CASE NO. 5867 CRB-7-13-7 : COMPENSATION REVIEW BOARD
CLAIM NO. 700133717

JENNIFER NISBET
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: JULY 17, 2014

XEROX CORPORATION
EMPLOYER

and

SEDGWICK CMS, INCORPORATED
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Guy L. DePaul, Esq., Jones, Damia, Kaufman, Borofsky & DePaul, LLC, 301 Main Street, PO Box 157, Danbury, CT 06813-0157.

The respondents were represented by Heather K. Porto, Esq., Pomeranz, Drayton & Stabnick, LLC, 95 Glastonbury Boulevard, Glastonbury, CT 06033-4412.

This Petition for Review from the July 5, 2013 Finding of the Commissioner acting for the Seventh District was heard February 28, 2014 before a Compensation Review Board panel consisting of Commissioners Stephen B. Delaney, Daniel E. Dilzer and Stephen M. Morelli.

OPINION

STEPHEN B. DELANEY, COMMISSIONER. The claimant has appealed from a Finding wherein the trial commissioner concluded that the Form 36 which was granted in 2008 should remain in place, as the commissioner found the claimant had a work capacity. The claimant argues that the trial commissioner erred by relying on the respondent's medical examiner, whom they believe had an inadequate basis to render an opinion. The claimant also argues the commissioner should not have found the surveillance evidence submitted probative, and the claimant did not receive a fair hearing as a result of the commissioner's bias. The claimant also argues the trial commissioner erred as to the date of maximum medical improvement. We find none of these arguments persuasive. Upon review, we find the claimant had the burden of proving she was still totally disabled and she simply failed to persuade the trial commissioner of that fact. As an appellate panel such as ours we cannot retry the case, we affirm the Finding.

The trial commissioner reached the following findings after an extensive formal hearing that commenced on December 28, 2010 through nine sessions with the record closing March 8, 2013. The commissioner took administrative notice of all documents filed in the case, including two Form 36's, the first filed March 5, 2007 and approved by Commissioner James Metro on August 6, 2008 moving the claimant to temporary partial disability with an effective date of July 15, 2008; the second Form 36 filed September 22, 2008 asserting the claimant was not making sufficient efforts to find employment. The commissioner found the claimant began work for the respondent around 1999 as a sales associate and was working for the respondent on October 24, 2002 when she wrenched her back carrying a "multi-function unit" at an executive breakfast for customers. She

said, "I guess my heel caught a balloon ribbon and as I started to slide I saw a table to the left and I wanted to get that printer to the table instead of dropping it, so I guess I jarred myself up to get it to the table. Just kind of slipped and fell a little bit. That was it." Findings, ¶ 5. On October 21, 2005, the claimant underwent a translumbar intervertebral body fusion at L5-S1 and instrumented posterior lateral fusion at L4-S1 bilateral with autogenous bone graft. The claimant had a morphine pump implanted in 2007 after she failed a variety of analgesic regimes and multiple spinal injections, but on June 18, 2008, the claimant underwent surgery to remove the morphine pump. On August 17, 2008, a voluntary agreement filed by the parties and approved by the commission documents acceptance of a low back injury by the respondents.

The commissioner noted that the medical witnesses differed on whether the claimant had a work capacity. On October 28, 2008, Dr. S. Javed Shahid declared that the claimant was totally disabled. The claimant testified to an essentially sedentary lifestyle, but also engages in errands that involve regular grocery shopping, attendance at doctors' appointments and driving her son to and from school. She further testified that she cannot read or concentrate anymore. She also testified to driving to Foxwoods Casino twice a year to play slot machines, and testified she traveled to Massachusetts in 2010 and helped prepare her family's Thanksgiving meal that year. The claimant testified that she is presently on a number of prescription anti-inflammatory medicines and pain medications. The commissioner noted that her demeanor at the formal hearings was attentive and alert, and that the claimant spoke of driving to one hearing that was 50 minutes from her home. The claimant's husband testified as to the limitation of his wife's activities subsequent to her back injury, and said that while she could do grocery

shopping she often did not feel like cooking a meal and he would go for take-out. He describes her condition as having gotten progressively worse.

The respondents entered into evidence surveillance covering the time period of May 3, 2008 to December 17, 2010. The claimant points out that the relevant time period should be October 28, 2008 to the commencement of these proceedings on December 28, 2010. Seventeen private investigators appeared at the hearing to authenticate the video evidence. The witnesses described the claimant as engaged in such activities as bringing a rug back from a Home Goods store and loading it into her SUV, engaging in bank transactions, traveling to Foxwoods Casino, bringing laundry to a dry cleaners and lifting clothes over her head, shopping at the Christmas Tree Shop, Pier One Imports, Bed Bath & Beyond, Lord and Taylor's, Burlington Coat Factory, Costco and Stew Leonard's, among other destinations. The claimant also visited Maggie McFly's restaurant twice and frequently visited Dunkin Donuts. The video surveillance did indicate that on some occasions the claimant's gait was impeded, but in general the claimant was able to perform these activities while exhibiting no apparent distress or limitations.

The trial commissioner also considered testimony from two experts who performed Functional Capacity Examinations ("FCE") on the claimant; Robb D. Wright and Toby MacDonald. Mr. Wright, an occupational therapist, performed an examination for the respondents and offered the following conclusions. He said he had received surveillance video of the claimant but did not review it until after completing all of his physical tests on the claimant. Mr. Wright noted the claimant exhibited a normal heart rate during his tests, but reported a high level of pain and challenge from the pain. While the claimant's gait was slow and guarded, Mr. Wright said there was no instability with

regard to bearing weight or supporting herself. The claimant tested positive for Waddell signs. Mr. Wright further said that the claimant performed a variety of physical tests without displaying physical challenges, but he did not see congruence between her stated level of pain and her inability to proceed. He opined that she demonstrated a level of ability but not the expectation of ability. He considered the claimant's performance as "guarded and maladaptive." Findings, ¶ 97. Her self-reporting of high pain levels was inconsistent with her performance on the FCE. While the claimant displayed a "no-load capacity" in lifting tests, Wright discounted this as unreliable, noting that were the claimant as physically limited in her activities as she portrayed herself, there would be more specific signs of muscle atrophy. He projected that the claimant's work capacity would probably rise to a level slightly greater than sedentary, with the ability to occasionally lift 10 pounds. Wright pointed out his disagreement with the conclusions of the claimant's expert, Toby MacDonald. He also reiterated that his opinion of the claimant's work capacity accounted for her use of medications such as Lyrica, Roxicodone and Soma.

Toby MacDonald, a physical therapist, also performed an FCE on the claimant and testified as to its results. He said he could not determine if the claimant was making a maximal effort as she was able to only produce one trial on each test. MacDonald stated the claimant was unable to do the "dynamic lifting" test and was unable to lift 10 pounds on a regular or frequent basis. The claimant was also unable to do a "Kasch step" test where she was asked to step up and down for three minutes wearing a heart monitor, as she had a sharp pain in her back prior to completing the test. MacDonald acknowledged that he relied on the claimant's narrative that she was not able to sit, walk

or stand for an extended period in finding she lacked a sedentary work capacity. MacDonald also acknowledged he did not test the claimant's heart rate against her subjective pain complaints, although he said a patient's heart rate will increase if they are in pain. He also did not review surveillance videos or prior medical reports prior to issuing his FCE report.

The trial commissioner also considered evidence submitted from the claimant's treating physicians and the respondents' medical expert. Dr. Shahid was deposed twice. At his first deposition in 2009 he testified he began treating the claimant in 2003 with chronic symptoms of low back pain, which led to fusion surgery. He said a year after the surgery she had not reached maximum medical improvement. He discussed the decision to implant a morphine pump to address the claimant's pain, and her decision to have it removed. He said at the 2009 deposition the claimant had reached maximum medical improvement subsequent to removal of the morphine pump with a 30% permanent partial disability rating; notwithstanding the claimant's need for further pain management. Dr. Shahid was deposed again in 2010. In reliance on Mr. MacDonald's FCE report, he opined that the claimant was totally disabled. He maintained this opinion after viewing surveillance videos of the claimant.

The deposition of the claimant's pain management doctor, Dr. David Levi, was submitted into evidence. He said he had treated the claimant for about two and a half years prior to his 2010 deposition and testified the claimant treated with Dr. David Kloth for pain management prior to treating with him. Dr. Levi said that since the claimant had her morphine pump removed she has been treating with various opiates, and non-sporadic muscle relaxants, trigger point injections, hip bursitis injections and injections of her SI

joints. He testified the claimant has a chronic problem and his approach has been towards maintenance and management. He has recommended a cool program of physical therapy as well as medications. He also noted he recommended the claimant see a psychiatrist because of issues of depression ongoing with her current pain. As of his December 15, 2010 deposition Dr. Levi did not believe that his treatment of the claimant was palliative as he was working to return her to a work status. He did not believe she had a work capacity as he did not believe she could sit for more than 15 minutes at a time; based on her presentation at her treatment sessions. He agreed at his 2010 deposition with Toby MacDonald's FCE report on work capacity; but did not agree with Dr. Shahid's opinion the claimant was at maximum medical improvement, as he did not think a sedentary work environment existed to enable the claimant to work. Dr. Levi was deposed a second time in 2011 after having reviewed the surveillance videos. He said this evidence "puts a question in my mind about her capacity" Findings, ¶ 161 and she presented in his office differently than what he observed on video.

The respondents' examiner, Dr. Michael E. Karnasiewicz, examined the claimant on July 28, 2005 and February 14, 2008. After the 2008 examination he opined that she has reached maximum medical improvement and has a 30% permanent partial disability loss in her spine. He recommended removal of the intrathecal pump, if it is not being used. He states that she is capable of sedentary work, but suggested an FCE be done to confirm this issue. After reviewing the surveillance videos Dr. Karnasiewicz opined the claimant had a full time light duty work capacity. On September 23, 2010 Dr. Karnasiewicz was deposed. He testified he was aware of the claimant's pain medication when he examined her, specifically citing her use of Lyrica, Cymbalta, Skelaxin and

Vicodin. He had not seen video surveillance at that time but after reviewing this it confirmed his prior opinion as to the claimant's work capacity. Dr. Karnasiewicz said he had reviewed Mr. MacDonald's FCE report and had numerous disagreements with the report; specifically his conclusion the claimant lacked a work capacity. He said he has not reviewed the reports of Dr. Shahid and Dr. Levi, however, to the extent they conclude the claimant is totally disabled, he disagrees. He further opined unless she had additional surgery that he did not expect the claimant's impairment rating to increase and did not believe further surgery was being recommended.

The commissioner also noted that the claimant had been examined by a psychiatrist, Dr. Mark Rubinstein. He opined "on a psychiatric basis, she presents with a non-disabling depressive disorder related to her October 24, 2002 work-related injury." Findings, ¶ 174. Dr. Rubinstein recommended the claimant be re-prescribed Cymbalta and clinical counseling.

Based on these subordinate facts the trial commissioner concluded the surveillance evidence presented was relevant both on the issues of credibility and work capacity. She found that Robb Wright's FCE report was properly admitted into evidence as the report is based largely upon objective criteria, not subjective evaluation and the issue of Mr. Wright viewing the surveillance videos did not impact the claimant's performance on standardized tests. The commissioner found Wright's FCE report objective and credible and found MacDonald's FCE report unreliable. The commissioner also found the claimant had a number of credibility issues; such as the lack of muscle atrophy and elevated heart rates observed in Wright's FCE; which were inconsistent with the claimant's narrative of a painful, sedentary lifestyle. The commissioner also noted

the surveillance videos demonstrated the claimant engaged in a number of activities, and that the claimant's demeanor during the lengthy formal hearing was inconsistent with her narrative regarding her limitations. The trial commissioner concluded the claimant has been at maximum medical improvement with a 30% permanent partial disability rating to her low back since July 15, 2008, per Dr. Karnasiewicz' opinion and the claimant has had a light duty work capacity since July 15, 2008 through the commencement of these proceedings on December 28, 2010. The trial commissioner thus determined the claimant was not totally disabled during this time period.

The claimant filed a Motion to Correct seeking to add findings as to the date of maximum medical improvement and the testimony of various witnesses. The trial commissioner denied all but one correction, which did not materially change the Finding. The claimant then pursued the instant appeal. The claimant has made a number of averments of error. She claims that the trial commissioner did not provide her a fair hearing as the commissioner allegedly made unreasonable inferences from her testimony at the formal hearing. The claimant also alleges error from the decision to admit the testimony of Robb Wright, as the claimant argues that this testimony was tainted from the witness having viewed the surveillance videos. The claimant also argues that the date used by the trial commissioner as to maximum medical improvement and the commencement of the period in which benefits were contested was in error. Finally, the claimant argues the trial commissioner erred in her reliance on the opinions of Dr. Karnasiewicz, which she suggests were unreliable as they were not based on a contemporaneous examination. We are not persuaded by these averments of error.

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).

In Rohmer v. New Haven, 5811 CRB-3-12-12 (December 23, 2013), we restated the black letter law regarding a claim for temporary total disability benefits.

> The burden is on the claimant to demonstrate he or she is entitled to temporary total disability benefits. Hernandez v. American Truck Rental, 5083 CRB-7-06-4 (April 19, 2007). The probative evidence herein, which included opinions from treating physicians, that the claimant had a work capacity, convinced the trial commissioner that the claimant did not prove her case. We cannot reverse such a decision on appeal.[1]

The trial commissioner in this case concluded the claimant did not meet her burden of proving entitlement to temporary total disability benefits. We must determine whether this was a reasonable conclusion based on the record presented.

[1] See also Cummings v. Twin Tool Mfg. Co., 40 Conn. App. 36 (1996).

The trial commissioner concluded that after observing the claimant testify in person and viewing the surveillance videos that there were credibility issues in the claimant's narrative. As an appellate body, we cannot revisit issues related to witness credibility when a trial commissioner weighs the probative value of live testimony. See Burton, supra. "Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude . . . ." Id., 40. The claimant argues that the trial commissioner improperly relied on her personal observations during the hearing of her demeanor in reaching this conclusion. We are not persuaded by this argument due to our precedent in Leandres v. Mark IV Construction, Inc., 5159 CRB-4-06-11 (October 22, 2007). In Leandres the trial commissioner noted the demeanor of the witness in determining whether he possessed a work capacity. We affirmed this decision, *citing* Liano v. Bridgeport, 4934 CRB-4-05-4 (April 13, 2006) where we considered a similar situation and pointed out "[c]ertainly the trial commissioner can evaluate the responses of the claimant at the formal hearing to reach a determination as to whether the claim is meritorious and the claimant's medical condition objectively so debilitating as to warrant a finding of total disability."[2]

We also note that a trial commissioner who observes a claimant testify can rely on these observations to ascertain whether their prescribed medicines appear to interfere with their ability to properly function. In DiDonato v. Greenwich/Board of Education, 5431 CRB-7-09-2 (May 18, 2010) the respondent appealed an order of drug

[2] The claimant argues the trial commissioner drew an unreasonable inference that she drove to the hearings and that was a substantial basis for the commissioner's allegedly erroneous evaluation of her work capacity. We note that the claimant sought a correction of this finding, Requested Correction #3, and the trial commissioner denied this correction, citing statements made by the claimant at the December 28, 2010 hearing. We have reviewed the transcript wherein the claimant testified she drove to the hearing. December 28, 2010 Transcript, pp. 27-28.

detoxification for the claimant, arguing they had not sought this relief. We pointed out, citing Leandres, supra, that the commissioner could rely in part on the claimant's demeanor to determine whether this was necessary medical treatment. In DiDonato, the commissioner concluded that narcotics were interfering with the claimant's ability to function. The trial commissioner reached a differing opinion after observing the claimant in this case and we may not revisit this conclusion on appeal.

The claimant argues that the trial commissioner drew inferences supportive of a work capacity and failed to properly credit evidence supportive of continued disability. This goes to the weight of the evidence, however. The claimant points out that on more than half of the days the respondents conducted surveillance she stayed at home. We may reasonably conclude that the trial commissioner found the claimant's extensive activities on the days she left her home sufficient in her judgment to demonstrate the claimant had a work capacity. We note the similarity herein with our decisions in Savageau v. Stop & Shop Companies, Inc., 5808 CRB-3-12-12 (November 7, 2013); Ritch v. Connecticut Materials Testing Labs, 5766 CRB-7-12-7 (October 24, 2013); Clukey v. Century Pools, 5683 CRB-6-11-9 (August 22, 2012), and Smith v. Federal Express Corp., 5405 CRB-7-08-12 (December 1, 2009). In all those cases the trial commissioner relied on surveillance videos of the claimants' activities to conclude the claimant had a work capacity. We see no difference herein. The claimant's activities, including her travels to Foxwoods, could have caused a reasonable person to question if she was actually as debilitated as she had claimed to be.

The claimant argues that she did not receive a fair hearing as the trial commissioner drew negative inferences from her testimony and the other evidence

presented. She proffers no indicia, however, that the trial commissioner had any personal bias of any kind against her, her attorney, or any of her witnesses. As we held in Martinez-McCord v. State/Judicial Branch, 5647 CRB-7-11-4 (August 1, 2012) inferences a trier of fact draws from the evidence presented on the record do not constitute the type of bias that warrants recusal of the trial commissioner. Based on that rationale, we do not find such inferences constitute legal error. We also do not find legal error from the trial commissioner's decision to admit the testimony and report of Robb Wright to the record. The claimant argues that the fact that Mr. Wright had access to the surveillance video prior to conducting the FCE taints the tests and his testimony. As the claimant views the situation, the prejudicial impact of admitting this evidence outweighed its probative value. The claimant cites no appellate authority for this position, however.

We find that our precedent is unsupportive of the claimant's position. See Valiante v. Burns Construction Company, 5393 CRB-4-08-11 (October 15, 2009), "[d]ecisions regarding the relevance and remoteness of evidence in workers' compensation proceedings fall solely within the discretion of the trier of fact" and LaMontagne v. F & F Concrete Corporation, 5198 CRB-4-07-2 (February 25, 2008), "a trial commissioner has broad discretion to determine the admissibility of evidence, and an evidentiary ruling will not be set aside absent a clear abuse of that discretion." The claimant raised an objection to the testimony of Mr. Wright, and the commissioner chose to admit this evidence. The claimant was availed of a significant opportunity to cross-examine Mr. Wright and ascertain to what extent his reliance on the surveillance videos influenced his evaluation. October 25, 2011 Transcript, pp. 95-107. We believe this

addressed any due process issues related to the consideration of Mr. Wright's testimony by the commissioner.

Moreover, we have generally extended a great deal of latitude to trial commissioners to determine in what manner surveillance videos should be considered at the formal hearing. See Bryant v. Pitney Bowes, Inc., 5723 CRB-7-12-1 (January 24, 2013); Montenegro v. Palmieri Food Products, 5701 CRB-3-11-11 (November 15, 2012); and Catale v. Physicians Health Services, 4495 CRB-4-02-2 (March 5, 2003). In Catale, supra, we cited § 31-298 C.G.S. for the proposition that a workers' compensation commissioner "shall not be bound by the ordinary common law statutory rules of evidence or procedure, but shall make inquiry, through oral testimony, deposition testimony or written and printed records, in a manner that is best calculated to ascertain the substantial rights of the parties . . . ." Id. After reviewing the totality of the circumstances herein we are satisfied that the admission of the surveillance videos was proper, as was the admission of reports and testimony by expert witnesses who had viewed the videos.

The claimant also argues that the trial commissioner should not have relied on the opinions of Dr. Karnasiewicz on the issues of maximum medical improvement and work capacity as he had not recently examined the claimant, and should have relied on the opinions of her treating physicians, Dr. Shahid and Dr. Levi. 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). The trial commissioner could properly find Dr. Karnasiewicz offered a persuasive opinion on the claimant's condition and choose to rely on that opinion over

the opinions offered by the witnesses the claimant presented. See Tartaglino v. State/Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999) and Dellacamera v. Waterbury, 4966 CRB-5-05-6 (June 29, 2006). The claimant argues that since Dr. Karnasiewicz last examined the claimant in 2008 that his opinions as to her condition at a later date must be discounted. We are not persuaded. The witness had examined the claimant twice previously and fully reviewed the FCE performed by Mr. MacDonald on October 19, 2009 prior to his September 23, 2010 deposition. Respondent's Exhibit 1. We also note that the claimant does not point to evidence from other expert witnesses that would suggest that her medical condition materially changed from 2008 to 2010.

Even assuming *arguendo* that the foundation for Dr. Karnasiewicz's opinion was too tenuous to render his opinions reliable, we would still affirm the trial commissioner's decision. The trial commissioner was under no obligation to find Dr. Shahid and Dr. Levi persuasive witnesses. Tartaglino, supra. As the trial commissioner clearly identified objective reasons for discounting much of the claimant's narrative, the commissioner could determine any medical opinion reliant on that narrative to be unreliable. See Abbotts v. Pace Motor Lines, Inc., 4974 CRB-4-05-7 (July 28, 2006), *aff'd*, 106 Conn. App. 436 (2008), *cert. denied*, 287 Conn. 910 (2008). If the trial commissioner were to find both the claimant's witnesses and the respondents' witnesses unreliable, the claimant's case would by necessity fail, as the claimant has the burden of persuasion. See Hernandez, supra, and Warren v. Federal Express Corp., 4163 CRB-2-99-12 (February 27, 2001).

We finally turn to the issue of the date where the claimant's temporary total disability status ended and her partial disability status commenced. The claimant argues that the date found by the trial commissioner, July 15, 2008, is in error and the correct date is October 28, 2008. The trial commissioner considered and rejected a Motion to Correct seeking this change and offered a detailed explanation for her rationale in her Ruling responding to that motion, dated July 30, 2013.[3] The claimant raises this issue on appeal. We find that Commissioner James Metro approved the Form 36 filed in 2007 moving the claimant to temporary partial disability effective July 15, 2008. Upon reviewing the record we believe the trial commissioner could have reasonably found that the claimant had reached maximum medical improvement and had a work capacity as of that date. The witnesses the trial commissioner chose to rely on, Dr. Karnasiewicz and Mr. Wright, offered opinions supportive of this result.

As we held in Hernandez, supra, *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." We must respect her conclusions as to the evidence presented. The claimant has the burden of persuasion before this Commission. See 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.,

[3]We uphold the trial commissioner's denial of the claimant's Motion to Correct. The other corrections in this motion denied by the trial commissioner sought to interpose the claimant's conclusions as to the law and the facts presented. To the extent "undisputed" facts were not added to the record, they either would not have compelled a different result, D'Amico v. State/Department 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), or the trial commissioner did not find the evidence probative or persuasive 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).

5343 CRB-7-08-5 (March 23, 2009) and Dudley v. Radio Frequency Systems, 4995 CRB-8-05-9 (July 17, 2006).

Therefore, we affirm the Finding.

Commissioners Daniel E. Dilzer and Stephen M. Morelli concur in this opinion.