CASE NO. 6119 CRB-3-16-7 : COMPENSATION REVIEW BOARD
CLAIM NO. 300099042

ANTHONY FUSCO : WORKERS' COMPENSATION
CLAIMANT-APPELLEE COMMISSION

v. : OCTOBER 13, 2017

CITY OF NEW HAVEN/BOARD OF EDUCATION
EMPLOYER
SELF-INSURED

and

CONNECTICUT INTERLOCAL RISK
MANAGEMENT AGENCY (CIRMA)
ADMINISTRATOR
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by Christopher D. DePalma, Esq., D'Elia, Gillooly & DePalma, L.L.C., Granite Square, 700 State Street, New Haven, CT 06511.

The respondents were represented by Anne Kelly Zovas, Esq., Strunk, Dodge, Aiken & Zovas, 200 Corporate Place, Suite 100, Rocky Hill, CT 06067.

This Petition for Review from the May 16, 2016 Finding and Award of Jack R. Goldberg, the Commissioner acting for the Third District, was heard May 19, 2017 before a Compensation Review Board panel consisting of Commissioners Christine L. Engel, Daniel E. Dilzer and Peter C. Mlynarczyk.[1]

[1] We note that motions for a continuance and extensions of time were granted during the pendency of this appeal.

OPINION

CHRISTINE L. ENGEL, COMMISSIONER. The respondents have appealed from a May 16, 2016 Finding and Award issued by Commissioner Jack R. Goldberg. In the Finding and Award, Commissioner Goldberg determined that a permanent partial disability award was due to the claimant although he had not sought such an award prior to his demise. The trial commissioner concluded that the claimant had reached maximum medical improvement from his compensable injury, and because he had not been awarded permanent partial disability benefits during his lifetime, the benefits remained vested and payable to his dependent spouse. The respondents challenge the finding of maximum medical improvement for the claimant and assert that the condition precedent for issuing a permanent partial disability award is not present in this matter. They also argue that if a permanent partial disability award should issue in this matter, they are entitled to a credit for any temporary total disability benefits paid to the claimant subsequent to his date of maximum medical improvement. We conclude, consistent with Churchville v. Bruce R. Daly Mechanical Contractor, 299 Conn. 185 (2010), that an award for permanent partial disability benefits vested in this case. Relative to the issue of whether a credit should be applied against such an award, we determine from the record that this issue was not considered by the trial commissioner. In the absence of a prior determination on this issue, we remand that inquiry for further proceedings.

Commissioner Goldberg reached the following factual determination at the conclusion of the formal hearing. The sole issue considered was whether the claimant sustained a 13 (thirteen) percent permanent partial disability to his right shoulder prior to his demise. The parties stipulated that the claimant sustained a compensable injury at

work on May 15, 2012, which resulted in injuries to his neck and right shoulder. The respondents had previously accepted responsibility for the claimant's 10 (ten) percent impairment to the neck and the level of shoulder impairment had not been resolved. Dante Brittis, M.D., was the respondents' medical examiner and later became the claimant's treating physician. On March 6, 2013, he responded to a letter from a claims representative, Susan DeSorbo, regarding the date when the claimant would be at maximum medical improvement. He indicated it would be about one year post injury, i.e., in May 2013.

On May 27, 2014, Dr. Brittis responded to another letter from Ms. DeSorbo. Dr. Brittis opined in his response that if he were to rate the claimant's shoulder in accordance with the AMA Guidelines to Permanent Impairment, the claimant's impairment would be approximately 13 (thirteen) percent. Dr. Brittis also noted that the claimant's shoulder symptoms, attributable to his workers' compensation injury, were ongoing. The treating physician suggested the claimant could have rotator cuff inflammation and an MRI was warranted, but the claimant's habitus made this difficult. He said it would be up to the claimant whether to seek surgery on the rotator cuff. Dr. Brittis' records indicated that as of May 27, 2014, the claimant was fifty-three years old, weighed 440 pounds, and had a variety of co-morbidities, including uncontrolled diabetes, hypertension and sleep apnea.

An MRI was performed on the claimant that appeared to demonstrate that the rotator cuff was intact, but the MRI was not of great quality. Dr. Brittis believed the claimant's size suggested medical management be optimized prior to surgery, and Dr. Brittis emphasized to the claimant that optimal blood pressure must exist before

surgery. As of May 2014, the claimant had decided not to pursue surgery but, rather, to manage his condition through prescription medicine and steroid shots in the shoulder. The claimant's pain management doctor was Mohan Vodapally, M.D., who reported on January 21, 2015, that the claimant was afraid of surgery.

The respondents filed two Forms 36 with the Workers' Compensation Commission. The first, received by the commission on October 31, 2014, sought to discontinue the claimant's benefits or convert his payments to permanent partial disability benefits because the claimant was not proceeding with surgery. The second Form 36, received by the commission on January 30, 2015, indicated that the claimant had not made surgical appointments and should be considered at maximum medical improvement pursuant to the initial Form 36. Neither Form 36 was acted on by the commission. On February 17, 2015, Dr. Brittis said the pain management for the claimant had stopped being effective and the claimant wanted to pursue surgery.

The claimant underwent a pre-operative exam on April 27, 2015 which did not clear him for surgery due to blood pressure and diabetes issues. The claimant's medications were adjusted and the claimant was cleared for surgery on May 15, 2015. Dr. Brittis performed the surgery on May 18, 2015 and discovered a large rotator cuff tear. The operative note showed the rotator cuff could not be repaired due to issues involving diabetes and the claimant's body habitus. The claimant died on May 21, 2015, of a myocardial infarction while recuperating at home. Subsequently, the claimant's spouse and fiduciary of his estate sought payment of the 13 (thirteen) percent permanent partial disability rating.

Based on this record, Commissioner Goldberg concluded that the claimant had sustained work-related neck and right shoulder injuries, died on May 21, 2015, of a myocardial infarction, and was married to Dawn Fusco as of that date. He found that Dr. Brittis offered persuasive evidence regarding the claimant's permanency rating, his need for future medical treatment, and his reluctance to have additional medical treatment. He concluded Dr. Brittis' 13 (thirteen) percent permanent partial disability rating for the claimant was based on the AMA guidelines and presumed the claimant had reached maximum medical improvement. He further concluded that the respondents' Forms 36 constituted evidence that the respondents sought "to place the claimant at maximum medical improvement." Conclusion, ¶ h. Commissioner Goldberg determined the claimant had a 13 (thirteen) percent permanent partial disability of the right shoulder with a maximum medical improvement date of May 27, 2014. He also concluded that the claimant's decision to undergo surgery in 2015 was evidence that his condition had deteriorated after May 27, 2014. Therefore, he directed the respondents to pay the permanent partial disability benefits due to the claimant to Dawn Fusco, the claimant's widow and the fiduciary of his estate.

The respondents filed a Motion to Correct. The corrections sought were consistent with a conclusion that the claimant had never reached maximum medical improvement and had been consistently seeking to have surgery on his rotator cuff at all times relevant to this issue. The respondents also filed a Motion for Articulation. The trial commissioner denied both motions in their entirety and the respondents have pursued this appeal. The gravamen of their appeal is that the trial commissioner's finding that the claimant had reached maximum medical improvement and was thus entitled to an

award of permanent partial disability benefits constituted error. The respondents also argue that it was erroneous not to credit them for payments made to the claimant subsequent to the date of maximum medical improvement.

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 & 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).

The respondents argue that the evidence in the record indicates that the claimant never reached maximum medical improvement prior to his death and, therefore, the condition precedent for awarding permanent partial disability benefits was not satisfied. They argue that the trial commissioner misinterpreted the reports of Dr. Brittis when he determined that the claimant had reached maximum medical improvement on May 27, 2014. They also claim the relief herein is inconsistent with precedent established by McCurdy v. State, 227 Conn. 261 (1993), and Squitieri v. Mariano Cardillo & Sons,

3084 CRB-7-95-6 (January 6, 1997). The claimant argues that the trial commissioner's decision is supported by the record and in accordance with Churchville, supra, and Cappellino v. Cheshire, 226 Conn. 569 (1993). We will review the record to ascertain if the trial commissioner's decision was based on factual evidence and consistent with the law.

The respondents central point is that "there is no medical opinion placing the claimant at maximum medical improvement for the right shoulder prior to his death…." Respondents' Brief, p. 11. This contention seems at odds with the Forms 36 filed by the respondents. The Form 36 received by the Workers' Compensation Commission on October 31, 2014, specifically stated that the respondents sought to stop payments of benefits "pending claimant's compliance [in seeking medical clearance for surgery] or changed to Permanent Partial Disability." It is apparent that at that point, the respondents believed the claimant had attained maximum medical improvement, and it is not unreasonable for a trial commissioner to determine this constituted an estoppel against claiming that the claimant had not reached maximum medical improvement. We therefore find Conclusion, ¶ h, supported by subordinate facts.

The respondents argue, nonetheless, that the trial commissioner lacked subordinate facts from expert witnesses supportive of a finding of maximum medical improvement. They contend that Dr. Brittis' reports were too equivocal to merit reliance. 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), *quoting* Gillis v. White Oak Corp., 49 Conn. App. 630, 637, *cert. denied*, 247 Conn. 919 (1998). As we pointed out in Brooks v. West Hartford,

4907 CRB-6-05-1 (January 24, 2006), "[o]n review, this board may not second-guess a commissioner's inferences of evidentiary credibility, and we may reverse factual findings only if they are unsupported by the evidence or if they fail to include undisputed material facts."

We have reviewed Dr. Brittis' medical reports. The doctor's March 8, 2013 report indicated that MMI for the claimant should be considered "at a point appropriately one year post injury that is May of 2013." Claimant's Exhibit C. His May 27, 2014 report referenced a cover letter from Ms. DeSorbo which apparently sought a rating of permanent partial disability. Dr. Brittis rated the claimant's shoulder at 13 (thirteen) percent permanent partial disability according to AMA guidelines. The trial commissioner concluded in Conclusion, ¶ g, that Dr. Brittis' rating "presumes a finding of maximum medical improvement." Since Dr. Brittis was not deposed by either party, his reports, as well as any permissible inferences which the trial commissioner drew from them, must be accepted "as is." Berube v. Tim's Painting, 5068 CRB-3-06-3 (March 13, 2007).

If Dr. Brittis' reports were inconsistent with other evidence in the record, we might find more persuasive the respondents' argument that the doctor's opinions were inconclusive. However, we note that the May 7, 2014 report of John N. Awad, M.D., contained an assessment stating that "it is my opinion that I do feel that the [claimant] has reached maximum medical improvement." Claimant's Exhibit F. Dr. Brittis' May 27, 2014 report specifically acknowledged this report by Dr. Awad and offered no concern about or critique of his opinions. We may reasonably infer that Dr. Brittis was in accord with the finding of maximum medical improvement when he issued his permanency

rating for the claimant. Therefore, we find Conclusion, ¶ g, supported by subordinate facts.

The respondents argue that based on the facts in this matter, McCurdy, supra, and Squitieri, supra, support reversing the trial commissioner. We are not persuaded. We note that both these cases predate Churchville, supra, and this later precedent must be deemed controlling over prior inconsistent precedent. In Churchville, our Supreme Court specifically held that a claimant's entitlement to General Statutes § 31-308 (b) benefits "vests when the plaintiff reaches maximum medical improvement, and does not depend on an affirmative request for such benefits." Id., 191. The case further noted that "a formal award … made prior to the employee's death" was not a condition precedent to awarding permanency benefits. Id., 192. The Churchville court stated that pursuant to McCurdy, once a claimant had reached maximum medical improvement, if he or she requested permanency benefits, "the commissioner no longer has discretion to deny the award of the disability benefits." Id., 195. In addition, in n.8 of the Churchville opinion, the court indicated that the claimant's surviving spouse became entitled to any award due the claimant by operation of law.[2]

Based on the court's holding in Churchville, we question the continued validity of Squitieri, supra. In Squitieri, this tribunal vacated an award of permanent partial disability benefits to a dependent widow. In that case, the claimant had reached

[2] The respondents have raised the issue of whether the reference to Dawn Fusco as the fiduciary of the claimant's estate, Findings, ¶ 18, constitutes error. We note that recent precedent has made clear that an estate does not have standing to file a claim under Chapter 568. See Estate of Rock v. University of Connecticut, 323 Conn. 26 (2016). However, we note that in Brennan v. Waterbury, 6065 CRB-5-15-12 & 5996 CRB-5-15-3 (October 31, 2016), *appeal pending*, S.C. 19937, we determined that the surviving spouse was the proper beneficiary of any unpaid award under General Statutes § 31-308 (b) at the time of the claimant's death. See also Estate of Haburey v. Winchester, 150 Conn. App. 699 (2014), in which the claim was deemed a dependency claim as it had been filed post-mortem. Given that Dawn Fusco is among the statutorily authorized recipients of a General Statutes § 31-308 (b) award, we find no error.

maximum medical improvement prior to his death but the claimant's attorney had made an affirmative request for such benefits prior to the claimant reaching maximum medical improvement. We reversed the award on the grounds that the claimant could not seek permanency benefits prior to reaching maximum medical improvement. In light of the holding in Churchville that claimants need not have made an affirmative request to receive permanent partial benefits during their lifetime for a dependent spouse to receive these benefits post-mortem, and that the attainment of maximum medical improvement results in the vesting of a right to these benefits, we do not find Squitieri persuasive regarding the issues presented herein.

The claimant argues that Cappellino, supra, supports the result in this case and also argues that despite the respondents' contention, no offsets for payments to the claimant should be applied against the permanent partial disability award. While it is true that in Cappellino, the Supreme Court held that the Workers' Compensation Act "prohibits concurrent payment of benefits for permanent partial disability and temporary total disability," (emphasis in the original), id., 577-78, we note that in Cappellino, a voluntary agreement between the parties was in force. The Supreme Court found that the payments of temporary total disability benefits until the claimant's death essentially stayed payment of the permanency award to the claimant. In this case, we do not have a stipulation or a voluntary agreement between the parties, and no award was issued by a trial commissioner to the claimant during his lifetime. The Finding and Award also contains no findings as to what payments the claimant received during his lifetime and whether they were intended to compensate the claimant for partial disability or total

disability. As a result, we do not believe the factual predicate in this matter enables us to find Cappellino is applicable as a matter of law.

On the other hand, the respondents are asking this tribunal to determine whether a credit exists against the permanent partial disability award although they offered no evidence or legal argument on that issue during the formal hearing. This tribunal will not deal with such an issue *de novo* on appeal. For the reasons stated in Brennan v. Waterbury, 6065 CRB-5-15-12 & 5996 CRB-5-15-3 (October 31, 2016), *appeal pending*, S.C. 19937, further proceedings are warranted on the issue of whether a credit should be applied against the permanent partial disability award.

Relative to the issue of the award to the claimant of permanent partial disability benefits, we affirm the Finding and Award.[3] Regarding the issue of whether this award is subject to an offset for benefits paid subsequent to the date of maximum medical improvement, we remand the matter for further proceedings.

Commissioners Daniel E. Dilzer and Peter C. Mlynarczyk concur in this opinion.

[3] We uphold the trial commissioner's denial of the respondents' Motion to Correct. This motion sought to interpose the respondents' conclusions as to the law and the facts presented. Liano v. Bridgeport, 4934 CRB-4-05-4 (April 13, 2006) and D'Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003). In addition, we do not believe that the trial commissioner was obligated, as a matter of law, to grant a Motion for Articulation in this matter.

CERTIFICATION

THIS IS TO CERTIFY THAT a copy of the foregoing was mailed this 13th day of October 2017 to the following parties:

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