CASE NO. 6204 CRB-3-17-6 : COMPENSATION REVIEW BOARD
CLAIM NO. 500151853

MARIA PEREIRA : WORKERS' COMPENSATION
CLAIMANT-APPELLEE COMMISSION

v. : AUGUST 1, 2018

STATE OF CONNECTICUT/
DEPARTMENT OF DEVELOPMENTAL
SERVICES
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLANT

and

GALLAGHER BASSETT SERVICES, INC.
ADMINISTRATOR

APPEARANCES:

The claimant was represented 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 June 8, 2017 Finding and Orders of Scott A. Barton, the Commissioner acting for the Fifth 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 a motion for extension of time was granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondent has appealed from Finding and Orders issued by Commissioner Scott A. Barton which determined that the claimant was entitled to benefits under General Statutes § 31-307 (a) for temporary total disability. [2] The respondent argues that the claimant failed to proffer sufficient evidence to support a claim for total incapacity while it presented evidence in the form of surveillance videos and a vocational report suggesting the claimant could engage in tasks such as babysitting. The claimant argues that this is essentially a "weight of the evidence" case and the trial commissioner resolved the contested issues against the respondent. We find the claimant's position more persuasive as we are required to extend great deference to a trial commissioner's fact-finding authority. We affirm the Finding and Orders.

The trial commissioner issued seventy-four separate findings of fact in this matter which we shall summarize. The claimant was sixty-five years old at the time of the formal hearing and immigrated to America from Portugal in 1971. She had only four years of formal education and cannot read or write in English. She was hired in 1996 to do housekeeping work at Southbury Training School which included cleaning floors, vacuuming and moving furniture. Prior to working there, she had worked at her brother's

[2] General Statutes § 31-307 (a) states in relevant part: "If any injury for which compensation is provided under the provisions of this chapter results in total incapacity to work, the injured employee shall be paid a weekly compensation equal to seventy-five percent of the injured employee's average weekly earnings as of the date of the injury, calculated pursuant to section 31-310, after such earnings have been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act made from such employee's total wages received during the period of calculation of the employee's average weekly wage pursuant to section 31-310; but the compensation shall not be more than the maximum weekly benefit rate set forth in section 31-309 for the year in which the injury occurred. No employee entitled to compensation under this section shall receive less than twenty per cent of the maximum weekly compensation rate, as provided in section 31-309, provided the minimum payment shall not exceed seventy-five per cent of the employee's average weekly wage, as determined under section 31-310, and the compensation shall not continue longer than the period of total incapacity."

grocery store and as a seamstress. On July 29, 2010, the claimant sustained an injury to her cervical spine and right shoulder while at work. The respondent accepted compensability of this injury, and on October 7, 2010, Commissioner Nancy Salerno approved a voluntary agreement memorializing acceptance of the injury.

Since the 2010 injury, the claimant has undergone three shoulder surgeries. Following her second surgery in 2012, Glenn G. Taylor, M.D., opined that the claimant was at maximum medical improvement and had a twenty-five (25) percent permanent partial disability rating for her right upper extremity. Claimant's Exhibit D. The most recent surgery was performed by Frederick J. Watson, M.D., in February 2013 and the claimant testified that it did not go well as she continued to feel pain and had difficulty sleeping. Dr. Watson examined the claimant on November 11, 2014 and opined that the claimant had a permanent impairment of her right upper extremity of eleven (11) percent. Claimant's Exhibit A.

The claimant was examined on April 3, 2014, by the respondent's expert witness, Gordon A. Zimmermann, M.D. Dr. Zimmermann opined that the claimant had reached maximum medical improvement and had a twenty-five (25) percent permanent partial impairment of her right shoulder. Claimant's Exhibit B. He also opined that she was unable to return to her old housekeeping job and was only capable of light sedentary duties with restrictions regarding lifting or repetitive use. On August 12, 2014, the claimant underwent a functional capacity examination at SCORE, L.L.C., in Middlebury at which the examiner, Michael A. Dane, P.T., concluded that although the claimant's efforts were diminished or biased by her pain perception, she had a sedentary work capacity with limitations on lifting or reaching with her left hand.

The claimant testified as to the limitations she faces dealing with activities of daily living. She said she could not cook and had difficulty grocery shopping. She said that driving and cleaning were very difficult. She said she had difficulty caring for her grandchildren and did not babysit for them. She said that she took Tylenol for her pain along with another medication. She also testified that she had not looked for work since her injury in 2010.

The trial commissioner noted both parties presented vocational experts. The claimant's expert, Albert J. Sabella, M.S., Q.R.C., L.R.C., testified that on August 31, 2015, he examined the claimant and, following the examination, deemed the claimant essentially unemployable. He cited the claimant's limited English language skills, including an inability to read English, as a factor. He also noted that the claimant's permanent lifting restrictions impeded her job opportunities. He also cited the claimant's age and prolonged absence from the workforce as factors in deeming her unemployable. He also believed the claimant's pain was a real factor limiting her employment opportunities.

The respondent presented testimony from its expert witness, Renee B. Jubrey, M.S., C.V.E., D/A.B.V.E, who examined the claimant on March 1, 2016.[3] She said she believed that the claimant did understand some English, but also opined that the claimant did not have any marketable transferable skills. Jubrey did identify a number of jobs she believed the claimant could perform, such as jobs in inspection and assembly involving lifting of less than five (5) pounds. She said the claimant could not return to work at Southbury Training School. On cross-examination, the witness noted that jobs such as an

[3] The Finding and Orders named this witness as "Rene Jubrey." We deem this harmless scrivener's error. See Hernandez v. American Truck Rental, 5083 CRB-7-06-4 (April 19, 2007).

inspector or small product assembler required repetitive activities. She also noted on cross-examination that a number of the firms at which she had identified job opportunities for the claimant were not currently hiring or required their employees to have some English proficiency.

The respondent also presented evidence from surveillance investigators whom it had retained: Steven Grande, Kenneth Wilson and Daniel Ortiz. These witnesses testified at the October 13, 2016 formal hearing as to video surveillance performed on the claimant on various dates in November 2015 when she was observed travelling in a sport utility vehicle to various addresses in Waterbury and Naugatuck including an elementary school, a bank, a pharmacy, and a Target store. She was observed carrying a purse, a backpack, and shopping bags as well as lifting a young child.[4] The trial commissioner noted that the claimant was not exhibiting signs of discomfort during these activities.

The trial commissioner recounted the procedural history of this claim. The first Form 36 the trial commissioner considered was filed on February 20, 2014, alleging that the claimant was not compliant for physical therapy and had taken a retirement from work. The trial commissioner denied that request after a hearing on April 29, 2014, finding that the failure of the claimant to undergo physical therapy was because she had been denied authorization for medical treatment due to utilization review. Another Form 36 was filed on May 2, 2014, seeking to convert the claimant's benefits to permanent partial disability as she had reached maximum medical improvement with a light-duty work capacity. The April 3, 2014 report of Dr. Zimmermann was attached to this form. This Form 36 was approved at a hearing on September 30, 2014, with an effective date of

[4] The trial commissioner noted in Findings, ¶ 69, that the respondent also attempted to document the claimant's activities on October 30, 2015, November 13, 2015 and January 19, 2016, but the claimant was not observed at her residence on those days.

July 8, 2014. On September 16, 2014, following the functional capacity examination, the respondent filed another Form 36 seeking to convert the claimant's benefits to permanent partial disability. This Form 36 was also approved at the September 30, 2014 hearing with an effective date of July 8, 2014.

Based on this factual foundation, the trial commissioner concluded that the claimant had sustained compensable injuries to her cervical spine and right shoulder and acceptance of these claims had been documented by a voluntary agreement. He discussed the procedural history of the claim in his conclusions as well as the claimant's medical history and noted that both parties presented vocational experts for consideration. He found Sabella, the claimant's expert, fully credible and persuasive and did not find Jubrey, the respondent's expert, credible. He offered a detailed rationale as to his reasons for reaching this conclusion. He found the claimant's testimony "mostly credible and persuasive" and elaborated upon which elements of her testimony he found of weight.

> Although the video surveillance does raise concerns regarding her claimed pain symptoms and physical abilities with her right arm, I find her testimony and presentation sufficiently credible to support her claim that she is currently unemployable for any practical vocational purpose.

Conclusion, ¶ U.

As for the respondent's video evidence, the trial commissioner noted in Conclusion, ¶ BB, that the respondent had not elicited the opinion of a medical doctor indicating that the videos documented the claimant as having more onerous work restrictions than the respondent had opined she had. He noted that most of the activities displayed in the videos were the claimant running errands and carrying small items. Therefore, the trial commissioner determined that the claimant was totally disabled from

all gainful employment and explained in Conclusion, ¶ V, his rationale for reaching this conclusion. He determined that the claimant was totally disabled as of July 8, 2014, and all dates since and denied the Forms 36 which had previously been approved, determining that benefits paid since that date were now deemed temporary total disability benefits pursuant to General Statutes § 31-307. The trial commissioner noted that while permanent disability had been an issue in this case, the order of temporary total disability benefits at that time meant that a ruling on the issue of permanent partial disability was not necessary and could be the subject of further hearings.

The respondent filed a motion to correct which sought a wholesale alteration of the Finding and Orders, seeking sixty-one separate corrections and interposing a conclusion that the claimant failed to prove her claim for total disability and should only be awarded permanent partial disability benefits. The trial commissioner denied this motion in its entirety. The respondent has pursued this appeal. The arguments are that the claimant did not present sufficient evidence to justify a temporary total disability claim under the disability standard as set forth in Osterlund v. State, 135 Conn. 498 (1949); the trial commissioner erred in awarding the claimant temporary total disability benefits as of July 8, 2014; the trial commissioner should have granted the motion to correct; and the trial commissioner erred in not ruling on the issue of permanent partial disability. [5] After review, we are not persuaded by the respondent's arguments.

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

[5] The Osterlund doctrine holds that even if a claimant is found to have an earning capacity, the claimant may be entitled to temporary total disability benefits if the claimant's physical condition is such that he or she cannot, with "the exercise of reasonable diligence," find employment. Osterlund v. State, 135 Conn. 498, 506 (1949).

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 legal standard for awarding temporary total disability benefits was restated most recently by our Appellate Court in O'Connor v. Med-Center Home Health Care, Inc., 140 Conn. App. 542 (2013), *cert. denied*, 308 Conn. 942 (2013). In O'Connor, the respondents argued that the medical evidence presented by the claimant did not sufficiently support her bid for temporary total disability benefits. Nonetheless, the Appellate Court held that a trial commissioner must engage in "a holistic determination of work capacity," id., 554, when ascertaining if a claimant is entitled to temporary total disability benefits. While a claimant must present "sufficient evidence before the commissioner that the plaintiff is unemployable," id., *quoting* Bode v. Connecticut Mason Contractors, The Learning Corridor, 130 Conn. App. 672, 680 (2011), *cert. denied*, 302 Conn. 942 (2011), we have generally deferred to the trier of fact as to the sufficiency of this evidence.

In the present case, the trial commissioner relied on the opinion of Sabella, a vocational expert, who opined that the totality of the evidence was such that the claimant did not have a realistic work capacity. We note that we have affirmed decisions of trial commissioners in similar cases when a vocational expert relied on similar factors to deem an injured claimant totally disabled based on the Osterlund doctrine. Sabella noted the claimant's limited English language skills as impeding her employability. We held in Ciaglia v. ITW Anchor Stampings, 5440 CRB-5-09-3 (March 2, 2010), that an injured claimant's limited English language skills were a relevant factor as to whether the claimant had a realistic work capacity.

The claimant's age was also a relevant factor in Ciaglia, supra, as well as in Romanchuk v. Griffin Health Services, 5515 CRB-4-09-12 (October 20, 2010), wherein this tribunal affirmed an award of General Statutes § 31-307 benefits. Sabella cited the claimant's age as a critical factor as to her lack of employability. We also note that Sabella indicated that the claimant could not return to a physically demanding job such as the one she had at Southbury Training School. While the respondent argued that the claimant had the potential to work in a remunerative capacity as a babysitter, and indeed focused on this point at oral argument before this tribunal, Sabella specifically ruled out this option as a viable occupation for the claimant.

The trial commissioner specifically found Sabella to be a credible and persuasive witness, Conclusion, ¶ T, and did not find the respondent's expert vocational witness credible. Conclusion, ¶ Q. In any "dueling expert" case, it is the trial commissioner's prerogative to determine which expert he or she finds more reliable. Dellacamera v. Waterbury, 4966 CRB-5-05-6 (June 29, 2006), n.1, *appeal withdrawn*, A.C. 27853

(September 12, 2006). In this matter, the trial commissioner chose to rely on the claimant's expert. As a result, the claimant did present probative evidence from which the trial commissioner could reasonably conclude that she had met her burden of proving she was totally disabled.[6]

Had the claimant not been found credible by the trial commissioner, her vocational evidence would not have carried any weight. See Toroveci v. Globe Tool & Metal Stamping Co., Inc., 5253 CRB-6-07-7 (July 22, 2008). The trial commissioner had the opportunity to hear the claimant's testimony and reach a determination as to her credibility which we believe was well-reasoned and sufficient to sustain an award of benefits.[7]

> I find the testimony of the claimant as mostly credible and persuasive. Although the video surveillance does raise concerns regarding her claimed pain symptoms and physical abilities with her right arm, I find her testimony and presentation sufficiently credible to support her claim that she is currently unemployable for any practical vocational purpose.

Conclusion, ¶ U; see also Burton, supra.

The trial commissioner thus considered the respondent's video evidence and offered good reasons for not relying upon it to dismiss the claim for temporary total disability benefits. In particular, we note his reasoning in Conclusion, ¶¶ BB-CC, wherein the respondent failed to have a medical doctor examine the video evidence and offer an opinion as to its impact on the claimant's work capacity. As we noted in Berube v. Tim's Painting, 5068 CRB-3-06-3 (March 13, 2007), when evidence is presented "as

[6] At oral argument before this tribunal, counsel for the respondent argued that it was impermissible to award temporary total disability benefits in the absence of a medical opinion of total disability. This position would require us to act in derogation of the precedent in O'Connor v. Med-Center Home Health Care, Inc., 140 Conn. App. 542 (2013), *cert. denied*, 308 Conn. 942 (2013), and we decline this entreaty.

[7] We note that the trial commissioner was also permitted to consider the claimant's demeanor in determining whether she had established her claim for temporary total disability benefits. See Leandres v. Mark IV Construction, Inc., 5159 CRB-4-06-11 (October 22, 2007).

is," a trial commissioner may draw whatever reasonable inferences he or she chooses from the evidence. The trial commissioner found that without additional expert opinion, this evidence was not weighty enough to overcome the claimant's evidence and it is the trier's prerogative to weigh contested evidence. Arnott v. Taft Restaurant Ventures, L.L.C., 4932 CRB-7-05-3 (March 1, 2006).

The respondent cites a number of cases in which the claimant's evidence as to total disability did not persuade the trial commissioner and this board affirmed the dismissal of the claim. See Brey v. State/Dept. of Correction, 5833 CRB-2-13-4 (April 2, 2014); Vallier v. Cushman & Wakefield, 5822 CRB-1-13-2 (February 21, 2014); Bidoae v. Hartford Golf Club, 4693 CRB-6-03-7 (June 23, 2004), *aff'd*, 91 Conn. App. 470 (2005), *cert. denied*, 276 Conn. 921 (2005). The respondent now argues that we should overturn the trial commissioner's decision in this case. In all of the cases mentioned above, we affirmed the factual findings of the trial commissioner and we see no reason why those cases do not compel us to affirm the trial commissioner in this matter.

We turn to the other claims of error advanced in this case. The respondent argues that it was error for the trial commissioner to have allowed arguments as to an Osterlund theory of disability. We note that a trial commissioner in the course of a hearing may follow the evidence where it may lead. DiDonato v. Greenwich, 5431 CRB-7-09-2 (May 18, 2010). Given that the respondent introduced its own vocational expert, it was fully able to litigate the claim, unlike the untenable circumstances in Ghazal v. Cumberland Farms, 5397 CRB-8-08-11 (November 17, 2009). We are therefore not persuaded by this claim of error.

The respondent argues that it was error for the trial commissioner not to rule on the issue of the extent of the claimant's permanent partial disability at this time. We note that pursuant to Churchville v. Bruce R. Daly Mechanical Contractor, 299 Conn. 185, (2010), this determination will eventually have to be made, even if the claimant never regains a work capacity during her lifetime. Nonetheless, we believe that because trial commissioners have broad powers to bifurcate proceedings and issues when conducting formal hearings, this decision could be deferred. See Magistri v. New England Fitness Distributors, Inc., 6169 CRB-2-17-1 (January 9, 2018); Martinez-McCord v. Judicial Branch, 5055 CRB-7-06-2 (February 1, 2007). We therefore find no error.

Finally, the respondent argues that it was error for the trial commissioner to rule that the claimant was totally disabled as of July 8, 2014. The respondent argues that there was no "competent evidence" supporting that date of disability. However, we note that July 8, 2014 was the effective date after a prior hearing at which the respondent's Forms 36 had been approved and the claimant's benefits were converted from temporary total disability benefits to permanent partial disability benefits. See Findings, ¶ 74; Conclusion, ¶ J. The vocational evidence from Sabella that the trial commissioner found credible and persuasive indicated that at all times subsequent to the claimant's injury, she remained totally disabled, and there is no evidence cited by the trial commissioner in the Finding and Orders suggesting that her condition materially changed in 2014. Having concluded that the Forms 36 to convert benefits which had been granted in 2014 were granted improvidently, the trial commissioner could reasonably determine that all benefits since that date should be deemed temporary total disability benefits. We have

reviewed our analysis in Papa v. Jeffrey Norton Publishers, Inc., 4486 CRB-3-02-1 (February 25, 2003), and note that we held as follows:

> Though § 31-296 contemplates that a claimant may request a hearing on a Form 36 within ten days of its issuance, a trial commissioner may also allow a claimant to later challenge an approved Form 36 at a *de novo* formal hearing, depending on the circumstances of the case. Santiago v. Metropolitan Insurance Co., 12 Conn. Workers' Comp. Rev. Op. 388, 1631 CRB-6-93-1 (September 1, 1994); see also, Covaleski v. Casual Corner, 4419 CRB-1-01-7 (June 27, 2002). Moreover, a trial commissioner is entitled to consider a broad range of issues at a subsequent formal hearing on a Form 36, including whether a claimant continues to be totally disabled. Ryba v. West-Con, 3196 CRB-2-95-10 (February 27, 1997).

Papa, supra.

As a result, we do not believe that the trial commissioner's decision to reinstate temporary total disability benefits as of the effective date of the prior approved Forms 36 was improper. This decision was consistent with the evidence he deemed credible and persuasive.[8]

As we find this decision comports with the "holistic" standard applied in O'Connor, supra, we affirm the Finding and Orders.

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

[8] The respondent argues that the trial commissioner erred in denying its motion to correct. The determination on appeal is whether the denial of this motion was arbitrary or capricious. Vitti v. Richards Conditioning Corp., 5247 CRB-7-07-7 (August 21, 2008), *appeal withdrawn*, A.C. 30306 (September 29, 2009). We conclude that the trial commissioner did not find the corrections involved probative or credible evidence. Beedle v. Don Oliver Home Improvement, 4491 CRB-3-02-2 (February 28, 2003). A trial commissioner is not obligated to adopt a litigant's view of the evidence presented on the record. See D'Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003); 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); Liano v. Bridgeport, 4934 CRB-4-05-4 (April 13, 2006).