CASE NO. 6183 CRB-3-17-3 : COMPENSATION REVIEW BOARD
CLAIM NO. 300065695

EDWARD KEYES : WORKERS' COMPENSATION
CLAIMANT-APPELLANT COMMISSION

v. : APRIL 25, 2018

TOWN OF BRANFORD
EMPLOYER
SELF-INSURED

and

WORKERS' COMPENSATION TRUST
ADMINISTRATOR
RESPONDENTS-APPELLEES

APPEARANCES: The claimant was represented by John M. Walsh, Jr., Esq., Licari, Walsh & Sklaver, L.L.C., 322 East Main Street, Suite 2B, Branford, CT 06405.

The respondents were represented by Judith A. Murray, Esq., Letizia, Ambrose & Falls, P.C., 667-669 State Street, 2nd Floor, New Haven, CT 06511.

This Petition for Review from the March 3, 2017 Finding and Dismissal of Jack R. Goldberg, the Commissioner acting for the Fifth 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 several motions for extension of time were granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has appealed from a Finding and Dismissal issued on March 3, 2017 concluding that the claimant's need for medical treatment for his L5-S1 disc was not due to a compensable injury. The claimant argues that he should have been granted an extension of time to file a motion to correct, and that it was legal error to deny this motion. He also argues that the trial commissioner failed to properly credit evidence linking his current spine condition to a compensable injury to an adjacent portion of his spine for which he had obtained benefits. The respondents argue that the trial commissioner had a sound basis to deny the claim given that their expert testified that the claimant's current disc ailment was unrelated to the claimant's compensable injury. After reviewing the record, we find that the trial commissioner's decision was grounded in evidence which he found credible and persuasive. Consequently, we affirm the Finding and Dismissal.

The trial commissioner made the following factual findings which are pertinent to our analysis of this appeal. The trial commissioner noted that the issues for determination included whether to grant the respondents' Form 36 and whether the November 5, 2003 compensable injury sustained by the claimant was a substantial contributing factor in his need for a fusion at the L5-S1 level. The claimant testified that he was a police officer for the town of Branford for twenty-six (26) years. He testified that his back gave out on November 5, 2003, while he was involved in intense training as a member of a SWAT team. Subsequent to that injury, Voluntary Agreements were approved by the Workers' Compensation Commission [hereinafter "WCC"] on April 6, 2005 and April 25, 2011, each evidencing a five (5) percent permanent partial disability

to the back for a total of ten (10) percent. The 2011 Voluntary Agreement describes the injury as a lumbar disc herniation at L4-5 stemming from the November 5, 2003 date of injury. The date of maximum medical improvement on the 2011 Voluntary Agreement was listed as December 7, 2010.

The claimant testified that his 2003 injury flared up in 2009, with symptoms including right-side back pain, a burning sensation, tingling, and numbness in the lower right leg. Jeffrey M. Sumner, M.D., the claimant's then-treating physician, performed a right L4-L5 discectomy on December 2, 2009. The claimant returned to regular duty as a police officer in May 2010 after a month of work-hardening. The claimant did not treat with Dr. Sumner for a four-year period, but on March 11, 2014, the claimant was examined by Dr. Sumner regarding episodes of intermittent back pain. X-rays demonstrated a narrowing at L4-L5 with no spondylolisthesis and some anterior spurring developing at L5-S1. Claimant's Exhibit A. A March 24, 2014 MRI was compared to a June 3, 2009 MRI and demonstrated multi-level degenerative disc disease at L3-L4, L4-L5, and L5-S1 with no disc herniation or central canal stenosis at L5-S1. Claimant's Exhibit B.

On September 18, 2014, the claimant was examined by Phillip S. Dickey, M.D., for a second opinion. The trial commissioner noted that Dr. Dickey stated in his report that the claimant underwent a discectomy in 2009 at both the L4-L5 and L5-S1 levels. Id. Following an updated MRI on October 6, 2014, Dr. Dickey, on October 14, 2014, noted that the claimant had some foraminal narrowing at L5-S1 that probably was causing the L5 radiculopathy and suggested the possibility of an L5-S1 fusion. Id. On November 18, 2014, Dr. Sumner reported that the claimant, after being examined by

Dr. Dickey, was seeking surgery to deal with the L5-S1 stenosis. He formally referred the claimant to Dr. Dickey at that time. Claimant's Exhibit A.

The respondents' expert, Judith L. Gorelick, M.D., F.A.C.S., F.A.A.N.S., performed a respondents' medical examination on December 30, 2014. Dr. Gorelick noted that the claimant had experienced two or three episodes of exacerbations of low back pain since the 2009 surgery, "all of which were brief and self-limiting in nature" and required no prolonged treatment. Findings, ¶ 11; Respondents' Exhibit 1. At a deposition, Dr. Gorelick, explaining that a discectomy does not extend to adjacent levels, testified that when the surgery is performed, "adjacent levels are not structurally affected because all of the important supporting ligaments are left intact…." Findings, ¶ 12; Respondents' Exhibit 3, pp. 19-20. She also testified that "evidence of a pre-existing degenerative condition at the L3 through S1 levels" appeared in the November 2003 MRI report, and "the condition pre-existed the November 5, 2003, injury at L4-L5." Findings, ¶ 13; Respondents' Exhibit 3, pp. 21-22.

Dr. Gorelick said that after reading Dr. Dickey's report referring to a two-level discectomy, she reviewed the original records and confirmed the claimant had undergone only a one-level discectomy at L5-S1. Respondents' Exhibit 3, p. 30. She believed that Dr. Dickey's conclusion regarding causation of the L4-L5 disc was related to his incorrect assumption that the claimant had undergone a two-level discectomy in 2009. Id., 31. The commissioner noted that Dr. Gorelick opined, in a January 30, 2015 report to the third-party administrator, that it was "appropriate to properly evaluate and treat the ongoing radiculopathic symptoms, although the need for such evaluation and treatment is not causally related to the November 5, 2003, work injury." Findings, ¶ 15;

Respondents' Exhibit 1. She also wrote that the claimant is at maximum medical improvement from the L4-L5 disk herniation, while the L5-S1 current pathology represents unrelated degenerative pathology. Id. In response to this report, the respondents filed a Form 36 seeking to discontinue benefits on the basis that the claimant had reached maximum medical improvement relative to the L4-L5 disc herniation on January 30, 2015.

The trial commissioner noted that both Drs. Dickey and Gorelick had offered additional opinions. Dr. Dickey stated, in a February 5, 2015 report, "that the only treatment likely to benefit the claimant is a discectomy and fusion at L5-S1." Findings, ¶ 17. In a March 12, 2015 report, Dr. Dickey "causally related the claimant's symptoms at the L5-S1 level to the 2003 work injury."[2] Id. On February 9, 2016, Dr. Dickey sought additional records, including the pre-operative imaging prior to the 2009 surgery and a copy of the operative note. After reviewing these records, he reported, on April 5, 2016, that "the 2009 surgery was performed at the L4-L5 level only and that a disc protrusion and foraminal narrowing was found at L5-S1 at the time," Findings, ¶ 18; Claimant's Exhibit D, which he deemed consistent with the theory that the L5-S1 disc had been injured. He also stated that he "could not determine which abnormality caused the L5 finding on the EMG." Id.

In a December 7, 2015 letter to respondents' counsel, Dr. Gorelick "stated that some of the claimant's residual sensory deficit relative to the L5 root is likely related to the injury and subsequent surgery." Findings, ¶ 19; Respondents' Exhibit 1. At her

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[2] It does not appear that Dr. Dickey's notes for February 5, 2015 or March 12, 2015 were submitted into the record. However, given that Dr. Dickey's report of April 5, 2016 essentially reiterates the same information, we deem the trier's reference to these notes "harmless error." See D'Amico v. Dept. of Correction, 73 Conn. App. 718, 729 (2002), *cert. denied*, 262 Conn. 933 (2003).

deposition, Dr. Gorelick testified that chronic radiculopathy could result from the disc herniation itself, from surgery, from root manipulation, or from the scar that develops around the root after surgery. Respondents' Exhibit 3, p. 42. Dr. Gorelick also reviewed the electrodiagnostic testing performed by M. Joshua Hasbani, M.D., Ph.D., a neurologist; reports from Dr. Dickey dated February 9, 2016 and April 5, 2016; a June 3, 2009 MRI; and all available imaging. In a November 16, 2016 letter to respondents' counsel, Dr. Gorelick stated that there was no change in her previously-stated opinion. Respondents' Exhibit 6. In a February 13, 2017 letter to respondents' counsel, she confirmed she had reviewed additional MRIs from November 18, 2003 and June 3, 2009, and there was no change in her opinion as set forth in the RME report or her deposition testimony. Respondents' Exhibit 7. Dr. Gorelick rated the claimant with a sixteen (16) percent permanent partial disability of the lumbar spine. Respondents' Exhibit 1.

Based on these facts, the commissioner concluded that the claimant sustained a compensable work injury to the L4-L5 disc on November 5, 2003, and found persuasive Dr. Gorelick's testimony that the L5-S1 disc problem was separate, distinct, and unrelated to the 2003 compensable work injury. He found Dr. Gorelick's testimony and reports more persuasive than Dr. Dickey's reports and, as such, concluded that the L5-S1 problem and fusion surgery were not related to the 2003 compensable work injury. Having determined that the claimant was at maximum medical improvement for his compensable injury, the commissioner granted the Form 36. In addition, having concluded that the claimant failed in his burden of persuasion, he dismissed the claim for medical treatment for the L5-S1 disc.

The claimant filed a timely appeal of the Finding and Dismissal and a motion for extension of time to file a motion to correct. The trial commissioner denied this motion. The claimant has pursued this appeal on two grounds. He argues that it was legal error for the trial commissioner to deny him an extension of time to file his motion to correct. He also argues that the trial commissioner's conclusions were arbitrary and capricious. He believes that the record clearly supports his belief that his current need for back surgery is due to his compensable 2003 injury and it was error for the trial commissioner to conclude that it was not.

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).

We first address the procedural issue raised by the claimant. He argues that it was error for the trial commissioner to deny his motion for extension of time to file his motion

to correct. He argues that in light of precedent such as Scott v. Bridgeport, 4637 CRB-4-03-2 (February 24, 2004) and Mason v. Dale Construction, Inc., 4476 CRB-3-01-12 (April 28, 2003), the trial commissioner's decision was inconsistent with the remedial purpose of the Workers' Compensation Act. We note, however, that neither Scott nor Mason dealt with the specific issue at bar, i.e., whether to grant a motion to extend the time for a claimant to file a motion to correct. On the other hand, Krevis v. Bridgeport, 63 Conn. App. 328 (2001), did address this specific issue. The Appellate Court affirmed the decision of the trial commissioner, who had denied an extension of time for the claimant to file a motion to correct. The Appellate Court pointed out that this decision was a matter of discretion for the trial commissioner, who needed to be satisfied that there was good cause in order to grant an extension. Id., 331-32. We are not persuaded that the trial commissioner in the present matter abused the discretion clearly vested in him pursuant to the court's analysis in Krevis; we therefore find no error on this issue.

We now turn to the claimant's argument on the merits. He argues that the trial commissioner failed to cite various allegedly undisputed facts in his Finding and Dismissal. As the claimant views the record, these facts serve to both demonstrate that the claimant's back problem has persisted since the date of the compensable injury and support the opinions of his treating physicians. In his brief, the claimant references medical reports from Dr. Sumner dating from 2003, 2004 and 2009, as well as the claimant's own testimony regarding his condition in 2009. The claimant also asserts that the trial commissioner failed to cite MRI reports from 2003 and 2009.

As this board has previously remarked, "[t]here are few principles of jurisprudence more fundamental than the principle that a trier of fact must be the one

party responsible for finding the truth amidst conflicting claims and evidence." O'Connor v. Med-Center Home Healthcare, Inc., 4954 CRB-5-05-6 (July 17, 2006). It appears from our review of the factual findings that the trial commissioner noted the claimant's testimony relative to his condition in 2009. See Findings, ¶ 5. The trial commissioner also noted the findings in the 2009 MRI, as they compared to the MRI performed in 2014. See Findings, ¶ 8. We may reasonably infer that the trial commissioner did not place much weight on the other medical reports prepared prior to the claimant's initial discectomy, and instead focused his inquiry on the claimant's contemporary medical condition.

In Huertas v. Coca Cola Bottling Company, 5052 CRB-1-06-2 (January 22, 2007), the respondents argued that the trial commissioner erred because he "relied on certain facts while omitting others." We rejected that argument, given that "[a]ll judgments of evidentiary credibility are left solely to the trial commissioner, who is charged with deciding which of the documentary exhibits and witnesses are the most believable." Id., *citing* Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999). See also Prescott v. Community Health Center, Inc., 4426 CRB 8-01-8 (August 23, 2002).

In order to prevail before this Commission on a claim that his L5-S1 disc problem was compensable, the claimant had the burden of persuasion as described in Zezima v. Stamford, 5918 CRB-7-14-3 (May 12, 2015).

> Essentially 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.)

Id., *quoting* Stewart v. Federated Dept. Stores, Inc., 234 Conn. 597, 611 (1995). See also Sapko v. State, 305 Conn. 360, 373 (2012).

As such, we must review the Finding and Dismissal to ascertain if the evidence relied upon by the trial commissioner supports his decision in this case. The claimant argues that the trial commissioner failed to consider "undisputed facts" in the Finding and Dismissal. Appellant's Brief, p. 17. The claimant places great weight on the results of a June 3, 2009 MRI which disclosed a "tiny central disc herniation" at the L5-S1 level of the claimant's spine. Id. The claimant believes that only by omitting this fact from the Finding, as well as other evidence of his leg pain prior to 2009, could the trial commissioner reject the opinion of the claimant's treating physicians.

It is black-letter law that "the 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). O'Reilly v. General Dynamics Corp., 52 Conn. App. 813 (1999), stands for the proposition 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 trial commissioner in the present matter was not persuaded by the opinions of Dr. Dickey. In Findings, ¶ 9, the trial commissioner noted that on September 18, 2014, Dr. Dickey had

originally stated that the claimant had undergone previous disc surgery in 2009 at both the L4-5 and L5-S1 levels. This statement proved to be inaccurate, in light of the operative report of Dr. Sumner dated December 2, 2009 (see Claimant's Exhibit C), and a fact-finder could consider this inaccuracy in evaluating the merit of this expert's opinion. "One can only expect the trier of fact to render a decision based on what evidence actually says, not what it should have said." Ben-Eli v. Lowe's Home Improvement Center, 5006 CRB-3-05-10 (November 16, 2006).

Although the claimant argues that the commissioner ignored the results of the June 3, 2009 MRI, we note that the commissioner cited this evidence in Findings, ¶ 8, in which he noted that Dr. Sumner compared this report to a March 24, 2014 MRI of the claimant's lumbar spine. We also have reviewed the opinion of Dr. Gorelick, whom the trial commissioner found persuasive and credible. The trial commissioner noted that Dr. Gorelick had performed a respondents' medical examination on December 30, 2014, and opined, subsequent to that examination, that the claimant's L5-S1 ailment was a degenerative condition predating the claimant's compensable injury and unrelated to that injury.

Subsequent to that report, Dr. Gorelick reviewed the electrodiagnostic testing performed by Dr. Hasbani in 2015 as well as the previously-referenced June 3, 2009 MRI, relied upon by the claimant. After viewing this additional evidence, Dr. Gorelick re-stated her opinion in a November 16, 2016 letter to respondents' counsel. Findings, ¶ 20. She reviewed additional diagnostic studies and, in a February 23, 2017 letter to respondents' counsel, re-stated her opinion as to causation. Findings, ¶ 21. We note that in her deposition of June 23, 2015, Dr. Gorelick unequivocally stated that she could not

relate the claimant's need for surgery at the L5-S1 level to his injury of 2003. Respondents' Exhibit 3, pp. 28-29. Since issuing her initial report of December 30, 2014, Dr. Gorelick has consistently reiterated her opinion that the claimant's ailment at L5-S1 is not specifically related to the work injury the claimant suffered in 2003, but, rather, is the result of degenerative changes.

We therefore do not find that either the trial commissioner or the witness he found credible and persuasive, Dr. Gorelick, failed to properly consider relevant evidence concerning the causation of the claimant's L5-S1 condition. As a result, the decision of the trial commissioner was neither arbitrary nor capricious. To a large extent, this case involved "dueling experts" between the claimant's treating physicians and the respondents' expert witness. In such a circumstance, the trial commissioner has the prerogative to choose the opinion he deems more persuasive and weighty. See Dellacamera v. Waterbury, 4966 CRB-5-05-6 (June 29, 2006).

Given that the trial commissioner's decision was grounded in evidence that he found credible and persuasive, we affirm the March 3, 2017 Finding and Dismissal of Jack R. Goldberg, the Commissioner acting for the Fifth 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 25th day of April 2018 to the following parties:

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