CASE NO. 5995 CRB-1-15-3 : COMPENSATION REVIEW BOARD
CLAIM NO. 100176750

SUVADA KLADANJCIC
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: MARCH 2, 2016

WOODLAKE AT TOLLAND
EMPLOYER

and

PMA INSURANCE COMPANY
ADMINISTRATOR
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Domenic D. Perito, Esq., Kocian Law Group, 356 Middle Turnpike West, Manchester, CT 06040.

The respondents were represented by Ryan Ellard, Esq., Montstream & May, LLP, Salmon Brook Corporate Park, 655 Winding Brook Drive, Glastonbury, CT 06033-6087.

This Petition for Review from the February 25, 2015 Finding and Dismissal of Stephen M. Morelli the Commissioner acting for the First District was heard November 20, 2015 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Randy L. Cohen and Daniel E. Dilzer.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant, Suvada Kladanjcic, has appealed from a Finding and Dismissal which determined that her present need for medical treatment was not due to a compensable injury. The claimant on appeal argues that the trial commissioner did not properly credit medical evidence supportive of her claim and did not properly apply the law to the facts. Had the commissioner done so, she argues, he would have found this treatment compensable. The respondents argue that the commissioner relied on medical evidence he found credible that the claimant's need for treatment was unrelated to her work related injury. We find that this case hinges on the evaluation of medical evidence and the trial commissioner's decision was supported by evidence on which he chose to rely. Therefore, while we wish to clarify the scope of the commissioner's Order II, we affirm the Finding and Dismissal.

The trial commissioner, Stephen M. Morelli, reached the following factual findings at the conclusion of the formal hearing. The claimant, Suvada Kladanjcic, was employed by the respondent-employer, Woodlake at Tolland, which was a nursing home. Her tasks included picking up heavy bags of wet blankets and sheets in a laundry room and on March 16, 2010 the claimant sustained a back injury while lifting a bag of laundry. On April 16, 2010, the claimant began treating with Dr. Gerald Becker, the authorized treating physician. Dr. Becker's reports indicate that the claimant, as a result of the March 16, 2010 work injury, aggravated a pre-existing degenerative disc disease.

The claimant was seen by Dr. Steven Selden, the respondent's medical examiner, on December 13, 2010. In his report of that date, Dr. Selden opines that the claimant reached maximum medical improvement and states that the claimant has a permanent

partial disability rating of seven (7%) percent, of which two (2%) percent is preexisting, and further indicates any additional treatment would be palliative at best. A voluntary agreement for this injury was approved on January 17, 2012 wherein the respondent and claimant reached a compromised rating of an 8.5% permanent partial disability rating of the back, with a date of maximum medical improvement being reached on March 15, 2011.

The trial commissioner noted that Dr. Becker performed two (2) epidural injections on the claimant with "some degree of benefit" as referenced in his August 2, 2010 report. However, Dr. Becker's reports also indicate that the claimant's pain remains 9 out of 10 on a scale of 0 to 10 and recommended another epidural injection, as well as core strengthening via physical therapy.

The claimant had two (2) subsequent epidural injections on October 21, 2010 and February 15, 2011. In a November 15, 2011 letter to Commissioner Stephen Delaney, Dr. Becker indicates that the claimant has reached maximum medical improvement and ascribed a 10% permanent partial disability rating of the back. The claimant has continued to treat with Dr. Becker and/or Jon Szydlo, the physician's assistant, approximately every 2-4 months and is prescribed medication for her ongoing complaints of pain. Her treatment pattern was constant for over two and one-half (2.5) years, until September 10, 2013, when Dr. Becker recommended an evaluation with Dr. Pietro Memmo "regarding epidural injections with the hope of avoiding a need for surgery."

The claimant was seen again by Dr. Selden for a respondent's medical examination on December 18, 2013. Dr. Selden reiterated his medical opinion that the claimant had reached maximum medical improvement as of the date of his first exam of

December 13, 2010, and further opined that any further treatment would not be causally related to the March 16, 2010 injury, but rather, the natural progression of degenerative disc disease. After the claimant was examined by the respondent's expert the claimant was seen by Dr. Glenn Taylor on August 19, 2014 for a commissioner's exam. Dr. Taylor noted that annular tears and disc protrusions revealed on the claimant's MRI scan done two weeks after the March 16, 2010 work injury clearly pre-existed the work injury. Dr. Taylor also opined that the claimant's complaints of pain are out of proportion to her clinical findings. He further opined that the March 16, 2010 work injury is not a substantial factor in her need for continued treatment, and that any continued treatment is based on the natural progression of the claimant's degenerative disc disease.

Based on these factual findings the trial commissioner concluded the claimant on March 16, 2010 suffered a work related injury which aggravated her pre-existing degenerative disc disease. The commissioner found the opinions of Dr. Becker, Dr. Selden and Dr. Taylor that the claimant reached maximum medical improvement as to her March 16, 2010 work related injury were credible and persuasive, and noted the approved voluntary agreement placed the date of maximum medical improvement as being March 15, 2011. From the date of the claimant's last epidural injection in February of 2011 until well over two years later in September of 2013, the claimant's treatment consisted of regular office visits, with refills of prescription medication. The trial commissioner found the opinions of Dr. Selden and Dr. Taylor, who opined the March 16, 2010 work injury was not a substantial factor in the claimant's need for continued treatment, more credible and persuasive than the opinion of Dr. Becker. After weighing the credibility of the testimony, exhibits and medical opinions in evidence, the trial

commissioner concluded the claimant's need for additional medical treatment as recommended beginning on or about September 10, 2013 was the result of the natural progression of her preexisting degenerative disc disease and was unrelated to her work injury of March 16, 2010. In Order I the commissioner found future medical treatment for the claimant was due to degenerative disc disease. In Order II the trial commissioner "**DENIED** and **DISMISSED"** authorization for future medical treatment for the claimant.

The claimant did not file a Motion to Correct seeking to modify the factual findings. Instead she commenced this appeal. Her position is that the commissioner's examiner, Dr. Taylor, ascribed her need for surgery to her degenerative disc disease and he had said the compensable injury exacerbated this condition. She argues that the precedent in Cashman v. McTernan School, Inc., 130 Conn. 401 (1943) makes medical treatment under these circumstances compensable. We have reviewed this evidence and the Cashman precedent and are not persuaded.[1]

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

[1] The claimant also cites Savage v. St. Aeden's Church, 122 Conn. 343 (1937) as supporting her bid to reverse the Finding and Dismissal. As we discussed in Kielbowicz v. Tilcon Connecticut, Inc., 5855 CRB-6-13-6 (June 12, 2014) Savage involved the determination of causation for an unwitnessed fatal injury. We concluded "[g]iven the factual distinctions with Savage and the weight of recent Supreme Court and Appellate Court precedent regarding the necessity for claimants to prove a nexus between employment and injury; we find the precedent in Savage is inapplicable to this case." Kielbowicz, supra. We reach a similar determination in this case.

"every reasonable presumption" supportive of a trial commissioner's 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.)

This case can be factually distinguished from Cashman, supra, as it involves a determination as to whether the claimant's medical treatment is due to a compensable injury, and not, as was the case in Cashman, whether the claimant's preexisting condition limited a permanent partial disability award. Id., 403-404. In recent years we have opined on disputes over whether a claimant's need for medical treatment was due to a compensable injury or circumstances which were noncompensable. We have reviewed cases such as Sanchez v. Edson Manufacturing, 5980 CRB-6-15-1 (October 6, 2015); Hadden v. Capitol Region Education Council, 5843 CRB-1-13-5 (May 20, 2014); Torres, supra; and Weir v. Transportation North Haven, 5226 CRB-1-07-5 (April 16, 2008). In each of these cases the trial commissioner evaluated whether the claimant established that the compensable injury was a substantial factor in the need for medical treatment and this tribunal reviewed whether the evidence supported the commissioner's determination.

In conducting our analysis this tribunal followed the concept of "proximate cause" to determine if the claimant made a persuasive argument that their need for medical treatment was linked to the compensable injury, and not a noncompensable ailment. We find Voronuk v. Electric Boat Corp., 118 Conn. App. 248 (2009)

instructive. In Voronuk the claimant argued that once she presented evidence that her decedent husband had *some* workplace exposure to a carcinogen that she had met her evidentiary burden for a § 31-306 C.G.S. claim before the Commission. The Appellate Court rejected the claimant's argument that pursuant to the standard in Birnie v. Electric Boat Corp., 288 Conn. 392 (2008) this was sufficient for her to meet her evidentiary burden before the Commission. Voronuk, supra, 255. Similar reasoning governed the Supreme Court's opinion in DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132 (2009). In DiNuzzo, the trial commissioner in a claim for § 31-306 C.G.S. benefits accepted the opinion as to the decedent's cause of death from a family physician who had not performed an autopsy. While this tribunal affirmed that decision, DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 4911 CRB-3-05-1 (January 13, 2006), the Appellate Court reversed this decision, 99 Conn. App. 336 (2007). The Supreme Court affirmed the Appellate Court and dismissed the claim, 294 Conn. 132 (2009). They cited the claimant's obligation to establish proximate cause in order to be awarded 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]. . . . The existence of the proximate cause of an injury is determined by looking from the injury to the negligent act complained of for the necessary causal connection. . . . This causal connection must be based [on] more than conjecture and surmise. . . .

Id., 142.

Finally, in 2012 the Supreme Court clarified the standard of "proximate cause" in Sapko v. State, 305 Conn. 360 (2012). In Sapko a claimant whose claim for § 31-306 C.G.S. benefits was dismissed appealed the dismissal, arguing that the trial commissioner

should not have considered nonemployment factors behind the decedent's death and that she presented sufficient evidence under the standard delineated in Birnie to secure compensation. Id., 388-389. The Supreme Court, however, rejected the position that in Birnie it had lessened the burden on claimants to establish a nexus of proximate cause between employment and injury in order to prevail on a claim for benefits under Chapter 568.

> [I]n reaching our conclusion in *Birnie*, we undertook an in-depth examination of the contributing and substantial factor standards to facilitate a comparison of the two tests. It was in this context that we observed that the substantial factor test requires that the employment contribute to the injury ''in more than a de minimis way.'' Id., 413. The ''more than . . . de minimis'' language is preceded, however, by statements explaining that ''the substantial factor standard is met if the employment *materially or essentially contributes* to bring about an injury''; (emphasis in original) id., 412; which, by contrast, ''does *not* connote that the employment must be the *major* contributing factor in bringing about the injury . . . nor that the employment must be the *sole* contributing factor in development of an injury.'' (Citation omitted; emphasis in original.) Id. Thus, it is evident that we did not intend to lower the threshold beyond that which previously had existed.

Sapko, supra, 391.

Viewing the precedent in Voronuk, DiNuzzo, and Sapko together as a whole, it is clear that since Birnie 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. The trial commissioner determined that the claimant failed to present such a case in regards to her current need for medical treatment. We must review the evidence on the record to determine if the trial commissioner was correct in his assessment.

The claimant focuses on the opinion of the commissioner's examiner, Dr. Taylor and argues the trial commissioner failed to properly credit this opinion on the issue of compensability. She points to a single sentence in Claimant's Exhibit E, Dr. Taylor's report of his examination dated August 19, 2014. In that report, referring to the March 2010 injury and the claimant's preexisting degenerative disc disease, he said "I believe that the injury represented an exacerbation of this condition." The claimant believes that since the trial commissioner found Dr. Taylor a credible and persuasive witness that this constitutes a conclusive determination that any medical treatment is compensable and the balance of this witness's opinion is "legally irrelevant." Claimant's Brief, p. 9. We do not agree.

We note that the trial commissioner in Conclusion, ¶ F, found Dr. Taylor more credible and persuasive than the claimant's treater, Dr. Becker, on the following issues, "that the March 16, 2010 work injury is not a substantial factor in the Claimant's need for continued treatment, and that any continued medical treatment is based on the progression of the Claimant's degenerative disc disease." Id. The trial commissioner reached no conclusion as to whether he accepted Dr. Taylor's opinion as to the exacerbation of the claimant's pre-existing condition. The claimant did not file a Motion to Correct and pursuant to Gonzalez v. Premier Limousine of Hartford, 5635 CRB-4-11-3 (April 17, 2012) we may give the commissioner's factual findings conclusive effect. In addition, it is black letter law a trial commissioner must evaluate medical evidence in its totality in determining whether or not to find it reliable. See Marandino v. Prometheus Pharmacy, 294 Conn. 564, 595 (2010) and O'Reilly v. General Dynamics Corp., 52 Conn. App. 813, 816 (1999). We also note the trial commissioner may accept or reject

all of an expert's opinion, or merely portions of it. See Gagliardi v. Eagle Group, Inc., 4496 CRB-2-02-2 (February 27, 2003), *aff'd*, 82 Conn. App. 905 (2004)(Per Curiam) and Lopez v. Lowe's Home Improvement Center, 4922 CRB-6-05-3 (March 29, 2006).[2] We find no error from the trial commissioner finding the opinions of Dr. Taylor adverse to the claimant to be reliable. Upon review, they are supportive of the trial commissioner's conclusion.

Dr. Taylor opines in Exhibit E in regards to the claimant's herniated disc that "I do not believe that this herniation was caused by the lifting injury of 2010." He further explained "[t]he annular tears and disc protrusions noted on an MRI scan two weeks after her March 2010 injury, clearly pre-existed." He further opined "[h]er need for continued treatment is based on progression of her degenerative disc disease." As to the issue of the proposed treatment of the claimant, he opined "I do not think that the injury should be viewed as a substantial factor in her need for continued treatment that might include a diskectomy on the right at L5-S1 to decompress the nerve root in an attempt to relieve her right-sided sciatica symptoms." Reading Claimant's Exhibit E in its totality, we find the trial commissioner reached a reasonable inference that the claimant's current need for treatment was unrelated to her compensable injury.

In reviewing precedent such as Sanchez, supra, Hadden, supra, Torres, supra, and Weir, supra, we note that it is the duty of the trial commissioner to determine whether the claimant has established that their compensable injury is a significant factor behind their

[2] If the claimant believed that Dr. Taylor offered opinions which were inconsistent on the issue of causation, she had the opportunity to clarify these opinions by deposing the commissioner's examiner. The claimant did not depose Dr. Taylor, and therefore pursuant to Berube v. Tim's Painting, 5068 CRB-3-06-3 (March 13, 2007) the trial commissioner could rely on this evidence "as is" and draw whatever inferences he could reasonably draw from Claimant's Exhibit E.

need for medical treatment. The claimant in Hadden, supra, satisfied the trial commissioner that the injury she sustained at work exacerbated a pre-existing condition and was the substantial factor in her current need for treatment. The claimants in the other aforementioned cases could not satisfy this burden and the trial commissioner ruled against them. As we pointed out in Sanchez, supra, our opinion in Burns v. Southbury, 5608 CRB-5-10-11 (November 2, 2011) stands 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.

We therefore find no error in Order I of the trial commissioner's Finding and Dismissal, as based on the record presented the trial commissioner could find the claimant failed to prove her *current* need for medical treatment was due to her compensable injury. The claimant however raises a valid argument that Order II of this Finding is legally unenforceable against future trial commissioners and we concur with her reasoning. It is black letter law based on our precedent in Attardo v. Temporaries of New England, Inc., 5858 CRB-2-13-7 (June 19, 2014) and Serluca v. Stone & Webster Engineering, 5118 CRB-8-06-8 (July 13, 2007) that a trial commissioner today cannot

rule prospectively on the issue of a claimant's *future* need for medical treatment. As we held in Serluca, supra,

> [t]his determination of the claimant's *current* medical treatment is not probative of what determination the Commission may reach regarding the claimant's *future* medical treatment. At such time as the claimant seeks to establish that future treatment constitutes reasonable and necessary treatment for the compensable injury he will be able to pursue this request *de novo*.

Accordingly, we hold that Order II of the Finding and Dismissal does not bind future commissioners who may rule on this claim. However, we find as related to the balance of the Finding and Dismissal this order constitutes harmless error. In all other respects, we affirm the Finding and Dismissal, as we find the trial commissioner could dismiss the claim herein based on the evidence he found most probative and persuasive.

Commissioners Randy L. Cohen and Daniel E. Dilzer concur in this opinion.