CASE NO. 6195 CRB-2-17-5 : COMPENSATION REVIEW BOARD
CLAIM NO. 400081774

ANGELICA CORTES : WORKERS' COMPENSATION
CLAIMANT-APPELLEE COMMISSION

v. : JULY 20, 2018

STATE OF CONNECTICUT/
JUDICIAL BRANCH
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLANT

and

GALLAGHER BASSETT SERVICES, INC.
ADMINISTRATOR

APPEARANCES:

The claimant was represented at oral argument before the board by James H. McColl, Jr., Esq., and Edward T. Dodd, Jr., Esq., The Dodd Law Firm, L.L.C., Ten Corporate Center, 1781 Highland Avenue, Suite 105, Cheshire, CT 06410.

The respondent was represented by Lisa Guttenberg Weiss, Esq., Assistant Attorney General, Office of the Attorney General, 55 Elm Street, P.O. Box 120, Hartford, CT 06141-0120.

This Petition for Review from the April 27, 2017 Finding & Award of Thomas J. Mullins, the Commissioner acting for the Second District, was heard December 15, 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 oral argument, which had been scheduled for November 17, 2017, was postponed as soon as argument commenced when the respondent-appellant requested permission to file a document entitled "Supplemental Authority at Oral Argument by the Appellant-Respondent State of CT/Judicial Department Regarding the Commissioner's Jurisdiction on Overpayment." Oral argument was rescheduled and heard on December 15, 2017.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN: The respondent has appealed from the April 27, 2017 Finding & Award of Thomas J. Mullins, the Commissioner acting for the Second District, concluding that the claimant sustained a compensable injury and was entitled to continued indemnity benefits as a result of that injury. The respondent contends that the trial commissioner offered inadequate support in his findings for the relief granted to the claimant. The respondent also argues that the evidence submitted into the record supported a decision to grant the Forms 36 filed by the respondent to terminate benefits and did not support an award of permanency benefits. In addition, the respondent points out that it was impermissible for the trial commissioner, in his Finding & Award, to essentially copy verbatim the proposed findings of the claimant. The claimant argues that notwithstanding the asserted deficiencies in the drafting of the Finding & Award, the commissioner's ultimate conclusions are supported by evidence deemed reliable by the commissioner.

Having reviewed the evidentiary record and the specific findings and conclusions contained in the Finding & Award, we find we are unable to ascertain the manner in which the trial commissioner arrived at his conclusions. In particular, we are confused by his conclusion that one critical witness was "marginally credible" while another critical witness was "partially credible." Conclusion, ¶¶ 1, 2. Without a more specific explanation regarding which elements of the witness testimony the trial commissioner deemed reliable, we are unable to pass judgment on the validity of the relief granted in the Finding & Award. We are also troubled by the fact that we cannot find support in the record for certain factual findings reached by the trial commissioner as well as the fact

that the trial commissioner does appear to have adopted the claimant's proposed findings verbatim. Consistent with precedent as set forth in Aylward v. Bristol/Board of Education, 5756 CRB-6-12-5 (May 15, 2013), *aff'd,* 153 Conn. 913 (2014) (per curiam) and Bazelais v. Honey Hill Care Center, 5011 CRB-7-05-10 (October 25, 2006), *appeal withdrawn*, A.C. 30307 (July 17, 2009), we are unable to affirm such a finding. Given that we conclude that the deficiencies in the Finding & Award are too substantial to be addressed by a remand of the matter, we vacate the Finding & Award and order that a *de novo* formal hearing be scheduled on this claim.

The following facts are pertinent to our review of this matter. The trial commissioner noted that the issues before him included the potential discontinuance of benefits to the claimant on the basis of six (6) Forms 36 filed by the respondent; the claimant's bid for permanent partial disability benefits; and the respondent's contention that it had overpaid the claimant.[2] The trial commissioner also noted that six formal hearings were held between October 14, 2014, and October 16, 2016, and the parties introduced thirty-six (36) exhibits during the course of the hearings.[3]

The commissioner found that the claimant had been employed by the State of Connecticut as a Juvenile Detention Officer in Bridgeport since 2008 and her job responsibilities included maintaining security at the Juvenile Detention Center. On April 28, 2010, the claimant experienced a violent confrontation with a juvenile which erupted into an assault. The claimant testified that she was kicked several times in the abdomen, her head was pushed against a cement wall, and she was kneed several times in

[2] It appears that eleven (11) separate Forms 36 were filed during the pendency of this claim. At the formal hearing of October 14, 2014, the trial commissioner advised the parties that he would address the most recent six (6) Forms 36, and the parties consented to proceeding in this manner.

[3] Our review of the record indicates that eight sessions of the formal hearing were held, with the last session concluding on October 17, 2016.

the stomach. She also testified that she was repeatedly struck in the back with chairs and desks and it took several detention officers to stop the assault and gain control of the detainee.

The claimant offered testimony regarding her medical condition and medical treatment following the assault. She also testified regarding her performance of light duty and the positions offered to her by the Judicial Branch. She testified that the State discussed with her the positions of "Support Services Investigator" and "Court Support Services Intake Assistant," and she indicated that although she did "shadow" on at least one of the positions, no employment offer was ever made to her in writing. At the time the jobs were discussed with her, she was on light-duty status with restrictions. The trial commissioner noted that the job specifications for "Support Services Investigator" indicate that the position involves exposure to risk of injury from assaultive/abusive clients. See Claimant's Exhibit T. The position for which she "shadowed" was "Court Support Services Intake Assistant." The trial commissioner found that the specifications for this post included "exposure to risk of injury from assaultive/abusive defendants and the risk of exposure to communicable diseases." Findings, ¶ 15; Respondent's Exhibit 12.

The trial commissioner also reviewed medical opinions submitted into the evidentiary record. He noted that the claimant testified she had been involved in two motor vehicle accidents but neither accident had involved an injury to her back. She was treated by a chiropractor, Robert J. Porzio, D.C., for these incidents. Drew J. Edwards, M.D., testified that the workplace injury had affected the claimant's work capacity and her back issues were the result of that incident. In addition, the respondent's expert

witness, Thomas C. Banever, M.D., F.A.C.S., conducted respondent's medical examinations in 2012 and again in 2013. Dr. Banever opined that the claimant's complaints of pain in her thoracic abdominal wall were due to the work-related assault.

Patrick R. Duffy, M.D., the claimant's authorized treater for the left knee and back, indicated that after his initial examination of the claimant, he prescribed a lengthy course of physical therapy and recommended that the claimant undergo an MRI. In his report of October 23, 2013, the doctor indicated that the claimant's back symptoms continued to "wax and wane" and "[t]here is point tenderness to palpitation about the lumbosacral junction." Findings, ¶ 49; Claimant's Exhibit A. In a subsequent report dated April 8, 2014, Dr. Duffy stated that the claimant had "reached maximum medical improvement with respect to her work-related injury of 4/28/2010," and assigned a "3% permanent partial impairment of the lumbar spine as a direct result of the work-related injury." Id. An April 3, 2012 report from the respondent's expert, W. Jay Krompinger, M.D., was also submitted into the evidentiary record indicating that the claimant had sustained a strain of the left sacroiliac joint in the incident of April of 2010.

Three witnesses testified on behalf of the respondent. Gina Rodriguez, the claims adjuster for the insurance carrier, testified via Skype from Orlando, Florida on January 28, 2015. Rodriguez authored all six of the Forms 36 at issue. The trial commissioner summarized the Forms 36 as follows:

> The first 36 is dated August 27, 2011 reflecting an MMI date of August 5, 2011 with zero percent PPD of the left knee to which the Claimant objected. The other two dated August 26, 2011 reflected MMI on September 4, 2010 with zero percent impairment of the spleen and zero percent of the back per Dr. Krompinger's report dated April 3, 2012, again to which the Claimant objected. Ms. Rodriguez filed another Form 36, dated October 11, 2013, requesting termination of TP benefits due to failing to submit

> verifiable job searches, attached to the 36 was one submission that had been investigated out of more than 52 weeks of job searches. The sixth Form 36 seeks to discontinue TP on the basis of a motor vehicle accident of October 11, 2013.

Findings, ¶ 23.

Rodriguez testified regarding the circumstances underlying the Forms 36, primarily focusing on her familiarity with the claimant's job searches and the availability of light duty for the claimant. The witness also said that four of the Forms 36 were filed before she began handling the file in July 2012, and the physical file was located at the offices of Gallagher Bassett in East Hartford, Connecticut. Rodriguez further testified that she understood the claimant "was beat up pretty bad and had injured her head, spleen, back, left knee as a result." Findings, ¶ 28; January 28, 2015 Transcript, p. 42. Rodriguez also admitted that only one of the Forms 36 was based upon the claimant's refusal to accept a light-duty position. That Form 36 was filed based upon a consultation with the Office of the Attorney General even though Rodriguez had not contacted anyone at the Judicial Branch regarding the availability of light duty.

Grace Cyr, Personnel Officer for the Judicial Branch, State of Connecticut, also testified at the April 13, 2015 formal hearing, indicating that she was responsible for handling workers' compensation claims. She testified regarding the job opportunities made available to the claimant, the working conditions for those positions, and the time periods when the positions were discussed with the claimant. In addition, Steven Grant, Executive Director of the Court Support Services Division for the Connecticut Judicial Branch, testified regarding whether the claimant had been offered alternative employment by the Judicial Branch and the working conditions for the positions which

had been suggested to the claimant. He indicated that he had not looked outside the Judicial Branch for job opportunities for the claimant.

Based on this record, the trial commissioner reached the following conclusions:

1. **I FIND** Ms. Gina Rodriguez, claims adjuster, Gallagher Bassett Services, marginally credible.

2. **I FIND** Ms. Grace Cyr, Personnel Officer, Judicial Branch, partially credible.

3. **I FIND** Mr. Stephen R. Grant, Executive Director, Court Support Services, Judicial Branch, not credible.

4. **I FIND** Dr. Jay Krompinger credible.

5. **I FIND** Doctors' Duffy, Edwards, and Banever credible and persuasive.

6. **I FIND** the Claimant fully credible and persuasive.

7. **I FIND** the six Form 36's at issue are **DENIED**.

8. **I FIND** Specific Award benefits of 3% to the back be awarded along with mandated interest pursuant to C.G.S. 31-295(c) and

9. **I FIND** the issue of overpayment shall be considered and adjudicated at a future hearing.

April 27, 2017 Finding & Award, Conclusion, ¶¶ 1-9.

The respondent filed a motion to correct seeking to add findings relative to: (1) the respondent's acceptance of the injuries from the assault via a voluntary agreement; (2) the claimant's motor vehicle accidents, and (3) the claimant's lack of credibility. The motion also provided a restatement of the narrative regarding the claimant's medical treatment and work status. The trial commissioner denied this motion in its entirety. In addition, the respondent filed a motion for articulation requesting that

the commissioner provide the rationale for his findings that Rodriguez was "marginally credible" and Cyr was "partially credible." The motion also sought an explanation from the trial commissioner regarding his other credibility determinations and his denial of the Forms 36 as well as the basis for his award of permanency benefits and his decision to postpone making a determination regarding the alleged overpayment. The trial commissioner denied this motion in its entirety.

The respondent has now pursued this appeal, arguing that the Finding & Award does not conform to the evidence presented and contending that some, if not all, portions of its motion to correct and motion for articulation should have been granted. It also points out that the Finding & Award was essentially a verbatim recitation of the proposed findings submitted by the claimant. The claimant, on the other hand, argues that the evidence on the record credited by the trial commissioner supports the relief granted by the commissioner.

It is well-settled that the findings reached by a trial commissioner are subject to a high degree of deference. "As 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." Daniels v. Alander, 268 Conn. 320, 330 (2004), *quoting* Burton v. Mottolese, 267 Conn. 1, 54 (2003). The Compensation Review Board cannot retry the facts of the case and may only overturn the findings of the trial commissioner if they are without evidentiary support, contrary to the law, or based on unreasonable or impermissible factual inferences. Kish v. Nursing & Home Care, Inc., 248 Conn. 379 (1999); Fair v. People's Savings Bank, 207 Conn. 535 (1988). Nonetheless, while we must provide deference to the decision of

a trial commissioner, we may reverse such a decision if the trial commissioner did not properly apply the law or reached a decision unsupported by the evidence on the record. Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007). Moreover, when an appellate panel is presented with an inadequate record from a trial court, it cannot conduct a proper appellate review from that record.[4] Springer v. J.B. Hunt Transport, Inc., 145 Conn. App. 805, 818-819, (2013).

In the present matter, the respondent has argued that the Finding & Award is irredeemable because it contains numerous verbatim quotations from the claimant's brief. However, even were we to avert our attention from the verbatim recitation of one party's proposed findings, we would still be unable to perform effective appellate review of the Finding & Award given its vague and uncorroborated conclusions. In particular, we find indecipherable the conclusions relative to the credibility of Rodriguez and Cyr. It is of course black-letter law that the trier of fact is the sole judge of witness credibility. Baron v. Genlyte Thomas Group, LLC, 132 Conn. App. 794, 804 (2012). In addition, a trial commissioner may find a witness credible on one issue but less credible on another issue. Lopez v. Lowe's Home Improvement Center, 4922 CRB-6-05-3 (March 29, 2006). However, in a case such as the one at bar which involves multiple issues, we find that we are unable to ascertain the substantive meaning of "marginally credible" or "partially credible." Our review of the record indicates that the respondent sought, by means of a motion to correct and a motion for articulation, to discover on what issues and to what

[4] In Springer v. J.B. Hunt Transport, Inc., 145 Conn. App. 805 (2013), our Appellate Court pointed out that "[t]he finding in a compensation case should contain all the subordinate facts which are pertinent to the inquiry…. If a finding does not conform to these requirements … neither the Superior Court nor this court is in a position to decide whether the award was correct and just or not…." (Citations omitted; internal quotation marks omitted.) Id., 818-819, *quoting* McQuade v. Ashford, 130 Conn. 478, 482 (1944).

extent the trial commissioner deemed these witnesses credible. In this matter, it was error to have denied those motions.

As discussed previously herein, we note that in some respects, the present appeal is similar to Aylward, supra. In that case, the trial commissioner discounted the role of alleged repetitive trauma in apportioning a permanency award, but we found "[t]he Finding and Award/Dismissal contains no representation as to what probative evidence the trial commissioner relied upon in reaching this determination." Id. The case contained conflicting medical opinions and, on appeal, this board noted that Lopez, supra, enables a trial commissioner to accept some, but not all, of the opinions of physicians who testify in a claim. However, we found the Finding and Award/Dismissal problematic, stating that "we must be able to ascertain from the record what evidence the trial commissioner did rely upon in reaching a conclusion at odds with the balance of this witness's opinion." Aylward, supra. In reaching this decision, we quoted the Appellate Court's admonition that trial commissioners may not rely on expert opinions rooted in "conjecture, speculation or surmise…." DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 99 Conn. App. 336, 338 (2007), *aff'd*, 294 Conn. 132 (2009). As a result, we remanded the matter back to the trial commissioner on the issue of apportionment.

> There may well be probative and reliable expert opinions in the record supportive of the trial commissioner's conclusion herein. It is not our place as an appellate board to reweigh the evidence. ***On the other hand, we are not allowed to speculate on what evidence the trier of fact finds persuasive and reliable in the absence of the commissioner identifying such evidence.*** We find this situation very similar to Bazelais v. Honey Hill Care Center, 5011 CRB-7-05-10 (October 25, 2006), where we found the two physicians relied on by the commissioner were not in agreement and "[w]e also believe the verbiage used that the doctor's opinions 'in effect keep the Claimant temporarily totally disabled' is sufficiently vague as to force us to speculate as to what factors led the trial

> commissioner to reach that conclusion." Id. In Bazelais, we remanded the matter for an articulation as to what evidence the commissioner relied on in reaching her determination, and what theory of disability the commissioner relied upon. (Emphasis added.)

Aylward, supra.

Having reviewed the Finding & Award, we find we are unable to ascertain the basis for the commissioner's credibility findings.[5] In light of the standard promulgated in DiNuzzo, supra, this lack of clarity renders the decision untenable. In addition, we note that the respondent sought an articulation. This board has frequently cited Biehn v. Bridgeport, 5232 CRB-4-07-6 (September 11, 2008), *appeal withdrawn*, A.C. 30336 (March 9, 2011), as authority for denying an articulation when the trial commissioner's rationale can be determined from the record. However, in the present matter, the record is opaque. The trial commissioner should have articulated his rationale for granting the relief ordered in this case and he failed to do so. We will not attempt to assess the merit of a decision which is "ambiguous, unclear or *incomplete*."[6] (Emphasis in the original.) Testone v. C. R. Gibson Co., 114 Conn. App. 210, 223 (2009), *cert. denied*, 292 Conn. 914 (June 25, 2009), *quoting* Manifold v. Ragaglia, 94 Conn. App. 103, 124-125 (2006).

---

[5] In addition, we note that the trial commissioner found all of the medical witnesses in this case "credible" or "credible and persuasive," Conclusion, ¶¶ 4, 5, although the substance of their opinions relative to the claimant's work capacity was not consistent. On remand, the trial commissioner will need to address the extent to which he believes the claimant has a work capacity, the evidence on the record which supports that conclusion, and whether the respondent offered the claimant a position within her capacity.

[6] In Testone v. C. R. Gibson Co., 114 Conn. App. 210 (2009), *cert. denied*, 292 Conn. 914 (June 25, 2009), our Appellate Court stated: "It is well settled that the role of this court 'is not to guess at possibilities, but to review claims based on a complete factual record developed by a [fact finder]…. Without the necessary factual and legal conclusions furnished by the [fact finder] … any decision made by us respecting [an appellant's claim] would be entirely speculative…. It is, therefore, the responsibility of the [appellants] to move for an articulation or clarification of the record when the [fact finder] has failed to state the basis of a decision…. [W]here the trial court's decision is ambiguous, unclear or *incomplete*, an appellant must seek an articulation … or this court will not review the claim.'" (Citation omitted; emphasis in the original; internal quotation marks omitted.) Id., 223, *quoting* Manifold v. Ragaglia, 94 Conn. App. 103, 124-25 (2006).

In addition, we are persuaded that the Finding & Award in the present matter contains infirmities rendering it indistinguishable from the Finding and Award found deficient in Sinclair v. Stop & Shop Companies, Inc., 5036 CRB-3-05-12 (March 6, 2007), *dismissed for lack of final judgment*, A.C. 28651 (September 13, 2007).[7] In Sinclair, the respondents contended that the trial commissioner erred by adopting, virtually wholesale, the claimant's proposed findings; the respondents also argued that certain factual findings were inconsistent or not supported by the evidentiary record. This board held that the decision of the trial commissioner to deny the motion to correct in its entirety was an abuse of discretion and, consequently, we vacated the Finding and Award and remanded the matter for a *trial de novo*.[8]

In light of the deficiencies in the instant Finding & Award, we conclude, consistent with our holding in Sinclair, supra, that due process requires a *de novo* hearing in which another trial commissioner can properly evaluate the facts. We therefore vacate the Finding & Award and remand this matter for a new formal hearing.

---

[7] We would specifically point to Findings, ¶ 31, of the Finding & Award, which includes a reference to "our office" in noting that claimant's counsel had informed the respondent about the claimant's motor vehicle accidents. It appears that the trial commissioner copied this language verbatim from page twenty-one (21) of the December 30, 2016 Claimant's Brief.

[8] In Bernardo v. Capri Bakery, 4570 CRB-3-02-9 (February 10, 2004), this board affirmatively expressed its opposition to the practice of cutting and pasting a litigant's proposed findings into a finding and decision. "We do not encourage the wholesale verbatim adoption of a party's proposed factual findings. Rather, we adopt the reasoning of our Appellate Court which has noted that the practice does not inspire confidence in the judicial system." Id. In Bernardo, we also noted that in Doe v. Bridgeport Hospital, 40 Conn. App. 429 (1996), the Appellate Court referenced a prior holding, stating that "[w]e have in the past emphasized the inadequacy of a trial court's adoption of a party's factual or legal conclusions as the basis for the court's decision. In Grayson v. Grayson, 4 Conn. App. 275 (1985), 494 A.2d 576 (1985), *appeal dismissed*, 202 Conn. 221, 520 A.2d 225 (1987) (certification improvidently granted), the trial court filed a memorandum of decision that adopted, essentially verbatim, the plaintiff's requested findings of fact. Although we affirmed the trial court's decision because those findings were supported by the evidence, we emphasized that 'the practice of adopting parties' proposed findings of fact invites error or sloppy analysis on the judge's part. More importantly, the appearance of justice is just as important as the reality, and a verbatim adoption of the facts proffered by one of the advocates invites a public suspicion of the trial court's decision. The perceptions by the public and by the losing litigant of our system of justice are surely not enhanced by such a practice.'" Doe, supra, 432-433, *quoting* Grayson, supra, 284.

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