CASE NO. 6194 CRB-1-17-5 : COMPENSATION REVIEW BOARD
CLAIM NO. 500166830

GARY J. BARD : WORKERS' COMPENSATION
CLAIMANT-APPELLANT COMMISSION

v. : OCTOBER 3, 2018

GRADE A SHOPRITE OF SOUTHBURY
EMPLOYER

and

NORTH RIVER INSURANCE COMPANY
TPA CRUM & FORSTER INSURANCE
COMPANIES
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by John J. D'Elia, Esq., D'Elia, Gillooly, DePalma, L.L.C., 700 State Street, New Haven, CT 06511.

The respondents were represented by Patrick T. Battersby, Jr., Esq., and Amanda A. Hakala, Esq., Montstream & May, L.L.P., 655 Winding Brook Drive, P.O. Box 1087, Glastonbury, CT 06033-6087.

This Petition for Review from the April 27, 2017 Finding and Award in Part and Dismissal in Part of Daniel E. Dilzer, the Commissioner acting for the First 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 Jodi Murray Gregg.[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 Award in Part and Dismissal in Part" [hereinafter "Finding"] issued by Commissioner Daniel E. Dilzer in which the commissioner concluded that the claimant had sustained a compensable injury and was totally disabled for a one-week period following the injury and for a one-week period after July 6, 2016. However, the commissioner denied the claimant's bid for subsequent temporary partial disability benefits.[2] The claimant contends that this denial was in error, and further argues that the commissioner erred in failing to address within the Finding a later medical report opining that he was totally disabled for additional time periods.

The respondents argue that the claimant was not deemed a credible and persuasive witness and therefore the trial commissioner discounted his medical evidence. They also point out that the trial commissioner found that the claimant had not demonstrated a willingness to accept light duty, and although the claimant, in his motion to correct, sought temporary total disability benefits on the basis of the aforementioned medical report, the trial commissioner denied the motion to correct. Upon review, we find the respondents' position more persuasive and affirm the Finding.

The commissioner reached the following factual findings at the conclusion of the formal hearing in this case. He noted that it was undisputed that the claimant was employed by Grade A ShopRite of Southbury on June 22, 2016, and the respondents did not contest that the claimant sustained a back injury in the course and scope of his employment on June 22, 2016. The commissioner also found that the claimant had been a meat cutter for thirty-five years and was hired to work at the Southbury store on

March 17, 2016. On June 22, 2016, the claimant was lifting meat boxes when he felt a pop in his back. He reported the incident to the store's front-end manager and prepared a handwritten statement. The manager told him he was free to seek medical care at Physician One Urgent Care [hereinafter "Physician One"] located directly across the street from the employer's Southbury store. The claimant left work early to be examined at Physician One, after which visit he was released to light duty for eight hours per day.

The claimant's immediate supervisor called the claimant on the evening of June 22, 2016 to inquire about the claimant's condition. The claimant faxed the light-duty status note from Physician One to the store in Southbury the following day but did not report to work immediately following his work injury, citing the discomfort he experienced after the injury while traveling long distances in his car. The trial commissioner noted that despite this contention, the claimant was able to travel from his home in Plainville to his boat docked in Mystic during the summer of 2016. The claimant explained that those trips were possible because he was a passenger in the motor vehicle and could stretch during the ride.

On June 24, 2016, the claimant noticed that his pain had increased since the initial incident and decided to go to an emergency room close to his home rather than going to Physician One, which was approximately one hour from his home. The claimant went to the emergency department at the Hospital of Central Connecticut, New Britain General Campus [hereinafter "Central Connecticut"], on June 24, 2016, and was diagnosed with "back pain, back strain (unspecified part of back), sciatica." Claimant's Exhibit A. The claimant was deemed totally disabled from work for one week. The claimant faxed this note to his employer's Southbury store on June 24, 2016.

The trial commissioner noted the testimony of Jacqueline Alarcon, the Human Resources Representative for the respondent employer, who indicated that she became aware of the claimant's injury on June 22, 2016, when the manager from the Southbury store faxed the First Report of Injury to her at the respondent employer's main office. The claimant testified that his initial contact with Alarcon, who manages all the workers' compensation claims for the respondent, occurred on June 30, 2016, when she telephoned him and provided him with a claim number and the name of an adjuster. The claimant tried to call the adjuster on July 1, 2016, left a message, and eventually spoke with a claims adjuster on July 6, 2016. The claimant testified that the adjuster told him he would calculate his compensation rate, and the claimant confirmed he was paid for the period from the date of the injury to July 10, 2016. The claimant also testified that he and the claims adjuster never discussed whether the claimant was required to provide disability notes to his employer.

On July 6, 2016, the claimant returned to Central Connecticut. He was totally disabled from work for one week due to ongoing back pain and was prescribed medication which prevented him from driving. The claimant faxed this note to the respondent employer at the Southbury store, and Alarcon confirmed receipt of the note on either July 6, 2016, or July 7, 2016. This note would have released the claimant to return to work on July 14, 2016. Alarcon confirmed that it was appropriate for the claimant to fax his disability note to the Southbury store as the note would then be forwarded to her. She also testified that the respondent employer had light duty available for the claimant in June of 2016.

Alarcon testified that she first spoke directly with the claimant on July 5, 2016. She provided him with a claim number and verbally authorized him to see a specialist of his choosing. On July 14, 2016, the date that the claimant's July 6, 2016 disability note from Central Connecticut expired, Alarcon tried to call the claimant on his cell phone but was unsuccessful in reaching him. She then asked the claimant's direct supervisor and the claims adjuster to try to reach him. Due to her inability to reach the claimant by phone, Alarcon sent the claimant a letter on that date advising him that if he did not contact the respondent employer by noon on July 18, 2016, his employment would be terminated due to abandonment. She also indicated that the respondent employer had not heard from him since July 5, 2016, when she and the claimant had discussed making an appointment with a specialist. Alarcon sent this letter via U.P.S., which confirmed that the letter was left on the claimant's porch on July 15, 2016 at 9:51 a.m.

The claimant testified that he did not receive the July 14, 2016 letter and his home does not have a porch. However, he did state that his home has a series of five or six steps leading to a front door with a concrete stoop and an open railing on both sides. The claimant asserts that on July 14, 2016, he was still treating for his injury and had not been released to work. The claimant also indicated that he saw his primary care physician, Henry D. Todd, M.D., of Hartford HealthCare Medical Group, on July 15, 2016. The claimant believed that as of July 14, 2016, he was still an employee of the respondent employer, and testified that he was unaware of any lack of compliance on his part for failing to advise his employer of his work status.

Dr. Todd's report of July 15, 2016, indicated that the claimant was concerned about being out of work and Dr. Todd had suggested that "the best course of action

would be to take matter up with human resources at his job." Respondents' Exhibit 2; see also Findings, ¶ 26. Dr. Todd noted that the claimant had stated that "going to HR on his job site is 'too inconvenient' for him at this point." Id. Dr. Todd did not offer a diagnosis or disable the claimant from work. He wrote the claimant a prescription for a "SMALL" amount of Percocet, id., and referred the claimant for an MRI, which occurred on July 22, 2016. Id. The claimant did not present the respondents with any work restrictions from this office visit.

The claimant testified that the claims adjuster was aware of the July 15, 2016 office visit and he assumed his employer was also aware of that office visit. In any event, the trial commissioner found that the claimant did not have a medical report disabling him from work as of July 15, 2016. The respondent employer indicated that it did not hear from the claimant until after it had sent its letter of July 14, 2016. The claimant testified that he misplaced his cellular telephone on July 13, 2016, or July 14, 2016, and did not locate it again until July 18, 2016.

On July 18, 2016, the respondent employer sent a termination letter to the claimant via U.P.S. This termination letter was not sent until after the deadline to respond set forth in the prior July 14, 2016 letter had passed. The letter arrived at the claimant's home on July 19, 2016, but he did not attempt to contact the respondents until July 21, 2016, when he telephoned his supervisor. The trial commissioner noted that the claimant visited the Central Connecticut emergency department on the afternoon of July 18, 2016, and obtained a disability slip restricting him to light duty with a five-pound lifting restriction. The treatment note from Central Connecticut for the

claimant's July 18, 2016 visit was not sent to the respondents until after the termination letter had been sent.

The claimant testified regarding the circumstances in mid-July 2016. He said that his phone did not have stored messages from the respondent employer or its insurance carrier. He also said that his employer never expressed any need for additional information concerning his disability status prior to terminating his employment. He denied ever receiving the July 14, 2016 letter and indicated that he had contacted his supervisor to explain that he had not received the letter. In addition, he testified that he was never advised he would be offered light duty if he reported to work.

The claimant presented no medical records for the period between July 18, 2016, and September 27, 2016, when he returned to Dr. Todd. At that visit, the doctor noted that he would continue to prescribe Oxycodone and referred the claimant to a neurosurgeon. The trial commissioner found that although the claimant was not referred to a specialist prior to September 27, 2016, he had declined to travel to Physician One for an examination and Central Connecticut had referred him back to his own doctor after each visit. The claimant testified that he attempted to obtain an orthopedic doctor on his own before September 27, 2016, but was advised that they "didn't deal with workmen's comp…." December 21, 2016 Transcript, p. 87; Findings, ¶ 41. Although the claimant had a prior workers' compensation claim for which he treated with Duffield Ashmead, M.D., he did not call Dr. Ashmead for a referral. The respondents did authorize a referral to an orthopedic specialist following Dr. Todd's referral in September 2016, and on October 26, 2016, the claimant saw Richard L. Froeb, M.D., who recommended

conservative care and disabled the claimant from work as of that date pending authorization for further treatment. See Respondents' Exhibit 5.

Based on these facts, the trial commissioner reached the following conclusions:

> A. The Claimant sustained a lumbar injury in the course and scope of his employment with the Respondent on or about June 22, 2016, while working at the Respondent's Southbury Store.
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> B. I find the Claimant was totally disabled for a period of one week from June 24, 2016, and for one week from July 6, 2015 and I hereby Order the Respondents to make such payments.
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> C. I do not find the Claimant's testimony credible and do not believe he demonstrated he was willing to perform light-duty work pursuant to C.G.S § 31-308(a) at any time since the date of his June 22, 2016 through the present and hereby DISMISS his claim for temporary partial disability benefits for this period of time. (Emphasis in the original.)

April 27, 2017 Finding.

The claimant filed a motion to correct these findings. The gravamen of the motion to correct was that the trial commissioner failed to rule on whether the claimant was temporarily totally disabled for various time periods subsequent to the date of injury for which the commissioner did not award benefits, including the period after his October 26, 2016 examination by Dr. Froeb. The trial commissioner denied the motion in its entirety, and the claimant filed this appeal, essentially arguing that the commissioner erred in not awarding the claimant temporary total disability benefits in accordance with his motion to correct.

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).

The claimant's principal argument on appeal is that he raised a claim for temporary total disability benefits and the trial commissioner denied this relief. He argues that medical evidence supportive of temporary total disability benefits was uncontroverted for the period during which the trial commissioner did not award benefits and should have been credited. The claimant contends that because the trial commissioner failed to consider this evidence, and failed to discuss the issue of total disability for the periods claimed, the Finding should be vacated and the issue remanded for an additional hearing. The respondents point out that the claimant sought this relief in his motion to correct. The trial commissioner denied the motion in its entirety; therefore, it must be presumed that he was not persuaded by the evidence presented by the claimant on this issue. We find the respondents' position more persuasive.[2]

[2] The claimant relies on Aylward v. Bristol/Board of Education, 5756 CRB-6-12-5 (May 15, 2013), *aff'd,* 153 Conn. App. 913 (2014) (per curiam), and Barbieri v. Comfort and Care of Wallingford, LLC, 5794 CRB-8-12-10 (September 26, 2013), as authority for remanding for additional proceedings any matter in which an issue was not addressed by a trial commissioner. We find both of these cases factually distinguishable. In Aylward and Barbieri, issues were presented (concurrent employment in Aylward and the piercing of the corporate veil in Barbieri) in post-judgment motions on which the commissioner failed to rule. However, when, as in the present matter, a motion to correct presents a specific claim for relief

We note that 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), supports the respondents' position. As we held in Brockenberry, supra,

> When a party files a Motion to Correct this is an effort to bring factual evidence to the trial commissioner's attention in an effort to obtain a Finding that is consistent with such facts. When a trial commissioner denies such a motion, we may properly infer that the commissioner did not find the evidence submitted probative or credible. Vitti v. Richards Conditioning Corp., 5247 CRB-7-07-7 (August 21, 2008). On appeal, our inquiry is limited to ascertaining if this decision was arbitrary or capricious. Id. The leading case on this point is Beedle v. Don Oliver Home Improvement, 4491 CRB-3-02-2 (February 28, 2003). "We also note that virtually all of the 'undisputed facts' cited by the respondent in their Motion to Correct were derived from testimony, which the trier was not required to believe even if those statements were uncontradicted or otherwise corroborated. Duddy [v. Filene's (May Department Stores Co.), 4484 CRB-7-02-1 (October 23, 2002)]; Pallotto v. Blakeslee Press, Inc., 3651 CRB-3-97-7 (July 17, 1998). The trier's denial of those corrections implies that he was not swayed by this testimony, and we cannot invade his sphere of authority by reappraising the evidence and drawing a contrary inference on appeal. Sendra v. Plainville Board of Education, 3961 CRB-6-99-1 (January 20, 2000)."

Brockenberry, supra, *quoting* Beedle, supra.

The question presented in this appeal is whether the trial commissioner could reasonably have discounted the claimant's medical evidence. We note that the commissioner concluded that the claimant was not a credible witness. See Conclusion, ¶ C. It is well-settled that such a determination could cause the trial commissioner to discount the medical evidence presented by the claimant. As this board has previously observed:

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based on specific evidence and is denied, we may presume the commissioner found the supportive evidence unpersuasive. See Brockenberry v. Thomas Deegan d/b/a Tom's Scrap Metal, Inc., 5429 CRB-5-09-2 (January 22, 2010), *aff'd*, 126 Conn. App. 902 (2011) (per curiam).

> 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.

Anderson v. Target Capital Partners, 5615 CRB-6-10-12 (January 3, 2012).

In the present matter, the claimant offered live testimony before the trial commissioner. When a witness offers live testimony, the fact-finder's assessment of the credibility of the witness is generally impervious to appellate review. See Baron v. Genlyte Thomas Group, LLC, 132 Conn. App. 794, 804 (2012), *cert. denied*, 303 Conn. 939 (2012), *citing* Samaoya v. Gallagher, 102 Conn. App. 670, 673-74 (2007). The claimant believes that the medical evidence which supported his temporary total disability status should have been credited. However, the record also contains substantial evidence which the trial commissioner could have reasonably inferred was inconsistent with this expert opinion, including, for instance, the claimant's testimony that he had journeyed from his home to the shore to engage in boating recreation. See Findings, ¶ 10. It also appears that the trial commissioner was skeptical of the claimant's arguments that the stoop in front of his home was not a "porch" and he failed to receive the respondent's notice of July 14, 2016. See Findings, ¶ 24. This tribunal has previously held that when a claimant is deemed not credible, his claim is subject to dismissal. See Pupuri v. Benny's Home Service, LLC, 5697 CRB-2-11-11 (November 5, 2012); Toroveci v. Globe Tool & Metal Stamping Co., Inc., 5253 CRB-6-07-7 (July 22, 2008).

We note that our analysis herein applies to claims for both temporary partial disability benefits as well as temporary total disability benefits. As our Appellate Court pointed out in Shepard v. Wethersfield Offset, Inc., 98 Conn. App. 682 (2006), *cert. denied*, 281 Conn. 911 (2007), "[t]he burden of proving entitlement to benefits under § 31-308 (a) rests on the claimant…." Id., 687. In the present matter, the trial commissioner's conclusion that the claimant failed to avail himself of an opportunity to perform light duty is supported by the evidentiary record.

The trial commissioner considered all of the evidence presented by the claimant, including the expert opinion in support of his claim for temporary total disability benefits submitted with the motion to correct. The commissioner was not persuaded by this evidence. It is axiomatic that the burden of persuasion in contested workers' compensation claims rests with the claimant. See Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440 (2001); Lentini v. Connecticut College, 4933 CRB-2-05-4 (May 15, 2006). If the trial commissioner was not persuaded by the claimant's evidence we, as an appellate tribunal, may not intercede on appeal. See Wierzbicki v. Federal Reserve Bank of Boston, 4147 CRB-1-99-11 (December 19, 2000), *appeal dismissed*, A.C. 21533 (June 14, 2001).

There is no error; the April 27, 2017 Finding and Award in Part and Dismissal in Part of Daniel E. Dilzer, the Commissioner acting for the First District, is accordingly affirmed.

Commissioners Scott A. Barton and Jodi Murray Gregg concur in this opinion.