CASE NO. 6104 CRB-4-16-6 : COMPENSATION REVIEW BOARD
CLAIM NO. 400079806

GLEN JELLIFFE
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: JUNE 16, 2017

KENNEDY CENTER, INC.
EMPLOYER

and

WORKERS' COMPENSATION TRUST
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by John J. Coughlin, Esq., Law Offices of John J. Coughlin, L.L.C., 92 Cherry Street, Milford, CT 06460.

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

This Petition for Review from the May 17, 2016 Finding and Decision of Charles F. Senich, the Commissioner acting for the Fourth District, was heard February 17, 2017 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Christine L. Engel and Daniel E. Dilzer. [1]

[1] We note that a postponement and several Motions for Extension of Time were granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has appealed from a May 17, 2016 Finding and Decision reached by Commissioner Charles F. Senich which granted a Form 36 filed by the respondent Workers' Compensation Trust on December 15, 2014. The claimant argues that he is still suffering radicular pain as a result of a compensable April 5, 2010 injury sustained at his employer, the Kennedy Center. On appeal, he argues that the Form 36 was not supported by probative medical evidence and the trial commissioner erred in not crediting the most recent opinion of his treating physicians. Upon review, we find that a reasonable fact finder could determine the totality of the medical evidence presented in this case supported granting the Form 36. We affirm the Finding and Decision.

The trial commissioner reached the following factual findings in this case. The commissioner took administrative notice of two voluntary agreements approved on March 4, 2015. The claimant injured his right upper extremity and sustained a cervical strain while in the course of employment for the respondent on April 5, 2010. The commissioner also took administrative notice of the Form 36 the respondents filed on December 15, 2014. He outlined the medical evidence in the case, including five (5) EMG studies which were all negative for cervical radiculopathy, and the circumstances of the claimant's April 5, 2010 injury at work. The commissioner noted the claimant was treated by Rolf Langeland, M.D., on April 26, 2010, who reported that "[p]hysical examination reveals a healthy appearing male sitting comfortably. Examination of the cervical spine reveals full, pain free range of motion, non-tender, no radicular signs, grossly normal cervical spine exam." Findings, ¶ 10. On January 24, 2011,

Dr. Langeland reviewed the claimant's cervical MRI and diagnosed the claimant's neck as normal.

The trial commissioner also noted that medical reports from Jonathan Fillmore, M.D., indicate that the claimant is a diabetic. In addition, the commissioner cited medical reports generated in 2012 and 2013 from Isaac Cohen, M.D., and Mark Wilchinsky, M.D., which discussed various tests performed on the claimant. Following Dr. Wilchinsky's June 11, 2013 report in which he concluded the claimant's "symptoms really outweigh the findings on the MRI scan of the cervical spine," Findings, ¶ 15, the claimant sought a second opinion from Abraham Mintz, M.D. Dr. Mintz's September 8, 2014 report was cited by the trial commissioner.

> I reviewed an MRI of the cervical spine from 5/21/13. It demonstrates a small disc herniation at C6/7 that does not appear to be compressing the nerve root. …C6/7 small disc herniation that I believe is incidental and does not require surgical treatment. I explained to him that I do not believe that this is a symptomatic problem and his symptoms are probably related to peripheral nerve problems.

Findings, ¶ 17.

The claimant was undergoing pain management treatment during this period. On November 13, 2014, Anthony Pazienza, PA-C, reported as follows: "At this point, he has reached MMI from an interventional pain management standpoint. He will continue Lyrica 75 mg BLD and he may require additional physical therapy and acupuncture in the future during pain flares." Findings, ¶ 18. On December 11, 2014, Rahul Anand, M.D., who belonged to the same medical group as Mr. Pazienza, reported as follows: "The patient is at maximum medical improvement from his cervical spine. He has ongoing chronic ulnar neuropathy which will require ongoing pain management as needed."

Findings, ¶ 19. Another one of the claimant's treating physicians, Mark Vitale, M.D., issued a report on December 22, 2014, regarding his understanding of the claimant's condition.

> I think Glen has reached maximum medical improvement with regards to his ulnar nerve. I also think that Glen unfortunately has significant ongoing cervical radiculopathy, which is contributing to his pain and creating the so-called, "double crush phenomenon." He has had prior MRIs revealing multiple areas of C-spine compression and he did benefit from his last cervical epidural injection, which both give us subjective evidence of some ongoing cervical spine compression. I do think he needs continued treatment of his C-spine by his pain management specialist and a neurosurgical specialist. I have referred him to Dr. Paul Apostolides who is a cervical spine neurosurgeon for consideration of further treatment. I do not think he has reached maximum medical improvement with regard to his nerve status related to his cervical radiculopathy.

Findings, ¶ 21.

Subsequent to Dr. Vitale's report, Dr. Anand wrote a handwritten note on Dr. Vitale's report of December 22, 2014 as follows: "Agreed. The patient requires ongoing neck care for a cervical radiculopathy. A prior cervical epidural was effective. He would benefit from 2-3 cervical epidurals a year as needed per WC-CT State guidelines (pain medicine)." Findings, ¶ 22.

Based on these facts, the trial commissioner concluded that the respondents' Form 36 should be approved. He found the claimant had reached maximum medical improvement as of December 15, 2014, citing Dr. Anand's report. The commissioner denied the claimant's bid for further medical treatment as a result of the claimed neck injury. The commissioner noted that the claimant has undergone five (5) EMG studies, which were all negative for cervical radiculopathy, as well as two (2) cervical MRIs, and that Dr. Langeland, after reviewing the claimant's cervical MRI, diagnosed the claimant's

neck as normal. The commissioner also noted Dr. Wilchinsky reported in June of 2013 that the claimant's symptoms outweighed the objective tests; Dr. Cohen diagnosed the claimant with peripheral neuropathy; and Dr. Mintz reported that the claimant's cervical symptoms are probably related to his peripheral nerve problems and the claimant did not have cervical radiculopathy. The commissioner found the opinions and reports of Dr. Mintz fully credible and persuasive, but determined Dr. Vitale's opinions, reports and testimony were not fully credible and persuasive. The commissioner specifically concluded he did not find Dr. Anand's handwritten note dated April 9, 2015, in regard to the issues before the commissioner, fully credible and persuasive.

The claimant filed a Motion to Correct responsive to the Finding and Decision. The Motion to Correct sought over eighty (80) corrections which were supportive of finding the claimant had not reached maximum medical improvement and had radiculopathy as a result of his compensable neck injury. The trial commissioner denied this motion in its entirety and the claimant has commenced this appeal. The gravamen of his appeal is that because Dr. Anand recanted his previous opinion as to maximum medical improvement, the respondents' Form 36 no longer has a sufficient foundation of probative evidence to sustain it. The respondents argue that the trial commissioner cited an abundance of expert opinion supportive of finding the claimant had not sustained radiculopathy from a cervical strain, and the totality of the evidence supports the Finding and Decision. We concur with the respondents' argument.

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) (internal quotation marks omitted), *quoting* Burton v. Mottolese, 267 Conn. 1, 54 (2003). 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 & Home Care, Inc., 248 Conn. 379, 384 (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 note that at the commencement of the formal hearing, the parties agreed that the issues in dispute were whether the claimant's cervical injuries were compensable and, if so, whether the claimant had reached maximum medical improvement. February 5, 2015 Transcript, pp. 3-4 and April 27, 2015 Transcript, p. 3. The Form 36 filed by the respondents on December 15, 2014 attaches a medical report from Anthony Pazienza, PA-C, stating the claimant had reached maximum medical improvement relative to the pain management treatment he was receiving. Dr. Anand later issued a report concurring with this conclusion. The question is whether this was sufficient to sustain approval of the Form 36 when Dr. Anand later changed his opinion in reliance on Dr. Vitale's opinions. We believe the trial commissioner could reasonably determine that the totality of the evidence presented in the case supported Mr. Pazienza's assessment of the claimant's condition and Dr. Anand's initial assessment. Since a sufficient quantum of

probative evidence supported the trial commissioner's ultimate conclusion, we believe that he could discount Dr. Anand's revised assessment as derivative of Dr. Vitale's opinion, which he found to be unpersuasive.

We note that the following evidence cited in the Finding and Decision is consistent with the trial commissioner's conclusion that the claimant's current medical condition is not linked to a compensable cervical spine injury resulting in radiculopathy. Dr. Langeland's January 24, 2011 report, presented as part of Claimant's Exhibit A and cited in Findings, ¶ 11 and Conclusion, ¶ H, noted the claimant's cervical MRIs were normal. Dr. Cohen's August 8, 2012 report, presented in Claimant's Exhibit E and cited in Findings, ¶ 13 and Conclusion, ¶ J, identified peripheral neuropathy but found no evidence of radiculopathy. Dr. Wilchinsky's June 11, 2013 report, presented as Claimant's Exhibit K and cited in Findings, ¶ 15 and Conclusion, ¶ I, found that while the claimant had a small bulging disc, "[h]is symptoms really outweigh the findings on the MRI scan of the cervical spine." Findings, ¶ 15. Finally, Dr. Mintz's September 8, 2014 report, presented as Respondents' Exhibit 5 and cited in Findings, ¶ 17 and Conclusion, ¶ L, stated that the claimant's "symptoms are probably related to peripheral nerve problems." Findings, ¶ 17. The trial commissioner specifically concluded that he found the opinions and reports of Dr. Mintz fully credible and persuasive. Conclusion, ¶ M.

We note that it is the trial commissioner's responsibility "to assess the weight and credibility of medical reports and testimony." O'Reilly v. General Dynamics Corp., 52 Conn. App. 813, 818 (1999). We also note that a reasonable person would need to determine there was a link of proximate cause between the claimant's 2010 injury and his current condition to award benefits. See Madden v. Danbury Hospital, 5745 CRB-7-12-4

(April 22, 2013), citing Sapko v. State, 305 Conn. 360 (2012). After reviewing the totality of the Finding and Decision, we conclude that the trial commissioner was left unpersuaded that the claimant's present shoulder and extremity issues were the result of his 2010 injury. This conclusion would justify the granting of a Form 36 discontinuing benefits.

The claimant argues that despite the significant quantum of evidence that supported the documentation accompanying the Form 36, and since Dr. Anand, after reviewing Dr. Vitale's reports, subsequently revised his opinion regarding whether the claimant had reached maximum medical improvement, the Finding and Decision is in contravention of the precedent in Risola v. Hoffman Fuel Company of Danbury, 5120 CRB-7-06-8 (July 20, 2007), *dismissed for lack of final judgment*, A.C. 29056 (October 18, 2007). As the claimant views our precedent, once Dr. Anand no longer subscribed to his earlier opinion, any reliance on it in a finding rendered the decision fatally flawed. We have reviewed Risola and find that it is factually distinguishable from the present case. Therefore, it does not compel us to reverse the trial commissioner.

Risola involved a disability rating for a claimant who had reached maximum medical improvement. The sole basis for the award cited by the trial commissioner was an opinion by the claimant's treater who had issued a permanency rating of sixteen percent (16%) to the claimant's lumbar spine as of January 30, 2005, and then subsequently determined the claimant's date of maximum medical improvement was June 21, 2005 and ascribed a "whole person" disability rating of thirty-one percent (31%) to the claimant. The trial commissioner chose to adopt the treater's disability rating from the prior date of maximum medical improvement and also adopted the June 21, 2005 date

of MMI, where it appeared the treater had found a greater level of disability. We remanded the matter as it was clear in the opinion the treater issued for the later date of MMI that he no longer subscribed to his earlier disability rating and the commissioner cited no other expert testimony supportive of the disability rating that was issued. "In the absence of any other supportive evidence, we believe it is erroneous to rely solely on evidence the witness himself no longer endorses." Id.

In the present case, unlike Risola, the trial commissioner cited numerous expert witnesses who opined in a manner consistent with the respondents' Form 36. The commissioner specifically found Dr. Mintz fully credible and persuasive and his opinions were consistent with the initial opinion offered by Dr. Anand rather than Dr. Anand's revised opinion. We also note that the medical provider who actually performed the examination affixed to the Form 36, Mr. Pazienza, never offered a subsequent opinion that was inconsistent with the one he had offered on November 13, 2014. While Dr. Anand did change his opinion after the Form 36 was filed, it is evident that he did so in reliance on Dr. Vitale's opinion and his subsequent opinion was essentially derivative of Dr. Vitale's opinion. The trial commissioner specifically found Dr. Vitale's opinions not fully credible and persuasive. 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, supra. If the commissioner did not find Dr. Vitale's opinion as to the presence of radiculopathy credible, the precedent in 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), suggests that Dr. Anand's revised opinion, which was a medical opinion reliant on another less than credible medical opinion, should be discounted. [2] [3]

Therefore, we find the claimant's reliance on Risola does not persuade us to overturn the Finding and Decision. We also find the claimant's reliance on Passalugo v. Guida-Seibert Dairy Co., 149 Conn. App. 478 (2014), and Holmes v. G. A. Masonry Corp., 12 Conn. Workers' Comp. Rev. Op. 369, 1588 CRB-5-92-12 (August 11, 1994), unpersuasive. The Holmes case, similar to Risola, involved a trial commissioner relying on the opinion of a single medical witness who changed his opinion and relied on a superseded medical opinion in the findings. In the present case, we believe the commissioner could rely on the totality of the evidence standard as delineated in Marandino v. Prometheus Pharmacy, 294 Conn. 564, 595 (2010), to support his conclusions. In Passalugo, supra, the claimant challenged the overall scheme of adjudicating a Form 36. We determined that our process was consistent with due process and the Appellate Court affirmed our decision. The Appellate Court pointed out that "the employer/insurer has the burden of proof and must submit documents..." supportive of the relief it seeks. Id., 486, *quoting* Pagan v. Carey Wiping Materials Corp., 144 Conn.

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[2] We have reviewed the transcript of Dr. Vitale's January 30, 2015 deposition. (Claimant's Exhibit V.) After reviewing various EMG results, the doctor was asked if he supported a diagnosis of cervical radiculopathy. He answered as follows: "They don't support a cervical radiculopathy, although EMGs … are notoriously insensitive for a cervical radiculopathy." Id., 77. The doctor also had Dr. Mintz's opinion brought to his attention and testified, "I think if he had all the information that we have available, I would not disagree." Id., 103. Based on these responses, we do not find the trial commissioner's determination that he would not rely on Dr. Vitale's opinions unreasonable as a matter of law.

[3] We also note that Risola v. Hoffman Fuel Company of Danbury, 5120 CRB-7-06-8 (July 20, 2007), fn. 2, stated: "We want to reiterate that there is no certainty that the most recent opinion of a physician must automatically be the most credible. We have upheld trial commissioners who found later expert opinions unreliable due to a lapse of time, Carlozzi v. State/DMR, 5072 CRB-5-06-3 (March 20, 2007), or an unreliable patient history, Do v. Danaher Tool Group, 5029 CRB-6-05-12 (November 28, 2006). In those cases, the trial commissioner provided an explanation for not crediting the more recent expert opinion, which is not present herein." The trial commissioner in this case clearly stated a rationale for not relying on Dr. Anand's most recent opinion.

App. 413, 420, *cert. denied*, 310 Conn. 925 (2013). See also A. Severino, Connecticut Workers' Compensation After Reforms (Centennial Ed. 2002) § 5.16.10, p. 715. The Appellate Court also noted that the claimant was entitled to a prompt formal hearing "at which she [is] permitted to cross-examine adverse witnesses and present evidence and testimony…." Id., 487, *quoting* Pagan, supra, 428. The record herein demonstrates that both parties were able to challenge the evidence presented; as such, we find the proceedings comported with the due process standards established in Passalugo. While the claimant argues that the employer's supportive documentation for the Form 36 was inadequate, the trial commissioner reached a different conclusion, which we deem reasonable.

The claimant also argues that the trial commissioner's decision to admit evidence from Dr. Fillmore over his counsel's objection constitutes reversible error. Dr. Fillmore's evidence pertained to the claimant's diabetes, which he believed was irrelevant to the issue of whether the claimant suffered from cervical radiculopathy. The respondents argue that this evidence was relevant as it suggests an alternate and non-job related cause of the claimant's medical condition. In light of the "totality of the evidence" standard delineated in Marandino, we do not find error. Our holding in Valiante v. Burns Construction Company, 5393 CRB-4-08-11 (October 15, 2009), stands for the proposition that our case law has been unequivocal.

> "Our case law clearly states, 'a trial commissioner has broad discretion to determine the admissibility of evidence, and an evidentiary ruling will not be set aside absent a clear abuse of that discretion.' Lamontagne" [v. F & F Concrete Corp., 5198 CRB-4-07-2 (February 25, 2008)]. Keeney v. Laidlaw Transportation, 5199 CRB-2-07-2 (May 21, 2008). See also Mosman, supra, and Vetre v. State/Dept. of Children and Youth Services, 3443 CRB-6-96-10 (January 16, 1998) which states that "[d]ecisions regarding

> the relevance and remoteness of evidence in workers' compensation proceedings fall solely within the discretion of the trier of fact."

Valiante, supra.

We do not find that the trial commissioner abused his discretion in this case. The commissioner decided, after weighing a voluminous amount of medical evidence, that the claimant's pain in his right upper extremity was not related to the compensable injury he had sustained and that the claimant had reached maximum medical improvement from this injury.[4] Upon review, we find that a reasonable fact finder could determine that the totality of the medical evidence presented in this case supported granting the Form 36.

We affirm the Finding and Decision.

Commissioners Christine L. Engel and Daniel E. Dilzer concur in this opinion.

[4] We uphold the trial commissioner's denial of the claimant's Motion to Correct. This motion sought to interpose the claimant's conclusions as to the law and the facts presented. 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).

CERTIFICATION

THIS IS TO CERTIFY THAT a copy of the foregoing was mailed this 16th day of June 2017 to the following parties:

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