CASE NO. 5882 CRB-2-13-10 : COMPENSATION REVIEW BOARD
CLAIM NO. 200177964

DAVID L. HUNT
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: SEPTEMBER 16, 2014

SHEFFIELD PHARMACEUTICALS
EMPLOYER

and

CBIA COMP. SERVICES
c/o FUTURECOMP
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by John E. Sheer, Esq., Law Offices of Cicchiello & Cicchiello, LLC, 582 West Main Street, Norwich, CT 06360.

The respondents were represented by Nicholas C. Varunes, Esq., Varunes & Associates, PC, 5 Grand Street, Hartford, CT 06106.

This Petition for Review from the August 9, 2013 Finding and Award of the Commissioner acting for the Second District was heard April 25, 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. The claimant has appealed from a Finding and Award claiming the award should have included benefits under § 31-307 C.G.S. for temporary total disability. The claimant argues that the weight of the evidence supported a finding that he lacked a work capacity, and therefore he should have been awarded these benefits. We have reviewed the evidence and conclude that the trial commissioner was not persuaded by the claimant's argument. Since it is the province of the trial commissioner to weigh and evaluate evidence, we cannot revisit this decision on appeal. We affirm the Finding and Award.

The trial commissioner found the following facts which are pertinent to our consideration. He found the claimant was employed in 2012 for the respondent Sheffield Pharmaceuticals as a production compounder. His job involved placing the ingredients of various products into industrial scale mixing machines and cleaning this equipment between production runs. On February 17, 2012 the claimant was required to clean a Nauta Mixing Machine. In the course of cleaning this machine a clamp was released and the weight of the pipe suddenly jerked his right arm downward, in the process causing his torso to bend to the right. The claimant felt pain in his right arm. He reported the incident and his pain to his employer and was sent that same day to the Occupational Health Center in Groton, where he was seen by Geraldine Ruffa, MD. At the time he first went to Occupational Health, his right elbow was tender. He reported pain in the elbow and radiating into his forearm. He had an area of redness on his right thumb, as well.

The claimant was at that time diagnosed with a right elbow sprain and a hand contusion which the doctor described as being the result of work activities. His elbow was wrapped and he was instructed to ice it and take ibuprofen. He was put on restricted duty with instructions to limit repetitive use of his right arm and to lift no more than 10 pounds on that side. The next day the claimant awoke with significant pain in his right shoulder and, now, with pain in his low back, as well. At his next scheduled shift on February 20 the claimant was given lighter work and managed to work his entire shift but with some difficulty.

On Wednesday, February 22, 2012, the claimant returned to Occupational Health. He reported that his arm was pain free and he had less pain in his elbow, but also complained of pain in the right shoulder. He said his back pain had been reduced and mostly noticed by him when bending or lifting. Examination of the back was unremarkable and prompted no treatment recommendation. Dr. Nicholas Browning examined the claimant on February 22, 2012 and his impression as to the claimant's shoulder was that the claimant had a deltoid strain, due to his work activities. He kept the same restrictions in place and said therapy to the shoulder and elbow would be ordered at the next visit if there were no improvement by then.

The claimant resumed his work and was assigned duties that involved no heavy lifting and was primarily involved in standing on a ladder and hosing out tanks. The claimant testified that this bothered his back. In addition to cleaning tanks, he would work with another employee mixing up batches of ingredients and putting them into the machines. In this task the claimant limited himself to the weighing and documenting ingredients, and pouring in lighter ingredients. On February 29, 2012 the claimant again

saw Dr. Browning at Occupational Health. At that time his primary complaint was his right elbow, but he also had lesser complaints regarding his right shoulder. He also complained of varying levels of pain in his "right lower back and flank," something he described as a "little pressure." While his back was not bothering him that much, he reported the level of back pain could be as high as "4" (on the 0-to-10 pain scale) with activity. He said bending and lifting aggravated his back. Findings, ¶ 13. In response to this, Dr. Browning prescribed physical therapy for the right arm but did not order any treatment for the claimant's back.

The claimant began his physical therapy on March 6. On March 7, 2012 the claimant returned to Dr. Browning. He felt his shoulder was improving but the pain in his elbow was getting worse. He also reported that his back condition was improved. Dr. Browning continued the claimant's therapy and continued his restrictions on lifting. The claimant had physical therapy to his right arm from March 6, 2012 through April 17, 2012. On April 3, 2012 the claimant was re-evaluated by the therapist to determine his progress. He reported that he was still getting increased shoulder pain with heavy lifting. He also reported that day that his shoulder was sore after using a leaf blower at home over the weekend. The claimant was adjudged capable of lifting 25 pounds but did complain of increased pain lifting a heavier weight. The therapist suggested a "worksite evaluation" was warranted to ascertain what further restrictions should be placed on the claimant. On March 21, 2012 the claimant told Dr. Browning that his elbow pain had "essentially resolved." He also reported that his right shoulder condition was improving, with no pain when resting and pain of "4" (on a 0-to-10 scale) with heavy lifting. No back complaints were noted in the office note of March 21, 2012.

The claimant was examined again at the Occupational Health Center on April 4, 2012, this time by Shrikant Deshpande, MD. The examination indicated the claimant's elbow was better but he was continuing to complain of pain in the shoulder. There was no mention of back problems. Continuation of physical therapy and home exercise was prescribed and the 15-pound lifting restriction was left in place. The next day the physician's office signed off on a referral for the worksite evaluation but that was never arranged. On April 9, 2012 the claimant sent his employer a letter resigning his position at work effective May 4, 2012. At the formal hearing the claimant testified that he resigned due to back pain as he was finding it difficult to stand by the end of a nine-hour workday. He further testified that he did not believe the employer was fully complying with his work restriction. The trial commissioner, however, noted that no physician had placed restriction on the claimant standing or bending until after he decided to leave his employment.

The claimant went to the emergency department of Lawrence & Memorial Hospital on April 17, 2012 complaining of severe back pain. He was prescribed a muscle relaxant and told to follow up with his physical therapist, and he had an appointment with this provider later that day. At his examination he indicated that his shoulder and elbow discomfort had been resolved, but he had an acute onset of low back pain. The claimant's exercise program was modified due to the back pain. On April 26 the claimant was examined by Dr. Geraldine Ruffa of the Occupational Health Center who determined the claimant's elbow and shoulder were no longer a limitation to full duty work. Dr. Ruffa diagnosed a lumbar sprain at that time and placed a 15 pound lifting

restriction on the claimant, along with minimal bending, squatting or twisting. The cause of the lumbar sprain was undetermined.

On April 27 the claimant told his physical therapist his back pain was interfering with household chores and he was no longer able to ride his motorcycle. On May 4 the claimant left work and on May 8 he told his therapist that mowing his lawn aggravated his back pain. On May 10 the claimant was examined again by Dr. Ruffa and advised her that his back pain had worsened. At that visit Dr. Ruffa associated the lumbar strain to the claimant's work activities, restricted the claimant's lifting and squatting, and referred the claimant to Frank Maletz, M.D., an orthopedic surgeon. On May 11, 2012 the claimant filed a Form 30C against the respondent citing low back, right elbow and right shoulder injuries from the February 17, 2012 incident. On May 14 the respondents filed a Form 43 contesting the extent of disability and future treatment.

On May 23, 2012 the claimant was involved in a motorcycle accident in which he sustained abrasions and lacerations. He was brought to Backus Hospital and complained of pain in his left hip and shoulder. The claimant did not complain of low back pain as a result of this incident. The aforementioned injuries were noted by Dr. Ruffa when she examined the claimant on May 25, 2012 and she noted the claimant's report of back pain had declined from the prior visit. The claimant had further therapy recommended but he did not see a therapist after May 22. At a June 1 examination by Dr. Browning the claimant was evaluated and found not to have a rotator cuff tear or disc pathology. Dr. Browning continued a lifting restriction and discharged the claimant from his care. The claimant was initially examined by Dr. Maletz on June 4, 2012. Dr. Maletz' report did not reference the claimant's motorcycle accident and suspected the claimant had a "soft

tissue" shoulder injury related to the February 17, 2012 work incident. Dr. Maletz checked off on his form from this examination that the claimant was totally disabled.

On June 21, 2012 the claimant had an MRI performed on his shoulder. This MRI suggested a possible micro-fracture and rotator cuff tendinopathy associated with a tear. On August 16, 2012 Dr. Maletz opined that based on the findings of the shoulder MRI the claimant could be treated with physical therapy and returned to work. At this examination Dr. Maletz further opined the claimant's major problem was his lumbar spine and ordered an MRI performed on the claimant's spine. He reiterated the claimant's disability was caused by his work injury and he remained totally disabled.

The claimant had a lumbar spine MRI performed on December 24, 2012. The exam revealed no herniated discs or improper alignment of the spine; nor any fractures or signs of nerve impingement. While the results of the MRI were negative, on January 3, 2013, Dr. Maletz continued to restrict the claimant from returning to work and determined he was temporarily totally disabled. Based on the claimant's report of continued pain while sitting or standing, Dr. Maletz suggested that while the claimant was not a surgical candidate he should be referred for lumbar epidural steroid injections.

The claimant testified at the formal hearing that he had not sought work since June of 2012, and prior to that date had sought work at various employers; but did not offer documentation of his job searches. He testified that his shoulder still hurt a little bit and that he got an aching pain while carrying heavy items.

Based on this record the trial commissioner concluded that claimant sustained a compensable back strain injury on February 17, 2012. The initial restrictions placed by the employer were reasonable and the claimant received reasonable and necessary

medical care for the injury. The claimant suffered an increase in pain in mid-April without a new injury. However, the trial commissioner was not persuaded that the claimant was unable to perform the light duty work provided by the respondent. The commissioner further found that Dr. Maletz' treatment for the claimant was reasonable and necessary but did not accept his opinion that the claimant was totally disabled. The commissioner pointed to the claimant's ability to work between the February 17, 2012 incident and May 2012 as a reason to discount this opinion, as well as the negative MRI results for the claimant's lumbar spine. Therefore, the trial commissioner denied the claim for § 31-307 C.G.S. benefits.

The claimant filed a Motion to Correct. This motion sought to add findings as to the claimant's medical treatment and work restrictions as well as to conclude the claimant was totally disabled. This motion was granted in part, but the trial commissioner denied the correction as to the claimant being totally disabled. The claimant then commenced this appeal. The gravamen of his appeal is that the trial commissioner was obligated to credit what he regards as the uncontroverted medical opinion of Dr. Maletz and find that he was totally disabled as a result of the February 17, 2012 work injury.

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).

We further note that 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). In addition, a trial commissioner has broad latitude in determining what medical testimony he or she finds probative and reliable, and may find even uncontroverted testimony unreliable, Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999). Based on that standard, we must examine whether the record herein supports the trial commissioner's conclusion.

The trial commissioner noted that the claimant continued to work within his restrictions for several months subsequent to the February 17, 2012 injury at work. The medical evidence indicates that the body parts which were the focus of the initial injury (the claimant's elbow and shoulder) had essentially healed sufficiently to enable the claimant to return to work without restrictions. The record also indicates that during a period in which the claimant said his pain was impeding his work and his household activities, he was injured while riding a motorcycle. Finally, the claimant offered no medical tests or examinations which documented a physical injury or impairment to his spine.

The claimant argues that his complaints as to the pain he sustained while at work should have been credited by the trial commissioner. The claimant also argues that the

corrections he sought as to the respondent not properly accommodating his work restrictions should have been granted. We conclude that the trial commissioner was not persuaded by the claimant's evidence herein. We may not revisit such an evidentiary evaluation on appeal. 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). The claimant also argues that it was error for the trial commissioner not to adopt the opinions of Dr. Maletz as to his work capacity. The trial commissioner, however, was under no obligation to accept this opinion even if it was unchallenged by other expert opinions. See O'Reilly v. General Dynamics Corp., 52 Conn. App. 813, 819 (1999) and D'Amico v. Dept. of Correction, 73 Conn. App. 718, 725 (2002).

The claimant further argues that the trial commissioner failed to apply the standards delineated in O'Connor v. Med-Center Home Healthcare, Inc., 140 Conn. App. 542 (2013), which call for a "holistic" approach to determining total disability, and not one solely based on a medical opinion. We examined the O'Connor precedent in great detail in Shevlin v. SNET, 5824 CRB-3-13-3 (March 3, 2014), in which we affirmed a trial commissioner's decision to apply O'Connor in granting the claimant benefits because he "found this evidence credible and persuasive and awarded benefits." Shevlin, supra. We conclude that the trial commissioner herein did not find the claimant's evidence persuasive.

"Whether a claimant is realistically employable requires an analysis of the effects of the compensable injury upon the claimant, in combination with his preexisting talents, deficiencies, education and intelligence levels, vocational background, age, and any other factors which might prove relevant…" O'Connor, supra, 554. In the present matter the

claimant did not present any vocational testimony as to his inability to perform gainful employment. He did not proffer documentation as to unsuccessful job searches, or evidence that he had attempted to return to the work force and found the effort futile. See Latham v. Caraustar Industries, 5241 CRB-2-07-6 (June 25, 2008) and Howard v. CVS Pharmacy, Inc., 5063 CRB-2-06-3 (April 4, 2007). The trial commissioner also reasonably could find the claimant's motorcycle riding to be incompatible with his asserted physical limitations. See Nisbet v. Xerox Corporation, 5867 CRB-7-13-7 (July 17, 2014), where the claimant's decision to drive herself to and from a formal hearing was deemed inconsistent with her proffered physical limitations. We believe that based on these facts the trial commissioner could reasonably conclude that unlike the claimant in O'Connor, supra, the claimant herein had not met the "totality of the factors" test we delineated in Romanchuk v. Griffin Health Services, 5515 CRB-4-09-12 (October 20, 2010).

In Damon v. VNS of CT/Masonicare, 5413 CRB-4-08-12 (December 15, 2009), we restated the standard for total disability under Chapter 568. "As we previously explained in Leandres, [v. Mark IV Construction, Inc., 5159 CRB-4-06-11 (October 22, 2007)], supra, it is a factual determination whether a claimant is unable to earn money 'in any occupation he may reasonably pursue.'" The trial commissioner was not persuaded by the claimant's evidence. We must respect his 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., 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 and Award.

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