CASE NO. 5976 CRB-6-15-1 : COMPENSATION REVIEW BOARD
CLAIM NO. 601039817

JAN JODLOWSKI
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: AUGUST 12, 2015

STANLEY WORKS
EMPLOYER

and

SEDGWICK CMS, INC.
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant appeared without legal representation at oral argument.

The respondents were represented by Erik S. Bartlett, Esq., McGann, Bartlett & Brown, LLC, 111 Founders Plaza, Suite 1201, East Hartford, CT 06108.

This Petition for Review from the December 15, 2014 Finding & Dismissal of the Commissioner acting for the Sixth District was heard May 29, 2015 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Randy L. Cohen and Stephen M. Morelli.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has appealed from a Finding & Dismissal which determined that his bid for additional spine surgery or a spinal cord stimulator would not be deemed reasonable or necessary medical care responsive to his compensable injuries.[1] The claimant also contests the recommendation that he undergo pain management treatment at the Rosomoff Clinic in Florida. The claimant, who is a self-represented party, seeks to add additional evidence to the record to support his claim, and argues that the trial commissioner failed to properly credit evidence from his treating physicians supportive of his claim. After reviewing the claimant's arguments we are not persuaded the trial commissioner's decision is legally erroneous. The commissioner's decision is grounded in probative evidence he deemed reliable and we may not second-guess such a decision on appeal. We affirm the Finding & Dismissal.

We note that this claimant was injured many years ago and the circumstances of that injury were addressed by this tribunal in our opinion in Jodlowski v. Stanley Works, 5627 CRB-6-11-2 (March 13, 2012). Subsequent to that opinion the claimant continued treating with Dr. Jonathan Kost for pain management treatment related to the 2004 compensable injury. During the course of that treatment the claimant sought to either obtain lumbar spine surgery or a spinal cord stimulator to address his chronic pain issues. On January 29, 2014 an order was issued directing the respondents to hold a deposition of the claimant within 30 days and to schedule a respondent's medical examination within

[1] At the hearing before this tribunal, the claimant informed the commission he had undergone the surgery under discussion herein and had obtained this treatment through his group health insurance.

90 days. Subsequent to those events on April 3, 2014 the respondents filed a Form 43 contesting further treatment based on the opinions of their expert, Dr. Jerrold Kaplan. The claimant filed an objection and sought a formal hearing, which was held on July 23, 2014. The trial commissioner held the record open until 30 days after the transcript was made available to the parties to enable them to respond to the issues presented at the hearing. The record closed on September 2, 2014.

In his decision, dated December 15, 2014, the trial commissioner noted the Finding and Award of January 7, 2011 and further noted that decision found that pain management treatment with Dr. Kost was reasonable and necessary and ordered the respondents to continue to authorize the treatment with Dr. Kost. The commissioner noted that the claimant had treated with Dr. Kost since 2006 and that this treater indicated that despite his treatment, the claimant continues to complain of pain to multiple parts of his body. On December 14, 2012, Dr. Kost discussed with the claimant the possibility of a spinal cord stimulator or a surgical consult to address his continued pain complaints.

Dr. Kost referred the claimant to Dr. Andrew Wakefield, a neurosurgeon, for an examination.[2] On September 19, 2013 the claimant presented at Dr. Wakefield's office for his examination and the report subsequent to this examination concluded that the claimant was not a surgical candidate and did not find objective evidence to explain the level of his complaints. On February 20, 2014, the claimant underwent EMG testing to determine if he was a candidate for a spinal cord stimulator. The results were normal.

[2] Findings, ¶ 6 states that the claimant was examined by Dr. Wakefield on April 25, 2013. The record indicates that this was the date, after having been examined by Dr. Kost, that the claimant was referred to Dr. Wakefield. This is a scriveners' error which has no legal weight in our deliberations. Hernandez v. American Truck Rental, 5083 CRB-7-06-4 (April 19, 2007). We do note, however, that the claimant has described Dr. Wakefield's involvement in this matter as that of an "independent medical examiner." The record demonstrates Dr. Wakefield was not retained by the respondents and did not offer opinions for that purpose.

On March 27, 2014, at the request of the respondents, the claimant was examined and evaluated by Dr. Jerrold Kaplan. His report opined in relevant part that the claimant's pain management was not curative and he did not recommend a spinal cord stimulator. He did however recommend the claimant undergo a comprehensive pain management program at the Rosomoff Center in Florida. On April 18, 2014, Dr. Kost advised that he concurred with Dr. Kaplan's opinion as to a spinal cord stimulator and as to the claimant treating at Rosomoff.

On April 30, 2014, the claimant was evaluated by Dr. Joseph Aferzon. He opined in relevant part that the claimant should undergo a discogram and recommended a fusion at L5-S1 and possibly at L4-5.[3] On June 16, 2014, Dr. Kost recommended that the claimant delay treatment at Rosomoff pending a discogram and fusion. The claimant argued that the commissioner should authorize medical treatment which includes ongoing pain management, a discogram, and a lumbar fusion. The respondents, relying on the opinions of Dr. Kaplan and Dr. Wakefield, argued the claimant has not sustained his burden of proof as to that course of treatment being reasonable and necessary.

Based on the foregoing factual foundation, the trial commissioner concluded the opinions of Dr. Kaplan and Dr. Wakefield were more persuasive than those set forth by Dr. Kost and Dr. Aferzon on the claimant's need for a spinal cord stimulator and lumbar surgery. The commissioner also determined the opinion of Dr. Kaplan, on the claimant undergoing treatment at Rosomoff, was more persuasive then Dr. Kost's opinion on the

[3] The trial commissioner described this examination in Findings, ¶ 12 as a "self referral." The claimant has maintained that he did not seek out Dr. Aferzon and that he had been referred to this physician by Lucyna Kolakowska, M.D., his primary care physician.

proposed treatment. The commissioner finally determined that Dr. Kost's continued pain management treatment was reasonable and necessary.

The claimant then appealed that decision and filed a Motion To Submit Additional Evidence. The claimant believes that the totality of the evidence supports his opinion that lumbar surgery was necessary to address his chronic pain issues. He said that the objective evidence demonstrated that his lumbar spine was like "a rim with no tires." He believes the additional evidence he did not submit at the formal hearing substantiates the opinions of Dr. Aferzon and Dr. Kost. The claimant further believes that due to the inconsistency between the opinions of Dr. Aferzon, Dr. Wakefield and Dr. Kaplan the trial commissioner was obligated under § 31-294f C.G.S. to order a commissioner's examination. He further argues that he does not believe treatment at Rosomoff would be beneficial. The respondents challenge this reasoning as they do not believe the claimant has established good cause to admit additional evidence. They also believe the trial commissioner had the discretion to choose which physician's opinion he deemed more persuasive and his determination to rely on the opinions of Dr. Kaplan and Dr. Wakefield cannot be disturbed on appeal. They do not believe the trial commissioner was obligated to order a commissioner's examination and believe the record supports the Finding & Dismissal.

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). The Compensation Review Board cannot retry the facts of

the case and may only overturn the findings of the trial commissioner if they are without evidentiary support, contrary to the law, or based on unreasonable or impermissible factual inferences. Kish v. Nursing & Home Care, Inc., 248 Conn. 379 (1999) and Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Nonetheless, while we must provide deference to the decision of a trial commissioner, we may reverse such a decision if the commissioner did not properly apply the law or reached a decision unsupported by the evidence on the record. Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

Prior to considering the merits of the appeal we must consider the pending Motion To Submit Additional Evidence. The claimant seeks to admit documentation concerning MRI's performed in September 2004 as well as medical notes supportive of lumbar surgery authored by Dr. Aferzon and Dr. Jeffrey Bash. The respondents have objected to the admission of these records, asserting that pursuant to Diaz v. Jaime Pineda, a/k/a Jamie Pineda d/b/a J. P. Landscaping Company, 117 Conn. App. 619 (2009) the claimant lacks sufficient justification for the admission of this material. We concur in this assessment and sustain the respondents' objection.

In Baker v. HUG Excavating, Inc., 5443 CRB-7-09-3 (March 5, 2010) we considered a similar request and denied the claimant's motion.

> As the Appellate Court pointed out in Mankus v. Mankus, 107 Conn. App. 585 (2008), when a litigant seeks pursuant to Admin. Reg. § 31-301-9 to present previously unconsidered evidence directly to this panel the moving party must establish good cause. Thus, in order to request the board to review additional evidence, the movant must include in the motion 1) the nature of the evidence, (2) the basis of the claim that the evidence is material and (3) the reason why it was not presented to the commissioner. Id., 596.

We have reviewed the transcript of the formal hearing and find no discussion to the effect that the evidence the claimant presented at that time was incomplete, and that he anticipated presenting additional evidence.[4] Therefore, we believe admission of this evidence at this juncture would be "... an effort to try the case in an inappropriate piecemeal fashion. Schreiber v. Town & Country Auto Service, 4239 CRB-3-00-5 (June 15, 2001)." Grant v. Siemens Westinghouse Power Co., 5292 CRB-4-07-11 (October 28, 2008). We therefore deny the Motion to Submit Additional Evidence.

On the merits the claimant's arguments focus on the decision not to order a commissioner's examination and the trial commissioner's evaluation of the evidence presented. We deal first with the issue as to the fact no commissioner's examination was ordered in this matter. The statute[5] does not mandate that when there is conflicting evidence presented to a trial commissioner that a trial commissioner is legally obligated to order a commissioner's examination. We have reviewed the transcript of the formal

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[4] If a party anticipates additional medical evidence will be necessary beyond what is available as of the date of the formal hearing, the appropriate remedy is to seek a continuance to delay the start of the formal hearing, or in the alternative, to file a motion to delay the closing of the record until this evidence can be presented to the trial commissioner. The claimant did not object to the hearing proceeding on July 23, 2014 or object to the record closing 30 days after the delivery of hearing transcripts.

[5] The statute reads as follows,

Sec. 31-294f. Medical examination of injured employee. Medical reports. (a) An injured employee shall submit himself to examination by a reputable practicing physician or surgeon, at any time while claiming or receiving compensation, upon the reasonable request of the employer or at the direction of the commissioner. The examination shall be performed to determine the nature of the injury and the incapacity resulting from the injury. The physician or surgeon shall be selected by the employer from an approved list of physicians and surgeons prepared by the chairman of the Workers' Compensation Commission and shall be paid by the employer. At any examination requested by the employer or directed by the commissioner under this section, the injured employee shall be allowed to have in attendance any reputable practicing physician or surgeon that the employee obtains and pays for himself. The employee shall submit to all other physical examinations as required by this chapter. The refusal of an injured employee to submit himself to a reasonable examination under this section shall suspend his right to compensation during such refusal. (b) All medical reports concerning any injury of an employee sustained in the course of his employment shall be furnished within thirty days after the completion of the reports, at the same time and in the same manner, to the employer and the employee or his attorney.

hearing and note that the trial commissioner stated that after reviewing the evidence, "I may appoint a Commissioner's exam." July 23, 2014 Transcript, p.10. The commissioner did not make any affirmative representation that he would order such an examination and the claimant should not have proceeded under the assumption such an examination would be ordered. The trial commissioner was not under any legal obligation to order a commissioner's examination and if he believed the record was sufficient to rule on this case without such evidence, he was legally able to proceed in that manner.

We then must address the claimant's contention that the trial commissioner reached the wrong decision after weighing the evidence that was in the record. As the claimant views the circumstances he presented a compelling argument in favor of authorizing lumbar surgery and the trial commissioner erred by not relying on this evidence. We do note that the claimant did present probative evidence supportive of this position from Dr. Aferzon and Dr. Kost, which had the trial commissioner credited as more persuasive than the respondents' evidence, would have supported authorizing the surgery. However, the evidence the trial commissioner did credit as persuasive from Dr. Wakefield's office and from Dr. Kaplan was also probative evidence and did opine that surgery was not recommended for the claimant. We must respect the determination of a trial commissioner as to what medical evidence in a contested case he or she finds most persuasive. Hadden v. Capitol Region Education Council, 5843 CRB-1-13-5 (May 20, 2014), *appeal pending*, AC 36913, see also Solonick v. Electric Boat Corporation, 5170 CRB-2-06-12 (January 9, 2008), *aff'd*, 111 Conn. App. 793 (2008). We find our precedent in Hadden governs our resolution of this matter, especially as the appropriate

modality of treatment for an injured worker is a determination reserved to the trial commissioner, Cervero v. Mory's Association, Inc., 5357 CRB-3-08-6 (May 19, 2009), *aff'd*, 122 Conn. App. 82 (2010), *cert. denied*, 298 Conn. 908 (2010).

Essentially this matter was a dispute between physicians as to the optimal manner to treat the claimant. The claimant and the respondents presented different alternatives to the trial commissioner and the trial commissioner found the opinions of the respondents' witnesses more persuasive. We cannot, as an appellate panel, second-guess the decision of the trial commissioner under this scenario.

Therefore, we affirm the Finding & Dismissal.

Commissioners Randy L. Cohen and Stephen M. Morelli concur in this opinion.