CASE NO. 5845 CRB-3-13-5 : COMPENSATION REVIEW BOARD
CLAIM NO. 300065294

GAETANO MAURIELLO
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: MARCH 28, 2014

GREATER NEW HAVEN TRANSIT
EMPLOYER

and

TRAVELERS PROPERTY & CASUALTY
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by John A. Keyes, Esq., Keyes & Looney, Attorneys at Law, 420 East Main Street, Building 3, Suite 15, Branford, CT 06405.

The respondents were represented by Donald F. Babiyan, Esq., Law Office of Cynthia M. Garraty, One Hamden Center, 2319 Whitney Avenue, Suite 4C, Hamden, CT 06518.

This Petition for Review from the April 5, 2013 Finding and Dismissal of the Commissioner acting for the Third 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 Ernie R. Walker.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has appealed from a Finding and Dismissal which rejected the claimant's assertion that he was permanently and totally disabled. He argues that the evidence on the record supported such a finding and also that additional evidence should have been admitted that was supportive of this claim. He also argues that the trial commissioner should have not relied on the opinions of the Commissioner's examiner in this matter. Upon review of the record and the applicable precedent we are satisfied that the trial commissioner's decision in this matter was supported by the facts and the law. We affirm the Finding and Dismissal.

The following facts are pertinent to our consideration of this appeal. The claimant was born in 1947 and had a long and varied occupational career, including serving in the military, where he sustained a service connected disability to his back. He later was an apprentice electrician, a bar owner, a bus and truck driver, and the owner of a pizza business. Over the years the claimant sustained injuries to his ankle and right knee in 1983 and a neck injury sustained in a 1996 motor vehicle accident. During his employment as a school bus driver for Laidlaw Transportation the claimant filed a Form 30C claiming a repetitive trauma injury to his right knee due to frequently pressing foot pedals to operate the school bus. There was no activity on this claim after filing of the Form 30C. On August 25, 2003, the claimant was working for "My Ride", a service that provided transportation for elderly or disabled passengers when he was struck by another vehicle. This injury was the subject of this formal hearing. The claimant did not file a Form 30C for the injury of August 25, 2003. The respondent filed a Form 43 on

November 10, 2003, denying the work injury to the left knee. However, the respondent's medical examiner, Dr. Peter Jokl, opined after examining the claimant in February 2004 that the injury was work related and surgery was reasonable and necessary. The claimant treated with Dr. Alan M. Reznik and eventually had surgery on his left knee in April 2004.

The claimant continued treating with Dr. Reznik who initially declared him totally disabled, but then released him to light duty work on November 30, 2006. The claimant underwent bilateral knee replacements on June 19, 2007 performed by Dr. John F. Irving. (Emphasis in original.) On January 31, 2008 Dr. Irving wrote the claimant reached maximum medical improvement but also said,

> His biggest problem is weakness and buckling of the left knee and numbness of his feet . . . I think if he gains any strength that would be slow and minimal from here . . . Obviously, because of his difficulty getting from his seated-to-standing position and getting in and out of a car, a chair, and a toilet, he is a poor candidate for light duty work capacity. Unfortunately, I think the patient will have to go on permanent disability at this point in time.

Claimant's Exhibit C.

Dr. Irving wrote in June 2008 that the claimant, ". . . is totally disabled from the combination of his knees and his back. The knees certainly put him over the edge as far as his functional capabilities go. . . ." Dr. Irving also believed the injury to the right knee was caused 50% by a pre-existing condition and 50% by ". . . his left knee arthritis and the treatment after his accident as noted by Dr. Reznik." Dr. Irving also wrote, in November 2008, "[T]he accident for which he was first seen by Dr. Reznik in 2003 started a cascade of deterioration of his left knee resulting in severe disability of this knee

ultimately causing the demise of his right knee at a premature date." Dr. Irving has assigned 40% permanent partial disabilities to the claimant's knees.

On August 5, 2008, Dr. Dante Brittis performed a Respondent's Medical Examination. He assigned a 25% permanent partial disability to each knee. He did not think the right knee replacement had been even partially caused by the 2003 work accident. "[T]he right knee followed its natural course and as the arthritic change became worse over time, he became symptomatic on that knee as well." In his September 9, 2008 report Dr. Dante Brittis, the respondent's medical examiner, assigned permanent restrictions due to the knee replacement. He limited the claimant to sedentary activities, no lifting over 10 to 15 pounds, no running and no climbing ladders. In October 2009 Dr. Brittis stated the claimant's work capacity was complex due to his multiple injuries and health conditions. He recommended a functional capacity examination. The FCE was performed at Wright2Work by Robb D. Wright, OTR/L.

The trial commissioner cited the results of the functional capacity evaluation and also noted that none of the physicians cited in the case had commented on the results. The relevant findings of the February 15, 2010 FCE were as follows.

> …the worker would not be able to resume work of his past nature as the demand of CDL driving…would appear beyond what the worker could demonstrate or tolerate over time. Presently, it is noted that the worker does not have neither the durational tolerances of physical ability to perform the associated tasks of driving, nor has the ability to sustain a posture that would allow him to be productive as a driver. The worker is noted to have a work capacity, Sedentary to Sedentary Light, but he would need a very ideal opportunity to be productive and competitive. This worker would also require a high degree of discretion and allowance to alternate between sitting, standing and walking about. Additionally, any performed work should be confined to neutral postures, ideally above waist level and below head level. Walking

> should be confined to short distances and to be required infrequently with no stair negotiation. This determination is based on work participation of eight hours, however, it should be noted that the worker, at least initially, would likely not tolerate a full eight hours, especially if the job nature was not truly ideal and in favor of the worker's challenges.

The respondent filed a Form 36 on June 21, 2010 seeking an order that the claimant was at maximum medical improvement and had a work capacity. Dr. Kevin Plancher performed a Commissioner's Examination on the claimant on April 29, 2011 and after the examination he assigned a 25% permanent partial disabilities to the knees. Findings, ¶ 33. Dr. Plancher related the left knee replacement to the injury of 2003, but not the right knee. Following Dr. Plancher's examination Commissioner Jodi Murray Gregg approved the Form 36 on April 29, 2011. Dr. Irving subsequently reexamined the claimant in September, 2011 and noted that although his range of motion was excellent there was increased ligament laxity. He suggested a revision surgery to deal with these symptoms. On December 28, 2011 Dr. Irving repeated his surgery recommendation for both knees in more detail. Dr. Irving also stated the claimant could not return to his prior job and he remained totally disabled, "[D]ue to his persistent swelling and laxity." Claimant's Exhibit G. Dr. Plancher examined the claimant again on April 8, 2012, by which time Dr. Irving had recommended the revision surgery. Dr. Plancher deferred the decision on surgery to Dr. Irving "[A]s he has an intimate working knowledge of the knee." Dr. Plancher further opined that revision surgery could address the claimant's knee problems and that in the absence of this surgery the claimant had a work capacity; although if the claimant went through with Dr. Irving's surgical procedure he would be restricted from full duty.

The claimant testified on May 31, 2012 that he was not certain he would have the new surgery offered by Dr. Irving. "I'm afraid to have the surgery due to I have a heart condition, I'm a diabetic and I'm at high risk and there's no guarantee that they can correct it." (May 31, 2012 Transcript, p. 5.) Dr. Plancher's second examination of April 8, 2012, was close in time to the second session of the formal hearing on May 31, 2012 and as of that date the claimant had not decided to have the revision surgery.

Based on these subordinate facts the trial commissioner concluded that the claimant sustained a compensable injury to his left knee in 2003. The claimant's testimony was found to be credible and persuasive. The trial commissioner sustained the Form 36 dated June 21, 2010 as based on the medical condition of the claimant at that time but noted that it was based on the medical condition at that time. The commissioner noted that Dr. Irving had declared the claimant totally disabled as of December 28, 2011, and that Dr. Irving was credible and persuasive and that the claimant's condition had turned for the worse. The commissioner awarded temporary total disability benefits from December 28, 2011 until May 31, 2012, but suspended them from that date forward to the date in which the claimant makes a decision on whether to accept or refuse additional surgery as reasonable medical treatment. The commissioner found Robb Wright's FCE report thorough and demonstrated that to the extent the claimant had a work capacity it was a very limited one. Drs. Brittis and Plancher did not believe the total knee replacement of the right knee was due to the 2003 injury and the commissioner found these opinions credible, consistent and persuasive, and adopted opinions of the Commissioner's Examiner on the cause of the claimant's right knee injury.

Therefore, the trial commissioner denied the claimant's bid to find the right knee injury compensable. She directed the claimant to return to Dr. Irving to reach a decision within thirty days on revision surgery. She determined that that the claimant had not sustained his burden of proof on whether he was permanently and totally disabled prior to making a determination of whether he should undergo further surgery.

There were a number of post-judgment motions filed by the claimant in this matter. The claimant filed a Motion to Correct, a Motion to Submit Evidence and a Motion to Open and Modify C.G.S. 31-315. The trial commissioner denied the Motion to Correct. The Motion to Submit Evidence dealt with the delivery of notices to claimant's counsel, and was also denied by the trial commissioner.[1] The trial commissioner deemed the Motion to Open and Modify as essentially a Motion for Clarification, and issued a ruling on this motion which outlined her reasoning behind the orders issued in the Finding and Dismissal.

The claimant asserts a number of errors were made by the trial commissioner in this matter. He argues that Dr. Plancher's opinions should not have been credited by the trial commissioner. He argues that the commissioner erred by determining that his right knee injury was not compensable. He argues that the Motion to Open should have caused the trial commissioner to hold a new hearing. Finally, he argues that he established that

[1] The respondents initially argued that this appeal was brought in an untimely fashion and filed a Motion to Dismiss. The additional evidence proffered by the claimant documented that claimant's counsel had received the original Finding and Dismissal from the trial commissioner in a delayed manner. At oral argument before this tribunal the respondents advised that they concurred with the claimant's position and were withdrawing their Motion to Dismiss. As appeals that are delayed due to circumstances beyond the appellant's control are jurisdictionally valid, see Kudlacz v. Lindberg Heat Treating, 250 Conn. 581, 590-91 (1999) and Schreck v. Stamford, 250 Conn. 592, 595 (1999), we will rule on the merits of the claimant's appeal.

he was totally disabled pursuant to an *Osterlund* theory of total disability. We are not persuaded by any of these arguments.

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 & 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).

The claimant centers his appeal on his opinion that the trial commissioner erred by finding Dr. Plancher the more credible and persuasive expert witness in this matter. Indeed, the claimant asserts that Dr. Plancher was "unworthy of belief." Claimant's Brief, p. 23. While the claimant clearly believes that his treating physician was the most persuasive witness, we cannot ascertain why the Commissioner's examiner in this matter was incapable of issuing an opinion which the trial commissioner could have chosen to find reliable. We have previously delineated a very deferential standard for reviewing a trial commissioner's reliance on expert testimony. It is black letter law that, "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). 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."

A critical question in this case was whether the claimant's right knee disability was a compensable sequelae of the 2003 work injury sustained by the claimant. A review of Dr. Plancher's deposition indicates that he clearly disagreed with the treater's opinion that these injuries were interrelated. Claimant's Exhibit H, pp. 13-15. While the witness did suggest that on the issue of whether surgery was necessary he would "refer to the treating physician," id., p. 22, the witness further suggested that the deteriorating condition of the knee was due to "natural progression" and did not adopt the opinion of Dr. Irving. Id., pp. 23-24. A review of Dr. Plancher's medical reports dated April 11, 2011 and April 8, 2012 (Respondent's Exhibits B and C) indicates that after examining the claimant and reviewing additional medical records he did not at either time opine that the claimant's right knee condition was caused by the work injury.[2]

The claimant's arguments herein are therefore similar to the arguments the claimant advanced in Anderson v. Meriden Record Journal, 5531 CRB-8-10-3 (January 20, 2011) where the claimant argued that his treating physicians offered more weighty opinions on the causation of his ailments. We noted in Anderson that "it is the claimant's

[2] We note the respondents' examiner, Dr. Dante Brittis, concurred with the opinion on causation rendered by the commissioner's examiner regarding the claimant's right knee aliment. See Findings, ¶ 27, citing Respondent's Exhibit 1.

burden to prove an ailment was caused by a compensable injury. See Smith v. Waterbury, 5326 CRB-5-08-3 (February 4, 2009) and Marandino v. Prometheus Pharmacy, 294 Conn. 564 (2010)." Id. We also noted in Anderson that we generally affirm a trial commissioner who bases his or her findings on the opinion of the Commissioner's examiner. "We cited Carroll v. Flattery's Landscaping, Inc., 5385 CRB-8-08-10 (September 24, 2009) for the proposition that 'while the trial commissioner was not bound to accept (the commissioner's examiner's) opinion, generally he would need to proffer a reason why he found another expert more persuasive. See Ben-Eli v. Lowe's Home Improvement Center, 5006 CRB-3-05-10 (November 16, 2006), Torres v. New England Masonry Company, 5289 CRB-5-07-10 (January 6, 2009), and Alvarez v. Wal-Mart Stores, Inc., 5378 CRB-5-08-9 (July 27, 2009).'" Id.

The claimant argues that this case is similar to Mele v. Hartford, 118 Conn. App. 104 (2009) and that the trial commissioner's decision in this case should also be reversed on appeal. We find Mele distinguishable. The Appellate Court in Mele found that all the physicians whom the trial commissioner found credible opined that the claimant's hip condition was work related. Id., 110. Since the expert testimony which the commissioner credited on this point was in agreement, the trial commissioner could not disregard this uncontroverted evidence on the issue of causation. Id., 112. After reviewing the reports and testimony of Dr. Plancher we do not find the witnesses concurred in the same fashion and therefore a different outcome is supported by the record.

The claimant also argues that Dr. Plancher at various times noted that there were medical records pertaining to the claimant's medical history which he had not had the

chance to review. See for example, Claimant's Exhibit H, pp. 6-7, where the witness noted he had not been presented with various records from the Veterans' Administration. Therefore, the claimant argues his testimony should be discounted. However, we note that much of the claimant's decades-long medical history may not directly impact the issues considered at the formal hearing. The witness in this case conducted his own physical examination of the claimant on April 29, 2011 and therefore, was not reliant solely on medical records. In addition, in Respondent's Exhibit 3 the witness noted that he had had the opportunity to review additional records subsequent to his original examination and that his opinions as to causation of the right knee injury and the claimant's work capacity had not materially changed. As a result, we believe the witnesses' opinions were based on a sufficient foundation of facts for the trial commissioner to deem them reliable.

The claimant argues that he proved that he was totally disabled pursuant to the standards delineated in Osterlund v. State, 135 Conn. 498 (1949). The claimant's brief states "[i]t is clear that Mr. Mauriello's presentation is worse now than when he was initially evaluated by all of the doctors." Claimant's Brief, p. 25. Pursuant to the "totality of the factors" test outlined in Bode v. Connecticut Mason Contractors, The Learning Corridor, 130 Conn. App. 672 (2011) he was totally disabled and therefore entitled to benefits under § 31-307 C.G.S.; Claimant's Brief, p. 29. The trial commissioner was not persuaded by this argument. We believe she had a reasonable basis for this position.

We have had occasion in recent years to apply the holding in Bode to various fact patterns. We find our opinion in Olwell v. State/Dept. of Developmental Services, 5731

CRB-7-12-2 (February 14, 2013) is pertinent to the issues raised herein. In Olwell, the claimant argued that had the trial commissioner properly evaluated the totality of the evidence that temporary total disability benefits would have been granted. We affirmed the trial commissioner's denial of benefits as based on the evidence that was found probative and persuasive by the trier of fact. We noted in Olwell that the claimant had the burden of persuasion on such issues.

> We also note that it is the burden of the claimant to establish their medical condition is causally related to their employment. Marandino v. Prometheus Pharmacy, 105 Conn. App. 669, 677-678 (2008), *aff'd*, 294 Conn. 564 (2010). To that extent, the question is not whether the claimant suffered orthopedic injuries or a different form of compensable injury. The claimant must prove that their compensable ailment was a substantial factor in their current disability. Weir v. Transportation North Haven, 5226 CRB-1-07-5 (April 16, 2008); Lamontagne v. F & F Concrete Corporation, 5198 CRB-4-07-2 (February 25, 2008) and Vitti v. Richards Conditioning Corp., 5247 CRB-7-07-7 (August 21, 2008).

Our opinion in Olwell also cited Sapko v. State, 305 Conn. 360 (2012) as standing for the principle that a claimant must link the ailment or condition which creates the need for benefits with a compensable injury. We also distinguished both O'Connor v. Med-Center Home Health Care Inc., 140 Conn. App. 542 (2013) and Bode from the facts in Olwell, as "[i]n neither case however does it appear the respondents argued that there was an alternative basis for the claimant's disability." Id.[3]

[3] We also note that in Bode v. Connecticut Mason Contractors, The Learning Corridor, 130 Conn. App. 672 (2011) it was apparent that the trial commissioner had not properly weighed uncontroverted evidence presented to the tribunal that said the claimant lacked a work capacity. Id., 686. We believe in the present matter that the trial commissioner did properly consider all the evidence presented by the time the record had closed.

In the present case the claimant has sustained a number of non-compensable injuries from motor vehicle accidents and during his service in the military. In order to receive benefits under § 31-307 he needed to persuade the trial commissioner that he lacked a work capacity, and that his compensable injuries were the cause of this inability to work. The claimant argued that he had proven his case, and the subordinate facts found by the trial commissioner were inconsistent with her conclusions. However, we have reviewed the Commissioner's Ruling on Claimant's Motion for Clarification. We believe she sufficiently reconciled the issues herein. She noted that the claimant was a surgical candidate, but had not decided whether to undergo the surgery, and were he to have the surgery he would likely be totally disabled for some period thereafter. She therefore suspended benefits until such time as the claimant decided whether to undergo surgery.[4] The trial commissioner further noted that the claimant in her view had not met his burden of proof for permanent and total disability at this time. She explained that while Dr. Irving deemed the claimant totally disabled, Dr. Plancher and Dr. Brittis ascribed some work capacity to the claimant. In addition, the various physicians had not commented on the limited work capacity found for the claimant in the Functional Capacity Examination. We note that we have upheld trial commissioners who have found a claimant had a work capacity when the claimant argued that the limitations on their capacity were very onerous, see Clarizio v. Brennan Construction Company, 5281

[4] Presumably that decision has been made. In the event this matter has not been resolved, we suggest the claimant seek a new hearing as to his eligibility for § 31-307 C.G.S. benefits. We note that a decision on disability at one point of time is not conclusive as to the claimant's entitlement for future benefits. Schenkel v. Richard Chevrolet, Inc., 5302 CRB-8-07-12(November 21, 2008), *aff'd*, 123 Conn. App. 55 (2010).

CRB-5-07-10 (September 24, 2008) and Leandres v. Mark IV Construction, Inc., 5159 CRB-4-06-11 (October 22, 2007). While the commissioner did find the claimant persuasive and credible, she chose to rely on expert witnesses who testified the claimant had a work capacity and therefore discounted the testimony of the claimant's treating physician. 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. See Dellacamera v. Waterbury, 4966 CRB-5-05-6 (June 29, 2006), n.1 and O'Reilly, supra. The claimant had the burden of persuasion on the issue of total disability. Based on the expert opinions presented, the trial commissioner did not abuse her discretion by concluding he had not met this burden.

Finally, the claimant argues that his due process rights were impaired when the trial commissioner ruled on the Motion to Open and Modify without holding a new hearing and permitting the claimant to present additional evidence. The claimant cites Balkus v. Terry Steam Turbine Co., 167 Conn. 170 (1974) as supporting his position. We are not persuaded. The issue in Balkus was the decision by the commissioner to rely on documentary evidence when a party claimed he did not have the ability to cross-examine the author. Id., 177-178. Balkus does not stand for the proposition that a commissioner is obligated to reopen proceedings after the record is closed. The trial commissioner issued a clarified ruling based on the record presented. Although she offered no specific explanation for not opening the record and holding an additional hearing, we may infer that she reasonably could have determined that this would amount to the sort of piecemeal litigation proscribed under precedent such as Gibson v. State/Department of Developmental Services-North Region, 5422 CRB-2-09-2 (January

13, 2010) and Hines v. Naugatuck Glass, 4816 CRB-5-04-6 (May 16, 2005). We have extended great latitude to trial commissioners as to the management of formal hearings, see Kinsey v. World Pac, 5783 CRB-7-12-10 (September 17, 2013), and are not persuaded this discretion was abused herein.

Since it is the duty of the trier of fact to weigh the evidence presented, we find no basis to overturn the Finding and Dismissal.[5] We affirm the Finding and Dismissal.

Commissioners Charles F. Senich and Ernie R. Walker concur in this opinion.

[5] We uphold the trial commissioner's denial of the claimant's Motion to Correct. We conclude she did not find the evidence cited in this motion probative or persuasive. 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) and Vitti v. Richards Conditioning Corp., 5247 CRB-7-07-7 (August 21, 2008).