CASE NO. 6239 CRB-1-18-1 : COMPENSATION REVIEW BOARD
CLAIM NO. 100195295

SHARON FRANCIS : WORKERS' COMPENSATION
CLAIMANT-APPELLANT COMMISSION

v. : DECEMBER 11, 2018

BAYMONT INN & SUITES
EMPLOYER

and

UTICA NATIONAL INSURANCE GROUP
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant appeared as a self-represented party.

The respondents were represented by Kristen L. Stumpo, Esq., Solimene & Secondo, L.L.P., 1501 East Main Street, Suite 204, Meriden, CT 06450.

This Petition for Review from the December 29, 2017 Finding and Dismissal of Daniel E. Dilzer, the Commissioner acting for the First District, was heard June 29, 2018 before a Compensation Review Board panel consisting of Commission Chairman Stephen M. Morelli, and Commissioners Scott A. Barton and Brenda D. Jannotta.

# OPINION

STEPHEN M. MORELLI, CHAIRMAN. The claimant has appealed from a December 29, 2017 Finding and Dismissal concluding that she did not sustain a compensable injury while in the employ of the respondent-employer Baymont Inn & Suites [hereinafter "Baymont"]. The claimant argues that the trial commissioner erred in not crediting the medical evidence which she submitted in support of her claim. The respondents contend that this matter is essentially an effort to retry the facts of the case on appeal. We note that the trial commissioner did not find the claimant a credible historian and was not persuaded by her evidence. Given that determinations relative to the credibility of witnesses and the persuasive value of evidence are within the province of the trier of fact, we affirm the Finding and Dismissal.

The trial commissioner reached the following factual findings at the conclusion of the formal hearing. The issue in dispute was whether the claimant, on or about March 28, 2014, sustained a compensable work-related injury to her bilateral hands and lumbar spine which necessitated medical treatment and caused her to lose time from work. The trial commissioner found that Baymont had initially hired the claimant for the position of auditor in March 2014 but she was working in the capacity of a van driver at the time of the alleged injury.

On March 28, 2014, the claimant's supervisor assigned the claimant the task of setting up chairs and round tables for a banquet. After setting up approximately twenty-five (25) tables, the claimant began to experience back pain. The following day, she contacted her manager and explained that she was in pain from the work she had performed the day before. The manager referred the claimant to Concentra Medical

Centers (CT) [hereinafter "Concentra"]; however, the claimant did not present herself to Concentra until April 7, 2014. The Concentra records from that date indicate that the claimant reported that she had experienced a gradual onset of pain over the prior ten days and had been in a motor vehicle accident three days prior to the April 7, 2014 office visit. The claimant also reported to the Concentra provider that she had sustained a significant lumbar injury in the 1980s.

The trial commissioner noted that the claimant had filed a notice of claim ("form 30C") for the alleged injury of March 28, 2014, which was received by the Workers' Compensation Commission [hereinafter "Commission"] on April 16, 2014. The respondent-employer filed a "form 43" denying compensability which was received by the Commission on April 15, 2014.[1] The trial commissioner found that the claimant had filed a number of prior workers' compensation claims for injuries to her back, hands, and wrists, all of which predated the alleged March 28, 2014 injury. The commissioner described these claims as follows:

> a. The Claimant filed a Notice of Claim (Form 30C) received by the Workers' Compensation Commission on March 11, 2012 against her employer, Basics Hair Salon, for an injury to her back sustained on February 12, 2012. (Exhibit 3)
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> b. The Claimant filed a Notice of Claim (Form 30C) received by the Workers' Compensation Commission on November 4, 2009 against her employer Holiday Inn Express for an injury to her back sustained on June 26, 2009. (Exhibit 4)

[1] We note that the form 43 filed by the respondents on April 15, 2014, referenced "Prism Hospitality" as the claimant's employer for the March 28, 2014 date of injury; this document stated that the claim was denied on the basis that no injury had occurred in the course or scope of the claimant's employment and the claimant was not an employee of Prism Hospitality. See Commission Exhibit 3. A subsequent form 43 filed by the respondents on May 2, 2014 indicated that the employer for the March 28, 2014 date of injury was "Baymont Inn & Suites East." This form 43 denied the claim on the basis that the claimant had provided no documentation in support of her claim that she had sustained an injury or disability while in the course or scope of her employment. See Commission Exhibit 4.

c. The Claimant filed a Notice of Claim (Form 30C) received by the Workers' Compensation Commission on November 4, 2009 against her employer Holiday Inn Express for an injury to her right arm, wrist and hand sustained on September 18, 2009. (Exhibit 5)

d. The Claimant filed a Notice of Claim (Form 30C) received by the Workers' Compensation Commission on November 4, 2009 against her employer Holiday Inn Express for an injury to her back sustained on September 18, 2009. (Exhibit 6)

Findings, ¶¶ 7.a.-7.d.

The trial commissioner also found that the claimant alleged she had sustained an injury to her upper and lower back on April 4, 2014, just six days after the claimed March 28, 2014 injury. However, the claimant withdrew this claim at the August 24, 2017 formal hearing. See Transcript, p. 25. In reviewing the claimant's April 7, 2014 treatment notes from Concentra, the commissioner noted that the claimant had reported that three days prior to that office visit, and subsequent to the alleged injury of March 28, 2014, she was involved in a motor vehicle accident at work in which she "was struck on the driver side of her van as another car brushed by. *She [the Claimant] feels that this has increased her level of pain*." (Emphasis in the original.) Findings, ¶ 9; see also Claimant's Exhibit D.

In addition, the trial commissioner found that subsequent to the date of the alleged injury in this claim, but prior to the formal hearing of August 24, 2017, the claimant had filed four additional workers' compensation claims. See Findings, ¶¶ 10.a.-10.d. One of these claims, against Key Human Services, Inc., for injuries sustained on November 13, 2014, to the claimant's right arm, right leg, back and neck, was settled via a stipulation approved by the Commission on October 5, 2016. See Respondents' Exhibit 12.

Following the April 7, 2014 visit with Concentra, the claimant did not seek additional treatment for her back until February 25, 2015. At that encounter, the claimant was treated by Stephen A. Dalfino, D.C., a chiropractor, to whom she reported that she had injured her back at work on November 13, 2014. The claimant explained that she had been kicked by a client, and Dr. Dalfino diagnosed cervical, lumbar and right-shoulder strains. Dr. Dalfino's records also reflect that the claimant was complaining of low-back pain in May of 2015. Dr. Dalfino's records make no mention of a March 28, 2014 work injury.

On May 14, 2015, the claimant sought treatment for her low back with Clinton A. Jambor, M.D. At that visit, the claimant described the injury to her back as having occurred on November 13, 2014, while she was providing care to a client. She made no mention of a March 28, 2014 incident. At trial, the claimant testified that she did not seek additional medical treatment after the April 7, 2014 visit with Concentra for the March 28, 2014 work injury because of an outstanding balance. However, the May 14, 2015 office note of Dr. Jambor indicates that the claimant told the doctor "she has been working regularly with Dr. Dalfino and attributes much of her improvement to work with him."[2] Claimant's Exhibit C; Respondents' Exhibit 1. At that visit, Dr. Jambor recommended a lumbar MRI, but the claimant cancelled this test because she felt her condition had improved. On October 8, 2015, Dr. Jambor assigned a three (3) percent

[2] Our review of the record indicates that much of the claimant's treatment at Dr. Jambor's practice was actually rendered by Brian M. Fry, P.A.-C., under Dr. Jambor's supervision. See Claimant's Exhibit C; Respondents' Exhibit 1.

permanent partial disability rating to the claimant's lumbar spine "due to the work-related injury of 11/13/2014."[3] Id.

It was not until December 13, 2016, more than two-and-a-half years after the March 28, 2014 work incident, that the claimant advised Dr. Jambor regarding her "history of two separate work related injuries. The first on 3/28/2014 and the second in November 2014." Id. Dr. Jambor prescribed physical therapy, assigned work restrictions, and scheduled a follow-up appointment. In his report for a March 23, 2017 office visit, Dr. Jambor stated:

> Sharon is also offering added detail as to the timeline and chronology of her back and neck injury. She does not feel as though she had given us enough detail early on. She goes on to clarify that the start of her back and neck pain with radiation into the arms was of onset March 28, 2014.

Id.

On the basis of the foregoing, the trial commissioner, noting that the claimant had withdrawn her claim for injuries resulting from the April 4, 2014 incident, dismissed that claim. The commissioner also dismissed the March 28, 2014 claim, concluding that "the Claimant is not a credible historian and … did not meet her burden demonstrating that she sustained a compensable work-related injury" on that date.[4] Conclusion, ¶ C.

The claimant did not file a motion to correct the Finding and Dismissal but did file a petition for review within the statutory appeal period set forth in General Statutes

[3] Dr. Jambor also assigned a three (3) percent permanent partial disability rating to the claimant's cervical spine. Claimant's Exhibit C; Respondents' Exhibit 1.

[4] We note that in Conclusion, ¶ C, of his December 29, 2017 Finding and Dismissal, the trial commissioner referenced a date of injury of March 28, 2015, which scrivener's error was corrected by the granting of the January 3, 2018 Motion to Correct filed by the respondents and the issuance of an "Errata Sheet to Finding and Dismissal issued December 29, 2017" on January 9, 2018.

§ 31-301.[5] However, the respondents, in reliance upon this board's reasoning in Sutherland Hofler v. State/Dept. of Developmental Services, 6173 CRB-5-17-1 (December 12, 2017), have filed a motion to dismiss, asserting that the claimant did not file timely reasons for appeal pursuant to the provisions of Administrative Regulations § 31-301-2.[6]

The claimant has subsequently filed a document which, in our estimation, can serve as her reasons for appeal. We distinguish this case from Sutherland Hofler, supra, because the instant claimant commenced her appeal by filing a petition for review within the statutory guidelines, whereas the claimant in Sutherland Hofler failed to file any document demonstrating her interest in filing an appeal within the time period mandated by statute. We therefore find the circumstances of this case to be more akin to the factual scenario in Morales v. Bridgeport, 5551 CRB-4-10-5 (April 18, 2011), in which the claimant commenced his appeal in a timely fashion but failed to file his reasons for appeal on time. Generally, in the absence of prejudice to the respondents, we are hesitant to dismiss an appeal on jurisdictional grounds, especially when the appeal has been taken by a self-represented party. As such, consistent with this board's reasoning in Morales, we deny the respondents' motion to dismiss and will consider this matter upon the merits.

[5] General Statutes § 31-301 states: "(a) At any time within twenty days after entry of an award by the commissioner, after a decision of the commissioner upon a motion or after an order by the commissioner according to the provisions of section 31-299b, either party may appeal therefrom to the Compensation Review Board by filing in the office of the commissioner from which the award or the decision on a motion originated an appeal petition and five copies thereof. The commissioner within three days thereafter shall mail the petition and three copies thereof to the chief of the Compensation Review Board and a copy thereof to the adverse party or parties. If a party files a motion subsequent to the finding and award, order or decision, the twenty-day period for filing an appeal of an award or an order by the commissioner shall commence on the date of the decision on such motion."

[6] Administrative Regulations § 31-301-2 states: "Within ten days after the filing of the appeal petition, the appellant shall file with the compensation review division his reasons of appeal. Where the reasons of appeal present an issue of fact for determination by the division, issue must be joined by a pleading filed in accordance with the rules applicable in ordinary civil actions; but where the issue is to be determined upon the basis of the finding of the commissioner and the evidence before him, no pleadings by the appellee are necessary."

The standard of deference we are obliged to apply to a trial commissioner's findings and legal conclusions on appeal 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).

Having had the opportunity to review the claimant's written submissions as well as her oral argument before this tribunal, we conclude that her claims of error on appeal are essentially an effort to retry the factual findings of the trial commissioner. This board's prior analysis in Macon v. Colt's Manufacturing, 5505 CRB-1-09-10 (September 27, 2010), *appeal dismissed*, A.C. 32785 (December 13, 2010), is dispositive of that issue; in Macon, we stated that our standard of review is limited to addressing findings of fact which are "clearly erroneous." Berube v. Tim's Painting, 5068 CRB-3-06-3 (March 13, 2007). As was the case in Macon, the trial commissioner in the present matter reached findings of fact which were consistent with the testimony and evidence he had found credible and probative but unsupportive of the relief the claimant

sought. In both Macon and the appeal at bar, the appellant failed to file a motion to correct challenging the factual findings of the trial commissioner. When an appellant fails to file such a motion, it is axiomatic that we are constrained in our ability to challenge the factual findings of the trial commissioner. See Stevens v. Raymark Industries, Inc., 5215 CRB-4-07-4 (March 26, 2008), *appeal dismissed*, A.C. 29795 (June 26, 2008); see also Administrative Regulations § 31-301-4.

In this appeal, the claimant argues that she presented evidence supportive of compensability but the trial commissioner did not accord this evidence its proper evidentiary weight.[7] This board has previously "held that it is within the discretion of the trial commissioner to accept some, but not all, of a physician's opinion." Lopez v. Lowe's Home Improvement Center, 4922 CRB-6-05-3 (March 29, 2006). Given that the trial commissioner is responsible for evaluating the weight and probative value of medical evidence, we cannot re-visit these issues on appeal. See O'Reilly v. General Dynamics Corp., 52 Conn. App. 813 (1999).

We also note that in light of the more than two-year lapse of time between the date of the alleged injuries in this claim and the claimant's reports to her medical providers associating her condition with the alleged injuries, it was well within the trial commissioner's discretion to conclude that the claimant's arguments regarding causation were without merit.

It is well-settled that "[t]he burden of proof in a workers' compensation claim for benefits rests with the claimant." Torres v. New England Masonry Company, 5289 CRB-5-07-10 (January 6, 2009), *citing* Dengler v. Special Attention Health Services,

[7] At oral argument before this tribunal, the claimant argued that the August 24, 2017 formal hearing was not conducted in a fair manner. However, in the absence of a motion to correct, we are unable to identify the errors which the trial commissioner is alleged to have made in conducting this hearing.

Inc., 62 Conn. App. 440, 447 (2001). See also Lentini v. Connecticut College, 4933 CRB-2-05-4 (May 15, 2006). Although the claimant advanced what she believed to be a cogent argument in favor of compensability at the formal hearing, the trial commissioner did not find her argument persuasive and concluded that the expert evidence she presented did not support a finding of compensability. As an appellate body, we are bound by that decision.

There is no error; the December 29, 2017 Finding and Dismissal of Daniel E. Dilzer, the Commissioner acting for the First District, is accordingly affirmed.

Commissioners Scott A. Barton and Brenda D. Jannotta concur in this opinion.