CASE NO. 6083 CRB-6-16-3 : COMPENSATION REVIEW BOARD
CLAIM NO. 601075280

PETER J. DWYER : WORKERS' COMPENSATION
CLAIMANT-APPELLANT COMMISSION

v. : MARCH 23, 2017

INSPERITY SERVICES, L.P.
EMPLOYER

and

ACE
INSURER

and

SEDGWICK CMS, SERVICES
THIRD-PARTY ADMINISTRATOR
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was not represented by counsel.

The respondents were represented Brian L. Smith, Esq., Pomeranz, Drayton & Stabnick, 95 Glastonbury Boulevard, Suite 216, Glastonbury, CT 06033.

This Petition for Review from the March 10, 2016 Finding & Award/Dismissal of Daniel E. Dilzer, the Commissioner acting for the Sixth District, was heard on September 23, 2016 before a Compensation Review Board panel consisting of Chairman John A. Mastropietro and Commissioners Ernie R. Walker and Nancy E. Salerno.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has petitioned for review from the March 10, 2016 Finding & Award/Dismissal of Daniel E. Dilzer, the Commissioner acting for the Sixth District. We find no error and accordingly affirm the decision of the trial commissioner.[1]

In his Finding & Award/Dismissal, the trial commissioner identified the following three issues for determination: 1) whether the claimant has reached maximum medical improvement; 2) if the claimant has reached maximum medical improvement, whether the respondents have paid all permanent partial disability benefits pursuant to § 31-308 C.G.S.; and, 3) if all permanent partial disability payments pursuant to § 31-308 C.G.S. have been made, whether the claimant is entitled to any additional benefits pursuant to § 31-308a C.G.S.[2] The trier made the following findings which are pertinent to our

[1] We note that three Motions for Extension of Time were granted during the pendency of this appeal.

[2] Section 31-308(a) C.G.S. (Rev. to 2013) states: "If any injury for which compensation is provided under the provisions of this chapter results in partial incapacity, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of the difference between the wages currently earned by an employee in a position comparable to the position held by the injured employee before his injury, after such wages have been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act in accordance with section 31-310, and the amount he is able to earn after the injury, after such amount has been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act in accordance with section 31-310, except that when (1) the physician or the advanced practice registered nurse attending an injured employee certifies that the employee is unable to perform his usual work but is able to perform other work, (2) the employee is ready and willing to perform other work in the same locality and (3) no other work is available, the employee shall be paid his full weekly compensation subject to the provisions of this section. Compensation paid under this subsection shall not be more than one hundred per cent, raised to the next even dollar, of the average weekly earnings of production and related workers in manufacturing in the state, as determined in accordance with the provisions of section 31-309, and shall continue during the period of partial incapacity, but no longer than five hundred twenty weeks. If the employer procures employment for an injured employee that is suitable to his capacity, the wages offered in such employment shall be taken as the earning capacity of the injured employee during the period of the employment.
(b) With respect to the following injuries, the compensation, in addition to the usual compensation for total incapacity but in lieu of all other payments for compensation, shall be seventy-five per cent of the average weekly earnings of the injured employee, calculated pursuant to section 31-310, after such earnings have

review. The claimant, who is a high-school graduate, also graduated from the Culinary Institute of America and holds an Associate's Degree in Occupational Studies as well as a degree in Organizational Leadership. The claimant was employed by the respondent employer as a culinary instructor at the Naval Station in Norfolk. As part of his job responsibilities, he was required to periodically board ships and prepare meals for the ship's crew.

It is undisputed that on or about November 12, 2013, the claimant sustained an injury arising out of and in the course of his employment when he slipped and fell on a

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been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act made from such employee's total wages received during the period of calculation of the employee's average weekly wage pursuant to said section 31-310, but in no case more than one hundred per cent, raised to the next even dollar, of the average weekly earnings of production and related workers in manufacturing in the state, as determined in accordance with the provisions of section 31-309, or less than fifty dollars weekly. All of the following injuries include the loss of the member or organ and the complete and permanent loss of use of the member or organ referred to.…"

Section 31-308a C.G.S. (Rev. to 2013) states: "(a) In addition to the compensation benefits provided by section 31-308 for specific loss of a member or use of the function of a member of the body, or any personal injury covered by this chapter, the commissioner, after such payments provided by said section 31-308 have been paid for the period set forth in said section, may award additional compensation benefits for such partial permanent disability equal to seventy-five per cent of the difference between the wages currently earned by an employee in a position comparable to the position held by such injured employee prior to his injury, after such wages have been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act in accordance with section 31-310, and the weekly amount which such employee will probably be able to earn thereafter, after such amount has been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act in accordance with section 31-310, to be determined by the commissioner based upon the nature and extent of the injury, the training, education and experience of the employee, the availability of work for persons with such physical condition and at the employee's age, but not more than one hundred per cent, raised to the next even dollar, of the average weekly earnings of production and related workers in manufacturing in the state, as determined in accordance with the provisions of section 31-309. If evidence of exact loss of earnings is not available, such loss may be computed from the proportionate loss of physical ability or earning power caused by the injury. The duration of such additional compensation shall be determined upon a similar basis by the commissioner, but in no event shall the duration of such additional compensation exceed the lesser of (1) the duration of the employee's permanent partial disability benefits, or (2) five hundred twenty weeks. Additional benefits provided under this section shall be available only to employees who are willing and able to perform work in this state.

(b) Notwithstanding the provisions of subsection (a) of this section, additional benefits provided under this section shall be available only when the nature of the injury and its effect on the earning capacity of an employee warrant additional compensation."

freshly-mopped floor. The respondents provided medical treatment and indemnity benefits as a result of the claimant's injuries. On May 4, 2015, the claimant's treating physician, Ernest Squatrito, D.O., opined in an e-mail to claimant's counsel that the claimant had not reached maximum medical improvement. However, the doctor assigned to the claimant an eight-percent (8%) permanent partial disability rating to the claimant's cervical spine and an eight-percent (8%) permanent partial disability rating to the claimant's thoracic (lumbar) spine. At trial, the claimant testified that he did not feel that he had reached maximum medical improvement.

On December 2, 2014, the claimant underwent a Respondents' Medical Examination with Steven Selden, M.D. Dr. Selden indicated that he had found no structural abnormalities in the claimant's neck, back or left shoulder which would require additional treatment. He assigned a five-percent (5%) permanent partial disability rating to the claimant's thoracic spine and a five-percent (5%) permanent partial disability rating to the claimant's upper left extremity along with a permanent twenty-five (25) pound lifting restriction based solely on the claimant's subjective complaints.

On May 26, 2015, the respondents filed a Form 36 with the Workers' Compensation Commission ["Commission"] requesting that the claimant's indemnity benefits be converted to permanent partial disability benefits effective December 2, 2014. On December 11, 2015, the respondents filed another Form 36 seeking to establish that all permanent partial disability benefits pursuant to § 31-308(b) C.G.S. and all post-specific benefits pursuant to § 31-308a C.G.S. were paid. At trial, the respondents

introduced evidence demonstrating that the claimant's compensation rate was $718.85 and he has been paid continuously from December 30, 2013 through January 8, 2016.

Having heard the foregoing, the trial commissioner found persuasive Dr. Selden's opinion that the claimant had sustained a five-percent (5%) permanent partial disability rating to his lumbar spine and a five-percent (5%) permanent partial disability rating to his non-master arm as a result of the injuries sustained on November 12, 2013 while in the course and scope of his employment. The trier granted the respondents' Form 36 filed on May 26, 2015 effective as of the date of receipt converting the claimant's indemnity benefits to permanent partial disability benefits. As a result of Dr. Selden's five-percent (5%) ratings to the claimant's lumbar/thoracic spine and non-master arm, the trier concluded that the claimant was entitled to 28.4 weeks of permanent partial disability benefits continuously through December 10, 2015.

The trial commissioner denied the Form 36 received by the Commission on December 11, 2015 seeking to establish that all permanent partial disability benefits and § 31-308a benefits had been paid. Instead, the trier granted the claimant's request for benefits pursuant to § 31-308a C.G.S., concluding that based upon the totality of the circumstances, the claimant was entitled to an additional 28.4 weeks (the maximum period) of weekly benefits commencing on December 12, 2015 and ending on June 26, 2016 at the base compensation rate of $718.85. The trial commissioner waived the job search requirement.

The claimant filed a timely appeal from the trial commissioner's Finding & Award/Dismissal and, following a request for an extension of time which was granted,

hand-delivered to the Compensation Review Board on April 13, 2016 a package of materials purporting to be a compilation of the claimant's Reasons of Appeal, a Motion to Correct the Finding, and a Motion to Submit Additional Evidence. Our review of these documents indicates that the claimant was seeking: 1) authorization for additional medical treatment with Dr. Squatrito and two other physicians; 2) reimbursement for out-of-pocket medical expenses; 3) mileage for prior doctors' appointments; 4) payment for a membership in a health center; and 5) a prescription for Lyrica. In addition, the claimant challenged the trial commissioner's reliance on Dr. Selden's opinion in granting the Form 36 and discussed his allegedly related claim for a psychiatric injury. Finally, the claimant indicated that he had secured the assistance of the Office of the Healthcare Advocate in order to obtain additional medical reports and address some outstanding tax credit issues. The trial commissioner denied the Motion to Correct in its entirety.

On April 18, 2016, the claimant e-mailed to the Compensation Review Board a second packet of materials. These documents primarily reflect the claimant's unhappiness with the workers' compensation system in general as well as the actions of the respondents' in defending the claim. The claimant also included notes from two psychiatric providers along with an e-mail message dated May 4, 2015 from Dr. Squatrito wherein the doctor discussed his disagreement with the findings in Dr. Selden's RME. In addition, the packet contained copies of e-mailed correspondence concerning allegedly late and/or missing benefits checks.

Nothing further was received from the claimant until July 26, 2016, when he requested a ten-day extension for filing his brief, which was granted. A third filing was

hand-delivered to the Compensation Review Board on August 5, 2016 wherein the claimant again discussed *inter alia* his unhappiness with the workers' compensation system generally, the perceived shortcomings of the representation by his former attorney, and the various medical and economic difficulties he has experienced since sustaining his workers' compensation injury. The claimant also reiterated the demands contained in his initial correspondence filed with this board on April 13, 2016.

On September 16, 2016, the respondents filed an objection to the claimant's request to file additional evidence along with their brief.[3] In their objection to the claimant's motion, the respondents contend that the claimant has failed to comply with the statutory requirements for submitting additional evidence pursuant to Admin. Reg. § 31-301-9 C.G.S.[4] They also point out that at the formal hearing, the claimant was given the opportunity to submit additional evidence but declined to do so.

With regard to the merits of the appeal, the respondents argue that it was well within the trier's discretion to adopt the opinion of Dr. Selden and the claimant is merely attempting to re-try his case before the Compensation Review Board. The respondents also contend that the trial commissioner's denial of the claimant's Motion to Correct did

[3] On September 2, 2016, the respondents filed a request for an extension of time to file their brief along with a Motion to Dismiss predicated on the fact that they had not yet received the claimant's brief. Given that the claimant properly requested an extension of time to file his brief, said brief was forwarded to the respondents upon receipt by the board, the board granted the respondents' request for an extension to file their brief, and the respondents' did not discuss the motion at oral argument, we deem the Motion to Dismiss moot and/or abandoned.

[4] Admin. Reg. § 31-301-9 C.G.S. (Rev. to 2013) states: "If any party to an appeal shall allege that additional evidence or testimony is material and that there were good reasons for failure to present it in the proceedings before the commissioner, he shall by written motion request an opportunity to present such evidence or testimony to the compensation review division, indicating in such motion the nature of such evidence or testimony, the basis of the claim of materiality, and the reasons why it was not presented in the proceedings before the commissioner. The compensation review division may act on such motion with or without a hearing, and if justice so requires may order a certified copy of the evidence for the use of the employer, the employee or both, and such certified copy shall be made a part of the record on such appeal."

not constitute error as the motion primarily represented an attempt to introduce additional materials into the record following the close of evidence. Moreover, the issues addressed in the claimant's brief were not within the scope of the formal hearing, which was limited to compensability of the original injury, approval of the Form(s) 36, and medical treatment. As such, the compensability of the claimed psychiatric injury, payment of and reimbursement for medical bills and other expenditures, and § 31-308a C.G.S. benefits were neither listed as issues on the hearing notice nor added at any time during the formal hearing.[5] Finally, the respondents deny that the claimant was deprived of medical treatment or prevented from selecting his own treating physician, noting that the records in evidence and the claimant's own testimony indicate that he treated with Pietro Memmo, M.D., and Dr. Squatrito, among others.

We begin our analysis with a review of the claimant's Motion to Submit Additional Evidence. As previously discussed herein, it is axiomatic that in order to introduce additional evidence after the evidentiary record has closed, the evidence in question must be material to the claim and the party seeking to introduce the evidence must file a motion describing "the nature of such evidence or testimony, the basis of the claim of materiality, and the reasons why it was not presented in the proceedings before the commissioner." Admin. Reg. § 31-301-9 C.G.S. However, we also note that in the present matter, the claimant is not represented by counsel, and it is equally well-settled that "it is the policy of Connecticut courts and this board to accommodate pro se claimants as much as possible by liberally construing procedural rules where doing so

[5] The respondents point out that they did not appeal the award of § 31-308a C.G.S. benefits but, rather, paid the additional benefits promptly.

does not interfere with the rights of other parties." Walter v. Bridgeport, 5092 CRB-4-06-5 (May 16, 2007), *citing* Ferrin v. Glen Orne Leasing/Webster Trucking, 4802 CRB-8-04-4 (March 28, 2005). We must therefore assess the evidentiary submissions of the claimant to determine how closely they comport with the requirements of Admin. Reg. § 31-301-9 C.G.S. and "will make whatever allowances we can in terms of errors that [the claimant] may have committed. However, our powers are limited in this regard, and the claimant's failure to take certain steps at trial and on this appeal cannot simply be remedied through a policy of leniency toward pro se claimants." Drew v. Sears Roebuck & Co., 4400 CRB-7-01-5 (May 2, 2002), *appeal dismissed*, A.C. 23094 (August 21, 2002).

We note at the outset that the claimant has inserted into his post-trial submissions a number of extraneous facts and/or contentions which go well beyond the scope of the formal hearing. As such, the claimant's statements concerning the compensability of his alleged psychiatric injury as well as the various representations regarding unpaid medical bills and reimbursements and late or missing indemnity payments must be disregarded by this board. Similarly, the claimant's remarks concerning the perceived limitations of the workers' compensation system and the actions of his former counsel and respondents' counsel go well beyond the scope of the instant inquiry. As discussed previously herein, one of the three issues noticed for the formal hearing was the approval of the respondents' Form 36. As such, we find that the claimant filed two documents which could conceivably be considered germane to this issue: Dr. Squatrito's e-mail message to claimant's former counsel dated May 4, 2015 and contained in the claimant's submission

of April 18, 2016, and the April 7, 2016 report of Dr. Squatrito which was appended to the claimant's submission of April 13, 2016.

Our review of the record indicates that the respondents also submitted a copy of the May 4, 2015 e-mail message from Dr. Squatrito into evidence as an attachment to the Form 36 with an effective date of December 2, 2014. Respondents' Exhibit 1. It may therefore be reasonably inferred that the trial commissioner had the benefit of Dr. Squatrito's opinion, insofar as it was expressed in this correspondence, at the time of trial.[6] Obviously the April 7, 2016 report could not have been entered into the record at the formal hearing as it was not created until some three months after the fact. However, our review of that document suggests that the doctor primarily reiterated what he had said in his e-mail message of May 4, 2015, save for the additional assignment of a ten-percent (10%) rating to the upper left extremity and the observation that the claimant was seeking a diagnosis of and treatment for Complex Regional Pain Syndrome, which he allegedly developed as a sequella of his injury.

At the formal hearing of January 7, 2016, the claimant testified that he had been treating with Dr. Squatrito for a year and that the doctor did "agree that there is a rating pending…." Transcript, p. 6. We also note that at this hearing, the trial commissioner repeatedly informed the claimant that he needed to submit medical reports into the record if he wanted them to be considered. *See* id., pp. 8, 9, 11-12, 31. In light of the fact that the only additional evidence that the claimant is seeking to introduce that can be

[6] A review of this correspondence indicates that although Dr. Squatrito indicated he disagreed that the claimant had reached maximum medical improvement and opined that an accurate rating for the left upper extremity could not be done absent a functional capacity evaluation, he also stated that he would have assigned the claimant an eight-percent (8%) permanent partial disability rating to both the cervical and thoracic regions.

considered germane to the inquiry at bar is both duplicative of evidence already in the record and could conceivably have been obtained prior to the formal hearing or within some fixed period of time following the hearing, we are not persuaded these documents warrant admission into the record. "A party is not entitled to present his case in a piecemeal fashion, nor may he indulge in a second opportunity to prove his case if he initially fails to meet his burden of proof." Krajewski v. Atlantic Machine Tool Works,Inc., 4500 CRB-6-02-3 (March 7, 2003), *citing* Schreiber v. Town & Country Auto Service, 4239 CRB-3-00-5 (June 15, 2001). The claimant's Motion to Submit Additional Evidence is denied.

We turn now to an analysis of the merits of the claimant's appeal, beginning with a recitation of the well-settled standard of deference an appellate body, such as this board, is obliged to apply to a trial commissioner's factual findings and legal conclusions. "The trial commissioner's factual findings and conclusions must stand unless they are without evidence, contrary to law or based on unreasonable or impermissible factual inferences." Russo v. Hartford, 4769 CRB-1-04-1 (December 15, 2004), citing 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). Thus, "it is … immaterial that the facts permit the drawing of diverse inferences. The [commissioner] alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing

court." Fair, supra, 540 (1988), quoting Del Vecchio v. Bowers, 296 U.S. 280, 287 (1935).

We have succeeded in identifying only one issue in the claimant's wide-ranging appeal which is reviewable by this board: the trial commissioner's decision to rely on the opinion of Dr. Selden rather than Dr. Squatrito in determining whether the claimant had reached maximum medical improvement and his entitlement to permanent partial disability benefits. We have reviewed the evidentiary submissions of the parties and find, in light of the accepted conventions of appellate review, that the record before us contains absolutely nothing which would support the inference that the trial commissioner's decision to rely on the opinion of Dr. Selden rather than Dr. Squatrito in any way constituted error.[7] "It is the quintessential function of the finder of fact to reject or accept evidence and to believe or disbelieve any expert testimony…. The trier may accept or reject, in whole or in part, the testimony of an expert." (Internal citations omitted.) Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999).

There is no question that the claimant expressed significant objections to the protocols of the Respondents' Medical Examination. It is also quite understandable that the claimant would have preferred the trial commissioner to have adopted the higher ratings suggested by Dr. Squatrito. However, the trier was under no compunction to do so as long as there existed a sound basis for the ratings suggested by Dr. Selden. The

[7] In light of our affirmance of the trial commissioner's finding that the claimant has reached maximum medical improvement, we decline to address the issue of whether the claimant is entitled to additional medical treatment given that the record provides no basis for assessing whether the additional medical treatment sought by the claimant satisfies the statutory requirement that the treatment be "reasonable or necessary." Section 31-294d C.G.S.

claimant's misgivings aside, it is well-settled in the workers' compensation forum that the Respondents' Medical Examination generally provides such a basis. Given these circumstances, this board is simply not empowered to reverse the decision of the trier.

> Essentially, the appellant seeks to have this board independently assess the evidence presented and substitute our presumably more favorable conclusions for those reached by the trial commissioner. This we will not do. This board does not engage in de novo proceedings and will not substitute our factual findings for those of the trial commissioner.

Vonella v. Rainforest Café, 4788 CRB-6-04-2 (March 16, 2005). *See also* Fair v. People's Savings Bank, 207 Conn. 535 (1988); Papapietro v. Bristol, 4674 CRB-6-03-6 (May 3, 2004).

There is no error; the March 10, 2016 Finding & Award/Dismissal of Daniel E. Dilzer, the Commissioner acting for the Sixth District, is accordingly affirmed.

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