CASE NO. 6155 CRB-4-16-11 CLAIM NO. 400063014	: COMPENSATION REVIEW BOARD
JOSEPHINE THELORS CLAIMANT-APPELLANT	: WORKERS' COMPENSATION COMMISSION
v.	: APRIL 10, 2018
JEWISH HOME FOR THE ELDERLY EMPLOYER	
and	
WORKERS' COMPENSATION TRUST INSURER RESPONDENTS-APPELLEES	
and	
SECOND INJURY FUND RESPONDENT-APPELLEE	

APPEARANCES:

The claimant was represented by David J. Laudano, Esq., Law Office of Raymond W. Ganim, 2192 Main Street, Stratford, CT 06615.

Respondents Jewish Home for the Elderly and Workers' Compensation Trust were represented by James A. Mongillo, Esq., Letizia, Ambrose & Falls, P.C., 667-669 State Street, New Haven, CT 06511.

Respondent Second Injury Fund was represented by Francis C. Vignati, Jr., Esq., Assistant Attorney General, Office of the Attorney General, 55 Elm Street, P.O. Box 120, Hartford, CT 06141-0120.

This Petition for Review from the October 13, 2016 Finding and Decision of Charles F. Senich, the Commissioner acting for the Fourth District, was heard on August 25, 2017 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Christine L. Engel and Daniel E. Dilzer. [1]

[1] We note that a Motion for Extension of Time was granted during the pendency of this appeal. A second Motion for Extension of Time was filed but deemed a Motion for Postponement. See March 13, 2017 Ruling on Motion for Extension of Time to File Appellant's Brief.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has appealed from a Finding and Decision issued on October 13, 2016 concluding that she was not entitled to benefits pursuant to General Statutes § 31-307.[2] She argues that the trial commissioner erred by misinterpreting the medical evidence which had been presented given that the record supported her claim for benefits. The respondents argue that the trial commissioner simply was not persuaded by the claimant's evidence and did not find her treating physician fully credible and persuasive. It is axiomatic that the claimant has the burden of persuasion in this forum. After examining the record, we conclude that a reasonable fact-finder could reach the conclusions rendered in this case. We therefore affirm the Finding and Decision.

The issues under consideration in this matter included the respondents' Form 36, filed on March 17, 2015, and the claimant's bid for temporary total disability benefits. The commissioner found that the respondents had accepted a claim for a right-wrist injury and psychiatric injuries with a date of injury of April 27, 2004. The claimant underwent a number of surgeries for her right wrist and hand. The parties submitted a voluntary agreement to the Workers' Compensation Commission [hereinafter

[2] General Statutes § 31-307(a) states: "If any injury for which compensation is provided under the provisions of this chapter results in total incapacity to work, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of the injured employee's average weekly earnings as of the date of the injury, 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 section 31-310; but the compensation shall not be more than the maximum weekly benefit rate set forth in section 31-309 for the year in which the injury occurred. No employee entitled to compensation under this section shall receive less than twenty per cent of the maximum weekly compensation rate, as provided in section 31-309, provided the minimum payment shall not exceed seventy-five per cent of the employee's average weekly wage, as determined under section 31-310, and the compensation shall not continue longer than the period of total incapacity."

"Commission"] which was approved on September 21, 2006. The claimant testified at the formal hearing that her entire body was in constant pain.

The commissioner considered evidence from various medical experts. He cited an October 5, 2012 report from Fernando Branco, M.D., F.A.A.P.M.R., Medical Director of The Rosomoff Comprehensive Rehabilitation Center, who examined the claimant and concluded that "[h]er psychological issues are not a hindrance for her to return to work at the present time, but she is not able to return due to cognitive deficits that are not psychologically rooted." Findings, ¶ 5; Respondents' Exhibit 3. The trial commissioner noted that the claimant's treating physician, Michael J. Brennan, M.D., reported on March 17, 2014 that the claimant was doing "much worse." Claimant's Exhibit A. On September 11, 2015, Dr. Brennan reported that he could not state with reasonable medical probability whether the claimant's disability was solely due to her work-related injury or to a combination of co-occurring medical issues and deteriorating neurologic status coupled with her work-related pain issues. Findings, ¶ 7; Claimant's Exhibit A. Dr. Brennan did believe that the claimant was totally disabled from any gainful employment, but he could not opine that it was solely the result of her work injury. At his deposition on January 21, 2016, Dr. Brennan reiterated that the claimant was totally disabled but also acknowledged that he had not examined the claimant since March 2014. Claimant's Exhibit H, pp. 9, 11-13.

The trial commissioner also noted the results of an August 25, 2015 functional capacity examination which deemed the claimant capable of sedentary work. See Claimant's Exhibit E. In addition, he noted that both Jerrold Kaplan, M.D., and Kenneth M. Selig, M.D., J.D., had performed Commissioner Examinations of the claimant.

Dr. Kaplan's October 27, 2014 report opined that "[j]ust based on her right upper extremity injury, she should have a sedentary capacity…." Respondents' Exhibit 1. Dr. Selig's February 20, 2015 report opined that the claimant "does not have any limitations in her capacity to work on a psychiatric basis." Respondents' Exhibit 2.

Based on this record, the trial commissioner found the opinions of the two commissioners' examiners fully credible and persuasive, but did not find Dr. Brennan's opinions fully credible or persuasive. He also noted the functional capacity examination indicated the claimant had a work capacity. He therefore approved the respondents' Form 36 and denied the claimant's bid for temporary total disability benefits.

The claimant filed a Motion to Correct which sought to find the opinion of Dr. Brennan fully credible, persuasive, and supportive of the conclusion that the Form 36 should be denied and the claimant was entitled to temporary total disability benefits. Although the claimant argued that the evidence demonstrated her work injury was a substantial contributing factor to her current disability, the trial commissioner denied the Motion to Correct in its entirety. The claimant has now pursued this appeal. The gravamen of her argument is that the trial commissioner failed to properly credit the totality of the evidence presented. In particular, the claimant argues that the commissioners' examiners largely agreed with her treating physician, and the trial commissioner therefore should have credited the portions of the opinions which were in agreement.

We note that the standard of deference we are obliged to apply to a trial commissioner's findings and legal conclusions is well-settled. "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), *quoting* Thalheim v. Greenwich, 256 Conn. 628, 656 (2001). "This presumption, however, can be challenged by the argument that the trial commissioner did not properly apply the law or has reached a finding of fact inconsistent with the evidence presented at the formal hearing." Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

We note that in cases such as this, a claimant must prove two propositions to the satisfaction of the trier of fact in order to obtain an award under General Statutes § 31-307. A claimant must establish that he or she is totally disabled from remunerative employment, and must also establish that an injury sustained at work is a substantial factor behind this disability. If the claimant fails to prove either of these prongs, workers' compensation benefits will be denied. One example of this reasoning is illustrated in our recent decision in Singh v. CVS, 6038 CRB-7-15-10 (July 20, 2016), *aff'd,* 174 Conn. App. 841 (2017) (per curiam).

In Singh, the claimant asserted that he was totally disabled as a result of a frostbite injury to his right great toe sustained at work. The trial commissioner found persuasive evidence that the claimant had a sedentary work capacity and also credited evidence ascribing the claimant's toe ailment to diabetes rather than the work injury. On

appeal, we affirmed the trial commissioner, noting in part the line of cases discussing the role of the proximate cause standard in establishing compensability.

> The trial commissioner concluded the claimant's preexisting diabetic condition was the proximate cause of his current medical condition. In reviewing this conclusion we look at our analysis of the proximate cause standard as recently delineated in cases such as Kladanjcic v. Woodlake at Tolland, 5995 CRB-1-15-3 (March 2, 2016) and Nelson v. Revera, Inc., 5977 CRB-5-15-1 (September 21, 2015). "We also have reviewed the precedent since Marandino on the evidentiary burden regarding proximate cause a claimant must meet in order to be awarded benefits under Chapter 568. We recently engaged in an extensive review of this standard in Larocque v. Electric Boat Corporation, 5942 CRB-2-14-6 (July 2, 2015). Citing Sapko v. State, 305 Conn. 360 (2012), DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132 (2009) and Voronuk v. Electric Boat Corp., 118 Conn. App. 248 (2009), we concluded 'our appellate courts have restated the need for claimants seeking an award under Chapter 568 to present reliable, nonspeculative evidence and to carry their burden of proof that there is a clear nexus of proximate cause between employment and injury. Larocque, supra.'"

Singh, supra, *quoting* Nelson, supra.

We further note that in Zezima v. Stamford, 5918 CRB-7-14-3 (May 12, 2015), this board held:

> [e]ssentially the question of whether a nexus of proximate cause exists between a compensable injury and a subsequent medical condition is, and always has been, an issue of fact for the trial commissioner to resolve, "[t]he question of proximate causation … belongs to the trier of fact because causation is essentially a factual issue…. It becomes a conclusion of law only when the mind of a fair and reasonable [person] could reach only one conclusion; if there is room for a reasonable disagreement the question is one to be determined by the trier as a matter of fact." (Citations omitted; internal quotation marks omitted.)

Zezima, supra, *quoting* Sapko, supra, 373.

In the present matter, the claimant argues that Dr. Brennan's testimony established a nexus of proximate cause, and because the commissioner's examiners, in

the claimant's opinion, agreed with certain elements of Dr. Brennan's conclusions, the trial commissioner was obligated to award her temporary total disability benefits. We are not so persuaded. As this board noted in Lopez v. Lowe's Home Improvement Center, 4922 CRB-6-05-3 (March 29, 2006), "it is within the discretion of the trial commissioner to accept some, but not all, of a physician's opinion." Moreover, we have ruled against litigants who argued that we should "cherry pick" an expert's opinion for portions of the opinion not adopted by the trial commissioner which would have supported the claimant's argument. See Williams v. Bantam Supply Co., Inc., 5132 CRB-5-06-9 (August 30, 2007). To the extent that this matter was a "dueling expert" case between the claimant's treating physicians and the commissioner's examiners, the trial commissioner had the prerogative to choose the opinion he deemed more persuasive and weighty. See Dellacamera v. Waterbury, 4966 CRB-5-05-6 (June 29, 2006).

In his Finding and Decision, the trial commissioner found the opinions of Dr. Kaplan and Dr. Selig credible, and he specifically cited one opinion from each expert. He cited Dr. Kaplan for the proposition that based on the claimant's right upper extremity injury alone, she should have a sedentary work capacity. See Respondents' Exhibit 1. He cited Dr. Selig for the proposition that the claimant's psychiatric condition did not limit her work capacity. See Respondents' Exhibit 2. Although both experts made other observations in their reports which, in the claimant's view, were supportive of the compensability of her condition, we may infer that the trial commissioner did not find those opinions persuasive; nor was he was obligated to do so. See Lopez, supra.[3]

[3] In reviewing Dr. Kaplan's report, we note that he did suggest that the claimant might be unable to hold a job due to her psychiatric condition. Respondents' Exhibit 1. Given that this expert witness was not a psychiatrist, we believe the trial commissioner could discount this observation. The claimant noted that Dr. Selig linked her depression to her work injury of April 27, 2004. Respondents' Exhibit 2. However,

The claimant believes the trial commissioner erred in finding that she had a work capacity. Had the trial commissioner found the claimant totally disabled and discounted the work injury as a proximate cause, we might view Dr. Selig's report in a different light. However, the commissioner cited the functional capacity examination as well as the reports of the commissioner's examiners as a basis for his conclusion that the claimant had a work capacity. We must defer to this judgment. As this board observed in Vallier v. Cushman & Wakefield, 5822 CRB-1-13-2 (February 21, 2014), "when a trial commissioner found an expert opinion that a claimant had a work capacity persuasive and reliable, we have upheld that determination even when the claimant argued that the restrictions were onerous." Id. See also Clarizio v. Brennan Construction Company, 5281 CRB-5-07-10 (September 24, 2008); Leandres v. Mark IV Construction, Inc., 5159 CRB-4-06-11 (October 22, 2007). In addition, "[w]e have reiterated that it is the claimant's burden to prove that they are totally disabled." Clarizio, supra. See also Hernandez v. American Truck Rental, 5083 CRB-7-06-4 (April 19, 2007). The claimant in the present matter did not carry that burden of persuasion.

Moreover, we note similarities with another case in which a claimant asserted that she lacked a work capacity and her condition was the sequelae of a work-related injury. In Olwell v. State/Dept. of Developmental Services, 5731 CRB-7-12-2 (February 14, 2013), the claimant argued that the trial commissioner had failed to properly credit testimony from witnesses deemed credible who were supportive of her bid for benefits. Given that testimony from the witnesses found persuasive by the commissioner ascribed

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because Dr. Selig opined that that the claimant's work capacity was not limited due to her psychiatric condition, this opinion fails to satisfy both prongs of the test for awarding benefits pursuant to General Statutes § 31-307. The claimant needed to prove that her current condition was the result of a work injury **and** it resulted in an inability to perform remunerative labor.

the claimant's condition to non-compensable ailments, we determined that as an appellate panel, would need to re-weigh the testimony of expert witnesses to reach a different result. Such a course of action would be inconsistent with precedent such as that set forth in O'Reilly v. General Dynamics Corp., 52 Conn. App. 813 (1999), in which our Appellate Court held that the trial commissioner is responsible for evaluating the weight and probative value of medical evidence. "[I]t is the trial commissioner's function to assess the weight and credibility of medical reports and testimony…." Id., 818, *quoting* Gillis v. White Oak Corp., 49 Conn. App. 630, 637, *cert. denied*, 247 Conn. 919 (1998). The claimant invites us to re-evaluate the evidentiary weight assigned by the trial commissioner to the work-related factors, as opposed to the non-compensable factors, in the claimant's condition. We decline the invitation.

It is well-settled that a trial commissioner's "findings of basic facts *and* his finding as to whether those facts support an inference that the plaintiff's injury arose from his employment are subject to a highly deferential standard of review." (Emphasis in the original.) Blakeslee v. Platt Bros. & Co., 279 Conn. 239, 253-254 (2006). Having reviewed the trial commissioner's findings in this matter, we do not find them "clearly erroneous."[4] Berube v. Tim's Painting, 5068 CRB-3-06-3 (March 13, 2007).

Having found no error, the October 13, 2016 Finding and Decision of Charles F. Senich, the Commissioner acting for the Fourth District, is accordingly affirmed.

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

[4] The claimant has also appealed the trial commissioner's November 1, 2016 Ruling on Claimant's Motion to Correct. We uphold the trial commissioner's denial of this motion, as it may be reasonably inferred that the trial commissioner did not find the evidence cited in the motion probative or persuasive. See Brockenberry v. Thomas Deegan d/b/a Tom's Scrap Metal, Inc., 5429 CRB-5-09-2 (January 22, 2010), *aff'd*, 126 Conn. App. 902 (2011) (per curiam); Vitti v. Richards Conditioning Corp., 5247 CRB-7-07-7 (August 21, 2008).

CERTIFICATION

THIS IS TO CERTIFY THAT a copy of the foregoing was mailed this 10th day of April 2018 to the following parties:

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