CASE NO. 6168 CRB-2-17-1 : COMPENSATION REVIEW BOARD
CLAIM NO. 200147948

ISADORIA ANTHONY : WORKERS' COMPENSATION
CLAIMANT-APPELLANT COMMISSION

v. : DECEMBER 29, 2017

ARAMARK CORPORATION
EMPLOYER

and

SEDGWICK CMS, INCORPORATED
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Gary Huebner, Esq., Law Office of Gary Heubner, L.L.C., 164 Hempstead Street, New London, CT 06320.

The respondents were represented by Dominick C. Statile, Esq., and Jessica N. Kipphut, Esq., Montstream & May, L.L.P., P.O. Box 1087, Glastonbury, CT 06033.

This Petition for Review from the December 20, 2016 Finding & Award by Ernie R. Walker, the Commissioner acting for the Second District, was heard on June 30, 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 claimant has petitioned for review from the December 20, 2016 Finding & Award by Ernie R. Walker, the Commissioner acting for the Second District. We find no reversible error and accordingly affirm the decision of the trial commissioner.

In his initial Finding & Award, the trial commissioner identified as the issue for determination whether the claimant had met her burden that her current need for surgery was related to a compensable injury sustained on January 13, 2003. Based on the evidence presented at the formal hearing, the commissioner made the following factual determinations which are pertinent to our analysis of this appeal.[1] The claimant was hired as a mess attendant or food service worker for the respondent employer in 1987. At trial, the claimant testified regarding the duties of the position and indicated that such duties were physically demanding. In the 1990s, the claimant began experiencing shoulder problems. In 1997, she was treated with medication and given restrictions, but continued to perform very strenuous lifting at work. She returned to Jeffrey A. Miller, D.O., in 2004, and he recommended surgery.

The claimant testified that she was paid workers' compensation benefits and that she returned to work after her surgery, but in a light-duty capacity with no overhead tasks and no lifting over ten pounds. However, she indicated that even with these restrictions, she continued to perform heavy-duty lifting at work. The claimant also testified regarding her slip-and-fall at home, the injuries she sustained to her left shoulder and hands, and her medical treatment for same. After the incident, she returned to her regular

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

duties. She also sought treatment from Frank W. Maletz, M.D., and Joseph E. Noonan, Jr., M.D. The claimant indicated that she thought her right shoulder claim had been closed, and that her shoulder condition is much worse since the surgery.

In March 2004, Dr. Miller's diagnosis was work-related right rotator cuff tendonitis, aggravated by performing overhead activities, repetitive reaching, and carrying trays. An MRI taken on March 18, 2004 demonstrated retraction of the supraspinatus tendon suggestive of a tear. On March 22, 2004, Dr. Miller reported high signal intensity at the insertion of the supraspinatus that appeared to be retracted due to a tear. On April 14, 2004, Dr. Miller performed surgery on the claimant's right shoulder.

The respondents issued a Voluntary Agreement for bilateral shoulder strains.[2] On November 1, 2005, a Voluntary Agreement was approved by the Workers' Compensation Commission for a 10 (ten) percent permanent partial disability to the right shoulder.

Records generated by Lawrence & Memorial Hospital substantiate injuries to the claimant's hands and left shoulder.

On May 2, 2011, Dr. Maletz evaluated the claimant. An MRI taken on May 23, 2011 demonstrated post-operative changes and a full thickness rotator cuff tear of the right shoulder. On March 30, 2015, Dr. Noonan evaluated the claimant's right shoulder. In his deposition on June 5, 2015, Dr. Noonan implicated the claimant's prior injury and surgery in her current need for surgery and, in addition, implicated the claimant's subsequent period of repetitive trauma following her return to work after her first right shoulder surgery. Peter R. Barnett, M.D., in his report of July 20, 2015, stated that the claimant's need for current ongoing treatment was related to her prior work-related injury

[2] This Voluntary Agreement was approved by the Workers' Compensation Commission on May 17, 2004.

and subsequent surgery. However, in his deposition on November 23, 2015, Dr. Barnett changed his position on the issue.

Having heard the foregoing, the trial commissioner concluded that the claimant's testimony was credible and persuasive, including her testimony that she continued to have symptoms and problems with her right shoulder following the surgery performed by Dr. Miller on April 14, 2004.[3] The commissioner also found Dr. Noonan credible and persuasive regarding his opinion that the claimant's pathology and subsequent surgery were material and substantial contributing factors to her current need for surgery. The commissioner found the medical and testimonial evidence established that the sequelae of the claimant's original injury and surgery, including degenerative changes in her right shoulder, had caused the claimant's current need for surgery. In addition, subsequent MRIs taken in 2011 and in 2015 demonstrated post-operative changes and scarring attributable to the surgery.

The trial commissioner concluded that the slip-and-fall incident of February 20, 2011 constituted an intervening accident and injury to the claimant's left shoulder, not her right shoulder. The commissioner did not find Dr. Maletz credible or persuasive; moreover, in light of Dr. Barnett's change in position, the commissioner also did not find either of Dr. Barnett's opinions credible or persuasive. The trier did find credible Dr. Noonan's opinion indicating that the claimant's current need for surgery was attributable to her original work injury and subsequent sequelae of the injury. The commissioner concluded that the degenerative changes in the claimant's shoulder

[3] Dr. Miller operated on the claimant's supraspinatus tendon in addition to other medical issues addressed intra-operatively.

constituted a legitimate change in circumstances and therefore ordered the respondents to authorize surgery and pay benefits in accordance with the approved Voluntary Agreements within twenty days of his decision. Finally, the trial commissioner determined that there had been no unreasonable contest or delay in this matter.

On January 3, 2017, the respondents filed a Petition for Review along with a motion to correct. On January 4, 2017, the trial commissioner granted the respondents' motion in its entirety. On January 6, 2016, the claimant filed a motion to correct requesting that trial commissioner either eliminate the word "intervening" from Conclusion, ¶ D, or, alternatively, amend the conclusion "to reflect the fact that the left shoulder was not an issue fully and fairly litigated during this proceeding, such that [the claimant] should be left to her proof to establish any entitlement to future medical care for the accepted left shoulder condition." Claimant's Motion to Correct, p. 1. On January 9, 2017, the trial commissioner granted the claimant's motion.[4] On January 11, 2017, the respondents filed a Withdrawal of Appeal, which was granted by the Compensation Review Board on January 18, 2017.

On January 26, 2017, the claimant filed a Petition for Review.[5] On appeal, the claimant contends that the trial commissioner's decision to grant the respondents' motion to correct was based on the "application of incorrect legal standards" and "resulted in an ambiguous, internally inconsistent decision unsupported by the evidence." Appellant's Brief, p. 12. The claimant also argues that the trier's decision to grant the corrections

[4] We infer that in granting this correction, the trial commissioner agreed to remove the word "intervening" from Conclusion, ¶ D.

[5] The claimant also filed a second Petition for Review on January 27, 2017 which appeared to use a different date for the Ruling on Motion being appealed.

proposed by the respondents, resulting in the reversal of his award, constituted error. We are not so persuaded.

In the workers' compensation forum, motions to correct are governed by the following provisions as set forth in Admin. Reg. § 31-301-4:

> If the appellant desires to have the finding of the commissioner corrected he must, within two weeks after such finding has been filed, unless the time is extended for cause by the commissioner, file with the commissioner his motion for the correction of the finding and with it such portions of the evidence as he deems relevant and material to the corrections asked for, certified by the stenographer who took it, but if the appellant claims that substantially all the evidence is relevant and material to the corrections sought, he may file all of it so certified, indicating in his motion so far as possible the portion applicable to each correction sought. The commissioner shall forthwith, upon the filing of the motion and of the transcript of the evidence, give notice to the adverse party or parties.

It is axiomatic that when proposed corrections "would have no impact on the final disposition of this case …, the commissioner's ruling on the motion to correct must be upheld." Kluttz v. Howard, 228 Conn. 401, 405, fn. 5 (1994). Similarly, in Simmons v. Bonhotel, 40 Conn. App. 278 (1996), our Appellate Court held that it was not an abuse of discretion for a trial commissioner to deny a motion to correct when the factual findings requested in the motion to correct were not "material." The court explained, "[a] *material* fact is one that will affect the outcome of the case." (Emphasis in the original.) Simmons, supra, 286.

However, in the present matter, the claimant has identified as erroneous the trial commissioner's decision to grant the respondents' motion in its entirety, thereby resulting in a reversal of his conclusions relative to causation. The claimant asserts that the "motion to correct is not the proper vehicle for wholesale substitution of facts and

complete reversal of the outcome in this proceeding. Such motions should be used for relatively minor clarifications." Appellant's Brief, p. 19.

This exact issue was reviewed by our Appellate Court in Buccieri v. Pacific Plumbing Supply Co., 53 Conn. App. 671 (1999), and the court reached a holding at variance with the instant claimant's contention. In Buccieri, the trial commissioner initially determined that injuries sustained by the claimant when he fell in his driveway were the result of an earlier compensable injury. The respondents filed a motion to correct which the commissioner granted in its entirety, essentially reversing his earlier findings and concluding that the claimant's injuries were the result of the intervening accident. The claimant in Buccieri contended that the trial commissioner's authority to correct his findings "may be exercised only if the record discloses that his finding includes facts found without evidence or if the record fails to include material facts that are admitted or undisputed." Id., 675. In addition, the Buccieri claimant proffered essentially the same argument presented by the claimant in the present matter: i.e., a motion to correct may be used to correct the findings, but not to change the ultimate conclusions.

With regard to the first argument, the Supreme Court pointed out that the claimant "incorrectly equates the power of the commissioner to correct his *own* findings to the power of a reviewing board or court to correct those same findings." (Emphasis in the original.) Id., 676. Thus, "[w]hile a reviewing authority may not substitute its findings for those of the trier of fact … the commissioner, as the trier of fact has the inherent authority to reconsider a prior ruling if, after reviewing the evidence, he concludes that such findings are incorrect." (Internal citation omitted.) Id.

Relative to the Buccieri claimant's second contention, the court made the following statement: "If we uphold this argument, the result would be that the commissioner could correct his findings so as to remove any basis for the award, but could not change the award. Such a result would be absurd." Id. Instead, the court held that when assessing whether proposed corrections were improvidently granted, it is necessary to examine the record and apply the well-settled standard of appellate review: "[T]he conclusions drawn by [the trial commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them." Id., 677, *quoting* Kish v. Nursing & Home Care, Inc., 47 Conn. App. 620, 623 (1998). Given, then, that the corrected "findings were reasonably drawn from the facts found by the commissioner," id., 678, and the record "amply" supported the trier's ultimate conclusions, id., 677, the court affirmed the decision of this board concluding that the commissioner retained the authority to correct his findings and reverse the award.

In light of the court's holding in Buccieri, it would thus appear that the proper course of action in reviewing the present matter is to examine each of corrections granted by the trier, but contested by the claimant, to determine whether the evidentiary record supports the trier's decision to grant the correction. We therefore begin with the claimant's objection to the respondents' request to amend Findings, ¶ 11.A of the Finding & Award to include a finding that "the medical evidence shows that [the claimant] began treating for right shoulder pain on March 4, 2011…." Respondents' Motion to Correct, ¶ 2. The claimant contends that the transcript references provided in support of this proposed correction do not support such a factual finding. We disagree; our review of the

November 18, 2015 transcript indicates that when respondents' counsel pointed out that "the first note we have regarding treatment for your right shoulder is a March 4, 2011 note from a P.A. at Crossroads Orthopaedic," the claimant replied "[u]h-huh." Id., 35. When respondents' counsel then asked the claimant if she recalled that, she replied, "[y]es, sir." Id.

The claimant further contends that the respondents' reliance for this correction upon the office note dated March 4, 2011 provided by Velvet Vachon, PA-C, is misplaced, given that the note does not support a finding that the claimant commenced treatment for her right shoulder on that date. Again, we are not so persuaded; the office note indicates that the claimant presented "with a chief complaint of bilateral shoulder pain" and states that the claimant was referred to physical therapy, given a sample and script for Voltaren Gel, and told to return in six to eight weeks for re-assessment by one of the physicians. Claimant's Exhibit C. We therefore find this note provides a sufficient basis for the trier's decision to grant this correction. Moreover, at trial, when presented with the history recited in this office note, the claimant agreed with it, and also agreed with the following statement by respondents' counsel:

> So, is it your testimony today that after this February 20th incident you did not have any increased right shoulder pain, but going back to work doing your full job duties, you ended up having more pain in your right shoulder between February 20th and March 4, 2011?

November 18, 2015 Transcript, pp. 21-22.

In addition, we find that this office note, along with the balance of the medical record, provides adequate support for the commissioner's decision to grant the proposed

correction to Findings, ¶ 12.B. This correction requested that the trier add a paragraph stating:

> There is no evidence of any medical treatment to the claimant's right shoulder from the time she reached maximum medical improvement on November 1, 2005 until two weeks after the fall down the stairs on March 4, 2011.

Respondents' Motion to Correct, ¶ 4.

Our review of the evidentiary record indicates that it contains no medical reports demonstrating that the claimant received medical treatment for her right shoulder during the time period between November 1, 2005 and March 4, 2011. Moreover, at trial, when respondents' counsel queried, "so your shoulder did not cause you to seek any medical treatment for about 5 and a half years between the last visit with Dr. Miller in September of 2005 and when you started treating in March of 2011?" the claimant replied, "[t]rue." November 18, 2015 Transcript, p. 32. In light of this evidence, we do not find erroneous the trier's decision to grant the proposed correction to Findings, ¶ 12.B.

The claimant objects to the trier's decision to grant the proposed correction to Findings, ¶ 27, which added language indicating that Dr. Noonan "acknowledged that despite what the claimant told him, the medical records from 2011 address bilateral shoulder pain. Furthermore, the surgery recommended for the claimant's right shoulder in 2015 was the same surgery that was recommended and scheduled in 2011."[6] Respondents' Motion to Correct, ¶ 8. The respondents cite to the November 18, 2015 formal hearing transcript for this correction, and the claimant accurately points out that

[6] In its original form, Findings, ¶ 27, states: "Dr. Noonan in a June 5, 2015 deposition implicates the Claimant's prior injury and surgery for her current need for surgery and in addition implicates the Claimant's subsequent work period of repetitive trauma after she returned to work after her first right shoulder surgery."

Dr. Noonan did not testify at the November 18, 2015 formal hearing. However, while the citation was indeed inaccurate, our review of the record indicates that the Crossroads Orthopaedic medical records from 2011 discussed previously herein reference the claimant's bilateral shoulder pain. Moreover, at trial, the claimant agreed that Dr. Noonan had recommended surgery to repair her torn rotator cuff and it was the "same exact surgery that was recommended in 2011." November 18, 2015 Transcript, p. 51. As such, despite the fact that the respondents relied upon an inaccurate citation, the proposed correction does not misrepresent the record in this case, and the commissioner's decision to grant the correction despite the inaccurate citation constituted harmless error, at best.

The claimant objects to the proposed correction to Findings, ¶ 27.C, which sought to add the following language: "The claimant last worked on September 23, 2015 and did not file a claim for repetitive trauma within one year of that date."[7] Respondents' Motion to Correct, ¶ 11. The claimant argues that our "law does not support a requirement that a claimant must file redundant claims for repetitive trauma," Appellant's Brief, p. 14, and points to the following passage in Rodriguez-Colon v. Easter Seals Goodwill Industries, 4804 CRB-3-04-4 (June 22, 2005) in support of this contention:

> It follows that, where a repetitive trauma injury is at issue at a formal hearing, the use of a specific injury date on a written notice of claim need not prevent the claimant from incorporating a time period following that date into the claim. A finding of further traumatic exposure would be permissible as long as the evidence supports such a finding, and the employer can be shown not to have been prejudiced by the inaccuracy in the written notice.

Id.

[7] The respondents acknowledge that the reference to "2015" was a typographical error, and there is no dispute between the parties that the claimant's final date of employment was September 23, 2013.

We agree with the claimant's argument that "[r]equiring a claimant to file a new notice of claim after it has been accepted is unnecessary, and contrary to the purpose of the Act." Appellant's Brief, p. 15. However, we disagree that in granting this particular correction, "the trial commissioner applied an incorrect legal standard and imposed a burden upon the claimant which the law does not recognize." Id. Our review indicates that the record does not contain a second notice of claim filed by the claimant filed after the fall down the stairs on February 20, 2011. Moreover, the claimant testified that she did not file a claim for her right shoulder following this incident because she was told she could not. See November 18, 2015 Transcript, pp. 45-46. Had this matter involved a dispute pertaining to jurisdiction, then the existence of a second notice of claim might have been germane to our inquiry. However, in light of the fact that causation, rather than jurisdiction, was contested, the trier's decision to grant a correction which merely corroborated the status of the record does not constitute error.[8]

The claimant objects to the following proposed revisions to Findings, ¶ 28:

> [D]ue to conflicting information contained in the medical records as it relates to the February 2011 incident and based on the history which had been provided to him by the claimant, it cannot be determined whether any sequelae stemming from the fall contributed to the claimant's current right shoulder condition…. As indicated, the claimant's testimony is in direct contrast to the medical evidence of this case, and she gave Dr. Barnett the same contrasting information as her testimony.

Respondents' Motion to Correct, ¶ 12.

[8] We note that the box for repetitive trauma was not checked off on either the Voluntary Agreement for bilateral shoulder strains approved on May 17, 2004, or the Voluntary Agreement for a right shoulder strain approved on November 1, 2005.

The claimant contends that the final sentence of this correction is "ambiguous," and not supported by the July 20, 2015 Respondents' Medical Examination report provided by Peter Barnett, M.D. Appellant's Brief, p. 15. We disagree. Our review of this report indicates that Dr. Barnett stated:

> Records provided for review provide conflicting information regarding the relatedness of this individual's current right shoulder condition to the slip-and-fall incident in February 2011, and at this time it cannot be determined with any certainty whether this incident contributed in any significant way to the patient's current right shoulder difficulties.

Claimant's Exhibit E, p. 5.

In addition, Dr. Barnett remarked:

> Due to conflicting information contained in the medical records as relates to the incident which occurred in February 2011 and also based on the history which has been provided by this individual during today's examination, it cannot be determined whether any sequelae stemming from the slip-and-fall incident in February 2011 contributed in any meaningful way to the patient's current right shoulder condition.

Id.

These statements by Dr. Barnett clearly reflect that his opinion relative to causation in this matter was influenced by the inconsistencies between the medical reports and the claimant's narrative. Thus, while the proposed revision as framed is not an exact quote of Dr. Barnett's findings, we believe it is sufficiently consistent with his opinion such that the trial commissioner's decision to grant this correction was not erroneous.

Similarly, the claimant objects to the proposed correction to Findings, ¶ 29, which correction states that Dr. Barnett, in his deposition of November 23, 2015, indicated that

in his report of July 20, 2015, his conclusions were "based on the information available at the time," which presumably included the claimant's narrative. However, the respondents point out that when the doctor authored his follow-up letter on October 29, 2015, he noted that "the claimant specifically stated to him that there was no re-injury to the right shoulder following the 2011 fall. Dr. Barnett subsequently relied on the medical reports that suggested complaints in both shoulders." Respondents' Motion to Correct, ¶ 13. The claimant contends that this revision is not supported by the evidence, in that Dr. Barnett testified that he did not review any new medical reports after July 20, 2015, and "[h]e did not change the conclusion he reached on July 20, 2015, but was merely 'responding to a hypothetical question.'" Appellant's Brief, p. 15; see also Respondents' Exhibit 2, p. 45.

We agree that the respondents' use of the word "subsequently" in this proposed correction does, at first blush, seem to suggest that Dr. Barnett changed his opinion regarding causation at some point between his initial report of July 20, 2015 and his follow-up correspondence of October 29, 2015. However, our review of the record suggests that the doctor did not change his opinion; in fact, it was quite consistent throughout his involvement with this matter. As discussed previously herein, Dr. Barnett's initial report was laden with a number of caveats regarding the "discrepancies" between the prior medical reports and the claimant's narrative.[9] Claimant's Exhibit E, pp. 4-5. In addition, at his deposition, Dr. Barnett discussed those

[9] The discrepancies identified by Dr. Barnett at his deposition were: 1) there was no reference to the claimant's right shoulder in the emergency room report but subsequent medical reports seem to reflect that she injured her right shoulder in the fall; 2) the claimant reported to Dr. Barnett that her right shoulder was already in pain prior to the fall but the records from Crossroads Orthopaedic Sub Specialists, L.L.C., seem to indicate that the pain in her right shoulder was the result of the fall. See Claimant's Exhibit C.

discrepancies, Respondents' Exhibit 2, pp. 46-48, and specifically denied that he had changed his opinion, stating that when he drafted his follow-up correspondence of October 29, 2015, he "was responding to a hypothetical question," id., 45, posed by counsel for the respondents.[10] The doctor reiterated his opinion in the following testimony:

> But if the fall that occurred did, in fact, injure the right shoulder resulting in the onset of right shoulder pain, that is the sequelae of that fall that led to her seeing or seeking treatment and the sequelae from that fall that led to the recommendation to ultimately undergo further surgery. So I think the fall would under the circumstances clearly be a substantial contributing factor to the need for additional care because it represented a new injury.

Id., 24.

The foregoing excerpts from Dr. Barnett's testimony in this matter demonstrate that his opinion regarding causation remained tentative because he consistently acknowledged that it was dependent on the claimant's narrative. Thus, while we concede the claimant's point that Dr. Barnett did not change his opinion over time, and recognize that the phrasing of the respondents' correction was inartful, we do not find erroneous the commissioner's decision to grant this proposed correction, given that it essentially reflects the nature of the evidence proffered in this matter.

The claimant also objects to the proposed correction stating that Conclusion, ¶ A, should be changed to reflect that the commissioner did not find the claimant credible. The respondents argue that the basis for this correction lies in the fact that the claimant did not seek medical care between 2005 and 2011 and her testimony relative to the fall is

[10] The hypothetical posed by the respondents was as follows: "if there is a finding by the commissioner that the claimant did injure her shoulder in the fall down the stairs at home in 2011, do you believe that the claimant's current problems and need for surgery are related to that fall down the stairs in a material and substantial way…." Respondents' Exhibit 2, p. 23.

inconsistent with the medical reports in the record. In addition, the respondents state that "at a prior Formal Hearing on a back claim, the same Trial Commissioner found the claimant to be 'mostly credible.'" Respondents' Motion to Correct, ¶ 14. The claimant points out that the respondents failed to cite to medical reports in the record pertaining to bilateral shoulder issues, and the issue of whether the claimant sought medical care in the intervening period is irrelevant to her credibility. Moreover, relative to the respondents' reference to the prior formal hearing for a back claim, the claimant contends that the trial commissioner relied on evidence outside the record when he granted this proposed correction.

There is no question that the trial commissioner's ability to reach a determination regarding causation in this matter hinged upon his assessment of the claimant's credibility. It was necessary for the commissioner to first determine if the claimant was credible when she testified that she did not injure her right shoulder in the February 2011 fall. Only then could he reach a determination regarding the causal connection between the claimant's accepted shoulder claim, the fall, and the claimant's current need for surgery. As discussed previously herein, the medical reports generated by Crossroads Orthopaedic contain a number of references to bilateral shoulder pain following the claimant's fall down the stairs on February 2011. In addition, while we agree that the respondents' reference to the claimant's unrelated back claim was gratuitous, in light of the tenor of the previous findings granted by the trial commissioner, no basis exists for the inference that the trial commissioner relied upon evidence outside the record in concluding that the claimant was not credible.

The claimant also objects to the proposed correction to Conclusion, ¶ C, requesting that the conclusion be replaced with the following statement: "The medical and testimony evidence do not establish that the sequelae from the original date of injury caused the current need for surgery." Respondents' Motion to Correct, ¶ 16. The claimant contends that this conclusion is not supported by the evidence, and "the record does not contain a reliable medical opinion that a right shoulder injury occurred in February 2011." Appellant's Brief, p. 16. We are not so persuaded. While we agree that neither Dr. Maletz nor Dr. Barnett proffered a definitive report opining that the claimant had sustained a right shoulder injury in the February 2011 fall, the reports generated by Crossroads Orthopaedic clearly indicate that the claimant complained of right shoulder pain following this incident. A trial commissioner's prerogative to weigh medical evidence is well-settled: "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). Moreover, the trier's decision to grant this proposed corrected conclusion is consistent with the corrections he granted to his factual findings.

The claimant objects to the trial commissioner's granting of the proposed correction to Conclusion, ¶ D, which in its original form stated: "I find that the incident of February 20, 2011 shows an intervening accident and injury to the Claimant's left shoulder, not the right shoulder." The respondents sought to eliminate the phrase "left shoulder, not the right shoulder" and replace it with the phrase "bilateral shoulders." As the basis for this correction, the respondents point out that the claimant did not seek

treatment for her right shoulder between 2005 and 2011, and both Drs. Maletz and Noonan reference the claimant's right shoulder pain following the fall. Additionally, the medical reports from 2011, including the MRI, indicate that the claimant treated for an injury to her right shoulder after the fall, "and attribute the need for same to the fall." Respondents' Motion to Correct, ¶ 17.

The claimant disputes the respondents' assertions, contending that "[n]either Dr. Maletz nor Dr. Noonan specifically state in their reports that the claimant was experiencing right shoulder pain *caused by* the 2011 fall." (Emphasis in the original.) Appellant's Brief, p. 16. The claimant also points to Dr. Barnett's conclusion indicating that "it cannot be determined with any certainty whether this incident contributed in any significant way to the patient's current right shoulder difficulties." Id., 16-17, *quoting* Claimant's Exhibit E, p. 5. The claimant characterizes the respondents' argument on this issue as follows: "merely because Ms. Anthony experienced right shoulder pain after February 2011, this compels a finding that it was due to the fall." Appellant's Brief, p. 17. We disagree that the trial commissioner was in any way "compelled" to find that the fall contributed to the claimant's right shoulder issues. Rather, the trial commissioner was "compelled" to examine all the evidence and draw the most reasonable inferences from that evidence. "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 v. People's Savings Bank, 207 Conn. 535, 540 (1988), *quoting* Del Vecchio v. Bowers, 296 U.S. 280, 287 (1935). While the medical record excerpts cited by the claimant are accurate, the commissioner's conclusions were

based on the entirety of the evidentiary record. As such, we find no error in the trial commissioner's decision to grant the correction to Conclusion, ¶ D.

As noted previously herein, in addition to granting the respondents' motion to correct in its entirety, the trial commissioner also granted the claimant's proposed correction to Conclusion, ¶ D, by deleting the word "intervening." As justification for the correction, the claimant pointed out that the issues presented at the formal hearing were solely limited to the claimant's right shoulder, and argued that the term "intervening" be deleted "to the extent that it may carry any legal significance or adversely impact the claimant's ability to pursue future medical care for her left shoulder." Claimant's Motion to Correct, p. 1. The claimant contends that the commissioner's decision to grant both parties' requested corrections to this conclusion resulted "in an inconsistent and ambiguous decision." Appellant's Brief, p. 18. We disagree. Conclusion, ¶ D, after incorporating both requested corrections, now reads as follows: "I find that the incident of February 20, 2011 shows an accident and injury to the Claimant's bilateral shoulders." We are not persuaded that the omission of the word "intervening" from this conclusion creates ambiguity or affects in any fashion the claimant's ability to pursue future treatment for her left shoulder.

The claimant also objects to the proposed correction to Conclusion, ¶ E, wherein the respondents request that this conclusion, which indicated that the trier did not find Dr. Maletz credible and/or persuasive, be deleted and replaced with a conclusion indicating that the trier did find Dr. Maletz persuasive. The claimant objects to the respondents' statement that Dr. Maletz treated the claimant "immediately" following the fall of 2011, pointing out that Dr. Maletz did not see the claimant until May 2, 2011, by

which time the claimant had been performing her regular duties for more than two months. The claimant also points out that the March 4, 2011 office note of Velvet Vachon, PA-C, does not indicate that she thought the claimant had sustained a rotator cuff injury at that time, and the claimant did not undergo any treatment between March 4, 2011 and May 2, 2011.

We concede that the respondents' use of the word "immediately" is not entirely consistent with its generally accepted meaning. However, the record does reflect that Dr. Maletz offered no opinion whatsoever on the causal link between the claimant's fall and her need for rotator cuff surgery, and merely recommended the same course of treatment subsequently recommended by Dr. Noonan. As such, the significance of the trier's conclusions relative to the credibility of Dr. Maletz, or lack thereof, would seem to be limited to a concurrence with the recommended course of treatment. Such a finding, although not necessary, is well within the trial commissioner's prerogative, as is the determination of the evidentiary weight to be accorded to the two-month gap between the claimant's visit to Ms. Vachon and her follow-up visit with Dr. Maletz.[11]

The claimant also objects to the proposed deletion of Conclusion, ¶ G, wherein the trial commissioner found credible Dr. Noonan's opinion that the claimant's "current need for surgery [was] attributable to the original work injury and subsequent sequelae of the same." Finding & Award, Conclusion, ¶ G. The respondents contend that Dr. Noonan acknowledged that bilateral shoulder pain was mentioned in the claimant's other medical records. Moreover, although the doctor was initially unable to offer an

[11] We note that the claimant testified that after returning to work following the fall down the stairs, her left shoulder bothered her but she favored her right shoulder more "[b]ecause it was sore." November 18, 2015 Transcript, p. 21.

opinion on causation, he ultimately testified that the claimant's ongoing job-related duties were a contributing factor to her right shoulder injury. Claimant's Exhibit D, pp. 38-39, 42.

The claimant contends that the deletion of the conclusion pertaining to Dr. Noonan's opinion would suggest that the trial commissioner failed "to evaluate the totality of the evidence" in light of Dr. Noonan's status as a treating physician. Appellant's Brief, p. 18. We are not so persuaded; although we agree that the trial commissioner is indeed responsible for evaluating the entire evidentiary record, we do not find that in this particular matter, the deletion of Conclusion, ¶ G, relative to Dr. Noonan's opinion signifies error on the part of the trier. This is particularly so given that Dr. Noonan's opinion as to causation was consistently somewhat equivocal. At his deposition, he noted that the medical records were "contradictory among themselves," Claimant's Exhibit D, p. 32, and although he opined that the claimant's prior rotator cuff surgery and daily "activities" since that surgery were likely contributing factors to her current need for rotator cuff repair, id., 38, he also testified, when presented with a hypothetical, that if it were found that the claimant's right shoulder was injured in the fall, then the fall could also be a contributing factor to the claimant's current need for rotator cuff repair. In light of this testimony, we find the commissioner's decision to delete Conclusion, ¶ G, was supported by the record and consistent with the corrections granted to his other factual findings.

We recognize that the procedural history in this matter is somewhat unconventional. It is quite rare that a trial commissioner's adoption of one party's proposed corrections results in a complete reversal of the underlying decision.

Nevertheless, as our Appellate Court's analysis in Buccieri, supra, makes clear, a trial commissioner does retain the authority to amend his findings and reverse a decision, provided the corrections sought are supported by the evidentiary record. In the present matter, our review of the record indicates that the evidence and testimony presented was such that contradictory inferences could be drawn. As an appellate body, we are not empowered to second-guess factual findings, particularly when those findings are predicated on determinations of credibility. "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…." Burton v. Mottolese, 267 Conn. 1, 54 (2003).

There is no reversible error; the December 20, 2016 Finding & Award by Ernie R. Walker, the Commissioner acting for the Second District is accordingly affirmed.

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