CASE NO. 5808 CRB-3-12-12 : COMPENSATION REVIEW BOARD
CLAIM NO. 700144918

DAVID SAVAGEAU
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: NOVEMBER 7, 2013

STOP & SHOP COMPANIES, INC.
EMPLOYER

and

MAC RISK MANAGEMENT/
AHOLD USA
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Nickola J. Cunha, Esq., Law Office of Nickola J. Cunha, 2494 Whitney Avenue, Hamden, CT 06518.

The respondents were represented by Matthew S. Necci, Esq., Halloran & Sage, LLP, One Goodwin Square, 225 Asylum Street, Hartford, CT 06103.

This Petition for Review from the October 18, 2012 Finding and Orders of the Commissioner acting for the Seventh District was heard June 28, 2013 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Charles F. Senich and Peter C. Mlynarczyk.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has appealed from Finding and Orders issued in this case which denied his bid for temporary total disability benefits. He has also appealed from the Orders concerning § 31-308a C.G.S benefits, asserting they are inconsistent with the prior benefits awarded. We have reviewed the record herein and determine that based on the evidence presented, the trial commissioner could have reasonably concluded the claimant had failed to establish he was unemployable based on the precedent in Osterlund v. State, 135 Conn. 498 (1949). In regards to the issue concerning § 31-308a C.G.S. benefits, we are unable to ascertain the basis for the trial commissioner's determination as to the amount of weekly payments. We remand that issue to the commissioner for further proceedings.

The trial commissioner reached the following factual findings at the conclusion of the formal hearing. She noted that the claimant sustained a compensable cervical spine injury while working for the respondent on May 6, 2006. The claimant underwent surgery on July 11, 2007 by Dr. James K. Sabshin, who performed an anterior cervical discectomy at the C4-C7 level with an interbody fusion. On October 16, 2009, Dr. Sabshin assigned a 35% permanent partial disability to the claimant with a light duty work capacity. The treating physician noted the claimant could not lift more than 10 pounds, or engage in frequent bending, stooping, squatting, heavy labor or working at heights. In January of 2010 the claimant began to experience increased pain and after the respondent denied his bid for an evaluation, sought treatment through his primary care physician, Dr. Kandiah Sritharan. On May 28, 2010 Dr. Sritharan reported the claimant

was in need of pain management but as the primary care physician he could not order pain medication. On June 24, 2010, Dr. Sabshin recommended that the claimant be evaluated for pain management. The informal notes of the Commissioner reflected the claimant requested such a pain management evaluation on August 11, 2010, September 29, 2010 and November 24, 2010. On January 25, 2011 Dr. Sabshin reported again the claimant was in need of pain management and was unable to function on a daily basis without it and would be unable to work at a sedentary position. The respondent authorized a pain management evaluation in February of 2011, but the claimant was unable to get an appointment for this evaluation until March 4, 2011.

The claimant testified at the hearing. He said he is 64 years of age and graduated from high school in Orlando, Florida in 1965. He testified to his previous employment which included an operations manager position at General Medical where he was in charge of approximately ten employees, and was responsible for the staff in the purchasing department, data entry, the warehouse staff and drivers. While employed at Stop & Shop he supervised two employees and his responsibilities included making out the work schedule and preparing claims for losses and damages. The claimant said that due to his untreated pain he had began consuming large amounts of alcohol in order to sleep. He had been granted Social Security disability benefits in January 2009.

The claimant also testified as to his activities at the Owl's Nest, a bar owned by his good friend, Jose Cunha. The claimant said he had keys to open the Owl's Nest and opened the bar on a frequent and consistent basis and consumed alcohol there. He has access to the area there restricted to employees, has signed vendor invoices, has paid

monthly bills and has ordered and purchased food for the venue. He testified he had never been paid for his assistance in operating the Owl's Nest.

The claimant also testified that he had attempted to look for work through newspapers, the Connecticut Department of Labor, and the Internet. He also testified that the insurance carrier had on occasion denied his prescriptions and he had to pay these medications out-of-pocket. He said his unreimbursed out-of-pocket medication expenses totaled $626.16.

The trial commissioner also considered the results of a May 12, 2010 Functional Capacity Evaluation of the claimant conducted by Raymond Edward Cestar, a vocational expert. Mr. Cestar, who works for the Social Security Administration and testifies in workers' compensation cases, testified the claimant was unemployable due to his impairment and continual pain. He said the claimant's functional abilities have deteriorated and he is unemployable at any occupation whatsoever. The commissioner also considered the testimony of an expert witness for the respondents, Diane Durr. Ms. Durr testified that after conducting a records review and a labor market survey she concluded the claimant was employable. She said the results of two surveys, one in February 2011 and the other in January 2012, indicated positions existed and were available within the claimant's restrictions that required little or no training. She also testified the claimant's activities at the Owl's Nest demonstrated he had the ability to work on a consistent basis.

Based on that evidentiary record the trial commissioner did not find the claimant totally disabled based on the Osterlund standard. She concluded the claimant had a sedentary work capacity and while he could not return to his prior post at Stop & Shop,

he was employable at another job that could accommodate his restrictions. The commissioner noted the claimant had transferable work skills and had shown an ability to work by volunteering at the Owl's Nest. The commissioner found the reports and opinions of the respondent's vocational expert, Ms. Durr, more persuasive and credible than those of the claimant's expert, Mr. Cestar. She found reports of Dr. Sabshin dated October 16, 2009 and June 24, 2010 persuasive and credible, and found his report of January 25, 2011 credible on the issue of pain management, but unpersuasive as to work capacity.

The trial commissioner also concluded the respondents unreasonably delayed the authorization of medical treatment for the claimant in regards to pain management and owed the claimant for his out-of-pocket medication expense. She ordered the respondents to pay a $500 penalty to the claimant for undue delay and reimburse him $626.16 for medications. She dismissed the claim for total disability and found the claimant entitled to § 31-308a C.G.S. benefits based on a light duty work capacity, and ordered the respondents to pay these benefits at minimum wage based on a forty hour work week.

Both parties filed a Motion to Correct in this matter. The trial commissioner issued a Corrected Finding and Orders which incorporated only corrections to scrivener's errors in the original Finding and Orders. The claimant has now pursued the present appeal. His principal argument is that the evidence established that he was entitled to

total disability benefits based on the Osterlund standard.[1] He also argues that there was a prior agreement in place in regards to § 31-308a C.G.S. benefits and the Finding and Orders do not explain a deviation from that agreement, nor was the issue litigated at the hearing.

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). In addition, the burden of proof in a workers' compensation claim for benefits rests with the claimant. Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440 (2001).

[1] In Osterlund v. State, 135 Conn. 498 (1949), the Supreme Court established the standard of total incapacity as being an inability to earn money not in his previous occupation, but "in any other occupation which he can reasonably pursue." Id., 505-506.

The claimant argues that the trial commissioner failed to properly apply the Osterlund test in this case. As the claimant views this situation, while he does have a work capacity, it is such that he has been rendered unmarketable for what jobs in the community he could reasonably seek. The trial commissioner specifically cited Osterlund and marshaled evidence that she believed demonstrated a work capacity for jobs the claimant could reasonably perform. We must ascertain if this evidence supports the commissioner's finding.

Just recently in Ritch v. Connecticut Materials Testing Labs, 5766 CRB 7-12-7 (October 24, 2013), we reviewed how a claimant's extensive activity at a workplace can provide probative evidence that he or she has a work capacity. We find on the facts and the law the present case indistinguishable from Ritch.

> The commissioner in this matter was presented with a rather substantial amount of evidence from surveillance footage and testimony from the claimant's associates at the Office café demonstrating the claimant was an active individual capable of performing a variety of tasks in a business environment. We find this case indistinguishable from Smith v. Federal Express Corp., 5405 CRB-7-08-12 (December 1, 2009) where the trial commissioner denied the claimant's bid for total disability benefits.
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> The trial commissioner considered issues related to the claimant's son's business. The claimant's son operates a Taekwondo academy in Maryland. The claimant denies an ownership interest in the business, but testified that he went to the business three times a week to help out his son. He testified he drove to the business sometimes. The claimant testified that his involvement at the academy continued even when his son was unable to teach classes there, having been injured in a mugging in 2006. During this period when his son retained a woman named Faith Dortch to teach classes at the academy, the claimant continued to help out at the business, even putting on a uniform and showing prospective students around the facility. The claimant denied being the facility's bookkeeper, but admitted that he accepted customer

checks for the business, and that phone calls for the business rolled over to his home telephone or cell phone. He also testified that he had traveled to Taekwondo tournaments in New Jersey.

The trial commissioner noted that the claimant had been filmed by surveillance cameras on four occasions in 2006 and 2007, and the tapes indicated the claimant was driving an SUV, sitting in an SUV and lifting carts and bags out of the SUV. The tapes indicated that on one occasion the claimant spent three hours at a YMCA where the claimant's son worked.

Id.

More recently, we affirmed a trial commissioner who relied on surveillance footage to determine a claimant had a work capacity in Clukey v. Century Pools, 5683 CRB-6-11-9 (August 22, 2012). In Clukey, the claimant argued that his presence at a construction site banging a cement mixer with a hammer and offering advice on mixing cement was social in nature. The trial commissioner rejected this characterization of the claimant's activities and found he had a work capacity. We affirmed that decision on appeal. The trial commissioner, after evaluating the surveillance tape and the testimony of Mr. Spitko and Mr. Carpentier, could reasonably conclude the claimant had the ability to perform supervisory work on a construction site and indeed was doing such work. Such a conclusion would warrant granting the Form 36 and discontinuing benefits.

Id.

We can find no discernable difference from the claimant's activities at the Office café from that of the claimants in Smith, supra, and Clukey, supra. In all of these cases the claimant testified he was not paid for his activities, but the evidence on the record clearly demonstrated activities at a place of business for which an individual would usually receive remuneration. The burden is on the claimant to demonstrate he is entitled to temporary total disability benefits Hernandez v. American Truck Rental, 5083 CRB-7-06-4 (April 19, 2007). The probative evidence herein convinced the trial commissioner the claimant did not prove his case. We cannot reverse such a decision on appeal.

Id.

The trial commissioner noted in this case the claimant engaged in activities at the Owl's Nest such as opening the bar, ordering food and paying invoices which would be tasks one would generally expect a paid employee or business owner to attend to. The trial commissioner reviewed the facts in Ritch where the claimant was a regular guest at a friend's bar and concluded that his activities there such as checking I.D.'s, collecting cover charges and walking dancers to their cars at closing time were tasks one would usually be paid to perform. The trial commissioner in Ritch found the claimant had a work capacity. Given the similarities, we must respect the trial commissioner's conclusion in this case that the claimant had a work capacity.[2]

The trial commissioner also reviewed the expert testimony both parties presented on the claimant's employability. The claimant argues that there were deficiencies in Ms. Durr's report and conclusions based on the fact she did not review medical records. As the claimant views this circumstance, that would make Mr. Cestar's opinions more credible and persuasive as a matter of law. We are not persuaded by this argument. This is not a case similar to Bode v. Connecticut Mason Contractors, The Learning Corridor, 5423 CRB-3-09-2 (March 3, 2010), *aff'd and rev'd in part*, 130 Conn. App. 672 (2011), *cert. denied*, 302 Conn. 942 (2011), where a trial commissioner failed to consider an expert opinion on vocational issues supportive of the claimant. The trial commissioner clearly reviewed and weighed the opinions of both Ms. Durr and Mr. Cestar, both of

[2] Both in his brief and in oral argument, before this tribunal, the claimant has argued that the trial commissioner should have placed greater weight on the fact that he had worked briefly at a Subway restaurant, and was let go. As the claimant views this, this establishes that he lacked the "tenets of employability" required for a work capacity under our law, *citing* Howard v. CVS Pharmacy, Inc., 5063 CRB 2-06-3 (April 4, 2007). While relevant to the determination, we do not find this dispositive. The trial commissioner cited other evidence she found more weighty and probative and we may not reweigh this evidence on appeal. Leandres v. Mark IV Construction, Inc., 5159 CRB-4-06-11 (October 22, 2007).

whom testified at the formal hearing, and found Ms. Durr more credible and persuasive. The trial commissioner in this case was presented with opposing expert witnesses and chose to find the respondent's witness 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.

The claimant also argues that as the trial commissioner found Dr. Sabshin credible, on the issue of pain management treatment, that she should have credited this expert's opinion on the claimant's work capacity. However, we have long held "that it is within the discretion of the trial commissioner to accept some, but not all, of a physician's opinion." Lopez v. Lowe's Home Improvement Center, 4922 CRB-6-05-3 (March 29, 2006). See also, Williams v. Bantam Supply Co., 5132 CRB-5-06-9 (August 30, 2007). The trial commissioner cited both vocational expert testimony and the claimant's narrative about his activities at the Owl's Nest in determining the claimant had a work capacity. We find no error in the trial commissioner's reasoning on this issue.

The claimant needed to prove to the trial commissioner's satisfaction that he was incapable of obtaining a job available in the workforce that he could reasonably perform. Having reviewed such other Osterlund cases such as, Damon v. VNS of CT/Masonicare, 5413 CRB-4-08-12 (December 15, 2009), Franklin v. State/Dept. of Mental Health & Addiction Services, 5224 CRB-8-07-4 (April 11, 2008), and Leandres v. Mark IV Construction, Inc., 5159 CRB-4-06-11 (October 22, 2007), we are not persuaded that the trial commissioner's decision on this issue was in error.[3]

[3] In Franklin v. State/Dept. of Mental Health & Addiction Services, 5224 CRB-8-07-4 (April 11, 2008), we delineated the standard for review in cases dealing with § 31-307 C.G.S. claims. In considering this appeal, we note that we have established a uniform standard for review of cases applying § 31-307 C.G.S. In

We now turn to the issue of the § 31-308a C.G.S. award. We note that the claimant sought to correct this order. The trial commissioner denied the correction but offered a clarification of her reasoning in her decision on that motion (entitled "Motion to Correct/Clarification") issued on November 20, 2012. The trial commissioner stated that "Benefits pursuant to C.G.S. 31-308a are discretionary and the Commissioner has authority to decrease or increase the amount of the weekly benefit to the Claimant. Order to commence October 18, 2012 the date of the Finding and Award." Finding, ¶ 7, Motion to Correct/Clarification.

We concur with the trial commissioner's interpretation of § 31-308a C.G.S. that it is a highly discretionary statute and the trial commissioner may set compensation in a

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Leandres v. Mark IV Construction, Inc., 5159 CRB-4-06-11 (October 22, 2007) we *cited* McMahon v. Emsar, Inc., 5049 CRB-4-06-1 (January 16, 2007).

We begin by stating that 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., 3780 CRB-3-98-2 (June 15, 1999), *aff'd*, 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 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).

Our inquiry must focus on whether the trial commissioner was presented with sufficient evidence to conclude that the claimant had a work capacity. We note at the outset that we have reiterated that it is the claimant's burden to prove that they are totally incapacitated. Hernandez v. American Truck Rental, 5083 CRB-7-06-4 (April 19, 2007). The trial commissioner determined the claimant failed to meet this burden, and we must determine whether this conclusion was "clearly erroneous" by lacking evidence, misapplying the law or reaching an improper inference. Berube v. Tim's Painting, 5068 CRB-3-06-3 (March 13, 2007).

manner that he or she believes is warranted.[4] On appeal, we must ascertain what is the factual predicate for the commissioner's decision in order to affirm such a decision. McFarland v. State/Dept. of Developmental Services, 115 Conn. App. 306, 323 (2009), *cert. denied*, 293 Conn. 919 (2009). If we are unable to ascertain such a basis in the record to support a conclusion we must remand the issue. Tedesco v. Decorator Services, 5693 CRB-4-11-11 (September 27, 2012).

We also note that the parties were not originally placed on notice that § 31-308a C.G.S. benefits were to be considered, but that was resolved by the statements at the hearing wherein the issue was properly placed before the parties as being under consideration. January 23, 2012 Transcript, p. 128 and January 24, 2012 Transcript, p. 3. See Valiante v. Burns Construction Company, 5393 CRB-4-08-11 (October 15, 2009).

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[4] This statute reads as follows:

Sec. 31-308a. Additional benefits for partial permanent disability. (a) In addition to the compensation benefits provided by section 31-308 for specific loss of a member or use of the function of a member of the body, or any personal injury covered by this chapter, the commissioner, after such payments provided by said section 31-308 have been paid for the period set forth in said section, may award additional compensation benefits for such partial permanent disability equal to seventy-five per cent of the difference between the wages currently earned by an employee in a position comparable to the position held by such injured employee prior to his injury, after such wages have been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act in accordance with section 31-310, and the weekly amount which such employee will probably be able to earn thereafter, after such amount has been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act in accordance with section 31-310, to be determined by the commissioner based upon the nature and extent of the injury, the training, education and experience of the employee, the availability of work for persons with such physical condition and at the employee's age, but not more than one hundred per cent, raised to the next even dollar, of the average weekly earnings of production and related workers in manufacturing in the state, as determined in accordance with the provisions of section 31-309. If evidence of exact loss of earnings is not available, such loss may be computed from the proportionate loss of physical ability or earning power caused by the injury. The duration of such additional compensation shall be determined upon a similar basis by the commissioner, but in no event shall the duration of such additional compensation exceed the lesser of (1) the duration of the employee's permanent partial disability benefits, or (2) five hundred twenty weeks. Additional benefits provided under this section shall be available only to employees who are willing and able to perform work in this state.

(b) Notwithstanding the provisions of subsection (a) of this section, additional benefits provided under this section shall be available only when the nature of the injury and its effect on the earning capacity of an employee warrant additional compensation.

However, the issue does not appear to have been further addressed by the parties at the hearing. The claimant points to a recommended order issued at the September 29, 2010 informal hearing as governing the issue of § 31-308a benefits; however, it does not appear either party cited this prior decision at the formal hearing. The claimant's trial brief does not reference this issue. The respondents' brief briefly cites § 31-308a in opposing such relief, but noted that if such relief was ordered "his C.G.S. 31-308a compensation rate should still be reduced because he at least has an ability to maintain a minimum wage position for 40 hours per week. The current minimum wage in Connecticut is $8.25 per hour, meaning the claimant has the ability to earn a minimum average weekly wage of $330.00 per week at a sedentary position. This would lead to a compensation rate of $221.84. Consequently, the post specific benefits the claimant would be entitled to, if any, should be reduced by a minimum of $221.84 per week." Respondents' Trial Brief, p. 10, dated March 30, 2012.

The trial commissioner certainly was entitled to accept the respondent's position on this issue and it appears based on the Motion to Correct/ Clarification that she adopted their position. However, the basis for this relief was solely based on a litigant's trial brief, and not testimony on the record. Therefore, we believe that the precedent in McCarthy v. Hartford Hospital, 108 Conn. App. 370 (2008) requires the commissioner to offer a more substantive rationale for her decision.

> In determining the duration and amount of such award, the commissioner is *required* to consider the nature and extent of the injury, the training, education and experience of the employee [and] the availability of work for persons with such physical condition and at the employee's age . . . . (Internal quotation marks omitted.) *Bowman* v. *Jack's Auto Sales*, 54 Conn. App. 289, 295, 734 A.2d 1036 (1999).

Id., 376. (Emphasis added.)

We believe a more thorough discussion of the rationale behind the § 31-308a C.G.S. award was warranted when the underlying record on this issue was so limited. An articulation of this issue, and the opportunity of both parties to suggest appropriate relief, would appear to be appropriate based on the holdings of McCarthy and McFarland.

We affirm the trial commissioner's Finding and Orders with the exception of the order of § 31-308a C.G.S. benefits. That issue is remanded to the trial commissioner for further proceedings.

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