CASE NO. 6036 CRB-3-15-9 : COMPENSATION REVIEW BOARD
CLAIM NO. 300102400

WILLODENE ALLEN
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

: JUNE 9, 2016

CONNECTICUT TRANSIT
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLANT

APPEARANCES:

The claimant was represented by Wayne R. Sharnick, Esq., Rubens & Lazinger, LLC, 295 Congress Street, Bridgeport, CT 06601-1555.

The respondent was represented by Claudia D. Heyman, Esq., Halloran & Sage, LLP, 315 Post Road West, Westport, CT 06880.

This Petition for Review[1] from the July 7, 2015 Finding and Award, of Nancy E. Salerno the Commissioner acting for the Third District, was heard February 19, 2016 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Ernie R. Walker and Stephen M. Morelli.

[1] Extensions of time were granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant, in this action, Willodene Allen, filed a claim for injuries he said he sustained on May 16, 2013 while driving a bus for the respondent, Connecticut Transit. On July 7, 2015 the trial commissioner, Nancy E. Salerno, issued a Finding and Award which granted the claimant benefits for shoulder, rib and cervical injuries she concluded the claimant had sustained in the May 16, 2013 incident. The respondent has appealed from this decision arguing that the Finding and Award was not supported by reliable and probative evidence, citing DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132 (2009), and seek to have the award of benefits vacated. After reviewing the record and relevant precedent we are satisfied the trial commissioner could reasonably have awarded the claimant benefits for his May 16, 2013 injuries. We affirm the Finding and Award.

The trial commissioner found the following facts in the Finding and Award. She found the claimant was employed on May 16, 2013 driving a bus for Connecticut Transit which was involved in a motor vehicle accident. The claimant asserted that he injured his left shoulder, ribs and neck in that accident, which occurred when the bus was rear-ended by another vehicle. The commissioner noted the claimant had treated for prior injuries as a result of a motor vehicle accident in February 2010. The commissioner cited medical reports from Dr. Robert V. Dawe, Dr. Lawrence P. Kirschenbaum and Dr. Patrick W. Kwok who treated the claimant after his 2010 accident for cervical pain, left shoulder pain and a tear of the left shoulder tendon. Dr. Kwok's report noted that the claimant treated with exercise and anti-inflammatories and decided he would only undergo shoulder surgery if his symptoms worsened.

On May 16, 2013 the claimant's bus was rear ended. The Hamden police investigated the accident and had the claimant transported by ambulance to Yale-New Haven Hospital St. Raphael's campus. The hospital report noted the claimant mentioned "diffuse neck pain, mid back pain in center, and L sided rib pain." Findings, ¶ 6. The claimant was sent for X-rays to address "shoulder/neck pain." Id. The X-rays of the claimant's cervical, thoracic spine and ribs were negative and the claimant was prescribed Ibuprofen, Flexeril and directed to stay out of work for two days. The claimant followed up after the accident at Yale-New Haven's Occupational Health Center and was seen by Dr. Peter Amato. On May 17, 2013 the claimant advised Dr. Amato his bus was hit by a car travelling at a high rate of speed and he had pain in the neck, shoulders and low back. The claimant said he had been jerked forward and to the side. Dr. Amato determined "[t]he described mechanism of injury is consistent with the objective findings on the physical examination." Findings, ¶ 7a. Dr. Amato placed the claimant on total disability and advised him to return in one week. Dr. Amato's May 22, 2013 report restated the claimant's pain complaints and noted that "[t]he cause of this problem is related to work activities." Findings, ¶ 7b. Dr. Amato examined the claimant again on May 24, 2013 and noted that a video of the incident suggested there was not a significant injury but the claimant refuted that allegation. While the employer questioned the mechanism of injury Dr. Amato stated "[t]he findings suggest soft tissue strains and or contusions." Findings, ¶ 7c. Dr. Amato kept the claimant out of work until his May 28, 2013 appointment where he released the claimant to light duty. At that appointment he noted some symptom magnification. On June 3, 2013 Dr. Amato noted the claimant's pain was improving, but his ribs were still sore. He discharged the claimant to full duty.

The claimant then began treating with Dr. David Brown, an orthopedic surgeon from July of 2013 through August of 2014. The trial commissioner noted his treatment notes. At the initial treatment of July 11, 2013 Dr. Brown said the claimant had said he was injured when he was "jolted forward on impact striking his chest against the steering wheel." Findings, ¶ 8a. He noted some chest soreness and stiffness on cervical rotation and flexion. He referred the claimant for physical therapy and prescribed muscle relaxants and anti-inflammatory medicine. On August 19, 2013 the treater noted the claimant was "aware of neck and left sided-arm pain" and that "[t]here is the suggestion of referred pain extending down the left arm. . . ." Findings, ¶ 8b. Dr. Brown ordered a cervical MRI for the claimant. That MRI was performed on September 14, 2013 and in an October 1, 2013 report Dr. Brown compared that MRI with an August 26, 2010 MRI. The results appeared largely similar. In the October 1, 2013 report Dr. Brown noted the claimant continued to complain of left shoulder pain limiting his ability to use his arm in an overhead fashion. Due to the pain and motion limitations the claimant was a candidate for left rotator cuff repair surgery. Dr. Brown noted the claimant reported no shoulder pain prior to the May 16, 2013 incident and did not require surgery at that time. However "[a]fter the recent injury of May 16, 2013, the left shoulder became acutely painful. The necessity of left shoulder rotator cuff surgery is therefore causally related to the incident of May 16, 2013." Findings, ¶ 8c. The claimant underwent left shoulder rotator cuff surgery on February 4, 2014 and was out of work for several weeks thereafter. By August 25, 2014 the claimant had been working for a while after his surgery but still reported left shoulder soreness and some left sided rib pain. Dr. Brown causally linked

this shoulder and rib pain to the May 16, 2013 injury, prescribed analgesics, and directed the claimant to avoid heavy lifting.

The trial commissioner also noted the claimant underwent physical therapy from July 25, 2013 through May 1, 2014 and made reference to the treatment notes generated during that treatment, which noted weakness and discomfort in the claimant's left shoulder. The commissioner also noted the testimony of the claimant at the formal hearing wherein he testified that he had a pre-existing left rotator cuff tear from his 2010 motor vehicle accident. The claimant said his treating physician, Dr. Kwok, had recommended surgery but he had chosen not to proceed with surgery because he was not experiencing any pain at that time. The claimant further testified he did not require any treatment on his shoulder nor did he miss any time from work between September 2010 and the May 16, 2013 accident, and he had been able to lift weights prior to the 2013 accident. He also testified that at the scene of the accident he felt pain in his neck radiating down to his hands and back as well as pain in his ribs.

The respondent had their expert witness, Dr. Kevin Shea, perform a records review and his report was presented as evidence to the trial commissioner. He concluded the May 16, 2013 accident "was unlikely to cause any injury at all." Findings, ¶ 13. Dr. Shea was deposed on January 19, 2015 and reiterated that position. He noted that the claimant did not initially complain of shoulder pain in his May 17, 2013 visit to Dr. Amato or his initial emergency room visit and had the claimant reinjured his shoulder on May 16, 2013 he would have expected complaints of pain shortly after the incident. Dr. Shea opined that since the claimant did not raise the complaint of shoulder pain to a

medical provider until his August 9, 2013[2] visit to Dr. Brown that there was no connection between the bus accident and the claimant's need for shoulder surgery. He also noted no significant change between the claimant's 2010 MRI test and his 2013 MRI test. He also reviewed DVD footage of a camera inside the bus at the time of the accident and said the history as to being jolted against the steering wheel that the claimant provided to Dr. Brown on July 11, 2013 was strikingly different from what the DVD showed. Dr. Shea summarized that in his opinion the claimant did not injure his left shoulder in the May 16, 2013 accident as the DVD did not depict a mechanism of injury consistent with a shoulder injury and the delay between this event and the complaints provided to medical providers. He suggested that there had been a natural progression of the pre-existing 2010 injury and therefore opined there was no link between the claimant's work accident and his need for surgery.

Commissioner Salerno noted that she viewed the surveillance DVD provided by the respondent and noted it showed the claimant wearing his seatbelt at the time of the May 16, 2013 accident. She noted that it showed the bus was rear-ended and the claimant's body moved forward and to the left. She also noted that it did not show the history the claimant provided to Dr. Brown on July 11, 2013 of having been jolted forward against the bus's steering wheel.

Based on these facts the trial commissioner concluded that the claimant was in an accident while working for the respondent and presented to the emergency room with complaints of shoulder and neck pain. She found the opinions expressed by Dr. Amato on May 17, 2013 consistent with the objective physical findings as to the claimant

[2] The trial commissioner cited in the Finding and Award the date Dr. Shea referenced at his deposition. See Joint Exhibit 19, pp. 17-18. Dr. Brown did not treat the claimant on that date, however. He did treat the claimant on August 19, 2013.

sustaining a contusion or strain. She also found Dr. Amato's May 22, 2013 opinion relating the claimant's physical symptoms to his work activities credible. The commissioner also found the opinions of Dr. Brown credible and persuasive, noting that he had determined that the claimant's shoulder had become acutely painful after the 2013 work incident and this connected the need for left shoulder surgery to that incident. Commissioner Salerno found the claimant's testimony credible. She also found he had a pre-existing left rotator cuff tear from a 2010 motor vehicle accident and opted not to have surgery at that time as he was not experiencing any pain. She noted that he did not miss any time from work between his last visit with Dr. Kwok on September 21, 2010 and the 2013 bus accident. The commissioner reviewed the testimony and opinion of Dr. Shea but concluded that they were not credible as the claimant had related complaints of shoulder pain to providers shortly after the accident. Therefore, based on the totality of the evidence presented the commissioner concluded that the May 16, 2013 injury was a substantial factor in the claimant's need for treatment for a shoulder injury including his February 4, 2014 surgery; and that the claimant was totally disabled from February 4, 2014 through May 12, 2014 as a result of this surgery. She ordered the respondent to pay benefits and medical treatment resulting from the May 16, 2013 accident.

The respondent filed a Motion to Correct seeking corrections that the claimant was not a credible witness and the medical evidence did not support finding the claimant's shoulder injury was linked to the May 16, 2013 accident. The trial commissioner denied this motion in its entirety. The respondent commenced this appeal, essentially restating the arguments they presented in the Motion to Correct.

On appeal, we generally extend deference to the decisions made by the trial commissioner. "As with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial court could have reasonably concluded as it did." Daniels v. Alander, 268 Conn. 320, 330 (2004). "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 and Home Care, Inc., 248 Conn. 379 (1999) and Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Moreover, "[a]s with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial court could have reasonably concluded as it did." Burton v. Mottolese, 267 Conn. 1, 54 (2003). We further 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.)

The respondent's argument can be summed up succinctly. The claimant's misstatement to Dr. Brown as to the precise mechanism of his injury should have caused the trial commissioner to have found him an unreliable witness and should cause the trial commissioner, in accordance with DiNuzzo, supra, to find Dr. Brown's medical opinions unworthy of belief. As the respondent views this case, any discrepancy between the surveillance video and the narrative the claimant provided to his medical providers was

so material as to bar a finding of causation. They cite our recent decision in Tarantino v. Sears Roebuck & Co., 5939 CRB-4-14-5 (April 13, 2015) as compelling this tribunal to reverse the trial commissioner. We do not agree.

We note that the trial commissioner had the opportunity to observe the claimant testify and affirmatively concluded that he was a credible witness. This is a determination which is within her purview as the trier of fact.

> Our precedent stands for the proposition that when a trial commissioner finds a witness who testifies to be credible, or conversely, finds a witness who testifies not to be credible, we do not have the ability to reverse this judgment on appeal. See Toroveci v. Globe Tool & Metal Stamping Co., Inc., 5253 CRB-6-07-7 (July 22, 2008), citing Burton, supra, 40.

Tarantino, supra.

On the issue of whether his injuries were caused by a workplace incident both the trial commissioner in Tarantino and the trial commissioner in this case found the claimant to offer credible testimony. As an appellate panel we must defer to this determination. The trial commissioner *may* discount medical evidence when he or she concludes it is based on an unreliable patient narrative, Ramirez-Ortiz v. Wal-Mart Stores, Inc., 5492 CRB-8-09-8 (August 25, 2010) but if the trial commissioner finds the claimant credible and persuasive despite alleged discrepancies in their narrative we must defer to the trial commissioner's determination related to whether that narrative is consistent with the mechanism of injury. Id., citing Berube v. Tim's Painting, 5068 CRB-3-06-3 (March 13, 2007) and Arnott v. Taft Restaurant Ventures, LLC, 4932 CRB-7-05-3 (March 1, 2006). See also Wiggins v. Middletown, 5300 CRB-8-07-12 (January 15, 2009).

The trial commissioner reviewed the DVD surveillance video of the incident and duly noted that the narrative the claimant provided to Dr. Brown at the initial treatment

session was inconsistent with the video evidence in one respect; as the claimant was belted in the driver's seat his chest **did not** collide with the steering wheel of the bus. Nonetheless, she did note that the impact of the collision was sufficient to jerk the claimant forward and to the left.[3] In cases where the impact of a motor vehicle collision on a claimant's injury was in dispute we have generally deferred to the trial commissioner to ascertain the facts, see Burns v. Southbury, 5608 CRB-5-10-11(November 2, 2011). The commissioner in this case was satisfied, after reviewing the totality of the record that this mechanism of injury was consistent with the shoulder injuries the claimant presented to the emergency room and to Yale Occupational Health immediately subsequent to the May 16, 2013 incident. Since Dr. Brown ascribed the claimant's need for rotator cuff surgery to these injuries, the trial commissioner's conclusion is supported by probative evidence as to causation.

The respondent clearly believes that the claimant's inaccurate narrative of the mechanism of injury so tainted Dr. Brown's opinion as to render it as unreliable as the evidence found wanting by the Supreme Court in DiNuzzo. As we pointed out in our analysis of DiNuzzo in Tarantino, in both those cases a witness for the claimant was cross-examined and his opinions following cross examination were found to have been based on faulty factual foundations.

> We cannot distinguish this deposition testimony on the issue of total disability from the testimony presented by the claimant's expert witness as to causation in DiNuzzo which resulted in that award being overturned on appeal. Dr. Lendino's understanding of

[3] At oral argument before this tribunal counsel for the respondent maintained that this was a "low speed" collision. The Hamden police report presented as Joint Exhibit, ¶ 4 suggests the operator of the other vehicle was engaged in reckless conduct which led to his apprehension distant from the accident location by the North Haven police. We believe the trial commissioner could reasonably have concluded the collision speed herein was not "low."

> the claimant's job duties and the reason for his termination were a central element as to his opinion as to the claimant's disability. The deposition clearly demonstrates the witness based his original opinions on faulty assumptions; and essentially recanted that opinion after being presented with the facts.

Tarantino, supra.

However, our review of Dr. Brown's written opinions fail to confirm the respondent's theory that the inaccuracy in the claimant's narrative substantially impacted his reasoning, and the respondent made no effort to question this witness so as to elicit an answer to this question on the record. When a party chooses not to depose a medical witness the trial commissioner may rely on their reports "as is" and draw any reasonable inferences from this evidence. Berube, supra. We do not find Commissioner Salerno drew an unreasonable inference as to causation from Dr. Brown's reports. See Rosa v. State/DCF, 5475 CRB-8-09-7 (June 22, 2010).[4]

We note that the respondents in Estate of Haburey v. Winchester, 150 Conn. App. 699 (2014), *cert. denied*, 312 Conn. 922 (2014), challenged the adequacy of the claimant's evidence as to causation and the Appellate Court held "our law does not demand metaphysical certainty in its proofs." Id., 716. We also note the factual and legal similarities with Hadden v. Capitol Region Education Council, 5843 CRB-1-13-5 (May 20, 2014), *aff'd*, 164 Conn. App. 41 (2016). In Hadden, the claimant had pre-existing multiple sclerosis which she claimed was exacerbated after a traumatic injury

[4] We also note that in DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132 (2009) the Supreme Court pointed out "the plaintiff's claim to survivor's benefits was predicated on a series of inferences, some of them quite attenuated, that the commissioner was required to draw from the fact that the decedent had suffered a compensable injury in 1997." Id., 147-148. These inferences required evidence the claimant actually sustained a fatal heart attack which the claimant's evidence did not establish. Id. In the present case there is no dispute the claimant sustained some form of traumatic injury while in the course of employment and we may therefore distinguish this case factually from DiNuzzo.

sustained at work. The trial commissioner found the medical evidence on that point persuasive and rejected the respondent's argument that the claimant's need for medical treatment was attributable to pre-existing causes, noting that the claimant was essentially asymptomatic prior to the work injury. In the present case the trial commissioner concluded the claimant's evidence was persuasive that his need for rotator cuff surgery was due to an exacerbation resulting from a traumatic injury at work, noting that prior to the incident he was not seeking surgery. The precedent in Hadden compels us to affirm her decision.

The respondent believes the case they presented, which included surveillance video and an opinion by an expert medical witness, Dr. Shea, challenging the claimant's position, should have carried the day. However, we have affirmed the decision a trial commissioner reaches when weighing the evidence in "dueling expert" cases, Dellacamera v. Waterbury, 4966 CRB-5-05-6 (June 29, 2006). It is black letter law that, "it is the trial commissioner's function to assess the weight and credibility of medical reports and testimony. . . ." O'Reilly v. General Dynamics Corp., 52 Conn. App. 813, 818 (1999). The trial commissioner in this case found the claimant's witnesses more credible and persuasive than the respondent's witnesses and evidence.[5] In light of the "totality of the evidence" standard enunciated in Marandino v. Prometheus Pharmacy, 294 Conn. 564 (2010) we do not find that conclusion unreasonable.

Therefore, we affirm the Finding and Award.

Commissioners Ernie R. Walker and Stephen M. Morelli concur in this opinion.

[5] For that reason we find no error in the trial commissioner's denial of the respondent's Motion to Correct. See Brockenberry v. Thomas Deegan d/b/a Tom's Scrap Metal, Inc., 5429 CRB-5-09-2 (January 22, 2010), *aff'd*, 126 Conn. App. 902 (2011)(Per Curiam); D'Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003); and Liano v. Bridgeport, 4934 CRB-4-05-4 (April 13, 2006).