CASE NO. 6054 CRB-4-15-11 CLAIM NOS. 400014823, 400037369, 400055407	: COMPENSATION REVIEW BOARD
LUZ TEDESCO CLAIMANT-APPELLEE	: WORKERS' COMPENSATION COMMISSION
v.	: SEPTEMBER 14, 2016
CITY OF BRIDGEPORT – BOARD OF EDUCATION EMPLOYER SELF-INSURED	
and	
PMA INSURANCE COMPANY ADMINISTRATOR RESPONDENTS-APPELLANTS	

APPEARANCES:

The claimant was represented by James M. Kearns, Esq., 799 Silver Lane, Trumbull, CT 06611-5301.

The respondents were represented by Marie E. Gallo-Hall, Esq., Montstream & May, LLP, PO Box 1087, Glastonbury, CT 06033-6087.

This Petition for Review from the November 12, 2015 Finding and Decision, of Charles F. Senich the Commissioner acting for the Fourth District, was heard April 29, 2016 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Ernie R. Walker and David W. Schoolcraft.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondent City of Bridgeport has appealed from a November 12, 2015 Finding and Decision by Commissioner Charles Senich awarding benefits to the claimant, Luz Tedesco, for compensable injuries she sustained while employed as a school aide. The gravamen of the respondents' argument is that there was an insufficient foundation of probative evidence to sustain this award, in part due to discrepancies in the claimant's testimony. After reviewing the record we are satisfied that the trial commissioner could reasonably have awarded the claimant benefits for her injuries based on the record presented. We affirm the Finding and Decision.

We will summarize the factual findings which Commissioner Senich relied upon in reaching his decision. The Commissioner noted that this case involved three dates of claimed injuries, February 6, 1995, October 16, 1998 and October 22, 2003, and had been pending before the Commission for twenty years. Commissioner Senich also noted that three issues were under consideration: compensability of the claimant's back condition, medical treatment, and whether the claimant was entitled to permanent partial disability benefits under § 31-308(b) C.G.S. He noted that the claimant began working for the respondent on October 6, 1989 assisting handicapped children. She was born in 1940 and by the time the formal hearing concluded she was 75 years old. The claimant was terminated by the respondent in June of 2006 but she did not return to work after she underwent back surgery on March 26, 2004.

The claimant testified as to her injuries at the formal hearing. She said that she injured her right shoulder, back and neck when she fell in the parking lot of the Anna Baum Skane School. She testified that she is bad with dates and was not sure when she

had fallen. She testified that she had sought treatment with Dr. Kenneth Lipow soon after the fall in the parking lot. The commissioner noted that the employer prepared a First Report of Injury on February 6, 1995 indicating that the claimant fell in the parking lot as a result of slipping on ice/snow injuring her right arm, neck and back. The Employer's First Report of Occupational Injury was completed by the claimant's supervisor, Giovanna DeNitto, and signed by both the claimant and Ms. DeNitto. The respondents filed a Form 43 contesting the claimant's claim for the back and neck related in the February 6, 1995 incident, and a voluntary agreement was approved on February 23, 1999 accepting the claimant's right shoulder injury as a result of that incident.

On May 12, 1999 the claimant filed a Form 30C indicating she has suffered another injury on October 16, 1998 while assisting a child who had fallen on a bus. The form indicated the claimant sustained injuries to her cervical spine, lumbar, shoulders and had headaches. The respondents filed a timely Form 43 contesting liability for this injury. The commissioner noted that the claimant treated on November 17, 1998 with Dr. Elizabeth Van de Berghe-Brennan at the Ahlbin Center and related her injury occurred while assisting a child. He also noted that Dr. Lipow on October 20, 1998 noted the claimant presented at his office and stated on October 16, 1998 she had been injured while attempting to lift a struggling child who had Down's Syndrome. On December 2, 1998 Dr. Lipow issued a report on the claimant's injuries which read as follows.

> In answer to whether her current complaints are directly related to her reported injury of 2/6/95 it is my impression from reviewing my records that Ms. Tedesco presented on 10/22/96 complaining of neck pain, occipital headaches, right upper extremity pain, low back pain and visual changes which she attributed to 2/16/94 when she fell in the snow getting out of her car at work landing on her back and buttocks. I have no record of an injury on 2/16/95 specifically but assuming your (sic) talking about 2/16/94 it would

> be my impression that strains and sprains can occur in the fashion she complains of and presuming there was closed head injury a post concussive syndrome could lead to her complaints of headache and multiple area of spinal and extremity aches and pains.

Findings, ¶ 20.

Commissioner Senich noted that during this time period the claimant also treated with the Orthopaedic Specialty Group, PC, underwent numerous spinal MRI's and sought a second opinion from Dr. Peter Jokl. On May 1, 1995 Dr. Jokl reported as follows: "The history dates back to February 6, 1995 when the patient apparently fell in a parking lot on some ice sustaining an injury to her right shoulder, neck, arm and back." Findings, ¶ 24. The claimant also treated on February 9, 1995 with Dr. Eric Katz, who noted as follows.

> Diagnosis: 1. Hyperextension injury of the cervical spine; 2. Rule out compression fracture, C5 and C6; 3. Grade 2 separation, acromial clavicular joint, right shoulder; 4. Hyperextension injury of lumbosacral spine. This patient states that on 2/6/95, while walking in the parking lot of the Board of Education where she works, she slipped on some ice and landed on her back.

Findings, ¶ 25.

The Commissioner also noted the claimant treated with Dr. Michael Brennan who reported on February 8, 1999 as follows. "Ms. Tedesco, who was injured in 10/98, continues to complain of pain. Pain continues to be problematic in the neck with associated headaches, diffuse back pain, shoulder pain, et cetera. . . I believe her pain is wholly due to her work related injury." Findings, ¶ 26.

The respondents had their expert witness, Dr. Tushar Patel, examine the claimant on July 15, 1999. Dr. Patel opined that there was no objective evidence of a new injury from the October 1998 incident besides an additional 2% permanent partial impairment to

the claimant's lumbar spine. He found no evidence of permanent partial impairment to the claimant's shoulder or the rest of her back. The claimant was directed by Dr. Perry Shear to undergo an MRI on her back on March 17, 2002 which indicated a disc herniation. On June 25, 2002 Dr. Shear and Dr. Mark Blechner performed fusion surgery to the claimant's spine which included implementation of a rod in the claimant's back. The claimant returned to work after this surgery.

The commissioner noted the claimant sustained a third injury on October 22, 2003 when she was walking a child and the child fell down and pulled the claimant down. The claimant stated that she struck her knees and hit her back against a metal railing. The claimant submitted a form after the incident which stated, "I was walking a child, the child fell and pulled me down with her. She weighs about 80 pounds. I hurt my right side, my thumb, knee and back, also my left leg hurts." Findings, ¶ 32. In March 2004 the claimant underwent surgery at Bridgeport Hospital for the removal of hardware in her back and refusion with instrumentation. During the surgery she sustained a large epidural tear, needed to be intubated and required numerous days of critical care. The claimant testified that she has continued to experience symptoms in her back and has been totally disabled since her back surgery in 2004; although in August 2004 Dr. Michael Saffir suggested that in regards to her back she had a sedentary work capacity.

Various physicians opined prior to the formal hearing as to the causation of the claimant's current medical condition and the extent of her disability. Dr. Blechner, the claimant's treater, opined that the claimant sustained a back injury as a result of her fall on February 6, 1995. Dr. Blechner opined that the subsequent surgeries were a result of the February 6, 1995 work related injury and the claimant's symptoms were directly and

causally related to the claimant's workers' compensation injury. He further testified that the proximate cause of the 2002 surgery was the original injury of February 6, 1995. Dr. Blechner testified on April 26, 2010 that the claimant would never return to work and rated the claimant with a 60% permanent impairment to the claimant's back. The respondents had the claimant examined by Dr. Glenn Taylor on July 10, 2013. Dr. Taylor reported that it was unlikely that the claimant was capable of gainful employment and rated the claimant with a 37% permanent partial impairment of the back. Dr. Taylor further testified that the claimant was likely currently totally disabled, and unlikely to return to work. The claimant sought an additional opinion on September 24, 2014 from Dr. John Awad. Dr. Awad opined as follows:

> In regards to causality, certainly this is a known sequelae of a lumbar fusion, adjacent degeneration and therefore I do feel that the current symptomology is directly related to her work related injury and the need for future surgery as well as future treatment. . . . She is totally and permanently disabled.

Findings, ¶ 42.

Based on these facts the trial commissioner concluded the claimant sustained a back injury while in the course of employment for the respondent on February 6, 1995 and that the claimant was fully credible and persuasive. He found the claimant has a problem recollecting dates. Commissioner Senich determined that the testimony, opinions and reports of Dr. Blechner were fully credible and persuasive; and adopted Dr. Blechner's opinion that the claimant's symptoms were directly and causally related to the claimant's workers' compensation injury and that her subsequent surgeries were a result of the February 6, 1995 work related injury. The Commissioner also adopted Dr. Blechner's opinion as to the claimant's permanent disability rating and her present work

capacity. Commissioner Senich also found the opinions of Dr. Awad, who concurred with Dr. Blechner's opinions, fully credible and persuasive. The commissioner found the subsequent injuries of October 16, 1998 and October 22, 2003 were minor aggravations of the initial 1995 injury. Commissioner Senich did not find the respondents' expert witness, Dr. Taylor, to be fully credible and persuasive. He also noted that Dr. Lipow was "inaccurate and inconsistent as to the date of the claimant's first injury, as to when the claimant fell in the parking lot at work." Conclusion, ¶ N.

The respondents filed a Motion to Correct seeking numerous elaborations on existing findings of fact, and a number of new findings supportive of the respondents' position the claimant's medical condition was not due to a compensable injury. The trial commissioner denied this motion in its entirety. The respondents then filed a Motion for Articulation seeking elaboration from the trial commissioner as to this basis for various conclusions he reached. The trial commissioner denied this motion as well. The respondents have pursued this appeal.

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).

The respondents' Reasons of Appeal cite three grounds for taking this appeal.[1] They believe the trial commissioner's conclusions, particularly on the issue of causation of the claimant's surgery and subsequent disability, were unreasonable based on the subordinate facts on the record. The respondents also argue that it was error for the trial commissioner to have denied their Motion to Correct. Finally, they argue it was error for the trial commissioner to deny their Motion for Articulation. We find none of these averments of error persuasive.

The respondents cite DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132 (2009) and Jones v. Connecticut Children's Medical Center Faculty Practice Plan, 131 Conn. App. 415 (2011) as supporting their argument that the medical evidence on the record was too conclusory and speculative to support the trial commissioner's conclusions. We note, however, 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.) Moreover, we find that on a

[1] The claimant has moved to dismiss this appeal arguing that the respondents' Reasons of Appeal were filed in an untimely basis. As we can identify no prejudice to the claimant in the respondents' prosecution of this appeal we deny the Motion to Dismiss.

factual basis the cases relied upon by the respondents may be distinguished from the circumstances herein.

In DiNuzzo we note that the expert witness relied upon by the trial commissioner relied upon a series of extremely attenuated inferences, including the inference the claimant actually sustained a fatal heart attack which the claimant's evidence did not establish. Id., 147-148. In the present case there is no dispute the claimant sustained a number of traumatic injuries while in the respondent's employ. The necessary inference to link the claimant's condition and need for medical treatment to these acknowledged events is considerably less attenuated herein. As for the Jones case; the claimant's claim for benefits in that case was based on her claim that she had sustained a traumatic work related injury, which was not substantiated by any contemporaneous medical records. Id., 417. The trial commissioner found "there was no persuasive, objective evidence to show that the plaintiff suffered from any soft tissue, skeletal or neurological issues." Id., 426. As a result "the commissioner found that neither the plaintiff nor Wade [the claimant's expert] was credible with respect to the events of the motor vehicle accident." Id., 429-430. To reiterate, there is no dispute in the present case that the claimant sustained traumatic work related injuries.

In the present case the trial commissioner specifically found the claimant to be a credible witness. Conclusion, ¶ C. Having viewed her live testimony; that was his prerogative. See Burton v. Mottolese, 267 Conn. 1, 40 (2003) and Tarantino v. Sears Roebuck & Co., 5939 CRB-4-14-5 (April 13, 2015). The respondents argue that the claimant is a poor historian and may have difficulty remembering dates. The trial commissioner clearly acknowledged this on the record and determined, notwithstanding

this issue, that her testimony was reliable. See Conclusion, ¶ D. 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 respondents argue that the commissioner's decision cites the December 2, 1998 causation report of Dr. Lipow, Findings, ¶ 20, and that the language of that report is confusing as to the date of injury. While that may be true, any confusion on the part of Dr. Lipow regarding the date of injury cannot be said to have affected the trial commissioner's decision. The commissioner specifically noted that Dr. Lipow's recited history was not reliable. Conclusion, ¶ N. As such, even if the commissioner did place weight on Dr. Lipow's opinion it cannot be argued he was misled by conflicting dates set out in the 1998 report. The commissioner noted that February 6, 1995 was the date of the fall that was used on the employer's first report injury. Respondents' Exhibit 1; Findings, ¶ 10. That the fall on ice occurred on February 6, 1995 was also clearly stated by Dr. Jokl as early as May 1, 1995. Findings, ¶ 24. February 6, 1995 was also the date of accident the respondents used when they issued the voluntary agreement.

The claimant also points to numerous findings as to back pain and disc injury in Dr. Lipow's report of 1996 and 1997. See Respondents' Exhibit 25. We believe this supports the Commissioner's ultimate conclusion.

In addition, Commissioner Senich found Dr. Blechner "fully credible and persuasive." Conclusion, ¶ F. Dr. Blechner opined on November 20, 2003 that "[a]ll of her prior symptoms and physical exam findings as well as radiographic images are consistent with her presentation and with the mechanism of injuries that she sustained at work." Respondents' Exhibit 9. The witness did confirm this opinion at his September 10, 2010 deposition. Exhibit 27, p. 73. We note that Dr. Blechner performed surgery on the claimant's spine in 2002. As such, this case is similar to Burns v. Southbury, 5608 CRB-5-10-11 (November 2, 2011) where the trial commissioner relied on the opinion of the claimant's surgeon as to whether a compensable injury was responsible for their current medical condition.

We also note that the trial commissioner found Dr. Awad, who most recently examined the claimant, fully credible and persuasive. Conclusion, ¶ K. This witness found the claimant's condition was due to her work injuries. Conclusion, ¶ L. Given the number of medical experts who opined in a manner supportive of finding the claimant's current condition compensable, it is clear the trial commissioner could look beyond the alleged individual limitations in each expert's opinion when formulating his conclusions and orders in this case.

We note that the respondents have cited Estate of Haburey v. Winchester, 150 Conn. App. 699 (2014), *cert. denied*, 312 Conn. 922 (2014) in support of their appeal. This precedent does not argue in favor of overturning the Finding and Decision. In

Haburey the respondents 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. The test for an appellate body is whether there is "sufficient support" in the record to uphold the decision of the fact finder. Id. We discussed this test at some length in Nelson v. Revera, Inc., 5977 CRB-5-15-1 (September 21, 2015). In Nelson we reviewed the Supreme Court precedent in Marandino v. Prometheus Pharmacy, 294 Conn. 564 (2010) and pointed out it was a trial commissioner's prerogative to "consider medical evidence *along with all other evidence* to determine whether an injury is related to the employment." Id., 595 (Emphasis in original.) The trial commissioner herein applied the proper standard of review delineated in Marandino and could reasonably have reached the conclusions that he reached.

We turn to the other averments of error. The respondents argue that the trial commissioner erred in denying their Motion to Correct. The determination on appeal is whether the denial of this Motion was arbitrary or capricious. Vitti v. Richards Conditioning Corp., 5247 CRB-7-07-7 (August 21, 2008). We conclude the trial commissioner did not find those corrections involved probative or credible evidence. Beedle v. Don Oliver Home Improvement, 4491 CRB-3-02-2 (February 28, 2003). A trial commissioner is not obligated to adopt a litigant's view of the evidence presented on the record. 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).

We also find no error from the trial commissioner's denial of the respondents' Motion for Articulation. The central issue in this case was determining whether the claimant's compensable injuries were responsible for her current medical condition and her subsequent disability and need for treatment. As we pointed out in Haines v. Turbine Technologies, Inc., 5932 CRB-6-14-4 (March 9, 2015) issues related to causation are generally straightforward and not issues "where the trial court's decision contains some ambiguity or deficiency reasonably susceptible of clarification." See Biehn v. Bridgeport, 5232 CRB-4-07-6 (September 11, 2008), citing Alliance Partners, Inc. v. Oxford Health Plans, Inc., 263 Conn. 191, 204 (2003). We do not believe the trial commissioner was obligated to grant an articulation of this decision.

The respondents believe that they presented a substantial challenge to the claimant's medical evidence and this should have been credited by the trier of fact. 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 respondents' witnesses and evidence. In light of the "totality of the evidence" standard enunciated in Marandino, supra, we do not find that conclusion unreasonable.

Therefore, we affirm the Finding and Decision.

Commissioners Nancy E. Salerno and David W. Schoolcraft concur in this opinion.