CASE NO. 5903 CRB-1-13-12
CLAIM NO. 100175618 : COMPENSATION REVIEW BOARD

VICKIE A. HATCHER
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: JANUARY 22, 2015

STATE OF CONNECTICUT
UNIVERSITY OF CONNECTICUT
HEALTH CENER
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLEE

and

GALLAGHER BASSETT SERVICES,
INC. OF NEW ENGLAND
ADMINISTRATOR

APPEARANCES:

The claimant was represented by Nichole Hatcher, Esq., Hatcher Legal, PLLC, 411 Andrews Road, Suite 240, Durham, NC 27705.

The respondent was represented by Donna Summers, Esq., Assistant Attorney General, Office of the Attorney General, 55 Elm Street, Hartford, CT 06141-0120.

This Petition for Review[1] from the November 21, 2013 Finding and Award In Part/And Dismissal In Part of the Commissioner acting for the First District was heard October 24, 2014 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Michelle D. Truglia and Nancy E. Salerno.

[1] We note that a postponement was granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant appeals from the November 21, 2013 Finding and Award In Part/And Dismissal In Part [hereafter Finding and Award] of the commissioner acting for the First District. In that Finding and Award the trial commissioner concluded that the claimant suffered accidental injuries while at work on the following dates; January 7, 1998, March 11, 2002 and January 6, 2010. The claimant alleged that the injuries that occurred on those dates were substantial factors in the claimant's progressive development of osteoarthritis and her need for bilateral knee replacement surgery. The claimant also brought a claim for the fifty (50) percent permanent partial impairment of her left knee. The trial commissioner denied these claims. At the time of each of the aforementioned incidents the claimant was an employee of the University of Connecticut Health Center/Department of Correction where she worked as a Health Service Counselor/HIV Counselor.

The trial commissioner concluded that while the claimant sustained injuries to her: right knee on January 7, 1998; to her left knee on March 11, 2002; and to both knees on January 6, 2010, all of these injuries were self-limiting and not substantial factors in the claimant's total left knee replacement performed March 30, 2010 by Dr. Carmine Ciccarelli.[2] Nor were any of these incidents a substantial factor in the proposed medical treatment that claimant undergo a total right knee replacement.

The gravamen of the claimant's appeal is that the trial commissioner erred in concluding that the claimant's need for bilateral knee replacement surgery was not the result of the injuries sustained in 1998, 2002 and 2010 or the result of repetitive trauma.

[2] Nor did the trial commissioner conclude that claimant's injuries were the result of repetitive trauma.

The trial commissioner concluded that the injuries were work related but specific as to location in time and place. He further concluded that the injuries were self-limiting and not substantial factors contributing to the development of her progressive osteoarthritis and need for bilateral knee replacement. See Findings, ¶¶ B, F and G. Specifically the trial commissioner found the opinion proffered by Dr. Steven Selden which supported this conclusion was more credible and persuasive.

A determination as to whether the need for certain medical treatment is related to a personal injury which arose out of and in the course of the claimant's employment is largely a factual determination and dependent upon the opinion of expert witnesses. Marandino v. Prometheus Pharmacy, 294 Conn. 564 (2010); O'Reilly v. General Dynamics Corp., 52 Conn. App. 813 (1999); Reis-Pereira v. Goodrich Pump & Engine Control Systems, Inc., 5713 CRB-6-11-12 (May 20, 2013); Burns v. Southbury, 5608 CRB-5-10-11 (November 2, 2011). The standard of appellate review applied by this board is that the trier's conclusions will stand unless they; result from an incorrect application of the law, are without evidentiary support or based on unreasonable or impermissible inferences**.** O'Reilly, supra; Fair v. People's Savings Bank, 208 Conn. 535 (1988).

As this board and our courts have said on numerous occasions we do not engage in de novo review. The weight and credibility to be assigned to the evidence presented to the trial commissioner is within the trier's discretion. Haburey v. Winchester, 150 Conn. App. 699 (2014), *cert. denied*, 312 Conn. 922 (2014). O'Reilly, supra. Additionally, we note that the claimant-appellant did not file a Motion to Correct in this appeal. We, therefore, "must accept the validity of the facts found by the trial commissioner and . . .

[are] limited to reviewing how the commissioner applied the law." Corcoran v. Amgraph Packaging, Inc., 4819 CRB-2-04-6, 4948 CRB-2-05-5 (July 26, 2006). As there is evidentiary support in the record for the conclusions drawn by the trial commissioner, they will remain undisturbed but for the appellant's demonstration of legal error.

We next consider the various issues raised by the appellant which, in effect, challenge the trier's conclusions as a matter of law. The appellant presents the following issues for review; whether the trial commissioner erred in failing to accord the claimant a fair and impartial hearing within her Constitutional and statutory rights, whether the trial commissioner erred by failing to make findings that were based on reliable, competent and substantiated evidence, whether the trial commissioner erred by failing to make findings that were reasonably drawn from the facts, and whether the trial commissioner erred in failing to find whether the claimant was paid the full amount of the award.

We begin our review with the claimant's allegation that the trial commissioner failed to provide the claimant with a fair and impartial hearing consistent with the claimant's constitutional and statutory rights under the Connecticut Workers' Compensation Act. The claimant framed this issue in three parts. The first being that the original trial commissioner assigned to hear the matter did not conduct a fair and impartial hearing. We fail to see any merit as to this claim because the trier who ultimately decided the instant matter was not the original trial commissioner. Further our review of the record reflects the trial commissioner who ultimately did hear and decide this matter scrupulously sought to assure the claimant that her concerns pertaining to the opinion and conduct of a particular expert witness in hearings before another

commissioner would not be the basis for the conclusions drawn by the trial commissioner. See, e.g., January 30, 2013 Transcript, pp. 14-15.[3]

Additionally, the claimant contends that the claimant was denied her rights pursuant to § 31-297 C.G.S. Section 31-297 provides:

> If an employer and his injured employee, or his legal representative, as the case may be, fail to reach an agreement in regard to compensation under the provisions of this chapter, either

[3]At the January 30, 2013 Formal Hearing Session the trial commissioner stated the following:

> "For purposes of history, for the record, it is my understanding that Commissioner Delaney may have been part of an earlier proceeding which may have included a deposition of the Commissioner's Exam. By way of my being here today, it is my understanding from the parties that Commissioner Delaney has recused himself from this matter, and in addition to that, Commissioner Delaney has recused and/or removed the Commissioner's Examiner's report and testimony, leaving the issue up to the presiding Commissioner, the undersigned, to make a determination as to whether or not an additional Commissioner's Exam is warranted and/or needed.
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> It was raised off the record by Respondent's counsel, objected to off the record by Claimant's counsel, raised again by Respondent's counsel on the record and objected to by Claimant's counsel on the record, and I stand with the position that I will not schedule an additional Commissioner's Exam in regards to this particular matter in an attempt to administratively move the case along as expeditiously as possible.
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> This Commissioner has stated clearly to counsel prior to the opening of the record, and we're now on the record, that none of the information, including Commissioner's Exams, depositions and any other formal testimony that may have involved Commissioner Delaney will not come into this proceeding, as Commissioner Delaney has removed it from the proceeding and, therefore, I will not entertain any aspect of those prior rulings and/or transcripts, et cetera.
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> In addition, an argument has been made as to potential problem with one counsel or the other, and as far as I'm concerned I don't care if it's one or two, or both, but it is my position that Mrs. Hatcher has a right to an expeditious trial and a ruling in regards to this particular matter.
>
> The Respondents have been directed on the record to schedule the deposition of Doctor Selden. I am advising both parties on the record that Doctor Selden's report and deposition will come in as Respondents have a right to present a defense of the claim. Whether I agree or disagree with that defense, is not the point; they have a right to present their defense as part of the record.
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> If there is a problem with the deposition of the Doctor – – and I'm not looking at either counsel – – then that will delay Mrs. Hatcher's proceeding, and in no way, shape, or form do I wish to delay Mrs. Hatcher's proceeding. So both parties are put on notice that if there's a problem I will then have to deal with that problem which means it will delay the proceeding."
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> January 30, 2013 Formal Hearing Transcript, pp. 14-15.

> party may notify the commissioner of the failure. Upon such notice, or upon the knowledge that an agreement has not been reached in a case in which a right to compensation may exist, the commissioner shall schedule an early hearing upon the matter, giving both parties notice of time and place not less than ten days prior to the scheduled date; provided the commissioner may, on finding an emergency to exist, give such notice as he finds reasonable under the circumstances. If no agreement has been reached within sixty days after the date notice of claim for compensation was received by the commissioner, as provided in section 31-294c, a formal hearing shall be scheduled on the claim and held within thirty days after the end of the sixty-day period, except that if an earlier hearing date has previously been scheduled, the earlier date shall prevail. Hearings shall be held, if practicable, in the town in which the injured employee resides; or, if it is not practicable to hold a hearing in the town, in any other convenient place that the commissioner may prescribe. Sufficient notice of the hearing may be given to the parties in interest by a brief written statement in ordinary terms of the date, place and nature of the injury upon which the claim for compensation is based.

The claimant argues that the provision in § 31-297 which states, "[i]f no agreement has been reached within sixty days after the date notice of the claim for compensation was received by the commissioner, as provided in section 31-294c, a formal hearing shall be scheduled on the claim and held within thirty days after the end of the sixty-day…." It is the claimant's contention that a Form 30C was filed on or about January 21, 2010 and that a formal hearing was not scheduled for more than 3 years.[4] Although the claimant has appended documents to her appellate brief in support of her contention that the claimant was deprived of her rights pursuant to § 31-297 we are not so persuaded.

The copies of correspondence claimant has attached to her brief[5] do not indicate if any of these documents were part of the evidentiary record and are properly before us on review. See Mahoney v. Bill Mann Tree Service, Inc., 67 Conn. App. 134 (2001); cf.

[4] Although actually of very little consequence we note that the electronic records associated with the instant claim indicate that the Form 30C was filed on January 28, 2010.
[5] See Appellant's Brief filed August 15, 2014, p.18.

Peters v. State/Southern Connecticut State University, 10 Conn. Workers' Comp. Rev. Op. 32, 1103 CRD-3-90-8 (January 13, 1992) (improper for commissioner to rely on medical opinion not admitted into the record). Nor is it the task of this appellate panel to cull through the evidentiary record and determine which documents were part of the record and correspond to the documents appended to the claimant's brief.[6] Harrison v. New Country Motor Cars of Greenwich, Inc., a/k/a New Country Porsche of Greenwich, a/k/a New Country Motor Car Group, a/k/a/ New Country Audi of Greenwich, 5329 CRB-7-08-3 (December 1, 2009) *citing* Gonzalez v. Meriden-Wallingford Hospital, 10 Conn. Workers' Comp. Rev. Op. 127, 1178 CRD-8-91-2 (May 21, 1992). See also; Capasso v. Fusco Corporation, 13 Conn. Workers' Comp. Rev. Op. 30, 1622 CRB-3-93-1, 1920 CRB-3-93-11 (November 8, 1994); Horkheimer v. Stratford, 4 Conn. Workers' Comp. Rev. Op. 139, 163 CRD-4-82 (December 31, 1987) *citing* Sorrentino v. Cersosimo, 103 Conn. 426, 429 (1925).

As our Supreme Court stated in Besade v. Interstate Security Services, 212 Conn. 441, 450 (1989):

> The general rule is that, absent a violation of a specific statutory provision, delay in civil proceedings does not necessitate a new trial without a showing of prejudice. Even in criminal prosecutions, an impairment of a defendant's constitutional and statutory rights to a speedy trial does not mandate automatic dismissal of the charges, but rather triggers a balancing test, the most important factor of which is prejudice to the defendant; Barker v. Wingo, 407 U.S. 514, 530 (1972); State v. Herring, 210 Conn. 78, 89, (1989); see also Statewide Grievance Committee v. Rozbicki, 211 Conn. 232, 243 n. 6, 558 A.2d 986 (1989).

Id., 450.

[6] We note that the Appellee's Brief filed September 4, 2014 does admit that the February 24, 2011 letter, from claimant's treater included as part of Exhibit A to the Appellant's Brief, was part of an exhibit proffered before the trial commissioner but that the entire exhibit was not included and therefore cannot be relied upon.

Additionally, if we were to consider the very documents that the claimant included in Exhibit A appended to her appellate brief, we would be apprised of claimant's counsel's agreement to avail herself of the alternative dispute resolution process that is part of the Connecticut Workers' Compensation system, i.e., utilization of the informal and pre-formal hearings to resolve disputes. In effect the claimant waived the time frame by which any necessary formal hearing must occur pursuant to § 31-297 C.G.S. Furthermore, it strikes us that the remedy for curing the failure to meet the time frame espoused in § 31-297 C.G.S. would be to have a formal hearing. As this is exactly what occurred we fail to see the harm sustained by the claimant.

The claimant appellant next argues that her right to a fair and impartial hearing as provided in § 31-298 C.G.S. was unmet.[7] In particular the claimant points to the language in § 31-298 which states, "[The commissioner] shall make inquiry, through oral testimony, deposition testimony or written and printed records, in a manner that is best calculated to ascertain the substantial rights of the parties and carry out the provisions and intent of this chapter."

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[7] Section 31-298 provides:

> Both parties may appear at any hearing, either in person or by attorney or other accredited representative, and no formal pleadings shall be required, beyond any informal notices that the commission approves. In all cases and hearings under the provisions of this chapter, the commissioner shall proceed, so far as possible, in accordance with the rules of equity. He shall not be bound by the ordinary common law or statutory rules of evidence or procedure, but shall make inquiry, through oral testimony, deposition testimony or written and printed records, in a manner that is best calculated to ascertain the substantial rights of the parties and carry out the provisions and intent of this chapter. No fees shall be charged to either party by the commissioner in connection with any hearing or other procedure, but the commissioner shall furnish at cost (1) certified copies of any testimony, award or other matter which may be of record in his office, and (2) duplicates of audio cassette recordings of any formal hearings. Witnesses subpoenaed by the commissioner shall be allowed the fees and traveling expenses that are allowed in civil actions, to be paid by the party in whose interest the witnesses are subpoenaed. When liability or extent of disability is contested by formal hearing before the commissioner, the claimant shall be entitled, if he prevails on final judgment, to payment for oral testimony or deposition testimony rendered on his behalf by a competent physician, surgeon or other medical provider, including the stenographic and videotape recording costs thereof, in connection with the claim, the commissioner to determine the reasonableness of such charges.

As with her contention pertaining to § 31-297, the claimant has, again, appended various documents to her brief which she references in support of her claim. See Exhibits A, B and C. Likewise, for the reasons discussed previously, we need not consider these documents. Additionally, the thrust of the claimant's argument is that the opinion of the Commissioner's Examiner, Dr. Paul Murray, who was appointed by the former trial commissioner, and the impressions of the former trial commissioner should not be part of the process to determine claimant's entitlement to the claimed benefits. Again, we refer to our earlier discussion detailing the trial commissioner's comments wherein he informed the parties as to what the course of conduct would be in the hearings over which he would preside. See footnote 2.

Additionally, the claimant suggests that the trial commissioner's failure to direct that the claimant undergo another Commissioner's Examination with a different examiner constituted error. Compelling a claimant to attend a medical examination is a matter within the trier's discretion. See Straub v. Bolt Technology Corporation, 9 Conn. Workers' Comp. Rev. Op. 212, 1130 CRD-3-90-11 (September 12, 1991). The claimant has not persuaded us that the trier abused his discretion in failing to compel the claimant to undergo a Commissioner's Examination.

The final issue presented for review is whether the trial commissioner erred in failing to find whether the claimant was paid the full amount of the award. In the Appellant's Brief the claimant contends that "[i]n Commissioner Walker's [the trial commissioner's] decision, he indicates an Award to be made pursuant to a 1998 executed filing status report. Said report has been signed and filed, and is admitted under Claimant's trial Exhibit BBB. No additional payment has been rendered to the

knowledge of undersigned counsel." Appellant's Brief, p. 24. Again this is a factual finding which if the claimant wanted either a correction or clarification the request should have been put before the trial commissioner as part of the appellate process, e.g., the filing of a motion to correct.

We therefore affirm the November 21, 2013 Finding and Award In Part/And Dismissal In Part of the Commissioner Acting for the First District.

Commissioners Michelle D. Truglia and Nancy E. Salerno concur.