CASE NO. 5963 CRB-3-14-10 : COMPENSATION REVIEW BOARD
CLAIM NO. 300088956

TIMOTHY SCANLON
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: JULY 22, 2015

FINKLE & SONS SERVICE CO., INC.
EMPLOYER

and

ACADIA INSURANCE COMPANY
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Ross T. Lessack, Esq., The Dodd Law Firm, LLC, Ten Corporate Center, 1781 Highland Avenue, Suite 105, Cheshire, CT 06410.

The respondents were represented by Joseph J. Passaretti, Jr., Esq., Montstream & May, LLP, 655 Winding Brook Drive, Glastonbury, CT 06033.

This Petition for Review from the September 18, 2014 Finding and Decision of the Commissioner acting for the Fourth District was heard March 20, 2015 before a Compensation Review Board panel consisting of Commissioners Randy L. Cohen, Stephen M. Morelli and Daniel E. Dilzer.

OPINION

RANDY L. COHEN, COMMISSIONER. The claimant has appealed from a Finding and Decision which awarded him additional permanent partial disability benefits in addition to what he had previously received. The claimant argues that the award was inadequate and that the prior award of permanent disability benefits he received should not be credited against his current disability award. We are not persuaded that the trial commissioner's decision is erroneous; and therefore we affirm the Finding and Decision.

The trial commissioner reached the following factual findings in this matter. The claimant had an accepted bilateral arm condition as a result of repetitive trauma as well a prior workers' compensation injury for repetitive trauma injuries to his hands and upper extremities. The claimant reached a full and final settlement on February 22, 2010 in regard to his prior repetitive trauma injuries. The full and final stipulation memorialized payment of permanent partial disability benefits for 10% to the left upper extremity, 10% to the right upper extremity, 5% to the left hand and 5% to the right hand as a result of left and right carpal tunnel, cubital tunnel and thoracic outlet syndrome as a result of repetitive and/or cumulative trauma. This agreement also acknowledged any claim for the shoulders remained open and pending and is not covered by the stipulation agreement.

The commissioner took note of various opinions rendered as to the claimant's present level of impairment from his injuries. On January 25, 2009 Dr. Stanley Foster reiterated opinions he previously issued and rated the claimant with a 5% impairment of each hand, based on the bilateral carpal tunnel syndrome, and on January 30, 2009 he rated the claimant with a 10% impairment of the right arm due to cubital tunnel

syndrome. On February 2, 2001 Dr. Paul Fischer rated the claimant with a 10% of each arm based on the carpal tunnel syndrome and cubital tunnel period. Dr. Michael Kaplan has rendered his opinions in regard to permanency in this matter and testified at a deposition held January 3, 2013. Dr. Kaplan did agree that a 5% of each shoulder is equal to 3% of the whole arm and the 20% of each shoulder would be 12% of the arm. Dr. Kaplan has assigned a 12% permanent partial impairment to the claimant's arms bilaterally. The trial commissioner also noted that Dr. Joshua Frank performed a Commissioner's examination on April 3, 2014 and issued a report responsive to that exam on April 13, 2014.

Based on this factual foundation the trial commissioner reached the following conclusions.

A. The claimant is entitled to a permanent partial disability rating of 12% impairment to his arms, less previously paid 10% impairment for his arms, resulting in an additional 2% permanent partial disability to his arms.
B. The claimant is entitled to an additional 2% permanent partial disability to his arms.
C. Dr. Kaplan opined that the claimant has a 12% disability to each arm.
D. The shoulder is not a scheduled body part pursuant to CGS Section 31-308(b).
E. I do not find the opinions and report of Dr. Frank persuasive in this matter.
F. I find that Dr. Frank has not considered all the facts and evidence in regard to this matter before rendering his opinions and report.
G. The claimant was previously paid and compensated for a 10% permanent partial disability to his arms.

Therefore, the trial commissioner ordered the respondents to pay the claimant an additional 2% permanent partial disability of his arms. The claimant filed a Motion to Correct the findings herein. The gravamen of this motion was the claimant's belief that

Dr. Kaplan's testimony supported ascribing a new 12% disability rating to the arms in addition to the previous 10% rating. The claimant therefore believed he should receive an additional 12% permanency award, and not an additional 2% award. The trial commissioner denied this motion in its entirety and the claimant then commenced the instant appeal.

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).

The claimant argues in his appeal that the witness that the trial commissioner found credible and persuasive, Dr. Kaplan, offered testimony as to his shoulder impairment which was not related to the injuries the claimant had already been compensated for. See Claimant's Brief, pp. 5-6. Since the claimant believes the two impairments to be unrelated, the trial commissioner erred in giving the respondents a credit against the prior award to the claimant. He cites Rodriguez v. Remington Products, 16 Conn. Workers' Comp. Rev. Op. 115, 3069 CRB-4-95-5 (November 25, 1996) and Digrazio v. CBL Trucking, 3479 CRB-8-96-11 (February 18, 1998) as appellate authority for this position. He states that when a prior agreement or award does

not specifically state compensation is for a specific body part, the commissioner should not impute that the prior award compensated the claimant for an injury to that body part.

The respondents challenge this position. The respondents note that there were significant changes to the statute in 1993 and rely on the specific terms of § 31-308(b) C.G.S. and § 31-349(a) C.G.S. for the argument that the trial commissioner was obligated to credit the prior award.[1] They note that under the current law "shoulders" are not an enumerated body part for which one can receive a specific award. The respondents argue that under the claimant's characterization of Dr. Kaplan's testimony no additional award to the claimant could be sustained, as only by relating the shoulder injury to the

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[1] The relevant terms of those statutes read as follows:

Sec. 31-308(b). With respect to the following injuries, the compensation, in addition to the usual compensation for total incapacity but in lieu of all other payments for compensation, shall be seventy-five per cent of the average weekly earnings of the injured employee, calculated pursuant to section 31-310, after such earnings have been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act made from such employee's total wages received during the period of calculation of the employee's average weekly wage pursuant to said section 31-310, but in no case more than one hundred per cent, raised to the next even dollar, of the average weekly earnings of production and related workers in manufacturing in the state, as determined in accordance with the provisions of section 31-309, or less than fifty dollars weekly. All of the following injuries include the loss of the member or organ and the complete and permanent loss of use of the member or organ referred to:

Member	Injury	Weeks of Compensation
Arm		
Master arm	Loss at or above elbow	208
Other arm	Loss at or above elbow	194

Sec. 31-349. Compensation for second disability. Payment of insurance coverage. Second Injury Fund closed July 1, 1995, to new claims. Procedure. (a) The fact that an employee has suffered a previous disability, shall not preclude him from compensation for a second injury, nor preclude compensation for death resulting from the second injury. If an employee having a previous disability incurs a second disability from a second injury resulting in a permanent disability caused by both the previous disability and the second injury which is materially and substantially greater than the disability that would have resulted from the second injury alone, he shall receive compensation for (1) the entire amount of disability, including total disability, less any compensation payable or paid with respect to the previous disability, and (2) necessary medical care, as provided in this chapter, notwithstanding the fact that part of the disability was due to a previous disability. For purposes of this subsection, "compensation payable or paid with respect to the previous disability" includes compensation payable or paid pursuant to the provisions of this chapter, as well as any other compensation payable or paid in connection with the previous disability, regardless of the source of such compensation.

claimant's arm could an award of § 31-308(b) C.G.S. benefits be sustained. They cite Safford v. Owens Brockway, 262 Conn. 526 (2003) and Barton v. Ducci Electrical Contractors, 248 Conn. 793 (1999) for this position. We find the respondents view of the case more persuasive.

We have reviewed our recent precedent on this matter. We note that in Ouelette v. New England Masonry Company, 5424 CRB-7-09-2 (January 14, 2010) we pointed out that when a previous stipulation had been reached between a claimant and the respondent, the question for the trial commissioner was whether the award at that time was "paid or payable" against the claimant's disability. We further note that in Ouelette the claimant argued that Rodriguez, supra, and Digrazio, supra, compelled a reversal, and we were not persuaded. We affirmed the trial commissioner's determination in Ouellette that a credit did exist based on the stipulation creating a "payable" obligation for the disability rating in place at that time.

We also have reviewed Sierra v. C & S Wholesale Grocers, Inc., 5370 CRB-1-08-8 (September 23, 2009), *aff'd,* 128 Conn. App. 78 (2011), *cert. denied*, 301 Conn. 924 (2011). In Sierra, the claimant sustained an abdominal injury, and as the abdomen was not an enumerated body part under § 31-308(b) C.G.S., the claimant needed to present persuasive medical evidence linking that injury to an injury sustained by an enumerated body part in order to receive permanency benefits. The trial commissioner was not persuaded by the claimant's witness as to the level of disability the claimant's lumbar spine had sustained. We affirmed that decision, as Safford, supra, stands for the principle that any medical opinion that relies on such a "subsuming" of injury must clearly link the injury to that of a scheduled body part through competent medical testimony, or the

opinion must be disregarded by the trial commissioner. Id., 536. The trial commissioner was permitted to rely on the witness that provided the most weighty and persuasive opinion as to the claimant's injuries. Our decision was affirmed on appeal by the Appellate Court.

In the present case, the trial commissioner relied on Dr. Kaplan's opinion. The claimant argues that the trial commissioner drew unreasonable inferences from Dr. Kaplan's testimony and that the only reasonable inference that could be drawn would be that the claimant's shoulder disability should be credited in its entirety for creating disability to his arm above and beyond the prior injury for which he had been compensated. As the trial commissioner denied that claimant's Motion to Correct on this point, we may reasonably conclude that he rejected this reasoning. 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). The claimant had previously received an award for a 10% disability of his arm. We may reasonably conclude that the trial commissioner, by rejecting the claimant's Motion to Correct, was not persuaded that the shoulder injury created a new cumulative level of disability of the claimant's arm which was 22%. "We have held that it is within the discretion of the trial commissioner to accept some, but not all, of a physician's opinion." Lopez v. Lowe's Home Improvement Center, 4922 CRB-6-05-3 (March 29, 2006). The trial commissioner did not credit the statement by Dr. Kaplan issued on June 26, 2012 (Claimant's Exhibit A) in response to claimant's counsel's February 27, 2012 letter (Claimant's Exhibit L). Having reviewed the totality of the evidence, in particular the transcript of Dr. Kaplan's two depositions (Respondents' Exhibits, 7 & 8); we are not persuaded that as a matter of law the trial

commissioner was obligated to adopt the claimant's interpretation of the evidentiary record.[2]

On appeal, this panel must provide "every reasonable presumption" supportive of the Finding and Decision. Torres v. New England Masonry Company, 5289 CRB-5-07-10 (January 6, 2009). Based on the record herein and the precedent governing this issue, we conclude the trial commissioner could have reasonably concluded the respondents' were entitled to a credit against a 10% permanent partial disability award.[3] The Finding and Decision herein reflects that conclusion, granting the claimant an additional 2% permanency rating against his arm injury, and since it is grounded in evidence the trial commissioner found probative, we cannot overturn this decision on appeal.

We affirm the Finding and Decision.

Commissioners Stephen M. Morelli and Daniel E. Dilzer concur in this opinion.

[2] We note that Dr. Kaplan was asked specifically to opine on the claimant's total level of disability to his upper extremity and declined as "[t]hat's not my expertise." Respondents' Exhibit 7, p. 15.

[3] Since the authority relied upon by the claimant, Rodriguez v. Remington Products, 3069 CRB-4-95-5 (November 25, 1996) and Digrazio v. CBL Trucking, 3479 CRB-8-96-11 (February 18, 1998) predates Safford v. Owens Brockway, 262 Conn. 526 (2003) and Barton v. Ducci Electrical Contractors, 248 Conn. 793 (1999), we must accord the more recent precedent more weight.