CASE NO. 5800 CRB-5-12-11 : COMPENSATION REVIEW BOARD
CLAIM NOS. 500151076
500151354

WENDY OSBORN
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

: OCTOBER 28, 2013

LOWE'S HOME CENTERS, INC.
EMPLOYER

and

SEDGWICK CMS, INC.
INSURER
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by Leonard A. McDermott, Esq., Employee Advocates, LLC, 35 Porter Avenue, 3B, PO Box 205, Naugatuck, CT 06770.

The respondents were represented by Dominick C. Statile, Esq., Montstream & May, LLP, 655 Winding Brook Drive, PO Box 1087, Glastonbury, CT 06033.

This Petition for Review from the November 8, 2012 Finding and Award of the Commissioner acting for the Fifth District was heard May 31, 2013 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Peter C. Mlynarczyk and Daniel E. Dilzer.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondents in this matter have appealed from a Finding and Award issued to the claimant for work-related injuries. They argue that the trial commissioner should not have found the claimant credible, and the medical evidence did not support her claim for knee replacement surgery. We generally defer to a trial commissioner's determination of whether the claimant is a credible witness. We also find the commissioner's examiner opined in support of knee replacement surgery. We therefore affirm the Finding and Award.

The following facts were found by the trial commissioner and are pertinent to this appeal. The claimant began working for Lowes's on June 1, 2009. She was hired as an install sales coordinator and worked originally at a new store that had not yet opened to the public. The claimant testified that she injured her right knee at work for the employer-respondent on two occasions, in March of 2010 and again in May of 2010. Prior to her employment at Lowes's the claimant suffered a knee injury in 2002 and had surgery on her right knee performed by Dr. Richard E. Loyer.

The trial commissioner reviewed the medical reports of the claimant's treating physician, Dr. William F. Flynn, Jr. Dr. Flynn's notes from March 12, 2010 stated the claimant "presents today with a chief complaint of right knee swelling and pain. This started about a month ago, although she does recall a fall at work several months ago during which she didn't necessarily hurt her knee but her hip. Over the course of the last month she has had worsening complaints of right knee pain and swelling. Findings, ¶ 4a. On March 14, 2010 the claimant had a pre-operative physical at Dr. Flynn's group,

Neurosurgery, Orthopedic and Spine Specialists (NOSS). This report noted no specific injury and scheduled the claimant for surgery on April 16, 2010. Dr. Flynn performed right knee arthroscopy, synovectomy, and medial meniscectomy on that date and the claimant was out on short-term disability until May 6, 2010. The claimant returned to work with some restrictions for two weeks and returned to full duties on May 21, 2010.

The claimant returned to NOSS on June 1, 2010, whose report states that she was doing well following April 16, 2010 knee surgery; "however about a week ago while she was working her foot slipped off a pallet causing a twisting injury to her knee. The patient states her knee pain is exactly how it was prior to having surgery. The patient states her knee gives out on her at times and has increasing knee pain at night." Findings, ¶ 4g. An updated right knee MRI showed "a meniscal tear involving the posterior horn of the medial meniscus. June 10, 2010 report. It also showed some anterior horn involvement. There does seem to be lateral meniscus changes as well." Id. On June 10, 2010, the doctor noted the difference between the claimant's previous and current MRI and diagnosed a new injury. On June 15, 2010, the claimant followed up with Dr. Flynn, who again noted a new tear of the medial meniscus and a sprain in the medial collateral ligament. Dr. Flynn notes that this is a new injury and states, "Just to make things entirely clear, her first injury was a work injury but she thought that she might be able to get it taken care of faster not going through workers' comp, so she did not report it. This is obviously also a work injury." Findings, ¶ 4h. On August 6, 2010, the claimant underwent a second right knee surgery with Dr. Flynn consisting of an arthroscopy and a partial medial meniscectomy.

The claimant testified at the formal hearing regarding her March 2010 injury, stating, “It was the beginning of March when I noticed severe pain and discomfort in my knee." She further stated that she had sustained a specific incident, which she described as follows: "[W]e were loading some appliances, and I remember I had to climb over pallets because, as I said, back in receiving was extremely unorganized. My foot slipped on a pallet, and my knee twisted, wrenched." Findings, ¶ 4d. The claimant further testified at the formal hearing that she did speak to Elizabeth Alessandro, a human resources representative, following the March 2010 incident regarding her options of filing a workers’ compensation claim or filing a short-term disability claim. The claimant stated that she felt workers' compensation claims were looked down upon by management and because this was a relatively new store and her employment was so recent, she thought it would be better to use her own insurance rather than file a workers' compensation claim. She did not fill out an accident report for workers' compensation at that time and instead applied for short-term disability benefits from the respondent. The commissioner also noted the claimant filed a Form 30C for the May 2010 injury on July 7, 2010 and filed a second Form 30C for the March 3, 2010 injury on August 2, 2010 and noted she did not claim that she had sustained a work-related injury for the March 3, 2010 incident until after she claimed that she had a second injury on May 26, 2010.

The claimant further testified that she once again injured her right knee while working in the receiving department on May 26, 2010. She testified that it was an especially busy week before Memorial Day and mass amounts of product were being moved. The claimant once again slipped off a pallet; this time she was moving carpet. The claimant further testified that she spoke with Elizabeth Alessandro in human

resources the same day she was injured: "I told her I hurt myself and that I did wish this time to file a report. She said she would get me the paperwork, and I did not receive the paperwork until two weeks later." Findings, ¶ 4f. The claimant also testified that when she advised the respondents in a phone interview that she had not sustained a prior injury that a couple days after her phone interview she realized she had forgotten about her prior knee treatment and surgery that she had eight years earlier, and called her attorney to tell him. Thereafter, she obtained her records from Waterbury Hospital as quickly as possible and had them forwarded to the respondents within a week. On cross-examination, the claimant further explained the contradiction between her response during her phone interview and the fact that she had prior knee treatment and surgery by stating that she had had a number of extenuating circumstances going on in 2001-2002, including the death of her mother, and she was not trying to hide anything; she had simply forgotten about this during her phone interview. The trial commissioner noted that the respondents made an effort to discredit the claimant's narrative on cross-examination by pointing to this situation, as well as other alleged discrepancies in the claimant's testimony.

A former manager at Lowe's, Patricia Frasca, testified on behalf of the claimant. She corroborated the claimant's account of sustaining an injury at work in March 2010, recalling she saw the claimant early on one day moving around without a problem and later in the day seeing her limping towards an elevator visibly in pain. Findings, ¶ 10.

Two expert medical witnesses offered opinions in this case. On May 10, 2011, the claimant saw Dr. Thomas W. Dugdale at the request of the respondents. Dr. Dugdale notes that the claimant's past history includes an arthroscopic procedure in February of

2002. Dr. Dugdale states, "The patient states that she made a satisfactory recovery and that she was not symptomatic between 2002 and 2010. The patient reports no other past issues with her right knee." Dr. Dugdale does not comment on causation. Findings, ¶ 8. On June 26, 2011 Dr. Michael Kaplan conducted a Commissioner's Examination. Dr. Kaplan opined that the claimant sustained a work-related injury, as described in his assessment of the claimant.

> This woman has closed traumatic and degenerative arthritis of her right knee. There is no question that a work-related injury was causal with regard to her incapacitation and surgical treatments. At this point, replacement surgery will be necessary to be determined by her and her physician understanding the postoperative regimen, risk and complication inherent. Obviously, her thin nature and strength quotient is imperative for her ultimate result. Her work capacity remains that of light duty. No high-impact loading. No repetitive squatting or twisting. She has reached her medical maximum improvement from injury with a 15% permanent partial disability equated to the work insults. Again, replacement surgery will be necessary at some point to be decided upon after discussion with her and Dr. Flynn.

Findings, ¶ 9.

Based on these subordinate facts the trial commissioner concluded she found "the claimant's testimony persuasive that she injured her right knee in March of 2010 at the respondent-employer. The claimant thought it would be better to use her own insurance rather than file a workers' compensation claim due to the fact that she was working at a relatively new store; she had not been employed that long; and she felt her employment may be jeopardized because the administration looks negatively upon employees filing workers' compensation claims. Conclusion, ¶ D. The trial commissioner further noted that the claimant informed her treating physician after the March 2010 incident that she had sustained a prior knee injury, so therefore she found the claimant's account of

forgetting the prior injury during a June 22, 2010 phone conversation with a representative of the respondent was credible. The commissioner found Ms. Frasca's testimony persuasive that the claimant sustained a March 2010 injury at work, and found the claimant's testimony persuasive she sustained a subsequent knee injury at work in May of 2010. The commissioner further found the opinions of Dr. Flynn and Dr. Kaplan credible and persuasive that the claimant sustained two work related knee injuries in 2010 and that the two resulting surgeries on April 16, 2010, and August 6, 2010, are also causally related. Additionally, Dr. Kaplan opined that the claimant will require right knee replacement surgery. As a result the commissioner found the two knee injuries were compensable injuries and that the respondent was responsible for the resulting medical treatment; including a future right knee replacement surgery as outlined by the commissioner's examiner.

The respondents filed a Motion to Correct which sought to add a number of findings that the claimant was not credible and therefore, she had not proven she had sustained a compensable injury. The trial commissioner denied each of the corrections besides one correction concerning the date of a prior surgery for the claimant. The respondents have pursued the present appeal. The appeal is focused on two points. They argue that while the trial commissioner found the claimant persuasive, she did not specifically find the claimant credible, and the claimant's narrative was too full of inconsistencies to sustain an award. They also argue the supporting evidence before the trial commissioner was inadequate to support approving knee replacement surgery, and the issue had not been properly noticed before the commissioner.

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 on appeal we may not substitute our opinion of the credibility of a witness for the opinion of credibility that the trier of fact reached after observing the witness testify.

> Credibility 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 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).

The respondents argue that while the trial commissioner found the claimant "persuasive" the commissioner did not specifically find her "credible." Appellant's Brief, p. 10. We are of the opinion this constitutes a search for "magic words" concerning witness credibility similar to the search for such talismanic language eschewed in Struckman v. Burns, 205 Conn. 542 (1987). It would be difficult to

ascertain a circumstance wherein a witness who was not credible could be deemed persuasive. The respondents argue that the trial commissioner was "silent" on the issue of whether the claimant was credible. Appellant's Brief, p. 11. Her denial of the respondent's Motion to Correct however, constitutes a vociferous rejection of the respondent's arguments herein.

The respondents sought multiple corrections to the Finding and Award to specifically deem the claimant not credible. Each of these corrections was denied by the trial commissioner. As a result, we must conclude that having had this issue brought to her attention, she deliberately concluded the claimant was indeed 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). 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).[1]

The respondents argue that as the injuries herein were unwitnessed and the claimant did not immediately report these injuries to her employer the trial commissioner should have denied compensation. This constitutes an effort to retry the case, which pursuant to Fair, supra, we may not do as an appellate panel. Moreover, we find this matter on all

[1] As we pointed out 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), when a claimant is deemed to lack credibility, the claim must be dismissed and the issue is not subject to reversal on appeal.

fours with another recent case where we affirmed an award for benefits. In Wilson v. Costco Wholesale Corporation, 5780 CRB-5-12-9 (August 28, 2013), "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." Id. In the present case, the claimant believed the respondent wanted the matter handled as a disability matter, not a workers' compensation claim. In both cases the claimant's narrative of injury was adopted by her treating physician, who provided an unequivocal opinion of workplace causation. The trial commissioner decided in both cases to find the claimant a reliable witness.[2] In addition, in both cases the trial commissioner decided to follow the medical opinions offered by the commissioner's examiner. We generally have affirmed commissioners who have relied on the opinion of the commissioner's examiner. See Damon v. VNS of CT/Masonicare, 5413 CRB-4-08-12 (December 15, 2009).[3] For those foregoing reasons, we affirm the trial commissioner's judgment as to compensability.

The respondents then argue that even if the claimant was deemed credible enough to establish compensability in this case, the award of knee replacement surgery should be

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[2] We also note many similarities between this case and our decision in Ramirez-Ortiz v. Wal-Mart Stores, Inc., 5492 CRB-8-09-8 (August 25, 2010). In Ramirez-Ortiz, the respondents argued that the claimant's testimony at the formal hearing had too many discrepancies to be deemed reliable and her treating physicians opinions should also be discounted. We found to the contrary as "[t]he trial commissioner *may* discount medical evidence when he or she concludes it is based on an unreliable patient narrative. Abbotts v. Pace Motor Lines, Inc., 4974 CRB-4-05-7 (July 28, 2006), *aff'd*, 106 Conn. App. 436 (2008), *cert. denied*, 287 Conn. 910 (2008). In the present case, the trial commissioner found the claimant credible and persuasive." Id.

[3] The respondents did not depose Dr. Kaplan. 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).

stricken from the Finding and Award. They argue the issue of medical treatment was not properly noticed before the trial commissioner. They also argue that the claimant's treating physician did not specifically recommend the claimant undergo knee replacement. We must ascertain if the record supports the trial commissioner's decision.

Our review of the hearing notices in this matter indicate that medical treatment had been a noticed matter prior to the formal hearing, as notices in this matter cited § 31-294d C.G.S. The respondent notes that the opening statements of the parties at the commencement of the formal hearing on May 30, 2012 did not reference medical treatment, but we do not believe that this was dispositive. We have pointed out that a trial commissioner may follow the evidence where it leads when it deals with an appropriate modality of treatment for the claimant, DiDonato v. Greenwich/Board of Education, 5431 CRB-7-09-2 (May 18, 2010). We also note that the reports of Dr. Flynn and Dr. Kaplan were prepared well in advance of the formal hearing and the respondents had ample opportunity to depose these physicians if they questioned their opinions. Therefore, the concerns we had with late arriving medical evidence we had in Ghazal v. Cumberland Farms, 5397 CRB-8-08-11 (November 17, 2009), are not present herein.

We have long held that it is a factual determination of the trial commissioner as to what modalities of treatment are most appropriate for a claimant. See 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). The trial commissioner is responsible for evaluating the evidence in the record presented to him. A review of Claimant's Exhibit D indicates that on numerous occasions Dr. Flynn discussed the likely need for the claimant to undergo further knee surgery. On April 7, 2011 Dr. Flynn noted that the claimant is

"probably headed for an arthoplasty." On May 18, 2011 Dr. Flynn noted that he had decided to prescribe Mobic to the claimant and "[i]f this gives her relief we will stick with that, but it maybe that she is going to come to a replacement." On June 9, 2011 Dr. Flynn discussed the claimant's symptoms and her belief that Mobic had been ineffective in offering relief. On June 27, 2011, Dr. Flynn noted the claimant "really cannot tolerate too many of the anti-inflammatories and they are only helping her to some degree. After discussing his concerns with knee replacement surgery with the claimant, as well as his opinion "we have probably exhausted conservative treatment"; Dr. Flynn noted "[s]he really thinks that she wants to go ahead with the knee replacement despite the risks versus the benefits, so we will try to make arrangements to do this."

Reviewing this evidence in its totality, it is apparent that while Dr. Flynn did not believe an immediate knee replacement was a medical necessity for the claimant, he did believe that she was a proper surgical candidate and the claimant was interested in proceeding with the modality of treatment. We note that the respondent's examiner, Dr. Dugdale, opined that "a reconstructive procedure may be necessary and would be considered curative" for the claimant. Claimant's Exhibit F. Dr. Kaplan opined unequivocally, "At this point, replacement surgery will be necessary to be determined by her and her physician. . . ." Claimant's Exhibit G. Since there appears to be agreement among the various examiners that knee reconstruction is a viable option for the claimant, and the claimant has indicated a desire to pursue this treatment, we find the trial

commissioner had a sufficient basis pursuant to the standard delineated in Cervero to find such treatment was "reasonable" pursuant to § 31-294d C.G.S.[4]

In the present case the trial commissioner accepted the claimant's narrative and found it persuasive. She rejected an argument that the claimant lacked credibility. Therefore, 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. We affirm the Finding and Award.

Commissioners Peter C. Mlynarczyk and Daniel E. Dilzer concur with this opinion.

[4] We generally have upheld trial commissioners who relied on the opinion of the commissioner's examiner on the issue of whether surgery was due to a compensable injury or necessary for the claimant. Carroll v. Flattery's Landscaping, Inc., 5385 CRB-8-08-10 (September 24, 2009).