CASE NO. 5939 CRB-4-14-5 : COMPENSATION REVIEW BOARD
CLAIM NO. 400090362

JOHN TARANTINO
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

: APRIL 13, 2015

SEARS ROEBUCK & CO.
EMPLOYER

and

SEDGWICK
INSURER
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by Andrew Wallace, Esq., Carter Mario Injury Lawyers, 158 Cherry Street, Milford, CT 06460.

The respondents were represented by Gerald V. Davino, II, Esq., Adelson, Testan, Brundo, Novell & Jimenez, 2080 Silas Deane Highway, Suite 304, Rocky Hill, CT 06067.

This Petition for Review from the April 24, 2014 Finding and Award 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 Michelle D. Truglia.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. It is black letter law that a claimant cannot be awarded benefits under § 31-307 C.G.S. unless they can prove a total incapacity to work. It is also black letter law that pursuant to DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132 (2009) a trial commissioner's finding cannot rely on an evidentiary foundation based on "conjecture, speculation or surmise." Id., 136-137. The respondents in this matter have appealed a Finding and Award granted to the claimant which determined that he sustained a compensable injury on October 9, 2012 and subsequently was entitled to benefits under § 31-307 C.G.S. and § 31-308 C.G.S. Upon review we conclude that the issue of compensability was a factual decision and the trial commissioner could find the claimant's testimony and evidence persuasive on that issue. The trial commissioner's reasoning in awarding the claimant § 31-307 C.G.S. benefits, however, is based on an evidentiary foundation akin to that the Supreme Court found untenable in DiNuzzo, supra. We remand the issue of appropriate compensation to the claimant to the trial commissioner for further proceedings.

The trial commissioner found the following facts at the conclusion of the formal hearing. The claimant testified that he was employed by Sears from October 8, 2009 until December 13, 2012 when he was terminated for theft. His separation agreement acknowledged he had taken goods and services without paying Sears in exchange for his not being prosecuted. The claimant said he was injured on October 9, 2012 while lifting two tires at the auto center. He reported the injury three days later to his manager, Paul Rivera. Although company policy required employees to immediately report injuries, he did not file a claim right away because he thought the pain would go away. Since his

termination from Sears he had not officially worked although he has accompanied his father-in-law to jobs at his glass installation business which, he described as barter for living arrangement at his father-in-law's house for he and his family.

The trial commissioner found that the claimant worked from the date of injury through December 13, 2012. In Findings, ¶ 2g, the trial commissioner found that the claimant testified that he was told on that date by his treating physician, Dr. Anthony Lendino, that he was unable to work, and that he therefore stopped working. There is no statement in the record documenting that Dr. Lendino directed the claimant to stop working on that date. The claimant filed a Form 30C commencing this claim on January 8, 2013 claiming he injured his back and his left lower extremity carrying two tires while working at Sears.

The trial commissioner also noted testimony at the hearing as to injuries the claimant sustained prior to filing a claim against Sears. The claimant explained that while he denied being injured in any prior accidents, in his deposition testimony, he now recalled being involved in an October 18, 2007 motor vehicle accident after reading the deposition of Dr. Lendino. November 20, 2013 Transcript, p. 21 and p. 43. The claimant's treating physician authored an undated letter opining that the claimant's back injury was causally and directly related to his accident at work, and further opined the claimant was capable of sedentary work between October 9, 2012 and November 7, 2012 and was totally disabled from November 7, 2012 going forward. This letter did not reference the December 13, 2012 date the claimant actually stopped working. However, Dr. Lendino's deposition testimony indicated that the claimant had a sedentary work capacity during the entire period following this accident.

In his deposition Dr. Lendino also testified that he is friendly with the claimant's father-in-law but did not commence treating the claimant until 2007. Since then he has treated the claimant both for his injury at Sears and for a previous motor vehicle accident. He said the first time he treated the claimant for the work-related injury was October 31, 2012 when he noted the claimant suffered low back pain and left buttock pain. On November 7, 2012 the claimant told him his left foot was now numb and Dr. Lendino indicated the claimant needed an epidural block or surgery. The claimant was referred to Dr. Dean Mariano, who on January 23, 2013 diagnosed the claimant with a large L4-5 central disc herniation with lower extremity pain. Dr. Lendino also opined that the claimant has pre-existing disc disease which was exacerbated by the reported injury at Sears. He related the claimant's need for treatment to the fact that the previous back pain had responded to conservative measures and had not previously required intervention nor imaging. Dr. Lendino also reviewed surveillance tapes of the claimant at his deposition with respondents' counsel, and vehemently denied that those tapes showed the claimant doing HVAC work or glass work with his father-in-law. The trial commissioner also noted that Dr. Lendino filled 43 prescriptions to address the claimant's back pain between October 19, 2007 and March 28, 2012.

Two of the claimant's co-workers testified at the hearing. Paul Rivera testified that he observed the claimant limping on October 13, 2012. He asked the claimant what happened and he was told by the claimant that he had hurt himself picking up tires. He said the claimant told him he did not report the incident as it happened before and medication had taken care of it. Mr. Rivera knew the claimant had filed a claim for this incident, and also testified he knew the claimant worked on vehicles for family and

friends; did work for his father-in-law as well as doing other construction and remodeling work outside his job with Sears. The district auto center manager for Sears, Victor Sperazza, also testified. He said he observed the claimant in October 2012 walking awkwardly and was told by the claimant it wasn't a big deal and the pain would go away.

Based on this factual record the trial commissioner concluded the claimant was credible as to his narrative of being injured when he picked up two tires on October 9, 2012. He also found the claimant was credible in believing his treating physician had disabled him from work, as the claimant was not good at recounting dates and past events. The commissioner found that Dr. Lendino was credible and persuasive that the October 9, 2012 work incident exacerbated the claimant's pre-existing disc disease and was the reason that further medical intervention became necessary. The commissioner did not find Dr. Lendino's opinion of the claimant being totally disabled subsequent to November 7, 2012 credible as the claimant continued to work full time until December 13, 2012. The trial commissioner found Dr. Lendino's opinion credible that the claimant was totally disabled after December 13, 2012 until May 7, 2013, where the commissioner found the video surveillance persuasive that the claimant had a work capacity as of that date. The commissioner found the claimant temporarily partially disabled after that date. As the claimant sustained a compensable injury at work the commissioner directed the respondents to pay medical bills and treatment as recommended by Dr. Lendino, as well as temporary total and temporary partial disability benefits.

The respondents filed a Motion to Correct seeking 28 separate corrections. The corrections focused on the respondents' argument that the evidence suggested the claimant was not a credible witness, his medical condition was not related to any work

injury, and therefore he should be awarded no benefits. We do note the first correction sought was to conform Findings, ¶ 2g, to the testimony on the record that the claimant's inability to work at Sears after December 12, 2012 was due to being terminated for disciplinary reasons, and not due to any medical advice from Dr. Lendino. The trial commissioner denied this correction, as he denied the Motion to Correct in its entirety. The respondents have now commenced the instant appeal.

The respondents' appeal focuses on two different arguments. They argue that the Finding and Award should be reversed in its entirety as the trial commissioner should not have found the claimant credible and his medical evidence persuasive. We are not persuaded that as a matter of law we must reverse the Finding and Award on the issue of compensability. The other argument raised by the respondents is that the commissioner erred in the manner that he awarded benefits to the claimant as the medical evidence did not support an award of temporary total disability benefits and the trial commissioner failed to ascertain if the claimant was receiving a *de facto* monetary benefit in exchange for his work for his father-in-law. We find this argument more meritorious, and remand these issues to the trial commissioner for further findings so as to conform the award to the claimant to the evidence on the record.

We note 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). Moreover, "[a]s 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." Burton v. Mottolese, 267 Conn. 1, 54 (2003). "This presumption, however, can be challenged by the argument that the trial commissioner did not properly apply the law or has reached a finding of fact inconsistent with the evidence presented at the formal hearing." Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

The respondents argue that the claimant did not present a credible argument that he sustained a compensable injury on October 9, 2012 and the trial commissioner should have dismissed the claim. The respondents point to the medical evidence indicating that the claimant sustained injuries in a motor vehicle accident prior to that date as a reason to discount the alleged injury at work as impacting the claimant's condition. As the respondents view the evidence, which included numerous prescriptions for pain medication, there is no reason to believe the claimant's back condition was any worse after the alleged work injury than before that date. The respondents also believe that the claimant's narrative should have been given no weight by the trial commissioner as he denied prior injuries which were documented in the medical records, and that he was terminated by his employer for untrustworthy conduct. As a result, they believe the claimant's narrative was so lacking in credibility as to warrant dismissal of his claim.

Our precedent stands for the proposition that when a trial commissioner finds a witness who testifies to be credible, or conversely, finds a witness who testifies not to be credible, we do not have the ability to reverse this judgment on appeal. See Toroveci v. Globe Tool & Metal Stamping Co., Inc., 5253 CRB-6-07-7 (July 22, 2008), citing

Burton, supra, 40. We also note that in cases wherein causation of an injury is contested the trial commissioner's " . . . findings of basic facts *and* his finding as to whether those facts support an inference that the plaintiff's injury arose from his employment are subject to a highly deferential standard of review." Blakeslee v. Platt Bros. & Co., 279 Conn. 239, 253-254 (2006). (Emphasis in the original.) "While cases such as Ialacci v. Hartford Medical Group, 5306 CRB-1-07-12 (December 2, 2008), Do v. Danaher Tool Group, 5029 CRB-6-05-12 (November 28, 2006) and 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) clearly establish that a trial commissioner may decide uncontroverted medical evidence is unreliable when he or she finds the claimant's narrative not to be credible; the converse is also true. A trial commissioner may rely on expert testimony which is grounded in a claimant's narrative he or she *does* find credible." Wiggins v. Middletown, 5300 CRB-8-07-12 (January 15, 2009). (Emphasis in original.) The trial commissioner found the claimant's narrative of having injured his back at work on October 9, 2012 credible. The commissioner could therefore find expert testimony consistent with this narrative to be reliable. Consequently, the claimant was entitled to whatever benefits under the law he was entitled to as a result of that injury.

The respondents thus argue that even though the claimant may have sustained a compensable injury that the evidence on the record does not support the benefits awarded to the claimant. Upon review we find this to be a persuasive argument which warrants a remand of this case.

The standard for establishing entitlement to temporary total disability benefits is well established. We look to the Appellate Court's opinion in Sellers v. Sellers Garage,

Inc., 80 Conn. App. 15 (2003) as enunciating the test a claimant must meet to obtain such benefits.

> The plaintiff is entitled to total disability benefits under General Statutes § 31-307 (a) only if he can prove that he has a total incapacity to work . . . . The plaintiff [bears] the burden of proving an incapacity to work . . . . Our Supreme Court has defined total incapacity to work as the inability of the employee, *because of his injuries*, to work at his customary calling or at any other occupation which he might reasonably follow.

Id., 20. (Emphasis added.)

The respondents focus on the claimant's departure from the respondents' employment at Sears on December 13, 2012. As the respondents view the situation the claimant was working at Sears with some medical restrictions at that time, and his departure from Sears was totally unrelated to any compensable injury. The trial commissioner in Findings, ¶ 2g, found that Dr. Lendino had directed the claimant to stop working as of that date. We have reviewed the record and find that neither testimony nor the documentary evidence supports that finding. The most contemporary medical examination of the claimant, dated November 7, 2012, authorized the claimant to work modified duty. The claimant was not examined again by Dr. Lendino until the next year. See Claimant's Exhibit A. As a result the trial commissioner's Finding that the claimant left the employ of Sears for medical reasons is unsupported by probative evidence.[1] The Claimant's Brief, p. 8, cited Snyder v. Gladeview Health Care Center, 149 Conn. App.

[1] As a result, we believe that this finding was "clearly erroneous." Kennedy v. State/Department of Correction, 5238 CRB-1-07-6 (June 26, 2008). Consequently, the trial commissioner should have granted a correction of the Finding and Award to remove this unsupported Finding. As we pointed out in Vallier v. Cushman & Wakefield, 5822 CRB-1-13-2 (February 21, 2014), "[w]hen a Motion to Correct seeks to change the Finding to conform to the evidence on the record, we have affirmed granting such a correction." Rizzo v. Stanley Works/Hand Tools Division, 5106 CRB-6-06-6 (November 21, 2007). In regards to Correction of Finding, ¶ 2g, sought by the respondents, the uncontroverted evidence found persuasive and credible by the trial commissioner supports the correction. We believe it was error not to have granted this correction and herein incorporate it into the Finding as affirmed herein. As this finding cited evidence not in the record, a correction (Correction 1) to remove the finding should have been granted.

725 (2014) as grounds to affirm the § 31-307 C.G.S. award and we are not persuaded. Snyder was a case regarding enforcement of a stipulation and not a dispute as to § 31-307 C.G.S. benefits. In addition, the commissioner's finding herein was the sort of unreasonable inference from the evidence which Snyder states cannot stand on appeal.

We do note that in some cases we have related back the results of a subsequent medical examination to support the award of temporary total disability benefits to a prior date. See McInnis v. Shelter Workz, 5299 CRB-3-07-11 (June 11, 2009). In McInnis we related back the date of total disability to the date the claimant left the workforce as a subsequent examination established that he was medically disabled and,

> [t]here is no evidence in the record that points to any event that would have materially changed the claimant's medical condition between suffering his compensable disc herniation and his examination by Dr. Murphy. We believe the trial commissioner reasonably inferred from this uncontroverted evidence that the claimant had been disabled for this entire period.

Id.[2]

The claimant does point to a February 7, 2013 report by Dr. Lendino opining the claimant was totally disabled. Claimant's Exhibit A. However, a trial commissioner must examine "the entire substance of the testimony" to ascertain if it is reliable and probative. O'Reilly v.General Dynamics Corp., 52 Conn. App. 813, 818 (1999). After reviewing Dr. Lendino's deposition testimony, (Claimant's Exhibit C), we cannot find that February 7, 2013 opinion constitutes reliable evidence.

We have reviewed the deposition testimony of Dr. Lendino and find that it was in many ways conclusory and inconsistent. Dr. Lendino reviewed his undated letter to claimant's counsel and acknowledged that it represented the claimant was totally

[2] We must ascertain if the claimant's medical evidence supports a finding of total disability as he did not present any vocational evidence and did not advance an argument that he was totally disabled by way of the standards delineated in Osterlund v. State, 135 Conn. 498 (1949).

disabled. Claimant's Exhibit C, pp. 34-35. He testified that he remained in that condition until the date of the deposition, September 25, 2013. Id., p. 35. When asked if the incident at Sears rendered the claimant unable to work after November 7, 2012, the witness said "[m]y best opinion is that he has had preexisting disc disease, which was exacerbated with the reported injury at Sears." Id., p. 37.[3] The witness then reviewed various surveillance videos of the claimant performing various activities. The witness then testified that the claimant's pain level had decreased and he was getting better on his own. Id., pp. 78-79. Dr. Lendino also testified that he was not aware the claimant's job at Sears was supervisory and that he believed the claimant was not allowed to work a desk job. Id., pp. 79-80. The witness also noticed that the claimant's presentation in his office visits was different than that displayed in the surveillance videos. Id., pp. 81-82. He then noted that the claimant had testified that he was able to work within his restrictions at Sears because his normal job was supervisory in nature. Id., pp. 83. Dr. Lendino then testified that based on the video evidence that the claimant was "not totally disabled from any form - - from any form of employment." Id., p. 88. The witness then said "I assumed that his work was what he always did, which was heavy work requiring bending, lifting, sitting for periods of time." Id., p. 89. The witness then testified that he "assumed" the claimant had been let go by Sears "because he couldn't do the job." Id., p. 90.

We cannot distinguish this deposition testimony on the issue of total disability from the testimony presented by the claimant's expert witness as to causation in DiNuzzo which resulted in that award being overturned on appeal. Dr. Lendino's understanding of

[3] We note that this opinion does not reach the standard delineated in Struckman v. Burns, 205 Conn. 542, 553-556 (1987) as it does not cite the term "reasonable medical probability" or any synonymous phrase.

the claimant's job duties and the reason for his termination were a central element as to his opinion as to the claimant's disability. The deposition clearly demonstrates the witness based his original opinions on faulty assumptions; and essentially recanted that opinion after being presented with the facts.[4] As the Supreme Court pointed out in DiNuzzo, "…the testimony of even the most persuasive expert witness cannot be credited if it is not based on facts." Id., 137. Since "[t]he right of a claimant to compensation must be based [on] more than speculation and conjecture" id., 143, and the facts on the record are inconsistent with the reasoning behind Dr. Lendino's opinion as to the claimant's work capacity, the finding of total disability is unsupported by subordinate facts and must be vacated. While Strong v. UTC/Pratt & Whitney, 4563 CRB-1-02-8 (August 25, 2003), stands for the proposition that "[i]f on review 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"; in the present case we find the sole medical evidence presented does not reasonably support the award of § 31-307 C.G.S. benefits.

We reach the same result in this case we reached in a case involving a claim for total disability for a hazardous duty state employee, where we reversed an award for insufficient evidence. In Kennedy v. State/Department of Correction, 5238 CRB-1-07-6 (June 26, 2008), the claimant asserted that he was entitled to § 5-142 C.G.S. benefits for total disability. On appeal we concluded the claimant's witness "offered no medical evidence on the issue of total disability for any period following October 28, 2004" and "[a] claimant must generally proffer medical evidence that demonstrates he or she is

[4] See also Risola v. Hoffman Fuel Company of Danbury, 5120 CRB-7-06-8 (July 20, 2007) where we held "we believe it is erroneous to rely solely on evidence the witness himself no longer endorses."

totally disabled within a reasonable medical probability. This evidence was lacking." Id. We remanded Kennedy back to the trial commissioner to determine the benefits to which the claimant was entitled.

We note that in McInnis, supra, we related back the period of total disability from a medical examination the trial commissioner relied on. In the present case the trial commissioner concluded the video surveillance established the claimant had a work capacity as of May 6, 2013 and was only entitled to partial disability benefits under § 31-308(a) C.G.S. after that date. It would seem reasonable, based on the McInnis precedent and owing to the unreliability of contrary opinions, to conclude that if the claimant had a work capacity in November 2012 and a work capacity in May 2013 that he had a work capacity during the intervening period. This is a finding of fact, however, and we may not find facts as an appellate body. That determination must be reached by the trial commissioner.

On appeal the respondents argue at some length that any benefits awarded under § 31-308(a) C.G.S. to the claimant should be subject to an offset for the value of goods and services his father-in-law provided him in exchange for his services at his business. See Respondents' Brief, pp. 16-18. We note that the respondents presented extensive video evidence documenting those activities. However, we note that at the trial level the respondents defended this case solely on the basis of seeking to dismiss the case in toto, and the respondents made no affirmative demand for an offset against § 31-308(a) C.G.S. benefits due to the claimant. See Respondent's Post Trial Position Statement Proposed Findings Of Fact And Proposed Orders, dated February 11, 2014 and their Motion to Correct, dated May 8, 2014. As an appellate body, we will not adjudicate an issue for the

first time when it was not litigated before the trial commissioner. Haines v. Turbine Technologies, Inc., 5932 CRB-6-14-4 (March 9, 2015).

The precedent in DiNuzzo stands for the proposition that all awards under Chapter 568 must be based on a foundation of reliable evidence, and not rely on what could be characterized as a fictional narrative. Therefore, we herein vacate the provisions of Order, ¶ 4, of the Finding and Award awarding the claimant temporary total disability benefits for the period from December 14, 2012 through May 6, 2013. We remand this matter for further proceedings as to the compensation due the claimant for this time period. In all other respects we affirm the Finding and Award.

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