CASE NO. 6211 CRB-3-17-8 CLAIM NOS. 700170618, 700170923 & 700170924	: COMPENSATION REVIEW BOARD
STACIE FERNANDES CLAIMANT-APPELLEE	: WORKERS' COMPENSATION COMMISSION
v.	: NOVEMBER 2, 2018
TOWN OF DARIEN/ BOARD OF EDUCATION EMPLOYER	
and	
CIRMA INSURER RESPONDENTS-APPELLANTS	

APPEARANCES:

The claimant was represented by Francis P. Cipriano, Esq., Law Offices of Francis P. Cipriano, L.L.C., 1220 Whitney Avenue, P.O. Box 6503, Hamden, CT 06517.

The respondents were represented by Maureen E. Driscoll, Esq., Driscoll Law Offices, L.L.C., 1077 Bridgeport Avenue, Suite 100, Shelton, CT 06484.[1]

This Petition for Review from the July 25, 2017 Finding and Decision of Charles F. Senich, the Commissioner acting for the Third District, was heard March 23, 2018 before a Compensation Review Board panel consisting of Commissioners Scott A. Barton, Jodi Murray Gregg and Stephen M. Morelli.[2] [3]

[1] On April 13, 2018, Governor Dannel P. Malloy appointed Maureen G. Driscoll, the principal of Driscoll Law Offices, L.L.C., to be a workers' compensation commissioner.

[2] As of the date this matter was heard by the Compensation Review Board, Commission Chairman Morelli had not yet been appointed to that position.

[3] We note that three motions for extension of time and a motion for a continuance were granted during the pendency of this appeal.

OPINION

SCOTT A. BARTON, COMMISSIONER: The respondents have appealed from a Finding and Decision reached by Commissioner Charles F. Senich concluding that the claimant, who sustained a left-knee injury in the course of her employment as a special education paraprofessional, also sustained a compensable injury to her right knee. The respondents argue that the evidentiary record does not support this conclusion, and the trial commissioner should have relied upon the opinions of their expert witness and a treating physician which, they claim, provide a basis for their position. The claimant argues that sufficient medical evidence from the treating physician was presented at the hearing to support the trial commissioner's conclusion and the respondents are merely seeking to have this tribunal re-weigh the evidence. We note that with regard to the facts and the law, this matter is congruent with Rosa v. State/DCF, 5475 CRB-8-09-7 (June 22, 2010), in which we determined that the evidence submitted into the record was sufficient to find the claimant's injuries compensable. We reach a similar determination in this case and affirm the Finding and Decision.

The trial commissioner reached the following findings of fact at the conclusion of the formal hearing. He found that the claimant had been employed by the respondent as a paraprofessional who had worked with students for approximately nineteen years. One of the claimant's responsibilities was to conduct "take downs" on students in order to prevent them from injuring themselves. The claimant claims she sustained injuries while in the course of her employment on September 6, 2013, September 13, 2013, and April 28, 2014. All three of these incidents involved "take down" situations in which the claimant had to restrain an agitated student.

On September 6, 2013, a special education student began yelling, threatening to leave the room, hitting his head on the wall, hitting his head with his fists, and spitting. The claimant was assisted by four co-workers who performed a protective hold to bring the student down to the floor. As a result of this incident, the claimant began experiencing pain in her knees. She returned to work on September 9, 2013, and showed her coworkers the bruises on her knees. One of these coworkers, Noel Senna, corroborated that the claimant had been involved in the September 6, 2013 incident and returned to work with bruised knees.

On September 13, 2013, the clamant said she was involved in two separate incidents in which she had to restrain students. The claimant indicated that she sustained bruising and pain in her knees in both of these incidents. On September 16, 2013, she reported a left-knee injury to her employer and commenced treating with Norman R. Kaplan, M.D. Dr. Kaplan's report of September 16, 2013, states:

> On Friday, September 6, 2013, she was on her knees trying to restrain a child and felt pain in her patellofemoral joint at the left knee…. She was sore but the next week, on September 13, 2013, the following Friday, she hurt it again twice, once when kneeling on the tile floor restraining a child, and another time restraining a child when she twisted the knee when a girl dropped down.

Claimant's Exhibit A.

At trial, the claimant testified that she injured both of her knees in the September 2013 incidents. She underwent physical therapy for her left knee after the incidents but her right knee got worse over time. The claimant said she was involved in another restraint incident on April 28, 2014, when she landed on her knees while attempting to get a helmet onto a student's head. She said her left knee cracked afterward and she sought treatment from Dr. Kaplan on April 29, 2014. The trial commissioner

noted that the claimant filed a hearing request on August 8, 2014, for her September 13, 2013 claimed injury. A hearing request was also filed on July 8, 2014, for the claimed dates of injury of September 6, 2013, and April 28, 2014.

The trial commissioner reviewed the deposition testimony and medical reports of Dr. Kaplan. The doctor noted that his June 10, 2014 report contains the first reference to the claimant's right-knee pain. He indicated that because it was not feasible to seek an operation on two knees at the same time, he had originally ordered an MRI for the claimant's left knee, although the claimant had wanted both knees examined. Following the claimant's left-knee surgery on June 4, 2014, the claimant presented with medial pain in the right knee on June 10, 2014. The report of that date indicated that "she hurt [the right knee] at the same time she hurt the left." Claimant's Exhibit A. Dr. Kaplan continued to recommend a right-knee MRI, and on September 29, 2014, he opined that, "I think it should be part of the compensation of the original injury." Id. On October 15, 2014, after describing the claimant's narrative regarding her injuries, Dr. Kaplan said of the claimant's knee injuries, "[b]oth are Workers' Compensation injuries. The left knee was more severe than the right but the right knee now hurts because it has not been taken care of and because she overused the right knee because the left knee was so much worse." Id.

The trial commissioner found that the claimant eventually underwent an MRI on her right knee which was paid for by her group health insurance. The MRI demonstrated that the claimant had sustained a medial meniscus tear. In a June 12, 2015 letter to claimant's counsel, Dr. Kaplan summed up his medical opinion as follows:

> I have reviewed all of my office notes from the injuries the patient has had, which were on September 6, 2013, September 13, 2013,

> and April 28, 2014, along with the deposition of October 20, 2014. … The factors that have caused the right knee problem are three injuries from 2013 along with overuse and favoring the left side and dominating to the right after the left knee surgery. At this point, I think, with reasonable medical probability, that the right knee condition is a direct result of the injuries and then the overuse because of the injuries to the contralateral side. At this point, she needs an arthroscopic partial medial meniscectomy and debridement of the right knee.

Claimant's Exhibit B, p. 2.

The trial commissioner also reviewed the opinions of Peter Jokl, M.D., who performed a Respondents' Medical Examination [hereinafter "RME"] on the claimant on October 29, 2014. Dr. Jokl issued his report without the benefit of imaging studies, but opined that "Ms. Fernandes had a preexisting condition of degenerative changes in her right knee." Respondents' Exhibit 5 [Respondents' Exhibit 1, p. 4]. The RME report also stated that "[t]he mechanism of injury is not compatible with a severe injury to her right knee." Id.

Dr. Jokl was deposed on March 8, 2016, and testified that he had received and personally reviewed the right-knee MRI scan from 2015 prior to appearing at the deposition. He reiterated his prior opinion that, within a reasonable degree of medical probability, the claimant's injuries were the result of degenerative changes to her right knee which pre-existed the workplace incidents, and the workplace incidents were not a major contributing factor to these degenerative changes.

Based on this factual record, the trial commissioner concluded the claimant was a credible witness and had injured her right knee during the course of her employment on September 6, 2013, September 13, 2013, and April 28, 2014. He found Dr. Kaplan's reports and opinions fully credible and persuasive and determined that Dr. Jokl's

opinions and reports were neither fully credible nor persuasive. He also concluded that the claimant had filed timely hearing requests for her injuries. As a result, he ordered the respondents to accept the compensability of the claimant's right-knee injury and "to pay all reasonable and necessary medical, diagnostic, hospital, surgical, physical therapy and pharmaceutical bills incurred as a result of the injuries sustained on September 6, 2013; September 13, 2013; and April 28, 2014." Orders, ¶ 3.

The respondents filed a motion to correct the Finding and Decision. The proposed corrections sought to substitute revised findings relative to the nature of the claimant's injuries, the medical opinions and reports offered by Dr. Kaplan, and the RME report and opinions of Dr. Jokl. The respondents also proposed conclusions indicating that Dr. Kaplan was not credible, Dr. Jokl was credible, and the claimant's right-knee injury was not compensable. The trial commissioner denied this motion in its entirety and the respondents have pursued this appeal. The gravamen of the appeal is that Dr. Kaplan failed to offer definitive expert testimony relative to the etiology of the claimant's right-knee condition which was sufficient to sustain the finding of compensability. The respondents also object to the award of medical treatment for the claimant's right knee.

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). In cases in which the causation of an injury is contested, "the commissioner's findings of basic facts *and* his finding as to whether those facts support an inference that the plaintiff's injury arose from his employment are subject to a highly deferential standard of review." (Emphasis in the original.) Blakeslee v. Platt Bros. & Co., 279 Conn. 239, 253-254 (2006) (Sullivan, C.J., joined by Zarella, J., dissenting.)

As noted previously herein, the present matter bears a number of factual and legal parallels with our decision in Rosa, supra. In Rosa, the claimant's employment duties required him to restrain agitated children. The claimant testified that following a shift during which it had been necessary to restrain a boy who had become highly agitated, he developed pain in his foot, which had bounced against a wall. The claimant was ultimately diagnosed with a positive right foot fracture, and the respondent argued that this condition was not compensable because "there [was] no medical evidence establishing causation." Rosa, supra, *quoting* Appellant's Brief, p. 6. We rejected that argument, remarking that the trial commissioner retained the discretion to rely on the medical reports of the claimant's treating physician. Although the respondent contended that elements of the treating physician's reports were inconsistent with a finding of

workplace causation, we stated, "it is the trial commissioner's responsibility to resolve discrepancies in medical testimony." Id. See also Williams v. Bantam Supply Co., Inc., 5132 CRB-5-06-9 (August 30, 2007). Given that the trial commissioner was obligated to consider "the entire substance of testimony," we affirmed the award of benefits to the claimant in Rosa. Id., *quoting* O'Reilly v. General Dynamics Corp., 52 Conn. App. 813, 818 (1999).

Since issuing Rosa, we have had other opportunities to articulate the standard of probative medical evidence required to establish causation between employment and an injury. One example is Nelson v. Revera, Inc., 5977 CRB-5-15-1 (September 21, 2015). In Nelson, the claimant suffered from a pre-existing compensable lumbar spine injury, which radiated into her left lower extremity. She testified that she later sustained a second injury at home after her leg gave out and she fell down the stairs. She contended that the second injury was the compensable sequelae of the original injury, and the respondents challenged the adequacy of her supportive medical evidence. We affirmed the award, holding that the trial commissioner could "rely both on the expert testimony presented, as well as the claimant's own testimony, to determine causation." Id.

We also examined our Supreme Court's analysis in Marandino v. Prometheus Pharmacy, 294 Conn. 564 (2010), and concluded that Marandino compelled us to affirm the Finding and Award. In Marandino, the court held that the trial commissioner had the prerogative to "consider medical evidence *along with all other evidence* to determine whether an injury is related to the employment." (Emphasis in the original.) Id., 595, *citing* Murchison v. Skinner Precision Industries, Inc., 162 Conn. 142, 151 (1972). We examined the medical evidence presented by the claimant and concluded that a clear

nexus could be drawn between her lumbar spine injury, the radicular pain and weakness in her foot caused by the initial injury, and her subsequent fall down the stairs. As such, we concluded that the claimant had satisfied the legal standard for establishing causation as enunciated in Sapko v. State, 305 Conn. 360 (2012), and affirmed the award.[4]

Our review of the evidentiary record in the present matter indicates that Dr. Kaplan first noted the claimant's right-knee pain on June 10, 2014, and stated in his report of that date that she had hurt the right knee at the same time she injured the left knee, for which she had already undergone surgery. His October 15, 2014 report described both knee injuries as "Workers' Compensation injuries." Claimant's Exhibit A. The October 15, 2014 report also specifically attributes the claimant's right-knee issues to overuse as a result of the left-knee injury sustained at work. Id.

The respondents' challenge to the commissioner's findings is primarily based upon Dr. Kaplan's allegedly equivocal responses at his deposition. It is the respondents' contention that Dr. Kaplan failed to attribute the claimant's right-knee condition to her employment with the requisite standard of reasonable medical probability required under Struckman v. Burns, 205 Conn. 542 (1987). At his deposition, Dr. Kaplan testified that the claimant had complained of pain in both knees but he initially focused on the left knee due to insurance limitations. See Respondents' Exhibit 2, p. 25. Counsel for the respondents specifically focused on an exchange in which the doctor discussed the mechanism of the claimant's right knee injury:

[4] We had an opportunity to restate this standard in Larocque v. Electric Boat Corporation, 5942 CRB-2-14-6 (July 2, 2015), in which we remarked: "Viewing …Voronuk [v. Electric Boat Corp., 118 Conn. App. 248 (2009)], DiNuzzo [v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132 (2009)], and Sapko [v. State, 305 Conn. 360 (2012)], together as a whole, it is clear that since Birnie [v. Electric Boat Corp., 288 Conn. 392 (2008)], our appellate courts have restated the need for claimants seeking an award under Chapter 568 to present reliable, nonspeculative evidence and to carry their burden of proof that there is a clear nexus of proximate cause between employment and injury."

> It's plausible that it was injured at the same time, but it was much less symptomatic.
>
> Can I say that with probability and definitiveness? No.
>
> Could it be overuse? Yes.
>
> Could it be an old injury that then became overused? I mean she does not mention the right knee at all from September 6th to September 13th.

Id., 36.

Dr. Kaplan then agreed that it was "possible but it's not necessarily probable within a reasonable degree of medical probability that the [claimant's] right knee was injured" on any of the claimed dates of injury. Id., 37. Dr. Kaplan opined that "she has a meniscal tear on the right," id., 38, and elaborated that although overuse would not cause such a tear, it "can take a tear that's asymptomatic and make it symptomatic." Id. The respondents argue that this testimony renders Dr. Kaplan's opinions too equivocal to merit reliance. Dr. Kaplan, however, revised his opinion in a June 12, 2015 letter to claimant's counsel, in which he stated with reasonable medical probability that the claimant's right-knee condition is a direct result of the injuries sustained while at work. See Claimant's Exhibit B, p. 2.

The commissioner therefore chose to rely on the causation opinion expressed by the treating physician in correspondence following a deposition, and it was well within his discretion to do so. This issue was previously discussed by this board in Williams, supra, in which we stated that "[t]he respondents evidently believe that the trial commissioner should have credited those statements of Dr. Spero supportive of their position and disregarded that testimony supportive of the claimant." Id. We rejected that argument, pointing out that "[w]e have held that it is within the discretion of the trial commissioner to accept some, but not all, of a physician's opinion." Id., *quoting* Lopez

v. Lowe's Home Improvement Center, 4922 CRB-6-05-3 (March 29, 2006). As is the case in the present matter, the record in Williams contained probative evidence from a medical expert supporting causation between the claimant's employment and the injury, and we affirmed the award to the claimant.[5]

The respondents contend that the evidence in this claim renders it akin to Kielbowicz v. Tilcon Connecticut, Inc., 5855 CRB-6-13-6 (June 12, 2014), in which a claimant failed to establish workplace causation for his injuries. See Respondents' Brief, p. 12. However, we find enormous factual differences between the two cases.[6] In Kielbowicz, the injuries sustained by the claimant were merely contemporaneous with his period of employment and, moreover, were deemed the result of personal behavior totally unrelated to his employment, i.e., an alcohol withdrawal seizure. As a result, we concluded, "[t]he record is bereft of any finding that the claimant's employment contributed in any fashion to his injury." Id. In the matter at bar, the respondents concede that the claimant sustained an injury to at least one of her knees as the result of an activity which was specifically within her job duties as a paraprofessional. We find that the circumstances of the claimant's injury in this matter more closely resemble those which led to the compensable injury in Blakeslee, supra, which decision we reviewed at great length in Kielbowicz, supra. We therefore reject the respondents' reliance on Kielbowicz.

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[5] The respondents also argue that the trial commissioner should have granted their proposed corrections seeking to find Dr. Jokl the more reliable medical witness. In a "dueling expert" case, we generally defer to the trial commissioner's discretion in determining which medical witness is more persuasive and credible. See Dellacamera v. Waterbury, 4966 CRB-5-05-6 (June 29, 2006), *appeal withdrawn,* A.C. 27853 (September 12, 2006).

[6] On a factual basis, this case also closely resembles Tyskiewicz v. Danbury, 5839 CRB-7-13-5 (April 4, 2014), *appeal withdrawn*, A.C. 36732 (October 23, 2014), in which the claimant sustained traumatic injuries at a fire scene and the respondents contended that the evidence relative to the precise mechanism of the injuries was equivocal. We affirmed the award of benefits to the claimant in that case.

Finally, we address the respondents' argument that Order, ¶ 3, in the Finding and Decision is improper. They contend that because the record contained no disputed medical bills or disputed medical treatment at the time of the hearing, the trial commissioner should not have issued this order. We disagree, and find Hodio v. Staples, Inc., 5152 CRB-3-06-10 (October 3, 2007), on point. In Hodio, the respondents raised a similar argument, and we remarked that "[t]o the extent the claimant and the respondent dispute whether a specific treatment or bill is due to the compensable injury they may hold further proceedings before the trial commissioner." Id. We therefore find no merit in the respondents' claim of error relative to Order, ¶ 3.

We believe the expert testimony found credible by the trial commissioner provided a reasonable basis for his conclusion that the claimant's workplace injuries caused her current right-knee condition.[7] As an appellate panel, we are not empowered to re-weigh such evidence. Given that the decision is consistent with precedent, the Finding and Decision is accordingly affirmed.

Chairman Stephen M. Morelli and Commissioner Jodi Murray Gregg concur in this opinion.

[7] We uphold the trial commissioner's denial of the respondents' motion to correct. This motion sought to interpose the respondents' conclusions relative to the law and the facts presented and, as such, the trial commissioner retained the discretion to deny these corrections. 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).