CASE NO. 5858 CRB-2-13-7 : COMPENSATION REVIEW BOARD
CLAIM NO. 200170522

MICHAEL ATTARDO
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: JUNE 19, 2014

TEMPORARIES OF NEW ENGLAND, INC.
EMPLOYER

and

WORK FIRST CASUALTY COMPANY
c/o BROADSPIRE (CRAWFORD CO.)
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Cristina C. Caruk, Esq., and Domenic D. Perito, Esq., Kocian Law Group, 356 Middle Turnpike West, Manchester, CT 06040.

The respondents were represented by David C. Davis, Esq., McGann, Bartlett & Brown, LLC, 111 Founders Plaza, Suite 1201, East Hartford, CT 06108

This Petition for Review from the June 11, 2013 Finding and Denial of the Commissioner acting for the Second District was heard January 24, 2014 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Stephen B. Delaney and Michelle D. Truglia.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. This appeal involves issues concerning what would be the appropriate prosthetic device for the claimant, who sustained an accepted compensable injury. The trial commissioner determined in his Finding and Denial that the claimant had not proven his case that an upgrade to a microprocessor controlled foot/ankle was required pursuant to § 31-294d C.G.S. The claimant has appealed, arguing that the statute requires the commissioner to approve as "reasonable and necessary" medical care a device which in his view would aid in his efforts to return to work. The claimant also seeks to introduce additional evidence supportive of this claim. We find that the decision herein was essentially a factual decision committed to the trial commissioner, and do not find his conclusions arbitrary or capricious. As for the additional evidence sought to be added, we suggest that a new hearing would be the appropriate venue to consider these issues. We affirm the Finding and Denial.

The following facts are pertinent to our consideration of this matter. On April 14, 2010 the claimant was employed as a truck driver for the respondent. On that date the claimant suffered an injury to his right leg/ankle in the course of his work for the respondent, which led to a number of surgical interventions culminating in a below-knee amputation of the right leg. The amputation left approximately 25 centimeters of his tibia. As he recovered from the amputation surgery, his treating physician, Dr. Bruce Browner, referred the claimant to be evaluated and fitted for a prosthetic limb. In October 2010 the claimant was evaluated by Ms. Abby Hoffman, a certified prosthetist at Hanger Prosthetics & Orthotics ["Hanger"].

The process of determining if someone is a candidate for a prosthetic limb - and selecting an appropriate limb for those who are - requires assessment of the person's current level of functioning, understanding the physical environment in which the patient will operate in the future (home and work), and anticipating the patient's expected level of function with a prosthesis. In making this assessment the industry uses a scale of five grades. The lowest grade being someone who will not get real benefit from a prosthetic limb and the highest being someone who will be very active with a prosthesis. Hanger performed this assessment and the claimant rated at their highest level, a K4, making him a good candidate for achieving results from the use of a prosthetic limb.

In choosing the specific prosthesis, Ms. Hoffman considered the claimant's environmental factors and his desire to return to heavy activities, including work, sports with his children, and home and yard maintenance. She offered the claimant several prosthetic foot designs appropriate for a person at the K3 or K4 level. These designs were structured with multiple components, i.e. (1) the socket, which is specially fitted to attached to the stub of the patient's limb; (2) the suspension, which is the means by which the limb is secured in the socket; (3) the shank, which is the shaft connecting the socket to the foot unit; and (4) the artificial foot. The process of designing and building a permanent socket/suspension, and matching that to a foot that best suited the claimant's needs, was a process of trial and error that occurred over several sessions and several months between the fall of 2010 and early February 2011. After construction of a test socket, the claimant tried out three different prosthetic foot devices recommended by Ms. Hoffman, including a "Renegade," by Freedom Innovations. The claimant ultimately

settled on a foot known as the "Highlander," also made by Freedom Innovations. He received this prosthesis in February 2011.

The Highlander, like all the other prosthetic feet considered in this case, is a "flexible endoskeletal" model and is also described as a Solid Ankle Flexible Endoskeletal (SAFE) model, as the foot is "fixed," i.e., bolted directly to the shank. There are other models available on the market that incorporate an articulating joint at the junction of the foot and the shank, which allows the entire foot unit to flex a few degrees relative to the shank. These are called foot/ankle systems. After taking possession of his prosthesis the claimant continued to be seen at Hanger periodically as he tried to acclimate to the limb. Modifications had to be made to the suspension because of changes in the size of the stump, but there was no problem with the foot itself. His gait remained good and he continued to function at the K4 level. The stump, however, required some follow-up surgery and as a result, the socket was no longer fitting properly. On April 18, 2012 a resident physician by the name of "Anthony Parrino" filled out a prescription, on UConn Health Center prescription form stating: "® BKA prosthetic. Please fit for ® BKA prosthetic – custom." The prescription form was from Dr. Browner's practice.

On April 26, 2012 the claimant returned to Hanger. Ms. Hoffman was away and the claimant was seen by Paul Armstrong, another certified prosthetist at Hanger. At that point, the claimant's prosthesis was only about a year old. But for the needed modifications to the socket, it was fully functional and without defect. However, rather than simply constructing a new socket/suspension, Mr. Armstrong proposed building a whole new prosthetic limb. Specifically, Mr. Armstrong proposed fitting the claimant

with an "Endolite Élan Microprocessor Controlled Foot." The Elan prosthetic is a foot/ankle system. It allows the foot to flex downward vis-à-vis the shank (plantarflexion) by as much as six degrees from neutral and to flex upward (dorsiflexion) by as much as three degrees. Unlike conventional foot/ankle systems, the resistance to flexion of the joint does not come from the mechanical tightness of the joint. Rather, with the Elan the resistance is provided by hydraulic pressure. Between the foot and the shank there is a device ("tower") that contains hydraulic mechanisms and multiple valves that open and close to increase or decrease resistance of the joint to the forces causing flexion. Operation of the valves is governed by an onboard microprocessor that constantly takes measurements and adjusts hydraulic pressure as needed. The unit is powered by a built-in battery that must be charged up daily.

An articulating ankle joint on a prosthetic limb allows a person to stand up straight on a sloped surface without bending the knee, assuming the grade of the slope does not exceed the number of degrees of flexion allowed by the ankle. The amount of movement allowed in foot/ankle units is limited. Whereas a normal human foot can flex upward 25 degrees and downward 45 degrees, for a total of 70 degrees, the Elan foot allows movement only nine degrees of arc (6 degrees down and 3 degrees up). A Renegade MX model, without the hydraulic system, allows a total of 13.5 degrees of movement (6 degrees down and 7.5 degrees up). The claimant's original prosthesis cost a total of $8,878.65, of which the Highlander foot accounted for $2,485.24. The Elan foot was quoted at a price exceeding $36,000, however, upgrading the rest of the prosthesis would add over $19,000 of additional cost for a total cost in excess of $56,000.

The respondents challenged the need for the switch to the Élan prosthesis, and the claimant sought an opinion from Dr. Browner. In an August 17, 2012 letter to the claimant's attorney, Dr. Browner explained the medical necessity for a new socket. In the same letter the doctor hypothesized that the Highlander foot might have been subject to wear over the past year and might warrant replacement, but he deferred to the prosthetist on that issue. Mr. Armstrong, the new prosthetist, testified at the formal hearing. He could identify no defect in the existing prosthesis and described the Highlander as a "good" foot. He also said that he could not point to any "deleterious effects" of using the existing prosthesis. The existing prosthetic foot is still within the warranty period. Apart from the need to modify the socket to accommodate changes in the claimant's stump, there is no evidence the prosthesis needs any repair or replacement. The commissioner also noted at the time of his initial evaluation at Hanger and the construction of his current prosthesis in 2010-11, foot/ankle systems - including the Elan foot/ankle - were available on the market. Ms. Hoffman did not suggest the Elan. The claimant chose the Highlander, which has no ankle. The commissioner noted the record does not suggest the existing prosthetic foot fails to meet the current needs of the claimant, nor is there evidence as to what effect any replacement prosthesis would have on lessening the claimant's effort in walking.

Based on this record the trial commissioner concluded that the Highlander prosthesis works well and meets the current needs of the claimant. While the socket portion of the prosthesis required replacement, the Highlander foot was, and is, functioning well and still under warranty. Revision or replacement of the socket of the existing prosthesis is reasonable and necessary medical care for purposes of § 31-294d

C.G.S. Apart from the fit of the socket, which can be remedied by replacing the socket, there is no credible evidence in the record that the existing prosthetic limb in general, and the Highlander foot in particular, is inappropriate for the claimant or fails to meet his current needs. On the other hand, the commissioner did not find credible evidence that replacing the existing prosthetic foot with one that incorporates the microprocessor-controlled foot/ankle would provide any appreciable benefit to the claimant beyond that provided by the existing prosthesis, therefore, the proposed upgrade to the Elan microprocessor-controlled prosthetic foot was not reasonable nor necessary. Therefore, the commissioner denied the bid to have the respondents pay for an Elan prosthetic foot.

The claimant did not file a Motion to Correct; therefore, we may give facts found by the trial commissioner conclusive effect. Stevens v. Raymark Industries, Inc., 5215 CRB-4-07-4 (March 26, 2008), *appeal dismissed*, A.C. 29795 (June 26, 2008). The claimant argues that the trial commissioner failed to credit the weight of the evidence supportive of upgrading to a more technologically advanced prosthesis. The claimant regards such a device as "curative care" and believes that it was unreasonable to deny this claim. The claimant also wants to present additional evidence supportive of this argument. While we appreciate the claimant's position, we essentially find he is trying to retry the case on appeal. In addition, we believe it would amount to piecemeal litigation to add additional evidence to the record at this late date.

The standard of deference we are obliged to apply to a trial commissioner's findings and legal conclusions is well-settled. "The trial commissioner's factual findings and conclusions must stand unless they are without evidence, contrary to law or based on unreasonable or impermissible factual inferences." Russo v. Hartford, 4769 CRB-1-04-1

(December 15, 2004), *citing* Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Moreover, "[a]s with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial court could have reasonably concluded as it did." Burton v. Mottolese, 267 Conn. 1, 54 (2003). "This presumption, however, can be challenged by the argument that the trial commissioner did not properly apply the law or has reached a finding of fact inconsistent with the evidence presented at the formal hearing." Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

The claimant says that he had testified to some level of discomfort with the existing prosthetic foot and the trial commissioner failed to credit this testimony, instead finding the existing foot entirely functional. He argues that therefore this finding was not supported by the evidence. The claimant also argues that the trial commissioner misapplied the statute, as interpreted in the holding of Bowen v. Stanadyne, Inc., 2 Conn. Workers' Comp. Rev. Op. 60, 64, 232 CRD-1-83 (June 19, 1984). As the claimant views this matter, a new prosthetic foot would aid him in an attempt to return to the workforce, and therefore was the sort of "curative care" which is compensable under Chapter 568. The claimant also argues as he presented opinions from Mr. Armstrong supportive of a new prosthesis that he met the "worthy of attempt" standard, as applied in Cirrito v. Resource Group Ltd. of Conn., 4248 CRB-1-00-6 (June 19, 2001). The claimant states that as the respondents failed to present a witness to contest this evidence that the trial commissioner was obligated to approve this request. We are not persuaded by these arguments.

We find that the trial commissioner in his Memorandum, dated June 11, 2013, explained in detail how he weighed the evidence and evaluated the merits of the claimant's request. It is clear that he considered whether the Elan prosthesis would be of more aid in returning the claimant to the workforce than his current prosthesis. The trial commissioner further determined the primary reason that the Elan device was now being considered was that Mr. Armstrong had a more favorable opinion as to the efficacy of this device than Ms. Hoffman.

Our precedent governing disputes over requests for medical treatment brought pursuant to § 31-294d C.G.S. is clear: we defer to the trial commissioner as the trier of fact to ascertain whether the claimant's evidence is sufficient to support the claim. In disputes as to whether a form of treatment is either palliative or curative, consistent with Bowen, supra, we have followed this standard. See Palumbo v. Bridgeport, 4991 CRB-4-05-9 (September 7, 2006) "[w]e have in past cases addressed the subject of the 'curative/palliative' distinction upon which the compensability of his medical treatment hinges, and have explained that it is a *factual matter* as to whether medical care satisfies the 'reasonable and necessary' standard of § 31-294d C.G.S.", *citing* Carroll v. Flattery's Landscaping, Inc., 4499 CRB-8-02-2 (March 25, 2003). See also Bryant v. Pitney Bowes, Inc., 5723 CRB-7-12-1 (January 24, 2013) and Covaleski v. Casual Corner, 5524 CRB-1-10-1 (December 3, 2010). The record herein does not demonstrate that as a matter of law, that a replacement prosthesis would be deemed "curative" care.[1]

[1] We have reviewed the claimant's brief and while it discusses the humanitarian purposes of Chapter 568, and argues a more advanced prosthesis will benefit the claimant in returning to the workforce, we do not find a citation to an expert opinion rendered by any witness representing that the claimant should be fitted with such a device so that he **will** be able to return to his previous occupation.

We also have long held that it is a factual determination of the trial commissioner as to what modalities of treatment are most appropriate for a claimant. See Cervero v. Mory's Association, Inc., 5357 CRB-3-08-6 (May 19, 2009), *aff'd*, 122 Conn. App. 82 (2010), *cert. denied*, 298 Conn. 908 (2010). The claimant argues that he established that the Elan prosthesis met the "worthy of attempt" standard enunciated in Cirrito v. Resource Group Ltd. of Conn., 4248 CRB-1-00-6 (June 19, 2001) and therefore, it was legal error for the trial commissioner to deny approval of the device. We note, however, that Cervero distinguished and limited the holding in Cirrito. "Moreover, a close reading of the Cirrito opinion indicates it stands for the *discretion* of a trial commissioner to approve treatments which may have a relatively low percentage of success. It does not, as the claimant suggests, establish that once the 'worthy of attempt' threshold is reached the commissioner is *obligated* to approve surgery." Cervero, supra. (Emphasis in original.) See also Owens v. State/DMHAS, 5661 CRB-8-11-6 (June 21, 2012). In the present case the trial commissioner was not persuaded that the Elan prosthesis was the most appropriate modality for the claimant. We do not find that decision inconsistent with the record or the law governing this decision.

We now turn to the claimant's bid to add additional evidence to the record. The respondents have objected on the grounds that the evidence in question (medical reports from Dr. Browner) could have been presented to the trial commissioner prior to the record in this matter having closed. We are not persuaded this evidence was unavailable to the claimant and his counsel at the time of the formal hearing. As we pointed out in Gibson v. State/Department of Developmental Services-North Region, 5422 CRB-2-09-2 (January 13, 2010), this is a prerequisite to admitting such evidence. See also Diaz v.

Jaime Pineda, a/k/a Jamie Pineda d/b/a J.P. Landscaping Company, 5244 CRB-7-07-7 (July 8, 2008), *aff'd, rev'd on other grounds,* 117 Conn. App. 619, 627-629 (2009). The claimant's request herein essentially is a bid for piecemeal litigation, which our precedent clearly states is inappropriate. See Gibson, supra, Hines v. Naugatuck Glass, 4816 CRB-5-04-6 (May 16, 2005) and Schreiber v. Town & Country Auto Service, 4239 CRB-3-00-5 (June 15, 2001). We therefore deny the Motion for Additional Evidence.

We do note that the claimant is anticipated to need to replace his current prosthesis at some point in the near future, and at that point a new hearing may be required to ascertain what device is the most reasonable and necessary means of addressing the claimant's medical needs. In any event, our precedent states that while a claimant's present medical condition does not warrant approving a certain form of medical treatment the door is generally left open to reconsider the issue at some later date. See Cervero, supra, *citing* Serluca v. Stone & Webster Engineering, 5118 CRB-8-06-8 (July 13, 2007). In Serluca we pointed out this is the type of decision where a present trial commissioner cannot bind a future trial commissioner.

> This determination of the claimant's *current* medical treatment is not probative of what determination the Commission may reach regarding the claimant's *future* medical treatment. At such time as the claimant seeks to establish that future treatment constitutes reasonable and necessary treatment for the compensable injury he will be able to pursue this request *de novo*.

The evidence which the claimant sought to add to the record at this time would be probative in any future hearing as to an appropriate prosthetic for the claimant and should be presented at that time.

While we can reverse a trial commissioner's decision when it is unsupported by the evidence or inconsistent with the law, Neville v. Baran Institute of Technology, 5383 CRB-8-08-10 (September 24, 2009), the claimant in this matter is essentially seeking to retry the case on appeal. As we held in Hernandez v. American Truck Rental, 5083 CRB-7-06-4 (April 19, 2007) *citing* Goldberg v. Ames Department Stores, 4160 CRB-1-99-2 (December 19, 2000), "[w]e may not retry a case on appeal and substitute our own findings for those of the trier." It is the trial commissioner's job to weigh medical evidence. O'Reilly v. General Dynamics Corp., 52 Conn. App. 813, 818 (1999) and Weir v. Transportation North Haven, 5226 CRB-1-07-5 (April 16, 2008). We must respect his conclusions as to the evidence presented. The claimant has the burden of persuasion before this Commission. See Hernandez, supra, and Lentini v. Connecticut College, 4933 CRB-2-05-4 (May 15, 2006). The claimant did not meet this burden and after evaluating the record we do not find the trial commissioner's decision was "clearly erroneous." Burns v. Wal-Mart Stores, Inc., 5343 CRB-7-08-5 (March 23, 2009) and Dudley v. Radio Frequency Systems, 4995 CRB-8-05-9 (July 17, 2006).

We therefore affirm the Finding and Denial.

Commissioners Stephen B. Delaney and Michelle D. Truglia concur in this opinion.