

CASE NO. 5835 CRB-4-13-5
CLAIM NO. 400080997

: COMPENSATION REVIEW BOARD

PEDRO L. TOSADO
CLAIMANT-APPELLANT

: WORKERS' COMPENSATION
COMMISSION

v.

: MARCH 3, 2014

B. LIPNICK SUPPLY COMPANY, INC.
EMPLOYER

and

THE HARTFORD INSURANCE
GROUP
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant appeared without legal representation at oral argument. At the trial level, the claimant was represented by Andrew E. Wallace, Esq., Carter Mario Injury Lawyers, 158 Cherry Street, Milford, CT 06460.

The respondents were represented by Jason E. Indomenico, Esq., The Law Offices of David J. Mathis, 150 Cogswell Street, Second Floor, Hartford, CT 06105.

This Petition for Review from the Finding and Dismissal of the Commissioner acting for the Fourth District was heard October 25, 2013 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Peter C. Mlynarczyk and Stephen B. Delaney.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. It is black letter law that a claimant cannot prevail before this Commission if he or she cannot persuade the trial commissioner that their medical condition is the result of an injury or illness sustained in the course of their employment. The claimant in this case argued that his gangrene and subsequent need for a leg amputation was sustained as the result of an injury at work. The trial commissioner was not persuaded that occurred. Based on our review of the evidence, the trial commissioner had a reasonable basis to reach this conclusion. We cannot reverse such a decision on appeal. We affirm the Finding and Dismissal.

The trial commissioner reached the following factual findings at the conclusion of the formal hearing. The claimant had been employed as a delivery driver for the respondent from 1998 until August 2010. The claimant testified that on June 17, 2010 he injured his leg and foot lifting a boiler onto a truck at work. He said the crate hit his shin and foot, causing scratches. He said he stopped loading the truck and immediately advised a supervisor, Lee Hegley, that he was injured, and offered to pull down his pants to show him the injury. Mr. Hegley declined to view the injury and told him to wait until the company's owners, Jacqueline Garelick and Sharon Krasner arrived, so he could inform them of the injury. The claimant said he was out of work with a cold on June 15, 2010 and June 16, 2010 and returned to work the day he was injured.

The commissioner noted that medical records of St. Vincent's Medical Center showed the claimant was admitted on June 23, 2010 after being found on his apartment floor by his parents. The claimant was diagnosed with necrotizing fasciitis with dry

gangrene in the left lower leg; which was taken with a left lower above-the knee amputation. The claimant was then sent to the intensive care unit to monitor and care for uncontrolled diabetes.

The physician who treated the claimant at St. Vincent's Medical Center, Dr. Anthy Demestihis, testified via deposition. She testified the claimant arrived at the hospital in septic shock due to gas gangrene and necrotizing fasciitis with gas in the tissue itself, and was close to death. An immediate amputation was performed and the wound was washed out and closed two days later. She testified the claimant actually had wet gangrene, not dry gangrene, and the hospital records were inaccurate on that point. She testified wet gangrene is an acute infection that develops in a relatively short period of time of less than 10 or 14 days, and dry gangrene is an infection that looks like a scab and develops over months. She said the most common way to have gas gangrene is through a break in the skin, whether from a traumatic injury to a puncture from walking barefoot; and there was no other way to contract the infection. She identified the claimant's gas gangrene at a point six centimeters above the ankle joint and as gangrene travels upwards in blood vessels, opined the likely entry point was on the bottom of the claimant's foot. She could not locate an entry point on the claimant's foot however, due to its diseased condition.

She further testified that when the claimant regained consciousness the claimant said he was injured at work stepping on a gas pedal, to the best of her recollection. He offered a vague date of injury about two or three weeks before being admitted to the hospital. She said the description of the injury on the claimant's Form 30C was not consistent with what the claimant said at the hospital, as a break on the front of the

claimant's leg or shin would have been obvious. She said scratches would not cause the claimant's injury, but swelling and bruises could. She also noted that while diabetics are more prone to get a progressive infection that diabetes alone is not a cause of gas gangrene. She concluded that the claimant's infection and amputation were due to a work related accident, but said this opinion was based on the claimant's narrative after he regained consciousness.

The claimant's treating internal medicine physician, Dr. Wayne Levin, testified on September 24, 2012 that he had treated the claimant for diabetes since July 28, 2006. He said the claimant was not compliant with the recommended treatment and his diabetes was uncontrolled. He last saw the claimant on March 26, 2010 at which time the claimant's diabetes was not under control. He testified that the claimant had dry gangrene, which may have led to the infection and eventual amputation.

The trial commissioner also noted the testimony of the claimant's current treating physician, Dr. Adrian Klufas, who did not offer an opinion of whether the claimant's infection and amputation were the result of a work-related injury. The commissioner also noted the testimony of two fact witnesses produced by the respondent. Lee Hegley testified that he was the claimant's supervisor and the claimant called in sick on June 15 and June 16, 2010. He asked the claimant to come in the following day to deal with deliveries that were backing up. The claimant came into work on June 17 and did not look good, and told Mr. Hegley he was weak. Mr. Hegley assigned a co-worker, Carmelo Colon, to load the truck for the claimant and go on the delivery. The claimant told Mr. Hegley that his back hurt and his groin area hurt, and he offered to pull down his pants to show where his groin hurt, not his leg. Ms. Garelick also testified as to the

events of June 17, 2010 and said the claimant never reported a foot or leg injury to her or her sister on that date, although there was a company policy to report an injury to an owner. Ms. Garelick said that at the end of his deliveries on June 17, 2010 the claimant indicated he had a hernia type injury to his abdomen and she told him to have it treated.

Based on this record the trial commissioner concluded the claimant was not credible. He found Dr. Levin's testimony that the claimant had uncontrolled diabetes persuasive. He found Dr. Demestihis' opinions persuasive on the issue of the claimant's gas gangrene was developed through a break in the skin and as it was six centimeters above his ankle, the likely entry point was on the bottom of the claimant's foot. He did not find her opinion as to the causation of the claimant's injury persuasive as it was based on the claimant's narrative. The commissioner found no evidence the claimant sustained a puncture wound on the bottom of his foot, nor any evidence the claimant sustained a leg injury by being struck in the leg by a pipe or a boiler. As the claimant failed to prove that the amputation of his lower left leg was causally related to his employment, the trial commissioner dismissed his claim.

The claimant did not file a Motion to Correct this decision, but did file a timely Petition for Review to this tribunal. While the claimant was represented by counsel at the formal hearing, he is representing himself on the appeal. He has submitted as documentary support for his appeal some information on the Americans with Disabilities Act and the Drug-Free Workplace Act. He has also attached various medical records and the deposition transcript of Dr. Demestihis which he says supports his bid for benefits in this matter. At oral argument before this tribunal, he argued that the trial commissioner

failed to properly credit medical evidence supportive of his claim, and the evidence on the record supported a finding of compensability.

We note that the claimant did not file a Motion to Correct the Finding and Dismissal. Therefore, pursuant to Crochiere v. Enfield/Board of Education, 227 Conn. 333, 347 (1993); Stevens v. Raymark Industries, Inc., 5215 CRB-4-07-4 (March 26, 2008), *appeal dismissed*, A.C. 29795 (June 26, 2008) and Damon v. VNS of CT/Masonicare, 5413 CRB-4-08-12 (December 15, 2009), we must accept the validity of the facts found by the trial commissioner in this matter. We are limited on appeal to determining if any probative evidence supports the trial commissioner's finding and as to how the trial commissioner applied the law.

We note that the trial commissioner specifically determined that he did not find the claimant a credible witness and did not find that the claimant sustained an injury at work by being struck by a boiler or a pipe. As an appellate body, we are not in a position to overturn the credibility determination of the trial commissioner. See our opinion in Toroveci v. Globe Tool & Metal Stamping Co., Inc., 5253 CRB-6-07-7 (July 22, 2008).

The trial commissioner concluded that the claimant failed to prove his case as a result of his testimony not being credible or persuasive. When the issue of credibility governs a trial commissioner's decision, our appellate power of review is limited even further.

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).

A claimant's credibility also bears heavily on whether medical testimony reliant on his or her narrative is to be given weight by the trial commissioner. When a trial commissioner does not find the claimant credible, the commissioner is entitled to conclude any medical evidence which relied on the claimant's statements was also unreliable. See 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); Baker v. Hug Excavating, Inc., 5443 CRB-7-09-3 (March 5, 2010) and Do v. Danaher Tool Group, 5029 CRB-6-05-12 (November 28, 2006). The trial commissioner found some of Dr. Demestihis' opinions persuasive but did not credit her opinion as to the claimant sustaining a work injury and this being the cause of the claimant's amputation. It is black letter law that a trial commissioner can reach this conclusion. "We have held that it is within the discretion of the trial commissioner to accept some, but not all, of a physician's opinion." See Williams v. Bantam Supply Co., 5132 CRB-5-06-9 (August 30, 2007) and Lopez v. Lowe's Home Improvement Center, 4922 CRB-6-05-3 (March 29, 2006). We find the trial commissioner could reasonably have decided based on finding the claimant's narrative of events not credible, that Dr. Demestihis' opinion on causation was unreliable. See Abbotts, *supra*.

As a result the trial commissioner did not commit error when he decided not to rely on the treating physician's opinion as to causation in this matter. This matter is in many ways similar to Torres v. New England Masonry Company, 5289 CRB-5-07-10 (January 6, 2009). In both cases the claimant presented evidence from his treating

physician that a condition that he developed was caused by an incident at work. In both cases the trial commissioner provided a rationale in the Finding and Dismissal why he chose not to credit this evidence.¹ See Torres, supra.

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); Lentini v. Connecticut College, 4933 CRB-2-05-4 (May 15, 2006). The claimant proffered probative evidence his hip condition was the result of work injuries; see e.g. Claimant's Exhibit A; but also needed to persuade the trial commissioner that his evidence was persuasive. .

Id.

The claimant in the present case failed to persuade the trial commissioner.^{2 3}

After review of the record we believe the commissioner could reasonably have reached this conclusion. As a result, we conclude the trial commissioner's determination was a reasonable exercise of his discretion.

We affirm the Finding and Dismissal.

¹ In Torres v. New England Masonry Company, 5289 CRB-5-07-10 (January 6, 2009) the trial commissioner concluded that the evidence was that the claimant's avascular necrosis was "idiopathic" i.e. of unknown causation. In the present case the trial commissioner essentially reached the same conclusion as to the claimant's injury by discounting the claimant's theory of causation but not finding any alternative theory fully persuasive.

² The claimant has submitted among the documentation supporting his appeal a deposition transcript of Dr. Demestihias. We find that the trial commissioner admitted this document as Respondent's Exhibit 1, and it was considered at the formal hearing and cited by claimant's counsel in his Proposed Findings of Fact. We are not in a position as an appellate body to reweigh the evidence considered by the trial commissioner. Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 451 (2001). The claimant has also included various cases and materials pertaining to the Americans with Disabilities Act. These documents do not refer to Chapter 568 and the claimant has not persuaded us that this material is germane to the issues considered by the trial commissioner herein.

³ The trial commissioner made no finding as to the credibility and persuasiveness of the other witnesses who testified at the formal hearing, Ms. Garelick and Ms. Gyorke. We note the trial commissioner cited Ms. Garelick's testimony that the claimant did not report sustaining any leg or foot injury on the day he claimed to have been hurt; and instead reported a hernia-type injury. See Findings, ¶ 8. We conclude that her testimony was deemed sufficiently persuasive to refute the claimant's testimony that he sustained a foot or leg injury and reported it to his superiors.

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