CASE NO. 6023 CRB-7-15-8 : COMPENSATION REVIEW BOARD
CLAIM NO. 700140930

DAVID COLLINS : WORKERS' COMPENSATION
CLAIMANT-APPELLEE COMMISSION

v. : AUGUST 19, 2016

TOWN OF WILTON
SELF-INSURED
EMPLOYER
RESPONDENT-APPELLANT

APPEARANCES:

The claimant was represented by David J. Morrissey, Esq., Morrissey, Morrissey & Mooney, LLC, 203 Church Street, P.O. Box 31, Naugatuck, CT 06770.

The respondent was represented by Scott Wilson Williams, Williams Moran, LLC, P.O. Box 550, Fairfield, CT 06824.

This Petition for Review from the July 23, 2015 Findings and Orders of Randy L. Cohen, Commissioner acting for the Seventh District, was heard on April 29, 2016 before a Compensation Review Board panel consisting of Chairman John A. Mastropietro and Commissioners Ernie R. Walker and Nancy E. Salerno.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondent has petitioned for review from the July 23, 2015 Findings and Orders of Randy L. Cohen, Commissioner acting for the Seventh District. We find no error and accordingly affirm the decision of the trial commissioner.[1]

The trial commissioner made the following factual findings which are pertinent to our review. The claimant was hired by the Town of Wilton Police Department on or about September 28, 1992. Upon entry into the police department, he successfully passed a physical examination which failed to show evidence of hypertension or heart disease. From the mid-1990's until 2000, the claimant's primary care physician was Murray Brodoff, M.D. After Dr. Brodoff's retirement, Jack Hauser, M.D., took over the practice and became the claimant's treating physician. On July 9, 2001, Dr. Hauser saw the claimant for a routine physical examination at which the claimant's blood pressure was 130/90. The doctor considered this to be a borderline hypertensive reading, and recommended lifestyle modifications including diet, sodium restrictions and exercise.

At the claimant's next office visit with Dr. Hauser on September 6, 2001, the claimant had blood pressure readings of 130/92 and 150/100. The doctor continued to recommend lifestyle modifications including smoking cessation, reduction of alcohol intake and increased exercise. The claimant was next seen on October 5, 2001 and had blood pressure readings of 130/90 and 120/90. Dr. Hauser testified that at that time, he still considered the claimant to be borderline hypertensive and recommended that he

[1] We note that two Motions for Extension of Time and a Motion for Postponement were granted during the pendency of this appeal.

continue the lifestyle modifications. The claimant underwent an annual physical examination on September 23, 2002, at which time his blood pressure was 152/92. Dr. Hauser sent him for an echocardiogram on October 4, 2002 to look for evidence of ventricular hypertrophy – i.e., thickening of the heart. That test was normal.

Dr. Hauser testified that at the claimant's September 23, 2002 visit, the doctor was getting closer to considering pharmaceutical therapy because of the claimant's consistent readings over the course of a year. He recommended the echocardiogram to assess whether the heart was manifesting hypertensive changes. The echocardiogram was normal and showed no evidence of left ventricular hypertrophy; an EKG was also normal and revealed no evidence of hypertension. At a February 7, 2003 office visit, the claimant's blood pressure was 146/96; he also underwent a stress test, which was negative. During the stress test, the claimant's blood pressure was 194/80, which is considered a normal reading during a stress test. The doctor continued to recommend lifestyle modifications. At the claimant's next visit on April 15, 2003, Dr. Hauser told the claimant that he had borderline diabetes as well as borderline hypertension.

At Dr. Hauser's deposition, in response to a query as to whether, in light of the claimant's history of elevated blood pressure readings, it was his opinion that the claimant had hypertension, the doctor replied that the claimant "shows a tendency toward hypertension, yes. And if I were to have prescribed pharmacal therapy at that time … I would have been more apt to treat his sugar than his blood pressure at this juncture." Respondent's Exhibit 1, p. 27. When asked if he believed the claimant was hypertensive in 2003, the doctor answered, "I would say to you that in 2003, the answer would be no.

I would tell you that in 2006, the answer would be yes." Id., 31. The doctor testified that throughout his treatment of the claimant, he had shared the claimant's blood pressure readings with him as well as the implications of those readings in the need for lifestyle modifications. The doctor also stated that the first foundation in the management of hypertension is lifestyle modification.

The claimant testified at the formal hearing, stating that Dr. Hauser never used the term "hypertension" during his office visits but, rather, told him his blood pressures were elevated and suggested certain lifestyle modifications. Throughout 2001, the claimant's then-girlfriend, a nurse, took his blood pressure readings and told him his blood pressure "was elevated from time to time," information which he relayed to Dr. Hauser. December 17, 2014 Transcript, p. 7. In May 2003, the claimant decided to switch his primary care to Thelma Batiancila, M.D. because Dr. Batiancila was a diabetic doctor and her office was closer. At the time of his initial evaluation with Dr. Batiancila on May 22, 2003, the claimant completed and signed a medical history form on which he checked off the box for high blood pressure in the medical history section. At the formal hearing, the claimant testified that Dr. Batiancila spoke with him about diabetes and blood sugar levels but he did not recall the doctor using the word "hypertension" because "that would have stuck out in my mind." Id., 17. The claimant also stated that the doctor probably mentioned that the blood pressure readings were high and to watch himself. Id.

The claimant testified that at some point, Dr. Batiancila told him he was suffering from the disease of hypertension and put him on medication. At that time, the claimant filed a claim with the Town of Wilton under the Heart and Hypertension Act. He

indicated that he has been aware of the Act since he became a police officer, but he did not file a claim for hypertension earlier because he had never been diagnosed with it. He stated that he had no idea he had hypertension until Dr. Batiancila diagnosed him. In her report of May 22, 2003, Dr. Batiancila indicated that the claimant's blood pressure had been elevated for three to five years and reported his blood pressure readings as 150/90 on the right and 130/80 on the left. In the "Assessment" section of the report, the doctor listed DM2 (diabetes mellitus, type 2), HTN (hypertension), and positive for smoking.

Dr. Batiancila also testified at deposition. She stated that she generally takes the time to discuss her findings and/or impressions from a patient evaluation before the patient leaves the office. She indicated that she had the opportunity to speak with the claimant regarding her findings after the May 22, 2003 evaluation and would have conveyed her assessment, which included hypertension, to the claimant at that time. In response to a query as to whether she communicated a diagnosis of hypertension to the claimant at the May 22, 2003 office visit, the doctor replied that "[h]e had a hypertension reading when he saw me at that time," Respondent's Exhibit 2, p. 26, and she considered that reading to be "[m]ildly elevated." Id., 23. When the doctor saw the claimant on August 26, 2003, she recorded blood pressure readings of 140/90 on the left and 130/86 on the right, and recommended weight loss and increased exercise. In the "Plan" section of the August 26, 2003 note, she endorsed waiting three months making a decision to treat with medication but at her deposition, she testified that she could not remember whether the medications she referred to were for diabetes or hypertension. At that time, the claimant was not taking medication for either condition.

At the office visit of December 30, 2003, the claimant's blood pressure was reported as 130/90 bilaterally; on May 7, 2004, the blood pressure readings were 120/90 on the right and 130/90 on the left; on June 11, 2004 and July 19, 2004, the readings were reported as 140/78 and 130/82 respectively. At the June 11, 2004 office visit, the doctor noted that the claimant had started and stopped Glucophage for his blood sugar. At the July 19, 2004 office visit, the doctor noted that the claimant had DM (Diabetes Mellitus) with increased triglycerides and listed his medications as Metaphor and Lorazepam. At the October 11, 2005 office visit, she reported that the claimant was diabetic and had increased triglycerides. She also stated that the claimant "[h]as had BP taken at work and seems to be up. 140-150/90 plus," id., 33, and reported the claimant's blood pressure at that visit was 140/90.

At the office visit of October 11, 2005, the doctor diagnosed the claimant with hypertension and started him on the blood pressure medication Cozaar. At her deposition, the doctor testified that she made the diagnosis on this date because the claimant had told her he was getting blood pressure readings of 140-150 over 90 and she came to the conclusion that the claimant not only had sporadic blood pressure readings but also had the disease of hypertension. The doctor explained that a "[s]olitary high blood pressure reading is one reading and may be normal the next time you see the patient. Hypertension is a consistent elevation of blood pressure over a period of time." Respondent's Exhibit 3, p. 14. The doctor also testified that although the claimant had a hypertensive reading at the office visit on May 22, 2003, she did not diagnose the claimant with hypertension on that date.

On December 17, 2012, the claimant underwent an examination with Steven Horowitz, M.D., a cardiologist at Cardiac Care Associates. Dr. Horowitz assigned the claimant a six-percent (6%) permanent partial disability rating to the claimant as a result of his hypertensive condition. See Claimant's Exhibit A [Exhibit 5, p. 2]. On November 5, 2014, the claimant underwent a Respondent's Medical Examination with Kevin Tally, M.D., who diagnosed the claimant with "essential hypertension, currently well controlled on a single agent." Claimant's Exhibit A [Exhibit 4, p. 2]. Dr. Tally opined that the claimant's hypertension could not be attributed to his employment and that "[t]he single most likely factor to have contributed to development of his essential hypertension would be his prior history of cigarette smoking." Id., 2-3.

Based on the evidence presented at the formal hearing, the trial commissioner, noting that she found the claimant credible and persuasive, concluded that the testimony of Dr. Hauser was also credible and persuasive, including his opinion that in 2003, the claimant was not hypertensive. The trier also found Dr. Batiancila's testimony "credible and persuasive with regard to the fact that she did not diagnose the Claimant with hypertension until October 11, 2005." Conclusion, ¶ C. The trier concluded that although the claimant was aware he had blood pressure issues and had been advised to make lifestyle modifications prior to October 11, 2005, he was not diagnosed with the disease of hypertension until that date. As such, the trier determined that his claim for hypertension pursuant to § 7-433c C.G.S. was timely and therefore compensable.[2] The

[2] Section 7-433c(a) C.G.S. (Rev. to 2005) states: "Notwithstanding any provision of chapter 568 or any other general statute, charter, special act or ordinance to the contrary, in the event a uniformed member of a paid municipal fire department or a regular member of a paid municipal police department who successfully passed a physical examination on entry into such service, which examination failed to reveal

trier also found credible and persuasive Dr. Horowitz' opinion regarding the claimant's permanent partial disability rating and therefore found the claimant entitled to permanent partial disability benefits for six percent of the heart effective December 12, 2012. Finally, the trial commissioner rejected the respondent's argument that the rebuttable presumption of § 7-433c C.G.S. should be applied in light of the claimant's date of hire, stating that "[i]t has long been held that the date of injury controls the statute to be applied in a Heart and Hypertension claim. C.G.S. Section 7-433c, as it existed on October 11, 2005, did not provide for a rebuttable presumption."[3] Conclusion, ¶ G.

The respondent filed a Motion to Correct which was denied in its entirety and this appeal followed. On appeal, the respondent argues that the trial commissioner erred as a

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any evidence of hypertension or heart disease, suffers either off duty or on duty any condition or impairment of health caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability, he or his dependents, as the case may be, shall receive from his municipal employer compensation and medical care in the same amount and the same manner as that provided under chapter 568 if such death or disability was caused by a personal injury which arose out of and in the course of his employment and was suffered in the line of duty and within the scope of his employment, and from the municipal or state retirement system under which he is covered, he or his dependents, as the case may be, shall receive the same retirement or survivor benefits which would be paid under said system if such death or disability was caused by a personal injury which arose out of and in the course of his employment, and was suffered in the line of duty and within the scope of his employment. If successful passage of such a physical examination was, at the time of his employment, required as a condition for such employment, no proof or record of such examination shall be required as evidence in the maintenance of a claim under this section or under such municipal or state retirement systems. The benefits provided by this section shall be in lieu of any other benefits which such policeman or fireman or his dependents may be entitled to receive from his municipal employer under the provisions of chapter 568 or the municipal or state retirement system under which he is covered, except as provided by this section, as a result of any condition or impairment of health caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability. As used in this section, the term 'municipal employer' shall have the same meaning and shall be defined as said term is defined in section 7-467."

[3] Prior to July 1, 1992, the Heart and Hypertension Act provided for a conclusive presumption of liability. Public Act 92-81 replaced the conclusive presumption with a rebuttable presumption, stating that "[n]otwithstanding the provisions of subsection (a) of this section, any uniformed member of a paid municipal fire department or any regular member of a paid municipal police department who begins such employment on or after July 1, 1992, (1) shall not be eligible for benefits pursuant to this section until such member has completed two years of service from the date of employment and (2) shall not be eligible for benefits pursuant to this section after such member has completed two years of service *if the municipal employer proves by a preponderance of evidence that the member's condition or impairment of health caused by hypertension or heart disease is not job-related*." (Emphasis added.) § 7-433c(b) C.G.S. (Rev. to July 1, 1992).

matter of law in applying the version of § 7-433c C.G.S. in effect at the time of the claimant's date of injury rather than the version which was in effect at the time the claimant was hired. The respondent also contends that the trial commissioner's conclusions are legally inconsistent with the subordinate facts, because the medical evidence demonstrates that the claimant was diagnosed with hypertension more than one year before he filed his notice of claim. Finally, the respondent argues that the trial commissioner erroneously failed to grant its Motion to Correct. We do not find any of the respondent's claims of error meritorious.

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 with the respondent's assertion that the trial commissioner should have applied the version of § 7-433c C.G.S. in effect when the claimant was hired (September 28, 1992) rather than the version in effect on the date of the claimant's injury (October 11, 2005). As discussed previously herein, P.A. 92-81 added language to § 7-433c C.G.S. creating a rebuttable presumption, which afforded a respondent municipality the possibility of defeating a claim for heart and hypertension benefits if it could "[prove] by a preponderance of evidence that the member's condition or impairment of health caused by hypertension or heart disease is not job-related." Appellant's Brief, p. 4. The respondent points out that the legislative history of Public Act 92-81 indicates that "the purpose of the creation of the rebuttable presumption was to reduce the overwhelming costs of payment of Heart and Hypertension benefits that were severely impacting the budgets of the state's municipalities." Appellant's Brief, p. 5. However, in 1996, P.A. 96-231 abolished the rebuttable presumption and also provided that individuals who commenced employment on or after July 1, 1996 were ineligible for heart and hypertension benefits. Given, then, that a claimant's date of hire determines whether a claimant is even eligible for heart and hypertension benefits, it "logically" follows that a claimant's date of hire should determine the applicable version of § 7-433c C.G.S. Id., 7. As such, "[a]pplication of the 1992 version of C.G.S. §7-433c in the case at bar is entirely consistent with the legislative purpose." Id. We are not so persuaded.

It is of course well-settled that "[a]lthough an award of benefits under § 7-433c is not a workers' compensation award, the Workers' Compensation Act is used as a 'procedural avenue' for the administration of benefits under § 7-433c." (Internal

quotation marks omitted.) Genesky v. East Lyme, 275 Conn. 246, fn. 9 (2005), *quoting* Carriero v. Naugatuck, 243 Conn. 747, 755 (1998). Heart and hypertension benefits are therefore "payable and administered under the Workers' Compensation Act … and 'the type and amount of benefits available pursuant to § 7-433c are the same as those under the Workers' Compensation Act….'" O'Connor v. Waterbury, 286 Conn. 732, 752 (2008), *quoting* Bergeson v. New London, 269 Conn. 763, 778 (2004).

In Iacomacci v. Trumbull, 209 Conn. 219 (1988), our Supreme Court held that "new workers' compensation legislation affecting rights and obligations as between the parties, and not specifying otherwise, applied only to those persons who received injuries after the legislation became effective, and not to those injured previously."[4] Id., 222. Given, then, that "[t]he date of injury rule functions as a presumption of legislative intent with the workers' compensation context, similar to the general presumption against retroactive application of a statute," Gil v. Courthouse One, 239 Conn. 676, 686 (1997), our Supreme Court has also held that "[t]he legislature is presumed to know of our interpretation of the workers' compensation statutes and to know that it must make its intention clear if it intends to override the date of injury rule." Gil, supra.

In the matter at bar, the respondent contends that "[i]t is not unprecedented to reject the date of injury rule in order to effectuate significant legislative purposes."

[4] In Iacomacci v. Trumbull, 209 Conn. 219, 222 (1988), supra, the court was called upon to decide whether the legislature's elimination of the "waiting period" for dependency benefits pursuant to § 31-306 C.G.S. "was intended to benefit dependents of those persons injured before, as well as after, the effective date of repeal." Id., 220. The court, noting that "[t]here is nothing in the language or history of Public Act 1978, No. 78-369, that overcomes the presumption that the General Assembly was fully aware of the date of injury rule…," held that "the legislature intended that the applicability of the 1978 revisions was to be controlled by the traditional date of injury rule, thereby requiring that claims arising out of injuries occurring prior to October 1, 1978, would be subject to the previously specified reduction in benefits." Id., 224.

Appellant's Brief, p. 8. For instance, in Gil, supra, the court was called upon to decide whether the legislature intended that P.A. 91-339, § 27 (an amendment to § 31-307a(a) C.G.S. dealing with COLA calculation methodology) was to be applied to claimants injured prior to October 1, 1991. Noting that the express language of the bill stated that "[t]he weekly compensation rate of each employee entitled to receive compensation under section 31-307 … *as a result of an injury sustained on or after October 1, 1969* … shall be adjusted…" (emphasis in the original), the Gil court concluded that "[a]ny presumption against having P.A. 91-339, § 27, apply to those injured before 1991 must therefore give way to the expressed intent of the legislature to apply the amended COLA provision to claimants injured before the effective date of the act." Id., 687.

The respondent also points out that in addition to the court's holding in Gil, supra, our Supreme Court rejected the application of the date of injury rule in Hall v. Gilbert & Bennett Mfg. Co., 241 Conn. 282 (1997), wherein the court was called upon to decide whether P.A. 95-277, § 4(a), which "[required] a panel of three physicians to decide all controverted issues concerning the existence of a previous disability, applies retroactively to cases in which the claimant's second injury predated the effective date of the act, July 1, 1995." Id., 301-302. Noting that § 3(d) of the same act "effectively terminated the transfer of cases in which the second injury occurred on or after July 1, 1995" id., 303, the court held that "the legislature clearly and unequivocally intended § 4(a) to apply retroactively to those transfer claims in which the claimant's second injury occurred prior to July 1, 1995. If we were to conclude that the legislature intended § 4(a) of P.A. 95-277

to apply only prospectively from the effective date of the act, we would render [§ 3(d)] a legal nullity…."[5] Id.

The respondent further argues that in Rice v. Vermilyn Brown, Inc., 232 Conn. 780 (1995), our Supreme Court again failed to apply the date of injury rule when it "rejected the utilization of the notice provisions of the Act as they existed on the date of injury." Appellant's Brief, p. 8. In Rice, the claimant was seeking to bring an occupational disease claim in 1989 arising from exposure to asbestos which occurred in 1942, and the respondents contested the claim on the basis that the "claim was barred by § 1330e, which required [the claimant] to have filed the claim within five years from the termination of his employment with Vermilyn Brown."[6] Rice, supra, 784. Our review of Rice indicates that the court ultimately held that the notice of claim provisions of § 31-294 in effect when the claimant brought his claim were essentially "superseded" by the provisions of § 1330e which were in effect when the claimant was found to have sustained his injury. As such, the court explained:

> We need not, and do not, reject the date of injury rule as it has been applied since 1916 to determine the rights and obligations of the parties under the act. We conclude, however, that the date of injury rule has no applicability under the facts of this case, in which the claimant's right to seek compensation already expired

[5] In a similar vein, in Coley v. Camden Associates, Inc., 243 Conn. 311 (1997), our Supreme Court held that P.A. 95-277 §9(f), which amended § 31-301(f) C.G.S., was also applicable retroactively because it was "procedural in nature, [and] we must presume that it is applied retroactively unless the legislature clearly expressed an intention that it should be given prospective effect only." Id., 318.

[6] General Statutes (Cum. Sup. 1939) § 1330e [codified at § 5245 C.G.S. (Rev. to July 20, 1939)] provided, in pertinent part, that "no claim on account of an occupational disease shall be made by an employee or his dependents against the employer in whose employ the disease is claimed to have originated, except while the employee is still in such employ, or within five years after his leaving such employ." It should be noted that "Section 1330e was amended in 1959, at which time the prohibition against compensation claims filed more than five years after the termination of employment was eliminated. Public Acts 1959, No. 580, § 8, codified at General Statutes (1959 Sup.) § 31-168." Rice v. Vermilyn Brown, Inc., 232 Conn. 780 (1995), fn. 1.

> under the provisions of the act governing the employment relationship.

Rice, supra, 792-793.

In the matter before us, the respondent contends that "[t]he language of both the 1992 and the 1996 versions of C.G.S. § 7-433c make[s] it clear that the date of hire of the claimant is significant to determine whether there is entitlement to benefits." Appellant's Brief, p. 8. We agree that as a threshold matter, a claimant's date of hire is indeed significant in determining, inter alia, whether a claimant even comes within the purview of the heart and hypertension legislation. However, based on the foregoing analysis of our Supreme Court's reasoning in Iacomacci, Gil, Hall, and Rice, we see nothing in the language of either version of § 7-433c C.G.S. which suggests that the legislature intended that our customary reliance upon a claimant's date of injury should be overridden by the claimant's date of hire when making the determination as to which version of the statute applies. This is particularly so given that our Supreme Court has stated that "[i]n the interpretation of a statute, a radical departure from an established policy cannot be implied. It must be expressed in unequivocal language." Jennings v. Connecticut Light & Power Co., 140 Conn. 650, 667 (1954). We would also point out that the legislature has never given us any indication that it finds fault with our continued application of the date of injury rule to determine entitlement to benefits for heart and hypertension claimants. "Once an appropriate interval to permit legislative reconsideration has passed without corrective legislative action, the inference of legislative acquiescence places a significant jurisprudential limitation on our own authority to reconsider the merits of our earlier decision." Hall, supra, 297. In light of the foregoing analysis, we therefore find

no error in the trial commissioner's refusal to apply the rebuttable presumption in a heart and hypertension claim arising from a date of injury which occurred after the rebuttable presumption had been abolished.

The respondent also contends that the trial commissioner's conclusion that the claimant was not diagnosed with hypertension until October 11, 2005 was legally inconsistent with the evidence presented which indicated that the claimant was aware that he had blood pressure issues and had been told to make lifestyle modifications prior to that date. The respondent argues that the trier ignored the medical records of Dr. Hauser and Dr. Batiancila, which demonstrate that based on what was "actually said and done" at the time of the claimant's medical appointments, the claimant was diagnosed with hypertension more than one year prior to filing his notice of claim. Appellant's Brief, p. 10.

It is axiomatic that "[n]o proceedings for compensation under the provisions of this chapter shall be maintained unless a written notice of claim for compensation is given within one year from the date of the accident…." Section 31-294c(a) C.G.S. Our Appellate Court has stated that "[a] claimant who proceeds under § 7-433c must satisfy the one year limitation period under the Workers' Compensation act, General Statutes § 31-275 et. seq., for an 'accidental injury.'" Wabno v. Derby, 133 Conn. App. 232, 237 (2012). However, in Ciarlelli v. Hamden, 299 Conn. 265 (2010), our Supreme Court held that:

> the one year limitation period for claims under § 7-433c begins to run only when an employee is informed by a medical professional that he or she has been diagnosed with hypertension…. Thus, although the issue of when the limitation period of § 31-294c

> begins to run in any given case remains a question of fact for a workers' compensation commissioner, evidence that an employee merely knew of past elevated blood pressure readings, or was advised by his or her physician to make certain lifestyle changes in response thereto, is not sufficient to trigger the limitation period in the absence of evidence that the employee formally had been diagnosed with hypertension by a medical professional and advised of that diagnosis.

Id., 300-301.

Our review of the instant record indicates that Dr. Hauser, who treated the claimant during the period of July 9, 2001 to April 15, 2003, repeatedly testified at deposition that although the claimant's blood pressure readings were often elevated, he chose to recommend lifestyle recommendations rather than prescription medication. The doctor also testified that the results of the echocardiogram on October 4, 2002 were normal, as were the results of an EKG. Respondent's Exhibit 1, p. 17. Based on those test results, the doctor "elected to continue with the lifestyle modification approach rather than pharmacologic." Id., 19. The doctor also indicated that when the claimant underwent a stress test on February 7, 2003, the test **"**revealed [the claimant] had an excellent exercise capacity" and the claimant's exercise blood pressure readings were consistent with what is generally seen in "individuals without a propensity towards hypertension." Id., 22-23. At the claimant's last appointment with Dr. Hauser on April 15, 2003, his blood pressure reading was 128/80, and the doctor testified that he "would have been more apt to treat [the claimant's] sugar than his blood pressure at this juncture." Id., 27. When queried as to what point in time the claimant should have considered himself to be suffering from hypertension, the doctor replied, "I would say to

you that in 2003, the answer would be no. I would tell you that in 2006, the answer would be yes." Id., 31.

The instant record also contains the deposition of Dr. Batiancila, who first saw the claimant on May 22, 2003 and ultimately prescribed the high blood pressure medication "Cozaar" to the claimant on October 11, 2005. Dr. Batiancila's records demonstrate that during that time span, the claimant's blood pressure readings were inconsistent, and the doctor described these readings as "[m]ildly elevated," Respondent's Exhibit 2, p. 23 and "[b]orderline."[7] Id., 33, 34. The doctor testified that she prescribed the blood pressure medication on October 11, 2005, when the claimant's blood pressure reached 140/90, id., 35, and October 11, 2005 was also the date when she made the diagnosis of hypertension.[8] Respondent's Exhibit 3, p. 18. Dr. Batiancila also indicated that in order to reach a diagnosis of hypertension, she "would need to see [the claimant] over several visits and see consistently high blood pressure readings…", id., 15, a position which is

[7] Dr. Batiancila's records indicate that on May 22, 2003, the claimant's blood pressure readings were 150/90 for the right arm and 130/80 in the left arm; on August 26, 2003, the claimant's blood pressure was 130/86 in the right arm and 140/90 in the left arm; on December 30, 2003, the claimant's blood pressure was 130/90 bilaterally; on May 7, 2004, the claimant's blood pressure was 120/90 on the right and 130/90 on the left; on June 11, 2004 and July19, 2004, the claimant's blood pressure was 140/78 and 130/82 respectively; and on October 11, 2005, the claimant's blood pressure was 140/90.

[8] At her deposition on May 14, 2014, Dr. Batiancila testified as follows:

Q: "His blood pressure when you saw him that day was 140 over 90, correct?
A: Correct.
Q: And that's about as borderline as you can get? That's the line, isn't it, for systolic and diastolic?
A: Correct.
Q: Yet you put him on medication that day, Cozaar?
A: Correct.
Q: And that was to treat the disease of hypertension?
A: Correct.
Q: Why was it that particular date as opposed to any prior dates?
A: Because from him he was getting blood pressure readings of 140-150 over 90."

Respondent's Exhibit 3, p. 18.

entirely consistent with our Supreme Court's remark in Ciarlelli, supra, that hypertension "often is diagnosed after observing the patient over a period of time." Id., 300.

There is no question that both Dr. Hauser and Dr. Batiancila testified that they would have discussed their findings with the claimant at each of his office visits. As such, the respondent asserts that the trial commissioner erroneously "focused on the deposition testimonies of Dr. Hauser and Dr. Batiancila, taken years after the medical appointments in question, instead of focusing on the actions and medical records taken by each physician at the time of each medical appointment." Appellant's Brief, pp. 14-15. Essentially, the respondent is asking the trial commissioner to substitute her interpretation of the medical evidence contained in the office notes for the interpretation offered by the physicians who actually treated the claimant. Even when taking into consideration the wide discretion afforded to trial commissioners in reviewing evidentiary submissions by the provisions of § 31-298 C.G.S., the trial commissioner is not empowered to assess medical evidence in such a fashion.[9] As this board has previously remarked, "it is not the responsibility of the trial commissioner to 'second guess' the medical findings or attempt to render a medical diagnosis if the evidence presented suggests that the medical personnel who treated the claimant were unable to do so." Clements v. Aramark Corporation, 6034 CRB-2-15-10 (July 18, 2016).

[9] Section 31-298 C.G.S. (Rev. to 2005) states, in pertinent part: "In all cases and hearings under the provisions of this chapter, the commissioner shall proceed, so far as possible, in accordance with the rules of equity. He shall not be bound by the ordinary common law or statutory rules of evidence or procedure, but shall make inquiry, through oral testimony, deposition testimony or written and printed records, in a manner that is best calculated to ascertain the substantial rights of the parties and carry out the provisions and intent of this chapter."

The respondent also points out that in Tesla v. Bridgeport, 5460 CRB-4-09-5 (August 26, 2011), this board stated that footnote 18 in Ciarlelli "does appear to provide greater flexibility to trial commissioners to ascertain based on a 'totality of the circumstances' test whether the prescription of medicine can act to formalize an otherwise vague diagnosis of hypertension by the treating physician." Tesla, supra. In this footnote, the Ciarlelli court remarked that:

> [o]f course, this standard is not so inflexible as to require a finding in all cases that the medical professional used the term 'hypertension' in communicating the diagnosis to the employee. For example, evidence that an employee was prescribed antihypertensive medication for the treatment of high blood pressure related to hypertension, and not some other illness, likely would support a finding that the employee formally had been diagnosed with hypertension and knew, or should have known, of that diagnosis.

Id., fn. 18.

We concede that in Tesla, this board upheld a finding that a notice of claim was untimely based on the treating physician's testimony relative to what he had discussed with the claimant at two office appointments. We also recognize that in Roohr v. Cromwell, 302 Conn. 767 (2011), our Supreme Court upheld a trial commissioner's finding of untimely notice, again on the basis of the treating physician's testimony, in a heart and hypertension claim for which the claimant had not been prescribed blood pressure medication. We would submit that these two cases merely reflect our Supreme Court's holding in Struckman v. Burns, 205 Conn. 542 (1987), wherein the court observed that "[w]hether an expert's testimony is expressed in terms of a reasonable probability that an event has occurred does not depend upon the semantics of the expert

or his use of any particular term or phrase, but rather, is determined by looking at the entire substance of the expert's testimony." Id., 555. Moreover, we find that the trier's analysis in this matter to be entirely consistent with the scenario contemplated by the Ciarlelli court in its rejection of "a standard that essentially authorizes workers' compensation commissioners to accept a post hoc diagnosis of hypertension based on a claimant's symptoms and then impute knowledge of that diagnosis retroactively to the claimant." Ciarlelli, supra, 296.

The respondent also claims as error the trier's failure to grant its Motion to Correct. Our review of the Motion indicates that the respondent was primarily reiterating its argument that the trial commissioner failed to adequately take into account the actions taken by Drs. Hauser and Batiancila during their respective office visits with the claimant. As discussed previously herein, we are not so persuaded. When "a Motion to Correct involves requested factual findings which were disputed by the parties, which involved the credibility of the evidence, or which would not affect the outcome of the case, we would not find any error in the denial of such a Motion to Correct." Robare v. Robert Baker Companies, 4328 CRB-1-00-12 (January 2, 2002).

There is no error; the July 23, 2015 Findings and Orders of Randy L. Cohen, Commissioner acting for the Seventh District, are accordingly affirmed.

Commissioners Ernie R. Walker and Nancy E. Salerno concur in this opinion.