CASE NO. 6078 CRB-8-16-3 : COMPENSATION REVIEW BOARD
CLAIM NO. 800139994

FRINET R. PALACIOS
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

: FEBRUARY 23, 2017

DUAL-LITE
EMPLOYER

and

LIBERTY MUTUAL GROUP
INSURER
RESPONDENTS-APPELLANTS

and

DYMAX CORPORATION
EMPLOYER

and

CHUBB & SON
TRAVELERS INDEMNITY COMPANY
INSURERS
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Barbara Collins, Esq., 557 Prospect Avenue, Hartford, CT 06105.

The respondents Dual-Lite and Liberty Mutual Group were represented by Maribeth M. McGloin, Esq., Williams Moran, LLC, PO Box 550, Fairfield, CT 06430.

The respondents Dymax Corporation and Chubb & Son were represented by Philip T. Markuszka, Esq., Solimene & Secondo, LLP, 1501 East Main Street, Suite 204, Meriden, CT 06450.

The respondents Dymax Corporation and Travelers Indemnity Company were represented by Timothy G. Zych, Esq., Law Offices of Cynthia M. Garraty, 2319 Whitney Avenue, Suite 4C, Hamden, CT 06518. However,

they did not file a brief and waived oral argument as the issues on appeal did not directly involve Travelers.

This Petition for Review[1] from the February 23, 2016 Finding and Award of Peter C. Mlynarczyk, the Commissioner acting for the Eighth District, was heard September 23, 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 respondents Dual-Lite and its insurance carrier Liberty Mutual have appealed from a Finding and Award wherein the trial commissioner, Peter Mlynarczyk, determined that the employer who employed the claimant at the time of her initial compensable thumb injury was responsible for her upcoming thumb surgery and related indemnity benefits. The appellants have appealed arguing that due to the claimant's repetitive trauma injury a subsequent employer should be deemed the responsible party to pay for the claimant's surgery and related benefits. We have reviewed the medical evidence cited in the Finding and Award by the trial commissioner and the relevant legal precedent on these issues. We conclude the commissioner reached a reasonable determination from the evidence presented and therefore, we affirm the Finding and Award.

Commissioner Mlynarczyk reached the following factual findings at the conclusion of the formal hearing. He noted the claimant had an accepted March 17, 2003 left thumb interphalangeal joint repetitive trauma injury with Dual-Lite and Liberty Mutual Group. He further noted the claimant argued that she now needed surgery on that

[1] We note that an extension of time was granted during the pendency of this appeal.

thumb and was asserting the surgery should be deemed compensable. The claimant testified that she was presently employed by Dymax Corporation and had worked there for ten years. She said she was employed to assemble light bulbs and to assemble the light bulbs she puts wires, brackets, screws, nuts, and washers, on the bulbs. The tools used are wrenches, battery-operated power drivers for screws and nuts, and Phillips and flat-head screwdrivers. She testified that she had worked at Dual-Lite prior to working at Dymax and that work as an assembler of wire harnesses included a great deal of crimping. She also used screwdrivers and power drivers at that job. Ms. Palacios explained the circumstances of her 2003 left thumb injury. She had been using a battery-operated screwdriver and it was very heavy. She started having a lot of pain and developed a lump, which Dr. Stanley Foster removed surgically. She lost a couple of weeks of work, returned to light duty for about one month, and then returned to full duty.

The claimant returned to Dual-Lite after her 2003 surgery but reported continued issues with her hand. After she felt something "snap" she went to Dr. Foster for additional treatment. She also said when she transitioned from Dual-Lite to Dymax, there was not a time when she started getting pain in her left hand because she never lost the discomfort from working at Dual-Lite. She explained her lapses in treatment as due to high insurance deductibles, and noted she had not treated with Dr. Foster since he had recommended thumb surgery which she was waiting to have approved. She testified to left hand pain based on whether she went to work on a given day, and said her pain in 2012 was the same as in 2009.

Dr. Foster, the claimant's treating physician, had his medical reports introduced as evidence. In his report dated March 29, 2009, he stated that the claimant continues to

have problems with her left basilar joint, metatarsophalangeal joint and interphalangeal joint. He continued, "[t]his is directly related to the patient's original problem. She has had no other injuries to the left thumb other than what this workman's compensation injury is all about. She most likely will continue to have problems with that left thumb the rest of her life." Findings, ¶ 3a. On September 20, 2012, he referenced the fact that the claimant has worked for many years using her hands to pick up parts and stated that she needs left basilar joint reconstruction. Dr. Foster ascribed causation of the claimant's present thumb condition to her original injury at Dual-Lite in a April 3, 2014 letter to counsel; but noted that her repetitive work after the injury has aggravated the condition and made it worse with degeneration over time. He ascribed 70% of the claimant's present condition to her original injury and 30% to her subsequent employer and degeneration. Findings, ¶ 3c.

The trial commissioner also noted the deposition testimony of Duffield Ashmead, M.D. who had examined the claimant on behalf of Dymax and one of their insurers, Chubb & Son. After examining the claimant, his diagnosis was osteoarthritis of the left and right hands with principal involvement at carpometacarpal and interphalangeal joint levels. He opined that once the degenerative process is set in motion, the role of substantive injurious exposure becomes much less relevant and the degenerative process takes on a life of its own. The claimant's subsequent work activities did not play a significant role in her deteriorating condition. He noted a diagnosis date for the claimant of February 26, 2009, and said there could not be apportionment after that date. The trial commissioner noted Dr. Foster and Dr. Ashmead agree that the claimant is in need of a left thumb carpometacarpal joint arthroplasty surgery as a result of her work activities.

Based on these findings Commissioner Mlynarczyk concluded the claimant's need for thumb surgery arose out of her employment with Dual-Lite. He determined her joint arthritis would have progressed whether or not she had been working at Dymax. Any worsening of her condition during her years working at Dymax was attributable to natural progression of her earlier injury. He directed Dual-Lite and Liberty Mutual to authorize thumb surgery for the claimant and to pay any associated indemnity benefits. The appellants filed a Motion to Correct seeking to add findings supportive of finding Dymax liable for the claimant's surgery based on additional factual findings and the citation of the precedent in Hatt v. Burlington Coat Factory, 263 Conn. 279 (2003). The trial commissioner denied this motion in its entirety and the appellants pursued this appeal. They argue that the trial commissioner drew unreasonable inferences from the medical evidence and erred by not finding that Hatt, supra, applied to the instant case.

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 appellants argue that the conclusion reached in this case differs from some of the findings and evidence cited by the trial commissioner in the Finding and Award, in particular Findings, ¶ 3c.[2] They argue that this inconsistency renders the decision invalid. We note that trial commissioners often cite all the relevant evidence presented at a formal hearing in their findings, and some of these findings often prove to be superfluous to the ultimate conclusion reached. Appellate courts have long disfavored this approach, see Grabowski v. Miskell, 97 Conn. 76, 78 (1921). That is the approach taken by the trial commissioner in this matter, but we have reviewed the medical evidence presented and find that both experts concurred with the conclusion the commissioner reached herein.

After reviewing the totality of the medical evidence we conclude that it can be reconciled with the relief ordered by the trial commissioner. In particular we look to Claimant's Exhibit B, an August 12, 2015 letter from Dr. Foster to claimant's counsel. This letter was issued subsequent to the July 23, 2015 deposition of Dr. Ashmead wherein Dr. Ashmead ascribed causation of the claimant's thumb condition solely to degenerative changes subsequent to her original compensable injury.[3] Dr. Foster's

[2] While the appellants argue Findings, ¶ 4d and ¶ 5 were inconsistent with the ultimate conclusion, see Appellants' Brief p. 9, we do not agree. Findings, ¶ 4d summarized evidence presented by Dr. Ashmead which did not find the claimant's condition was caused by her post Dual-Lite employment. Findings, ¶ 5 stated both witnesses concurred on the claimant's need for thumb surgery. Neither finding is inconsistent with the relief ordered by the trial commissioner.

[3] See in particular Respondents' Exhibit 2, pp. 11-12 and pp. 20-21.

August 12, 2015 letter states unequivocally "[i]n essence, I agree with Dr. Ashmead's findings and statements about this patient's basilar joint arthritis."

As a result, the witness clarified the opinion expressed in Findings, ¶ 3c. Had the trial commissioner relied on the previous 2014 opinion of Dr. Foster in the absence of finding Dr. Ashmead unpersuasive we would have a significant inconsistency, see Tarantino v. Sears Roebuck & Co., 5939 CRB-4-14-5 (April 13, 2015) and Risola v. Hoffman Fuel Company of Danbury, 5120 CRB-7-06-8 (July 20, 2007).[4] However, as Claimant's Exhibit B reconciled the opinions of the two medical witnesses and was consistent with the relief ordered in this case, we find no error.

The appellants also argue that there was no medical evidence presented on the record ascribing causation of the claimant's thumb injuries to a date prior to 2009, when she had commenced working at Dymax. As the appellants view the record the requisite grounds to assign liability to the prior employer do not exist. We are not persuaded. We find that Dr. Foster's March 29, 2009 letter to Liberty Mutual cites a date of injury of 3/27/03, offers a narrative of her ongoing condition, and states unequivocally "[t]his is directly related to the patient's original problem." Claimant's Exhibit A-18. The trial commissioner so found.

Having reviewed the factual record herein we turn to the legal standards which the trial commissioner was obligated to apply. It is black letter law under Hatt, supra,

[4] We note that the Appellants' brief cites evidence presented by the medical witnesses on the record supportive of its argument that the subsequent employer, Dymax, is the responsible party herein. It is apparent that the trial commissioner, however, chose not to rely on this evidence. For the reasons stated in Williams v. Bantam Supply Co. Inc., 5132 CRB-5-06-9 (August 30, 2007) we find the commissioner was not obligated to do so. "We 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). Since Dr. Spero clearly identified the 2000 injury as the 'substantial factor' causing the claimant's need for surgery, Dixon v. United Illuminating Co., 57 Conn. App. 51, 60 (2000), we find no error." Id.

that when there has been two compensable injuries that when the later injury creates a disability which is "materially and substantially greater" than the prior disability, that § 31-349(a) C.G.S. places the burden on the later employer and insurer. See Wilson v. Maefair Health Care Centers, 5773 CRB-4-12-8 (August 8, 2013), *aff'd*, 155 Conn. App. 345(2015). In Wilson, supra, we cited this standard enunciated in Neville v. Baran Institute of Technology, 5383 CRB-8-08-10 (September 24, 2009).

> The "plain meaning" of the statute governing second injuries is that for the employer or insurer on the risk at the time of the second injury to become solely liable, the resulting disability must be "permanent" and "materially and substantially greater" than the disability resulting from the initial injury. As a result, we cannot impose the terms of Hatt against the party responsible for a second injury if the second injury results in only temporary disability. See Hatt, supra, 307-309. Since the statute is written in conjunctive fashion, in order to apply Hatt we must also find, even if the additional disability is permanent, that the claimant's resulting disability is "materially and substantially greater" than the disability attributable to the second injury.

Id.

We find that the facts in this case are substantially congruent to the fact pattern in Neville, supra. In Neville the claimant sustained an initial compensable cervical spine injury and then a subsequent injury. The medical evidence on the record indicated that the second injury resulted in a temporary aggravation of the claimant's condition. The trial commissioner found the insurer on the risk for the subsequent injury responsible for the claimant's cervical spine condition. We reversed that decision on appeal as the medical evidence did not establish the claimant's condition had been made materially and substantially worse as a result of the subsequent injury.

In the present case the trial commissioner cited evidence from Dr. Ashmead that once the claimant sustained her initial injury she would have sustained additional

disability to her thumb even in the absence of any employment. We find that this is sufficiently similar to the facts in Neville to support the result herein. If we cannot apply Hatt to cases where a second injury yielded only temporary additional disability, we cannot extend that case to cover circumstances where any additional exposure to a trauma had no impact on the continued development of a claimant's disability. This reasoning also explains that when Dr. Ashmead's deposition is read in conjunction with Dr. Foster's March 29, 2009 letter that a reasonable person could find a link of proximate cause between the claimant's 2003 injury and her current condition. See Madden v. Danbury Hospital, 5745 CRB-7-12-4 (April 22, 2013), citing Sapko v. State, 305 Conn. 360 (2012). For those reasons we find the appellant's argument that the relief in this case is unsupported by the evidence unpersuasive.

After reviewing the totality of the record we believe a reasonable fact finder could find Dual-Lite liable for the claimant's thumb surgery. As an appellate panel, we cannot revisit this decision.[5]

We affirm the Finding and Award.

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

[5] We affirm the trial commissioner's denial of the appellants' Motion to Correct. 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).