CASE NO. 5822 CRB-1-13-2 : COMPENSATION REVIEW BOARD
CLAIM NO. 100171898

HOWARD VALLIER
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: FEBRUARY 21, 2014

CUSHMAN & WAKEFIELD
EMPLOYER

and

CHARTIS CLAIMS, INC.
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

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

The respondents were represented by Lynn M. Raccio, Esq., Law Offices of Jack V. Genovese, II, 200 Glastonbury Boulevard, Suite 301, Glastonbury, CT 06033.

This Petition for Review from the January 29, 2013 Finding and Award in Part/And Dismissal in Part of the Commissioner acting for the First District was heard August 30, 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 a Finding and Award in Part/And Dismissal in Part. He argues that the trial commissioner improperly denied his claim for total disability benefits. We find that based on the record presented at the formal hearing the trial commissioner could have reasonably concluded the claimant had not met his burden of proof on this issue. We affirm the trial commissioner's decision, except on the issue of medical treatment. We find the Commissioner should have granted correction number 4 of the Motion to Correct and Request for Clarification of the Trial Decision Dated January 29, 2013, and so amend the Finding to incorporate this correction.

This matter emanates from a compensable injury the claimant sustained on February 25, 2009 wherein the claimant fell off a ladder while working for the respondent Cushman & Wakefield. The parties have stipulated to this injury, as well as to the claimant's compensation rate, date of maximum medical improvement, and to an 18% permanent partial disability to the claimant's cervical spine. The claimant testified at the formal hearing as to the circumstances of the injury and to his duties over 40 years as an electrician for Cushman & Wakefield and the previous firms that were responsible for maintenance of the building where he worked. The claimant also testified as to his medical treatment subsequent to the injury from his treating physician, Dr. Andrew Wakefield, who performed cervical fusion surgery on him shortly after his injury. He testified as well to treating with a number of other medical professionals. The claimant testified as to his return to work after the injury, as well as his duties subsequent to the

injury. He also testified as to his present condition, saying that he had problems with headaches, dizziness and balance. He also testified that he had made job searches, had been approved for social security disability benefits, and now believed that he was unable to work due to his 2009 compensable injury.

Counsel for the claimant introduced the claimant's medical records into evidence. These records included the admission report to Hartford Hospital on the day of the claimant's injury as well as Dr. Wakefield's operative and post-operative notes, x-rays, an MRI of the claimant's cervical spine and the hospital's discharge report.

The trial commissioner also noted the reports of Dr. Subramani Seetharama and Dr. Sarah Tartar. On May 11, 2010 Dr. Seetharama examined the claimant and opined that the patient's problems were mechanical in nature and he did not seem to have any residual myelopathic symptoms. He recommended that the claimant undergo physical therapy and subsequently recommended a neuropsychological examination by Dr. Tartar. Dr. Tartar performed this examination on July 25, 2011. She concluded that the claimant's maladaptive coping style was likely contributing to his clinical posture and masking any true underlying cognitive deficits. She noted that while the clamant was friendly and cooperative he performed very poorly on tests assessing attention, concentration and motivation, and the results of the assessment were not thought to be an accurate assessment of his current cognitive functioning. She further suggested the claimant was trying to represent himself in a very negative light.

Dr. Seetharama also issued two other reports the trial commissioner noted. On October 11, 2011 Dr. Seetharama noted he reviewed the claimant's neuropsychological assessment from a "head injury, mild TBI concussion standpoint" and "[i]t was felt that

most of the [his] complaints were [with] physiological [psychological] related to his preoccupation with the somatic complaints." Findings, ¶ 12. In his December 1, 2011 report Dr. Seetharama opined that the claimant was "permanently and completely disabled from performing any meaningful kind of work secondary to his myelopathy, residual balance issues and high risk to fall." Findings, ¶ 13.

The trial commissioner also noted a variety of other medical reports concerning the treatment of the claimant, as well as an adult disability report prepared for Social Security, a medical definition of myelopathy and the claimant's 2011 unemployment compensation records. The trial commissioner also noted the report of Dr. Jarob Mushaweh dated May 9, 2012 and the transcript of Dr. Mushaweh's deposition, which was held on June 7, 2012. The commissioner noted that Dr. Mushaweh indicated in his report that he concurred with Dr. Wakefield as to the claimant's level of permanent partial disability and opined that the claimant sustained a cervical spine fracture with secondary radiculopathy which had been helped after the surgical procedure. Dr. Mushaweh opined the claimant had not sustained myelopathy and further opined that the claimant had a work capacity if he avoided prolonged extension of his cervical spine.

Based on those subordinate facts the trial commissioner reached conclusions as to the claimant's compensation rate; which are not germane to this appeal. He found <u>most</u> of the claimant's testimony to be credible and persuasive. (Emphasis in original.) Conclusion, ¶ F. He did not find the claimant's testimony credible and persuasive as to his claim that he was totally disabled. The commissioner found Dr. Mushaweh's opinion that the claimant did not have myelopathy credible and persuasive. The commissioner did not find Dr. Seetharama's opinion credible and persuasive that the claimant suffers

from cervical myelopathy or that the claimant was permanently and totally disabled. The trial commissioner found Dr. Tartar's opinion that the claimant's claim of dizziness and balance were not substantiated nor causally related to the compensable injury in 2009 as persuasive and was also persuaded as to her opinion that the claimant's presentation of those issues was not credible. The commissioner found Dr. Mushaweh's opinion that the claimant had a restricted work capacity credible and ordered the respondent to pay the claimant benefits pursuant to § 31-308a C.G.S. He also found Dr. Mushaweh's opinion that the claimant needed no additional treatment persuasive and credible. Finding that the claimant had not proved that he was entitled to temporary total disability benefits the trial commissioner dismissed the claim for these benefits.

The claimant filed a Motion to Correct and Request for Clarification of the Trial Decision Dated January 29, 2013 to find that the medical evidence in this case supported the award of temporary total disability benefits pursuant to the precedent in Osterlund v. State, 135 Conn. 498 (1949). The trial commissioner denied this motion in its entirety. The present appeal was then pursued.

The claimant argues on appeal that the trial commissioner mischaracterized the medical testimony presented at the hearing. He also argues that the evidence would support a finding that he sustained a concussion at the time of his injury and subsequently suffered from myelopathy. He further argues that as he had not found employment since his injury that pursuant to precedent in Howard v. CVS Pharmacy, Inc., 5063 CRB-2-06-3 (April 4, 2007) and Covaleski v. Casual Corner, 4419 CRB-1-01-7 (June 27, 2002) supports his bid for temporary total disability benefits. We do not find these arguments persuasive.

The standard of deference we are obliged to apply to a trial commissioner's findings and legal conclusions is well-settled. "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 could have reasonably concluded as it did." Burton v. Mottolese, 267 Conn. 1, 54 (2003). "This presumption, however, can be challenged by the argument that the trial commissioner did not properly apply the law or has reached a finding of fact inconsistent with the evidence presented at the formal hearing." Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

In Rohmer v. New Haven, 5811 CRB-3-12-12 (December 23, 2013), we restated the black letter law regarding a claim for temporary total disability benefits.

> The burden is on the claimant to demonstrate he or she is entitled to temporary total disability benefits. Hernandez v. American Truck Rental, 5083 CRB-7-06-4 (April 19, 2007). The probative evidence herein, which included opinions from treating physicians, that the claimant had a work capacity, convinced the trial commissioner that the claimant did not prove her case. We cannot reverse such a decision on appeal.

Id.

The claimant argues that he sustained a concussion at the time of the initial injury and that the circumstances of the accident are such that it is a matter of lay knowledge that a fall off a ladder can cause a concussion. While we may find some injuries may be established without an expert opinion, see Lee v. Standard Oil of Connecticut, Inc., 5284

CRB-7-07-10 (February 25, 2009) in general a trial commissioner may not find a claimant sustained a specific ailment in the absence of such an opinion. Murchison v. Skinner Precision Industries, Inc., 162 Conn. 142 (1972) stands for the proposition that when an injury is not easily identified by a lay person that it is necessary to rely on an expert medical opinion. Id., 152. In addition, we are mindful of the precedent in DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132 (2009) where the Supreme Court directed this Commission not to rely on medical opinions which are grounded in speculation or conjecture.

We have reviewed the medical records which were generated contemporaneously with the claimant's injury. Those reports do not document that the claimant sustained a concussion, and the claimant's head injury was described as a bruise or an abrasion. The medical treatment subsequent to the claimant's injury was responsive to an identified cervical spine fracture. We believe that pursuant to the precedent in Murchison and DiNuzzo the trial commissioner could reasonably conclude in the absence of documentation from a medical expert that there was insufficient probative evidence that the claimant sustained a concussion.

The claimant also argues that he is suffering from myelopathy and that the trial commissioner erred in concluding to the contrary. He notes that in a December 1, 2011 report Dr. Seetharama said the claimant was totally disabled from work secondary to his myelopathy. Findings, ¶ 13. This witness reiterated this opinion as to cervical myelopathy in a January 4, 2012 report. Claimant's Exhibit, ¶ D. The claimant believes the trial commissioner had no reason not to credit this opinion, as he believes that the testimony of Dr. Mushaweh was too equivocal to merit reliance. The trial commissioner

was not persuaded by this argument, and we must review the opinions of Dr. Mushaweh to ascertain if that was a reasonable conclusion.

Dr. Mushaweh examined the claimant on May 9, 2012. After examining the patient and reviewing the records pertaining to his treatment, Dr. Mushaweh opined "[i]n my opinion Mr. Vallier has no myelopathy." Dr. Mushaweh was deposed on June 7, 2012. Early in his deposition he opined directly on this issue.

> Attorney Raccio: What is myelopathy?
>
> Dr. Mushaweh: Myelopathy is what we call, it's a clinical entity where the spinal cord is affected, affected either by being bruised, contused, or even compressed by either a fragment of bone, in case of fracture, or big, large herniated disc with compression of the spinal cord.
>
> Attorney Raccio: So how would someone make a finding or a diagnosis of myelopathy?
>
> Dr. Mushaweh: It's easy: examine the patient. And this gentleman didn't have myelopathy. Nor did his MRI scan show he should have myelopathy.

Claimant's Exhibit, ¶ O, pp. 7-8.

Later in the deposition counsel asked Dr. Mushaweh as to Dr. Seetharama opining that the claimant had myelopathy. Dr. Mushaweh reiterated that the claimant did not have that condition and further opined that were he to have had that condition additional surgery would have been indicated rather than treatment with medications. Id., p. 11.

On cross-examination Dr. Mushaweh noted that the claimant's original treating physician, Dr. Wakefield, did not identify the claimant suffering from myelopathy. Id., p. 27. After counsel for the claimant discussed the limited post-surgical change of motion of the claimant's neck with Dr. Mushaweh, he reiterated his opinion that this

would not have been the cause of the claimant having myelopathy, nor would it have been an indicia of myelopathy. Id., pp. 36-38.

The claimant argues that Dr. Seetharama's opinions as to the claimant suffering myelopathy were weightier and should have been credited in this matter. The trial commissioner deemed Dr. Mushaweh more credible and persuasive. We do not find reliance on this witness constitutes reversible error. As we held in Champagne v. O. Z. Gedney, 4425 CRB-5-01-8 (May 16, 2002), a trial commissioner has broad latitude in determining what medical testimony he or she finds probative and reliable.

> In matters such as these, it was up to the trial commissioner to determine which (if any) of the physicians who examined the claimant provided the most reliable testimony or documentary evidence. Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999); Warren v. Federal Express Corp., 4163 CRB-2-99-12 (Feb. 27, 2001). In doing so, the trier was entitled to accept all, part or none of any given doctor's medical opinion. Tartaglino, supra; Donaldson v. Duhaime, 4213 CRB-6-00-3 (April 30, 2001). This board does not have the power to disturb such a finding on appeal, unless the facts found are without any support in the evidence. Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988); Warren, supra.

Id.[1]

We find that this was essentially a "dueling expert" case and in these matters we defer to the determination of the trial commissioner as to which medical expert he or she finds reliable. Dellacamera v. Waterbury, 4966 CRB-5-05-6 (June 29, 2006), n.1. See also Strong v. UTC/Pratt & Whitney, 4563 CRB-1-02-8 (August 25, 2003), "[i]f on

[1] We note that in Vaughan v. North Marine Group, 5695 CRB-4-11-11 (January 4, 2013) the claimant also expressed dissatisfaction with the trial commissioner's reliance on Dr. Mushaweh's opinions. We found no error and affirmed the trial commissioner's decision in that matter.

review this board is able to ascertain a reasonable diagnostic method behind the challenged medical opinion, we must honor the trier's discretion to credit that opinion above a conflicting diagnosis."

This analysis is largely dispositive of the argument that the claimant proved that he was totally disabled pursuant to an Osterlund theory of disability. 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 trial commissioner was not persuaded by the claimant. The commissioner specifically cited Dr. Mushaweh's opinion that the claimant had a work capacity, albeit restricted. Conclusion, ¶ M. Dr. Mushaweh opined in his May 9, 2012 report that after examining the claimant, "I see no reason that he cannot return to the workforce. With the exception of avoidance of prolonged extension of his cervical spine, the patient can now return to work in his usual capacity." Dr. Mushaweh did appear to suggest that the claimant's present work capacity was somewhat restricted when he was deposed on June 7, 2012. See Claimant's Exhibit, ¶ O, pp. 39-40. Dr. Mushaweh did suggest that certain exercises or therapies would be beneficial, id., pp. 40-43, but also opined that he could return to work in a short amount of time. Id., p. 43. On redirect examination Dr. Mushaweh reiterated that the claimant had a work capacity. Id., p. 45. On re-cross examination Dr. Mushaweh suggested that if the claimant underwent treatment he could return to work on a gradual basis. Id., p. 49. On re-re-direct examination Dr. Mushaweh reiterated his opinion that at the time of his examination of the claimant on May 9, 2012 that the claimant had a work capacity. Id., p. 51.

We note that when a trial commissioner found an expert opinion that a claimant had a work capacity persuasive and reliable, we have upheld that determination even when the claimant argued that the restrictions were onerous. See Clarizio v. Brennan Construction Company, 5281 CRB-5-07-10 (September 24, 2008) and Leandres v. Mark IV Construction, Inc., 5159 CRB-4-06-11 (October 22, 2007). A review of the totality of Dr. Mushaweh's testimony indicates that the major restriction on the claimant's work capacity involves the avoidance of extending his neck. The trial commissioner in our view could reasonably find that this did not reach the level that "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." Osterlund, supra, 506.

The claimant argues that the trial commissioner's decision in this case is inconsistent with the precedent in Howard, supra, and Covaleski, supra. We can easily distinguish those cases from the present case. In both cases the claimant persuaded the trial commissioner that he or she lacked a work capacity and this appellate tribunal upheld that factual finding. In both cases the claimant presented vocational evidence that the trial commissioner found persuasive that supported a finding that the claimant met the standards delineated in Osterlund. In Howard, the claimant also provided evidence that she attempted to re-enter the work force and had been unsuccessful as she was unable to meet the "tenets of employability" required in the work force such as being available to work in a reliable manner. The record herein is bereft of this type of evidence. Instead, the record consists of the claimant's testimony and the reports of medical experts.[2]

[2] The record states that the claimant testified that he had been laid off from his job in August 2010 because his employer lost the contract to do maintenance where he was working. June 26, 2012 Transcript, p. 44. The claimant testified that he had looked for work at some job fairs and at some big box retailers, id., pp.

We now turn to the denial of the claimant's Motion to Correct and Request for Clarification. The trial commissioner is not obligated to adopt the legal opinions and factual conclusions of a litigant. Liano v. Bridgeport, 4934 CRB-4-05-4 (April 13, 2006) and D'Amico v. Dept. of Correction, 73 Conn. App. 718 (2002). A trial commissioner may also conclude the evidence he or she chose not to cite in his or her Findings was not deemed probative. Vitti v. Richards Conditioning Corp., 5247 CRB-7-07-7 (August 21, 2008). A trial commissioner is also not obligated to clarify his or her reasoning in the Finding, as we held in Biehn v. Bridgeport, 5232 CRB-4-07-6 (September 11, 2008).

Nonetheless, as we held in Vitti, supra, "a Motion to Correct is the proper vehicle for a party to have the trial commissioner reconsider his ultimate conclusions in light of the factual evidence provided." In Conclusion, ¶ O of the Finding, the trial commissioner found as follows. "I find the position of Dr. Mushaweh credible and persuasive that no additional treatment is needed or warranted in regards to the Claimant's February 25, 2009 injury." In Correction, ¶ 4 of the Motion to Correct and Request for Clarification of the Trial Decision Dated January 29, 2013 the claimant sought to modify this conclusion to conform to what he believed Dr. Mushaweh testified to on this issue. The proposed correction said "Dr. Mushaweh is of the opinion that the claimant will need to undergo therapy for his neck including massage, ultrasound and TENS unit."

45-46, but also testified that neither the insurance carrier nor his former employer asked for documentation as to his job search. Id., pp. 96-97. We note that in a case involving § 31-308(a) C.G.S. benefits, Marino v. Cenveo/Craftman Litho, Inc., 5448 CRB-5-09-3 (March 16, 2010) we noted we must respect the factual determination of a trial commissioner if he determines that the claimant's loss of earnings are due to economic conditions, and not due to the claimant's medical condition. In the present case the claimant had the burden of persuasion on the question as to whether he was unable to obtain employment due to his compensable injury. We find the trial commissioner could reasonably find he had not met this burden.

We have reviewed the testimony of Dr. Mushaweh cited by the claimant in his Motion to Correct and Request for Clarification of the Trial Decision Dated January 29, 2013. The witness did not opine additional medical treatment was unwarranted. The testimony of Dr. Mushaweh, when reviewed in its totality, was supportive of additional medical treatment. Claimant's Exhibit, ¶ O, pp. 40-52. While the witness said the claimant had some work capacity at this time, he also suggested he undergo a functional capacity evaluation. Id.

We have delineated a deferential standard of review as to whether a trial commissioner is obligated to grant a correction to a Finding. Vitti, supra. When a Motion to Correct seeks to change the Finding to conform to the evidence on the record, we have affirmed granting such a correction. Rizzo v. Stanley Works/Hand Tools Division, 5106 CRB-6-06-6 (November 21, 2007). In regards to Correction, ¶ 4 sought by the claimant, the uncontroverted evidence found persuasive and credible by the trial commissioner supports the correction. We believe it was error not to have granted this correction and herein incorporate it into the Finding as affirmed herein. The denial of the balance of the claimant's Motion to Correct and Request for Clarification of the Trial Decision Dated January 29, 2013 is herein affirmed.

In Damon v. VNS of CT/Masonicare, 5413 CRB-4-08-12 (December 15, 2009), we restated the standard for total disability under Chapter 568. "As we previously explained in Leandres, supra, it is a factual determination whether a claimant is unable to earn money 'in any occupation he may reasonably pursue.'" The trial commissioner found expert testimony that the claimant in this case had a work capacity persuasive and credible; in the same manner as the trial commissioner in Damon found the expert

opinion as to employability persuasive and credible. We are obligated to affirm his finding.

The Finding and Award in Part/And Dismissal in Part is herein affirmed, with the exception of amending Conclusion, ¶ O to properly reference Dr. Mushaweh's position on the claimant's medical treatment. Commissioners Charles F. Senich and Peter C. Mlynarczyk concur in this opinion.