

CASE NO. 6166 CRB-2-16-12
CLAIM NO. 200148340

: COMPENSATION REVIEW BOARD

THOMAS F. KUZARA
CLAIMANT-APPELLANT

: WORKERS' COMPENSATION
COMMISSION

v.

: MAY 8, 2018

STATE OF CONNECTICUT
UNIVERSITY OF CONNECTICUT
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLEE

and

GALLAGHER BASSETT SERVICES, INC.
ADMINISTRATOR

APPEARANCES:

The claimant appeared at the trial level and at oral argument as a self-represented party.

The respondent was represented by Yinxia Long, 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 November 28, 2016 Finding & Dismissal of Ernie R. Walker, the Commissioner acting for the Second District, was heard September 29, 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 postponement was granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has appealed from a Finding & Dismissal issued November 28, 2016, in which the trial commissioner concluded that the claimant's claim for compensability of his right-hip condition is not a result of his compensable left-knee injury of May 21, 2003. The respondent-employer, the University of Connecticut, argues that this tribunal lacks jurisdiction to consider the appeal because the notice of appeal was untimely pursuant to the provisions of General Statutes § 31-301.² We have reviewed the circumstances and determined that the claimant commenced this appeal more than twenty days after the issuance of the Finding & Dismissal. In addition, we note that because there is no transcript from the July 14, 2016 formal hearing and the claimant did not file a motion to correct, we lack the foundation necessary to conduct effective appellate review of the decision. We therefore affirm the Finding & Dismissal.

The trial commissioner reached the following factual findings in his Finding & Dismissal. He noted that the issues for determination at the formal hearing were: (1) compensability; (2) a contested Form 43; and (3) medical treatment and bills. The trial commissioner acknowledged that both the claimant and the respondent offered medical evidence as exhibits, including a Commissioner's Medical Examination dated

² General Statutes § 31-301 (a) states: "At any time within twenty days after entry of an award by the commissioner, after a decision of the commissioner upon a motion or after an order by the commissioner according to the provisions of section 31-299b, either party may appeal therefrom to the Compensation Review Board by filing in the office of the commissioner from which the award or the decision on a motion originated an appeal petition and five copies thereof. The commissioner within three days thereafter shall mail the petition and three copies thereof to the chief of the Compensation Review Board and a copy thereof to the adverse party or parties. If a party files a motion subsequent to the finding and award, order or decision, the twenty-day period for filing an appeal of an award or an order by the commissioner shall commence on the date of the decision on such motion."

July 30, 2013, performed by Christopher J. Lena, M.D., and two Respondent's Medical Examinations performed by Aris D. Yannopoulos, M.D., dated July 18, 2011 and December 21, 2012, respectively. The claimant's testimony at the formal hearing was summarized in the Finding & Dismissal as follows:

1. The Claimant testified extensively as to the facts surrounding his claimed injury to his right hip, which he testified he believed is related to his compensable injury of May 21, 2003.
2. The Claimant testified as to how he believed the right hip is related to his compensable left knee injury and subsequent treatment.

November 28, 2016 Finding & Dismissal, Findings, ¶¶ 1, 2.

The trial commissioner listed the documentary evidence admitted as exhibits and stated that he had "reviewed and evaluated all the records submitted into the record as full exhibits in this particular matter" as well as the live testimony presented at the hearing. Findings, ¶ 6. Based on the record, the trial commissioner concluded as follows:

1. **I do not find** the Claimant credible and/or persuasive in his testimony in this particular matter.
2. **I do not find** the Claimant's position in his history and testimony credible in this matter.
3. **I do not find** the medical reports supporting said position credible and/or persuasive on the issue of compensability of the right hip.
4. The Claimant's claim for compensability of the right hip is hereby, **DENIED** and **DISMISSED**.

(Emphasis in the original.) November 28, 2016 Finding & Dismissal, Conclusion, ¶¶ 1, 2, 3, 4.

The claimant did not file a motion to correct the Finding & Dismissal. On December 21, 2016, the claimant filed a Petition for Review. He subsequently filed Reasons for Appeal on December 29, 2016. The claimant argues that it was error for the

trial commissioner not to specifically cite in the Finding & Dismissal the medical reports presented by the claimant's treating physicians which clearly opined that the right-hip condition was due to work-related aggravation. In its brief, the respondent argues that this appeal was jurisdictionally deficient because it was filed late. In addition, it argues that the trial commissioner had the right to reject the claimant's evidence and find persuasive and credible the opinion of Dr. Yannopoulos, who opined that the claimant's compensable left-knee injury was unrelated to his right-hip condition.

We note 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).

Initially, we must reach a determination regarding the respondent's motion to dismiss this appeal for jurisdictional reasons. Our decision in Bond v. Lee Manufacturing, Inc., 5868 CRB-8-13-8 (April 21, 2016), stands for the proposition that

prior to taking any action on the merits of an appeal, we must resolve any questions pertaining to jurisdiction. We note, consistent with Mankus v. Mankus, 4958 CRB-1-05-6 (August 22, 2006), *aff'd*, 107 Conn. App. 585 (2008), *cert. denied*, 288 Conn. 904 (2008), and 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), that “[o]nce a determination is reached that we lack subject matter jurisdiction no further inquiry is warranted.” Mankus, *supra*. In Brown v. Lawrence & Memorial Hospital, 5853 CRB-2-13-5 (April 21, 2014), the claimant offered an explanation for the untimely filing of her notice of appeal, but we concluded that we were not in a position to consider the matter because “[o]ur courts have determined that the failure of a party to file a timely appeal deprives the board of jurisdiction over the appeal.” *Id.* See also Stec v. Raymark Industries, Inc., 299 Conn. 346 (2010).

In the present matter, the claimant was obligated, if he was dissatisfied with or confused about the trial commissioner’s Finding & Dismissal, to either appeal to this tribunal within twenty days or file an appropriate motion with the trial commissioner seeking a correction or clarification within that period. See Garvey v. Atlas Scenic Studios, Inc., 5493 CRB-4-09-9 (February 14, 2012). Otherwise, his appellate rights would be deemed to have been waived pursuant to General Statutes § 31-301 (a). The claimant failed to take appropriate action within that twenty-day window. Given that the claimant, although aggrieved by the November 28, 2016 decision of the trial commissioner, failed to preserve his appellate rights, we lack subject matter jurisdiction to consider the appeal.

In any event, even had we retained jurisdiction under the statute to consider the merits of a jurisdictionally timely appeal, we do not believe that the claimant properly preserved the record such that this tribunal could perform an effective appellate review. The claimant failed to order a transcript, which leaves us unable to ascertain if the trial commissioner reached factual findings which were inconsistent with the live testimony presented at the hearing. The claimant also failed to file a motion to correct, which makes it a matter of speculation for this tribunal to ascertain which elements of medical evidence the claimant believes were not properly credited by the trial commissioner. As a result, in the absence of a motion to correct, the factual findings of this case were given conclusive effect. See Stevens v. Raymark Industries, Inc., 5215 CRB-4-07-4 (March 26, 2008), *appeal dismissed*, A.C. 29795 (June 26, 2008).

Our Supreme Court has stated that:

[i]t is the appellant's burden to provide an adequate record for review.... It is, therefore, the responsibility of the appellant to move for an articulation or rectification of the record where the trial court has failed to state the basis of a decision; ... to clarify the legal basis of a ruling; ... or to ask the trial judge to rule on an overlooked matter.... (Citations omitted.)

Willow Springs Condominium Assn., Inc. v. Seventh BRT Development Corp., 245 Conn. 1, 52-53, 717 A.2d 77 (1998). See also Cable v. Bic Corp., 79 Conn. App. 178, 186 (2003), *aff'd*, 270 Conn. 433 (2004).

In the absence of an adequate record for review, any decision we would make on appeal would be “entirely speculative.”³ Testone v. C. R. Gibson Co., 114 Conn. App. 210, 223 (2009), *quoting* Manifold v. Ragaglia, 94 Conn. App. 103, 124-125 (2006).

³ We note that in the Finding & Dismissal, the trial commissioner cited the Commissioner's Examination performed by Christopher J. Lena, M.D.; however, the trial commissioner failed to discuss the extent to which he found the opinions rendered by the examiner credible and persuasive. It is the expectation of this tribunal that when a Commissioner's Examination is performed pursuant to General Statutes § 31-294f, and it appears in the record, a trial commissioner should discuss in his Finding the extent to which he or she

In this case, the claimant was self-represented. As a result, consistent with our approach in Sutherland Hofler v. State/Dept. of Developmental Services, 6173 CRB-5-17-1 (December 12, 2017), we have reviewed the Finding & Dismissal and offered additional analysis. Based on the record which is available for review, we cannot identify reversible error. Although the trial commissioner did not individually list each evidentiary item presented into the record in his decision, he was not obligated to do so as a matter of law. See Cable v. Bic Corp., 270 Conn. 433, 440-441 (2004).

The trial commissioner rejected the opinions of the claimant’s treating physicians who supported the compensability of the claimant’s hip condition, and although the claimant disagrees with this decision, the trial commissioner was entitled to reach this conclusion. “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....” (Citations omitted.) Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999). We note that one expert, Dr. Yannopoulos, specifically opined that there was no link between the claimant’s compensable knee injury and his hip condition. Although the trial commissioner did not specifically state that he found Dr. Yannopoulos credible and persuasive, it may be inferred that by finding unpersuasive the medical evidence proffered by the claimant’s treating physician, he found Dr. Yannopoulos’ opinion more persuasive. He is entitled to reach such a determination in cases in which different

found the opinion persuasive in comparison to other expert opinion presented at the hearing. However, while the evidentiary distinctions drawn by the trial commissioner in this matter may not be readily apparent, it is well-settled that “although a commissioner should articulate the reasons behind his decision to disregard a § 31-294f examiner’s opinion, the ultimate decision is always with the commissioner” (Citations omitted; internal quotation marks omitted.) Sanchez v. Edson Mfg., 175 Conn. App. 105, 137, (2017), *quoting Gillis v. White Oak Corp.*, 49 Conn. App. 630, 637, *cert. denied*, 247 Conn. 919 (1998).

medical experts submit conflicting evidence. See Dellacamera v. Waterbury, 4966 CRB-5-05-6 (June 29, 2006). The April 3, 2013 addendum to Dr. Yannopoulos' December 21, 2012 report unequivocally found the claimant's hip condition unrelated to his compensable knee injury. This report provided sufficient probative evidence to support the trial commissioner's ultimate conclusions.

This tribunal can act only within the parameters established by statute. An appeal such as the present matter which was not filed within the time limitation established by the provisions of General Statutes § 31-301 (a) deprives us of the ability to offer the claimant relief.

We therefore affirm the November 28, 2016 Finding & Dismissal of Ernie R. Walker, the Commissioner acting for the Second District.

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

CERTIFICATION

THIS IS TO CERTIFY THAT a copy of the foregoing was mailed this 8^h day of May 2018 to the following parties:

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