CASE NO. 6147 CRB-5-16-10 : COMPENSATION REVIEW BOARD
CLAIM NO. 500162491

DAVID GRANT : WORKERS' COMPENSATION COMMISSION
CLAIMANT-APPELLEE

v. : OCTOBER 5, 2017

LEAFGUARD OF SOUTHERN CT, L.L.C.
d/b/a DIGIORGI ROOFING AND SIDING
EMPLOYER

and

PMA MANAGEMENT CORPORATION
INSURER
RESPONDENTS-APPELLANTS

APPEARANCES: The claimant was represented by Jonathan H. Dodd, Esq., and James H. McColl, Jr., Esq., The Dodd Law Firm, L.L.C., Ten Corporate Center, 1781 Highland Avenue, Suite 105, Cheshire, CT 06410.

The respondents were represented by Joseph J. Passaretti, Jr., Esq., Jessica N. Kipphut, Esq., and Alessandra Carullo, Esq., Montstream & May, L.L.P., P.O. Box 1087, Glastonbury, CT 06033-6087.

This Petition for Review from the October 17, 2016 Finding and Award by Thomas J. Mullins, the Commissioner acting for the Fifth District, was heard on March 24, 2017 before a Compensation Review Board panel consisting of Commission Chairman John A. Mastropietro and Commissioners Christine L. Engel and Daniel E. Dilzer.

# OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondents have petitioned for review from the October 17, 2016 Finding and Award by Thomas J. Mullins, the Commissioner acting for the Fifth District. We find no reversible error and accordingly affirm the decision of the trial commissioner.[1]

In his Finding and Award, the trial commissioner, having identified as the issue for determination the compensability of the claimant's total right knee replacement, made the following factual findings which are pertinent to our analysis of this appeal. The claimant was employed by the respondent LeafGuard of Southern CT, L.L.C., d/b/a DiGiorgi Roofing and Siding, as a sales representative. The claimant sustained a left knee injury on September 11, 2014 which was not in dispute. On that date, the claimant presented to the Waterbury Hospital emergency room, and the on-call physician, Paul Beauvais, M.D., performed surgery on the claimant's left knee on September 12, 2014. Prior to the date of this injury, the claimant had a long history of treatment with Michael J. Kaplan, M.D., commencing in 2010, for a meniscal tear of the right knee. The claimant had undergone an arthroscopy and chondroplasty to the right knee, which, according to Dr. Kaplan, was also arthritic.

After the surgery to the right knee, the claimant's regimen of aftercare included, *inter alia*, steroid injections and physical therapy. On August 24, 2014, less than one month before sustaining the compensable injury to his left knee, the claimant underwent

[1] We note that a Motion for Extension of Time was granted during the pendency of this appeal.

an examination of his right knee. The claimant testified that following the surgery in 2011, his right knee symptoms had decreased.

For some time following the claimant's left knee surgery, his leg was immobilized and essentially non-weight-bearing. The claimant testified that he could only put "very, very little" weight on the left leg and he began to experience pain from his reliance upon and pressure on the right leg. Findings, ¶ 8; May 2, 2016 Transcript, p. 19.

In his April 23, 2015 report, Dr. Kaplan corroborated the testimony offered by the claimant at trial. Dr. Kaplan opined that the work-related injury to the claimant's left knee, and the resulting surgery, had put significant stress on the claimant's right knee such that his preexisting arthrosis had become more painful and symptomatic. Claimant's Exhibit A. At his deposition, Dr. Kaplan testified that the claimant's total right knee replacement resulted from the claimant having had to endure substantial stress from the previous compensable left knee injury and subsequent overuse of his right leg.

The claimant was also examined by Peter Barnett, M.D. In his report of July 6, 2015, Dr. Barnett referenced the claimant's physical examination and accompanying history, and stated that the "redevelopment of right knee pain was related to increased stress being placed on the right lower extremity during recovery following the left knee injury." Findings, ¶ 11, *quoting* Respondents' Exhibit C. However, in a report dated September 1, 2015 written in response to correspondence of August 28, 2015 from respondents' counsel, Dr. Barnett "curiously reversed his previous opinion in support of compensability." Findings, ¶ 12. Instead, Dr. Barnett opined that "I do <u>not</u> feel it can be

stated with *medical certainty* that *any sequellae* stemming from the work-related incident on September 11, 2014, resulted in or precipitated any accelerated worsening of this underlying, preexisting objective degenerative process." (Emphasis added.) Id., *quoting* Claimant's Exhibit C.

Based on the foregoing, the trial commissioner concluded that the claimant, whom the commissioner found credible, had sustained a compensable injury to his right knee. He also found the opinion of Dr. Kaplan "credible and substantively persuasive," Conclusion, ¶ D, and the opinion of Dr. Barnett "credible." Conclusion, ¶ E. Having concluded that the continuing medical care for the claimant's right knee injury was reasonable and medically necessary, the trial commissioner ordered the respondents to accept the compensability of the claimant's right knee injury and to pay all related workers' compensation benefits. The commissioner also ordered the respondents "to pay all reasonable and necessary medical, diagnostic, hospital and pharmaceutical bills, including but not limited to the medical services rendered by Dr. Kaplan, and all medical procedures, medications, and treatment thereafter." Judgment, ¶ II. Finally, the trial commissioner indicated that additional hearings would be required in order to ascertain the claimant's entitlement to temporary total and temporary partial disability benefits.

The respondents filed a Motion to Correct, which was denied in its entirety, and a Motion for Articulation which was also denied, and this appeal followed. On appeal, the respondents contend that the trial commissioner's denial of their Motion to Correct and Motion for Articulation constituted error. The respondents also assert that the trier abused his discretion by making inferences unreasonably or illegally drawn from the

subordinate facts and by relying on information or evidence outside the record in evaluating the credibility of the experts. Finally, the respondents argue that the commissioner applied an incorrect legal standard in assessing the credibility of the experts. While we concede that portions of the Finding and Award were inartfully drafted, we are not persuaded, in light of the evidentiary record before us, that the drafting issues constitute reversible error.

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 role of this board on appeal is not to substitute its own findings for those of the trier of fact. Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 451 (2001). The trial commissioner's role as factfinder encompasses the authority to determine the credibility of the evidence, including the testimony of witnesses and the documents introduced into the record as exhibits. Burse v. American International Airways, Inc., 262 Conn. 31, 37 (2002); Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999). If there is evidence in the record to support the factual findings of the trial commissioner, the findings will be upheld on appeal. Duddy v. Filene's (May Department Stores Co.), 4484 CRB-7-02-1 (October 23, 2002); Phaiah v. Danielson Curtain (C.C. Industries), 4409 CRB-2-01-6 (June 7, 2002). This board may disturb only those findings that are found without evidence, and may also intervene where material facts that are admitted and undisputed have been omitted from the findings. Burse, supra; Duddy, supra. We will also overturn a trier's legal conclusions when they result from an incorrect application of the law to the subordinate facts, or where they are the product of an inference illegally or unreasonably drawn from the facts. Burse, supra; Pallotto v. Blakeslee Prestress, Inc., 3651 CRB-3-97-7 (July 17, 1998).

McMahon v. Emsar, Inc., 5049 CRB-4-06-1 (January 16, 2007).

In the present matter, we note at the outset that the issue before the trial commissioner concerned the compensability of the claimant's right knee replacement

surgery, and the trier was presented with conflicting opinions from two physicians. This is hardly an uncommon occurrence in the workers' compensation forum, and it is axiomatic that "[i]t 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). The evidentiary record contains reports and deposition testimony from Dr. Kaplan, who essentially opined that the pressure placed by the claimant on his right knee following his surgery and rehabilitation for the compensable injury to his left knee was a substantial contributing factor to the claimant's need for a total right knee replacement.[2] The record also contains reports and deposition testimony from Dr. Barnett reflecting his opinion that the deterioration in the condition of the claimant's right knee and necessity for a total knee replacement was not a sequelae of the work-related injury to the claimant's left knee. The trier ultimately found the opinion of Dr. Kaplan more credible, and it was his prerogative to do so.

Turning to the claims of error raised by the respondents in their appeal, we begin with the assertion that the trial commissioner erred in denying the Motion for Articulation. Generally speaking,

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[2] In addition to providing the April 23, 2015 report in support of compensability of the claimant's right knee condition previously referenced herein, Dr. Kaplan testified at his deposition that "the substantial stress from [the claimant's] patellar tendon injury and the weight which he, therefore, put on that right knee accelerated his pre-existing condition with an overuse phenomenon and therefore, gave him more pain and worsened his problem, to the extent that he came to intervention sooner." Claimant's Exhibit I, p. 15. Dr. Kaplan also stated that "[m]y thought and comments with regard to [the claimant's] right knee are that by virtue of his long and difficult convalescence from a patellar tendon rupture and repair, is [sic] that he was relying on his right side to support himself for a prolonged period of time, and in a gentleman who was 300 plus pounds, and in doing so, made his already arthritic knee profoundly more symptomatic." Id., 22-23.

> it is well established that [a]n articulation is appropriate where the trial court's decision contains some ambiguity or deficiency reasonably susceptible of clarification. . . . [P]roper utilization of the motion for articulation serves to dispel any . . . ambiguity by clarifying the factual and legal basis upon which the trial court rendered its decision, thereby sharpening the issues on appeal. (Internal quotation marks omitted.)

Breen v. Craig, 124 Conn. App. 147, 161 (2010).

The respondents contend that their motion:

> sought to clarify the basis for the Trial Commissioner's legal conclusions regarding his use of the adjective "oft-sought" when referring to Dr. Barnett, the Trial Commissioner's mischaracterization that Dr. Barnett's first opinion allegedly supported compensability, as well as the dichotomy drawn by the Trial Commissioner between standards of evaluating the credibility of experts.

Appellants' Brief, p. 9.

Taking each of these issues in turn, we first point out that in fact, the trial commissioner referred to both Dr. Barnett and Dr. Kaplan as "oft-sought." Findings, ¶¶ 4, 11. It would thus seem logical that any supposed prejudice on the part of the trial commissioner attached to that label by the respondents would have been borne equally by both experts, effectively rendering it a nullity. It appears that the trial commissioner was expressing recognition of the fact that both doctors are respected experts within our workers' compensation forum. While it was unnecessary to point out this truism, it was hardly erroneous to do so. Moreover, whether a medical expert is "oft-sought," "never-sought," or somewhere in between does not alter the fact that it is well within the

discretion of the trier to select the medical opinion he finds most persuasive, and in this case, it was Dr. Kaplan's.[3]

The respondents also assert that the trial commissioner mischaracterized Dr. Barnett's initial opinion as stated in his Respondents' Examination report of July 6, 2015 by observing that Dr. Barnett "curiously reversed his previous opinion of compensability." Findings, ¶ 12. We have reviewed this report, and note that Dr. Barnett prefaced his observation that "the redevelopment of right knee pain was related to increased stress being placed on the right lower extremity during recovery following the left knee injury," Claimant's Exhibit C, with the phrase "[t]he history obtained from this gentleman would suggest…." As such, it could be reasonably argued that this statement on the part of Dr. Barnett was a summary of the claimant's narrative regarding the mechanics of the right knee injury, and not the expression of the doctor's opinion regarding same.

This inference is supported by the fact that later in that same report, Dr. Barnett goes on to state that "[a]t this time, it cannot be determined whether any sequelae stemming from the work-related incident in September 2014 resulted in an accelerated worsening of this underlying, preexisting problem." Id. This inference is further bolstered by the fact that in his addendum of September 1, 2015, Dr. Barnett concluded that "[a]t this time, based on information available, I do not feel that it can be stated with

[3] The respondents also contend that the trial commissioner's use of the adjective "oft-sought" constituted an abuse of discretion, an unreasonable inference in that the record contained no basis for describing Dr. Barnett as such, and an indication that the trial commissioner relied on evidence outside the trial record in assessing the experts' credibility. We find none of these assertions meritorious. As discussed previously herein, while we find the use of the adjective superfluous, we are far from persuaded that it rises to the level of reversible error, particularly in light of the fact that it was applied to both Drs. Barnett and Kaplan.

any medical certainty that any sequelae stemming from the work-related incident on September 11, 2014, would contribute in any way to permanency in the right lower extremity." Id.

Having examined Dr. Barnett's reports in their totality, it can be argued that the trier may have misinterpreted the doctor's opinion as expressed in the July 6, 2015 report. However, we also note that the trier had the benefit of Dr. Barnett's follow-up report of September 1, 2015 which was considerably less ambiguously phrased and clearly did not support compensability of the right knee replacement, and despite this second report of Dr. Barnett, the trier still found Dr. Kaplan's opinion as to compensability more persuasive. Such a factual determination is not subject to "second-guessing" by an appellate body.

The respondents also allege that the trier's denial of their Motion to Correct constituted error, asserting that "the requested changes were relevant, material, and would have led to a different result." Appellants' Brief, p. 13. The respondents maintain that the trier's findings failed to give sufficient credence to the testimony of the claimant indicating that he felt a "pop" in his left knee at the time of injury, "which was exactly the same way he injured (or reinjured) his right knee on the elliptical machine just five months prior to his compensable left knee injury." Id., 14. In addition, the respondents challenge the commissioner's description of Dr. Kaplan as the claimant's "[a]uthorized treating physician." Findings, ¶ 9.

With regard to the first correction, the record indicates that the trier was the beneficiary of ample testimony from the claimant relative to the mechanics of how he

sustained both knee injuries; moreover, at Dr. Kaplan's deposition, the doctor was queried regarding the issue of the "pop," and he indicated that although he wasn't sure what the "pop" signified, as the right knee was not being subjected to any trauma when it occurred, he did agree that "the pop on the right was different than the pop on the left." Claimant's Exhibit I, p. 34. As such, the respondents' insistence that the trier should have placed more relevance on the similarity between the two "pops" is merely a post-trial attempt to persuade the trial commissioner to reassess the facts initially presented at trial. We therefore find no error in the trier's decision to deny this correction. D'Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003).

With regard to the second correction, we concede that the record does not support the inference that Dr. Kaplan was the "authorized" treating physician. This is due in large part to the fact that for much of the time the claimant was treating with Dr. Kaplan for the right knee condition, it was not considered a compensable injury. Nevertheless, despite the fact that Dr. Beauvais performed the surgery on the claimant's left knee, the inquiry in the present matter concerns the compensability of the right knee replacement, which was performed by Dr. Kaplan. As such, regardless of the designation given to Dr. Kaplan by the trial commissioner, Dr. Kaplan was certainly qualified to opine on the effects of the left knee surgery on the right knee condition. We therefore find no error in the trier's denial of the respondents' second correction. "The "Motion to Correct … may be denied properly where the corrections are immaterial because the outcome of the case

would not be altered by the substituted findings."[4] Pallotto v. Blakeslee Prestress, Inc., 3651 CRB-3-97-7 (July 17, 1998), *quoting* Knoblaugh v. Greenwood Health Center, 13 Conn. Workers' Comp. Rev. Op. 150, 152, 1608 CRB-1-92-12 (February 6, 1995).

Finally, the respondents contend that the trial commissioner applied the incorrect legal standard in assessing the credibility of Drs. Kaplan and Barnett. Specifically, the respondents challenge the trial commissioner's findings that Dr. Kaplan was "credible and substantively persuasive" while Dr. Barnett was merely "credible." Conclusions, ¶¶ D, E. The respondents argue that "[i]f the Trial Commissioner is going to draw a dichotomy between standards of evaluating the credibility of experts, he must explain what the actual difference is – because it is not evident in the record nor can an inference be drawn." Appellant's Brief, p. 22. According to the respondents, the trier's failure to articulate the basis for differentiating between the experts in this manner constitutes the deprivation of due process. While we concede that these findings are inartfully drafted, we are not persuaded that the respondents' due process rights have been substantively affected by the trier's unnecessary "muddying" of the customary terminology. Obviously it would have been much more straightforward had the trial commissioner simply noted that he found Dr. Kaplan more persuasive than Dr. Barnett. However, as pointed out previously herein, Tartaglino, supra, clearly stands for the proposition that a fact-finder is free to pick and choose among competing medical opinions; Tartaglino does not

[4] The respondents also requested that the trial commissioner eliminate the phrases "and treatment thereafter" and "including but not limited to" from Judgment, ¶ II, because the language goes beyond the scope of issues recited at the commencement of the formal hearing and the commissioner lacks the authority to approve future, as yet unknown, medical care. While we agree that these phrases are overly expansive, we find that the trier also acknowledged that the services in question must be "reasonable and necessary," appropriately restricting the scope of the medical payments contemplated by this Order.

prescribe the exact terminology that must be used in that process. In the present matter, the commissioner's findings reviewed in their totality make it clear that he found Dr. Kaplan's medical opinion more persuasive than Dr. Barnett's. In light of the evidentiary basis for that conclusion as set forth herein, we do not find that the trier's misuse of the "magic words" in assessing the experts' credibility is fatal to the overall soundness of his conclusions.

There is no reversible error; the Finding and Award is accordingly affirmed in this appeal.

Commissioners Christine L. Engel and Daniel E. Dilzer concur.