

CASE NO. 5977 CRB-5-15-1
CLAIM NO. 500158186

: COMPENSATION REVIEW BOARD

CHRISTINE NELSON
CLAIMANT-APPELLANT
CROSS-APPELLEE

: WORKERS' COMPENSATION
COMMISSION

v.

: SEPTEMBER 21, 2015

REVERA, INC.
EMPLOYER

and

ESIS
INSURER
RESPONDENTS-APPELLEES
CROSS-APPELLANTS

APPEARANCES:

The claimant was represented by Jonathan H. Dodd, Esq.,
The Dodd Law Firm, 1781 Highland Avenue, Suite 105,
Cheshire, CT 06410.

The respondents were represented by Tushar G. Shah, Esq.,
Montstream & May, LLP, 655 Winding Brook Drive,
Glastonbury, CT 06033.

This Petition for Review from the December 22, 2014
Finding and Award of the Commissioner acting for the
Fifth District was heard June 26, 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. Both the claimant and the respondents have appealed from a December 22, 2014 Finding and Award awarding the claimant benefits for an injury she asserts was the sequelae of a compensable injury. The respondents argue the claimant lacked an adequate foundation of expert opinion on causation to support this award. The claimant argues her bid for sanctions should have been granted as she believes the respondents unreasonably contested liability. We find neither argument persuasive. We find the trial commissioner reached a reasonable decision herein, and affirm the Finding and Award.

The trial commissioner found the following facts which are pertinent to our consideration of these appeals. The claimant is a respiratory therapist and has been employed by the respondent Revera since October of 1995. On October 28, 2012, the claimant suffered an injury to her lumbar spine while working for Revera. This incident occurred when a patient rammed into her with her walker, inflicting injuries. A subsequent Respondent's Medical Examination by Dr. Ronald Ripps revealed "pre-existing spondylolysis" at "L5" and an "L4-5 disc herniation left with radicular symptoms." Dr. Ripps further determined that "Ms. Nelson sustained a disc herniation at L4-5" on the left side as a direct result of the October 28, 2012 incident. He based this opinion on the fact that the claimant first developed radicular leg and foot pain subsequent to the October 2012 incident. These symptoms were not present prior to this injury. Respondents' Exhibit 2. The respondents accepted the compensability of this injury and executed a Voluntary Agreement approved on March 18, 2014 which designated Dr. Alan Waitze as the claimant's authorized treating physician.

The commissioner also noted the claimant was concurrently employed by the Hospital of Central Connecticut during the period relevant to this inquiry. He further noted that subsequent to the 2012 incident the claimant was evaluated by a pain management doctor, Dr. Thomas S. Mathew, who found on August 28, 2013 the claimant presented with "left sided low back and hip discomfort that radiates into (the) left lower extremity." Dr. Mathew further noted the claimant has been experiencing "left-sided low back and buttock pain that can radiate into left posterolateral aspect of her leg **down to her foot.**" Dr. Mathew further indicated that the claimant's "pain is made worse with walking" and the claimant experiences "tingling" in "her leg to the **bottom of her foot.**" Finally, Dr. Mathew noted that "at times, [the Claimant] can feel **weak in her legs.**" (Emphasis in Finding and Award.) Findings, ¶ 6. Dr. Mathew further noted the claimant related to tingling in her great toe and difficulty walking during her work days. As a result of the examination and review of records, Dr. Mathew diagnosed "left leg radiculitis" as well as "disc herniations" at L5-S1 and L4-5 and "diminished left Achilles reflex." "Severe bilateral foraminal stenosis at L5-S1" and "lumbar spondylosis" was also recognized. Findings, ¶ 8, Claimant's Exhibit F.

The claimant continued to work despite the effects of this condition. A September 25, 2013 examination by Dr. Mathew noted that the claimant continued "to experience frequent burning, shooting and aching" down her "left leg down to **her foot.**" (Emphasis in Finding and Award.) Findings, ¶ 10, Claimant's Exhibit F. On November 13, 2013 the claimant fell in her home. Prior to that, the claimant related that she had obtained on November 7, 2013 an injection in her lumbar spine due to her "pain" symptoms. The claimant indicated the injection caused her to have "night sweats" as

well as difficulty in walking due to weakness in her "legs" and "burning, throbbing, electrical pain down to (her) toes".

The trial commissioner recited the claimant's narrative as to the events of November 13, 2013 in the Finding and Award;

In the morning, I heard my son get up to go to work. He was at the top of the stairs with me. I went to reach for the railing by him, and my left leg and my foot just gave out when I was reaching for the railing. I just fell, and trying to, you know, catch yourself, but just fall. It felt like forever going down a flight of wooden stairs. I banged the whole side of my body, my right side including my elbow, and everything on my left side.

Findings, ¶ 12, July 3, 2004 Transcript, p. 15.

The claimant said she fell down approximately 14 stairs and passed out shortly after the fall. She did not seek immediate treatment as she had an appointment that morning with Dr. Waitze. She testified that he directed her to go immediately to the hospital after this appointment and she presented at the Hospital of Central Connecticut for treatment. In Dr. Waitze's November 13, 2013 report he notes that the claimant's pain symptoms have "increased" and includes radiating "left leg" symptoms including "weakness in her left leg and foot." Dr. Waitze further diagnosed "weakness of her left foot dorsiflexion." The report also notes as follows a comment regarding the alleged fall earlier that day. "She also recently fell." Claimant's Exhibit I. The claimant said she had discussed the mechanism of the fall with Dr. Waitze, and did not understand why it was not included in the report. The hospital report from her examination that day includes a narrative of the accident, and attributed the cause to a foot drop episode. The hospital exam revealed back and neck symptoms as well as right shoulder complaints and a syncope episode. As a result of the examination and review of symptoms, Dr. Edward

Kim prescribed Ultram, Percocet and Zofran. Dr. Kim further ordered diagnostic studies for her head, neck, back and right shoulder.

Following the day of the fall the claimant treated with Dr. Joycelyn Maw at Alliance Medical Group and with her chiropractor Dr. Mark Mashia. Dr. Maw received a history from the claimant as to the mechanism of her fall, and diagnosed the claimant with a concussion and joint pain in her hip. Dr. Mashia's November 19, 2013 report included a description of the November 13, 2013 incident which was consistent with other medical records as well as the claimant's testimony. Dr. Mashia also mentioned how the claimant has recently "developed a subtle left foot drop." He recommended "another MRI scan to rule out further disc injury." Claimant's Exhibit H. On November 22, 2013 the claimant was examined again by Dr. Mathew. The report describes the November 13, 2013 stair incident when the claimant's left "leg gave out" causing her to fall down the stairs. The report further discusses "weakness on the left foot dorsiflexion" and a meeting with Dr. Waitze where surgery was proposed to deal with the radiating symptoms. Dr. Mathew took the claimant "out of work for two weeks until she sees a concussion specialist." On December 6, 2013 Dr. Mathew cleared the claimant to return to working four hours a day with a lifting restriction. The claimant was able to work limited hours for her concurrent employer with the exception of a few weeks when "the pain was unbearable." Claimant's Exhibit F.

In 2014 the claimant was referred by Dr. Maw to Dr. Jianhui Zhang and Dr. Michael Karnasiewicz. Dr. Zhang, who reviewed her post-concussive syndrome, diagnosed "migraine headaches" and "postconcussion syndrome" due to her symptoms. Claimant's Exhibit C. On March 5, 2014 Dr. Maw noted that the claimant had "no pain"

associated with her cervical spine. Her neurological exam was "normal" and revealed "full range of motion." Regarding her bilateral shoulders, the exam was also "normal." Dr. Maw referred the claimant to a neurologist for her headaches. Claimant's Exhibit A. On March 26, 2014 the claimant was examined by Dr. Karnasiewicz. He noted the development of "radiating pain down the right upper extremity and numbness and tingling in the left hand." The report describes that a recent "MRI scan shows the presence of multiple level foraminal stenosis" which is "most impressive at C6-7 level on the right." Dr. Karnasiewicz "recommended a course of physical therapy" and "traction." Claimant's Exhibit E. On April 30, 2014 Dr. Karnasiewicz issued a letter to claimant's counsel opining as follows;

If one concludes that the history that the patient tripped over her foot, it is probable that the weakness of the foot is a substantial factor in her fall, and the fall down the stairs is a substantial factor in her cervical condition and need for treatment.

Id.

On April 1, 2014, the claimant presented to Dr. Jerrold Kaplan for an examination at the request of the respondents. Dr. Kaplan restates the facts as provided by the claimant regarding the November 13, 2013 incident. He further notes how she "had difficulty even picking up her leg to get into the car and was unable to drive a standard shift" due to left foot weakness and "foot drop" prior to a November 6, 2013 lumbar epidural steroid injection (ESI). Dr. Kaplan noted that prior to the 2012 compensable injury the claimant's complaints related to her right low back but now focused on her left lower back down her leg. As a result of this finding Dr. Kaplan opined "that the 10/28/12 DOI is a substantial causative factor for her current left radicular symptoms and need for treatment." Dr. Kaplan recommended a repeat ESI as well a possible "lumbar facet

diagnostic blocks and/or sacroiliac injections." Dr. Kaplan agreed with the claimant's light duty restrictions and anticipated a "return to full duty" upon completion of a "work conditioning" program and a functional capacity evaluation. Respondents' Exhibit 1.

Since the RME the claimant was examined again by Dr. Mathew and by Dr. Behzad Habibi Khameneh. Dr. Khameneh, a neurologist, diagnosed the claimant with common migraine headaches that started after her fall at her home. He also noted in his report her memory problems after the event had resolved. Claimant's Exhibit B. Dr. Mathew noted the claimant's low back pain and lower extremity pain were improving following a "left L4, L5 and S1" ESI and cleared her to return to full duty at work as of June 16, 2014. Claimant's Exhibit F. The claimant testified she stopped working at the Hospital of Central Connecticut at the end of January 2014 due to a lack of light duty work and had been working with the respondent Revera until May 2014. She further testified to out of pocket expenses she incurred for treatment for her injury.

Based on the record the trial commissioner concluded that the claimant was a credible witness and her testimony was fully persuasive. He found the claimant's narrative consistent with the medical reports entered into evidence. He found the reports and opinions of the medical witnesses credible and persuasive. In particular he concluded Dr. Kaplan was fully credible and persuasive as to his opinion that the claimant developed left leg and foot radicular symptoms following the compensable injury of October 28, 2012. The commissioner also noted Dr. Karnasiewicz opined the weakness in the claimant's foot was a substantial factor in causing her to fall down the stairs, and that Dr. Karnasiewicz further opined that the claimant's cervical spine condition and need for treatment was causally related to the November 13, 2013 fall

down injury. As a result he concluded the claimant sustained her burden of proof that she sustained compensable injuries to her cervical spine, head and right shoulder as a result of a fall down incident at her home on November 13, 2013, and that the fall down the stairs was as a result of weakness in her left foot due to her compensable October 28, 2012 lumbar spine injury. As for the claimant's bid for sanctions, the trial commissioner concluded the failure of Dr. Waitze's contemporaneous report to reference the mechanism of the claimant's fall justified the respondents' decision not to accept the claim. The commissioner ordered the respondents to pay the claimant compensation consistent with the conclusions herein.

Neither party filed a Motion to Correct. Instead both filed Petitions for Review and Reasons for Appeal based on the factual record herein. The claimant argued the trial commissioner erred in denying her bid for sanctions, arguing that the record did not justify the respondents contesting the claim. The respondents appealed based on their belief the medical evidence presented was inadequate to sustain a finding that the claimant's fall down accident was a sequelae of the compensable 2012 injury. The respondents also sought to introduce additional medical evidence which they believe would lead a trier of fact to reach a different conclusion as to the issue of compensability. We will address the issue of additional evidence first. The claimant has objected to the admission of this evidence and we sustain the 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.

We have reviewed the transcript of the formal hearing and find no discussion to the effect that the evidence the respondents presented at that time was incomplete, and that they anticipated presenting additional evidence. In addition, the issues under consideration at the formal hearing and ruled on by the trial commissioner were anticipated by both the claimant and the respondents. 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.

We note that neither appellant has filed a Motion to Correct in this matter. As a result, pursuant to Crochiere v. Board of Education, 227 Conn. 333, 347 (1993) and Corcoran v. Amgraph Packaging, Inc., 4819 CRB-2-04-6, 4948 CRB-2-05-5 (July 26, 2006), we must accept the validity of the facts found by the trial commissioner, and that this board is limited to reviewing how the commissioner applied the law. See Admin. Reg. § 31-301-4. On appeal, we generally extend deference to the decisions made by the trial commissioner. 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). On appeal, this panel must provide

“every reasonable presumption” supportive of the Finding and Award. Torres v. New England Masonry Company, 5289 CRB-5-07-10 (January 6, 2009). 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.)

The respondents argue that the claimant is asserting that her fall at home was the result of a “drop foot condition” and the medical experts did not opine she had this ailment prior to her November 13, 2013 injuries. The respondents further cite Smithwick v. Middlesex Hospital, 5886 CRB-8-13-10 (September 17, 2014), appeal pending, AC 37253, for the proposition that the claimant needed to support her claim for benefits with probative medical evidence, and they do not believe the evidence that the claimant presented established causation.

We are not persuaded by this argument for a number of reasons. We note at the outset that we affirmed the trial commissioner’s award of benefits in Smithwick as we found the commissioner could rely both on the expert testimony presented, as well as the claimant’s own testimony, to determine causation. The respondents do not persuade us that there is any material difference between the facts and the law in Smithwick and the present case, and therefore we do not reach a different result. Moreover, we find the present case indistinguishable both on the facts and the law from a Supreme Court case the respondents did not cite in their appeal brief, Marandino v. Prometheus Pharmacy,

294 Conn. 564 (2010). A review of Marandino compels us to affirm the Finding and Award.

In Marandino the claimant had sustained a previous compensable injury to her arm and then sustained a knee injury falling down the stairs of her house. *Id.*, 568-570. She attributed that knee injury to her arm weakness and inability to properly hold the railing. The claimant's treater issued an opinion letter attributing causation of the claimant's knee injury to her earlier compensable arm injury. *Id.*, 588. The respondents contested causation asserting that this evidence was inadequate to establish causation for the claimant's knee injury. The Supreme Court rejected that argument and concluded a trial commissioner was entitled to give this evidence whatever weight they deemed proper. *Id.* 592-594. The claimant's treater was familiar with her medical condition and could offer competent evidence and if the respondents wanted to challenge those opinions they could depose him, which they chose not to do.¹ *Id.* The Supreme Court further noted this opinion was unequivocal. *Id.*, 594. Therefore, the Supreme Court held it was a trial commissioner's prerogative to "consider medical evidence *along with all other evidence* to determine whether an injury is related to the employment." *Id.*, 595 (Emphasis in original.) Since the claimant's testimony was corroborated by medical evidence the award was affirmed. *Id.*

In the present case the trial commissioner found the claimant's testimony credible that her fall down the stairs on November 13, 2013 was attributed to her foot giving way

¹ The respondents failed to depose any of the medical witnesses in this case. As a result, the trial commissioner was permitted to rely on their reports "as-is" and draw any reasonable conclusions therein. Berube v. Tim's Painting, 5068 CRB-3-06-3 (March 13, 2007).

due to weakness.² The claimant presented medical records documenting that prior to that date she had been suffering from radicular pain down her leg into her foot. Dr. Mathew's medical examinations of the claimant in the weeks prior to her fall document foot pain and difficulty walking which were associated with the claimant's compensable spine injury. See Claimant's Exhibit F, notes for 9/25/13 and 8/28/13 examinations. The medical reports generated immediately after the fall by the Hospital of Central Connecticut reference a "foot drop" and "nerve damage." See Claimant's Exhibit G. The respondents' own examiner, Dr. Ripps, associated the claimant's radicular leg and foot pain on May 29, 2013 to her compensable October 28, 2012 lumbar spine injury. Respondent's Exhibit 2. This opinion was reiterated by the other expert who examined the claimant at the respondents' direction, Dr. Kaplan, see Respondent's Exhibit 1. The claimant presented an opinion letter from Dr. Karnasiewicz (Claimant's Exhibit E) which opined to the standard delineated in Struckman v. Burns, 205 Conn. 542 (1987) that the claimant's subsequent cervical spine condition was substantially due to her fall down injury, and that injury was substantially due to weakness in the claimant's foot. We

² The respondents argue that the claimant's narrative of her accident was not credible and the trial commissioner erred by crediting medical opinions reliant on this narrative. We cannot reverse a finding as to witness credibility on appeal.

"Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom As a practical matter, it is inappropriate to assess credibility without having watched a witness testify, because demeanor, conduct and other factors are not fully reflected in the cold, printed record." Burton v. Mottolese, 267 Conn. 1, 40 (2003). In addition, "[w]hile 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).

simply cannot find any material difference between the evidentiary basis the Supreme Court affirmed was sufficient to establish compensability in Marandino and the facts herein.

We also have reviewed the precedent since Marandino on the evidentiary burden regarding proximate cause a claimant must meet in order to be awarded benefits under Chapter 568. We recently engaged in an extensive review of this standard in Larocque v. Electric Boat Corporation, 5942 CRB-2-14-6 (July 2, 2015). Citing Sapko v. State, 305 Conn. 360 (2012), DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132 (2009) and Voronuk v. Electric Boat Corp., 118 Conn. App. 248 (2009), we concluded “our appellate courts have restated the need for claimants seeking an award under Chapter 568 to present reliable, nonspeculative evidence and to carry their burden of proof that there is a clear nexus of proximate cause between employment and injury.” Larocque, *supra*. We have reviewed the Finding and Award and find that the claimant’s supporting evidence could be found to be reliable and nonspeculative. Moreover, we find that a clear nexus can be drawn between her lumbar spine injury, the radicular pain and weakness it caused to her foot, and a subsequent fall down the stairs. As the Appellate Court noted in Estate of Haburey v. Winchester, 150 Conn. App. 699 (2014), *cert. denied*, 312 Conn. 922 (2014), our “law does not demand metaphysical certainty in its proofs.” *Id.*, 716. The trial commissioner herein could reasonably find compensability for the November 13, 2013 injuries sustained by the claimant.

The respondents challenge the adequacy of the medical opinions supportive of the trial commissioner’s findings. We have reviewed them in light of the standard enunciated in DiNuzzo, *supra*, that they must not be based on “surmise or conjecture.”

Id., 142. The medical evidence presented was based on physical examinations of the claimant within times proximate to the incident for which compensation is being sought. These opinions were consistent with the claimant's testimony which was deemed credible and we note that a trial commissioner must evaluate medical evidence in its totality in determining whether or not to find it reliable. See Marandino, supra, and O'Reilly v. General Dynamics Corp., 52 Conn. App. 813, 816 (1999). Based on that standard, we find no deficiency in the claimant's supportive medical evidence.

Finally, the respondents argue that even were one to credit the claimant's medical evidence it does not establish compensability because she asserted she was injured due to a "foot drop" condition and there is no medical evidence supportive of finding she sustained this specific ailment. They point to testimony wherein she testified as to her left foot being weak and tripping on the stairs as a result of this weakness. They assert this is not a "foot drop" condition and it was improper to award benefits for such an injury. We conclude that this is a distinction without a difference and the claimant's award does not rise or fall based on this level of specificity. We dealt with a similar situation in Marra v. Ann Taylor Stores Corp., 5027 CRB-3-05-11 (December 29, 2006). In Marra the respondents argued that since the treating physician and their examiner differed on whether the claimant had reflex sympathetic dystrophy that the claim for this ailment had not been proven. We disagreed, noting "the evidence demonstrates little was proffered to the trial commissioner that challenged the finding of pain syndrome or disability." Id. Since the medical witnesses agreed in Marra the claimant had some form of pain syndrome we affirmed the award. In the present case there is agreement by the medical witnesses that the claimant's injury involved radicular pain and impairment

down her lower left extremity. We believe this is sufficient to link the claimant's narrative of her fall down injury to medical evidence documenting the impact of the original compensable injury.

We therefore find no grounds to vacate the trial commissioner's Finding and Award to the claimant. We then turn to the claimant's appeal. She argues that pursuant to § 31-300 C.G.S. she should be awarded sanctions for the respondents' allegedly unreasonable contest. She argues that since the medical reports of Dr. Waitze and Dr. Kaplan were generally supportive of compensability that such sanctions should be awarded. We are not persuaded by this argument. It is black letter law that an award of sanctions is a totally discretionary decision for the trial commissioner to reach. Kuhar v. Frank Mercede & Sons, Inc., 5250 CRB-7-07-7 (July 11, 2008). In cases where the legal standard or the medical evidence is complex we have found sanctions not to be warranted. Francis v. Rushford Centers, Inc., 5428 CRB-8-09-2 (February 8, 2010). Given this precedent we cannot conclude that the trial commissioner was compelled as a matter of law to award the claimant sanctions in this matter.

We find that the trial commissioner reached a reasonable conclusion based on the totality of the record presented.

We affirm the Finding and Award.

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