CASE NO. 6192 CRB-5-17-4 : COMPENSATION REVIEW BOARD
CLAIM NO. 300110112

JOHN SPILLANE : WORKERS' COMPENSATION
CLAIMANT-APPELLANT COMMISSION

v. : AUGUST 9, 2018

YALE UNIVERSITY
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLEE

and

FUTURECOMP
ADMINISTRATOR

APPEARANCES:

The claimant appeared at oral argument as a self-represented party. At the trial level, the claimant was represented by Dennis W. Gillooly, Esq., D'Elia Gillooly DePalma, L.L.C., Granite Square, 700 State Street, New Haven, CT 06511.

The respondents were represented by Polly L. Orenstein, Esq., Letizia, Ambrose & Falls, P.C., 667-669 State Street, Second Floor, New Haven, CT 06511.

This Petition for Review from the April 10, 2017 Finding and Dismissal of Jack R. Goldberg, the Commissioner acting for the Fifth District, was heard February 23, 2018 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Scott A. Barton and Nancy E. Salerno.[1]

[1] We note that a motion for a continuance was granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has appealed from a Finding and Dismissal issued by Commissioner Jack R. Goldberg concluding that the claimant's injury at work was self-limiting and not responsible for his current medical condition. The claimant argues that the trial commissioner failed to properly credit medical evidence supportive of his claim for benefits. Upon review, we conclude that the trial commissioner was not persuaded by the claimant's evidence and found the evidence presented by the respondent more persuasive. Given that we may not re-weigh the evidence on appeal, we affirm the Finding and Dismissal.

The trial commissioner reached the following findings at the conclusion of the formal hearing. The claimant testified that he had been employed as a maintenance worker at what is now the West Haven campus of Yale University for about twenty years. On April 12, 2015, he was at work when he stepped onto the running board of a truck, the running board snapped off, and the claimant fell to the ground. He said his back began to hurt immediately and he was taken to Yale-New Haven Hospital by ambulance, where he was admitted for two days with back pain. The claimant testified that he had been involved in a car accident around 1990 and sustained injuries to his upper back for which he treated with a chiropractor and acupuncturist. The back pain "would come and go" over the years but did not cause him to miss time from work. November 30, 2016 Transcript, p. 17. On cross-examination, the claimant conceded that he had also injured his low back, neck, and legs in the car accident. The claimant testified that he treated with his personal doctor, Babu Kumar, M.D., in 2009 for back pain stemming from the motor vehicle accident.

The trial commissioner noted that prior to the April 12, 2015 incident, the claimant was continuing to receive medical treatment. On February 25, 2011, Robert H. Rubino, D.C., a chiropractor, stated that the claimant was reporting chronic pain. A lumbar MRI taken on December 22, 2011, demonstrated stenosis of the central canal and foramen at L4-L5, and mild subarticular disc protrusion and hypertrophic facet and ligamentous changes with moderate narrowing at L5-S1. The claimant testified that he treated with Sanjay P. Rathi, M.D., for a year or two but could not recall the doctor's specialty. Records indicate that Dr. Rathi, a neurologist, treated the claimant for three years, including during the four weeks prior to the 2015 fall from the truck running board. Dr. Rathi's December 12, 2014 report states that the claimant reported that his back pain had increased due to cold weather and he was having trouble navigating stairs. The claimant testified that he might have forgotten about his prior back pain and leg symptoms and the difficulties he had walking and climbing stairs prior to the work injury.

Following the 2015 incident, a Form 36 was approved for a return to full duty effective July 31, 2015, and indemnity benefits were stopped. The claimant testified that he never received the Form 36 in the mail and it was handed to him by a postal clerk while he was at the post office. In correspondence of November 29, 2016, Lorenda Loyd, the Administrative Assistant to the Postmaster in New Haven, stated that it appeared no notice was left by the postal carrier and the customer was therefore unaware that a certified letter was awaiting pick-up until he was informed of same on August 13, 2015, by a window clerk while he was performing routine postal business. See Claimant's Exhibit K.

Peter G. Whang, M.D., of Yale Orthopaedics and Rehabilitation, examined the claimant and, in his report of April 29, 2015, indicated that the claimant's MRI had revealed minimal degeneration of the thoracic spine, a small disk herniation at T6-T7 with minimal stenosis at that level, and no significant nerve compression at any level of the thoracic spine. Dr. Whang stated that much of the claimant's discomfort could be musculo-skeletal in nature and physical therapy could prove helpful. There was no evidence of any pathology which required immediate surgical intervention and Dr. Whang cleared the claimant for all activities as tolerated.

The claimant testified that he did not feel capable of working during the summer of 2015 because he was not driving his car on a regular basis and could not perform chores around his house, including feeding the chickens and ducks in the backyard and walking his dog. He obtained rides from his brother or a neighbor to shop for food or attend church, had difficulty sleeping, and was unable to carry grocery bags into the house.

The trial commissioner noted that Dr. Kumar referred the claimant to Shirvinda A. Wijesekera, M.D., an orthopedist. On September 8, 2015, Dr. Wijesekera's PA-C, Sherri L. O'Connor, recommended that the claimant undergo a Functional Capacity Examination. On October 13, 2015, Dr. Wijesekera determined that the claimant could perform sedentary work with a ten-pound lifting restriction.

The claimant eventually began treating with Michael J. Robbins, D.O., who diagnosed an annular tear at the L5 level on March 4, 2016. Dr. Robbins continued to prescribe Gabapentin for the claimant's back and neck pain and also prescribed OxyContin. Dr. Robbins ordered an MRI for the claimant and indicated that it had

revealed an annular tear at the L5-S1 level. In his June 23, 2016 office note, Dr. Robbins stated that the annular tear at L5-S1 had been caused or aggravated by the work incident of April 12, 2015. He indicated that the tear could not heal on its own and the treatment options were lumbar fusion surgery, artificial disc replacement surgery, or a trial of stem cell injections; he also stated that the claimant had no work capacity and was disabled due to his work-related injuries. At his deposition, the doctor testified that the work-related injuries were a substantial factor in the back pain from which the claimant was suffering. See Claimant's Exhibit L, pp. 24-25.

On September 26, 2016, Dr. Robbins performed a lumbar discogram which revealed a three-level Grade 4 lumbar annular tear at the L3-L4, L4-L5, and L5-S1 levels. Dr. Robbins noted that the annular tears were primarily located in the claimant's right lumbar region, which correlated with the claimant's pain complaints. Dr. Robbins also testified that the stem cell injection was the least invasive and least expensive treatment option. He estimated that the claimant would experience a 75 (seventy-five) percent or greater chance of pain reduction on a permanent basis from the stem cell injection, and even if it failed, it would not prevent other treatments such as a fusion, disc replacement, or spinal cord stimulator. The claimant indicated that he would like to undergo the stem cell injection treatment recommended by Dr. Robbins.

The respondent retained Judith Gorelick, M.D., a neurosurgeon, to perform a respondent's medical examination on April 15, 2016. At her deposition, Dr. Gorelick testified that the claimant denied being able to recall pre-existing back or leg symptoms or prior imaging when she took his medical history, which statement was inconsistent with the medical records and prior imaging studies Dr. Gorelick had reviewed. The

doctor also testified that the physical examination was very difficult because the claimant had a hard time cooperating and "was often vocalizing, grunting and kind of hyperventilating…." Respondent's Exhibit 1, pp. 8-9. She described the claimant's behavior as "exaggerated," and opined that the claimant's complaints and physical findings were out of proportion to the objective findings on the imaging studies. Id., 9-10.

Dr. Gorelick testified that the claimant's diagnosis was basically a soft tissue injury – either a thoracal lumbar sprain or strain or a musculo-ligamentous injury – which had resulted in an exacerbation of the pre-existing lower extremity pain symptoms but which was temporary and self-limiting. Dr. Gorelick testified that the claimant may require treatment for symptoms related to the underlying condition which pre-existed the April 12, 2015, incident. She opined that the claimant had reached maximum medical improvement with a 3 (three) percent permanent partial disability of the lumbar spine which was related to the compensable work injury. Id., 19.

Dr. Robbins testified that he did not agree with Dr. Gorelick's opinion, stating that Dr. Gorelick had not seen the lumbar discogram report and was unaware of the three-level annular tear. In addition, Dr. Gorelick had diagnosed a strain which is self-limiting and heals after a period of time on its own. Dr. Robbins testified that the claimant is no better, so some other underlying pathology must be causing the claimant's pain, and he believed that it must be the annular tear. He indicated that the claimant had continued to work despite his pre-existing back pathology, and it was only after the April 12, 2015 work event that "the wheels came off the bus" and the claimant no longer could work. Claimant's Exhibit L, p. 34. Dr. Robbins indicated that his opinion was

based on the discogram findings rather than the MRI findings reviewed by Dr. Gorelick because Dr. Robbins believed the discogram is a more comprehensive diagnostic tool than the MRI.

Based on this record, the trial commissioner concluded that the claimant was not credible, and Dr. Gorelick's testimony and conclusions were more persuasive than the testimony and conclusions of Dr. Robbins. The commissioner concluded that the claimant sustained a work-related injury on April 12, 2015, which arose out of and in the course of his employment but the compensable injury was temporary and self-limiting. The commissioner also discussed the apparent irregularities pertaining to the claimant's receipt of the Form 36, and concluded as follows:

> The issue of the July 31, 2015 Form 36 was fully considered in this proceeding. The subsequent completion of a full evidentiary formal hearing on the subject has rendered moot any alleged procedural inconsistencies regarding the prior administrative approval of that Form 36, pursuant to [Krol v. A.V. Tuchy, Inc., 4613 CRB-4-03-1 (January 29, 2004), *aff'd* 90 Conn. App. 346 (2005)].

Conclusion, ¶ g.

The trial commissioner found Dr. Whang's April 29, 2015 report provided a medical basis for the approval of the Form 36, and he approved the Form 36 with an effective date of July 31, 2015. He dismissed the claim for benefits with prejudice.

The claimant filed a timely appeal from the Finding and Dismissal but did not file a motion to correct. The gravamen of his appeal is that the trial commissioner did not grasp the severity of the April 12, 2015 incident and the commissioner's reliance on the opinion of Dr. Gorelick rather than Dr. Robbins constituted error.

We note that the claimant has sought to bring additional material to this tribunal's attention which was not included in the formal hearing record. He did not file a motion to submit additional evidence, and the respondent has objected to our consideration of this material.[2] Given that the claimant is bringing this appeal as a self-represented party, we are inclined to extend a certain amount of leeway as to how he may prosecute the matter; however, as we pointed out in Claros v. Keystone Pipeline Services, 5399 CRB-1-08-11 (October 28, 2009), "there must still be a reasonable effort to comply with the rules to enable this panel to take action." Id. In any event, we do not believe the absence of a formal motion is dispositive. After considering the oral argument presented by the claimant, we are not persuaded that the standard required for granting a motion pursuant to § 31-301-9 of the Regulations of Connecticut State Agencies has been met. "A party who wishes to submit additional evidence to this board must prove that there were good reasons for failing to present such evidence at the formal hearing." Carney-Bastrzycki v. Hospital for Special Care, 4722 CRB-6-03-9 (September 3, 2004).

We now turn to the merits of the claimant's appeal, noting that our standard of appellate review is limited and deferential to the fact-finding prerogative of the trial commissioner. We also note that in the absence of a motion to correct the factual findings in this case, we must accord these findings conclusive effect. Stevens v. Raymark Industries, Inc., 5215 CRB-4-07-4 (March 26, 2008), *appeal dismissed*, A.C. 29795 (June 26, 2008). "The trial commissioner's factual findings and conclusions must

[2] Regs., Conn. State Agencies § 31-301-9 states: "If any party to an appeal shall allege that additional evidence or testimony is material and that there were good reasons for failure to present it in the proceedings before the commissioner, he shall by written motion request an opportunity to present such evidence or testimony to the compensation review division, indicating in such motion the nature of such evidence or testimony, the basis of the claim of materiality, and the reasons why it was not presented in the proceedings before the commissioner. The compensation review division may act on such motion with or without a hearing, and if justice so requires may order a certified copy of the evidence for the use of the employer, the employee or both, and such certified copy shall be made a part of the record on such appeal."

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).

The claimant argues that it was error for the trial commissioner to have deemed him a less-than-credible witness. However, the claimant offered live testimony to the trial commissioner, and it is well-settled that a credibility judgment following such testimony is generally impervious to appeal. "The commissioner, as finder of fact, is the sole arbiter of credibility...." Baron v. Genlyte Thomas Group, LLC, 132 Conn. App. 794, 804 (2012), *citing* Samaoya v. Gallagher, 102 Conn. App. 670, 673-74 (2007). Moreover, our Supreme Court has indicated that this decision may not be revisited on appeal:

> Credibility must be assessed ... not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude.... An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] ... [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom.... As a practical matter, it is inappropriate to assess credibility without

> having watched a witness testify, because demeanor, conduct and other factors are not fully reflected in the cold, printed record. (Internal quotation marks omitted.)

Burton, supra, 40, *quoting* Briggs v. McWeeny, 260 Conn. 296, 327 (2002).

The trial commissioner did not find the claimant credible and we may not reverse this determination on appeal. In addition, the finding relative to credibility impacts the medical evidence presented. As we pointed out in Anderson v. Target Capital Partners, 5615 CRB-6-10-12 (January 3, 2012), when a claimant is deemed not credible, any medical evidence derivative of the claimant's narrative may be discounted by the trial commissioner.

> A claimant's credibility also bears heavily on whether medical testimony reliant on his or her narrative is to be given weight by the trial commissioner. When a trial commissioner does not find the claimant credible, the commissioner is entitled to conclude any medical evidence which relied on the claimant's statements was also unreliable. See Baker v. Hug Excavating, Inc., 5443 CRB-7-09-3 (March 5, 2010); Do v. Danaher Tool Group, 5029 CRB-6-05-12 (November 28, 2006); and Abbotts v. Pace Motor Lines, Inc., 4974 CRB-4-05-7 (July 28, 2006), *aff'd*, 106 Conn. App. 436 (2008), *cert. denied*, 287 Conn. 910 (2008). We may reasonably infer this would provide justification for the trial commissioner discounting the opinions of the claimant's treating physicians.

Id.

In the present case, the trial commissioner cited evidence from various medical providers indicating that the claimant had sustained back injuries prior to the incident of April 12, 2015, and had been treated for these injuries. The claimant bore the burden of establishing proximate cause between the compensable injury of that date and his current medical condition. This board described this burden 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* Sapko v. State, 305 Conn. 360, 373 (2012).

We note the similarities between the present matter and both Do, supra, and Zezima, supra. In Do and Zezima, the claimants sustained pre-existing injuries and then argued that subsequent work injuries were the source of their medical ailments. In neither case was the trial commissioner persuaded by the claimant's evidence. In the present matter, the trial commissioner found the respondent's expert witness, Dr. Gorelick, more persuasive than the claimant's treating physician. The claimant argues that Dr. Gorelick lacked a sufficient understanding of his prior and current medical condition to offer reliable testimony. We have reviewed her deposition transcript and are not so persuaded.

At her deposition, Dr. Gorelick was questioned at length regarding her April 15, 2016 report, wherein she stated that she had examined various imaging studies of the claimant's spine, including the lumbar MRI performed on February 6, 2016, and a thoracic MRI study of April 27, 2015. Her report also references a December 22, 2011 MRI of the lumbar spine which pre-dated the work injury. Her report concluded that the claimant's condition was "multilevel lumbar degenerative disk disease" and "any additional treatment … [is] in my opinion predominantly related to his underlying

condition which pre-existed the incident of April 12, 2015." Respondent's Exhibit 1 of Respondent's Exhibit 1, p. 7.

Dr. Gorelick also opined that the 2011 MRI findings were evidence of the "chronicity" of the claimant's back ailment and suggested that the claimant was suffering from a degenerative back problem. Id., 20. When asked if the accident at work could have exacerbated this degenerative condition, she stated that "there is no objective finding that would suggest that there was some event that occurred at this incident on a structural basis that would allow me to conclude that." Id., 35. She further noted that the claimant had complained "of ongoing difficulty with his lower extremities" one month prior to the work incident. Id., 36-37. Dr. Gorelick described the claimant's work injury as a "soft tissue injury" and stated that such injuries tended to be "self-limited situations." Id., 14, 16.

The claimant argues that Dr. Robbins' opinion regarding the claimant's September 26, 2016 lumbar discogram should have been given greater weight by the trial commissioner, particularly in light of the fact that Dr. Gorelick had not reviewed the discogram. We are perplexed as to why the results of a test administered on September 26, 2016, could not have been brought to the attention of Dr. Gorelick at her October 10, 2016 deposition. In Berube v. Tim's Painting, 5068 CRB-3-06-3 (March 13, 2007), this tribunal observed that when a party does not challenge a medical opinion, it may be considered "as is."

In the present matter, although Dr. Gorelick's overall opinion was challenged, she was not given a chance to opine on the discogram. In any event, the trial commissioner is responsible for evaluating the weight and probative value of medical evidence. "It is the

trial commissioner's function to assess the weight and credibility of medical reports and testimony...." O'Reilly v. General Dynamics Corp., 52 Conn. App. 813, 818 (1999), *quoting* Gillis v. White Oak Corp., 49 Conn. App. 630, 637, *cert. denied*, 247 Conn. 919 (1998). To the extent that this matter was a "dueling expert" case between the claimant's treating physician and the respondent's expert witness, 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) *appeal withdrawn*, A.C. 27853 (September 12, 2006).

We also note that the record reflects certain irregularities attendant upon the delivery of the Form 36 to the claimant. The commissioner considered this issue in his Finding and Dismissal, and concluded, consistent with this tribunal's analysis in Krol, supra, that a fully litigated hearing cured any prior discrepancies relative to the filing of a Form 36. We have reviewed Krol as well as other subsequent appellate precedent regarding the filing of Forms 36. See, e.g., Pagan v. Carey Wiping Materials Corp., 144 Conn. App. 413 (2013), *cert. denied*, 310 Conn. 925 (2013). Pagan clearly states that "a subsequent formal [evidentiary] hearing" is the proper forum to contest a Form 36. Id., 421. On the merits, we find that Dr. Whang's April 29, 2015 report, which cleared the claimant "for all activities as tolerated," provided a sufficient basis to terminate the temporary total disability benefits being paid as a result of the April 12, 2015 incident. Claimant's Exhibit D.

Upon review, we find that sufficient probative evidence supports the conclusions of the trial commissioner. We therefore affirm the Finding and Dismissal.

Commissioners Scott A. Barton and Nancy E. Salerno concur in this opinion.