CASE NO. 6172 CRB-5-17-2 : COMPENSATION REVIEW BOARD
CLAIM NO. 400075127

DAVID GARTHWAIT : WORKERS' COMPENSATION
CLAIMANT-APPELLANT COMMISSION

v. : FEBRUARY 2, 2018

AT&T
EMPLOYER

and

SEDGWICK CMS, INCORPORATED
ADMINISTRATOR
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Lawrence G. Scharph, Esq., and George H. Romania, Esq., Law Office of George H. Romania, 2653 Whitney Avenue, Hamden, CT 06518.

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

This Petition for Review from the January 17, 2017 Finding and Dismissal by Jack R. Goldberg, the Commissioner acting for the Fifth District, was heard on August 25, 2017 before a Compensation Review Board panel consisting of Commission Chairman John A. Mastropietro and Commissioners Daniel E. Dilzer and Ernie R. Walker.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has petitioned for review from the January 17, 2017 Finding and Dismissal by Jack R. Goldberg, the Commissioner acting for the Fifth District. We find no error and accordingly affirm the decision of the trial commissioner.

At the outset of the proceedings below, the trial commissioner identified the following issues for determination: medical treatment, total incapacity benefits, penalties for undue delay, and award of interest and attorney's fees for undue delay. Based on evidence presented at three formal hearings, the commissioner made the following factual determinations which are pertinent to our analysis of this appeal.[1] The claimant testified that he was employed as a lineman by AT&T on November 5, 2008, when he injured his back while jack-hammering the pavement. The Workers' Compensation Commission [hereinafter "Commission"] approved a jurisdictional voluntary agreement for an injury to the claimant's back on December 10, 2009, which listed Patrick R. Tomak, M.D., a neurosurgeon, as the authorized treating physician. On October 22, 2013, the Commission approved a permanency voluntary agreement identifying David B. Glassman, M.D., a pain management doctor, as the authorized treating physician, and reciting a maximum medical improvement date of December 31, 2012, with a permanent partial disability rating of 25 (twenty-five) percent of the lumbar spine.

On September 22, 2009 Dr. Tomak performed a left-side L4-L5 microdiscectomy and L5 foraminotomy authorized by the respondents. The claimant testified that the

[1] We note that two Motions for Extension of Time were granted during the pendency of this appeal. A third Motion for Extension of Time was instead deemed a notice of appeal. See February 15, 2017 correspondence from Commission Chairman John A. Mastropietro to George H. Romania, Esq.

surgery did resolve his leg pain for a time but never resolved the back pain. He was referred to Dr. Glassman, who recommended the implantation of a spinal cord stimulator. On June 28, 2011, Scott P. Sanderson, M.D., performed a commissioner's medical examination and agreed that the spinal cord stimulator constituted reasonable or necessary medical treatment, after which the procedure was approved by the respondents.[2] In his report, Dr. Sanderson noted the claimant had experienced episodes of back pain in 1998, 2001, and May 2008.

The claimant testified that the stimulator did not ameliorate his back pain and he began treating with Khalid Abbed, M.D., of the Yale Spine Center on his own after the respondents denied further treatment to the back. At his deposition, Dr. Abbed testified that he first evaluated the claimant on September 2, 2014, at which time the claimant gave a history of having experienced back pain since 2009 and, commencing eight weeks earlier, gluteal pain down the left leg. Dr. Abbed indicated that he had received no background records and, as such, did not review either the January 7, 2009 CT scan or Dr. Tomak's operative report of September 22, 2009. He stated that his opinion regarding causation was based on the claimant's complaints at the office visit and the claimant's medical history. In his September 2, 2014 report, Dr. Abbed indicated that he would discuss with Michael J. Robbins, D.O., the claimant's pain management doctor, the utility of removing the stimulator and having the claimant undergo an MRI rather than a CT myelogram in order to assess stenosis. Dr. Abbed also opined that the claimant

[2] General Statutes § 31-294d (a) (1) states, in relevant part: "The employer, as soon as the employer has knowledge of an injury, shall provide a competent physician or surgeon to attend the injured employee and, in addition, shall furnish any medical and surgical aid or hospital and nursing service, including medical rehabilitation services and prescription drugs, as the physician or surgeon deems reasonable or necessary."

likely needed an L5-S1 decompression, a left-side facetectomy, instrumented stabilization, and reduction of spondylolisthesis.

On October 31, 2014, on the basis of a respondents' medical examination with Dr. Mushaweh, the respondents denied any additional treatment, including surgery with Dr. Abbed, because the contemplated surgery was neither medically necessary nor causally related to the injury of November 5, 2008.[3] Dr. Abbed testified that on October 24, 2014, he performed decompression surgery at the L4-L5 and L5-S1 levels. The claimant testified that following the surgery, his leg pain improved but not his back pain. On May 19, 2015, Dr. Abbed wrote claimant's counsel that the disc levels on which he had operated on October 24, 2014 were the same levels that were operated on in the initial surgery of 2009, and opined that the November 5, 2008 injury was a substantial contributing factor to the claimant's need for the surgery of October 24, 2014.

Dr. Mushaweh performed Respondents' Medical Examinations on August 4, 2009; March 24, 2010; November 28, 2012; and May 13, 2015. In his 2009 report, the doctor stated that the claimant had an acute herniated disc at the L4-L5 level due to the work injury but also had severe degenerative changes a the L5-S1 level that pre-existed the November 2008 work injury. He indicated the claimant was a candidate for a lumber discectomy at the L4-L5 level. In his 2010 report, Dr. Mushaweh opined that the L5-S1 disc issues were due to severe degenerative changes and were not caused by the workplace incident on November 5, 2008. In his 2012 report, Dr. Mushaweh

[3] In his RME report of November 28, 2012, Jarob N. Mushaweh, M.D., stated that "the compensable motion segment in Mr. Garthwait's case is the L4-5 level where he had [a] herniated disc as a result of the November 5, 2008 injury. He does harbor degenerative disc disease seen at other segments that have no causal relationship to the injury of November 5, 2008. I doubt that any further treatment would improve his condition and therefore I would recommend no further interventional pain management." Respondents' Exhibit 4, Exhibit 1.

again stated that the only disc causally connected to the workplace incident was L4-L5. At that visit, he placed the claimant at maximum medical improvement and assigned a permanent partial disability rating of 25 (twenty-five) percent. In his report of 2015, Dr. Mushaweh questioned why Dr. Abbed had performed surgery at both L4-L5 and L5-S1, and opined that the issues at the L5-S1 level were not causally related to the November 5, 2008 workplace incident.[4]

Dr. Mushaweh was deposed on December 23, 2015. He testified that the claimant's problems at L5-S1 were "purely incidental" to the compensable injury at the L4-L5 level, and indicated that it took "years" for the L5-S1 problems to evolve. Findings, ¶ 20; Respondents' Exhibit 4, pp. 6-7, 8. Dr. Mushaweh indicated that he had reviewed Dr. Tomak's 2009 operative note and stated that the note confirmed that Dr. Tomak had performed an L4-L5 discectomy on the left side. He disagreed with Dr. Abbed's opinion that Dr. Tomak had also performed surgery at the L5-S1 level, and testified that although Dr. Tomak's surgery had included a foraminotomy, it was not approached from the L5-S1 level. Rather, Dr. Tomak had followed the nerve from the L5-L5 segment and, as such, only surgically repaired one disc segment. See Respondents' Exhibit 4, pp. 8-12. Dr. Mushaweh also noted that Dr. Abbed's operative report reflects that Dr. Abbed saw scar tissue on the right side, but the claimant never had right-side surgery.

In his May 9, 2016 correspondence to claimant's counsel, Dr. Tomak indicated that he had read Dr. Mushaweh's deposition and confirmed Dr. Mushaweh's testimony

[4] In his May 13, 2015 Respondents' Medical Examination report, Jarob N. Mushaweh, M.D., stated: "The rationale behind [the claimant's] surgery should be explained by his treating surgeon since personally I did not see any conclusive evidence on his preoperative workup to determine the presence of spinal stenosis. With that said I would maintain that the need for that procedure was not causally related to his compensable injury of 2008." Respondents' Exhibit 4, Exhibit 1.

regarding how he had performed the 2009 foraminotomy and surgically repaired only the L4-L5 disc.[5] See Claimant's Exhibit H.

Based on the foregoing, the trial commissioner concluded that the claimant had been mistaken in his testimony regarding his history of back pain prior to November 5, 2008 but was credible concerning the fact that after two surgeries, his leg pain resolved but not his back pain. The commissioner also found credible the claimant's testimony that he had treated with Dr. Abbed under his own health insurance plan after the respondents denied additional back treatment. The trier concluded that Dr. Mushaweh's testimony was far more persuasive than Dr. Abbed's. In addition, he found credible Dr. Tomak's opinion that the workplace injury on November 5, 2008 caused an acute disc herniation at the L4-L5 level which resulted in disc surgery at that level as well as a foraminotomy around the existing L5 root rather than surgery at the L5-S1 level. As such, the commissioner determined that the claimant had sustained a compensable injury to the L4-L5 disc on November 5, 2008.

The trial commissioner further concluded that the claimant's treatment with Dr. Abbed under his own health insurance was outside "the chain of authorized treatment" relative to the November 5, 2008 workplace incident. Conclusion, ¶ g. In addition, the trier determined that because the claimant had suffered from degenerative disc disease at the L5-S1 level which pre-existed the work-related injury of November 5, 2008, the claimant failed to sustain his burden of persuasion that the L5-S1

[5] In his correspondence of May 9, 2016, Patrick R. Tomak, M.D., stated: "I was quite clear in my office notes that the patient had very severe degenerative disk at L5-S1 with neural foraminal encroachment secondary to joint overgrowth at the L5-S1 segment," and "the only way to truly decompress the L5 nerve root in this particular setting, given the patient's severe degenerative changes, would be a complete facetectomy of the that [sic] was compressing the L5 root while also performing a L5 foraminotomy. I think a misinterpretation of the L4-5 surgery again makes this unclear to you." Claimant's Exhibit H.

disc problems were compensable. The trial commissioner further found that although the respondents had accepted a claim for a back injury, it was reasonable for them to investigate whether Dr. Abbed's diagnosis of the need for surgery at two levels constituted reasonable or necessary medical care. As such, the commissioner concluded that the respondents' decision to deny medical benefits to the claimant and contest his claim was not made in bad faith but, rather, was "reasonably based" on Dr. Mushaweh's medical examinations and reports. Conclusion, ¶ k. The trial commissioner dismissed the claim for compensability of the L5-S1 disc, the lost time resulting from the October 24, 2014 surgery, and the medical expenses associated with that surgery.

The claimant filed a Motion for Articulation and a Motion to Correct, both of which were denied in their entirety, and this appeal followed. On appeal, the claimant raises the following claims of error: (1) the trial commissioner "ignored the significance" of the Voluntary Agreement approved on December 10, 2009 documenting an injury to the claimant's low back; (2) the trial commissioner failed to address the compensability of the October 24, 2014 surgery performed by Dr. Abbed at the L4-5 level; (3) the trial commissioner failed to find that the workplace injury sustained by the claimant on November 5, 2008 was a substantial contributing factor to the claimant's lost time and need for the surgery performed by Dr. Abbed on October 24, 2014; and (4) the trial commissioner's factual findings and conclusions regarding the non-compensability of the claimant's problems with the L5-S1 disc are without evidence, contrary to law and based on unreasonable factual inferences. We do not find any of these claims of error persuasive.

We begin our analysis with a recitation of the well-settled standard of deference 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).

We turn to the claimant's first claim of error: i.e., that the trial commissioner "ignored the significance" of the jurisdictional Voluntary Agreement approved on December 10, 2009, indicating that the claimant had sustained an injury to the back. Appellant's Brief, p. 13. The claimant contends that because respondents authorized various modalities of medical treatment both before and after the issuance of the jurisdictional Voluntary Agreement, they were "mandated" to continue to provide medical care to the claimant's low back. Appellant's Brief, p. 15.

> With care to the L5-S1 level predating the Voluntary Agreement and care to the L5-S1 level post Voluntary Agreement, it is Claimant's position that said level was approved as compensable

> based upon the Respondent's approval of medical care and the Voluntary Agreement and they are now precluded from the argument that the L5-S1 level is non-compensable.

Id., 3.

The claimant points out that motions to modify Voluntary Agreements are governed by the provisions of General Statutes § 31-315, and "[s]ince all evidence which the Commission relies upon to modify the existing Voluntary Agreement (arthritic disk at L5-S1), existed before the issuance of the Voluntary Agreement, the Commission was without authority to deny the compensability at the L5-S1 disk level." Id. Thus, in order to "override" the Voluntary Agreement and deny the compensability of the issues at L5-S1, the respondents were required to file a motion in accordance with the provisions of General Statutes § 31-315. Id., 15.

General Statutes § 31-315 states:

> Any award of, or voluntary agreement concerning, compensation made under the provisions of this chapter or any transfer of liability for a claim to the Second Injury Fund under the provisions of section 31-349 shall be subject to modification in accordance with the procedure for original determinations, upon the request of either party or, in the case of a transfer under section 31-349, upon request of the custodian of the Second Injury Fund, whenever it appears to the compensation commissioner, after notice and hearing thereon, that the incapacity of an injured employee has increased, decreased or ceased, or that the measure of dependence on account of which the compensation is paid has changed, or that changed conditions of fact have arisen which necessitate a change of such agreement, award or transfer in order properly to carry out the spirit of this chapter. The commissioner shall also have the same power to open and modify an award as any court of the state has to open and modify a judgment of such court. The compensation commissioner shall retain jurisdiction over claims for compensation, awards and voluntary agreements, for any proper action thereon, during the whole compensation period applicable to the injury in question.

It is axiomatic that a trial commissioner's power to open and modify judgments extends to cases of accident, mistakes of fact, and fraud, but not mistakes of law. See Marone v. Waterbury, 244 Conn. 1, 16–17 (1998). In the matter at bar, the claimant asserts that "[a]ny avoidance of the Voluntary Agreement and the approval of a motion to modify cannot be based upon facts which existed before the agreement and equate to changed conditions which the statute specifies as a basis for modification or award." Appellant's Brief, pp. 15-16. As a consequence, "the Commissioner is bound by the jurisdictional Voluntary Agreement and is unable to rule against the compensability of the L5-S1 disk." Id., 16.

We are not persuaded by the claimant's arguments in this regard. Rather, we agree with the respondents, who point out that "[i]t defies logic and common sense that every Voluntary Agreement issued in a workers' compensation claim for the low-back/lumbar spine necessitates approval for medical treatment for every disc and every level contained therein." Appellees' Brief, p. 13. The purpose of the Voluntary Agreement is to memorialize, for the convenience of the parties, certain mutually agreed-upon details associated with a claimed injury or occupational disease. We see no benefit to either claimants or respondents in turning this document into an "admission against interest" which would then obligate a respondent to authorize medical treatment that may go well beyond the scope of an accepted injury.

We recognize that the record in the present matter does suggest that in the course of receiving treatment for the compensable injury to the L4-L5 disc, the claimant may

have received medical care which also addressed issues at L5-S1.[6] However, there is nothing to be gained by penalizing respondents who choose not to object to paying for medical care received by an injured claimant which may go beyond the scope of the accepted injury. Neither this tribunal, nor the Commission as a whole, has any interest in placing additional impediments in the way of a claimant receiving medical treatment. Were we to construe the Voluntary Agreement in the manner urged by the claimant, it would exercise a "chilling effect" on the issuance of these documents to the detriment of claimants and respondents alike.

The balance of the claimant's allegations of error in this matter concern the trial commissioner's determination that the surgery performed by Dr. Abbed on October 24, 2014 did not constitute reasonable or necessary medical treatment for the injury sustained by the claimant on November 5, 2008. In this regard, the claimant contends that the trial commissioner failed to address the compensability of the October 24, 2014 surgery at the L4-L5 level. We disagree. We note that in his factual findings, the commissioner found that that Dr. Abbed had testified that he performed decompression surgery at the L4-L5 and L5-S1 level. See Findings, ¶ 12. The trier also found that in a report of May 19, 2015, Dr. Abbed stated that he had operated on the same levels that were operated on in the initial surgery in 2009. Findings, ¶ 14.

However, Dr. Mushaweh, in his deposition, testified that he found Dr. Abbed's operative note "confusing," Respondents' Exhibit 4, pp. 11, 43; that he did not believe

[6] At trial, the claimant testified that the workers' compensation carrier approved epidural and facet injections from Martin Hasenfeld, M.D. See December 16, 2015 Transcript, p. 8. Although the claimant could not identify the discs that were involved, Dr. Sanderson, in his Respondents' Medical Examination report of June 28, 2011, indicates that Dr. Hasenfeld administered facet blocks at L4-5 and L5-S1 levels after a CT scan and X-rays which were taken in January 2009. Claimant's Exhibit C. Following the RME with Dr. Sanderson, the respondents authorized the insertion of a spinal cord stimulator. December 16, 2015 Transcript, pp. 10-11.

the second surgery was indicated, id., 14; and "the only thing that would make the second procedure causally related to [the injury of November 2008] is if he had a recurrent herniated disc at the L4-5 level, period." Id., 15. Dr. Mushaweh also pointed out that in addition to *not* finding a disc herniation at L4-L5, Dr. Abbed reported finding scar tissue on the right side, despite the fact that the claimant "never had any surgery on the right side…." Id., 16. Dr. Mushaweh described the second surgery as having been done "rather quickly," id., 17, and stated, "I don't know why the second procedure was done." Id., 34.

The trial commissioner ultimately concluded that "Dr. Mushaweh's testimony was far more persuasive than Dr. Abbed's testimony," Conclusion, ¶ d, and declined to find the second surgery compensable despite Dr. Abbed's testimony and reports attempting to link the surgery he performed to the surgery performed by Dr. Tomak in October 2009. This decision was well within the trial commissioner's discretion. "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).

The claimant also avers that the work-related injury sustained on November 5, 2008 was a substantial contributing factor to the claimant's lost time and need for surgery in October 2014 and points out that Drs. Tomak, Bauman, Abbed and Robbins "believe that the entire October 24, 2014 surgery was compensable." Appellant's Brief, p. 17. As previously discussed herein, Dr. Mushaweh's testimony and various RME reports, standing alone, provide a more than adequate basis for the trier's

determination that the November 5, 2008 injury was not a substantial contributing factor to the claimant's need for the second surgery. Moreover, in actuality, the opinions of the other doctors referred to by the claimant were considerably more nuanced than the claimant implies. For instance, Dr. Tomak, in his correspondence of May 9, 2016, indicated that Dr. Abbed "took [the claimant] back and did a revision laminectomy at L4-5 and a laminectomy at L5-S1." Claimant's Exhibit H, p. 1. However, he also remarked that "[t]o answer your question whether the L5-S1 surgery is compensable, this is a very difficult question to answer," id., p. 2, and "there is a combination of irritation to that L5 root that comes from the L4-5 disc but certainly from degenerative changes at L5-S1 as well could contribute to his symptomatology." Id.

Dr. Bauman's opinion regarding the surgery performed by Dr. Abbed is similarly ambivalent. In reports dated September 25, 2013, December 5, 2013, April 3, 2014, July 8, 2014, and July 28, 2014, Dr. Bauman stated that the claimant "has intractable axial low back pain which is likely due to his severely degenerative L5/S1 disc level with retrolisthesis." Claimant's Exhibit B. However, although Dr. Bauman opined, in his note for the office visit of July 28, 2014, that the claimant was a candidate for surgery, he also stated that "it is just a question of if the L4/5 level needs to be included" and the "L5/S1 procedure would be necessarily a transforaminal interbody fusion." Id. The record is quite clear that Dr. Abbed did not perform a fusion, and Dr. Bauman did not proffer an opinion regarding the surgery that Dr. Abbed did perform.

Finally, with regard to the reports of Dr. Robbins, although in 2014 the doctor did opine that the claimant was a surgical candidate, the record is devoid of report in which he addressed the compensability of the second surgery. See Claimant's Exhibit E (Office

Notes of July 24, 2014 and June 27, 2014). In addition, in a post-surgery office note, Dr. Robbins states:

> When looking at the patient's lumbar spine he almost has bone-on-bone at the L5-S1 level due to the severe degenerative loss. The laminectomy served its purpose to relieve his leg pain [and] the patient is very grateful for that. However, [it] may have been better for the patient to have a fusion at the L5-S1 to address the endplates of L5-S1 contacting each other resulting in continued low back pain.

Id. (Office Note of August 19, 2015).

In light of the foregoing, we reject the claimant's contention that the trial commissioner erred in failing to find that claimant's treating physicians, apart from Dr. Abbed, "[believed] that the entire October 24, 2014 surgery was compensable." Appellant's Brief, p. 17. In fact, only Dr. Abbed opined that the surgery he had performed was compensable, and the trial commissioner did not find Dr. Abbed's opinion persuasive. In addition, while all the physicians involved in this matter appeared to agree that the claimant suffered from impingement of the nerve root at L5, there was no agreement as to whether the nerve root issues were attributable to the trauma of the November 5, 2008 workplace incident or due to degenerative changes at L5-S1.[7]

The claimant also argues that the trial commissioner's factual findings and conclusions regarding the non-compensability of the surgery performed by Dr. Abbed are without evidence, contrary to law, and based on unreasonable factual inferences. The claimant contends:

[7] At his deposition, Jarob N. Mushaweh, M.D., testified that although in August 2009, the L5 nerve root was "the culprit," it was associated with the L4-L5 disc herniation and not the L5-S1 disc. Respondents' Exhibit 4, p. 32. Moreover, he opined that at the time of the second surgery, "[t]here was no compression on the L5 nerve root." Id., 34.

> [the commissioner's] entire basis for his opinion is whether or not Dr. Tomak in fact operated at the L5-S1 disk level in 2009 and his reading of Dr. Tomak's May 9, 2016 letter and his erroneous conclusions that Dr. Tomak agreed with the Respondent's Examiner, Dr. Mushaweh regarding how the 2009 surgery was performed.

Appellant's Brief, p. 19.

As the preceding discussion of the various medical opinions in this matter might suggest, we reject this characterization of the trial commissioner's findings. First, Dr. Tomak, in his correspondence of May 9, 2016 to claimant's counsel, went to great lengths to explain that he had reviewed Dr. Mushaweh's deposition testimony and thoroughly concurred with it.[8] Moreover, with regard to the issue of causation, as we have previously pointed out, Dr. Tomak was quite guarded in his opinion, stating that claimant's counsel's query regarding the compensability of the second surgery was "a very difficult question to answer," and that "it is my belief that the disk herniation was the acute element causing the patient's pain; this *perhaps* could have aggravated his

[8] In his correspondence of May 9, 2016 to claimant's counsel, Patrick R. Tomak, M.D., stated the following: "I had noted, frankly, that you had rather a heated discussion with [Jarob N. Mushaweh, M.D.] regarding spinal anatomy of which I would say you are wholeheartedly incorrect on [sic] your assumptions…. My records indicated very clearly that [the claimant] had a L4-5 disk herniation with a left L5 radiculopathy and some footdrop. Furthermore, I was quite clear in my office notes that the patient had very severe degenerative disk at L5-S1 with neural foraminal encroachment secondary to joint overgrowth at the L5-S1 segment." Claimant's Exhibit H, p. 1. Dr. Tomak went on to add: "I would state that I am in agreement with Dr. Mushaweh, that you clearly do not understand spinal anatomy concerning Mr. Garthwait's case. In decompressing the L4-5 segment I did a hemilaminotomy on the left side and performed a foraminotomy around the exiting L5 root. Dr. Mushaweh attempted to point this out in his deposition. I do not see any testimony indicating that I did not perform a foraminotomy. This again is your misunderstanding of the anatomy relevant to this case and your assertion." Id. Dr. Tomak, after explaining that neither he nor Dr. Abbed performed a fusion, stated: "My records clearly indicate that [the claimant] showed improvement after this L4-5 decompression. I think your misunderstanding of the anatomy certainly clouds the overlying issue pertaining to the L5-S1 segment." Id. Finally, Dr. Tomak indicated that because the claimant had not wanted a fusion, he had performed a "minimally invasive approach to deal with the disk herniation and decompress the root to the best of surgical ability…. At that time, the patient had degenerative changes at L5-S1 as he does today. I would indicate that there is a combination of irritation to that L5 root that comes from the L4-5 disc but certainly from degenerative changes at L5-S1 as well could contribute to his symptomatology. To clarify, Dr. Mushawh, did not in fact argue that I did not perform a foraminotomy. In fact, he describes to you the exact explanation as I give here. I think it is your misunderstanding." Id., p. 2.

underlying degenerative condition from the L5-S1 segment which was not an acute finding." (Emphasis added.) Id., p. 2.

Second, the medical record in this matter is rife with reports referencing the claimant's degenerative disc disease at the L5-S1 level. In addition to the testimony and reports of Dr. Mushaweh discussed previously herein, Dr. Bauman, in several of his office notes, described the claimant as having "intractable axial low back pain which is likely due to his severely degenerative L5-S1 disc level with retrolisthesis…" Claimant's Exhibit B. Dr. Tomak, in addition to the references in his correspondence of May 16, 2009, also states in his office notes that the claimant "has substantial degenerative disk disease seen at the L5-S1 level. He has disk space collapse. He has an anterior disk protrusion. He has significant endplate sclerosis and severe disk space disease." Claimant's Exhibit C.

A CT scan of the lumbar spine taken on August 12, 2013 demonstrated "degenerative disk space narrowing at L5-S1." Claimant's Exhibit F. A CT scan of the lumbar spine taken on January 7, 2009 revealed "[d]egenerative disc disease and facet arthropathy, left greater than right, at L5/S1," while a lumbar spine MRI taken on December 11, 2008 demonstrated "[c]hronic disc degeneration of L5/S1 with disc bulging and spondylosis." Respondents' Exhibit 3. In his RME report of June 28, 2011, Dr. Sanderson identified "severe degenerative disk disease at L4-5 and L5-S1 with mild kyphosis at that level causing a very straightened lumbar spine. There is fluid within the L5-S1 disk space consistent with very severe degenerative disk disease."[9] Claimant's Exhibit G, p. 4. Dr. Sanderson also stated that "[c]urrently I think the patient's pain is

[9] In his June 28, 2011 RME report, Scott P. Sanderson, M.D., indicated, and the trier so found, that the claimant reported episodes of back pain occurring in 1998, 2001 and May of 2008. Claimant's Exhibit G.

primarily from the degenerative disk disease at L4-5 and L5-S1." Id. With regard to Dr. Robbins, in an office visit on June 27, 2014, he stated the following:

> It is not hard to determine where this patient's pain is coming from. He has Modic endplate changes at L4-5 and L5-S1 with associated severe loss of disc height at the L5-S1 level of approximately 80% loss. This was seen on imaging from 2009. I can only assume that his problem is worse as time has gone on.

Claimant's Exhibit E.

In addition, on August 19, 2015, Dr. Robbins observed:

> [w]hen looking at the patient's lumbar spine he almost has bone-on-bone at the L5-S1 level due to the severe degenerative loss. The laminectomy served its purpose to relieve his leg pain [and] the patient is very grateful for that. However, [it] may have been better for the patient to have a fusion at the L5-S1 to address the endplates of L5-S1 contacting each other resulting in continued low back pain.

Id.

The foregoing indicates quite clearly that contrary to the claimant's assertions, the medical record in this matter provided ample support for the trial commissioner's conclusions that the claimant suffered from degenerative disc disease at the L5-S1 level and failed to sustain his burden of proof that those issues were compensable. We recognize that Dr. Abbed, in his correspondence of May 19, 2015, stated that because "the levels of the surgery performed in October 2014 [coincide] with the original levels of injury and initial surgery performed on 2009, I do feel that the original work injury sustained in 2008 is a substantial contributing factor in the recent decompression surgery performed on October 24, 2014." Claimant's Exhibit A. However, when queried at deposition as to whether a patient could suffer simultaneously from an unrelated disc herniation and a progressive degenerative disc disease, the doctor replied, "[i]t is

possible." Respondents' Exhibit 1. Dr. Abbed also testified that he didn't know if he had any of Dr. Tomak's medical records from the initial surgery, id., 6; that he didn't remember ever reviewing the 2008 MRI or January 7, 2009 CAT scan, id., 11; and he had never reviewed Dr. Tomak's operative note. Id., 6, 13.

In addition, Dr. Abbed testified that his opinion regarding causation "was based on the fact that [the claimant] had surgery for a problem that was deemed related at the time. It was my understanding. And then coming back to me with a problem that was in the same place that he had surgery before." Id., 12. Dr. Abbed also stated that "I think it would be fair to say that my opinion was based on the patient's complaints at the time that I saw him in the setting of what he had been through prior to me seeing him." Id., 12-13. Dr. Abbed conceded that it was "possible" that the issues with the claimant's L5-S1 disc were "simply the result of the natural progression of [the] preexisting condition." Id., 30.

It may be reasonably inferred that the foregoing testimony by Dr. Abbed, in tandem with Dr. Mushaweh's wide-ranging challenge to Dr. Abbed's opinion as set forth previously herein, provided a more than adequate basis for the trial commissioner's conclusion that "Dr. Mushaweh's testimony was far more persuasive than Dr. Abbed's testimony." Conclusion, ¶ d. Such determinations are strictly the province of the trier and cannot be reversed on appeal. "[I]t 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).

Finally, the claimant contends that the decision in this matter is "completely void" of the opinion of Dr. Bauman, who "was not only an authorized doctor by the Respondent, but it was Dr. Bauman who put the Claimant out of work, initially recommended surgery for the Claimant and causally connected the same to the original work related injury." Appellant's Brief, p. 20. We would point out that Admin. Reg. § 31-301-3 states the following:

> The finding of the commissioner should contain only the ultimate relevant and material facts essential to the case in hand and found by him, together with a statement of his conclusions and the claims of law made by the parties. It should not contain excerpts from evidence or merely evidential facts, nor the reasons for his conclusions. The opinions, beliefs, reasons and argument of the commissioner should be expressed in the memorandum of decision, if any be filed, so far as they may be helpful in the decision of the case.

As such, there is no requirement that a trial commissioner recite every piece of evidence submitted into the record. Second, as our prior discussion of Dr. Bauman's opinion indicates, while the record does contain a note from an office visit of July 28, 2014, in which Dr. Bauman stated that the claimant was a candidate for surgery, the record contains no report or correspondence addressing causation.

There is no error; the January 17, 2017 Finding and Dismissal by Jack R. Goldberg, the Commissioner acting for the Fifth District, is accordingly affirmed.

Commissioners Daniel E. Dilzer and Ernie R. Walker concur in this Opinion.