CASE NO. 5938 CRB-3-14-4 : COMPENSATION REVIEW BOARD
CLAIM NO. 300049015

CAROLYN R. WILLIAMS
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: MARCH 16, 2015

JEWISH HOME FOR THE AGED
EMPLOYER

and

TECHNOLOGY INSURANCE COMPANY
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Alphonse J. Balzano, Jr., Esq., The Law Offices of Balzano & Tropiano, PC, 321 Whitney Avenue, New Haven, CT 06511.

The respondents were represented by Neil J. Ambrose, Esq., Letizia, Ambrose & Falls, PC, 667-669 State Street, Second Floor, New Haven, CT 06511.

This Petition for Review from the April 4, 2014 Finding and Dismissal of the Commissioner acting for the Third District was heard November 21, 2014 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Stephen B. Delaney and Stephen M. Morelli.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has appealed from a Finding and Dismissal which determined that her current medical condition was due to noncompensable injuries and the work injury that she sustained to her neck and shoulder was self-limiting. She argues that this decision was not supported by the evidence on the record. We find that there was expert testimony presented which supports the trial commissioner's decision. Therefore, we affirm the Finding and Dismissal.

The trial commissioner found the following facts at the conclusion of the formal hearing. The claimant, a Certified Nurse's Aide, testified she suffered an injury on April 16, 2010 to her left shoulder and left arm while attending to a patient. She described the injury as occurring as she was being hit by a patient while cleaning him and turning him. She said she had to pull her arm from under the patient. She testified she talked to a nurse and to her supervisor and reported the incident. She told both co-workers the nursing home patient had injured her left shoulder and left trapezius. Her first medical treatment was at Concentra on April 21, 2010, and the report for that visit said "PATIENT STATEMENT: I was turning over a patient and hurt my left upper arm." The initial assessment at Concentra was shoulder and trapezius strain. "At a May 19, 2010 examination, the assessment was Cervical Strain and Trapezius Strain. The "HISTORY" section indicated the Claimant had reported pain located on the left cervical spine and trapezius muscle." Findings, ¶ 9. The claimant did not recall when at Concentra her "…treatment turned into a neck injury." Findings, ¶ 10. On June 16, 2010, Dr. James Petrelli of Concentra referred the claimant to an orthopedic surgeon.

The claimant treated next with Dr. Joseph Wu, an orthopedic surgeon. He notes, "[p]atient had sustained an injury while lifting a heavy patient, injuring the left shoulder, but since the symptom appear to have migrated more proximally. At this point her pain is radiating essentially from the left side of the neck down to the mid-upper arm." Claimant's Exhibit B. Dr. Wu diagnosed a cervical sprain/strain and Degenerated Disk Disease. "There are severe degenerative changes of the cervical spine at C5-6 and C6-7 with large osteophytes laterally on the left side." Id. He further noted that "[p]atient essentially has had an acute exacerbation of a pre-existing condition. This was explained to the patient. We will send her to physical therapy." Id., Findings, ¶¶ 12-14.

The claimant received physical therapy and had an MRI performed on her cervical spine on August 4, 2010. The MRI revealed "…a disc osteophyte complex at the C5-6 and the C6-7 levels with mild indentation of the thecal sac." Findings, ¶ 16, Claimant's Exhibit C. The claimant thought the MRI had been of her shoulder. On August 25, 2010 the claimant completed a pain diagram which indicated her pain was in the left side of her neck and her left trapezius. Findings, ¶ 18. Dr. Wu referred the claimant to Dr. Durgadas Sakalkale, another physician in his practice, who performed facet injections in her cervical spine, with limited relief of pain. Findings, ¶ 19. Dr. Sakalkale referred the claimant to Dr. Dwight Ligham of Advanced Diagnostic Pain Treatment Center. Findings, ¶ 20.

Dr. Ligham examined the claimant and his initial report indicated that the claimant told him she experienced a "pop" in her neck when she was pushed by her patient. The claimant denied telling this to Dr. Ligham when cross-examined at the hearing. On November 24, 2010, Dr. Ligham writes, "[t]his is certainly cervical spine

related pain. There are elements of cervical facet arthropathy, cervical radiculopathy, and perhaps disc related pain. I personally reviewed the MRI and x-ray images today." Findings, ¶ 23, Claimant's Exhibit D. Dr. Ligham prescribed medications and performed a radiofrequency ablation, the effect of which he hoped would last about two years. The operative report from the radiofrequency ablation indicates it was performed on the C4, C5, C6, C7 levels. Findings, ¶ 24, Claimant's Exhibit D. He identified two pain generators, the left shoulder, upper arm and the cervical spine. On October 24, 2011, Dr. Ligham assigned a 17% permanent partial disability rating to the Claimant's cervical spine. Findings, ¶ 26, Claimant's Exhibit D.

Two expert witnesses examined the claimant. On September 3, 2010, the respondents' expert, Dr. Enzo Sella examined the claimant. The claimant related the mechanism of her injury as being due to a patient pushing back against her left arm and causing her left arm to get jammed. After reviewing the First Report of Injury, which included this narrative and discussed the claimant having shoulder pain, Dr. Sella's conclusion was, "[p]atient has longstanding cervical spondylosis which pre-existed the injury of 4/16/10. However, the injury as described with pushing back and a twisting of the shoulder and arm certainly could have aggravated the underlying cervical condition. This should be a temporary aggravation of the pre-existing cervical spondylosis." Findings, ¶ 29, Respondents' Exhibit 1. Dr. Sella did not find the claimant had reached maximum medical improvement at that time. Dr. Sella examined the claimant a second time, on May 20, 2011. After that examination he concluded as follows,

> …the patient did sustain a sprain of the cervical spine superimposed on previously existing cervical spondylosis. This aggravation was temporary. It lasted about 3 months or so but the patient is still suffering from pain from the underlying cervical

> spondylosis…she has exhausted conservative treatment to date. Ablation is accomplished for relief of nerve pain secondary to the underlying cervical spondylosis. In my opinion the ablation should be related to the underlying cervical sponsylosis not to the cervical sprain that she suffered back in April of last year. As far as the work related injury is concerned, she is at maximum medical improvement. The patient should continue to work in her present capacity observing the previously given limitations.

Findings, ¶ 31, Respondents' Exhibit 1.

Dr. Sella subsequently found the claimant had reached maximum medical improvement and had a 17% permanent partial impairment of her cervical spine. A Commissioner's examination was held by Dr. Shirvinda Wijesekera on November 28, 2011. His patient history noted "…she was helping to wash the patient who was rolled on to his side and she was holding the patient with the left arm and washing with the right arm. At that time, the patient pushed back against her left arm and she began having left-sided neck, arm and shoulder pain." Joint Exhibit 1.

Dr. Wijesekera's assessment was the claimant was, "[a] patient with cervical spondylosis" id., and further opined "[i] do think that degenerative changes in the cervical spine are in fact preexisting and that the injury in question might cause temporary exacerbation in those underlying osteoarthritic changes, but ought to be self-limited." Id. He further opined that "[i] suspect that the radiofrequency ablation is not related to her work place injury." Id., Findings, ¶¶ 33-36.

At the formal hearing the claimant testified that she was not told by any of her doctors that the pain might be coming from her neck. She further testified "she had no explanation as to why her doctors had not included any mention of the convalescent home resident hitting her arm, shoulder or trapezius. She testified she had told all of the doctors that the patient had struck her three times." Findings, ¶ 39.

Based on this factual foundation the trial commissioner concluded the claimant did not sustain an arm, shoulder or trapezius injury on April 16, 2010 but rather suffered a temporary and self-limiting injury to her cervical spine. The commissioner noted that subsequent to her initial treatment all medical providers have diagnosed an aggravation or exacerbation of pre-existing degenerative disc disease of the cervical spine. The commissioner further concluded the claimant's testimony about the cause of her injury and her understanding of her diagnoses, medical treatment and examinations with multiple doctors was not credible and/or persuasive. On the other hand, the commissioner found Dr. Sella and Dr. Wijesekera were consistent and persuasive in opining that any neck injury suffered by the claimant was a temporary and self-limiting injury. The commissioner therefore found that any permanency rating and any further medical treatment for the claimant's spine were not attributable to a workplace injury. The trial commissioner therefore dismissed the claimant's bid for benefits.

The claimant filed a Motion to Correct seeking to substitute findings that she sustained a compensable injury to her arm and trapezius and her current medical condition had been caused by the compensable injury. The trial commissioner rejected this Motion in its entirety. The claimant has pursued the instant appeal. Her argument is that notwithstanding the preexisting degenerative disc condition the evidence clearly established that the 2010 work injury was the proximate cause of her present condition. As the claimant views the evidence, the incident aggravated her condition and created the need for her subsequent surgery. The claimant points out that the various medical providers all noted that the claimant had experienced some form of strain injury at her employment. She cites cases such as Gillis v. White Oak Corp., 3337 CRB-5-96-5 (July

15, 1997), 49 Conn. App. 630 (1998), *cert. denied*, 247 Conn. 919 (1998) Criscio v. State/Southern Conn. State Univ., 4271 CRB-3-00-7 (June 1, 2001), Franco v. Dependable Motors. Inc., d/b/a Branford Dodge, 4281 CRB-3-00-8 (July 17, 2001) and Prisco v. North & Judd, 10 Conn. Workers' Comp. Rev. Op. 154, 1190 CRD-8-91-3 (June 30, 1992) for the proposition that when a pre-existing condition is aggravated by a workplace injury, the resulting medical condition is compensable. As the claimant views the evidence and the law, the trial commissioner was bound to award her benefits for her claim and committed legal error by denying the claim.

The trial commissioner was not persuaded by the claimant's evidence at the formal hearing and after reviewing the precedent advanced by the claimant; we are not persuaded that the trial commissioner was obligated to find in her favor at the conclusion of the formal hearing. The cases she cites are distinguishable on the facts and do not compel an appellate tribunal to reverse what is essentially a finding of fact within the province of the trial commissioner. In Gillis, supra, the claimant presented evidence which the trial commissioner found persuasive that his workplace injury was a significant factor in his need for a knee replacement. We affirmed this decision as "[t]his board will not detract from a commissioner's authority to find the facts of a case." Id. The Appellate Court affirmed our decision as "[o]ur review of the record reveals that the commissioner considered and credited portions of several medical opinions that were presented to him regarding causation. . . ." Id., 639. In the present case the trial commissioner reviewed numerous opinions and found the opinions of Dr. Sella and Dr. Wijesekera that the claimant's workplace incident was self-limiting and not a significant

factor in her current condition persuasive. Gillis therefore does not stand for the position the fact finder herein erred.

We do not find Prisco, supra, or Crisco, supra, persuasive authority supporting reversal of the commissioner's decision either. Both cases dealt with issues related to the interplay of workplace and non-workplace contributions to a claimant's occupational disease and we note that since that time the controlling precedent on such issues may have been superseded by more contemporary controlling precedent. See Sullins v. United Parcel Service, Inc., 315 Conn. 543 (2015) and Deschenes v. Transco, Inc., 288 Conn. 303 (2008). We also note that in both Prisco and Crisco the claimant persuaded the trial commissioner that their preexisting ailment was aggravated in a permanent fashion by a workplace injury. The trial commissioner in the present case reached the opposite conclusion. On the other hand while the claimant cites Franco, supra, as precedent supportive of reversal, we find this case actually supports the trial commissioner's decision. "Here, the trial commissioner found that the claimant had an underlying cardiac disease which was not caused by his employment, and that the work stress, as alleged by the claimant, merely caused somatic symptoms of chest pain." Id. Similar to the trial commissioner's decision in the present case, the commissioner in Franco found that the claimant's job related injury did not exacerbate his pre-existing condition.

The claimant's burden in cases such as this one is to establish a nexus of proximate cause between the ailment she is seeking benefits for and the injury she sustained in the workplace. The proximate cause analysis in Sapko v. State, 305 Conn.

360 (2012) is relevant to our consideration of this matter. "The question of proximate causation . . . belongs to the trier of fact because causation is essentially a factual issue. . . . It becomes a conclusion of law only when the mind of a fair and reasonable [person] could reach only one conclusion; if there is room for a reasonable disagreement the question is one to be determined by the trier as a matter of fact.'' Id., 373. See also Turrell v. State/DMHAS, 144 Conn. App. 834, 845 (2013).

We also find our precedent in Pupuri v. Benny's Home Service, LLC, 5697 CRB-2-11-11 (November 5, 2012) on point herein, especially as the claimant in this matter argues on appeal that she should be awarded benefits for an injury which essentially is based on a workplace incident which allegedly aggravated a pre-existing condition. In Pupuri, the claimant argued that his back injuries were due to lifting stones at a quarry. A witness who observed the claimant shortly after this alleged incident testified the claimant was not injured at that time, and the trial commissioner found this witness credible. The claimant argued that notwithstanding this testimony, the respondent had offered no alternative explanation for his condition. We rejected this argument and pointed out, *citing* DiNuzzo v. Dan Perkins Chevrolet Geo. Inc., 294 Conn. 132, (2009), that it was the claimant's burden to prove compensability.

> As the Supreme Court held in DiNuzzo, supra, " . . . the humanitarian spirit of [the act] does not entitle the [court] to suspend the injured worker's burden of proof, [or] to change the rules of our legal system so that the onus of disproving causation is thrust upon the [employer or the insurer]." Id., at 150-151. The trial commissioner's findings indicate that the treating physician himself suggested the claimant's ailments may have been degenerative or idiopathic in nature. The circumstances herein are similar to other cases when evidence presented at the formal hearing suggested an alternative cause for an injury other than a work-related incident. See Burns v. Southbury, 5608 CRB-5-10-11 (November 2, 2011), 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).

Pupuri, supra.

We find our precedent in Burns v. Southbury, 5608 CRB-5-10-11 (November 2, 2011) particularly cogent as to this matter. In Burns the claimant sustained a compensable injury when he crashed his police cruiser in the line of duty. He later sought benefits for hip surgery, arguing that this was the sequalae of his compensable injury. The trial commissioner relied on expert opinion introduced at the hearing that the claimant's surgery was due to preexisting ailments and that the compensable injury did not create or accelerate the need for this surgery. We affirmed that decision.

> We have long held if "this board is able to ascertain a reasonable diagnostic method behind the challenged medical opinion, we must honor the trier's discretion to credit that opinion above a conflicting diagnosis." Strong v. UTC/Pratt & Whitney, 4563 CRB-1-02-8 (August 25, 2003). We cannot intercede when a trial commissioner determines one witness is more persuasive than another in a "dueling expert" case. Dellacamera v. Waterbury, 4966 CRB-5-05-6 (June 29, 2006), footnote 1. We note that it is the claimant's burden to prove that a work-related accident is the cause of a recent need for surgery, see Marandino v. Prometheus Pharmacy, 294 Conn. 564 (2010) and Weir v. Transportation North Haven, 5226 CRB-1-07-5 (April 16, 2008). Indeed, in DiNuzzo, supra, the Supreme Court rejected the idea "that the onus of disproving causation is thrust upon the [employer or insurer]." Id., 151.

Burns, supra.

The standard of deference we are obliged to apply to a trial commissioner's findings and legal conclusions is well-settled. "The trial commissioner's factual findings and conclusions must stand unless they are without evidence, contrary to law or based on unreasonable or impermissible factual inferences." Russo v. Hartford, 4769 CRB-1-04-1 (December 15, 2004), *citing* Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988).

Therefore we will review the evidence to see if it supports the trial commissioner's conclusions. The trial commissioner found the opinions of Dr. Sella and Dr. Wijesekera persuasive and credible. We will ascertain if they support dismissal of the claim.

The claimant was examined by Dr. Wijesekera, who was the Commissioner's examiner, on November 28, 2011. His report included a review of medical records and a physical examination of the claimant's spine, upper extremity and shoulder. The examiner concluded that the work injury "might cause temporary exacerbation" to the claimant's pre-existing cervical spondylosis "but ought to be self-limited." Joint Exhibit 1. Dr. Wijesekera further opined that he suspected the radiofrequency ablation "is not related to her work place injury." Id. Dr. Sella physically examined the claimant on September 3, 2010 and also reviewed medical records on that date. He described the claimant's workplace injury as a "temporary aggravation of the pre existing cervical spondylosis." Respondents' Exhibit 1. Dr. Sella reiterated that opinion after a May 20, 2011 examination where he found the claimant was at maximum medical improvement following the work place injury. He also opined the ablation was unrelated to the work injury. Id.

The claimant has cited DiNuzzo, supra, arguing that these opinions should not be credited as they were allegedly "not based on facts." Claimant's Brief, pp. 6-7. We disagree as since these opinions were rendered after a physical examination of the claimant and a full review of the relevant medical records we can distinguish this evidence on the facts from the opinion discounted in DiNuzzo which was found to have relied on "conjecture, speculation or surmise." Id., 136-137. The claimant did not depose these witnesses, and therefore the trial commissioner could rely on their reports

"as is" and draw whatever reasonable inferences were present. Berube v. Tim's Painting, 5068 CRB-3-06-3 (March 13, 2007).

In addition, at the formal hearing the claimant testified at length as to a March 18, 2010 motor vehicle accident. July 22, 2013 Transcript, pp. 28-30, 51-60 and 70-72. The claimant's nondisclosure of her motor vehicle accident shortly before the workplace incident to various physicians creates a reasonable basis for a trial commissioner to question the reliability of any opinion that did not consider such a potential vector of causation. In Do v. Danaher Tool Group, 5029 CRB-6-05-12 (November 28, 2006) the claimant asserted a workplace injury was the source of her current ailments, and denied that a motor vehicle accident was the proximate cause. The trial commissioner denied her bid for benefits even in the absence of expert testimony presented by the respondents. We cannot distinguish this case from Do, supra, and therefore reach a similar conclusion that the trial commissioner's denial of benefits must stand.

The claimant finally argues that it was error to deny her Motion to Correct. The trial commissioner was legally empowered to deny this motion. See 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); D'Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003); and Liano v. Bridgeport, 4934 CRB-4-05-4 (April 13, 2006). The claimant did not persuade the trial commissioner that this evidence was probative or relevant, and the commissioner is not bound to accept the view of the case presented by a litigant.

The claimant has the burden of persuasion under Chapter 568 that his or her medical condition is the result of a compensable injury. The trial commissioner in this

case concluded that the impact of the April 16, 2010 incident was self-limiting and unrelated to the claimant's present medical condition.

As this was a reasonable conclusion from the record presented we must affirm the Finding and Dismissal.

Commissioners Stephen B. Delaney and Stephen M. Morelli concur in this opinion.