CASE NO. 5980 CRB-6-15-1 : COMPENSATION REVIEW BOARD
CLAIM NO. 601070662

LOUIS SANCHEZ
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: OCTOBER 6, 2015

EDSON MANUFACTURING
EMPLOYER

and

PEERLESS INSURANCE CO.
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Frank V. Costello, Esq., McCarthy, Coombes & Costello, LLP, 61 Russ Street, Hartford, CT 06106.

The respondents were represented by Marian Yun, Esq., Law Offices of Meehan, Turret & Rosenbaum, 108 Leigus Road, First Floor, Wallingford, CT 06492.

This Petition for Review from the January 5, 2015 Finding & Award of the Commissioner acting for the Sixth 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. The claimant has appealed from a Finding & Award as a result of an April 15, 2013 shoulder injury he sustained in the course of his employment. The claimant believes that the terms of this award inadequately compensate him for the injuries he sustained, and that the opinions of his treating physician should have been credited on the issues of future medical treatment and his current level of disability. The respondents believe that the commissioner's decision is grounded in probative evidence from their expert witness, which the commissioner chose to credit. We have reviewed the Finding & Award and can identify no legal error. The trial commissioner is permitted to rely on the medical witness he or she finds most persuasive. Therefore, we affirm the Finding & Award.

The following facts are pertinent to our inquiry herein. The claimant was employed by the respondent in Connecticut on April 15, 2013. On that date the claimant testified that while moving a heavy barrel with a hand truck he injured his left shoulder. He continued to work for the respondent until April 26, 2013 when he was laid off. The claimant further testified that he first sought medical treatment for his left shoulder injury on May 22, 2013. He said that he did not immediately inform his superiors of an injury as he was afraid he would lose his job. His first notice of this injury to his employers was via a text sent on July 7, 2013. The respondents presented written statements from the claimant's co-workers stating that the claimant did not mention his injury nor did he have any difficulty performing his job duties while still employed with the respondent.

The trial commissioner noted that the claimant's treating physician, Dr. James O'Holleran, had performed two surgical procedures as a result a 2009 left shoulder

injury. Findings, ¶ 8. The commissioner further noted the claimant had settled two workers' compensation cases for left shoulder injuries in Massachusetts in 2011 and 2013 for $45,000.00 and $106,876.00, respectively. Findings, ¶¶ 9 & 10. A repeat MRI performed showed a "Hills-Sachs lesion and a fracture of the anterior-inferior glenoid consistent with a bony Bankart lesion." Findings, ¶ 11.[1] Dr. O'Holleran has recommended a third shoulder surgery if the claimant opted for it.

The commissioner further noted that the medical evidence in this claim was disputed, and there was inconsistency between the claimant's narrative as to his exercise regimen and the reports of his treating physician. Dr. O'Holleran's medical records indicate that on June 24, 2013 the claimant was "unable to return to work." Findings, ¶ 14. The records further indicate he released the claimant for light duty on August 8, 2013 and subsequently opined the claimant was unable to return to work on September 11, 2013. Dr. O'Holleran continued to opine that the claimant is unable to return to work. The respondents had the claimant examined by their expert, Dr. Steven Selden, on September 25, 2013. Dr. Selden issued a report and was subsequently deposed. He opined that the claimant may have sustained a strain to his left shoulder and recommended a course of physical therapy. He further opined that the claimant was not totally disabled and capable of light duty work. Lastly, Dr. Selden disagreed with the claimant's mechanism of the injury of April 15, 2013. Findings, ¶ 16. Dr. Selden further issued an addendum report in July 2014 which stated "that the incident of 4/15/13 caused nothing more than a temporary, self limited strain of his left shoulder. Furthermore, it is my opinion that any limitations on his ability to work at this time are unrelated to the

[1] Findings, ¶ 11 cited an inaccurate date of injury. We conclude this was a scrivener's error and accord it no weight. Hernandez v. American Truck Rental, 5083 CRB-7-06-4 (April 19, 2007).

incident of 4/15/13. No further treatment is needed as it pertains to the incident of 4/15/13." Findings, ¶ 17.

The trial commissioner ordered a commissioner's examination in this case. Dr. Peter Barnett performed this examination on the claimant's left shoulder on April 14, 2014 and causally related the present injury to the April 15, 2013 work related incident. He did not recommend surgical intervention at this time and recommended the patient undergo a neurologic assessment in an attempt to determine the cause and origin of the patient's nonspecific neurologic complaints and neurologic physical finding. The commissioner's examiner further opined "I would have no opinion whether the patients current subjective neurologic complaints and portrayed symptoms emanating from the cervical spine would have any causal connection to the work related incident on April 15, 2013." He further opined the claimant had not reached maximum medical improvement and was capable of performing light duty work. Findings, ¶ 20; Claimant's Exhibit E. The claimant testified that after reviewing Dr. Barnett's report he began to seek employment with an employment agency.

The claimant believed that he established that he sustained a left shoulder injury in the course of his employment and sought temporary total and temporary partial disability benefits for various periods between June 24, 2013 and July 14, 2014. Findings, ¶ 22.

The respondents contested that the claimant sustained a compensable injury on April 15, 2013 and denied the claimant was entitled to temporary total or temporary partial benefits and believed medical treatment should not be authorized. Based on the record presented the trial commissioner concluded the claimant sustained a left shoulder

injury on April 15, 2013 which arose out of and in the course of his employment with the respondent. The commissioner further concluded the opinions and conclusions of Dr. Selden to be more persuasive in part than those of Drs. O'Holleran and Barnett on the issues of extent of disability and need for further medical treatment. Specifically the commissioner found Dr. Selden's opinion persuasive that the claimant's April 15, 2013 injury was self limiting in nature and any restrictions or limitations on his ability to work were unrelated to that injury. The commissioner further found Dr. Selden's opinion persuasive that no further medical treatment is required as it relates to the compensable injury. The commissioner adopted Dr. O'Holleran's opinion that the claimant was totally disabled for the period of June 24, 2013 through August 8, 2013. The trial commissioner denied the claimant's bid for disability benefits subsequent to that date and denied the claimant's bid to sanction the respondents.

The claimant filed a Motion to Correct seeking changes to the findings more supportive of the claimant's narrative and depicting Dr. Selden's testimony in a less favorable light. The trial commissioner denied this motion in its entirety. The claimant has now commenced the instant appeal. The gravamen of his appeal was that the trial commissioner erred by reliance on Dr. Selden's opinions. The claimant believes Dr. O'Holleran and Dr. Barnett offered the more persuasive and credible testimony and their opinions would support finding that the compensable injury was not self-limiting. This would cause the claimant to be awarded disability benefits for his injury and to be awarded further medical treatment.

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.)

Much of the discussion in this case involves the claimant's current medical condition and whether or not it can be properly attributed to the claimant's April 15, 2013 injury. We note that precedent such as DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132 (2009) has established the need for a claimant to establish a nexus of proximate cause between his or her condition and the compensable injury to support a bid for benefits. ''[T]he test of proximate cause is whether the defendant's conduct is a substantial factor in bringing about the plaintiff's injuries. . . . Further, it is the plaintiff who bears the burden to prove an unbroken sequence of events that tied his injuries to the [defendant's conduct]. . . ." Id., 142.

The claimant argues that his treater and the commissioner's examiner did present such evidence to the trial commissioner which would establish his left shoulder lesions were linked to an injury subsequent to his prior shoulder injuries, and the mechanism of

this injury was consistent with the claimant's narrative as to the events of April 15, 2013. The claimant further argues that Dr. Selden's opinions should be discounted as being based on speculation and conjecture. As the claimant views the evidence presented by Dr. Selden, his initial opinion was reached without a full review of the surgical reports prepared by Dr. O'Holleran. The claimant also finds Dr. Selden's conclusions are inconsistent with much of his deposition testimony as to the mechanism behind glenoid fractures. Therefore, the claimant believes, based on DiNuzzo, supra, that Dr. Selden's opinion is based on an inadequate foundation to constitute reliable evidence and the trial commissioner erred in accepting and relying on this evidence. He furthers argues that Dr. Selden's addendum, presented after the witness reviewed additional medical records, should not have been deemed reliable evidence. He also points to the opinion of the commissioner's examiner, Dr. Barnett, who opined the April 15, 2013 incident was responsible for the claimant's shoulder fracture. Citing Iannotti v. Amphenol/Spectra-Strip, 1829 CRB-3-93-9 (April 25, 1995) he argues that the commissioner failed to adequately explain why he did not rely on the opinion of the commissioner's examiner, and this failure constitutes reversible error.

The respondents believe the trial commissioner ruled correctly in this matter and this was simply a question as to which expert witness as to causation the trier found more credible and persuasive. In their brief they cite Burns v. Southbury, 5608 CRB-5-10-11 (November 2, 2011) for the following proposition.

> We have long held if "this board is able to ascertain a reasonable diagnostic method behind the challenged medical opinion, we must honor the trier's discretion to credit that opinion above a conflicting diagnosis." Strong v. UTC/Pratt & Whitney, 4563 CRB-1-02-8 (August 25, 2003). We cannot intercede when a trial commissioner determines one witness is more persuasive than

> another in a "dueling expert" case. Dellacamera v. Waterbury, 4966 CRB-5-05-6 (June 29, 2006), footnote 1. We note that it is the claimant's burden to prove that a work-related accident is the cause of a recent need for surgery, see Marandino v. Prometheus Pharmacy, 294 Conn. 564 (2010) and Weir v. Transportation North Haven, 5226 CRB-1-07-5 (April 16, 2008). Indeed, in DiNuzzo, supra, the Supreme Court rejected the idea "that the onus of disproving causation is thrust upon the [employer or insurer]. Id., 151.

Id.

Dr. Selden offered a reasonable basis for his opinions on causation. This tribunal cannot reweigh the medical evidence presented to the trier of fact.

We find that we previously addressed many of the issues in this appeal in Madden v. Danbury Hospital, 5745 CRB-7-12-4 (April 22, 2013). In Madden the trial commissioner decided to credit the opinion of the claimant's treating physicians as to the causation of his shoulder injury over the opinion of the commissioner's examiner. We affirmed that decision on appeal. We noted that "[t]here are few principles of jurisprudence more fundamental than the principle that a trier of fact must be the one party responsible for finding the truth amidst conflicting claims and evidence" citing O'Connor v. Med-Center Home Healthcare, Inc., 4954 CRB-5-05-6 (July 17, 2006). We found the claimant's witnesses in Madden offered unequivocal testimony, while the opinion of the commissioner's examiner in that case was more equivocal. We therefore determined that after reviewing the entire record that the trial commissioner in Madden could reasonably discount the opinion of the commissioner's examiner, and her failure to specifically outline her reasons for doing so was harmless error.

In the present case, we believe the text of the Finding & Award complies with the standard we have delineated for a decision which does not rely on the opinion of the commissioner's examiner. Dr. Barnett's opinion (see Findings, ¶¶ 19-20) could lead a

reasonable person to believe the proximate and substantial cause of the claimant's pain could be unrelated to the compensable injury in 2013, as Dr. Barnett suggested a neurologic assessment was necessary to pinpoint the source of these issues, and related the claimant's complaints to his cervical spine. See Claimant's Exhibit E, p. 4. Dr. Barnett also reached a materially different conclusion from the claimant's treater on the efficacy of further shoulder surgery, suggesting it could not be determined at this time. Id., pp. 4-5. "It is long standing precedent that when a trial commissioner does not rely on the opinions of a commissioner's examiner, the trial commissioner should generally explain in the text of their decision why they found another expert witness more persuasive." Madden, supra. We believe this explanation is clearly ascertainable in this opinion.

Having identified the limitations of Dr. Barnett's opinion, we turn to the claimant's argument that the opinions of Dr. Selden were rooted in the same sort of "surmise or conjecture" that caused the award in DiNuzzo, supra, to be overturned on appeal. Id., 142. The claimant does point to the fact that Dr. Selden's initial opinions were rendered prior to conducting a review of Dr. O'Holloran's surgical notes. See Claimant's Exhibit N. We do note that in this opinion Dr. Selden opined, after conducting a physical examination of the claimant, that the claimant's shoulder lesion predated the date of injury in this claim. Id. Moreover, the addendum that Dr. Selden provided on July 14, 2014 reiterated his initial opinion and that after review of additional medical records his opinion was unchanged that the claimant's April 15, 2013 injury was a self-limited shoulder strain. See Respondent's Exhibit 1. After review of the record we are not persuaded that Dr. Selden's opinion is congruent with the flawed opinion in

DiNuzzo, supra, where the witness failed to consult relevant medical records prior to reaching his opinion. Id., 138-140. We find the situation in Lettieri v. Tilcon Connecticut, Inc., 5478 CRB-3-09-6 (June 17, 2010) more applicable to these facts and that decision is supportive of affirming the trial commissioner.

In Lettieri, the claimant appealed from a decision reliant on opinions of Dr. Barnett, who was the respondents' examiner in that case, which included an addendum report issued after Dr. Barnett had the opportunity to review additional medical records. We rejected the claimant's assertion that reliance on an addendum opinion made the commissioner's decision untenable based on the DiNuzzo precedent and pointed out "it is the trial commissioner's responsibility to resolve discrepancies in medical testimony. Williams v. Bantam Supply Co., Inc., 5132 CRB-5-06-9 (August 30, 2007)." We also pointed out it is the trial commissioner's responsibility "to assess the weight and credibility of medical reports and testimony. . . ." O'Reilly v. General Dynamics Corp., 52 Conn. App. 813 (1999)." Lettieri, supra. We found that Dr. Barnett's opinions in Lettieri constituted competent evidence. We believe that the opinions that Dr. Selden provided in this case were also competent evidence that the trial commissioner could reasonably rely upon. To the extent the initial opinions rendered by Dr. Selden had deficiencies, we believe that they were sufficiently clarified by the addendum submitted as Respondent's Exhibit 1 to constitute a reliable expert opinion. This is consistent with Mauriello v. Greater New Haven Transit, 5845 CRB-3-13-5 (March 28, 2014), where we affirmed a decision reached after a medical expert expanded on his original opinion after reviewing additional medical records.

It is black letter law that "[w]hen the board reviews a commissioner's determination of causation, it may not substitute its own findings for those of the commissioner . . . . A commissioner's conclusion regarding causation is conclusive, provided it is supported by competent evidence and is otherwise consistent with the law." Dengler v. Special Attention Health Services, 62 Conn. App. 440, 451 (2001) (Internal citations omitted.) The trial commissioner concluded the April 15, 2013 incident was not the cause of the claimant's current medical condition. This conclusion is consistent with a medical opinion he found persuasive and reliable.

We must affirm this conclusion on appeal, and therefore we affirm the Finding & Award.[2]

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

[2] We uphold the trial commissioner's denial of the claimant's Motion to Correct. This motion sought to interpose the claimant's conclusions as to the law and the facts presented. Liano v. Bridgeport, 4934 CRB-4-05-4 (April 13, 2006) and D'Amico v. Dept. of Correction, *aff'd*, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003).