CASE NO. 5955 CRB-1-14-8
CLAIM NO. 100137043 : COMPENSATION REVIEW BOARD

CORDELL GOULBOURNE
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: JULY 29, 2015

STATE OF CONNECTICUT
DEPARTMENT OF CORRECTION
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLEE

and

GALLAGHER BASSETT SERVICES
ADMINISTRATOR

APPEARANCES:

The claimant was represented by James M. Quinn, Esq., Quinn & Quinn, LLC, 248 Hudson Street, Hartford, CT 06106.

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

This Petition for Review from the August 6, 2014 Finding & Dismissal of the Commissioner acting for the Sixth District was heard February 27, 2015 before a Compensation Review Board panel consisting of Commission Chairman John A. Mastropietro and Commissioners Stephen M. Morelli and Jack R. Goldberg.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant appeals the August 6, 2014 Finding & Dismissal of the commissioner acting on behalf of the Sixth District. In that Finding & Dismissal the trial commissioner granted in part, and dismissed in part the claimant's claims. The trial commissioner dismissed the claims for (1) temporary total disability benefits pursuant to § 31-307 for the period between June 28, 2011 through December 11, 2013, (2) entitlement to an award of interest and attorneys fees pursuant to § 31-300 on the basis of the respondent's alleged undue delay/unreasonable contest. The trial commissioner granted the claimant's request for benefits pursuant to § 31-308a with some modification, i.e., he awarded 40 weeks of the requested 74.1 weeks of § 31-308a benefits.

The issues raised by the claimant-appellant are whether the trial commissioner erred in failing to conclude that the claimant was totally disabled and whether the trial commissioner erred in failing to award attorney's fees on the basis of the respondent's failure to accept February 21, 2001 as the date of injury. Prior to engaging in our review of the issues we commence a review of the procedural history of this claim.

The claimant was employed by the respondent as a correction officer. The claimant's tenure of employment commenced August 16, 1996 following the claimant's passing a physical examination on June 19, 1996. The June 19, 1996 physical examination did not reveal any evidence of heart or hypertension illness. See Claimant's Exhibit G – January 12, 2007 Finding and Dismissal of the Commissioner Acting for the First District (Commissioner Jesse M. Frankl) Findings, ¶¶ 1-2. The claimant perceived the duties of being a correction officer as stressful. He complained of chest pains and a

variety of other symptoms. As a result of the claimant's symptoms he was referred to Dr. Kathleen Kennedy, a cardiologist. On July 6, 1999 the claimant underwent a catheterization of his heart. Dr. Kennedy has remained the claimant's treating physician and in July, 2001 the claimant underwent cardiac bypass surgery. In the years following the claimant's bypass surgery the claimant has undergone a number of cardiac procedures. He continues to take medication related to his various cardiac symptoms. Findings, ¶ 19.

Prior adjudicative proceedings in this matter considered whether the claimant met the threshold jurisdictional requirement of filing a timely claim. It was ultimately determined that the claim was timely. As was noted in this Board's opinion in Goulbourne v. State/Department of Correction, 5461 CRB-1-09-5 (May 12, 2010) which affirmed the April 17, 2009 Finding and Award of the Commissioner Acting for the First District, the claimant's claim for benefits was successfully litigated on the basis that his coronary artery disease was predicated on a theory of repetitive trauma. Initially the unrepresented claimant filed a Form 30C that alleged a July 7, 1999 date of injury. Thereafter, former Commissioner Frankl, in his capacity as the trial commissioner, held that the claimant's claim for benefits was time-barred as the date of injury identified by the claimant in his Form 30C, and the August 31, 2001 filing of the Form 30C exceeded the one-year statute of limitation set out in § 31-294c.[1]

[1] Section 31-294c provides in pertinent part:

"(a) No proceedings for compensation under the provisions of this chapter shall be maintained unless a written notice of claim for compensation is given within one year from the date of the accident or within three years from the first manifestation of a symptom of the occupational disease, as the case may be, which caused the personal injury, provided, if death has resulted within two years from the date of the accident or first manifestation of a symptom of the occupational disease, a dependent or dependents, or the legal representative of the deceased employee, may make claim for compensation within the two-year period or within one year from the date of death, whichever is later. Notice of a claim for compensation

In this Board's opinion in Goulbourne v. State/Department of Correction, 5192 CRB-1-07-1 (January 17, 2008) [hereafter Goulbourne I] we remanded the matter for the purpose of determining "a) what date the claimant continued to be exposed to workplace stress thus establishing jurisdiction; and, b) whether the claimant's hypertension (sic) [coronary artery disease] constituted a compensable repetitive trauma injury." Thereafter the matter was heard by Commissioner Christine L. Engel who concluded in her April 17, 2009 Finding and Award, inter alia, that the claimant's last day of exposure was February 20, 2001 and the claim was timely. (Claimant's Exhibit I)

The respondent appealed from the April 17, 2009 Finding and Award which was the basis of this Board's opinion in Goulbourne v. State/Department of Correction, 5461-CRB-1-09-5 (May 12, 2010) [hereafter Goulbourne II). In Goulbourne II, this Board affirmed the trier's conclusion that the claimant's employment was a 'substantial contributing factor' to his medical conditions.[2]

The respondent appealed the May 12, 2010 opinion of the compensation review board in Goulbourne II to the appellate court (Claimant's Exhibit K) (appeal docketed AC 32294 May 27, 2010). Following the filing of the appeal with the appellate court the parties executed a "Stipulation to the Date of June 20, 2011" in which, among other issues, the respondent agreed to withdraw the appeal with the appellate court. The

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may be given to the employer or any commissioner and shall state, in simple language, the date and place of the accident and the nature of the injury resulting from the accident, or the date of the first manifestation of a symptom of the occupational disease and the nature of the disease, as the case may be, and the name and address of the employee and of the person in whose interest compensation is claimed. An employee of the state shall send a copy of the notice to the Commissioner of Administrative Services. As used in this section, "manifestation of a symptom" means manifestation to an employee claiming compensation, or to some other person standing in such relation to him that the knowledge of the person would be imputed to him, in a manner that is or should be recognized by him as symptomatic of the occupational disease for which compensation is claimed."

[2] The board did find that the trial Commissioner erred in failing to admit the opinion of Dr. Kevin Tally into the record. This board held that it was error for the trial Commissioner to fail "to permit these exhibits to be marked for identification and included in the record" and remanded the matter for the sole purpose of correcting the record.

stipulation was approved June 27, 2011 by Commissioner Ernie R. Walker. (Respondent's Exhibit 1)

Following the litigation referenced above, the claimant brought this claim seeking benefits under two theories; (1) that he was medically totally disabled and entitled to temporary total disability benefits pursuant to § 31-307, and in the alternative, (2) under the Osterlund doctrine, Osterlund v. State, 135 Conn. 498 (1949) he was entitled to total disability benefits. Our analysis begins with whether the trial commissioner's failure to conclude that the claimant was totally disabled on the basis of his progressive compensable coronary artery disease was error.

The essence of the claimant appellant's argument as to this issue is that the claimant's treating cardiologist opined that the claimant was "totally disabled from all work due to his progressive symptomatic coronary artery disease" and that opinion was uncontradicted. (Claimant's Exhibit C (September 26, 2013 report of Dr. Kennedy), Appellant's Brief, p. 8.) The only other medical evidence relevant to this issue was the opinion of Dr. Kevin Tally. Dr. Tally, in his capacity as the respondent's medical examiner, opined that he was not a vocational expert and without additional testing could not agree or disagree with Dr. Kennedy's assessment that the claimant was totally disabled from all employment. The claimant contends that the trial commissioner's finding that the September 26, 2013 opinion of Dr. Kennedy was not credible was "without merit." Stated another way the claimant argues that the trial commissioner abused his discretion by concluding that Dr. Kennedy's September 26, 2013 opinion was not credible.

The sum and substance of the claimant's argument is that, as Dr. Tally's opinion is inconclusive, the only medical opinion is that of Dr. Kennedy. The claimant contends that the trial commissioner, impermissibly, substituted his opinion for that of a medical expert. The appellant argues the trier lacks the medical knowledge and expertise necessary to determine whether the claimant was totally disabled.

It has long been held that when weighing and assessing the credibility the evidence proffered, the trial Commissioner is entitled to, accept or reject, in whole or in part, any medical expert's opinion. Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999). Furthermore conclusions based on the weight and credibility assigned to the evidence will not be disturbed unless contrary to law, without evidence or based on unreasonable or impermissible factual inferences. Fair v. People's Savings Bank, 207 Conn. 535 (1988). Thus our review is focused on whether the trial commissioner violated the aforementioned tenets.

Our courts have long held that every reasonable presumption should be given to the trier's discretionary action. As such we must ask whether the trier's exercise of discretion was such that it constituted an abuse of discretion. As we stated in Kuhar v. Frank Mercede & Sons, Inc., 5250 CRB-7-07-7 (July 11, 2008), '"An abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided based on improper or irrelevant factors.' In re Shaquanna M., 61 Conn. App. 592, 603 (2001)."

As we apply the above standard to the trial commissioner's finding and conclusion regarding Dr. Kennedy's September 26, 2013 opinion we note that the trial

commissioner does provide some explanation for his conclusion. Specifically, in Findings, ¶ F the trier stated:

> I find and conclude the opinions of Dr. Kennedy relating to the claimant being totally disabled not persuasive or credible. Specifically, on May 1, 2013 she opined the claimant had a light duty work capacity. No evidence was introduced that Dr. Kennedy treated the claimant, reviewed any additional records, performed any testing, etc. from the period of May 1, 2013 through September 26, 2013 which would support a basis for arriving at this opinion. As such, I find the opinion of September 26, 2013 is not based upon competent and reliable medical evidence.

Clearly the above provides some insight into the trier's rationale for not according Dr. Kennedy's opinion greater weight and credibility. Although the claimant-appellant sought a correction to Findings, ¶ F, in his Motion To Correct filed August 19, 2014, nothing in that proffered correction indicates the existence of additional medical records or testing for the period between May 1, 2013 and September 26, 2013.[3] While

[3] The pertinent part of the claimant-appellant's Motion To Correct filed August 19, 2014 seeking the correction to Findings, ¶ F seeks to replace and substitute the following:

"I find and conclude the opinion of Dr. Kennedy relating to the claimant being totally disabled to be both persuasive and credible. Dr. Kennedy has been the claimant's attending cardiologist since at least 1999 and has seen her patient on a regular basis since that time. On May 1, 2013, she wrote to the claimant's attorney that "Despite being treated with optimal medical therapy, he has developed progression of his coronary artery disease requiring five stents being placed in his right coronary artery in April 2010." She further stated "His previous placed bypass grafts from 2001 and not functioning with an occlusion of the vein graft to the diagonal and an atretic (nonfunctioning) mammary graft to the left anterior descending artery." She concluded "I certainly feel that he is disabled from a cardiac standpoint from employment that would place him under physical or emotional stress." On September 26, 2013, she wrote to claimant's counsel "I feel that Cordell is totally disabled from all work due to his progressive symptomatic coronary artery disease despite optimal treatment with both stents and bypass, he still requires multiple medication for treatment of chronic angina. He has had progression of his coronary artery disease and continues to have episodes of chest pain/angina despite revascularization and optimal medical treatment. These medications have side effects including fatigue, and at times nausea. He continues to have episodes of angina mostly precipitated by stress." She further stated that the claimant's permanent disability to his heart had increased since the rating provided by Dr. Arthur B. Landry on February 24, 2004.
Supporting evidence in the record:
Dr. Kennedy's opinion that the claimant is totally disabled from all work is consistent with the testimony presented at the hearing and the progressive nature of the claimant's disease. The claimant testified that he originally underwent bypass surgery in 2001, has had at least four angioplasties, including the placement of a stent, in the period since that time. He further testified that his progressive coronary artery disease affects him everyday, and his overall health has deteriorated over time. He suffers daily fatigue, weakness, chest pain and nausea and these symptoms are unpredictable in nature and require that he go to bed. He takes

claimant's Motion to Correct Findings, ¶ F cites portions of the transcript as supporting its contention we do not see any mention of medical records or testing for the period between May 1, 2013 and September 26, 2013. Thus, the trier did not err in failing to grant this provision of the claimant's motion to correct.

Additionally, as claimant points out Dr. Kennedy was not deposed nor was she called to testify before the trial commissioner. The claimant seems to suggest that this supports a conclusion that Dr. Kennedy's opinion was uncontradicted and unimpeached and therefore failing to accord her opinion the weight and credibility urged by the claimant is an abuse of discretion. However, the lack of Dr. Kennedy's testimony by deposition or directly before the trial commissioner cuts both ways. Given that it is the claimant who carries the burden of proof and persuasion the decision not to call Dr. Kennedy as a witness is a calculated risk in litigation strategy. We cannot speculate as to what testimony would have been put forth by Dr. Kennedy.

We therefore conclude the trial commissioner did not err in concluding that the claimant has some work capacity and therefore was not medically totally disabled pursuant to § 31-307. The next issue we consider is whether the trial commissioner erred in failing to conclude that the claimant was totally disabled under the Osterlund doctrine. Osterlund, supra. The Osterlund doctrine holds that a claimant may have some earning capacity but his physical condition is such that he cannot with the exercise of reasonable diligence find employment. Bode v. Connecticut Mason Contractors, 130 Conn. App.

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three medications on a daily basis and there is no day that he is without symptoms. Further, the finding that the claimant is totally disabled from all work is consistent with the Commissioner's finding that he has a 56% permanent partial disability of the heart based upon the opinion of the Commissioner's Examiner. (November 13, 2013 Transcript, pp. 17, 18, 22, 23, 27, 29, 30 and 32 attached)." Claimant's Motion To Correct dated August 19, 2014, pp. 2-3.

672, 680 (2011). Thus, if the trier considered Dr. Kennedy's report as indicative of some work capacity we must determine whether it was error for the trial commissioner to fail to conclude that claimant's physical condition rendered him unemployable.

Although the claimant did not provide evidence of job searches, in testimony before the trial commissioner the claimant testified to his extensive online employment research efforts. The claimant testified that he spent between 5-8 hours a day on line researching employment opportunities and staying up to date in the field of human resources. As to physical activity, the claimant testified to walking on a treadmill 3 times a week for 30 minutes. We note there was also testimony that the claimant suffered from unstable angina and took 3 medications a day relating to his cardiac issues. The claimant also testified that it was his impression that his health was deteriorating as he experienced bouts of chest pain, fatigue and nausea.

The issue then turns on whether the claimant's physical condition and employment capacity were such that the claimant was without the "tenets of employability" as suggested in Franklin v. State/Dept. of Mental Health & Addiction Services, 5224 CRB-8-07-4 (April 11, 2008). Again, the findings and conclusions drawn by the trier are also dependent upon the weight and credibility the trier assigned to the evidence and are an exercise of his discretion. The same analysis discussed earlier in this opinion applies here, i.e., is there evidence to support the trier's conclusion and did the trial commissioner abuse his discretion in concluding as he did? The standard we must apply is whether the trier's conclusion vitiates logic or is decided on improper inferences or irrelevant factors. We conclude the trier's conclusion was not an abuse of his discretion.

The claimant's own testimony reflects his ability to utilize a computer on a daily basis for a period of 5 to 8 hours. Further, there was evidence that the claimant sustained a Masters Degree through an on-line program and between 2006 and 2009 the claimant worked full time in two different employment positions. Additionally, the claimant testified to his attending a number of job fairs and sending out 200 resumes without successfully procuring employment. However, it does not appear that any direct evidence on this point was proffered. Thus, we cannot say that the trial commissioner erred in failing to conclude the claimant was entitled to total disability benefits in accordance with the Osterlund doctrine.

The final issue raised is whether the trial commissioner erred in failing to award an attorney's fee pursuant to § 31-300 C.G.S. The claimant appellant contends that the litigation strategy employed by the respondent was conduct that should be sanctioned as permitted by § 31-300.[4] Section 31-300 provides for interest and a reasonable attorney's fee where adjustments to and payments of compensation have been unduly delayed as a result of the fault or neglect of the respondent. The statute also permits a reasonable

[4] Sec. 31-300 provides in pertinent part:

"In cases where, through the fault or neglect of the employer or insurer, adjustments of compensation have been unduly delayed, or where through such fault or neglect, payments have been unduly delayed, the commissioner may include in the award interest at the rate prescribed in section 37-3a and a reasonable attorney's fee in the case of undue delay in adjustments of compensation and may include in the award in the case of undue delay in payments of compensation, interest at twelve per cent per annum and a reasonable attorney's fee. Payments not commenced within thirty-five days after the filing of a written notice of claim shall be presumed to be unduly delayed unless a notice to contest the claim is filed in accordance with section 31-297. In cases where there has been delay in either adjustment or payment, which delay has not been due to the fault or neglect of the employer or insurer, whether such delay was caused by appeals or otherwise, the commissioner may allow interest at such rate, not to exceed the rate prescribed in section 37-3a, as may be fair and reasonable, taking into account whatever advantage the employer or insurer, as the case may be, may have had from the use of the money, the burden of showing that the rate in such case should be less than the rate prescribed in section 37-3a to be upon the employer or insurer. In cases where the claimant prevails and the commissioner finds that the employer or insurer has unreasonably contested liability, the commissioner may allow to the claimant a reasonable attorney's fee."

attorney's fee in instances where the claimant prevails and the trial commissioner is persuaded that the respondent has unreasonably contested the matter.

In the instant matter the claimant contends that the respondent's attempt to challenge the February 20, 2001 date of injury was an act of undue delay/unreasonable contest. The predicate factual circumstances which the appellant cites are as follows. During the course of litigation in this matter, Commissioner Christine Engel issued a Finding and Award dated April 17, 2009 wherein the claim was found compensable, timely filed and the trier concluded the last date of exposure to workplace stress was February 20, 2001. See Findings, ¶ 7 (Claimant's Exhibit I). The respondent appealed the April 17, 2009 Finding and Award to the Compensation Review Board. The board affirmed the substance of the April 17, 2009 Finding and Award in its May 12, 2010 opinion. [5] The respondent then appealed this Board's opinion to the appellate court. Prior to the appellate court's consideration of the appeal, the parties entered into a stipulation in which the respondent agreed to withdraw the appeal and the claimant agreed that the stipulation was a full and final settlement to the date of June 20, 2011. Both parties agreed to disagree as to the date of injury. See Findings, ¶ 16.

In the first session of the proceedings at issue here, when asked if the respondent agreed that the date of injury was February 20, 2001 the respondent stated, "I'm afraid not." The claimant contends that the respondent's contest as to the date of injury was contrary to the legal principle that the law of the case stands. According to the claimant, as the appeal from Commissioner Engel's April 17, 2009 Finding and Award was withdrawn, the findings and conclusion of Commissioner Engel became the law of the

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[5] The only error identified by the Compensation Review Board in its Goulbourne II, May 12, 2010 opinion was the trial commissioner's failure to mark an exhibit for identification. See fn.2, supra.

case. In his brief the claimant points to our discussion of the doctrine of law of the case in Goulbourne II, supra, where we stated:

> We recently discussed the concept of "law of the case" in Gilbert v. Ansonia, 5342 CRB-4-08-5 (May 14, 2009). The "law of the case" doctrine stands for the proposition that "[w]here a matter has previously been ruled upon interlocutorily, the court in a subsequent proceeding in the case may treat that decision is the law of the case, if it is of the opinion that the issue was correctly decided, in the absence of some new or our overriding circumstance." Breen v. Phelps, 186 Conn. 86, 99 (1982). "In essence [the doctrine] expresses the practice of judges generally to refuse to reopen what (already) has been decided…. New pleadings intended to raise again a question of law which has already been presented on the record and determined adversely to the pleader are not favored…."

Again we must ask whether the trial commissioner's failure to award a reasonable attorney's fee pursuant to § 31-300 was an abuse of the trier's discretion. Consistent with the standard of review applied to discretionary rulings discussed herein we find no such abuse of discretion on the part of the trier.

We therefore affirm the August 6, 2014 Finding and Dismissal of the Commissioner acting on behalf of the Sixth District.

Commissioners Stephen M. Morelli and Jack R. Goldberg concur.