Kaplan, M.D., dated June 21, 2010, Claimant's Exhibit K, p. 3. Also submitted into the record were surveillance reports along with footage taken on June 8, 2011 showing the claimant, a passenger in an automobile, stopping at a gas station, bending to pump gas into a five-gallon plastic gas can, walking to and from the car and store without difficulty to pay for the gas, placing the can in the trunk of the car, returning home, and pouring the gas into an outside generator. Respondents' Exhibits 16, 17, 18.[6]

The trial commissioner, presumably on the basis of the foregoing as well as the occasionally inconsistent testimony by the claimant, ultimately determined that the claimant was "an unreliable witness, at best. In some regards his testimony was utterly lacking in credibility." Conclusion, ¶ F. The trier also concluded that although the claimant "continues to suffer from some degree of back pain, he is an unreliable barometer of the extent of that pain and the level to which it limits his ability to function." Id. It is of course well-settled that such determinations are the sole province of the trier of fact, given that:

> [c]redibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude . . . . An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the

[6] The investigator also testified live at the formal hearing held on November 7, 2011.

> credibility of the witnesses and to draw necessary inferences therefrom . . . . As a practical matter, it is inappropriate to assess credibility without having watched a witness testify, because demeanor, conduct and other factors are not fully reflected in the cold, printed record.

Burton v. Mottolese, 267 Conn. 1, 40 (2003).

Moreover, as mentioned previously herein, the successful prosecution of an Osterlund claim requires a showing of "due diligence" by a claimant in the effort to secure new employment. Our review of the record provides ample support for the trier's finding that:

> [t]he claimant has made no significant effort to find alternative employment since his work accident. While it is possible to show that one's earning capacity has been destroyed by means other than vocational opinion evidence, given the claimant's lack of credibility and his failure to document a real effort to find work, the claimant's evidence to date fails to prove he has no vocational prospects.

Conclusion, ¶ Q.

For instance, when queried at his deposition as to whether there was "any kind of work that you can envision that you're capable of doing," the claimant replied, "[n]o." Respondents' Exhibit 1, p. 44. At the formal hearing held on May 18, 2011, the claimant testified that when his workers' compensation benefits ceased, he "somewhat" made an effort to look for work, Transcript, p. 56, and he thought he might have "applied for maybe five or ten jobs" in the last three years. Id., at 110. At the formal hearing held on July 6, 2011, the claimant testified that he had filled out applications for six jobs, Transcript, p. 63, but had not kept track of the twenty or thirty employers he allegedly contacted by telephone. Id., at 64-65. The claimant had no explanation for why he

documented some employment inquiries and not others, id., at 65, and in any event, the last time he applied for a job was at the end of 2009. Id.

In contrast to the claimant's testimony at trial, Skillin's vocational assessment states that the claimant reported he "has made no attempts to look for work since his 2006 injury. He believes his wife may have developed a profile for him on Monster.com for 'light duty work' but he has never seen it or checked the account."[7] Respondents' Exhibit 9, p. 24. Our review of the instant record indicates that the claimant submitted one application for employment filed at Ocean State Job Lot in 2008, Claimant's Exhibit M; one handwritten job search form which listed several potential contacts but only one phone number, Claimant's Exhibit N; and two "Schedules of Events" at Workforce Central Southbridge for February 2008 and March 2008 respectively, Claimant's Exhibits O, P. Given the paucity of evidence from which it could be reasonably inferred that the claimant sought employment with the diligence required in order to satisfy the Osterlund standard, we find no error in the trier's dismissal of the claimant's Osterlund claim.

The claimant has failed to identify any basis on which it may be reasonably inferred that the trial commissioner erred in conducting his analysis of the evidence before him. "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

[7] Claimant submitted into the record two "Saved search results" in the form of G-mail messages dated September 4, 2009 and June 10, 2011. Claimant's Exhibit R.

could have reasonably concluded as it did." Burton, supra, at 54. Given, then, that the trial commissioner reasonably relied on the evidence contained in the instant record in reaching his conclusions, we find no error in his decision to dismiss the claimant's claim for temporary total disability benefits subsequent to June 21, 2010.

The September 17, 2012 Finding and Award of the Commissioner acting for the Second District is hereby affirmed.

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