

CASE NO. 5892 CRB-8-13-11  
CLAIM NO. 800175348

: COMPENSATION REVIEW BOARD

PAMELA BARBEE  
CLAIMANT-APPELLANT

: WORKERS' COMPENSATION  
COMMISSION

v.

: OCTOBER 16, 2014

SYSCO FOOD SERVICES  
EMPLOYER

and

GALLAGHER BASSETT SERVICES, INC.  
INSURER  
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Mark S. Loman, Esq.,  
The Law Office of Mark S. Loman, 116 Cottage Grove  
Road, Suite 101, Bloomfield, CT 06002.

The respondents were represented by Lucas D. Strunk,  
Esq., Strunk, Dodge, Aiken & Zovas, 100 Corporate Place,  
Suite 300, Rocky Hill, CT 06067 formerly of Pomeranz,  
Drayton & Stabnick, LLC, 95 Glastonbury Boulevard,  
Glastonbury, CT 06033.

This Petition for Review from the September 23, 2013  
Finding and Dismissal of the Commissioner acting for the  
Eighth District was heard May 30, 2014 before a  
Compensation Review Board panel consisting of the  
Commission Chairman John A. Mastropietro and  
Commissioners Michelle D. Truglia and Stephen M.  
Morelli.

## OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has appealed from a Finding and Dismissal of her claim for benefits. The trial commissioner in this matter concluded that the claimant was not a credible witness and found her narrative of having sustained injuries at the workplace unpersuasive. The claimant argues that this conclusion was unsupported by the evidence and an abuse of discretion. Having reviewed the record herein, we conclude that the trial commissioner reached a reasonable conclusion that the claimant had failed to meet her burden of persuasion. We affirm the Finding and Dismissal.

The trial commissioner reached the following findings of fact at the conclusion of an extensive formal hearing. He found the claimant joined the respondent, a food service warehouse business, in 1995 in Tennessee and transferred to their Rocky Hill, CT facility in 2000. At the times relevant to this case she was supervisor of the credit check-in dock. Her duties included verifying the items returned by the delivery drivers matched the items listed on the invoices they submitted for return. She also testified she was responsible for unloading trailers upon their return. The claimant then would assess the inventory returned to determine if it was re-sellable, enter the appropriate computer code, print a label to affix to the items and then would place the item on another pallet to be re-stocked. If the items were not re-sellable, she testified that she would either: 1) throw the items in the dumpster; or 2) place the items on a pallet to be given to Food Share (a charitable organization); or 3) give away the items to fellow employees; or 4) keep the items for herself.

The events following Hurricane Irene in Connecticut on August 28, 2011 are central to this case. The claimant presented evidence that during that period trailers were returning to the warehouse heavily loaded as power disruptions made it impossible for retailers to use delivered merchandise at that time. She said a particular trailer arrived on September 7, 2011 which needed to be unloaded and she was upset and took a photo of the trailer. The claimant testified that she and her subordinate, Myron Gonzales,<sup>1</sup> unloaded the trailer. During that period she said she had to work long hours doing extra work, coming in prior to her usual start time of 11 a.m. and working until 10 or 11p.m. She testified that she initially started feeling sore and achy in her legs on August 31, 2011. She did not initially report that injury thinking it would get better over the weekend; however, she testified her symptoms became progressively worse. She said that she was in a great deal of pain by September 9, and spent most of the day on September 10 in bed.

The claimant testified that on Sunday, September 11, 2011, she couldn't get out of bed and said "when I got up on Monday my legs were swollen." Findings, ¶ 9. At work on Monday, September 12, 2011, she called Maryanne Rafferty, who was then Vice President of Human Resources for the respondent and explained that she was in pain, her legs were swollen, and that she could hardly walk. At this point she said she could not bend her legs or squat. The claimant spoke with Mike Lombardi, the facility's safety manager, and told him that she needed to go to the doctor. The claimant went to Concentra Medical Center for treatment on September 12, 2011. In that initial report the claimant reported that she had been working on a cold dock at work lifting things on and

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<sup>1</sup> This individual is identified at one point in the Finding and Dismissal as "Ryan Gonzalez." We deem this a scrivener's error and afford it no weight.

off pallets and had pain in her legs. She explained that the objects she was required to lift ranged in weight from 10 to 90 lbs and that she had worked three straight twelve hour days unloading trucks and the pain worsened. The report indicated the claimant said it had been an effort the previous Friday just to walk out the door, but that she denied swelling in her legs. The claimant denied making these statements at the formal hearing. She claimed the doctor could see the swelling in her legs at that time.

Following her examination at Concentra the claimant was treated conservatively with medication and physical therapy. The claimant was given a full duty work release on September 28, 2011. She returned to work at that time. However, the claimant was terminated from her employment shortly thereafter. Subsequent to being informed the claimant asserted a work related injury due to working long hours in the aftermath of Hurricane Irene, Ms. Rafferty checked the facility's surveillance tapes to document what hours the claimant, who was a salaried employee, actually was at work. Those tapes documented that at the end of the work day on September 9, 2011, the claimant was captured on video leaving on four instances that evening carrying what appeared to be boxes of product from the respondent's premises through the employee entrance. The claimant did not appear to have any difficulty walking out the door on those four occasions and actually used her hip and leg to push the door open because her arms were full. Upon her return to work, the claimant's activities were monitored. She was observed leaving the premises with a box of merchandise. Although she said she believed she was authorized to remove this product she was terminated by the respondent.

Ms. Rafferty testified at the formal hearing that during the period in which the claimant said she was injured she had worked up to nine and a half hours a day on a couple of occasions, but usually worked eight to nine hours. Mr. Gonzalez testified that as to the trailer identified by the claimant as having arrived on September 7, 2011 that he had unloaded 90% of the load on that trailer and the claimant was attending to paperwork and dealing with drivers while this was occurring. The trial commissioner noted that these witnesses, along with another respondent witness, Jennifer Riley, disputed the claimant's account as to the physical demands on the claimant at the time of the alleged injury.

The claimant continued to seek medical treatment subsequent to her termination by the respondent. She treated with Dr. Ronald Maringola, Jr., a chiropractor, on January 31, 2012 and advised that treator that she had suffered from back pain as a result of working long shifts prior to her work injury. The claimant does not recall discussing a back injury with this treator. The claimant consulted with Dr. James Sabshin, M.D., from Omni Medical Neurosurgery, regarding left knee complaints on April 12, 2012, who causally related the claimant's left knee symptoms to her "August 31, 2011 work injury." Findings, ¶ 14. Dr. Sabshin's reports indicated the claimant disclosed two to three weeks of leg swelling and lower extremity pain that began following her working two to three weeks where there were significant products returned to her company and "she was lifting many, many heavy, heavy boxes unloading them." Findings, ¶ 15. The claimant was examined by Dr Anthony Spinella at the request of the respondent on April 11, 2012. Dr. Spinella concluded the claimant suffered from degenerative changes to her lumbar

spine and left knee. The claimant also told Dr. Spinella she worked excessively at the end of August and in September of 2011.

The trial commissioner also noted the testimony of Scott Bedard, who has been the Director of Warehouse Operations for the respondent for the past five years. Mr. Bedard testified as to the respondent's policies regarding product returned to the warehouse. Generally, product that could not be restocked or did not have to be disposed of was to be donated to the Food Share food bank. He denied the claimant had been given permission to bring returned product home with her. The one exception to the policy that product which could not be restocked was to be donated was for perishable food such as bananas. The claimant denied knowledge of this policy. She also admitted that although the respondent had a policy wherein employees could buy food for their own consumption, she had violated this policy by buying food for a friend who resold it at a food truck.

Based on this factual record the trial commissioner concluded that the claimant was not credible. He found that it was not credible that she did not understand the company policy on removing product from the warehouse; nor was her testimony credible when she described the physical demands of her position as credit check-in clerk. The commissioner also did not believe the claimant was experiencing any physical symptoms when she left work on September 9, 2011,<sup>2</sup> as evidenced by the surveillance video of that evening. He also found the medical history provided by the claimant to her treaters was unreliable and inconsistent with her contemporaneous condition when she

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<sup>2</sup> The date was cited in the Finding and Dismissal as "September 9, 2012" which was long after the time period relevant to this claim following the landfall of Hurricane Irene. We consider this a mere scrivener's error and afford it no weight.

claimed to have been injured. The commissioner found the respondents' witnesses to have been credible. As a result, the commissioner dismissed the claim.

The claimant filed a Motion for Articulation seeking to have the trial commissioner expound further on certain findings. The commissioner denied this motion. The claimant also filed a Motion to Correct seeking to add additional findings as to her medical treatment and various findings as to the operation of the warehouse. The trial commissioner denied this Motion in its entirety. The claimant has now pursued this appeal. The gravamen of her appeal was that the trial commissioner failed to properly credit evidence supportive of her claim that she sustained a leg injury in the course of her employment.

On appeal, 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). In addition, the burden of proof in a workers' compensation claim for benefits rests with the claimant. Dengler v. Special Attention Health Services, 62 Conn. App. 440 (2001).

Our review thus must focus on whether there was evidence presented at the hearing that could cause a reasonable finder of fact to find the claimant's narrative

unpersuasive. We take particular note of the surveillance video presented of the claimant's activities on September 9, 2011. The claimant testified to having been in extreme pain during this time period as a result of her excessive workload. She also related this narrative to her treating physicians. After reviewing the video, the trial commissioner concluded that at a time when the claimant said she was in physical distress she was able to carry merchandise and open a door without appearing to be physically impaired from performing these tasks.

There is lengthy precedent that when surveillance video displays a claimant performing tasks in a manner inconsistent with their asserted medical condition that the trial commissioner may find the claimant's testimony unpersuasive. Please see 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 those decisions the trial commissioner, after reviewing surveillance video, determined that the claimant's narrative of physical impairment was unpersuasive. We find the present case indistinguishable from this precedent.

The trial commissioner also determined after observing the claimant testify that she was not credible. As an appellate body, we are not in a position to overturn the credibility determination of the trial commissioner. See our opinion in Toroveci v. Globe Tool & Metal Stamping Co., Inc., 5253 CRB-6-07-7 (July 22, 2008).

The trial commissioner concluded that the claimant failed to prove his case as a result of his testimony not being credible or persuasive. When the issue of credibility governs a trial



commissioner's decision, our appellate power of review is limited even further.

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. Burton v. Mottolese, 267 Conn. 1, 40 (2003).

A claimant's credibility also bears heavily on whether medical testimony reliant on his or her narrative is to be given weight by the trial commissioner. When a trial commissioner does not find the claimant credible, the commissioner is entitled to conclude any medical evidence which relied on the claimant's statements was also 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); Baker v. Hug Excavating, Inc., 5443 CRB-7-09-3 (March 5, 2010) and Do v. Danaher Tool Group, 5029 CRB-6-05-12 (November 28, 2006). The trial commissioner in this case concluded that the medical witnesses relied on the claimant's narrative and were therefore unreliable. Based on the precedent in Abbotts, *supra*, he was entitled to reach that conclusion.<sup>3</sup>

The claimant argues that the trial commissioner should not have found the respondents' witnesses, who refuted much of her narrative, as credible witnesses. We

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<sup>3</sup> We note that similar to the scenario in Torres v. New England Masonry Company, 5289 CRB-5-07-10 (January 6, 2009) and Do v. Danaher Tool Group, 5029 CRB-6-05-12 (November 28, 2006), the trial commissioner was presented with evidence on the record which could reasonably attribute the claimant's medical condition to noncompensable factors. We may reasonably conclude he found that evidence more persuasive than the claimant's arguments.

cannot revisit the trial commissioner's determination of witness credibility on appeal, however. Toroveci, supra. We also note that we addressed similar issues in 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). We held in Brockenberry that when a claimant is deemed not to present a credible narrative to the trial commissioner, their effort to discredit other witnesses may prove unavailing, as "...we held that when two parties offer mutually inconsistent testimony, it is the commissioner's prerogative to find one narrative credible." *Id.* See also Warren v. Federal Express Corp., 4163 CRB-2-99-12 (February 27, 2001) where we pointed out that if no witness was deemed credible by the trial commissioner the claim could be dismissed.

We also find Brockenberry on point regarding the trial commissioner's decision to deny the claimant's Motion to Correct. "When a trial commissioner denies such a motion, we may properly infer that the commissioner did not find the evidence submitted probative or credible. Vitti v. Richards Conditioning Corp., 5247 CRB-7-07-7 (August 21, 2008)." We may only intervene in such a decision if we are persuaded that the trial commissioner's decision was arbitrary or capricious. We are satisfied in this instance that it was not. As for the claimant's Motion for Articulation a trial commissioner also is not required to offer a detailed explanation as to why he or she chose not to rely on certain evidence presented to the tribunal, or conversely chose to rely on other evidence presented. See Biehn v. Bridgeport, 5232 CRB-4-07-6 (September 11, 2008), *citing* Cable v. Bic Corp., 270 Conn. 433, 440 (2004). We therefore believe this precedent addresses the denial of the Motion for Articulation. An additional authority for the fact

that commissioners do not have to give their reasons for finding a particular way is our own agency regulations: Conn. Workers' Comp. Reg. Sec. 31-301-3.

The claimant in the present case failed to persuade the trial commissioner. "If the trier is not persuaded by the claimant's evidence, there is nothing that this board can do to override that decision on appeal." Wierzbicki v. Federal Reserve Bank of Boston, 4147 CRB-1-99-11 (December 19, 2000), *appeal dismissed*, A.C. 21533 (2001). After review of the record we believe the commissioner could reasonably have reached this conclusion. As a result, we conclude the trial commissioner's determination was a reasonable exercise of his discretion.

We affirm the Finding and Dismissal.

Commissioners Michelle D. Truglia and Stephen M. Morelli concur in this opinion.