CASE NO. 5914 CRB-1-14-2 : COMPENSATION REVIEW BOARD
CLAIM NO. 100185254

DON SUMMERS
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: FEBRUARY 26, 2015

R R DONNELLEY PRINTING COMPANY
EMPLOYER

and

GALLAGHER BASSETT SERVICES
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Jonathan M. Abels, Esq., 49 North Main Street, West Hartford, CT 06107 and Angelo Paul Sevarino, Esq., Law Office of Angelo Paul Sevarino, 26 Barber Hill Road, Broad Brook, CT 06016.

The respondents were represented by Dominick C. Statile, Esq., Montstream & May, LLP, 655 Winding Brook Drive, Glastonbury, CT 06033-6087.

This Petition for Review[1] from the February 11, 2014 Finding and Award 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] A postponement was granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant in this matter has appealed from a Finding and Award which found he had sustained a compensable injury, but denied the claimant's bid for sanctions against the respondents for unreasonable delay. The claimant argues that the trial commissioner had prejudged the motion for sanctions and by denying a motion to depose a claims adjuster, impeded the claimant from proving his case. The claimant seeks to remand this matter for a hearing *de novo* on the issue of undue delay. The respondents point out that it has generally been an issue of discretion as to whether to find respondents have acted in an unreasonable or dilatory manner justifying an award of sanctions. They further argue that while the claimant argues that the trial commissioner may have been perceived as having been biased, our precedent stands for the proposition that there is a strong presumption against recusal of trial commissioners. We concur that the respondents have accurately stated the law. However, in the present matter we find that the issue of whether sanctions should be levied is based on the record, and the claimant's argument that a deposition of the claims adjuster was essential to completing the record is not unreasonable. Given the trial commissioner's previously stated skepticism as to a claim of undue delay, an abundance of concern for due process suggests that another trial commissioner should determine whether a deposition is warranted, and based on the record; ascertain if the claimant has proven his claim for sanctions. We therefore remand the issue of sanctions, including the issue of whether to approve a deposition of the respondents' claim adjuster, to another commissioner for a *de novo* hearing.

The following facts are pertinent to our consideration. The claimant brought a claim alleging a June 1, 2011 injury at work and testified extensively as to the circumstances and treatment for that injury. The claimant also sought sanctions from the respondents for undue delay and unreasonable contest. The claimant was 60 years old at the time of the hearing and had graduated from high school in Arizona and subsequently served in the Air Force. The claimant was employed by the employer-respondent from March of 2003 until March of 2012. On June 1, 2011, the claimant was employed on a full-time basis by the employer-respondent as an Inserter Operator and Quality Auditor. The claimant testified that on June 1, 2011, he injured his right knee when he took paper from the jogger and then turned and put the paper on the machine. When he turned to put the paper back on the machine, he struck his knee against a fold plate that worked its way out from under the table. The incident was unwitnessed. The claimant said that within about an hour he notified his supervisor of the incident, and was advised to put ice on his knee. The claimant filed an incident report with the employer-respondent which was signed by the claimant's supervisor Joe Martins and the Environmental Health and Safety HR Manager, Robert Skripol. The claimant said he left work early that day and went home.

The claimant testified that he did not physically go to his primary care provider, Dr. Melinda Smith, but he spoke with her on the phone on June 2, 2011. He further testified that Dr. Smith told him to apply ice and keep off of his leg and to get back to her if the pain did not dissipate. The claimant did not obtain a doctor's note to be out of work on June 2, 2011, but he returned to work on June 3, 2011. He stated that Joe Martins put him on light-duty work at that time. The commissioner noted that the claimant went on

vacation to Newport, RI from June 6 to June 10. The claimant returned to work the following Monday and was put on light-duty by his supervisor for a couple of weeks. He further testified that he worked his regular duties from July, 2011 through December, 2011. The claimant testified that the first time he sought medical treatment for the work injury was February 10, 2012 from Dr. Moore. The claimant filed a Form 30C dated February 29, 2012 and the respondents filed a timely Form 43.

The claimant testified as to being unable to obtain treatment for his injury at St. Francis Hospital and therefore sought treatment at the Veterans Administration where his primary care physician directed him to receive an injection by Dr. Waterman and was prescribed physical therapy by Dr. Chong in early March of 2012 through May, 2012. The claimant also testified that by mid-January 2012 he was aware it was a possibility he would be laid off from his employer. While the claimant testified that he treated on a regular basis at the Veterans Administration from the date of his injury onward, the first time he sought treatment for his knee was in February, 2012. The commissioner noted that a November 14, 2011 progress note from Dr. Smith and an August 8, 2011 report at the Veterans Administration did not note any knee injury, although it noted other medical issues such as a prior history of substance abuse. The first Veterans Administration report that mentions the claimant's knee was a call center report dated March 6, 2012, after the claimant filed the Form 30C and after he was notified that he would be laid off from the employer-respondent. This report noted that the claimant "states he has been having pain in his R knee for the past 6 months. **No acute injury noted**." Findings, ¶ 32. (Emphasis in original.)

The commissioner noted that the claimant initially treated for his June, 2011 injury on February 10, 2012 with Dr. George Moore at St. Francis Occupational Health and was diagnosed with a knee contusion. The commissioner also noted that at his recommendation, the claimant had been examined by Dr. Gordon A. Zimmermann on July 30, 2012 at the respondents' expense. Dr. Zimmermann diagnosed the claimant with a torn meniscus and recommended an MRI of the claimant's right knee. At the recommendation of Dr. Zimmermann, the claimant underwent an MRI of his right knee on September 14, 2012 performed at Connecticut Valley Radiology, P.C. Dr. Zimmermann related that the MRI revealed a meniscal tear that required surgery. On December 10, 2012 Dr. Zimmerman opined, "I still think based upon the information provided in the history, as well as, the documentation thereof it appears that there is a causal relationship between the June 1, 2011 injury and the patient's meniscal tear." Findings, ¶ 43.

Dr. Steven Selden performed an Independent Medical Examination of the claimant on March 5, 2013. The trial commissioner summarized Dr. Selden's opinion as follows:

> If the facts are accurate as detailed above, then it is more likely than not that the meniscal tear of the right knee is causally related to the work incident of 6/1/11. The patient states that the pain began at the time and has persisted. If, indeed, that is true, then again, there would be a causal relationship of his meniscal tear with the work incident. Arthroscopic surgery would, therefore, be appropriate and be considered causally related to the incident of 6/1/11.

Findings, ¶ 47.

Dr. Selden noted that this opinion was reliant on the credibility of the claimant's narrative. The trial commissioner noted that he found "the claimant's testimony,

including lack of candor, and lack of medical treatment, initially, has created a credibility issue as to whether the claimant's current need for treatment is related to the claimant's June 1, 2011 incident." Findings, ¶ 50.

Based on those factual findings, the trial commissioner concluded "the claimant was not fully credible or persuasive", Conclusion, ¶ A, but ultimately determined the claimant sustained a knee injury at work on June 1, 2011. The trial commissioner cited various reasons for the credibility issues regarding the claimant; see Orders, ¶¶ 5-7. The trial commissioner did find the claimant's current need for medical treatment, including surgery, was due to the compensable June 1, 2011 incident but found the respondents did not unduly delay or unreasonably contest the claimant's benefits. Orders, ¶ 11.

Prior to the issuance of the Finding and Award the claimant had filed a Motion for Testimony of Insurer's Representative on November 4, 2013. On November 4, 2013 at a formal hearing the trial commissioner denied the Motion insofar as it sought live testimony from the claims adjuster; but granted the Motion to the extent that the insurer's non privileged documents were added to the record as Claimant's Exhibit I. The claimant took an exception to this ruling and it is now the gravamen of the present appeal. The Reasons of Appeal cite five issues, and we note that the dispute as to the trial commissioner's credibility determination of the claimant may be deemed abandoned, as it was neither briefed not addressed at oral argument before our tribunal. See Christy v. Ken's Beverage, Incorporated, 5157 CRB-8-06-11 (December 7, 2007) and St. John v. Gradall Rental, 4846 CRB-3-04-8 (August 10, 2005). The other issues center upon the handling of the unreasonable contest and undue delay issue; including an argument that

the trial commissioner should have recused himself and the assertion that the decision to bar the deposition of the respondents' claims adjuster was in error.

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). This is particularly true for disputes concerning the imposition of sanctions, Kuhar v. Frank Mercede & Sons, Inc., 5250 CRB-7-07-7 (July 11, 2008), disputes over the conduct of hearings, Valiante v. Burns Construction Company, 5393 CRB-4-08-11 (October 15, 2009) and disputes over evidentiary rulings Turrell v. State/DMHAS, 5640 CRB-8-11-3 (March 21, 2012), *aff'd*, 144 Conn. App. 834 (2013), *cert. denied*, 310 Conn. 930 (2013). We note that administrative hearings, including those held before workers' compensation commissioners, are informal and governed without necessarily adhering to the rules of evidence or procedure. LaPia v. Stratford, 47 Conn. App. 391, 400 (1997). Nonetheless, administrative hearings must be conducted in a fundamentally fair manner so as not to violate the rules of due process. Huck v. Inland Wetlands & Watercourses Agency, 203 Conn. 525, 542 (1987). See also Bryan v. Sheraton-Hartford Hotel, 62 Conn. App. 733 (2001).

The claimant argues that he essentially was denied due process in this matter because the trial commissioner had predetermined the issue of undue delay and unreasonable contest before hearing any evidence in the case. The claimant points to the following statement which the trial commissioner made prior to the opening of the formal hearing on June 6, 2013.

> Prior to the opening of the record, the Commissioner requested that the parties state their positions to the same. The parties have explained to me their claims and positions, with the Commissioner expressing that he would be hard pressed to issue a finding of unreasonable contest/unreasonable delay and a fight on credibility.
>
> Attorney Abels, you have requested that I recuse myself based on that position. Why don't you raise that for the record so I can respond on the record.

June 6, 2013 Transcript, pp. 3-4.

Counsel for the claimant then summarized his position, focusing on his belief that the commissioner had reached a credibility assessment of the claimant prior to having received any evidence on the record. Counsel then stated "[i]f you've already decided the issue, Commissioner, then I don't see how you possibly, in this particular case, can be unbiased and I would ask you to recuse yourself." Id., p. 5. The Commissioner then responded that his colloquy was based on reviewing the time line of events in the claim, wherein the claimant asserted a date of injury well before commencing treatment for the injury. "Based on that, my comment to the parties were that there is a legitimate question of credibility for that time frame." Id., p. 5. The commissioner then overruled the request for his recusal. Id., p. 6. Counsel for the claimant then clarified his concerns, claiming the undue delay in this matter concerned whether the claimant had his medical treatment delayed due to the respondents between February, 2012 and June, 2013. The hearing then commenced with the testimony of the claimant.

The claimant argues at length that the trial commissioner should have recused himself based on these statements. See Claimant's Brief, pp. 6-15. Upon review we are not persuaded by these arguments that the trial commissioner had any obligation to recuse himself at the commencement of this hearing. In particular, we do not agree with

the claimant that this case can be distinguished from Martinez-McCord v. State/Judicial Branch, 5647 CRB-7-11-4 (August 1, 2012). In both cases, counsel for the claimant asserted that the trial commissioner entered the hearing with a bias against the claimant on credibility grounds. We did not find that the facts in Martinez- McCord supported the extraordinary remedy of recusing the trial commissioner. We are not persuaded the commissioner's statement herein rises to such a level. Our discussion in Martinez-McCord outlines the burden a party has in seeking to mandate a commissioner recuse himself or herself from a proceeding.

> We further note that since the early days of Workers' Compensation in Connecticut, the recusal of trial commissioners has been disfavored except for circumstances under which a trial commissioner determined on his or her own that their impartiality was at issue. See Saddlemire v. American Bridge Co, 94 Conn. 618 (1920). "Every effort should be made to avoid disqualification, so that the same Commissioner may conduct the subsequent hearing, or the hearing for a modification of the original award." Id., 627. While a policy exists to try and cause pre-formal hearings to be heard by a different commissioner than the commissioner who hears the formal hearing, Rogers v. C.N. Flagg Power, 3809 CRB-6-96-5 (June 23, 2000), "unlike the superior court, which employs over 160 judges, the workers' compensation commission has only fifteen commissioners to hear formal hearings in the eight district offices. Accordingly, the judiciary has the ability to maintain a strict policy of recusal, whereas here it is an impracticality." Id. In Rogers, this board held that "the determination of whether a commissioner has heard prior evidence in a matter, and whether having heard such evidence may affect his or her ability to hear the case, is solely within the discretion of the trial commissioner. . . . Only the trial commissioner can know whether what he or she has heard will impact his or her ability to fairly preside over the formal hearing." Id. We reiterated in Doe v. State/Dept. of Correction, 4841 CRB-4-04-8 (June 7, 2005), that a trial commissioner's decision on whether to recuse him or herself was a discretionary matter, *citing* Osterlund v. State, 129 Conn. 591 (1943). "Once a trial commissioner has made a determination that he or she should be disqualified from hearing a case, it is not the place of an appellate board to second-guess that decision." Doe, supra.

We further pointed out that it is black-letter law in Connecticut that information that a fact finder receives in the course of a proceeding is not the form of bias that generally mandates he or she recuse themselves from hearing the case. In Martinez-McCord, we cited State v. Rizzo, 303 Conn. 72 (2011). In Rizzo, the defendant alleged error as the trial judge who heard his criminal trial served on a three judge penalty phase panel. Id., 112. The appellant argued the judge's prior involvement in the case tainted his participation in the penalty hearing. The Supreme Court rejected this argument, noting in part,

> ...opinions that judges may form as a result of what they learn in earlier proceedings in the same case ''rarely'' constitute the type of bias, or appearance of bias, that requires recusal. See *Liteky v. United States*, supra, 510 U.S. 554.40. To do so, an opinion must be ''so extreme as to display clear inability to render fair judgment.'' Id., 551. In the absence of unusual circumstances, therefore, equating knowledge or opinions acquired during the course of an adjudication with an appearance of impropriety or bias requiring recusal "finds no support in law, ethics or sound policy." *People v. Moreno*, 70 N.Y. 2d 403, 407, 516 N.E. 2d 200, 521 N.Y.S. 2d 663 (1987).

Id., 119.

The alleged bias displayed by the trial commissioner in this matter was based on his statement that the claimant had a credibility issue due to the delay in treating for his injury. This information was not outside the record of the case, and does not constitute a situation "where the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." See Canon 3(c)(1)(a) of the Code of Judicial Conduct.[2] As the Appellate Court held in Tracey v.

[2] The claimant has made a great deal of the trial commissioner's Findings, ¶ 29, which references that the claimant had had previous issues with alcohol and drug use. In the claimant's opinion, this was not an issue at the formal hearing and its reference constitutes reversible error. We disagree and find this issue is an irrelevant red herring. The claimant ultimately prevailed on the issue of compensability and medical

Tracey, 97 Conn. App. 278 (2006) when it found judicial disqualification unnecessary the bias or prejudice sufficient to result in a disqualification generally ''must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.'' Id., 283-284. Finding mere speculation inadequate to support recusal, the Appellate Court further held "… it is clear that adverse rulings by the judge do not amount to evidence of bias sufficient to support a claim of judicial disqualification.'' Id., 284-285.[3]

The claimant finally cites Rogers v. C.N. Flagg Power, 3809 CRB-6-96-5 (June 23, 2000) and Vetre v. State/Dept. of Children & Families, 4848 CRB-6-04-8 (August 19, 2005) as authority which is supportive of forcing the commissioner to recuse himself. Neither case supports this result. In Rogers, we reversed the decision of the former commission chairman to administratively move a case out of the Third District due to alleged conflicts. "However, the determination of whether a commissioner has heard prior evidence in a matter, and whether having heard such evidence may affect his or her ability to hear the case, is solely within the discretion of the trial commissioner. Section 31-278 makes it the prerogative of the trial commissioner, and not the administrative

---

treatment, see Orders, ¶¶ 8, 9, therefore we cannot identify the actual harm present herein. The issue of what treatment the claimant received subsequent to his work injury, and what underlying medical conditions he may have had were a legitimate issue to consider by the fact finder. Moreover, the information is within Respondents' Exhibit 2, and counsel for the claimant did not object to its admission to the record. June 6, 2013 Transcript, p. 22. At most, referencing this information constituted harmless error, Stiber v. Marks Total Security, 5479 CRB-4-09-7 (July 8, 2010).

[3] We contrast this situation, where the issue of when the claimant commenced treating for his injuries was clearly a matter of record; with the single recent case where this tribunal has vacated a decision due to an infringement of a claimant's right to due process. In Lessard v. Dattco, Inc., 5685 CRB-6-11-9 (September 17, 2012), the trial commissioner dismissed a claim and based his decision in part on personal observations of the claimant which appeared outside the record of the proceedings. We reversed and remanded this decision for a new hearing as it appeared the trier of fact relied on evidence outside the record which the claimant could not rebut, and this created an issue as to a possible denial of due process. In the present matter, the issue of the claimant's credibility due to a delay in treatment occurred as a matter of record and the parties could engage in meaningful cross-examination of evidence on this issue prior to the trial commissioner rendering a decision.

rules of this agency, to decide whether considerations of actual or potential bias mandate recusal in any given instance. Only the trial commissioner can know whether what he or she has heard will impact his or her ability to fairly preside over the formal hearing." Id. We remanded the matter back to the commissioners in that district to determine whether to hear the case. In Vetre the claimant filed a Motion to Disqualify the trial commissioner for having heard issues on the claim at informal hearings which were not directly on point with the issue being litigated at the formal hearing. The claimant's motion was denied and this tribunal affirmed the trial commissioner's decision. "Here the trial commissioner provided justification for his decision and clearly believed that he could fairly preside over the case. We see no reason to overturn this discretionary ruling." Id. We believe the trial commissioner adequately explained his rationale for hearing the case and the source of the alleged bias was information within the record of the case. Therefore, we find no error from the trial commissioner's refusal to recuse himself in this matter.[4]

The claimant also argues that the trial commissioner committed error in his determination of the issue of undue delay, due in part to his determination that it was not necessary to order a deposition of the claims adjuster prior to ruling on this motion. The claimant's argument is, although credibility may have been a legitimate issue as to matters prior to when he commenced treating for his work related injury, once he started treating for his injury the resulting medical reports of Dr. Selden and Dr. Zimmermann should have resolved this issue for the period between February 10, 2012 and June 2013. Claimant's Brief, pp. 15-16. As the claimant views the situation, once the medical

[4] See also Brey v. State/Department of Correction, 5833 CRB-2-13-4 (April 2, 2014), where we held that a trial commissioner's membership at the same gym as respondent's counsel was not the sort of circumstance that would lead a reasonable person to question a commissioner's impartiality.

reports found a link between his knee condition and a work injury the respondents should have authorized surgery and the failure to do so warrants an award of sanctions. Id., pp. 16-17. The claimant argues that only inquiry directed at the claims adjuster can ascertain if the respondents had a legitimate reason not to approve treatment. He further argues that the documentation proffered in Exhibit I offers no substantive support for the respondents' decision and is inadequate to support the trial commissioner's denial of sanctions. Id., 19-20.

Earlier this year the Appellate Court issued an opinion as to a trier's discretion to determine discovery orders in a case which we believe is on point. See Gagne v. Vaccaro, 154 Conn. App. 656 (2015).

> It is well established that ''the granting or denial of a discovery request rests in the sound discretion of the [trial] court, and is subject to reversal only if such an order constitutes an abuse of that discretion.'' (Internal quotation marks omitted.) *Barry* v. *Quality Steel Products, Inc.*, 280 Conn. 1, 16–17, 905 A.2d 55 (2006); see also *Olson* v. *Accessory Controls & Equipment Corp*., 254 Conn. 145, 176–77, 757 A.2d 14 (2000) (''[d]ecisions regarding discovery are best left to the trial court in its reasoned discretion''); *Lougee* v. *Grinnell*, 216 Conn. 483, 491, 582 A.2d 456 (1990) (ruling on motion to quash deposition subpoena reviewed for abuse of discretion), overruled in part on other grounds by *State* v. *Salmon*, 250 Conn. 147, 154–55, 735 A.2d 333 (1999) (en banc); *Pryor* v. *Pryor*, 140 Conn. App. 64, 68, 57 A.3d 846 (2013) (ruling on motion for protective order reviewed for abuse of discretion). ''Under the abuse of discretion standard, [a reviewing court] must make every reasonable presumption in favor of the trial court's action.'' (Internal quotation marks omitted.) *Woodbury Knoll, LLC* v. *Shipman & Goodwin, LLP*, 305 Conn. 750, 775, 48 A.3d 16 (2012).

Id., 663-664.

The Appellate Court in Gagne further indicated that a trial judge is under no obligation to approve a discovery request that amounts to an open-ended fishing expedition.

> Given the tortured history of this case, the court reasonably could conclude that the discovery sought by the defendant was unwarranted. See *Berger* v. *Cuomo*, 230 Conn. 1, 6–7, 644 A.2d 333 (1994) (''[d]iscovery is confined to facts material to the . . . cause of action and does not afford an open invitation to delve into the [opposing party's] affairs'').

Id., 668.

This position reiterates the long-standing precedent of this Commission affirming the discretionary power of a trial commissioner to determine what forms of discovery are necessary in order to resolve a contested case. We outlined this standard in Valiante v. Burns Construction Company, 5393 CRB-4-08-11 (October 15, 2009). In Valiante, the respondents contested the trial commissioner's decision to approve the deposition of a claims adjuster prior to ruling on a claim of undue delay and unreasonable contest. We affirmed the trial commissioner's decision that such a deposition was necessary. However, we made clear that this decision was a discretionary decision for the trial commissioner to make and we were not in a position to overturn it on appeal.

> This Commission's case law has been unequivocal. "Our case law clearly states, 'a trial commissioner has broad discretion to determine the admissibility of evidence, and an evidentiary ruling will not be set aside absent a clear abuse of that discretion.' Lamontagne" [v. F & F Concrete Corp., 5198 CRB-4-07-2 (February 25, 2008)]. Keeney v. Laidlaw Transportation, 5199 CRB-2-07-2 (May 21, 2008). See also Mosman, supra, and Vetre v. State/Dept. of Children and Youth Services, 3443 CRB-6-96-10 (January 16, 1998) which states that "[d]ecisions regarding the relevance and remoteness of evidence in workers' compensation proceedings fall solely within the discretion of the trier of fact."

> The trial commissioner was the person in the best position to judge whether a deposition of the respondent's claims adjuster was necessary in this case. The respondents' efforts to raise arcane legal arguments may contribute heat to these discussions; but shed no light on why the trial commissioner's decision constituted an abuse of his discretion. This panel cannot overturn what is essentially a finding of fact that the deposition of Ms. McCants is necessary in this matter.

Id.

In addition, when a trial commissioner has approved the deposition of a witness, we have affirmed a trial commissioner placing reasonable limits on discovery so as to avoid the disclosure of privileged information. See DeLeon v. Walgreens, 5568 CRB-4-10-6 (May 13, 2011).

> Our precedent directs us that there has been no error. On substantive grounds the claimant's wide-ranging production request was likely to require the production of privileged documents. Vetre v. State/Department of Children and Youth Services, 3948 CRB-06-98-12 (February 14, 2000). The trial commissioner had the right to decide not to proceed in this fashion, especially as procedurally the commissioner has wide discretion to decide when to compel the admission of evidence. Valiante v. Burns Construction Company, 5393 CRB-4-08-11 (October 15, 2009).

Id.

We note that the respondents counter to the claimant's argument in this case is that the documents they proffered in Exhibit I were non-privileged and further discovery was likely to result in the disclosure of privileged information.

Perhaps more significantly, the respondents argue that notwithstanding the claimant's argument that the claimant's credibility was no longer at issue subsequent to the medical reports of Dr. Selden and Dr. Zimmermann that his credibility was always at issue until the formal hearing was completed. They cite Seiler v. Ranco Collision, LLC, 5377 CRB-1-08-9 (August 27, 2009) for this position. We note that in Seiler we held,

> [o]ur case law is clear that a trial commissioner has the right to discount in *toto* the opinions of any expert witness who relied in any measure on what the trial commissioner deemed to be an unreliable narrative. 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).[5]

We also note the similarities between the issues in this case and the issues presented in Zbras v. Colonial Toyota, 5631 CRB-4-11-2 (February 14, 2012). In Zbras the claimant's bid for benefits was contested due to the respondents arguing there were issues of credibility present. The trial commissioner denied sanctions, but after a Motion to Correct was filed he awarded the claimant an award for undue delay. We remanded this matter to the trial commissioner for specific findings establishing the factual predicate to levy sanctions against the respondents. Our rationale was as follows.

> The claimant appropriately cites Kuhar v. Frank Mercede & Sons, Inc., 5250 CRB-7-07-7 (July 11, 2008) that this tribunal has extended broad latitude to trial commissioners in deciding when a respondent's conduct warrants the imposition of sanctions for undue delay or unreasonable contest. While in Kuhar, supra, we *cited* In re Shaquanna M., 61 Conn. App. 592, 603 (2001) as standing for an "abuse of discretion" standard in reviewing decisions regarding sanctions, we note that the next year the Appellate Court reversed an order of sanctions in McFarland v. Department of Developmental Services, 115 Conn. App. 306 (2009). The Appellate Court concluded the factual record in that case did not support a finding of malfeasance on the part of the respondents and concluded "[w]ithout a factual predicate underlying the award of attorney's fees, that award cannot stand." Id., 323. . . .
>
> We cannot affirm a finding that a party before this Commission should be sanctioned unless we can clearly ascertain from the

[5] See also Sosa v. Benchmark Assisted Living, 5592 CRB-3-10-9 (August 17, 2011), where we rejected the claimant's argument that weighing the claimant's credibility over uncontroverted medical evidence constituted a "due process" issue. In Sosa we noted, "we have frequently upheld the dismissal of claims for unwitnessed accidents when the trial commissioner did not find the claimant credible. See Smith v. Salamander Designs, Ltd., 5205 CRB-1-07-3 (March 13, 2008) and Ialacci v. Hartford Medical Group, 5306 CRB-1-07-12 (December 2, 2008)." Id.

record what the rationale is for levying such sanctions. McFarland, supra.

Id.

Our precedent in Zbras therefore suggests that a claimant's credibility must be determined by a trial commissioner and cannot be imputed merely through referencing documentary evidence presented by the litigants. See Footnote 2, id. In addition, while an award of sanctions is discretionary, Kuhar, supra, it must reference findings on the record to be affirmed on appeal McFarland, supra.

Ultimately we find it is an extraordinarily close call whether to grant any relief to the claimant, as the precedent in Kuhar and the terms of § 31-298 C.G.S.[6] clearly extend great deference to a trial commissioner as to the issues of levying sanctions against a respondent and determining what discovery is necessary to complete the record in a contested claim. We would affirm the trial commissioner's decision herein had he made a less definitive statement at the inception of the hearing as to his assessment of the claimant's bid for sanctions. While the claimant would be displeased with the result, he

[6] This statute reads as follows:
Sec. 31-298. Conduct of hearings. 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.

would have had no substantive reason to contest a decision reached after consideration of the record. On the other hand, notwithstanding the commissioner's initial statements, had the claimant been availed of every opportunity to add whatever evidence to the record he deemed relevant to the issue of sanctions, we would be highly likely to affirm whatever decision the trial commissioner reached on that issue. Notwithstanding the trial commissioner's original statement as to the possible merits of a sanctions award, we would have a circumstance where the claimant presented a full case with all possible substantive support for an award of sanctions. We would then ascertain if an award or denial of sanctions comported with the precedent in Kuhar, supra, and McFarland, supra.

In the present matter however, a decision was rendered by a trial commissioner on the issue of sanctions based on a record which the claimant argues was incomplete, as he was barred from deposing the claims adjuster. Considering the trial commissioner's opinions on the issue at the commencement of the hearing, the claimant's argument that the commissioner was disinclined to fully consider the issue is not unreasonable. Procedural due process is a requirement of adjudicative administrative hearings. Balkus v. Terry Steam Turbine Co., 167 Conn. 170, 177 (1974). In this case, once an opinion as to the underlying issue was offered by the fact finder, we believe the claimant was entitled to some additional latitude to offer substantive evidence to challenge this opinion. This position is in the spirit of our holding in Lessard v. Dattco, Inc., 5685 CRB-6-11-9 (September 17, 2012) where we vacated a Finding and Dismissal where we concluded, notwithstanding the other evidence supporting the decision, the claimant was denied an ability to rebut observations relied upon by the trial commissioner. We are simply not persuaded that the claimant was availed of every opportunity in this case to

rebut the evaluation as to the merit of sanctions the trial commissioner publicly stated at the commencement of this case prior to hearing any testimony on the record.

This leads us to the conclusion that the trial commissioner's determination as to whether sanctions should be awarded in this matter (Conclusions, ¶¶ D, E and Orders, ¶¶ 10, 11) should be vacated. Our precedent governing the broad discretion of a trial commissioner to grant discovery requests and award sanctions is well established, but the specific facts in this case are unusual, and the totality of the circumstances reach a cumulative threshold which warrant extending a further opportunity to the claimant.

In all other respects, we affirm the Finding and Award. The issue of whether additional discovery should be approved on the issue of sanctions shall be the subject of a *de novo* hearing by another commissioner, who shall once he or she deems the record complete, issue a ruling on the question as to whether the respondents unduly delayed treatment or unreasonably contested liability in this claim.[7]

Commissioners Michelle D. Truglia and Nancy E. Salerno concur in this opinion.

[7] The claimant sought in his appeal to obtain an order that the claims adjuster be directed to be deposed or offer live testimony. Claimant's Brief, p. 26. We do not grant this relief as we believe this is a factual decision committed to the finder of fact. At the *de novo* hearing ordered herein, the trial commissioner shall reach an independent determination as to whether additional discovery is warranted on the issue of sanctions, and if so, in what manner additional discovery will be permitted. Upon completing the record, the trial commissioner shall rule on the issue of sanctions.