CASE NO. 6105 CRB-1-16-6 : COMPENSATION REVIEW BOARD
CLAIM NO. 300074031

JOSEPH PISATURO : WORKERS' COMPENSATION
CLAIMANT-APPELLANT COMMISSION

v. : MAY 16, 2017

LOGISTEC, USA, INC.
EMPLOYER

and

GALLAGHER BASSETT SERVICES, INC.
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by David A. Kelly, Esq., Montstream & May, LLP, 655 Winding Brook Drive, P.O. Box 1087, Glastonbury, CT 06033.

The respondents were represented by Peter D. Quay, Esq., Law Offices of Peter D. Quay, LLC, P.O. Box 70, Taftville, CT 06380.

This Petition for Review from the May 28, 2016 Commissioner's Response to Compensation Review Board Remand by Christine L. Engel, the Commissioner acting for the Third District, was heard on December 16, 2016 before a Compensation Review Board panel consisting of Commission 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 May 28, 2016 Finding and Order of Christine L. Engel, the Commissioner acting for the Third District.[1] We find no error and accordingly affirm the decision of the trial commissioner.[2]

The parties in this appeal first appeared before the Compensation Review Board on June 26, 2015, at which time the claimant was challenging the December 18, 2014 Finding and Order by the Commissioner acting for the Third District. The board affirmed the Finding and Order in part and remanded the matter for additional proceedings consistent with our Opinion.[3] In her May 28, 2016 Commissioner's Response to Compensation Review Board Remand of September 23, 2015, the trial commissioner identified the following as the issue for determination:

> The Compensation Review Board (CRB) remanded this matter to the trial commissioner for additional proceedings "… so that additional medical evidence may be adduced which will hopefully guide the parties in determining the appropriate methodology to convert a permanency rating predicated on the AMA Guides to one that properly reflects the provisions of §31-308(b) C.G.S."[4]

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[1] The Petition for Review filed on June 14, 2016 indicates that the claimant, Joseph Pisaturo, is deceased. Given that the file does not appear to contain a Motion to Substitute Parties, we will continue to refer to "the claimant" for purposes of clarity.

[2] We note that a motion for extension of time was granted during the pendency of this appeal.

[3] See Pisaturo v. Logistec, USA, Inc., 5979 CRB-3-14-12 (September 23, 2015).

[4] Section 31-308(b) C.G.S. (Rev. to January 1, 2005) states, in pertinent part: "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 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

The trier made the following findings which are pertinent to our analysis of this second appeal.[5] The claimant sustained injuries to his left eye in a workplace accident on October 31, 2005. He treated with Darron Bacal, M.D., an ophthalmologist, who diagnosed the claimant with diplopia (double vision) as a result of the workplace accident and assigned to the claimant a thirty-percent (30%) impairment of the visual system. Stephen E. Orlin, M.D., also an ophthalmologist, performed a Respondents' Medical Examination in the form of a records review. Dr. Orlin assigned the claimant a seven-and-one-half percent (7.5%) impairment of the visual field based on the claimant's diplopia. After the initial formal hearing held in this matter, the trial commissioner awarded the claimant compensation for the permanent impairment of the left eye at seven-and-one-half percent (7.5%) after finding Dr. Orlin's opinion better reasoned and more persuasive than that of Dr. Bacal.

The trial commissioner found that "[t]here was a problem in reconciling impairment ratings from two qualified physicians who followed the AMA Guidelines to Permanent Impairment, 6th Edition (AMA Guides)." Findings, ¶ 3. She noted that both doctors formulated their ratings based upon the claimant's diplopia and the effects on his "visual field," i.e., his vision as perceived with both eyes. The relevant workers' compensation statute, § 31-308(b) C.G.S., provides for a permanent impairment award of one-hundred fifty-seven (157) weeks for the total loss of use of one eye.

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of the member or organ referred to…. One eye: Complete and permanent loss of sight in, or reduction of sight to one-tenth or less of normal vision: 157 [weeks]."

[5] It should be noted that the appellant did not provide this board with a copy of the transcript for the proceedings below.

In responding to the remand order, the trial commissioner reviewed the reports of Drs. Bacal and Orlin as well as Dr. Orlin's deposition and considered the oral arguments of the parties.[6] She "also considered information that was not provided by either party, but particularly the Claimant who had appealed the Formal Hearing decision to the CRB." (Emphasis in the original.) Findings, ¶ 4. Both Drs. Orlin and Bacal used the AMA Guides, "which are based upon an assessment of an injury's effect on the visual field. Connecticut [workers'] compensation statutes contemplate an injury and impairment to only one eye." Findings, ¶ 5. The trier noted that "[i]t is difficult to reconcile the rating system of the AMA Guides with Connecticut statutes, particularly in this claim." Id.

Dr. Orlin explained his methodology for assessing the impairment for diplopia as follows:

> "[s]tandardized measurement techniques on which standardized ability estimates can be based have not yet fully been developed for these functions," (referring to diplopia) which is on page 305 in these guidelines. So, based upon just his visual acuity and his visual field, he had no disability, but if you take into consideration those other deficits, such as double vision, you can come up with some additional measurement in terms of assigning a number to the disability….

Findings, ¶ 6, *quoting* Respondents' Exhibit 6, p. 21.

In addition, Dr. Orlin indicated that:

> the guidelines also state that for individual adjustments for measurements other than visual acuity and visual fields, such as diplopia … their significance depends on the environment and vocational demands, but that the impairment rating should be

[6] Dr. Bacal was not deposed.

> limited to an increase in impairment rating by no more than 15 points.

Findings, ¶ 7, *quoting* Respondents' Exhibit 6, p. 21.

Dr. Orlin further testified that there is some subjectivity in assessing an impairment rating due to diplopia and agreed there was no standard objective way to measure diplopia. He explained that the maximum impairment possible was fifteen percent (15%) and because the claimant's diplopia was present only when he looked up or down, Dr. Orlin did not believe it was serious enough to merit the full allowed amount. The doctor therefore reduced the possible fifteen (15) points to seven and one-half (7.5) because the claimant "didn't have a very severe deviation." Respondents' Exhibit 6, p. 24. In addition, Dr. Orlin stated that the claimant's:

> ocular deviations, which are a measurement of double vision, which we do by means of a prismatic measurement, were orthophoric, which means there was no deviation in primary position. In other words when he looked straight ahead at you or me, they could measure only one prism diopter, which is almost negligible.

Findings, ¶ 9, *quoting* Respondents' Exhibit 6, p. 24.

The written opinion of Dr. Bacal regarding the claimant's permanent impairment for diplopia is contained in three documents. In his report of October 25, 2012, Dr. Bacal stated that the claimant "is left with residual diplopia (double vision). The diplopia occurs when he looks up, or down and is vertical in orientation. This limits his single binocular field of vision to approximately 60 degrees vertically. As a result he is visually disabled approximately 30%." Claimant's Exhibit A. Dr. Bacal also completed a Form 42 ("Physician's Permanent Impairment Evaluation") in which he rated the left and

right eye and assigned a disability rating of thirty percent (30%) for the diplopia. He wrote a report on September 1, 2013 in which he stated that the claimant "had diplopia in 30% of his visual field (roughly 1/3 of the visual system or eyes.) Thus his disability would be 30% of the maximum disability allowed for a diagnosis of diplopia." Claimant's Exhibit C.

Neither party provided a formula for converting the seven and one-half percent (7.5%) rating for both eyes to a rating for one eye. In addition, neither party provided any additional written reports from either Dr. Bacal or Dr. Orlin to change their respective ratings for both eyes to a rating for a single eye. In its remand order, the Compensation Review Board stated, "[i]t should be noted that in choosing to remand this matter on the basis articulated, we are in no way implying that a trial commissioner is 'required to adopt any one particular methodology in assigning a permanency rating….'" Pisaturo, supra.

The trial commissioner indicated that the basis for her selection of the seven and one-half percent (7.5%) impairment was as follows:

> a. Dr. Orlin's report is the better reasoned.
> b. Dr. Orlin's deposition provided a greater explanation of his written report.
> c. Dr. Bacal's reports are devoid of any explanation of his thought process or any explanation of how he used the AMA Guides.
> d. Claimant's attorney has not provided any further reports from Dr. Bacal on the issue of impairment.
> e. The AMA Guides visual field impairments do not compare with §31-308(b) C.G.S. which assigns an impairment to a single eye.
> f. Without guidance from any physician, I am not willing to consider dividing 7.5% further to reflect a rating for a single eye.

Findings, ¶ 14.

The trier, noting that the respondents had never objected to the seven and one-half percent impairment rating, found that "[u]nder the circumstances, I believe this indicates acceptance of the prior order." Findings, ¶ 15. The trier also stated that "[t]he Claimant, particularly, has failed to provide '… any additional medical evidence to … hopefully guide the parties in determining the appropriate methodology to convert a permanency rating predicated on the AMA Guides to one that properly reflects the provisions of §31-308(b) C.G.S.'" Findings, ¶ 16, *quoting* Pisaturo, supra.

Based on the foregoing, the trial commissioner concluded that Dr. Orlin's impairment rating of seven and one-half percent (7.5%) was the most reasonable, and ordered the respondent to issue to the claimant a voluntary agreement for a seven and one-half percent (7.5%) impairment of the left eye and pay benefits accordingly.

The claimant filed a Motion to Correct which was granted in part and denied in part, and this appeal followed.[7] On appeal, the claimant essentially reiterates the same argument he presented when the parties first appeared before this board: the trial commissioner erred in concluding that Dr. Orlin's assignment of seven-and-one-half percent (7.5%) disability to the claimant's visual system pursuant to the AMA Guides translates directly into a permanent partial disability impairment of seven-and-one-half percent (7.5%) to the claimant's left eye pursuant to § 31-308(b) C.G.S.[8] The claimant again contends that statutory impairment in the workers' compensation forum is based on

[7] The trial commissioner changed ¶ 1 of her Factual Findings to reflect that Dr. Orlin had assigned a seven-and-one-half percent (7.5%) impairment to the claimant's visual system, rather than to his visual field, based on the claimant's diplopia. The other proposed correction was denied.

[8] The AMA Guides state that they "do not allow visual impairment ratings that do not consider binocular vision since a rating of only one eye does not provide an accurate assessment of the overall functioning of the person." See AMA Guides to the Evaluation of Permanent Impairment (Sixth Edition), § 12.4b, p. 305.

an evaluation of one eye, and "[t]here is no evidence in the record which says that Mr. Pisaturo had [a] 7.5% permanent partial disability to a single eye." Appellant's Brief, p. 2. As such, it is the claimant's position that the trier's findings "are without support in the record and must be overturned…. It is now the responsibility of this Compensation Review Board to enter an Award as to Mr. Pisaturo at a 7.5% impairment for each of his two eyes." Id.,2-3. We are not so persuaded.

We begin with a recitation of the well-settled standard of review we are obliged to apply to a trial commissioner's 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 note at the outset that when this board remanded this matter in its Opinion of September 23, 2015, we indicated that we were "unable to discern a reasonable basis for the trier's inference that the 7.5% disability rating to the visual system based on the AMA

Guides assigned to the claimant by Stephen Orlin, M.D., translates directly into a 7.5% disability rating to the left eye pursuant to § 31-308(b) C.G.S." Pisaturo, supra. We then remarked that "[t]his result is hardly surprising, given that the information which would have enabled the trier to accurately perform this calculation, i.e., a clarification of Orlin's opinion, was never submitted into evidence." Id. The remand of this matter afforded the claimant the opportunity to rectify this gap in the evidentiary record. Although the claimant is now deceased, an expert opinion, predicated on a records review from either the physicians already involved in the claim or another qualified practitioner, may have potentially provided the trial commissioner with a basis for converting Dr. Orlin's rating based on the AMA Guides to one that is consistent with the provisions of § 31-308(b) C.G.S.

The claimant did not avail himself of this opportunity and, as such, the evidentiary record is still devoid of a medical opinion which would support the claimant's contention that the seven-and-one-half percent (7.5%) impairment to the left eye assigned by Dr. Orlin should be in essence doubled and applied to both eyes. In fact, as the respondents indicate, Dr. Orlin "has pointed out in his report and in his deposition that any issue here is limited to diplopia in the left eye. Claimant has the burden to come forward and present evidence of an impairment in the right eye if he wants a rating in the right eye." Respondents' Brief, p. 7.

It is of course axiomatic that "the injured employee bears the burden of proof, not only with respect to whether an injury was causally connected to the workplace, but that such proof must be established by *competent evidence*." (Emphasis in the original.)

Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 447 (2001), *quoting* Keenan v. Union Camp Corp., 49 Conn. App. 280, 282 (1998). "'Competent evidence' does not mean any evidence at all. It means evidence on which the trier properly can rely and from which it may draw reasonable inferences." Id., 451. In the present matter, the claimant has failed to provide a report which would provide a basis for his contention that the seven-and-one-half percent (7.5%) impairment to the left eye assigned by Dr. Orlin should be applied to both of the claimant's eyes. In our judgment, such a report would have assisted the trial commissioner in converting Dr. Orlin's rating of the claimant's visual system per the AMA Guides to a rating of the left eye which would be consistent with the provisions of § 31-308(b) C.G.S.

Nevertheless, we note that the trial commissioner, in attempting to comply with the remand, carefully reviewed the reports that were in evidence and reached a result consistent with the record before her. Moreover, as the respondents point out, at no time did Dr. Orlin ever suggest that the claimant's right eye was in any way implicated in this claim such that the rating the doctor assigned to the claimant's "visual system" could be construed as encompassing the right eye. We therefore find no error in the trial commissioner's decision to adopt the opinion of Dr. Orlin and award the claimant permanent partial disability benefits for a seven-and-one-half percent (7.5%) impairment of the left eye. As this board has previously remarked, when parties submit expert testimony which is "inaccurate, confusing or vague, equity does not serve to protect their interests. One can only expect the trier of fact to render a decision based on what

evidence actually says, not what it should have said." Ben-Eli v. Lowe's Home Improvement Center, 5006 CRB-3-05-10 (November 16, 2006).

There is no error; the May 28, 2016 Commissioner's Response to Compensation Review Board Remand by Christine L. Engel, the Commissioner acting for the Third District, is accordingly affirmed.

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