CASE NO. 5886 CRB-8-13-10 CLAIM NO. 800175359	: COMPENSATION REVIEW BOARD
GAIL SMITHWICK CLAIMANT-APPELLEE CROSS-APPELLANT	: WORKERS' COMPENSATION COMMISSION
v.	: SEPTEMBER 17, 2014
MIDDLESEX HOSPITAL EMPLOYER	
and	
PMA MANAGEMENT GROUP INSURER RESPONDENTS-APPELLANTS CROSS-APPELLEES	

APPEARANCES:

The claimant was represented by Joseph J. Passaretti, Jr., Esq., Montstream & May, LLP, 655 Winding Brook Drive, PO Box 1087, Glastonbury, CT 06033.

The respondents were represented by Diane D. Duhamel, Esq., McGann, Bartlett & Brown, LLC, 111 Founders Plaza, Suite 1201, East Hartford, CT 06108.

This Petition for Review from the October 4, 2013 Finding and Award/Dismissal of the Commissioner acting for the Eighth 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 respondents have appealed from a Finding and Award/Dismissal granted to the claimant in this matter determining that she had sustained a compensable knee injury from her work at Middlesex Hospital. The respondents assert that the claim was jurisdictionally invalid by virtue of an allegedly untimely filing. We conclude that the claim was properly commenced within the time limits provided for under § 31-294c C.G.S. The respondents also assert that the trial commissioner lacked sufficient probative evidence on causation to award benefits to the claimant. However, we are not persuaded by this argument. Finally, we note that both parties concur that a number of issues, including the establishment of a compensation rate, must be remanded for further proceedings. As a result we affirm the Finding and Award/Dismissal to the extent it found the claimant's knee injury compensable. The claim is remanded for further proceedings as to the appropriate compensation due to the claimant.

The trial commissioner reached the following findings of fact. The commissioner first noted that the respondents were challenging the timeliness of the claim, as it was commenced by a Form 30C filed on October 6, 2011. The trial commissioner found the claimant was an employee of the respondent Middlesex Hospital on December 3, 2010. She retired on that day from having worked 33 years for the respondent as a registered nurse, primarily in their hospice unit. The claimant's job, particularly when she worked in the hospice unit, required her to be on her feet and involved working with patients who were nearing the end of their lives. The work was strenuous in nature as it involved significant lifting, pushing and pulling of individuals who could not care for themselves.

The claimant over time developed right knee and back problems and believes these problems stem from her job duties. During her employment the claimant treated with Dr. Thomas Larson and Dr. Michael Reife for her knee and back problems respectively. On December 7, 2010, immediately after her retirement, the claimant underwent arthroscopic right knee surgery. While the claimant had retired, she returned to the employ of Middlesex Hospital on a per diem basis on February 2011 and remained in their employ until June 17, 2011.

The claimant's knee condition worsened by the summer of 2011 and she had further treatment with Dr. Larson. The claimant eventually underwent right total knee replacement on November 11, 2011, under the auspices of Dr. Larson. She was totally disabled thereafter for a period of time. On May 29, 2012 Dr. Larson opined the claimant had a 34% permanent partial disability to her right knee. The trial commissioner found that Dr. Larson and Dr. Reife had opined the repetitive nature of the claimant's work was a substantial factor in her knee and back ailments. The trial commissioner noted that the respondents presented two expert witnesses, Dr. Peter Barnett and Dr. Aris Yannopoulos, who opined that the claimant's employment was not a substantial factor behind the claimant's knee and back problems. The commissioner also noted that the respondents' in-house physician, Dr. Thomas Danyliw, testified in an unfavorable manner as to the claimant's bid for benefits.

Based on these subordinate facts, the trial commissioner found the claimant sustained her burden of proof that her knee injury was compensable; but had not sustained her burden of proof her back ailments were compensable. The commissioner further found the claimant had filed a timely Form 30C and the commission had

jurisdiction over the claim, as the last date of injurious exposure for the claimant was within one year of the claim having been filed. The commissioner found the claimant sustained a compensable right knee injury as of December 3, 2010 and that she was entitled to indemnity and medical benefits for this injury.

Both parties filed motions subsequent to the Finding and Award/Dismissal. The respondents filed a Motion to Correct seeking to find the claimant's knee injury noncompensable. The trial commissioner denied this motion in its entirety. The claimant sought a Motion to Articulate proposing findings as to the compensation rate due the claimant, and the various periods of permanent partial, temporary total and temporary partial disability due the claimant. The trial commissioner also denied this Motion in its entirety. Both parties then filed an appeal to this board, essentially basing the respective appeals on the denial of their post-judgment motions.

We first must deal with the respondents' appeal as to the timeliness of the claim. It is black letter law that when the jurisdiction of this Commission is challenged, we must resolve the jurisdictional question prior to considering the merits of the case. Castro v. Viera, 207 Conn. 420, 426-430 (1988). On this issue, as with the other issues presented to a trial commissioner, 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 and 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 respondents argue that the claimant needed to prove that she had sustained injurious workplace exposure to her knee within one year of filing her Form 30C in order to confer jurisdiction with the Commission for a repetitive trauma injury. The respondents acknowledge the claimant filed her Form 30C on October 6, 2011 within one year of her December 3, 2010 retirement from Middlesex Hospital, but dispute that she sustained injurious exposure to her knee subsequent to September of 2010. The respondents cite Goulbourne v. State/Department of Correction, 5192 CRB-1-07-1 (January 17, 2008) as supportive of their position but a review of that case and the facts on the record is unsupportive of the respondents' arguments.

In Goulbourne, supra, the respondents argued that the claimant should not be able to pursue his claim as one for a repetitive trauma injury, as he had had treatment for and scienter of his compensable injury more than one year prior to filing a Notice of Claim. We noted that the Supreme Court had dealt with the situation in depth in Russell v. Mystic Seaport Museum, Inc., 252 Conn. 596 (2000). In Russell, the Supreme Court cited Discuillo v. Stone & Webster, 242 Conn. 570 (1997) for the proposition "the process of injury from a repetitive trauma is ongoing until [the last date of exposure]. . ." Id., 613. We remanded the matter in Goulbourne for a determination of when the

claimant sustained his last date of exposure. In so doing we rejected the argument that when the claimant last treated or sustained disability from the trauma was a relevant jurisdictional consideration.

> The critical error in the respondent's argument in this matter is that they appear to conflate the jurisdictional standards applied in cases involving § 7-433c C.G.S. with the jurisdictional standards for commencing a repetitive trauma claim. We have rejected such an interpretation of law. In Quinn v. Standard Knapp, 12 Conn. Workers' Comp. Rev. Op. 334, 1470 CRB 8-92-7 (July 8, 1994), *dismissed for lack of final judgment*, 40 Conn. App. 446 (1996) we held as follows:
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> . . . the suggestion in O'Leary v. New Britain, 3 Conn. Workers' Comp. Rev. Op. 108, 110, 236 CRD-6-83 (1988), also relied on by the claimant, that the date of injury in repetitive trauma cases is the date of first incapacity appears there in dicta and is contrary to our Supreme Court's recent holding in this regard in Crochiere v. Board of Education, 227 Conn. 333 (1993).
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> The respondent argues that treatment received by the claimant prior to his last date of employment is significant with respect to the identification of the proper date of injury for purposes of determining the timeliness of the notice of claim in this repetitive trauma case. That is not our law, however. Borent v. State, 33 Conn. App. 495 (1994) Id., n1.

Goulbourne, supra.

We look to the record in this case to see if there is evidence that the claimant continues to be exposed to repetitive trauma at a point within one year of filing her claim for benefits. The claimant testified at the formal hearing that after a restructuring at the hospital in 2005 she spent between six and seven hours a day on her feet. April 25, 2013 Transcript, p. 33. She further testified her workload remained "pretty much the same" until her December 2010 retirement. Id., p. 35. The claimant further testified that as a per diem nurse from December 2010 to June 2011 she was doing "exactly the same thing" she had been doing before her retirement. Id., p. 36. Despite the claims of the

respondents, the record reflects probative evidence that the claimant's repetitive trauma continued to a point well within one year of her filing of a Notice of Claim.[1] We reject the respondents' jurisdictional argument.

We thus turn to the respondents' argument as to the substance of the Finding and Award/Dismissal. The respondents argue that there is insufficient expert testimony linking her exposure to injurious workplace trauma to her current knee disability. In the absence of such testimony, the respondents argue the trial commissioner could not have found this injury compensable. The respondents cite Voronuk v. Electric Boat Co., 118 Conn. App. 248 (2009) and DiNuzzo v. Dan Perkins Chevrolet Geo, 99 Conn. App. 366 (2007), *aff'd,* 294 Conn. 132 (2009), as examples on point; where medical testimony proved insufficient to support an award for benefits under Chapter 568. See Appellants' Brief, pp. 8-11. The respondents focus their attention on a September 15, 2011 letter from Dr. Larson to claimant's counsel wherein he opined as follows as to the causation of the claimant's knee injury. The relevant portion of the letter which the respondents find inadequate is as follows. "I do feel that her work as a nurse for 35 years could be a contributing factor in the meniscal tear and degenerative arthritis of her right knee within a reasonable degree of medical certainty." Claimant's Exhibit A.

The respondents argue that this was essentially an opinion based on "conjecture and surmise" and based on the precedent in DiNuzzo, supra, does not constitute competent evidence on the issue of causation. They also point out that the trial

[1] The respondents argue that the claimant failed to provide medical evidence that her knee condition worsened after being examined in September 2010. The jurisdictional requirements of § 31-294c C.G.S. require only that the claimant continued to be exposed to injurious trauma; not that the claimant's condition progressively deteriorated at all times prior to the filing of a Notice of Claim. Therefore, the respondents' argument is unsupported by precedent.

commissioner in Voronuk, supra, determined a medical report that labeled workplace exposure “a contributory factor” in a claimant’s demise without noting its relative weight compared to non-employment causes was insufficient to support an award of benefits. They believe the evidence herein is equally as problematic as the evidence which was insufficient to support an award in those cases.

The claimant obviously believes the trial commissioner had sufficient evidence to award benefits for a work-related knee injury. She notes that two older cases, Aurora v. Miami Plumbing and Heating Inc., 6 Conn. App. 45 (1986) and Champagne v. O.Z. Gedney, 4425 CRB-5-01-8 (May 16, 2002) affirmed an award of benefits under Chapter 568; and in both cases the respondents challenged reliance on the claimant’s medical expert. In both cases reliance on the claimant’s expert witness was affirmed on appeal. The claimant argues that the respondents are focused on semantics as the September 15, 2011 letter of Dr. Larson lacked such qualifying terms as “substantial” or “material” to describe the impact her work had on her knee injury. In the absence of such “magic words”; she suggests the trial commissioner could have reviewed “the entire substance of testimony” offered by Dr. Larson to ascertain if it supported a finding of compensability. See Voronuk, supra, Mehan v. Stamford, 5389 CRB-7-08-10 (October 14, 2009), *aff’d,* 127 Conn. App. 633 (2011), *cert. denied*, 301 Conn. 911 (2011) and O’Reilly v. General Dynamic Corp./Electric Boat Div., 52 Conn. App. 813, 818 (1999). The claimant also argues that as Dr. Larson was the claimant’s treating physician and was familiar with the etiology of her knee injury that this case can be distinguished on the facts from Voronuk, supra, or DiNuzzo, supra; which were cases where opinions as to a cause of death were deemed unreliable. The claimant also suggests that the nature of her injury was such that

causation could be established without reliance on expert testimony, similar to Lee v. Standard Oil of Connecticut, Inc., 5284 CRB-7-07-10 (February 25, 2009) and Sprague v. Lindon Tree Service, Inc., 80 Conn. App. 670 (2003). We will review these arguments based on the most recent precedent governing proof of causation in Chapter 568 claims.

At the outset, we do not believe that the compensability of the claimant's knee injury could be established without some reliance on expert testimony. "As the claimant's injuries were not of the nature that can be established by way of lay testimony, such as Sprague v. Lindon Tree Service, Inc., 80 Conn. App. 670, 676 (2003), '[s]uch proof must be established by competent evidence.' Murchison v. Skinner Precision Industries, Inc., 162 Conn. 142, 151 (1972). This expert testimony must establish a causal relationship between the claimant's condition and his or her employment. Id., 152." Hadden v. Capitol Region Education Council, 5843 CRB-1-13-5 (May 20, 2014). However, we also note,

> . . . in Buonafede v. UTC/Pratt & Whitney, 5499 CRB-8-09-9 (September 1, 2010), however, that the DiNuzzo precedent had been clarified in Marandino v. Prometheus Pharmacy, 294 Conn. 564 (2010). In Marandino, the Supreme Court held it was a trial commissioner's prerogative to 'consider medical evidence *along with all other evidence* to determine whether an injury is related to the employment.' Marandino, supra, at 595. (Emphasis in original.)"

Palmieri v. Simkins Industries, Inc., 5694 CRB-3-11-11 (October 10, 2012).

While we note that it is the claimant's burden to prove compensability, Marandino, supra, we also note that on appeal, this panel must provide "every reasonable presumption" supportive of the Finding and Award. Torres v. New England Masonry Company, 5289 CRB-5-07-10 (January 6, 2009).

We note that a similar deference to the commissioner's evaluation of evidence governed the Appellate Court's opinion in Estate of Haburey v. Winchester, 150 Conn. App. 699 (2014). In Haburey, it was alleged the death of a sewage plant worker was due to Legionnaire's Disease contracted during his employment. The respondent vigorously challenged the medical opinions of the claimant's expert witness as equivocal and lacking sufficient foundation to prove causation. The Appellate Court applied the standard for determining causation enunciated in Sapko v. State, 305 Conn. 360 (2012); Haburey, supra, at 713-714. The expert witness in Haburey had opined within a reasonable medical probability that the decedent died after contracting Legionella and on cross-examination testified, "I feel that….[the decedent] died of Legionella." Id., 715. This evidence was sufficient to sustain the award on appeal as the Appellate Court held "metaphysical certainty" was not necessary to establish causation and "[r]ather, the commissioner need only be convinced that is was 'reasonably probable' that the decedent died of Legionnaires' Disease." Id., 716.

Having reviewed recent precedent and the arguments of the litigants; we turn to the record to see if the trial commissioner reasonably could have found the record supported a finding of compensability for the claimant's right knee injury. Besides Dr. Larson's September 15, 2011 letter we noted that in an April 26, 2011 office note he noted that the claimant associated persistent right knee pain as being caused by "activity" at a point in time when the claimant was working per diem for the respondents. Dr. Larson further opined that the claimant had a "work-related right knee condition and surgery" in his December 29, 2012 letter to claimant's counsel; wherein he opined the claimant's hip condition was unrelated to her knee condition. See Claimant's Exhibit A.

At the formal hearing the claimant testified that walking at work on what she described as very hard linoleum floors aggravated her knee pain. April 25, 2013 Transcript, p. 45. The claimant further described returning to per diem work at the hospital following her arthroscopy as a "mistake", id., pp. 48-49; testifying that she suffered knee pain that required an ice pack. She testified that after working a few shifts in June following a vacation she found "it was just too painful for me to do that" and she stopped working. Id., p. 50.

After reviewing the entire substance of the expert testimony and lay testimony on the record, we conclude the trial commissioner could have reasonably determined that the claimant's employment was a substantial factor in the etiology of her knee injury and subsequent need for surgery. While it is the claimant's burden to prove an injury is not merely contemporaneous with his or her employment, Kielbowicz v. Tilcon Connecticut, Inc., 5855 CRB-6-13-6 (June 12, 2014), the nature of the claimant's 35 year nursing career could cause a trier of fact to consider the treater's medical reports in a favorable manner regarding compensability. We do so as in cases wherein causation of an injury is contested the trial commissioner's " . . . findings of basic facts *and* his finding as to whether those facts support an inference that the plaintiff's injury arose from his employment are subject to a highly deferential standard of review." Blakeslee v. Platt Bros. & Co., 279 Conn. 239, 253-254 (2006). (Emphasis in the original.) Sapko, supra, stands for the proposition that the question of causation is a factual decision for the trial commissioner to resolve unless "the mind of a fair and reasonable [person] could reach only one conclusion." Id., 373. We are not persuaded the trial commissioner, after

considering the entire record, was bound as a matter of law to find the claimant's knee injury was noncompensable. Accordingly, we affirm his decision.[2] [3]

The claimant has filed a cross-appeal from the denial of her Motion for Articulation. In her Motion for Articulation she sought the trial commissioner to rule on a variety of issues relevant to the compensation she should receive for her compensable knee injury. The claimant sought findings that established a base compensation rate, determined the number of weeks of permanent partial disability benefits due the claimant for the permanency rating of her right knee, and findings as to the duration of temporary total disability and temporary partial disability benefits she was entitled to. The trial commissioner denied the Motion for Articulation and left in place a Findings, ¶ 26, that said in part, "[t]he parties are **Ordered** to use their best efforts to discuss and resolve this part of the case." The claimant argues that the issue of compensation was placed squarely before the trial commissioner and the commissioner declined to issue findings on these disputed questions. The claimant cited Bazelais v. Honey Hill Care Center, 5011 CRB-7-05-10 (October 25, 2006) as on point, where we ordered a remand when a trial commissioner denied a meritorious Motion for Articulation. The respondents have concurred that a remand is warranted in this matter to address the issues not resolved as

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[2] The respondents argue that their Motion to Correct, Findings, ¶ 17, should have been granted because Dr. Larson did not use the phrase "substantial factor." While Dr. Larson did not use this phrase in any of his reports, we believe given the totality of the record herein this constitutes harmless error. See Reeve v. Eleven Ives Street, LLC, 5146 CRB-7-06-10 (November 5, 2007), where a commissioner erroneously referenced a witness statement as "testimony" but we concluded the entire substance of the record supported the commissioner's ultimate decision.

[3] The respondents also raise the issue of the trial commissioner not relying on the opinions of their expert witness, Dr. Barnett. As we have long held, in a case where the parties offer contesting opinions from expert witnesses, the trial commissioner may choose to find one witness reliable and to discount the opinions of the other witness. See Dellacamera v. Waterbury, 4966 CRB-5-05-6 (June 29, 2006), n.1.

to compensating the claimant; citing Cormican v. McMahon, 102 Conn. 234 (1925), but request that new findings be reached after a new hearing.

We join in the concurring position of the litigants that these issues regarding compensation due the claimant must be remanded for further proceedings. As we held in Barbieri v. Comfort and Care of Wallingford, LLC, 5794 CRB-8-12-10 (September 26, 2013) and Distassio v. HP Hood, Inc., 4592 CRB-4-02-11 (May 5, 2004), when an issue is placed before the trial commissioner for resolution and the trial commissioner's findings do not address the issue, the matter must be remanded for further proceedings.

Accordingly, we affirm the Finding and Award/Dismissal as to the issue of the compensability of the claimant's right knee injury. The claimant's cross-appeal is sustained and the matter is remanded for additional proceedings on the issue of the appropriate compensation due to the claimant for her injury.

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