CASE NO. 5890 CRB-4-13-10 : COMPENSATION REVIEW BOARD
CLAIM NO. 400069704

MICHAEL REYNOLDS : WORKERS' COMPENSATION
CLAIMANT-APPELLANT COMMISSION

v. : OCTOBER 28, 2014

LOGISTEC CONNECTICUT, INC.
EMPLOYER

and

GALLAGHER BASSETT SERVICES, INC.
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by David A. Kelly, Esq., Montstream & May, L.L.P., 655 Winding Brook Drive, P.O. Box 1087, Glastonbury, CT 06033.

The respondents were represented by Peter D. Quay, Esq., Law Office of Peter D. Quay, L.L.C., P.O. Box 70, Taftville, CT 06380.

This Petition for Review from the October 8, 2013 Findings and Orders by the Commissioner acting for the Fourth District was heard on May 30, 2014 before a Compensation Review Board panel consisting of Commission Chairman John A. Mastropietro and Commissioners Stephen B. Delaney and Michelle D. Truglia.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has petitioned for review from the October 8, 2013 Findings and Orders by the Commissioner acting for the Fourth District. We find no error and accordingly affirm the decision of the trial commissioner.[1]

The trial commissioner made the following findings which are pertinent to our review of this matter. On or about August 8, 2007, the claimant was working for PMSI, a temporary employment agency utilized by the respondent employer, Logistec. Logistec operates and maintains maritime shipping ports in New Haven and Bridgeport. On said date, the claimant sustained an injury to his lower back while working on the docks. PMSI never acknowledged the claimant's injury and did not maintain a workers' compensation insurance policy. During proceedings pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et. seq., the respondent employer agreed that it should be considered the claimant's principal employer. The respondents accepted the compensability of this claim pursuant to the Longshore Act in accordance with a decision issued by Administrative Law Judge Donald Mosser on May 7, 2009. The respondents began paying the claimant total disability benefits at the weekly rate of $143.50 on August 9, 2007 and ceased payments following a June 12, 2012 decision by an Administrative Law Judge. [2]

[1] We note that a motion for an extension of time was granted during the pendency of this appeal.
[2] In his Motion to Correct, the claimant asserts that the June 12, 2012 decision was subsequently vacated by the Benefits Review Board.

Immediately following his injury, the claimant experienced pain in his low back and abdominal region. He was treated at an emergency room and released. The claimant was diagnosed with lumbar strain and received some additional medical treatment, including physical therapy and pain medications.[3] At trial, the claimant testified regarding his educational and occupational background, his medical treatment since the date of injury, and his medication history. It was the claimant's position that he was totally disabled as a result of the injury he sustained on August 8, 2007 and was therefore eligible for temporary total disability benefits pursuant to § 31-307 C.G.S. commencing on the date of injury to the present and continuing.[4] In the alternative, the claimant asserted that he was entitled to temporary partial disability benefits pursuant to either § 31-308(a) C.G.S. or § 31-308a C.G.S. from the date of injury to the present and continuing.[5]

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[3] The claimant testified that he could not remember the names of the doctors he saw between the date of injury on August 8, 2007 and July 15, 2008, the date of his Respondents' Medical Examination with Kenneth Kramer, M.D.

[4] Section 31-307(a) C.G.S. (Rev. to 2007) states, in pertinent part: "If any injury for which compensation is provided under the provisions of this chapter results in total incapacity to work, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of the injured employee's average weekly earnings as of the date of the injury, calculated pursuant to section 31-310…. No employee entitled to compensation under this section shall receive less than twenty per cent of the maximum weekly compensation rate, as provided in section 31-309, provided the minimum payment shall not exceed seventy-five per cent of the employee's average weekly wage, as determined under section 31-310, and the compensation shall not continue longer than the period of total incapacity."

[5] Section 31-308(a) C.G.S. (Rev. to 2007) states, in pertinent part: "If any injury for which compensation is provided under the provisions of this chapter results in partial incapacity, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of the difference between the wages currently earned by an employee in a position comparable to the position held by the injured employee before his injury … and the amount he is able to earn after the injury… except that when (1) the physician attending an injured employee certifies that the employee is unable to perform his usual work but is able to perform other work, (2) the employee is ready and willing to perform other work in the same locality and (3) no other work is available, the employee shall be paid his full weekly compensation subject to the provisions of this section. Compensation paid under this subsection shall not be more than one hundred per cent, raised to the next even dollar, of the average weekly earnings of production and related workers in manufacturing in the state, as determined in accordance with the provisions of section 31-309, and shall continue during the period of partial incapacity, but no longer than five hundred twenty weeks. If the

On July 15, 2008, the claimant underwent a Respondents' Medical Examination with Kenneth Kramer, M.D. Kramer reported that since the date of injury, the claimant had been given light-duty restrictions and treated with a "careful" medical regimen which accommodated the claimant's history of drug abuse and completion of a Methadone program. Respondents' Exhibit 9. Kramer also noted that the claimant had not returned to work since the date of injury. Kramer opined that the claimant had suffered a lumbar strain in the incident of August 8, 2007 for which he had been treated appropriately and which had resulted in chronic residual lower back pain. Kramer found that the claimant had reached maximum medical improvement and assigned a permanent partial disability rating of seven percent (7%) to the lumbar spine. Kramer did not recommend any additional formal treatment but did impose a permanent twenty-pound lifting restriction along with a limitation on repetitive lifting and bending.

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employer procures employment for an injured employee that is suitable to his capacity, the wages offered in such employment shall be taken as the earning capacity of the injured employee during the period of the employment."

Section 31-308a C.G.S. (Rev. to 2007) states, in pertinent part: "(a) In addition to the compensation benefits provided by section 31-308 for specific loss of a member or use of the function of a member of the body, or any personal injury covered by this chapter, the commissioner, after such payments provided by said section 31-308 have been paid for the period set forth in said section, may award additional compensation benefits for such partial permanent disability equal to seventy-five per cent of the difference between the wages currently earned by an employee in a position comparable to the position held by such injured employee prior to his injury … and the weekly amount which such employee will probably be able to earn thereafter, … to be determined by the commissioner based upon the nature and extent of the injury, the training, education and experience of the employee, the availability of work for persons with such physical condition and at the employee's age, but not more than one hundred per cent, raised to the next even dollar, of the average weekly earnings of production and related workers in manufacturing in the state, as determined in accordance with the provisions of section 31-309. If evidence of exact loss of earnings is not available, such loss may be computed from the proportionate loss of physical ability or earning power caused by the injury. The duration of such additional compensation shall be determined upon a similar basis by the commissioner, but in no event shall the duration of such additional compensation exceed the lesser of (1) the duration of the employee's permanent partial disability benefits, or (2) five hundred twenty weeks. Additional benefits provided under this section shall be available only to employees who are willing and able to perform work in this state."

In August 2009, the claimant began treating with Patrick Mastroianni, M.D., who ordered an MRI and subsequently diagnosed a left-side disc herniation at L5-S1 with compression of the S1 nerve root. In light of the severity of the claimant's symptoms, Mastroianni recommended surgery, and the claimant agreed. Authorization was obtained and the surgery was scheduled for June 11, 2010. On August 23, 2010, Mastroianni reported that the claimant had changed his mind about undergoing surgery and wished to pursue a non-operative approach. Mastroianni referred the claimant to Lewis Bader, M.D., for an epidural steroid injection and possibly physical therapy. The claimant underwent an injection on September 7, 2010. On October 7, 2010, Mastroianni completed a federal work restriction evaluation form (OWCP-5) on which he indicated that the claimant had declined to undergo surgery and was released to light duty with restrictions.

On November 4, 2010, Mastroianni reported that the claimant presented in his office with severe pain. The claimant told Mastroianni that the epidural injection on September 7, 2010 had not provided lasting relief and the claimant wished to proceed with the surgery. On December 10, 2010, the doctor reported that the claimant had again declined to go through with the surgery; in light of this decision, the doctor opined that the claimant was at maximum medical improvement and had sustained a ten-percent (10%) permanent partial disability to the lumbar spine.

On March 15, 2011, the claimant again presented with pain in his back radiating into his left leg. Mastroianni reviewed an updated MRI taken on November 23, 2010 and recommended the claimant undergo a disctectomy at L5-S1 on the left side with

stabilization and fusion. The doctor indicated that he scheduled the surgery for the third time and the claimant once again called and cancelled. Mastroianni testified that the second MRI demonstrated a worsening at the L4-5 level compared to the earlier MRI taken in 2009 and as a result, he increased the claimant's permanent partial disability rating to twelve and one half-percent (12.5%). The doctor indicated that the current restrictions were essentially the same as those outlined on the federal OWCP-5 form of October 7, 2010, including a lifting restriction of ten to twenty pounds and the recommendation that activities such as squatting, climbing and kneeling be done on an "intermittent" basis only. Respondents' Exhibit 3.

The claimant returned to Kenneth Kramer, M.D. on April 20, 2010. Kramer reported that the claimant continued to suffer from ongoing severe low back pain but did not have any significant lower extremity complaints. The doctor reviewed the claimant's medical history and opined that because the claimant was experiencing a non-radicular pain syndrome, he was a "suboptimal" candidate for surgical treatment, an opinion which he reiterated in the addendum to his report dated May 17, 2010 following his review of the claimant's MRI scan. The claimant followed up with Kramer on August 30, 2011, reporting that he had deferred surgery and ended his treatment with his prior physician. Kramer diagnosed chronic strain syndrome and prescribed Celebrex and Soma. Kramer also noted that the claimant showed no root signs and was neurologically intact.

On September 30, 2010, Kramer determined that the claimant was at maximum medical improvement with a permanent lifting restriction of thirty (30) pounds and no repetitive lifting or bending. Kramer again did not recommend any formal treatment

measures, noting that the claimant's symptoms, marked obesity and smoking habit negatively affected the predictability of any surgical measures. He recommended instead that the claimant manage his condition with activity modifications as needed and non-narcotic medication.

The claimant also treated with Gary Zimmerman, M.D., who noted on October 27, 2011 that the claimant was reporting severe back pain radiating to his buttocks and that his symptoms were "severe and incapacitating." Zimmerman reviewed an MRI dated May 7, 2012 which demonstrated a large left L5-S1 disc herniation. Zimmerman opined that the claimant was essentially incapacitated and discussed treatment options, including surgery, with the claimant. However, despite two follow-up visits with the PA-C in Zimmerman's office to schedule surgery, the claimant never underwent surgery. Zimmerman testified that he "couldn't conceive of [the claimant] working" given the level of pain reported by the claimant, Respondents' Exhibit 14, pp. 12-13, but also testified that his assumptions regarding the claimant's pain were based on a combination of objective findings along with what the claimant told him and "how he moved his body." Id., at 23. Zimmerman indicated that without surgery, the claimant's condition would likely remain the same, but he does have patients with herniated discs who are able to work.

On December 30, 2011, the claimant underwent an evaluation with Albert Sabella, a vocational rehabilitation counselor. In his report of January 13, 2012, Sabella opined that the claimant's employability was "substantially compromised" by his chronic pain and stated that the claimant "would have difficulty adhering to a set, routine

schedule and maintaining employability tenets." Claimant's Exhibit C, p. 6. Sabella also stated that the claimant is "unemployable for any practical vocational purpose." Id., at 7. In addition, Sabella testified regarding the additional problems encountered by job seekers such as the claimant who possess a criminal record in light of the prevalence of background checks being performed by employers. However, Sabella also testified that while a criminal background would preclude eligibility for certain occupations, it was not "a total deal killer," Claimant's Exhibit D, p. 28, and the claimant's test results demonstrated that the claimant possessed the necessary cognitive and academic skills to perform entry-level positions. Id., at 21.

On July 2, 2011, at the respondents' behest, the claimant underwent an evaluation by Donna White, a Licensed Rehabilitation Counselor and Certified Rehabilitation Counselor. In addition to interviewing the claimant, White reviewed the claimant's medical records and administered vocational testing. Noting that the claimant possessed a number of "transferable skills" and "vocational strengths," Respondents' Exhibit 12, pp. 6-7, White concluded that the claimant was employable for light-duty entry-level positions such as cashier, security guard, and assembler.[6] White also produced a Labor Market Survey report based on her meeting with the claimant in which she identified nine potential job opportunities within thirty miles of the claimant's home in Stratford, Connecticut. White testified that she has worked with other individuals who claimed to be in pain and that being in pain did not prevent them from returning to work. In addition, White testified that in her opinion, the claimant's age would not be a factor in

[6] The claimant evidently did not inform Donna White of his criminal history at their meeting; at trial, White conceded that a criminal background would negatively affect the claimant's chances of securing employment as a security guard.

finding employment, and the fact that the claimant had obtained a CDL license demonstrated that he had the ability to read and comprehend a complicated instructional guide and then successfully pass an exam based on the materials studied.

On the basis of the evidence presented, the trial commissioner concluded that the claimant was injured in the course and scope of his employment on August 8, 2007. The trial commissioner also noted that the finding of total disability in the Longshore action was not dispositive in the state's workers' compensation forum. The trial commissioner found credible the claimant's testimony relative to the circumstances surrounding his injury and his fear of undergoing surgery but did not find the balance of the claimant's testimony either credible or persuasive "with regard to the issues presently under consideration." Ruling on Claimant's Motion to Correct, ¶ 2. The trier determined that the record contained no medical evidence indicating that the claimant was disabled prior to his appointment with Kenneth Kramer, M.D., on July 15, 2008.[7] The trier found Kramer's testimony credible and persuasive that the claimant had a work capacity, albeit with restrictions, on July 15, 2008 and concluded that it was "more probable than not that the claimant had at least a limited work capacity" following the incident at work on August 8, 2007 and up to and including his first visit with Kramer. Conclusion, ¶ F. The trier did not find the opinions of either Gary Zimmerman, M.D., or Patrick Mastroianni, M.D., persuasive on the issue of the claimant's total disability status but did find Mastroianni credible and persuasive relative to his assessments of maximum medical improvement and assignments of permanent partial disability.

[7] We note that the record is devoid of any medical reports for the time period between the date of injury on August 8, 2007 and July 15, 2008, the date that the claimant underwent the Respondents' Medical Examination with Kenneth Kramer, M.D.

The trial commissioner concluded that the claimant was temporarily partially disabled from August 9, 2007 through December 9, 2010. However, the trier did not find the claimant eligible for benefits pursuant to either §§ 31-308(a) or 31-308a C.G.S. given that he "has not demonstrated any credible efforts, willingness or motivation with regard to seeking or obtaining employment during that period of time or at any time thus far." Conclusion, ¶ I. Relative to the vocational evidence proffered, the trier did not find persuasive Albert Sabella's opinion that the claimant was "unemployable for any practical vocational purpose." Claimant's Exhibit C, p. 7. Rather, the trial commissioner found Donna White credible and persuasive relative to her opinion that the claimant would be employable in a light-duty entry-level position. The trier dismissed the claims for temporary total and temporary partial disability benefits but ordered the claim held open for additional hearings as needed on the issue of the claimant's need for medical treatment.

The claimant filed a Motion to Correct which was granted in part and denied in part, and this appeal followed. On appeal, the claimant contends that "[t]he trial commissioner's conclusion that the claimant is not temporarily totally disabled is contrary to the testimonial, vocational and medical evidence in this case." Appellant's Brief, p. 12. The claimant also claims as error the trier's failure to grant the proposed corrections in the manner set forth in his Motion to Correct.[8]

[8] Although the claimant in his Motion to Correct claimed as error the trial commissioner's dismissal of his claims under §§ 31-308(a) and 31-308a C.G.S, the claimant neither briefed the issue nor included it in his Reasons of Appeal. As such, we deem the issue abandoned. Muha v. United Oil Co., 180 Conn. 720, fn. 1, (1980).

We begin with a recitation of the well-settled standard of review we are obliged to apply to a trial commissioner's findings and legal conclusions.

> … the role of this board on appeal is not to substitute its own findings for those of the trier of fact. Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 451 (2001). The trial commissioner's role as factfinder encompasses the authority to determine the credibility of the evidence, including the testimony of witnesses and the documents introduced into the record as exhibits. Burse v. American International Airways, Inc., 262 Conn. 31, 37 (2002); Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999). If there is evidence in the record to support the factual findings of the trial commissioner, the findings will be upheld on appeal. Duddy v. Filene's (May Department Stores Co.), 4484 CRB-7-02-1 (October 23, 2002); Phaiah v. Danielson Curtain (C.C. Industries), 4409 CRB-2-01-6 (June 7, 2002). This board may disturb only those findings that are found without evidence, and may also intervene where material facts that are admitted and undisputed have been omitted from the findings. Burse, supra; Duddy, supra. We will also overturn a trier's legal conclusions when they result from an incorrect application of the law to the subordinate facts, or where they are the product of an inference illegally or unreasonably drawn from the facts. Burse, supra; Pallotto v. Blakeslee Prestress, Inc., 3651 CRB-3-97-7 (July 17, 1998).

McMahon v. Emsar, Inc., 5049 CRB-4-06-1 (January 16, 2007).

Turning to the matter at bar, we note at the outset that it is axiomatic that a claimant "is entitled to total disability benefits under General Statutes § 31-307 (a) only if he can prove that he has a 'total incapacity to work.'"[9] D'Amico v. Dept. of Correction, 73 Conn. App. 718, 724 (2002), *cert. denied*, 262 Conn. 933 (2003). Generally, a claimant seeking temporary total disability benefits is expected to proffer medical evidence substantiating that claim. "The plaintiff [bears] the burden of proving an incapacity to work, and 'total incapacity becomes a matter of continuing proof for the

[9] See footnote 3, supra.

period claimed.'" Dengler, supra, at 454, *quoting* Cummings v. Twin Tool Mfg. Co., 40 Conn. App. 36, 42 (1996). In Czeplicki v. Fafnir Bearing Co., 137 Conn. 454 (1951), our Supreme Court described total incapacity to work as "the inability of the employee, because of his injuries, to work at his customary calling or at any other occupation which he might reasonably follow." Id., at 456.

The instant claimant has challenged the dismissal of his claim for temporary total disability benefits, asserting that he "has more than carried his burden with respect to the issue of whether he remains totally disabled as a result of his compensable August 8, 2007 injury." Appellant's Brief, p. 13. In support of this assertion, the claimant points to his own testimony, the testimony and medical records of treating physicians Mastroianni, Zimmerman, and Rahul Anand, and the vocational report provided by Sabella.[10] Our review of the commissioner's findings suggests that the evidence offered by Mastroianni, Zimmerman and Sabella might theoretically have provided a basis for the trier to conclude that the claimant was totally disabled for some period of time following the injury of August 8, 2007. However, we also note that the trial commissioner specifically did not find the claimant's testimony regarding his physical limitations and pain level credible, and it may thus be reasonably inferred that the trier ultimately deemed the opinions proffered by Mastroianni, Zimmerman and Sabella to be "derivative of the claimant's narrative." Do v. Danaher Tool Group, 5029 CRB-6-05-12 (November 28,

[10] Apart from noting that the claimant continues to treat with Rahul Anand, M.D., for pain management, the trial commissioner made no findings regarding Anand's credibility. In his deposition, Anand indicated that he did not form an opinion regarding the claimant's disability status because he "wasn't asked to." Respondents' Exhibit 16, p. 26.

2006). It is well-settled that such credibility findings are generally not subject to reversal on appeal.

> Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude . . . . An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom . . . . As a practical matter, it is inappropriate to assess credibility without having watched a witness testify, because demeanor, conduct and other factors are not fully reflected in the cold, printed record.

(Citations omitted; internal quotation marks omitted.) Briggs v. McWeeny, 260 Conn. 296, 327 (2002).

We also note that neither Mastroianni, Zimmerman nor Sabella offered unqualified opinions regarding the claimant's work capacity. For instance, the federal OWCP-5 form completed by Mastroianni on October 7, 2010 released the claimant to light duty, albeit with restrictions. Respondents' Exhibit 3. In addition, at his deposition, Mastroianni testified that the claimant could work eight hours a day in a sedentary capacity. Respondent's Exhibit 4, p. 42. When queried regarding the claimant's work capacity, Mastroianni replied that the question of whether the claimant was totally disabled was "complicated." Id., at 32. He went on to explain:

> You know, … his educational background is not great. The jobs that are available to him are not vast. Especially, non-manual jobs. And, you know, if you look at my assessment of him mechanically, what I indicated that he's capable of doing is very, very limited mechanically. And so, you know, when you look at that form, is he theoretically capable of some work? Yes. Is that likely to happen given his educational background, given our current economy and so forth? No. It's not likely at all. So if the question is, do I think practically Mr. Reynolds is capable of employment?

> No, I do not. Do I think theoretically it could be managed with the right, you know, support and so on? Yes. So I guess that's a yes and no answer to a simple yes, no question.

Id., at 32-33.

With regard to Zimmerman's opinion, we note that the doctor did refer to the claimant as "essentially incapacitated," Claimant's Exhibit A [Office Note of May 24, 2012] and described the claimant's symptoms as "severe, constant and incapacitating." Id. [Office Note of October 27, 2011]. However, at his deposition, Zimmerman testified that he "assumed" the claimant was not working because of "his severe pain," Respondents' Exhibit 14, p. 12, but that he did not recall actually evaluating the claimant's work capacity. Id., at 13. Zimmerman also indicated that he had based his assumptions about the claimant's pain level on what the claimant had told him and "how he moved his body," id., at 23, although he also stated that the claimant "was a man in pain. It's hard to – it's hard to fake that or to even magnify it." Id. Finally, we note that even Albert Sabella, at his deposition, reported that the claimant possessed the cognitive and academic skills for entry-level positions, Claimant's Exhibit D, p. 21, and that "there are people who do work with chronic pain on various types of medications, so some people do and some people don't." Id., at 24.

Moreover, as discussed previously herein, the record also contains the opinions of Kenneth Kramer, M.D., and Donna White regarding the claimant's work capacity, both of which were relatively unequivocal, particularly when compared with the heavily nuanced opinions put forward by Mastroianni, Zimmerman and Sabella. This board is not empowered to challenge the prerogative of the trier in selecting the expert testimony

on which his or her ultimate findings and conclusions will rely. "It is the quintessential function of the finder of fact to reject or accept evidence and to believe or disbelieve any expert testimony. The trier may accept or reject, in whole or in part, the testimony of an expert." (Internal citations omitted.) Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999).

Our review of the evidentiary submissions in the instant record has provided us with no basis to reverse the trier's findings. Rather, we are left with the strong impression that the claimant is primarily engaged in an attempt to re-litigate the facts of this matter. "Essentially, the appellant seeks to have this board independently assess the evidence presented and substitute our presumably more favorable conclusions for those reached by the trial commissioner. This we will not do. This board does not engage in de novo proceedings and will not substitute our factual findings for those of the trial commissioner."[11] Vonella v. Rainforest Café, 4788 CRB-6-04-2 (March 16, 2005).

There is no error; the October 8, 2013 Findings and Orders by the Commissioner acting for the Fourth District are accordingly affirmed.

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

[11] The claimant has also claimed as error the trial commissioner's refusal to grant the proposed corrections in the manner set forth in his Motion to Correct. Our review of those corrections indicates that the claimant is primarily engaged in reiterating the arguments made at trial which ultimately proved unavailing. As such, we find no error in the trier's refusal to adopt the corrections proposed by the claimant. D'Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003).