

CASE NO. 5848 CRB-5-13-5
CLAIM NO. 500129473

: COMPENSATION REVIEW BOARD

THOMAS STORY
CLAIMANT-APPELLEE

: WORKERS' COMPENSATION
COMMISSION

v.

: AUGUST 7, 2014

TOWN OF WOODBURY
EMPLOYER

and

PMA MANAGEMENT CORP.
OF NEW ENGLAND
INSURER
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by Robert S. Kolesnik, Esq., Kolesnik Law Firm, 49 Leavenworth Street, Suite 200, Waterbury, CT 06702.

The respondents were represented by Colette S. Griffin, Esq., Howd & Ludorf, 65 Wethersfield Avenue, Hartford, CT 06114-1190.

This Petition for Review¹ from the May 15, 2013 Finding and Decision of the Commissioner acting for the Fifth District was heard March 28, 2014 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Stephen B. Delaney and Michelle D. Truglia.

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

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondents appeal from the May 7, 2013 Finding and Decision of the Commissioner acting for the Fifth District. In that Finding and Decision the trial Commissioner awarded the claimant benefits for a hearing loss sustained as a result of a work related accident occurring October 21, 2002.

The pertinent facts in the matter are as follows. The claimant at the time of the accident was a police officer for the Town of Woodbury. On October 21, 2002 the claimant was directing traffic around a construction site. While engaged in that activity the claimant was struck by a motor vehicle. As a consequence of the accident the claimant sustained injuries to various body parts and the respondents accepted compensability for a number of them.

The instant matter concerns the claimant's claim for benefits due to a binaural hearing loss. The claimant contends that as a result of the accident he suffered from tinnitus, vertigo and sustained a hearing loss in both ears. Proceedings were held before the trial Commissioner who in his May 7, 2013 Finding and Decision found the hearing loss was compensable.

Following the trial Commissioner's May 7, 2013 Finding and Decision the respondents filed this appeal. The ultimate issue presented for review is whether the trial Commissioner erred in finding that the claimant's hearing loss was causally related to the October 21, 2002 motor vehicle accident.

The trial Commissioner was presented with the reports and opinions as to causation by the following doctors; Dr. William Lehmann, Dr. John Kveton, and Dr. Victor Gotay. Doctors Lehmann and Kveton, who were the respondents' experts, were of

the opinion that the hearing loss was not causally related to the motor vehicle accident. Dr. Gotay who treated the claimant for the tinnitus, vertigo and hearing loss opined that the motor vehicle accident was a substantial factor in the claimant's hearing loss. After reviewing these opinions and other evidence the trial Commissioner accorded greater weight to the opinion of Dr. Gotay than he did to the opinions of Dr. Lehman and Dr. Kveton.

The respondents' argument on appeal represents yet another round in the battle among experts. See e.g., DeLeon v. Walgreen's, 5568 CRB-4-10-6 (May 13, 2011). The crux of the respondents' argument is that the commissioner should have relied on the opinion of the experts who did not declare the claimant's hearing loss was causally related to the October 21, 2002 accident. The respondents contend that the trial commissioner's reliance upon the expert opinion of Dr. Gotay is error as Dr. Gotay's opinion is "mere speculation or conjecture and not supported by the subordinate facts." And thus, erroneous under the Supreme Court's holding in DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132 (2009). Appellants' Brief page 11.

In support of its argument the respondents-appellants point to Dr. Gotay's admission that he did not review the reports of the claimant's primary care physician, Dr. McNair, nor did Dr. Gotay review the records from the Waterbury Hospital Emergency Room. The point of the appellants' argument is that Dr. Gotay failed to review medical records that were more proximate in time to the date of the motor vehicle accident and therefore, his opinion should not be accorded the same weight as the respondents' experts. We are not so persuaded.

During respondents' counsel's deposition of Dr. Gotay, counsel questioned him as to the importance of an accurate history. Respondents' counsel's line of questioning sought to stress the fact that initial post accident reports did not reflect a complaint as to tinnitus, dizziness or hearing loss. The respondents contend, therefore, that the trauma endured by the claimant as a result of the accident was not a substantial factor in the claimant's hearing loss.

Additionally it appears that the respondents sought to impugn Dr. Gotay's grasp of the claimant's history and its relationship to his hearing issues. Our review of the April 27, 2012 deposition of Dr. Gotay reflects a number of statements and answers by Dr. Gotay that could support the trier's inference that Dr. Gotay's opinion as to causation was not merely speculative or based in conjecture². The factual circumstances in the matter at hand bear no resemblance to the facts at issue in DiNuzzo, supra.

² As an example we note the following testimony from the April 27, 2012 Deposition of Dr. Gotay, pp.17-21.

Attorney Griffin:	“Okay. And I’m going to ask you, Doctor, what was the history you took from Mr. Story?
Dr. Gotay:	On January 8th, 2004?
Attorney Griffin:	Yes.
Dr. Gotay:	Okay. The history was, chief complaint he was complaining about ringing in his ears, and light-headedness. You can see on my note, since an accident that occurred October of ‘02.
Attorney Griffin:	Okay.
Dr. Gotay:	Wait.
Attorney Griffin:	Okay.
Dr. Gotay:	Because you asked me about the history. I’m going to give you the history I took.
Attorney Griffin:	That’s fine.
Dr. Gotay:	Motor vehicle accident 10/21/02, hit by car, hurt both knees and lower back while directing traffic. Surgery of his knees by Doctor Glenn Taylor twice, times two. Three injections for pain at Naugatuck Valley Surgical Center by Doctor Patel. Of no help, made it worse. Also, complaining of hearing loss and off-balance. He had a weight loss of 28 pounds for the last eight months with Doctor Adkins’ diet. That is the history.
Attorney Griffin:	Okay. That was the history that Mr. Story provided to you?
Dr. Gotay:	That’s correct.

Attorney Griffin: Okay. And did you draw any - - did you evaluate Mr. Story at that time?

Dr. Gotay: I did. I did a physical examination which showed normal ears and tympanic membranes, nasal septal deviation, normal throat and neck examination. I diagnosed it as vertigo syndrome and tinnitus.

Attorney Griffin: Okay.

Dr. Gotay: I ordered a hearing test the same day I saw the patient 1/8/04, which shows a mild to severe sensorineural hearing loss between 3,000 and 8,000 kilohertz in both ears, with normal tympanograms. Speech reception thresholds of 15 decibels, and unaided discrimination scores of 100 percent in the right ear and 100 percent on the left ear. I ordered an electronystagmogram, his balance test. That was done 2/5/04, and the test results were consistent with peripheral abnormalities as per my record.

Attorney Griffin: Okay.

Dr. Gotay: I'm not done.

Attorney Griffin: Okay.

Dr. Gotay: I called the patient 2/19/04 after he had his balance test or the electronystagmography, and told him that the results of the test, that most probably his findings were secondary to the motor vehicle accident with reasonable medical probability. And I sent a letter to Doctor McNair with that information.

Attorney Griffin: Okay. And, Doctor Gotay, in drawing your conclusions, did you base the issue of causation on the description of Mr. Story, or his reporting to you that he had been having dizziness and loss of hearing since the motor vehicle accident?

Dr. Gotay: That's true.

Attorney Griffin: And, in fact, is dizziness and loss of hearing something that would be relevant in the medical records to other providers such as Doctor McNair?

Attorney Kolesnik: Object to the form.

Dr. Gotay: I don't think so.

Attorney Griffin: Okay.

Dr. Gotay: And I'll tell you why.

Attorney Griffin: Okay. Well, that's not pending right now, but I'll continue and we can go back.

Dr. Gotay: Okay.

Attorney Griffin: Okay. Now, did you come to draw any conclusions with regard to a diagnosis?

Dr. Gotay: I gave you two diagnoses already, vertigo syndrome and tinnitus. That's my impression on the first. I already went through that.

Attorney Griffin: Okay. And tell me, Doctor, if you will, the cause of that, those - -

Dr. Gotay: I already answered that, too. When I told you that when I notified the patient most probably was secondary to his accident.

Attorney Griffin: Okay. What about the accident? Was there trauma to his head that was reported to you?

Dr. Gotay: You don't have to have trauma to the head to have labyrinthine concussion. . . . I think he did have a labyrinthine concussion, even if he didn't have a head injury. Even if he didn't hit his head on the ground. Even if he didn't have a skull fracture. You don't need to have any of that if you have been impacted and you turn around. That alone can give you a labyrinthine concussion.

In DiNuzzo, the decedent had suffered a compensable cervical injury and a host of other unrelated injuries and illnesses. The decedent was on high levels of narcotics as a result of his compensable injury. On the night of his death the decedent was, inter alia, sweating profusely, mumbling incoherently, and complaining of back pain. The next morning the decedent's spouse found the decedent unresponsive. The medical examiner did not examine the decedent's body nor was an autopsy performed. The medical expert put forth by the claimant opined that the decedent's death was due to a heart attack caused by atherosclerotic heart disease. The claimant's expert further related the heart disease to be the consequence of the high levels of narcotics and resulting inactivity

Later in the deposition there is the following exchange, (April 27, 2012 Deposition of Dr. Gotay, pp. 49-50.)

Attorney Griffin: Earlier I read to you the report of Doctor Lehmann in which Doctor Lehmann states that he estimated that the bilateral high-pitched humming, tinnitus began approximately six months post motor vehicle accident.

Dr. Gotay: That's his statement, yes.

Attorney Griffin: Yes. And I had asked whether that was consistent with your understanding of Mr. Story's history.

Dr. Gotay: I cannot say yes to that, because the facts I have says ringing in the ears, lightheadedness, and hearing loss since the accident.

Attorney Griffin: Okay.

Dr. Gotay: October '02. So, it doesn't -- I don't have here six months after, one month, one day. This says since the accident. That's what I have on my -- and that's what I have to -- those are the facts (indicating).

Attorney Griffin: Yes, I understand that.

Dr. Gotay: Okay?

Attorney Griffin: Would that timing make a difference with respect to your addressing the issue of causation?

Dr. Gotay: No. I'll tell you why.

Attorney Griffin: Okay.

Dr. Gotay: Very simple. You can get hit in the head today and you can get dizzy a year from now, ten years from now and it could be from that. Okay? So, you don't have to be dizzy the day of the injury. You could be dizzy weeks, months, years after. And it all could be from that accident.

Attorney Griffin: Okay. So, how is a medical provider, is it that you can opine as to the event when you get six months, a year, two years out?

Dr. Gotay: You do testing, like I did, and then you, based on experience you come to conclusions.

Attorney Griffin: Okay.

Dr. Gotay: And based on your training."

which contributed to morbid obesity of the decedent. That opinion was proffered despite the non-existence of an autopsy, the non-existence of a report by the medical examiner, as well as the medical expert's failure to examine the decedent postmortem. Further, despite the fact that the claimant's medical expert treated the decedent for twenty years, there was no mention of heart disease in the decedent's medical records. *Id.*, at 136.

In the matter at hand the medical expert opinion on which the trial commissioner relied was based on; the expert's examination of the claimant, the claimant's history, the performance of various tests and the expert's own medical expertise and experience. The facts could not be more different than those which existed in DiNuzzo, *supra*. Therefore, the respondents-appellants' contention that the expert medical opinion of the claimant was speculative and based on conjecture is without merit.

Whether the claimant's hearing loss was causally related to the October 21, 2002 accident is a determination that is factual in nature. Sapko v. State, 305 Conn. 360, (2012). At the outset we note that on appeal we do not engage in *de novo* review. Haburey v. Winchester, 150 Conn. App. 699 (2014), *cert. denied*, 312 Conn. 922 (2014). Talton v. Saint Raphael Healthcare System, 5816 CRB-3-12-12 (January 16, 2014). The weight and credibility assigned to the evidence is a matter for the trial commissioner. Haburey, *supra*. The factual findings and conclusions of the Commissioner will not be disturbed unless they; result from an incorrect application of the law, are without evidence, or based on unreasonable or impermissible factual inferences. Sapko, *supra*. We find that the trial Commissioner's Finding and Decision did not violate any of the above tenets.

We therefore affirm the May 7, 2013 Finding and Decision of the Commissioner acting for the Fifth District.

Commissioners Stephen B. Delaney and Michelle D. Truglia concur.