CASE NO. 6005 CRB-6-15-4 : COMPENSATION REVIEW BOARD
CLAIM NO. 601044959

NILDA RIVERA : WORKERS' COMPENSATION
CLAIMANT-APPELLANT COMMISSION

v. : APRIL 12, 2016

PATIENT CARE OF CT
EMPLOYER

and

ZURICH AMERICAN INSURANCE COMPANY
INSURER
RESPONDENTS-APPELLEES

APPEARANCES: The claimant was represented by Jennifer B. Levine, Esq., and Harvey L. Levine, Esq., Law Offices of Levine & Levine, 754 West Main Street, New Britain, CT 06053.

The respondents were represented by Michael A. Burton, Esq., Sharp & Shields, 500 Enterprise Drive, Suite 4, Rocky Hill, CT 06067.

This Petition for Review from the March 31, 2015 Finding and Dismissal of Daniel E. Dilzer, Commissioner acting for the Sixth District, was heard on October 30, 2015 before a Compensation Review Board panel consisting of Chairman John A. Mastropietro and Commissioners Randy L. Cohen and Ernie R. Walker.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has petitioned for review from the March 31, 2015 Finding and Dismissal of Daniel E. Dilzer, Commissioner acting for the Sixth District. We find no error and accordingly affirm the decision of the trial commissioner.

The trial commissioner identified the following issues for analysis: (1) whether the claimant had reached maximum medical improvement to her right lower extremity with a permanent partial disability rating of six (6) percent; and (2) whether the claimant's left lower extremity and right shoulder complaints were causally related to the work-related injury of May 30, 2006. The trier made the following factual findings which are pertinent to our review. The claimant, a high-school graduate, is a certified nursing assistant (CNA) and daycare instructor. Over the course of her working life, she has held a variety of positions including housekeeper, clerical worker, certified nursing assistant, and hotel worker. It is undisputed that on May 30, 2006, the claimant sustained an injury to her right ankle while in the employ of the respondent employer. The claimant provided private duty care, which involves direct patient care such as bathing, feeding, dressing, and bathroom assistance, to the respondent employer's clients for approximately one year prior to her work-related injury; the injury occurred when she fell while walking down the stairs of a patient's home.

As a result of the fall, the claimant fractured the third metatarsal of the right foot which required a surgical repair by Gary P. Jolly, DPM, in 2007. Following that surgery,

the claimant complained of persistent sharp pain, tingling and swelling in her right foot, and Jolly referred the claimant to Jonathan Kost, MD, for pain management. According to the claimant, Kost is the only medical provider currently treating her right foot. On June 6, 2009, Kost concluded that the claimant had reached maximum medical improvement and sustained a permanent partial disability rating of eight percent (8%) to her right lower extremity or eleven percent (11%) to her right foot. Kost first commented upon the claimant's reaching maximum medical improvement on December 23, 2008 in a letter to a Zurich case manager wherein he agreed with an RME finding that the claimant had reached maximum medical improvement but opined that the claimant would need to continue her pain management regimen to assist with her partial functionality. On March 30, 2010, in a letter to claimant's counsel, Kost stated that the claimant had a light-duty work capacity but would need to be allowed to change positions and elevate her right foot as necessary. Kost also diagnosed the claimant with right greater trochanteric bursitis which he believed was causally related to the pain associated with her right foot condition.

The Form 36 received by this Commission on August 29, 2012 indicates that the claimant reached maximum medical improvement with a permanent partial disability rating of six percent (6%) to the claimant's right lower extremity which equated to a nine percent (9%) permanent partial disability to the claimant's right foot. The respondents relied upon the medical opinion of Enzo Sella, MD, as articulated in his commissioner's examination report of July 2, 2012. At an informal hearing held on October 2, 2012, the

trial commissioner approved the Form 36 effective August 29, 2012, the date it was received.

The claimant offered the opinion of Edgardo Lorenzo, MD, as articulated in his correspondence of December 26, 2014 wherein the doctor indicated that his last disability statement of July 21, 2009 remained unchanged relative to the claimant's psychiatric impairment. Lorenzo opined that the claimant is disabled, unemployable, and not expected to improve in the foreseeable future. Lorenzo also stated that the claimant's persistent and unrelenting foot pain continues to be the proximate cause of her depression. Lorenzo's July 2009 opinion was predicated on the claimant's self-reporting that she is unable to shop or perform household chores without the help of her boyfriend. The doctor indicated that the claimant told him that except for medical appointments, she stays home all day and keeps her foot elevated. At the formal hearing, the claimant testified that she did manage to go shopping and drive a car only with great difficulty. The claimant also testified that she elevated her foot nine to ten times per day and when she did elevate her foot, it was for one to two hours.

Relative to the claim for compensability of the left foot complaints, the claimant offered the opinion of Christina Kabbash, MD. The claimant consulted with the doctor on April 7, 2011 complaining of a burning sensation in her left heel and reporting that she had woken up one morning with pain and swelling in her Achilles heel. Kabbash diagnosed the claimant with an overuse injury of the left Achilles tendon with acute and chronic Haglund deformity and tendinopathy. On July 2, 2012, Sella examined both of

the claimant's ankles at the request of the trial commissioner for the Sixth District and was asked to comment as to whether the claimant's left foot condition was causally related to her right foot injury. Sella concluded that "the patient's left foot and hindfoot symptoms are totally unrelated to the problem that she has in her right foot." Respondents' Exhibit 1.

Regarding the claimant's complaints relative to her right shoulder, the claimant testified that because her right foot has a tendency to "give away [sic]," she has fallen a couple of times and landed on her shoulder. January 13, 2015 Transcript, p. 15. The claimant first informed her primary care provider that she had fallen down one step and landed on her right shoulder in February of 2012. However, the contemporaneous primary care records do not disclose that she reported that her ankle gave way and caused her to fall. Rather, the records introduced by the claimant indicate that the claimant told her provider that she had fallen "months ago due to injury at work from hips [sic] pain." Claimant's Exhibit D. On May 28, 2013, the claimant saw Robert Carangelo, MD, complaining of right shoulder pain since March of 2012. The doctor diagnosed the claimant with a possible rotator cuff tear and referred the claimant to Augustus Mazzocca, M.D., for evaluation and treatment. Carangelo's reports do not disclose what caused the claimant to fall. Rather than following up with Mazzocca, the claimant consulted with Kevin Shea, M.D., who confirmed Carangelo's diagnosis of a rotator cuff tear and surgically repaired the injury. Shea's records do not disclose what caused the claimant to fall.

Based on the foregoing, the trial commissioner concluded that it is undisputed that the claimant sustained an injury to her right lower extremity while in the course and scope of her employment with the respondent. He found Sella's opinion persuasive that the claimant had reached maximum medical improvement of her right lower extremity with a permanent partial disability rating of six percent (6%) to the right lower extremity which equates to a nine percent (9%) rating to the claimant's right foot. He also found Sella's opinion persuasive that the claimant's left foot condition was in no way caused or connected to her work-related injury and dismissed that portion of the claim. In addition, the trier determined that he did not find the claimant credible regarding the circumstances surrounding her right shoulder complaints given that the contemporaneous records did not disclose a history of the right foot giving way and causing her to fall. Rather, the primary care records indicate that the claimant attributed her fall to hip pain. As such, the trial commissioner dismissed the right shoulder claim.

The claimant filed a somewhat voluminous Motion to Correct which was denied in its entirety and this appeal followed. On appeal, the claimant contends the following: (1) the trial commissioner's decision to limit the scope of the trial de novo on the Form 36 approved on October 2, 2012 to the issue of maximum medical improvement and exclude the issue of work capacity constituted error; (2) the trial commissioner erred in relying on an orthopedic physician's opinion in establishing that the claimant's pain

management treatment had reached maximum medical improvement; (3) the trial commissioner erroneously refused to grant the claimant's Motion to Correct. [1]

The standard of deference we are obliged to apply to a trial commissioner's findings and legal conclusions is well-settled.

> … the role of this board on appeal is not to substitute its own findings for those of the trier of fact. Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 451 (2001). The trial commissioner's role as factfinder encompasses the authority to determine the credibility of the evidence, including the testimony of witnesses and the documents introduced into the record as exhibits. Burse v. American International Airways, Inc., 262 Conn. 31, 37 (2002); Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999). If there is evidence in the record to support the factual findings of the trial commissioner, the findings will be upheld on appeal. Duddy v. Filene's (May Department Stores Co.), 4484 CRB-7-02-1 (October 23, 2002); Phaiah v. Danielson Curtain (C.C. Industries), 4409 CRB-2-01-6 (June 7, 2002). This board may disturb only those findings that are found without evidence, and may also intervene where material facts that are admitted and undisputed have been omitted from the findings. Burse, supra; Duddy, supra. We will also overturn a trier's legal conclusions when they result from an incorrect application of the law to the subordinate facts, or where they are the product of an inference illegally or unreasonably drawn from the facts. Burse, supra; Pallotto v. Blakeslee Prestress, Inc., 3651 CRB-3-97-7 (July 17, 1998).

McMahon v. Emsar, Inc., 5049 CRB-4-06-1 (January 16, 2007).

We begin our analysis with the claimant's contentions relative to the scope of the trial de novo on the Form 36. The claimant argues that the trier "erred by ignoring the incapacity issue and refusing to require that the Respondents sustain their burden of proof showing that the Claimant's pain management treatment which she has been receiving

[1] The claimant has not appealed the trial commissioner's findings with respect to the compensability of the left foot and right shoulder.

since 2007 has not only plateaued, but that she also has a work capacity." Appellant's Brief, pp. 17-18.

The claimant also cites Butler v. Frito Lay, 5620 CRB-2-11-1 (May 3, 2012) and Howard v. CVS Pharmacy Inc., 5063 CRB-2-06-3 (April 4, 2007) for the proposition that:

> after a Form 36 is granted and a Claimant requests a *de novo* Formal Hearing on that issue, included in the Form 36 issue is whether the Claimant is totally incapacitated or unemployable under *Osterlund* despite evidence of maximum medical improvement, and it is initially the Respondents [sic] burden to prove both before a commissioner may properly affirm the approval of the Form 36.

Appellant's Brief, p. 21.

We are not persuaded by the claimant's arguments.

Section 31-296 C.G.S. (Rev. to 2005) states, in pertinent part:

> Before discontinuing or reducing payment on account of total or partial incapacity under any such agreement, the employer, if it is claimed by or on behalf of the injured person that his incapacity still continues, shall notify the commissioner and the employee, by certified mail, of the proposed discontinuance or reduction of such payments, with the date of such proposed discontinuance or reduction and the reason therefor [sic], and, such discontinuance or reduction shall not become effective unless specifically approved in writing by the commissioner. The employee may request a hearing on any such proposed discontinuance or reduction within ten days of receipt of such notice….

Section 31-296 C.G.S. (Rev. to 2005)

In Pagan v. Carey Wiping Materials Corp., 144 Conn. App. 413 (2013), the Appellate Court explained that the decision reached at the informal hearing "is not an

appealable decision, as [an informal hearing] does not create a record that can be reviewed…. Instead, the initial ruling on a Form 36 may be challenged at a subsequent formal [evidentiary] hearing, at which the previous ruling has no precedential weight. The issue is tried de novo." (Citation omitted; emphasis omitted.) Id., 421, *quoting* Brinson v. Finlay Bros. Printing Co., 77 Conn. App. 319, 327 (2003). Moreover,

> [w]hile evidence is not taken at an informal hearing … the employer/insurer has the burden of proof and must submit documents … in support of the discontinuance or reduction. Thereafter, the burden shifts to the injured worker who should be prepared to present competent medical evidence (usually by medical reports) that support the contest of the Form 36. The [commissioner] will weigh the evidence and either approve or disallow the discontinuance or reduction.

Id., 420-421, *quoting* A. Sevarino, Connecticut Workers' Compensation After Reforms (Centennial Ed. 2012), § 5.16.10, p. 715.

There is no question that "a trial commissioner is entitled to consider a broad range of issues at a subsequent formal hearing on a Form 36, including whether a claimant continues to be totally disabled." Papa v. Jeffrey Norton Publishers, Inc., 4486 CRB-3-02-1 (February 25, 2003). It is also well-settled that "[a] person may reach maximum medical improvement, have a *permanent* partial impairment, and be *temporarily* totally disabled from working all at the same time." (Emphasis in the original.) McCurdy v. State, 227 Conn. 261, 267-268 (1993), *citing* Osterlund v. State, 129 Conn. 591, 600 (1943). Moreover, a claimant deemed totally disabled due to one injury or condition is entitled to receive ongoing total disability benefits even if the

claimant has reached maximum medical improvement for a different injury or condition. Rayhall v. Akim Co., 263 Conn. 328, 357 (2003).

However, in the matter at bar, the respondents were not seeking to terminate the claimant's temporary total disability benefits.[2] Rather, the Form 36 states that the respondents were "[r]equesting transfer of benefit status from TPD to PPD based on Commissioner's exam by Dr. Enzo Sella dated July 2, 2012 that places claimant at MMI with 6% impairment rating to the right lower extremity." In fact, the claimant was receiving benefits pursuant to § 31-308(a) C.G.S., which by definition contemplates a partial work capacity.[3] This matter can thus be factually distinguished from both the

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[2] Section 31-307(a) C.G.S. (Rev. to 2005) states: "If any injury for which compensation is provided under the provisions of this chapter results in total incapacity to work, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of his average weekly earnings as of the date of the injury, 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 section 31-310; but the compensation shall not be more than the maximum weekly benefit rate set forth in section 31-309 for the year in which the injury occurred. No employee entitled to compensation under this section shall receive less than twenty per cent of the maximum weekly compensation rate, as provided in section 31-309, provided the minimum payment shall not exceed seventy-five per cent of the employee's average weekly wage, as determined under section 31-310, and the compensation shall not continue longer than the period of total incapacity."

[3] Section 31-308(a) C.G.S. (Rev. to 2005) states: "If any injury for which compensation is provided under the provisions of this chapter results in partial incapacity, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of the difference between the wages currently earned by an employee in a position comparable to the position held by the injured employee before his injury, after such wages have been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act in accordance with section 31-310, and the amount he is able to earn after the injury, after such amount has been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act in accordance with section 31-310, except that when (1) the physician attending an injured employee certifies that the employee is unable to perform his usual work but is able to perform other work, (2) the employee is ready and willing to perform other work in the same locality and (3) no other work is available, the employee shall be paid his full weekly compensation subject to the provisions of this section. Compensation paid under this subsection shall not be 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, and shall continue during the period of partial incapacity, but no longer than five hundred twenty weeks. If the employer procures employment for an injured employee that is suitable to his capacity, the wages offered

Butler, supra, and Howard, supra, cases offered by the instant claimant wherein the subject Forms 36 sought to terminate temporary total disability benefits. In the matter at bar, the claim for temporary total incapacity benefits constituted a "new" issue outside the scope of the subject Form 36 and it was therefore incumbent upon the claimant to apprise the respondents, either by an amendment to the hearing notice or other means, that they would be required to defend against a claim for temporary total disability benefits. Our review of the record suggests that this process was not followed, and, when queried by the trial commissioner as to why the claimant had not sought to amend the hearing notice at some point during the two months since it was issued, claimant's counsel had no explanation.[4]

This tribunal does not condone trial by ambush. It is of course undisputed that we have "allowed trial commissioners to rule on issues beyond the scope of the original hearing notices when the commissioner placed the parties on notice at the commencement of the formal hearing…." Henry v. Ansonia, 5674 CRB-4-11-8 (August 8, 2012). We have also previously remarked that "[g]enerally, a workers'

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in such employment shall be taken as the earning capacity of the injured employee during the period of the employment."

[4] The transcript reads as follows:

Commissioner: Well, we're going to deal with what's on the notice. I mean, if you want to have a subsequent hearing with different issues, ask for the hearing. You can have a hearing whenever you want. That's fine. But in all fairness, the notice today is for compensability and the Form 36. So why don't you mark the exhibits you want to…. Ms. Levine, if there were items missing from the notice, you should have called and have [sic] them added.

Ms. Levine: There was –

Commissioner: This went out over a month ago.

Ms. Levine: There was a rescheduling of the formal hearing –

Commissioner: But the notices went two months ago, on 10/10.

Ms. Levine: I'm sorry. Did you take administrative notice of the VAs that are in [the] file.

December 2, 2014 Transcript, pp. 15-16.

compensation commissioner is afforded some latitude in determining which of the issues presented at a formal hearing actually call for adjudication." Raphael v. Connecticut Ballet, Inc., 5985 CRB-7-15-2 (December 10, 2015). Nevertheless, it is "fundamental in proper judicial administration that no matter shall be decided unless the parties have fair notice that it will be presented in sufficient time to prepare themselves upon the issue." Osterlund v. State, 129 Conn. 591, 596 (1943). In the matter at bar, the trial commissioner made it quite clear at the outset which issues were to be considered at the Form 36 trial de novo.[5] Given the circumstances, we find the trial commissioner was well within his discretion to bifurcate the issue of temporary total disability benefits and work capacity.[6] "Bifurcation of trial proceedings lies solely within the discretion of the trial court…; and appellate review is limited to a determination of whether this discretion has been abused." (Internal citations omitted.) Swenson v. Sawoska, 18 Conn. App. 597, 601 (1989) *aff'd,* 215 Conn. 148 (1990). *See also* Martinez-McCord v. State/Judicial Branch, 5055 CRB 7-06-2 (February 1, 2007).

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[5] The transcript reads as follows:

Commissioner: I'm saying, exactly what I'm saying is what I mean. The question I'm going to be presented for the Form 36 was whether or not the day it was granted the claimant was at maximum medical improvement for her right lower extremity. If so, what rating, if any, was assigned to it. That's the issue of the Form 36. Subsequently, if she was disabled, I leave you to your proof. But that's not what's on for today for the Form 36.

December 2, 2014 Transcript, p. 10.

[6] In his Finding and Dismissal, the trial commissioner noted that in light of claimant counsel's representations at trial that she had made multiple requests for a formal hearing which were ignored, a formal hearing on the issues of temporary total disability benefits and medical treatment was scheduled for January 21, 2015. By correspondence dated the same day as the formal hearing, the claimant advised that she did not wish to proceed because the respondents had authorized continued medical treatment for the right foot injury and the other noticed issues were either "unripe" and/or "duplicative of the present proceedings." Finding and Dismissal, fn. 2.

The claimant also contends that the trial commissioner erroneously relied on Sella's commissioner examination's report of July 2, 2012 to "to establish that the claimant's pain management treatment reached maximum medical improvement."[7] Appellant's Brief, p. 23. The claimant avers that the respondents "inappropriately used Dr. Sella, an orthopedic surgeon, for rebutting Dr. Kost's medical opinions on pain management." Id. This claim of error mischaracterizes both the content of Sella's report and the trier's findings. Nowhere in Sella's report does the doctor address the efficacy of the claimant's pain management regimen with Kost. Moreover, we find nothing improper in the trier's reliance upon the opinion of an orthopedic specialist, solicited in the form of a commissioner's examination, to determine whether a claimant has attained maximum medical improvement and the appropriate permanent partial disability rating. We certainly find no reasonable basis for the claimant's contention that the trial commissioner drew any improper inferences from Sella's report.

We do note that at trial, claimant's counsel informed the trial commissioner that the respondents had stopped authorizing the claimant's medical treatment, presumably on the basis of Sella's opinion that the claimant had reached maximum medical

[7] The claimant also argues that the trier's decision to order a commissioner's examination for both of the claimant's feet at the informal hearing of April 20, 2012 was "improper and unfair" given that only the compensability of the left foot was in dispute. Appellant's Brief, p. 23. We find this complaint without merit; § 31-294f(a) C.G.S. clearly states that "[a]n injured employee shall submit himself to examination by a reputable practicing physician or surgeon, at any time while claiming or receiving compensation, upon the reasonable request of the employer *or at the direction of the commissioner*." (Emphasis added.) Section 31-294f(a) C.G.S. (Rev. to 2005.) Furthermore, at trial, respondents' counsel pointed out that the commissioner's examination was actually ordered following a RME held on March 27, 2012, and the commissioner's examination was therefore not pulled "out of the sky." December 2, 2014 Transcript, p. 67.

improvement.[8] The trier responded that because the issue of medical treatment had not been added to the notice for the formal hearing, it was "a due process issue" and he would set it down as an additional issue for adjudication at the formal hearing to be scheduled on the issues of work capacity and eligibility for temporary total disability benefits.[9] December 2, 2014 Transcript, p. 69. (*See* footnote 6, supra.) Again, as discussed previously herein, it is incumbent upon an individual asserting an entitlement to workers' compensation benefits to ensure that the opposing party is apprised of that claim prior to the commencement of a hearing on the merits. This process was not followed, and it was therefore well within the trial commissioner's discretion to schedule an additional hearing to afford the respondents an opportunity to prepare their defense.

Finally, the claimant argues that the trial commissioner's denial of her Motion to Correct constituted error. Our review of the proposed corrections seems to suggest that the claimant was merely reiterating the arguments made at trial which ultimately proved unavailing. As such, we find no error in the trier's decision to deny the Motion to Correct. D'Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003).

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[8] Section 31-294d(a)(1) C.G.S. (Rev. to 2005) states: "The employer, as soon as the employer has knowledge of an injury, shall provide a competent physician or surgeon to attend the injured employee and, in addition, shall furnish any medical and surgical aid or hospital and nursing service, including medical rehabilitation services and prescription drugs, as the physician or surgeon deems reasonable or necessary. The employer, any insurer acting on behalf of the employer, or any other entity acting on behalf of the employer or insurer shall be responsible for paying the cost of such prescription drugs directly to the provider."

[9] The transcript reads as follows:

Commissioner: So the issue of compensability and the issue of the Form 36 are pretty narrow. That's what's been noticed here and that's all I have. I think it's a due process issue. These are what's been out on the notices. It was sent out 10/10/2014. You have every right to be heard and claimant has every right to be heard on those other issues and I'm going to get it done as expeditiously as I possibly can. December 2, 2014 Transcript, p. 69.

There is no error; the March 31, 2015 Finding and Dismissal of Daniel E. Dilzer, Commissioner acting for the Sixth District is accordingly affirmed.

Commissioners Randy L. Cohen and Ernie R. Walker concur in this opinion.