

CASE NO. 5843 CRB-1-13-5
CLAIM NO. 100179085

: COMPENSATION REVIEW BOARD

ELIZABETH HADDEN
CLAIMANT-APPELLEE

: WORKERS' COMPENSATION
COMMISSION

v.

: MAY 20, 2014

CAPITOL REGION EDUCATION
COUNCIL
EMPLOYER
SELF-INSURED

and

WORKERS' COMPENSATION TRUST
ADMINISTRATOR
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by Richard T. Stabnick, Esq., Pomeranz, Drayton & Stabnick, LLC, 95 Glastonbury Boulevard, Suite 216, Glastonbury, CT 06033-4453. At the trial level the claimant was also represented by Lawrence Brick, Esq., 433 South Main Street, Suite 102, West Hartford, CT 06110.

The respondents were represented by Kristen Sotnik Falls, Esq., Letizia, Ambrose & Falls, PC, 667-669 State Street, Second Floor, New Haven, CT 06511.

Also in attendance at oral argument was Christopher Foley, Esq., 3000 Whitney Avenue, Suite 103, Hamden, CT 06518 on behalf of Prosight Specialty Insurance.

This Petition for Review¹ from the May 3, 2013 Finding and Award of the Commissioner acting for the First District was heard November 22, 2013 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Charles F. Senich and Peter C. Mlynarczyk.

¹ We note that extensions of time were granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The present appeal requires our panel to consider issues related to compensable injuries that occur to workers who have pre-existing medical conditions. The claimant suffers from Multiple Sclerosis and sustained a compensable injury when in the course of her employment as a school teacher she was physically assaulted by a student. She claims her current medical condition and her present lack of a work capacity are the sequelae of that incident. The trial commissioner accepted this belief and at the conclusion of the formal hearing awarded the claimant benefits in a Finding and Award dated May 3, 2013. The respondents have appealed, arguing that the claimant's current medical condition is the result of the progression of her pre-existing condition and, in the alternative, that benefits should be apportioned between the effects of the compensable injury and the effects of the claimant's pre-existing condition. We find that the trial commissioner had a sufficient quantum of probative evidence to sustain the Finding and Award. We further find the decision was in accordance with binding precedent such as Gartrell v. State/Dept. of Correction, 259 Conn. 29 (2002). We affirm the Finding and Award.

The following facts are pertinent to our consideration of this appeal. The claimant testified that she has a Master's degree and was employed by the respondent Capitol Region Education Council as a physical education teacher. On October 8, 2010 she was working at the Metropolitan Learning Center in Bloomfield. She testified that, in August of 2001, she was diagnosed with Multiple sclerosis and had been treating for that illness since that time. She also testified as to the multiple physical problems and multiple injuries she suffered prior to her injury of October 8, 2010. Those injuries included, but

were not limited to, surgeries to both shoulders, both legs and both hips. The claimant also testified that she had a pump inserted into her spinal cord as part of her Multiple sclerosis treatment. She testified that her form of Multiple sclerosis is described as relapsing/remitting which would cause her to experience exacerbation of her symptom and it primarily had affected her lower extremities. She testified that her Multiple sclerosis did not interfere with her employment and that she was extremely active even with her condition and taught her classes five days a week at her school.

The claimant further testified as to her treatment with Dr. Peter Wade, who had been treating her since 2009, and with Dr. Matthew Raymond. She testified that her normal Multiple sclerosis treatment was to see Dr. Wade and Dr. Raymond periodically, and that she would get an MRI every six months in regards to her brain and spine. She also testified she had not been advised of the progression of her Multiple sclerosis prior to October of 2010. She testified as to what she could best recall of the incident of October 8, 2010; that it was on a Friday; that she had picked up a friend and drove in to work; that she conducted her classes upstairs; that she had not used a cane that day; and that after her classes were done she went downstairs and assisted in conducting testing with Mr. Christopher Glowacki, her co-teacher. When classes concluded she went to open the girls locker room. At that point someone advised her of a fight between two students and she went to break up the fight. She testified when she got on top of the student to protect him, she was hit in the jaw and fell backwards and hit her head. She testified she was taken by ambulance to St. Francis Hospital and hospitalized for nine weeks after this incident. She testified she was intubated during her hospitalization. She also testified she suffered from headaches, blurred vision, very bad double vision, a

dislocated jaw and difficulty with her left arm and left foot which came on instantaneously. She testified this was unlike her previous Multiple sclerosis exacerbations which came on gradually. She testified that after the assault she had clouds over both eyes, a loss of sense of balance, difficulty walking and difficulty with equilibrium. These conditions caused her to be unable to work and unable to maintain an independent lifestyle.

Mr. Glowacki and Anne McKernan, who was the principal at Metropolitan Learning Center at the time of the incident, also testified as to the claimant's activities while employed by the respondent. Mr. Glowacki testified that he knew the claimant well and had attended her wedding. He testified that at the time of the October 8, 2010 incident he observed Ms. Hadden standing over her student in a prone position protecting the student from being hit by another student and testified as to the circumstances subsequent to breaking up the fight. Ms. McKernan testified she interviewed the students involved in the incident, concluding that Ms. Hadden had an injury and had suffered at least one blow to the head. She testified the claimant appeared nauseated following the incident, but that no one reported to her that they had seen Ms. Hadden experience any type of physical problems on the morning of October 8, 2010 prior to the incident. Ms. McKernan further testified the claimant had been an excellent teacher prior to her injury and had not requested a change in her classroom duties or floors.

Three medical witnesses testified either at the formal hearing or by way of deposition: the claimant's treating physicians and an expert witness for the respondents, Dr. Kimberlee Sass. Dr. Sass testified that he has a Ph.D. in Clinical Psychology and has been in private practice of neuropsychology since 1998. He testified he completed a one-

year semi-internship at Yale University in the Department of Neurosurgery and he was offered a full appointment. He testified the Study of neuropsychology is the Study of brain behavior relationship. He testified he did not perform any neuropsychological test on Ms. Hadden because, number one, she did not sustain a mild traumatic injury, and two, that Ms. Hadden has Multiple sclerosis and the domain of cognitive impairment associated with Multiple sclerosis overlap with the signs and symptoms of a mild traumatic brain injury. Dr. Sass said that he had had a four hour examination with the claimant and her husband. Dr. Sass said he did not believe the claimant sustained an injury to the brain on October 8, 2010, and reviewed the World Health Organization's standards for defining a traumatic brain injury. Dr. Sass did not associate the claimant's headaches and dizziness following her assault with a traumatic brain injury. Dr. Sass testified that a diagnosis of traumatic brain injury is not contingent on the presence of those particular symptoms, but rather, is dependent on whether there is an acute change in neurological functioning when mechanical trauma is applied to the head that is not explained by other factors. Dr. Sass also took note of the claimant's treatment in 1986 and 1987 for traumatic brain injuries, and noted in this case, the Claimant suffered from severe dystonia even prior to her diagnosis of Multiple sclerosis. Dr. Sass also noted the claimant's cognitive abilities had been sufficiently impacted by those events and that the claimant's treater at the time recommended she take a semester off from school.

Dr. Sass was asked to address the decline in the Claimant's functions following the October 8, 2010 work injury and pointed to two events: He noted the claimant fell sometime between December 20, 2010, and January 28, 2011, resulting in the Claimant injuring her left wrist and shoulder and the eventual diagnosis of Complex Regional Pain

Syndrome. He also noted a nursing note dated June 29, 2011 that indicates that the Claimant is no longer able to walk. He noted at the June 30, 2011 Formal hearing, the Claimant attributed her problems to her left hip dislocating and spasming. Dr. Sass ultimately concluded that the work-related trauma the Claimant sustained on October 8, 2010, did not exacerbate her underlying Multiple sclerosis, though he did agree that the spasticity that occurred immediately after the work injury was reasonable evidence that the Claimant's preexisting dystonia involving her left leg was exacerbated by the work injury. Dr. Sass also concluded the Claimant did not sustain a traumatic brain injury as a result of the October 8, 2010 work injury, but on cross-examination agreed that the Claimant suffered some symptoms subsequent to her October 8, 2010 injury similar to those she had following her October 7, 1986 traumatic brain injury. He also testified he believed that the claimant's dystonia was aggravated and/or exacerbated by the injury of October 8, 2010.

Dr. Peter Wade testified at his deposition that he has been the claimant's treating physician since 2009. He testified Multiple sclerosis is the autoimmune disease that affects the central nervous system which affects the brain and the spinal cord. He explained that Multiple sclerosis damages the insulation of the nerve in the brain and the spinal cord of the central nervous system. There are no cures for Multiple sclerosis at this time. He testified that areas of inflammation in a patient's brain can be identified by using MRI scans and these areas were places where the patient's brain was damaged. He testified that there is no change in Ms. Hadden's pre-MRI scans of October 8, 2010 versus her post-MRI scans post-October 8, 2010 MRI scans, but the MRI scan results do not correlate directly with how someone with Multiple sclerosis is doing. He said Ms.

Hadden's condition was described as relapsing/remitting and is now clearly progressive. Dr. Wade also said when he first saw Ms. Hadden as a patient, he saw signs of the previous injury to her central nervous system. He also said that a serious illness like the flu could exacerbate Multiple sclerosis. He testified as to the impact of the October 8, 2010 incident as follows, which challenged the opinions of the respondents' expert witnesses.

I think that there was a sudden step-wise change in her clinical picture in association with the traumatic event. Her course over the year before had been one of slow deterioration. It was a significant decline. If it was just MS, then usually you don't see that kind of cataclysmic decline. And so, I would disagree with his opinion as to how she is from an MS point of view and clinically would be unchanged whether she had an injury or not. He's arguing that if she hadn't had the injury she'd be as she is now, and I think the consequences of the injury are more significant than that.

Findings, ¶ 6 o. Respondent's Exhibit 8, p. 71.

Dr. Wade further opined that since the injury of October 8, 2010, Ms. Hadden is totally disabled from any form of gainful employment. He also opined the injury of October 8, 2010 was, and is, a substantial factor in the claimant's current disability. He testified the claimant sustained a traumatic brain injury in that incident, the claimant's current condition is a sequela from that incident and it has caused her to experience disabilities over and above her pre-existing Multiple sclerosis. He testified that Ms. Hadden's treatment plan has changed since the October 8, 2010 incident and she is now treating for conditions other than Multiple sclerosis, and also noted her previous treatment plan was successful in keeping her at work. He disagreed with the opinions stated by Dr. Joseph Guarnaccia in his October 4, 2011 opinion that attributes Ms.

Hadden's increased neurological dysfunction after October 8, 2010 to the progression of her Multiple sclerosis disease.

Dr. Matthew Raymond testified via deposition. He is an osteopathic physiatrist, and that his primary focus of treatment is for neuro rehab. This includes Multiple sclerosis, spinal cord injuries, stroke and brain injury, and focuses on spasticity management. He started treating the claimant in 2008. He stated he concurred with the diagnosis of Traumatic Brain Injury due to an October 8, 2010 work injury and that injury exacerbated the claimant's symptoms; as the physical incident created a stressful situation for Ms. Hadden which exacerbated her Multiple sclerosis. Dr. Raymond said he received specialized training in the diagnosis and treatment of Traumatic Brain Injuries and when he saw her following her injury of October 8, 2010, he diagnosed Ms. Hadden with a traumatic brain injury. He testified that Ms. Hadden suffered blows to her head and a single blow to the head, even without striking the floor, can cause a traumatic brain injury. He testified that the injury sustained on October 8, 2010 had contributed to Ms. Hadden's present condition which is a substantial factor in her current disability. He testified that Ms. Hadden was able to work full-time before the work accident of October 8, 2010, and since that time, has been unable to return to work and the injury of that date was a substantial factor in the claimant's inability to work. He testified that there is no indication that Ms. Hadden's treatment of Multiple sclerosis with Botox injections, prior to the October 8, 2010 incident, led to the deterioration of her condition following the October 8, 2010 injury. He also disagreed with Dr. Sass's opinion as to the claimant, noting he found no indicia of embellishment or feigning in her medical records.

The trial commissioner also noted that about 30 documentary exhibits had been entered into evidence and took notice of this evidence. After reviewing the testimony and the documentary evidence the commissioner concluded the claimant's testimony was credible and persuasive. The commissioner concluded she sustained a compensable injury on October 8, 2010 which included injuries to the face and head and a traumatic brain injury. The commissioner found that Ms. Hadden had been assaulted. The commissioner found Mr. Glowacki's testimony credible and persuasive. The commissioner also found the reports of Dr. Matthew Raymond credible and persuasive in regards to this matter in that Ms. Hadden suffered a physical injury on October 8, 2010, as well as a Traumatic Brain Injury on October 8, 2010. The commissioner also found Dr. Peter Wade credible and persuasive that the claimant sustained a compensable physical injury including a traumatic brain injury on October 8, 2010 and that the claimant was temporarily totally disabled from the date of that injury going forward. The commissioner found the opinions of Dr. Wade and Dr. Raymond were credible and persuasive that the October 8, 2010 injury was a material and substantial factor in the claimant's current disability and need for treatment. The commissioner found the opinions of Dr. Sass less credible and persuasive than the other witnesses. The commissioner concluded the October 8, 2010 injury made the claimant's condition materially and substantially worse and therefore was responsible for her inability to work. This incident, which was compensable as it occurred while the claimant was acting as an employee, also aggravated, in a material and substantial manner, her physical condition and thus her current need for treatment is causally related to the October 8, 2010 incident.

The trial commissioner did not order a compensation rate and set the matter down for future hearings.

The respondents filed a Motion to Correct. This Motion sought 98 separate corrections and focused on medical evidence that the claimant had suffered prior episodes of debilitating illness due to her Multiple sclerosis and prior traumatic injuries before being assaulted on October 8, 2010. The trial commissioner denied the motion in its entirety. The respondents have pursued this appeal. They argue that the weight of the medical evidence does not support the Finding and Award and the trial commissioner drew unreasonable inferences from the evidence presented. They also argue that the “plain meaning” of § 31-275(1)(D) C.G.S.² requires apportionment of the award to the claimant. These arguments do not persuade us that the trial commissioner’s award to the claimant should be vacated.

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,

² The text of this statute reads as follows:

(D) For aggravation of a preexisting disease, compensation shall be allowed only for that proportion of the disability or death due to the aggravation of the preexisting disease as may be reasonably attributed to the injury upon which the claim is based;

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). We also note that in cases wherein causation of an injury is contested the trial commissioner’s “. . . findings of basic facts *and* his finding as to whether those facts support an inference that the plaintiff’s injury arose from his employment are subject to a highly deferential standard of review.” Blakeslee v. Platt Bros. & Co., 279 Conn. 239, 253-254 (2006). (Emphasis in the original.)

In the present case the trial commissioner found the claimant was a credible witness and credited the testimony of her treating physicians. The commissioner did not find the main witness presented by the respondents, Dr. Sass, to be as persuasive as the claimant’s witnesses. The fact the claimant was found credible was essential to proving her case, but in light of the extremely complex nature of this case, this was not conclusive. As the claimant’s injuries were not of the nature that can be established by way of lay testimony, such as Sprague v. Lindon Tree Service, Inc., 80 Conn. App. 670, 676 (2003), “[s]uch proof must be established by competent evidence.” Murchison v. Skinner Precision Industries, Inc., 162 Conn. 142, 151 (1972). This expert testimony must establish a causal relationship between the claimant’s condition and his or her employment. *Id.*, 152.

We have recently considered the issue of proximate causation of a claimant’s injury in the wake of the Supreme Court’s decision in Sapko v. State, 305 Conn. 360 (2012). In Madden v. Danbury Hospital, 5745 CRB-7-12-4 (April 22, 2013) we cited

Sapko, supra, as reiterating the long-standing “substantial factor” test for compensability.

The Sapko decision clarified prior precedent from Birnie v. Electric Boat Corp., 288

Conn. 392, 412-13 (2008).

....in reaching our conclusion in *Birnie*, we undertook an in-depth examination of the contributing and substantial factor standards to facilitate a comparison of the two tests. It was in this context that we observed that the substantial factor test requires that the employment contribute to the injury “in more than a de minimis way.” *Id.*, 413. The “more than . . . de minimis” language is preceded, however, by statements explaining that “the substantial factor standard is met if the employment *materially or essentially contributes* to bring about an injury”; (emphasis in original) *id.*, 412; which, by contrast, “does *not* connote that the employment must be the *major* contributing factor in bringing about the injury . . . nor that the employment must be the *sole* contributing factor in development of an injury.” (Citation omitted; emphasis in original.) *Id.*

Sapko, supra, at 391.

The question then for our consideration is whether Dr. Wade and Dr. Raymond offered sufficient testimony linking the October 8, 2010 assault at work to the claimant’s present medical condition for the trial commissioner to find that this incident was a material factor in the claimant’s present medical condition. The respondents argue that the trial commissioner acted unreasonably in reaching the conclusion that the October 8, 2010 incident did materially contribute to the claimant’s condition. We will review the medical evidence to see if there is support in the record for the Finding and Award.

We note that both Dr. Raymond and Dr. Wade were treating physicians for the claimant and would be expected to be familiar with her condition. Both witnesses testified that the events of October 8, 2010 were, within a reasonable medical probability, a contributing factor to the claimant’s current medical condition. See Respondents’ Exhibit 7, pp. 67-68; and Respondents’ Exhibit 8, p. 81. The respondents point to

inconsistencies between these two witnesses as to their sense as to the etiology of the claimant's injury, but we note that a trial commissioner must evaluate medical evidence in its totality in determining whether or not to find it reliable. See Marandino v. Prometheus Pharmacy, 294 Conn. 564, 595 (2010) and O'Reilly v. General Dynamics Corp., 52 Conn. App. 813, 816 (1999). We note that Dr. Wade was less detailed in describing the claimant's injury as a traumatic brain injury than Dr. Raymond. See Respondents' Exhibit 8, p. 83 and Respondents' Exhibit 7, pp. 68-71. Nonetheless, both witnesses clearly stated that in some fashion the October 8, 2010 incident had caused the claimant's condition to deteriorate beyond where they believed the claimant's pre-existing multiple sclerosis would have caused. Dr. Raymond said the "more likely" cause was a combination of the blow to the head and the claimant's MS. Respondents' Exhibit 7, p. 52. He also said that based on his clinical experience that a stressful event could lead to an exacerbation of multiple sclerosis. *Id.*, pp. 39-42. Dr. Raymond noted a sudden downturn in the claimant's condition immediately after the work injury, describing them as "[m]uch more profound and much more significant" than prior flare ups of her multiple sclerosis. *Id.*, p. 57.³ Dr. Wade concurred that the incident created a serious deterioration in the claimant's condition as noted by the trial commissioner in Findings, ¶ 6 o; Respondents' Exhibit 8, p. 71.

³ The respondents argue that much of the claimant's reasoning herein is based on a temporal association between her deteriorating condition and the assault at work, and not sufficiently based in their viewpoint on expert medical opinions. Respondents' Brief, pp. 34-37. In light of the holding of Marandino v. Prometheus Pharmacy, 294 Conn. 564 (2010) we are not persuaded by this argument. In Marandino, the Supreme Court enunciated this legal standard for determining causation. "Moreover, as we have explained previously herein, it is proper to consider medical evidence *along with all other evidence* to determine whether an injury is related to the employment. *Murchison v. Skinner Precision Industries, Inc.*, supra, 162 Conn. 151." *Id.*, 595. (Emphasis in original.) This standard enables a trial commissioner to consider both medical evidence and lay testimony in determining causation.

In reviewing the testimony of the treating physicians in its totality, we may determine that the trial commissioner could reasonably conclude that but for the traumatic incident of October 8, 2010 it was likely the claimant's condition would be materially better than it is now.⁴ We note that this is an extremely challenging case. However, the general tenets of our precedent are applicable herein. As we pointed out in O'Connor v. Med-Center Home Healthcare, Inc., 4954 CRB-5-05-6 (July 17, 2006) “[t]here are few principles of jurisprudence more fundamental than the principle that a trier of fact must be the one party responsible for finding the truth amidst conflicting claims and evidence.” See also Strong v. UTC/Pratt & Whitney, 4563 CRB-1-02-8 (August 25, 2003), “[i]f on 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.” The trial commissioner could reasonably find the treating physicians more persuasive than the respondents' expert. In a “dueling expert” case that is his prerogative. Dellacamera v. Waterbury, 4966 CRB-5-05-6 (June 29, 2006), n.1.

We reach this conclusion in part because of the long standing principle that the respondent takes the claimant in the state of health they find him or her. See Blakeslee, supra, citing Gartrell, supra.

It long has been a fundamental tenet of workers' compensation law
. . . that an employer takes the employee in the state of health in

⁴ Much of the effort made by the respondents in this appeal has been an effort to suggest that Dr. Raymond was not sufficiently acquainted with claimant's prior medical condition to offer reliable testimony as to the etiology of her condition after October 8, 2010. Respondents' Brief, pp. 31-34. After reviewing Dr. Raymond's deposition we are satisfied that he was sufficiently versed in the claimant's extensive medical history to offer probative evidence. The witness clearly stated that prior to the deposition he reviewed the report of Dr. Sass, who offered a detailed medical history of the claimant in his report. Respondents' Exhibit 7, pp. 44-45. Dr. Raymond clearly voiced his disagreement with the conclusions in Dr. Sass's report, especially as to his conclusion the claimant was feigning illness. *Id.*, pp. 62-67.

which it finds the employee. (Internal quotation marks omitted.) Id., 40. Thus, an injury received in the course of the employment does not cease to be one arising out of the employment merely because some infirmity due to disease has originally set in action the final and proximate cause of the injury. The employer of labor takes his workman as he finds him and compensation does not depend upon his freedom from liability to injury through a constitutional weakness or latent tendency. Whatever predisposing physical condition may exist, if the employment is the immediate occasion of the injury, it arises out of the employment because it develops within it.

Id., at 245-46. (Internal quotation marks omitted.)

In reviewing the medical evidence we may reasonably conclude that while it may be difficult to ascertain precisely where the claimant's pre-existing condition ends and the sequelae of the October 8, 2010 incident begins it is reasonable to conclude that someone in the claimant's condition would be more susceptible to being rendered disabled as the result of a physical assault than a healthier individual.⁵ See Glenn v. Stop & Shop, Inc., 168 Conn. 413 (1975), Cashman v. McTernan School, Inc., 130 Conn. 401 (1943) and Epps v. Beierdorf, Inc., 41 Conn. App. 430 (1996). The claimant's treating physicians offered evidence, which the trial commissioner found persuasive, that the impact of the assault materially contributed to her present disability. Therefore, we affirm the decision herein on the issue of compensability.

⁵ The respondents argue that the trial commissioner did not give sufficient weight to the modalities of treatment the claimant was undergoing for her condition prior to the assault at work, such as botox injections, a baclofen pump and infusions of Tysabri. The respondents also argue the claimant as a result of her leg weakness had used a cane and had difficulty walking prior to the incident. Respondent's Brief, pp. 4-10. The trial commission however, did consider this evidence and when these matters were raised in the Motion to Correct, it was determined that they were not sufficiently persuasive to reconsider his findings. It is black letter law "it is the trial commissioner's function to assess the weight and credibility of medical reports and testimony. . . ." O'Reilly v. General Dynamics Corp., 52 Conn. App. 813, 818 (1999). We do not find the ultimate conclusion that the claimant's condition subsequent to the assault at work materially deteriorated as a result of that event unreasonable.

The respondents have also appealed on the grounds that the trial commissioner erred in not ordering an apportionment of the award in accordance with what they believe is the “plain meaning” of § 31-275(1)(D) C.G.S. They also argue that this situation where the full burden of the claimant’s injury falls on her employer places an unfair onerous burden on the respondents and thus contravenes public policy. We do not concur with the respondents’ statutory interpretation. We also note that on a policy basis, the outcome in this case is congruent to the situation when a claimant sustains two different and consecutive compensable accidental injuries. Most importantly, we are not satisfied the respondents properly preserved this issue on appeal and therefore, at this time considering this issue amounts to impermissible piecemeal litigation.

The respondents argue that it is appropriate to consider the issue of apportionment on appeal as they sought this relief in their trial brief dated November 21, 2012, filed after the record closed in the formal hearing. This brief however does not reference any probative evidence on the record which sought to apportion liability for the claimant’s disability between the compensable injury and her pre-existing ailments. Based on the record presented at the formal hearing the trial commissioner could not have granted the relief sought by the respondents. As we held in Ben-Eli v. Lowe’s Home Improvement Center, 5006 CRB-3-05-10 (November 16, 2006), “[o]ne can only expect the trier of fact to render a decision based on what evidence actually says, not what it should have said.”

Had the trial commissioner attempted to grant the respondents the relief they sought he would have needed to re-open the hearing to accept additional evidence. A party before this Commission is not entitled to a bifurcation of proceedings as a matter of right. Previti v. Monro Muffler Brake, Inc., 5769 CRB-6-12-7 (June 25, 2013). We note

similarities in this situation with the facts in Goulbourne v. State/Department of Correction, 5461 CRB-1-09-5 (May 12, 2010) where after initially defending a claim solely on jurisdictional grounds the respondents sought to present new evidence contesting causation on remand.

A party to a compensation case is not entitled to try his case piecemeal, to present a part of the evidence reasonably available to him and then, if he loses, have a rehearing to offer testimony he might as well have presented at the original hearing. Meadow v. Winchester Repeating Arms Co., 134 Conn. 269, 273-274 (1948), citing Kearns v. Torrington, 119 Conn. 522 (1935). Chief Justice Maltbie explained in Kearns the rationale behind this rule [h]e must be assumed to be reasonably familiar with his rights and with the requisites of proof necessary to establish his claim; and to permit him intentionally to withhold proof, or to shut his eyes to the reasonably obvious sources of proof open to him; would be fair neither to the commissioner and the court nor to the defendant. *Id.*, at 529. We see no reason not to apply the standard for claimants enunciated by Chief Justice Maltbie against respondents before this tribunal. Indeed, we have frequently reiterated our stance against piecemeal litigation. See Gibson v. State/Department of Developmental Services - North Region, 5422 CRB-2-09-2 (January 13, 2010); Schreiber v. Town & Country Auto Service, 4239 CRB-3-00-5 (June 15, 2001) and Hines v. Naugatuck Glass, 4816 CRB-5-04-6 (May 16, 2005).

In Yelunin v. Royal Ride Transportation, 5274 CRB-1-07-9 (September 5, 2008), *aff'd*, A.C. 30367 (May 11, 2010) we cited McGuire v. McGuire, 102 Conn. App. 79 (2007) for the proposition parties should not proceed under the belief this appellate body will remedy an unfavorable result resulting from an advocate's ineffective factual presentation. As the Appellate Court held in McGuire [w]e have made it clear that we will not permit parties to anticipate a favorable decision, reserving a right to impeach it or set it aside if it happens to be against them, for a cause which was well known to them before or during the trial. *Id.*, at 83. The respondent clearly decided to rely solely on their jurisdictional defense at the initial formal hearing. We do not find the Commissioner's decision not to allow new medical evidence in the form of an RME to be admitted at this juncture was an unreasonable decision.

Id., (Internal quotation marks omitted.)

We note that in cases such as 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) and DaSilva v. Danbury Board of Education, 5263 CRB-7-07-8 (November 5, 2008), the trial commissioner denied the claimant the ability to pursue their case on an alternative theory of recovery after the record closed, and we affirmed that decision. We see no reason to reach a different result in this matter.

While clearly the trial commissioner's decision herein was sound based on the overall proscription against piecemeal litigation, we are also satisfied it was a sound decision based on policy and precedent. While the respondents believe it is poor public policy for an employer to pay the full burden of the most recent injury sustained by its employee when prior injuries may have materially contributed to the claimant's condition, such is the outcome of cases where the holding of Hatt v. Burlington Coat Factory, 263 Conn. 279 (2003) is applicable. We noted the potential anomalies from this precedent in Gill v. Brescome Barton, Inc., 5659 CRB-8-11-6 (June 1, 2012), *aff'd*, 142 Conn. App. 279 (2013), *cert. granted*, 310 Conn. 912 (2013) which dealt with a *sui generis* fact pattern; but our analysis of this decision does not suggest that the outcome in the present case is inconsistent with public policy. Had the claimant sustained a prior compensable injury made materially worse by the events of October 8, 2010, the respondents would now bear full responsibility. See Kelly v. Dunkin' Donuts, 4621 CRB-4-03-2 (April 5, 2004). We are not persuaded that public policy requires that prior noncompensable injuries should be treated in a different fashion.

The respondents argue however that the "plain meaning" of § 31-275(1)(D) C.G.S. requires such an apportionment of benefits and therefore the holding of Cashman,

supra, which limited such apportionment to cases involving a prior occupational disease, is in error. The respondents argue that § 1-2z C.G.S. requires us to revisit the precedent in Cashman. We find that this issue was previously addressed by the Connecticut Supreme Court in Hummel v. Marten Transport, Ltd, 282 Conn. 477 (2007) which made clear that the “plain meaning” statute was *not* intended to undo prior judicial interpretation of statutes.

We acknowledge that, if we were writing on a clean slate, § 1-2z might foreclose us from reading a final judgment requirement into § 31-301b because the text of § 31-301b contains no such requirement. For the reasons that follow, however, we conclude that § 1-2z does not dictate the result that the parties urge. It is evident from that history that the legislature, by virtue of its enactment of § 1-2z, did not intend to overrule our prior interpretation of any other statutory provision, including § 31-301b.

Id., at 496, 498-499.

The interpretation of law that apportionment was unavailable in situations such as the present claim was affirmed by the Connecticut Supreme Court in Gartrell, supra. We find that decision directly on point. In Gartrell, the claimant had an existing noncompensable psychiatric condition exacerbated by a physical injury sustained in the course of his employment. The Supreme Court affirmed our decision that this exacerbation was also compensable. Moreover, it cited Cashman, supra, as to the unavailability of apportionment for such situations. “Under *Cashman*, the apportionment limitation of § 31-275 (1)(D) is inapplicable to the plaintiff because his preexisting post-traumatic stress disorder is not an occupational disease, that disorder having arisen from events unrelated to the plaintiff’s employment.” Id., 44.⁶

⁶ We note that there is dicta in Gartrell v. State/Dept. of Correction, 259 Conn. 29 (2002) noting that it did not consider whether the 1993 legislative revisions to Chapter 568 may have cast doubt on the precedent in

We have reviewed the cases since Gartrell that have dealt with apportionment of occupational disease claims. We do note that in Deschenes v. Transco, Inc., 288 Conn. 303 (2008) the Supreme Court distinguished that case from Cashman, supra, and Gartrell, supra. Id., 312-313. The court concluded that a case where an occupational disease (asbestosis) and a nonoccupational disease (emphysema due to cigarette smoking) were concurrently developing was a matter of first impression. Id., 313-314. The Court held that when a respondent can prove that the conditions of the claimant's occupation have no influence on the development of the nonoccupational disease that apportionment is appropriate. Id., 321. However, in Sullins v. United Parcel Service, Inc., 146 Conn. App. 154 (2013) the majority opinion of the Appellate Court found that the precedent in Deschenes was inapplicable to cases where the nonoccupational disease was a previous disability and was not concurrently developing. Id., 161-163.⁷

Therefore, even if we were to ignore the holding in Cashman, supra, and rule on the apportionment issues herein in a manner as the respondents desire we would have to consider the precedent in Sullins, supra, which may not be supportive of relief to the respondents. Given the untimely manner in which this issue was raised and the continued vitality of the Cashman precedent we need not resolve this issue, however.

Cashman v. McTernan School, Inc., 130 Conn. 401 (1943), id., 44. In light of the fact that 12 years have passed since the Gartrell decision and there has been no further legislative or judicial effort to revisit this issue we are of the opinion that we must respect the legislative acquiescence herein. See Hanson v. Transportation General, Inc., 245 Conn. 613, 619 (1998).

⁷ While the respondents argue that the apportionment statute for occupational diseases should be applied herein, their brief does not cite either of the two recent appellate decisions on this issue Deschenes v. Transco, Inc., 288 Conn. 303 (2008) or Sullins v. United Parcel Service, Inc., 146 Conn. App. 154 (2013). We have independently reviewed this precedent as the more recent application of the law would be most relevant to our consideration of the issues at hand.

We find the trial commissioner had a sufficient quantum of probative evidence to find that the claimant's current medical condition and present disability was due to a compensable injury.⁸ We also find the issue of apportionment was not presented in a timely fashion to the trial commissioner and as we must give the holdings in Cashman and Gartrell *stare decisis* the decision herein is legally sound.

We therefore affirm the Finding and Award.

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

⁸ We finally note that the appellants believe that their Motion to Correct should be granted. Those corrections sought to interpose the respondents' conclusions as to the law and the facts presented. The trial commissioner was legally empowered to deny this motion. 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); D'Amico v. State/Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003); and Liano v. Bridgeport, 4934 CRB-4-05-4 (April 13, 2006). We find that many of the corrections sought appear to be an effort to reargue the factual evidence already presented over an extensive formal hearing. For the reasons clearly stated in Fair v. People's Savings Bank, 207 Conn. 535 (1988), we are not persuaded by such arguments.