CASE NO. 6051 CRB-6-15-11 : COMPENSATION REVIEW BOARD
CLAIM NO. 601064240

BARBARA MIKUCKA
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: SEPTEMBER 14, 2016

ST. LUCIAN'S RESIDENCE, INC.
EMPLOYER

and

WORKERS' COMPENSATION TRUST
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

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

The respondents were represented by Neil J. Ambrose, Esq., Letizia, Ambrose & Falls, 667-669 State Street, 2nd Floor, New Haven, CT 06511.

This Petition for Review from the November 10, 2015 Finding Re: Form 36 of Daniel E. Dilzer, the Commissioner acting for the Sixth District, was heard May 20, 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 a **Finding Re: Form 36** ("Finding") issued by Commissioner Daniel Dilzer on November 10, 2015. In that ruling, Commissioner Dilzer granted a Form 36 submitted by the respondent which determined the claimant had reached maximum medical improvement. The claimant appealed arguing the trial commissioner erred by not considering her claim for temporary total disability benefits pursuant to Osterlund v. State, 135 Conn. 498 (1949). In the claimant's view, this issue should have been addressed prior to granting the Form 36. We find the trial commissioner cited legitimate due process concerns for not proceeding in this manner. We also find this case indistinguishable both on the facts and the law from our decision in Rivera v. Patient Care of CT, 6005 CRB-6-15-4 (April 12, 2016), *appeal pending*, AC 39154. We affirmed a similar decision by a trial commissioner in Rivera and as we must extend *stare decisis* to that precedent, affirm the trial commissioner's Finding.

Commissioner Dilzer reached the following factual findings in his decision. He found it was undisputed the claimant sustained compensable bi-lateral shoulder injuries in the course and scope of her employment on May 10, 2011 and that a voluntary agreement accepted compensability of this injury and determined a permanent partial disability rating for each shoulder. He also found the claimant's authorized treating physician, Dr. Robert Carangelo, M.D. had performed one of three surgeries on the claimant's shoulder. On March 19, 2014, the workers' compensation sixth district received a Form 36 from the respondents wherein they assert the claimant reached

maximum medical improvement on February 27, 2014 with respect to her injuries sustained on May 10, 2011 and sought to convert future payments to permanent partial disability payments. Attached to the Form 36 received on March 19, 2014 was the report of Dr. Carangelo wherein he opined that the claimant reached maximum improvement and assigned a 17.5% permanent partial disability rating to her right shoulder and a 12% permanent partial disability rating to her left shoulder. Commissioner Dilzer also noted Dr. Carangelo opined as to the claimant's work capacity, stating "I do not think the patient has a work capacity beyond sedentary or clerical work. I do not think she will be able to return to her previous level of employment." Findings, ¶ 7.

Commissioner Stephen B. Delaney approved the Form 36 effective as of the date of receipt at an informal hearing held on May 23, 2014. The claimant objected and requested a formal hearing resulting in notice of a formal hearing being sent to all parties on February 10, 2015 for a March 11, 2015 hearing. The sole issue noticed for this hearing was "31-296 – Form 36/Discontinuance of Benefits." Findings, ¶ 9. At the formal hearing claimant's counsel did not dispute and offered no medical evidence to suggest the claimant was not at maximum medical improvement. Instead, claimant's counsel sought to pursue a claim that the claimant was vocationally disabled. Commissioner Dilzer found the respondents had no notice that this issue would be litigated. Therefore, claimant's counsel was advised that she could pursue the vocational disability claim at another hearing where the respondents were given notice of the claim, and Commissioner Dilzer scheduled a hearing on this issue for three weeks following the March 11, 2015 hearing.

Based on these facts the trial commissioner concluded the claimant had sustained compensable shoulder injuries and had a permanent partial disability rating of 17.5% to her right shoulder and 12% to her left shoulder. Commissioner Dilzer concluded the opinion of Dr. Carangelo dated February 27, 2014 that the claimant reached maximum medical improvement, and that she possessed a work capacity was credible and persuasive. He also concluded the claimant offered no medical opinion that she had not reached maximum medical improvement with respect to her bi-lateral shoulder injuries. Therefore, Commissioner Dilzer granted the Form 36 finding the claimant at maximum medical improvement as of the day of receipt.

The claimant filed a Motion to Correct. The motion sought to add findings that the issue of vocational disability should have been addressed at the formal hearing and the trial commissioner acted arbitrarily and capriciously in denying evidence on this issue. The trial commissioner denied this motion in its entirety. The claimant also filed a Motion to Submit Additional Evidence which was not ruled on by the trial commissioner. She has pursued this appeal. Her argument is that under the statute the trial commissioner could not rule on a Form 36 establishing her attainment of maximum medical improvement without considering whether she was still temporarily totally disabled.

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). Nonetheless, while we must provide deference to the decision of a trial commissioner, we may reverse such a decision if the commissioner did not properly apply the law or reached a decision unsupported by the evidence on the record. Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

We also note this appellate tribunal is bound by the concept of stare decisis. In Mitchell v. J.B. Retail Inventory Specialists, 3458 CRB-2-96-10 (March 31, 1998) fn. 1, we held "[s]tare decisis, although not an end in itself, serves the important function of preserving stability and certainty in the law. Accordingly, 'a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it. Maltbie, Conn. App. Proc., p. 226.' Herald Publishing Co. v. Bill, 142 Conn. 53, 62 (1955)." See Chambers v. General Dynamics Corp./Electric Boat Division, 4952 CRB-8-05-6 (June 7, 2006), *aff'd,* 283 Conn. 840 (2007). After considering the briefs presented by the litigants and hearing oral argument from counsel, we are not persuaded that the facts herein are sufficiently dissimilar from Rivera, supra, to reach a different outcome.[1] We affirm the Finding.

We do need to address the claimant's Motion to Submit Additional Evidence and we note that this reflects on the merits of this overall appeal. The claimant seeks to

[1] The cases counsel for the claimant rely upon in her brief, Pagan v. Carey Wiping Materials Corp., 144 Conn. App. 413 (2013), *cert. denied*, 310 Conn. 925 (2013); 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) were all fully considered and addressed in our opinion in Rivera v. Patient Care of CT, 6005 CRB-6-15-4 (April 12, 2016).

introduce a September 18, 2015 vocational assessment of the claimant. We note that while presumably this document was available to the claimant prior to the November 10, 2015 Finding, counsel for the claimant did not bring this to the attention of Commissioner Dilzer before he issued his finding; and neither the trial commissioner nor the respondents were apprised of this evidence prior to the claimant filing the aforementioned motion on November 23, 2015. As we pointed out in Gibson v. State/Department of Developmental Services - North Region, 5422 CRB-2-09-2 (January 13, 2010), "[a] party who wishes to submit additional evidence to this board must prove that they had good reasons not to present such evidence at the formal hearing" citing Carney-Bastrzycki v. Hospital for Special Care, 4722 CRB-6-03-9 (September 3, 2004). See also Diaz v. Jaime Pineda, a/k/a Jamie Pineda d/b/a J.P. Landscaping Company, 5244 CRB-7-07-7 (July 8, 2008), *rev'd*, *aff'd on other grounds,* 117 Conn. App. 619 (2009). We have reviewed the hearing transcript and note that at the point in time the claimant argues she was prepared to present a case establishing an Osterlund disability claim, her counsel admitted that they did not have vocational evidence supportive of such a claim. See Transcript pp. 46-47.[2] This appears to be a textbook example of piecemeal litigation. Gibson, supra. We therefore deny the claimant's motion.

Essentially on March 11, 2015 the respondents were prepared to proceed with their arguments in favor of granting the Form 36 and the claimant had not offered notice to the trial commissioner nor to the respondents that she was pursuing a claim that she was entitled to total disability based on an Osterlund theory; nor is it clear she had the

[2] Commissioner Dilzer at that time offered to schedule another formal hearing in three weeks' time to enable the claimant to pursue an Osterlund claim. See Findings, ¶ 11. The claimant did not avail herself of that opportunity.

evidence necessary as of that date to establish a *prima facia* case on such a claim. Under these circumstances the trial commissioner essentially was obligated to follow the precedent in Martinez-McCord v. State/Judicial Branch, 5055 CRB-7-06-2 (February 1, 2007) to rule on the issue which was capable of being addressed at that juncture and bifurcate the issues and address the balance of the issues at a later proceeding. "Bifurcation of trial proceedings lies solely within the discretion of the trial court; (Citations omitted) and appellate review is limited to a determination of whether this discretion has been abused." Swenson v. Sawoska, 18 Conn. App. 597, 601 (1989). Commissioner Dilzer did not abuse his discretion in this matter.[3]

Moreover, the claimant's argument herein appears to contravene our unequivocal precedent in Ghazal v. Cumberland Farms, 5397 CRB-8-08-11 (November 17, 2009). If a new issue or new evidence is considered at a formal hearing, the trial commissioner must offer the opposing party the ability to prepare on the issue and challenge the evidence. Commissioner Dilzer offered the parties this opportunity. The claimant does not persuade us that this decision was erroneous in any respect. Moreover, we believe that had the trial commissioner ruled on the claimant's claim for § 31-307 C.G.S. benefits solely on the record available as of March 11, 2015 the claim may well have failed. The decision of Commissioner Dilzer to bifurcate the proceedings comported with the due process standards delineated in Balkus v. Terry Steam Turbine Co., 167 Conn. 170, 177 (1974) and protected the interests of both parties.

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[3] In Martinez-McCord v. State/Judicial Branch, 5055 CRB-7-06-2 (February 1, 2007) we pointed out that the claimant was essentially arguing she was entitled to an order of mandamus requiring the trial commissioner to rule on the record as of that date. In the present case the claimant did not possess as of the date of the formal hearing the evidence which would have compelled the trial commissioner to order the relief that she sought.

We have long pointed out that the parameters of § 31-298 C.G.S. extend great deference to trial commissioners as to how to manage proceedings before them. See Reid v. Sheri A. Speer d/b/a Speer Enterprises, LLC, 5818 CRB-2-13-1 (January 28, 2014) and Valiante v. Burns Construction Company, 5393 CRB-4-08-11 (October 15, 2009). We find no error in how Commissioner Dilzer handled an issue which was raised at the 11th hour by claimant's counsel, and which could not reasonably have been addressed at that point in time.[4]

The Finding is affirmed.

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

[4] The claimant asserts error from denial of her Motion to Correct. Upon review we find 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).