CASE NO. 5979 CRB-03-14-12 : COMPENSATION REVIEW BOARD
CLAIM NO. 300074031

JOSEPH PISATURO : WORKERS' COMPENSATION
CLAIMANT-APPELLANT COMMISSION

v. : SEPTEMBER 23, 2015

LOGISTEC, USA, INC.
EMPLOYER

and

GALLAGHER BASSETT SERVICES, INC.
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by David A. Kelly, Esq., Montstream & May, LLP, 655 Winding Brook Drive, P.O. Box 1087, Glastonbury, CT 06033.

The respondents were represented by Peter D. Quay, Esq., Law Offices of Peter D. Quay, LLC, P.O. Box 70, Taftville, CT 06380.

This Petition for Review from the December 18, 2014 Finding and Order by the Commissioner acting for the Third District was heard on June 26, 2015 before a Compensation Review Board panel consisting of Commission Chairman John A. Mastropietro and Commissioners Randy L. Cohen and Stephen M. Morelli.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has petitioned for review from the December 18, 2014 Finding and Order by the Commissioner acting for the Third District. We find error and accordingly affirm in part and remand in part for additional proceedings consistent with this Opinion.[1]

The trial commissioner made the following findings which are pertinent to our analysis of this matter. The claimant had an accepted workers' compensation claim for injuries to his face and left eye resulting from a fall on October 31, 2005. He treated with Darron Bacal, M.D., an ophthalmologist, who diagnosed the claimant as having sustained "a major facial injury with orbital fractures." Claimant's Exhibit A. In January 2006, the claimant began to experience symptoms of double vision (diplopia) in his left eye. In 2006, he underwent surgery for the left eye orbital fracture, and in February 2007, he underwent surgery for "diplopia secondary to left hypotropia." Claimant's Exhibit C. In June 2008, Bacal reported that the claimant continued to suffer from monocular diplopia in his left eye, and in February 2009, Bacal indicated that the claimant had obtained prescription prism glasses to correct the diplopia. However, in March 2010, Bacal noted the claimant still suffered from diplopia in "downgaze." Id. The claimant died on June 11, 2013 from causes unrelated to his work injury.

On September 1, 2013, Bacal completed a Form 42 on which he indicated that the injured body part was "eyes," both left and right, and reported the "Percentage of

[1] We note that a motion for extension of time was granted during the pendency of this appeal.

Permanent Loss" as "30% of diplopia disability." Id. On the same date, Bacal also wrote the following note: "The late Mr. Pisaturo had diplopia in 30% of his visual field (roughly 1/3 of the visual system or eyes). Thus his disability would be 30% of the maximum disability allowed for a diagnosis of diplopia." Claimant's Exhibit C. In a note dated October 25, 2012, Bacal wrote that the claimant was "left with residual diplopia (double vision). The diplopia occurs when he looks up, or down and is vertical in orientation. This limits his single binocular field of vision to approximately 60 degrees vertically. As a result he is visually disabled approximately 30%." Claimant's Exhibit A.

On February 27, 2013, Stephen Orlin, M.D., an ophthalmologist from Pennsylvania, performed a records review at the respondents' request for the purpose of assigning a disability rating. The claimant objected to the submission of Orlin's opinion into evidence because Orlin is an out-of-state doctor and therefore not on the list of "approved treating physicians" as described in Administrative Regulations § 31-280-1(a) C.G.S.[2] In a deposition taken on May 9, 2013, Orlin described his qualifications as "an ophthalmologist specializing in the area of anterior segment diseases, cornea and cataract surgery. I am a full-time employee of the University of Pennsylvania, and my academic

[2] Admin. Reg. § 31-280-1(a) C.G.S. (Rev. to 2005) states, in pertinent part: "The list of approved practicing physicians, surgeons, podiatrists, optometrists and dentists from which an injured employee shall choose for examination and treatment under the provisions of Chapter 568, including but not limited to specialists, shall include all such practitioners who hold a current and valid license in their field in the State of Connecticut and who meet the following standards…."

rank is associate professor of ophthalmology at the University of Pennsylvania." Respondents' Exhibit 6, p. 4.

In his report of February 27, 2013, Orlin described in some detail the requirements of the AMA Guides to the Evaluation of Permanent Impairment (Sixth Edition) for assessing visual function, and concluded as follows:

> Taking all … factors into consideration, including Mr. Pisaturo's most recent visual acuity, visual field and diplopia measurements, I can state within a reasonable degree of medical certainty, that Dr. Bacal's opinion that Mr. Pisaturo has a 30% disability is completely unfounded and inaccurate. It would be more accurate, based on [my] review [of the] AMA Guidelines to the Evaluation of Permanent Impairment – Sixth Edition, and my professional interpretation of that review, as well as the medical records presented to me, to limit Mr. Pisaturo's individual adjustment of the double vision to 50% of the maximum of 15 points allowed by the guidelines. Because he has normal best corrected visual acuity and full Humphrey visual fields, his functional visual impairment score would therefore be 92.5% (100-7.5) giving him an impairment rating 7.5% [disability] loss.[3]

Respondents' Exhibit 4, p. 3.

Orlin testified that his rating, in accordance with the requirements of the AMA Guides, was for the visual system, not a single eye, and also indicated that "although a

[3] We recognize that Orlin's assignment of an impairment rating based in part on a measurement for visual acuity which relies upon "best corrected" vision is consistent with the methodology set forth in the AMA Guides to the Evaluation of Permanent Impairment (Sixth Edition). See, e.g., §§ 12.1a; 12.2b; 12.2c. However, we would note that the utilization of this methodology appears to conflict with the following principle set forth in Larson's workers' compensation treatise as quoted by this board in Carlson v. Waste Conversion Technologies, 4035 CRB-3-99-4 (May 24, 2000): "[A] question encountered in loss-of-use cases is whether the impairment should be evaluated before or after correction by such devices as glasses, contact lenses, or hearing aids. *The usual holding is that loss of use should be judged on the basis of uncorrected vision or hearing, and that therefore loss of use will not be ruled out because some correction is achieved*…." (Emphasis added.) 4 A. Larson & L. Larson, Workers' Compensation Law (1999) § 86.04[6].

complete examination would ordinarily include a personal examination of the Claimant he nonetheless believed his review of all the Claimant's records from Dr. Bacal allowed him to make an accurate assessment of a permanent partial disability rating." Findings, ¶ 23. Orlin stated that he would have used the same equipment and performed the same tests had he examined the claimant in his own clinic, and, when asked if there was anything else he could have gained from performing a physical examination, replied: "I don't think so. I mean, the records were very comprehensive and they were well documented, so I think I had all the objective measurements that I certainly would have looked for in performing an examination." Respondents' Exhibit 6, p. 58.

Having heard the foregoing, the trial commissioner, noting that both Orlin and Bacal had provided permanent partial disability ratings for the "visual system," concluded that Orlin's opinion assigning a permanent partial disability of 7.5% was "better reasoned and more persuasive," Conclusion, ¶ D, than Bacal's assignment of a 30% permanent partial disability. The trier also found that Orlin was not prohibited from performing a Respondents' Medical Examination given that he was a qualified specialist in the same field as the treating physician, and "[t]here was no evidence or testimony proffered that Dr. Orlin did not possess the Claimant's entire medical record." Conclusion, ¶ F. The trier, recognizing that the scheduled list of body parts enumerated

in § 31-308(b) C.G.S. contemplates ratings for only one eye, awarded the claimant permanent partial disability benefits for the value of a 7.5% disability to his left eye.[4]

The claimant filed a Motion to Correct which was denied in its entirety, and this appeal followed. On appeal, the claimant raises the following issues: (1) whether the trial commissioner's admission of, and reliance upon, the opinion of Stephen Orlin, M.D., constituted error; and (2) whether the trial commissioner erroneously transformed Orlin's 7.5% permanent partial disability rating of the claimant's visual system predicated on the AMA Guides to a 7.5% impairment of the left eye "without any recalibration." Brief, p. 5.

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

[4] Section 31-308(b) C.G.S. (Rev. to January 1, 2005) states, in pertinent part: "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…. One eye: Complete and permanent loss of sight in, or reduction of sight to one-tenth or less of normal vision: 157 [weeks]."

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).

We begin with the claimant's contention that the trial commissioner's reliance upon the opinion of Stephen Orlin, M.D., rather than that of Darron Bacal, M.D., constituted an unreasonable and impermissible factual inference given that Bacal is licensed in the state of Connecticut and acted as the claimant's treating physician whereas Orlin is not licensed in Connecticut and never engaged in treating the claimant. We are not so persuaded. First, we would draw the claimant's attention to the well settled maxim that, "[i]t is the quintessential function of the finder of fact to reject or accept evidence and to believe or disbelieve any expert testimony…. The trier may accept or reject, in whole or in part, the testimony of an expert." (Internal citations omitted.) Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999). As such, while we concede the claimant's point that Orlin's "lack of state licensure is a tangible factor that should be taken into consideration when juxtaposing his credibility as a witness with that of Dr. Bacal," the claimant has provided no basis for the inference that the trier did not do exactly that. Appellant's Brief, p. 7.

Second, while this board recognizes that § 31-275(17) C.G.S. defines "physician" as "any person licensed and authorized to practice a healing art, as defined in section 20-

1, and licensed under the provisions of chapter 370, 372, and 373 to practice in this state," in the matter at bar, the physician in question was not a treating physician but, rather, performed a Respondents' Medical Examination in the form of a review of the claimant's medical records.[5] Moreover, at his deposition, although Orlin conceded that "it's always better to see a patient and examine a patient," Respondents' Exhibit 6, pp. 47-48, Orlin also testified that the measurements required for the disability assessment were performed by the claimant's treating physicians using the same machine as the one in his own office, "[s]o it doesn't matter who did them." Id., 52. In addition, we note, and the trial commissioner so found, that Orlin stated, "the records were very comprehensive and they were well documented, so I think I had all the objective measurements that I certainly would have looked for in performing an examination." Id., 58. Finally, we also note that the trial commissioner did not find fault with Bacal's test results or diagnostic methodology; rather, she concluded that Orlin's opinion as to permanent partial disability based on the same measurements was "better reasoned and more persuasive." Conclusion, ¶ D. Thus, based on the foregoing, we find no basis for reversing the trial commissioner's decision to accept the opinion of Stephen Orlin, M.D., into evidence and rely upon that opinion in formulating her findings.[6]

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[5] We are also cognizant of the fact that it is not uncommon for claimants to move out of state and request that their medical care proceed with physicians who are in the general geographic vicinity. As such, this board is loathe to issue an Opinion which could in any way be construed as limiting a claimant's ability to seek out-of-state medical care under such factual circumstances.

[6] We do concede that at first blush, it appears that the trial commissioner improperly admitted the February 27, 2013 RME report of Stephen Orlin, M.D., into the record at the formal hearing of April 15, 2013, given that Orlin's deposition did not occur until May 9, 2013. However, our review of the transcript from the April 15, 2013 hearing indicates that counsel for the respondents conceded that the ultimate

The claimant also contends that the trial commissioner's Order stating that the claimant was "entitled to permanent partial disability benefits for the value of 7.5 percent disability to his left eye," December 18, 2014 Finding and Order, constituted error because it "was premised on a misunderstanding of Dr. Orlin's rating and constitutes an unreasonable inference drawn from the subordinate facts." Appellant's Brief, p. 10. The claimant points out that the AMA Guides "provide criteria for evaluating the entire visual system, rather than impairment to one eye," id., taking "into account one's visual acuity, visual field, and visual functional deficits…." Id. In fact, the Guides specifically state that they "do not allow visual impairment ratings that do not consider binocular vision since a rating of only one eye does not provide an accurate assessment of the overall functioning of the person." Id., *quoting* the AMA Guides to the Evaluation of Permanent Impairment (Sixth Edition), § 12.4b, p. 305. As such, the claimant asserts that the trier "accredited [Orlin's] opinion and performed a wholesale transfer of the 7.5% rating from the AMA Guides into the schedule provided by Connecticut General Statutes § 31-308(b) without taking into account the inherent incongruity between the two regimes and neglecting to recalculate the rating in light of the same." Appellant's Brief, p. 11. In doing so, the trier erred because "[t]he inequality between the two schedules' metrics

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admissibility of the RME report would necessitate a deposition and informed the trial commissioner that scheduling discussions were underway. April 15, 2013 Transcript, p. 14. Thus, while the trial commissioner should technically have accepted the exhibit for I.D. purposes only at the hearing of April 15, 2013, her failure to do so constituted at most harmless error which was cured when Orlin was subsequently deposed and the transcript submitted into the record at the hearing of August 7, 2013. At that hearing, the trial commissioner explained, "I do believe my practice would be to not admit an RME report by its own lonesome, especially over your objection. But when there has been a deposition and both of you have attended and you have had time to go over it all, I would admit it." August 7, 2013 Transcript, p. 6.

precludes any sort of wholesale transfer of a rating from one system to the other without a recalibration." Id., at 12. We agree.

There is no question that Orlin went to great lengths to explain the methodology by which the AMA Guides assess visual impairment associated with diplopia. For instance, in his RME report of February 27, 2013, Orlin stated that "[u]nder the worst case scenario of the diplopia necessitating permanent and complete occlusion of the one eye, the combined visual acuity score would be 80, with an impairment rating of 20%." Respondents' Exhibit 4, p. 3. Orlin explained that:

> The guidelines also state that for individual adjustments for measurements other than visual acuity and visual fields, such as diplopia, their significance depends upon the environment and vocational demands, but that the impairment rating should be limited to an increase in impairment rating by no more than 15 points.

Id., *quoting* AMA Guides to the Evaluation of Permanent Impairment (Sixth Edition), § 12.4b, p. 305.

Having opined that Bacal's assignment of a 30% disability was "completely unfounded and inaccurate," id., at 3, Orlin concluded that:

> It would be more accurate … to limit Mr. Pisaturo's individual adjustment of the double vision to 50% of the maximum of 15 points allowed by the guidelines. Because he has normal best corrected visual acuity and full Humphrey visual fields, his functional visual impairment score would therefore be 92.5% (100-7.5) giving him an impairment rating 7.5% [disability] loss.

Id.

Orlin essentially reiterated these findings at his deposition. However, Orlin also testified that the AMA Guides indicate that "you can't take each eye independently. You

have to take the patient's overall visual acuity based upon what they see in both eyes." Respondents' Exhibit 6, p. 20. In addition, Orlin stated that his 7.5% rating was for "the visual system," which included both eyes.[7] Id., at 26. Orlin conceded that assessing disability due to diplopia was a somewhat more subjective exercise than assessing disability arising from impairments to visual acuity or the visual field, and agreed that had the claimant demonstrated "really bad diplopia," id., at 29, he would have assigned a rating of 15 percent of the visual system. However, based on his assessment of the claimant's impairment, Orlin had "taken the 15, looked at it from the whole perspective and then come out with half of that." Id. Orlin also clarified that when he was "doing the math outlined on page 305 of the Sixth Edition," he was "adding points, not percentages." Id., at 57.

Having reviewed the foregoing, we find that we are unable to discern a reasonable basis for the trier's inference that the 7.5% disability rating to the visual system based on the AMA Guides assigned to the claimant by Stephen Orlin, M.D., translates directly into a 7.5% disability rating to the left eye pursuant to § 31-308(b) C.G.S. This result is hardly surprising, given that the information which would have enabled the trier to

[7] Under cross examination, Orlin testified as follows:
Q: Just so I'm sure, Doctor, so, when you completed your report, you came to – your opinion was 7.5 percent?
A: Yes.
Q: Of the visual system, correct?
A: Yes.
Q: So that's both eyes?
A: Yes.
Q: The AMA guide really doesn't let you do one eye, does it?
A: No.

accurately perform this calculation, i.e., a clarification of Orlin's opinion, was never submitted into evidence. Moreover, in her Finding and Order, the trier found that "[b]oth Dr. Orlin and Dr. Bacal have provided permanent partial disability ratings of the visual system, and not rating specifically for the left eye," Findings, ¶ 26, and she concluded that "Dr. Orlin and Dr. Bacal both provided permanent partial disability ratings to the 'visual system' with Dr. Orlin testifying the visual system rating is required by the AMA Guides." Conclusion, ¶ B. Thus, her decision to limit the 7.5% permanent partial disability award to the left eye is not supported in either the evidentiary record or in her own findings. We therefore have no option but to remand this matter for additional proceedings, as this board has previously "held that, where the findings of a trial commissioner appear to be inherently inconsistent amongst themselves, or with the trier's conclusions, the correct approach is to remand the matter for clarification." Ortiz v. Highland Sanitation, 4439 CRB-4-01-9 (November 12, 2002).

It should be noted that in choosing to remand this matter on the basis articulated, we are in no way implying that a trial commissioner is "required to adopt any one particular methodology in assigning a permanency rating…." Safford v. Brockway, 262 Conn. 526 (2003). However, when a fact finder is engaged in an assessment of the merits of different methodologies of calculating permanent impairment, it is well-settled that the ultimate selection must be based on competent medical evidence and not "upon the improper substitution of [a trier's] own opinion for that of the medical experts…." Id., at 534. In light of this evidentiary lack in the instant record, we remand the claim so

that additional medical evidence may be adduced which will hopefully guide the parties in determining the appropriate methodology to convert a permanency rating predicated on the AMA Guides to one that properly reflects the provisions of § 31-308(b) C.G.S. "No case under this Act should be finally determined when the … court is of the opinion that, through inadvertence, or otherwise, the facts have not been sufficiently found to render a just judgment." Cormican v. McMahon, 102 Conn. 234, 238 (1925).

As mentioned previously herein, the claimant filed a Motion to Correct which was denied in its entirety. With regard to the trier's denial of the corrections sought which challenged the trier's discretion to admit into the record and rely upon the opinion of Stephen Orlin, M.D., we find no error and note that the claimant appears to be merely reiterating the arguments made at trial which ultimately proved unavailing. D'Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003). The claimant also challenged the trier's adoption of a permanency rating predicated on the AMA Guides without any indication as to how her conclusion relates to the scheduled permanent partial disability provisions of 31-308(b) C.G.S. We find error insofar as the denial of those proposed corrections was inconsistent with our analysis herein. However, we would note that the proposed alternative methodology of calculating the impairment rating set forth by the claimant in his motion also lacks any foundation in the evidentiary record.

There is error; the December 18, 2014 Finding and Order by the Commissioner acting for the Third District is accordingly affirmed in part and remanded in part for additional proceedings consistent with this opinion.

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