CASE NO. 6038 CRB-7-15-10 : COMPENSATION REVIEW BOARD
CLAIM NO. 700155444

HARMINDER SINGH
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: JULY 20, 2016

CVS
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLEE

and

GALLAGHER BASSETT SERVICES, INC.
ADMINISTRATOR

APPEARANCES:

The claimant was represented by Andrew E. Wallace, Esq., Law Office of Andrew E. Wallace, LLC, 1077 Bridgeport Avenue, Suite 100, Shelton, CT 06484.

The respondents were represented by James Baldwin, Esq., Coles, Baldwin & Kaiser, LLC, One Eliot Place, Third Floor East, Fairfield, CT 06824.

This Petition for Review from the October 5, 2015 Finding and Decision of Charles F. Senich the Commissioner acting for the Fourth District was heard March 18, 2016 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Ernie R. Walker and Nancy E. Salerno.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has appealed from an October 5, 2015 Finding and Decision reached by Commissioner Charles F. Senich which concluded the claimant had reached maximum medical improvement for a compensable toe injury and that he was not entitled to § 31-307 C.G.S. benefits for total incapacity as a result of that injury. The claimant argues on appeal the trial commissioner did not properly apply credible evidence to the law, in particular § 31-349 C.G.S.[1] and reached a decision inconsistent with the facts on the record. The claimant also argues the trial commissioner failed to perform an analysis of total disability consistent with the precedent in Osterlund v. State, 135 Conn. 498 (1949). We find the commissioner's determination that the claimant's current medical condition was the result of degenerative processes unrelated to the compensable injury was supported by evidence in the record the commissioner found persuasive and credible. Accordingly, we affirm the Finding and Decision.

The trial commissioner reached the following factual findings at the conclusion of the formal hearing. He found the parties stipulated the claimant had sustained a

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[1] The relevant portion of this statute reads as follows:

"Sec. 31-349. Compensation for second disability. Payment of insurance coverage. Second Injury Fund closed July 1, 1995, to new claims. Procedure. (a) The fact that an employee has suffered a previous disability, shall not preclude him from compensation for a second injury, nor preclude compensation for death resulting from the second injury. If an employee having a previous disability incurs a second disability from a second injury resulting in a permanent disability caused by both the previous disability and the second injury which is materially and substantially greater than the disability that would have resulted from the second injury alone, he shall receive compensation for (1) the entire amount of disability, including total disability, less any compensation payable or paid with respect to the previous disability, and (2) necessary medical care, as provided in this chapter, notwithstanding the fact that part of the disability was due to a previous disability. For purposes of this subsection, "compensation payable or paid with respect to the previous disability" includes compensation payable or paid pursuant to the provisions of this chapter, as well as any other compensation payable or paid in connection with the previous disability, regardless of the source of such compensation."

compensable injury to his right great toe on December 20, 2008, but that the respondent is challenging the extent of injury or disability from that incident. He also found the claimant had been employed by the respondent for about seven years prior to that date, and that on that date the claimant sustained an injury while unloading a delivery truck in the freezing cold. Subsequent to the date of injury the claimant treated initially with Dr. Arcangelo DiStefano. The claimant then was admitted to St. Vincent Medical Center on December 26, 2008 where it was determined that he had sustained an injury to his right great toe as a result of working outside for several hours on December 20, 2008. The claimant attempted to return to work on several occasions subsequent to December 20, 2008, and in July 2009 the claimant sought a second medical opinion from Dr. Alan Feldman. The claimant testified that he attempted to return to work on several occasions and has been treating with a number of physicians, including Dr. Sahani Howie, Dr. Jossie Abraham, Dr. Howard Harinstein and Dr. Jitendra Bharucha.

The trial commissioner noted the testimony of Dr. Bharucha. Dr. Bharacha testified the claimant had a sedentary work capacity. He also noted that claimant suffered from preexisting diabetes and offered the following opinion as to the causation of the claimant's condition beyond that of his right great toe.

> A: I thought, I really thought genuinely that frostbite caused his initial problem, but unfortunately being diabetic, it took him so long to get better. If this frostbite were in a normal person, who is not otherwise diabetic, things would heal faster. But people who are diabetic, again, slightest injury can take a major role, and here a significant injury which took a long time for him to heal.…
>
> A: The right big toe, because the location was exactly the same, identical, in the same spot, my opinion was that there was a causal relationship to his initial injury, whether it healed to the point to reopen, had it not occurred, that injury, whether -- if

that tissue had been in sound, good condition, strong shape, that it would not have occurred is my opinion.

Q: Again, your testimony is that the great toe, in your opinion, was caused by the frostbite, but the third toe it wasn't; it was caused by the other mechanisms of injury?

A: Correct.

Findings, ¶ 14.

The commissioner also noted the testimony of Dr. Enzo Sella, who performed a respondent's medical examination. Dr. Sella opined and testified that the claimant sustained a frostbite injury to his right great toe as a result of his employment with the respondent on December 20, 2008. Dr. Sella further testified as to the claimant's injury and disability and his opinion as to causation.

Q: Is someone who had an ulceration more prone to subsequent ulcerations?

A: Yes.

Q: And Mr. Singh had a prior ulceration? Again, prior to, say, June 2009.

A: He had ulcerations before the frostbite which were also due to diabetes and then the frostbite reopened an ulcer of the diabetic foot, then the frostbite resolved and the ulceration recurred again and again and again because of diabetes. It is a common history in these patients.

A: Because he's an ongoing diabetic who's had previous ulcers even before the frostbite. It happened even without the frostbite. The frostbite was a substantial factor in causing an ulcer in the great toe on top of his diabetes. It healed. But the diabetes didn't heal; it's still going on. Even if it's just a month in between, it just recurred again. I know it's kind of close, but that's the way it works.

Q: Again, I know Attorney Baldwin already went over part of this. As far as a work capacity, as of August 30, 2013 you did not believe Mr. Singh had a work capacity?

A: That's correct.

Q: And you believed him to be permanently totally disabled?

A: Yes.

Q: My understanding from your testimony earlier is you just didn't believe it was related to the work injury?

A: It was not related to the frostbite.

Q: Is Mr. Singh's work injury a substantial factor in his inability to work right now?

A: No.

Q: Is it a factor?

A: No.

Findings, ¶ 18.

On August 30, 2013 Dr. Sella issued a report assessing the claimant's injuries. He opined that the claimant had "a fifteen percent impairment to loss of function of the right foot, five percent due to the work related frostbite and ten percent due to the diabetes and poor venous circulation of the leg." Findings, ¶ 19.

The trial commissioner also noted that two commissioner's examinations had been performed on the claimant. Dr. Raymond Sullivan's May 7, 2012 report opined as follows.

> Mr. Singh has right great toe chronic ulceration after sustaining frostbite to the right great toe on 10/20/2008 (sic). This has been compounded by his diabetic neuropathy. At this point, I would agree with Dr. Sella that he needs cutaneous oxygen tension testing and if indeed this is amenable to surgery, then he should proceed with hallux interphalangeal joint fusion.

Findings, ¶ 22.

The commissioner also noted that Dr. Adam Brodsky had performed a commissioner's examination. He opined on February 26, 2014 that the claimant was "very limited in what he can do for work. With his foot at risk for re-ulceration, I would only allow him a part-time sedentary position. He can no longer perform the duties of his old job." Findings, ¶ 26. Dr. Brodsky further opined the claimant was at maximum medical improvement and had a 20% impairment rating for his right foot. Id. As to the issue of causation, Dr. Brodsky offered the following testimony.

> Q: Okay. So after going through these records can you state with a reasonable degree of medical probability whether in your opinion the ulcerations of the other toes, the lesser toes were caused by frostbite in December 2008? And not a hundred percent, I understand your testimony earlier --
>
> A: I mean based on the fact that there's no mention of frostbite in the emergency room record admitting diagnosis or anything here and the toes were -- and the lesser toes were not involved, I would have to say I would have to agree with that.
>
> Q: So you would agree that you can't state with a reasonable degree of medical probability that they were -- the ulcerations, subsequent ulcerations were related to the cold exposure in 2008, is that --
>
> A: That's correct.
>
> Q: What, then, in your opinion with a reasonable degree of medical probability was or were the causes of those ulcerations to the lesser toes?
>
> A: It -- the ulcerations to those toes most likely within reasonable degree of certainty is because of his diabetes and neuropathy.
>
> Q: So based on the medical history that you've been provided with, the additional medical history and clarifications from Dr. Bharucha, would you therefore amend your opinion as stated in your February 2014 report with respect to the right foot condition? And if so, how would you amend that opinion?

> A: I would remove the lesser toe component and just stay with the great toe as far as in the assessment.

Findings, ¶ 27.

The trial commissioner also noted that the claimant presented evidence from other treating physicians as well as from a vocational expert. On January 20, 2014 Dr. Harinstein reported that the claimant's work capacity is limited due to the fact that he has chronic pain. On January 22, 2014 Dr. Abraham reported that Mr. Singh's current work capacity should remain as being totally disabled. Albert Sabella, a vocational rehabilitation counselor, issued a vocational evaluation and employment assessment in regard to the claimant. He testified that the claimant is unemployable for any practical or vocational purpose, and that it is vocationally likely and probable that based on the claimant's right toe injury and subsequent concomitance, he is unable to find, secure, and maintain any employment, or an employer who will hire him.

Based on these subordinate facts the trial commissioner concluded that he did not find the testimony of the claimant to be fully credible and persuasive, in part as he did not offer an accurate medical history to his providers and that the medical treatment that the claimant has received beyond his great right toe is not compensable as a result of the work related injury sustained on December 20, 2008. The trial commissioner denied one Form 36 filed on August 2, 2013, but approved a Form 36 filed on December 26, 2013, establishing maximum medical improvement as of February 26, 2014. The commissioner ordered temporary total disability benefits to end as of February 25, 2014 and for permanent partial disability benefits to commence on February 26, 2014. The commissioner noted additional hearings could be required on the issue of establishing a § 31-308 C.G.S. award for permanent partial disability. Commissioner Senich did not find

that the claimant's toe ulcers and need for medical treatment beyond the right great toe were work related and caused by the compensable injury sustained in the course of employment on December 20, 2008; nor did he find that the claimant was totally disabled from all forms of gainful employment subsequent to December 26, 2013. The commissioner reached these determinations as he found Dr. Sella, Dr. Brodsky and Dr. Bharucha offered credible and persuasive testimony while he did not find the opinions of Dr. Harinstein, Dr. Abraham or Mr. Sabella fully credible and persuasive. He reached this conclusion, as noted previously, he found the claimant did not give an accurate medical history to his medical providers and failed to meet his burden of proof in regard to the sum of the issues in this matter.

The claimant filed a Motion to Correct which sought to substitute different findings as to Dr. Bharucha's testimony as well as conclusions supportive of finding the claimant credible and continued to sustain temporary total disability from the compensable toe injury. The trial commissioner granted one correction which did not materially modify the Finding and Decision and the claimant has pursued the instant appeal.

The claimant argues on appeal that pursuant to § 31-349 C.G.S. and the holding of Sullins v. United Parcel Service, Inc., 315 Conn. 543 (2015) that the trial commissioner should have awarded him benefits under § 31-307 C.G.S. as his compensable injury exacerbated a preexisting condition and rendered him unable to work. He also argues the trial commissioner reached improper inferences from the testimony of Dr. Sella and Dr. Bharucha which did not support his conclusions. Finally the claimant argues the trial commissioner failed to perform an Osterlund analysis as to

whether the claimant was employable. The respondent argues the evidence does not support the claimant's position that the compensable injury exacerbated the preexisting diabetic condition he had, the trial commissioner properly weighed the medical evidence, and that the commissioner properly evaluated the claimant's work capacity.

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). In addition, the burden of proof in a workers' compensation claim for benefits rests with the claimant. Dengler v. Special Attention Health Services, 62 Conn. App. 440 (2001). 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 claimant argues that the precedent in Sullins, when applied to the facts in this case, compels this tribunal to reverse the Finding and Decision. As the claimant views the evidence the claimant's compensable frostbite injury clearly exacerbated his

preexisting diabetes and continues to do so. Therefore, the claimant believes his current need for medical treatment and claims for disability are compensable. The claimant accurately states the standard promulgated under Sullins.

> Therefore, the question in the present case is whether the factual findings demonstrate that the plaintiff suffered a preexisting disability that combined with the workplace injury like the claimants in *Cashman* v. *McTernan School, Inc.*, supra, 130 Conn. 401, and *Jacques* v. *H. O. Penn Machinery Co.*, supra, 166 Conn. 352, or that the plaintiff had two concurrently developing disease processes, like the claimant in *Deschenes*. If the former, the question arises whether the current disability is materially and substantially greater than the disability that would have resulted from the second injury alone, as required to recover for the entire disability under § 31-349 (a). Id., 559-560.

Nonetheless, the trial commissioner determined the evidence did not support a conclusion that the claimant's disability was materially and substantially greater now as a result of the compensable injury. The trial commissioner concluded the claimant's preexisting diabetic condition was the proximate cause of his current medical condition. In reviewing this conclusion we look at our analysis of the proximate cause standard as recently delineated in cases such as Kladanjcic v. Woodlake at Tolland, 5995 CRB-1-15-3 (March 2, 2016) and Nelson v. Revera, Inc., 5977 CRB-5-15-1 (September 21, 2015).

> We also have reviewed the precedent since Marandino on the evidentiary burden regarding proximate cause a claimant must meet in order to be awarded benefits under Chapter 568. We recently engaged in an extensive review of this standard in Larocque v. Electric Boat Corporation, 5942 CRB-2-14-6 (July 2, 2015). Citing Sapko v. State, 305 Conn. 360 (2012), DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132 (2009) and Voronuk v. Electric Boat Corp., 118 Conn. App. 248 (2009), we concluded "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. Larocque, supra."

Nelson, supra.

We further note that in Zezima v. Stamford, 5918 CRB-7-14-3 (May 12, 2015) we held,

> [e]ssentially the question of whether a nexus of proximate cause exists between a compensable injury and a subsequent medical condition is, and always has been, an issue of fact for the trial commissioner to resolve, [t]he question of proximate causation . . . belongs to the trier of fact because causation is essentially a factual issue. . . . It becomes a conclusion of law only when the mind of a fair and reasonable [person] could reach only one conclusion; if there is room for a reasonable disagreement the question is one to be determined by the trier as a matter of fact. (Citations omitted; internal quotation marks omitted.) Sapko v. State, 305 Conn. 360, 373 (2012).

The trial commissioner in Findings, ¶ 11 and Findings, ¶ 18 cited testimony from Dr. Sella and Dr. Bharucha which the trial commissioner concluded were unsupportive of a finding that the claimant's compensable injury neither exacerbated nor combined with his preexisting condition to increase his present disability. The claimant argues that the evidence clearly demonstrated that his condition worsened after the compensable injury. However, the trial commissioner cited evidence from these expert witnesses that the claimant's current condition was attributable to his preexisting diabetes. While Dr. Bharucha clearly opined that the claimant's recovery from his compensable frostbite injury to his great toe was impeded by his preexisting diabetes, he also opined that that injury was not a factor in the injuries the claimant had to his other toes. Dr. Sella opined that the compensable injury and the preexisting condition combined to worsen the initial injury to the claimant's great toe but that initial injury had already healed. However, the claimant's diabetes had not healed and continued to injure the claimant. Dr. Sella unequivocally opined that the claimant's compensable injury was *not* a factor in his

current disability. Since circumstances must determine whether a compensable injury is responsible for the resultant disability when resolving questions of medical treatment and indemnity benefits, the trial commissioner's conclusions were supported by probative evidence on the record.

The claimant argues that the trial commissioner misapplied the evidence presented by Dr. Bharucha and Dr. Sella. He argues in part that Dr. Bharucha did not present a reliable opinion on the issue of work capacity and that Dr. Sella's testimony as to the claimant suffering ulcerations prior to the date of the compensable injury was speculative and not based on facts on the record. He also argues that Dr. Sella's opinion as to work capacity (i.e. that the claimant was totally disabled) should be adopted by the trial commissioner as Commissioner Senich found Dr. Sella fully persuasive and credible. We are not persuaded any of these averments constitute reversible error. Even if *arguendo*, the trial commissioner misstated Dr. Bharucha's opinion as to the claimant's work capacity, it would not have impacted the causation analysis herein. The claimant needed to prove to the trial commissioner's satisfaction that his disability was the result of his compensable injury. Since "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) and the commissioner did not find a nexus between the compensable injury and causation, a condition precedent to the award of benefits for total disability was absent.

In regards to the testimony of Dr. Sella, the respondent points to the medical records of Dr. Harinstein as to documenting the claimant had been suffering from ulcers on his toe in 2007 and 2008 prior to the December 20, 2008 frostbite injury. See

Respondent's Exhibit 9. This evidence is consistent with Dr. Sella's testimony. We also note that the trial commissioner found the claimant did not present an accurate medical history to his treating physicians and the trial commissioner could reasonably discount any medical opinion reliant on such an inaccurate history. See Abbotts v. Pace Motor Lines, Inc., 4974 CRB-4-05-7 (July 28, 2006), *aff'd*, 106 Conn. App. 436 (2008), *cert. denied*, 287 Conn. 910 (2008). As to this witnesses opinion as to the claimant's work capacity we note the claimant did not establish causation to the trial commissioner's satisfaction. We also note "[w]e have held that it is within the discretion of the trial commissioner to accept some, but not all, of a physician's opinion." Lopez v. Lowe's Home Improvement Center, 4922 CRB-6-05-3 (March 29, 2006), and we have ruled against litigants who have argued that we should cherry pick an expert's opinion for opinions the trial commissioner did not adopt that would support their argument. Williams v. Bantam Supply Co., Inc., 5132 CRB-5-06-9 (August 30, 2007). The trial commissioner was not obligated to adopt Dr. Sella's opinion as to the claimant's work capacity. In any event, in light of his adverse conclusions as to the issue of causation this issue was not material.

The claimant finally argues the trial commissioner failed to perform an Osterlund analysis as to whether he was totally disabled. As we note herein, such claims require an initial finding that the claimant's condition is the result of a compensable injury and the trial commissioner was not persuaded of this fact. In any event, we note that the claimant presented testimony from a vocational expert, Albert Sabella, which had it been accepted would have substantiated such an award of benefits. The trial commissioner did not find Mr. Sabella a persuasive witness and we may not intercede in this factual determination.

The claimant argues the trial commissioner failed to perform the analysis required under Bode v. Connecticut Mason Contractors, The Learning Corridor, 130 Conn. App. 672, 681 (2011), *cert. denied*, 302 Conn. 942 (2011). We disagree. As the Appellate Court established in O'Connor v. Med-Center Home Health Care, Inc., 140 Conn. App. 542 (2013) it is the plaintiff's burden to present a persuasive Osterlund claim for the commissioner's consideration.

> In *Bode*, this court explained that a medical determination of total disability is merely one way a claimant can establish total incapacity to work, and one of many types of evidence the commissioner may consider in making this finding. ''[I]n order to receive total incapacity benefits . . . *a plaintiff bears the burden* to demonstrate a diminished earning capacity by showing either that she has made adequate attempts to secure gainful employment *or* that she is truly unemployable. . . . Whether the plaintiff makes this showing of unemployability by demonstrating that she actively sought employment but could not secure any, or by demonstrating through nonphysician vocational rehabilitation expert or medical testimony that she is unemployable . . . as long as there is sufficient evidence before the commissioner that the plaintiff is unemployable, the plaintiff has met her burden.

Id., 553-54. (Emphasis added.)

In the present case the claimant presented and the trial commissioner considered vocational evidence on whether the claimant was employable. The commissioner applied the "holistic determination" as described in O'Connor, supra, 554-555, but he was not persuaded by this evidence and we may not retry this issue on appeal.

We noted previously the parallels between this case and Zezima, supra. In both cases the claimant argued the trial commissioner erred in attributing causation of an injury to factors unrelated to a compensable injury and due to the reasons we cited herein, we affirmed the trial commissioner.

> In many ways this case is the mirror image of Hadden v. Capitol Region Education Council, 5843 CRB-1-13-5 (May 20, 2014), *appeal pending*, AC 36913 [aff'd, 164 Conn. App. 41 (2016)]. In Hadden, the respondents argued the claimant's medical condition was due to preexisting ailments, but the trial commissioner accepted the claimant's argument a compensable injury accelerated the deterioration of her condition. We affirmed the trial commissioner's factual determination. In the present case the trial commissioner concluded the work-related injury did not materially accelerate the need for surgery. Since this conclusion was based on a foundation of probative evidence the commissioner found reliable, we must defer to this conclusion.

Zezima, supra.

We are not persuaded the trial commissioner's determination in this case was in error.[2] Therefore, we affirm the Finding and Decision.

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

[2] We find no error in the trial commissioner's decision to deny those corrections in the Motion to Correct he chose to deny. 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). The claimant did not persuade the trial commissioner that this evidence was probative or relevant and the commissioner is not bound to accept the view of the case presented by a litigant.