CASE NO. 6209 CRB-4-17-8 CLAIM NO. 700133171	: COMPENSATION REVIEW BOARD
MARK PERRY CLAIMANT-APPELLANT	: WORKERS' COMPENSATION COMMISSION
v.	: FEBRUARY 25, 2019
CITY OF DANBURY/ FIRE DEPARTMENT EMPLOYER	
and	
CONNECTICUT INTERLOCAL RISK MANAGEMENT (CIRMA) INSURER RESPONDENTS-APPELLEES	

APPEARANCES:

The claimant was represented by David J. Morrissey, Esq., Morrissey, Morrissey & Mooney, L.L.C., 203 Church Street, P.O. Box 31, Naugatuck, CT 06770.

The respondents were represented by Colette S. Griffin, Esq., Howd & Ludorf, L.L.C., 65 Wethersfield Avenue, Hartford, CT 06114-1190.

This Petition for Review from the July 26, 2017 Finding and Orders of Randy L. Cohen, the Commissioner acting for the Fourth District, was heard April 27, 2018 before a Compensation Review Board panel consisting of Commissioners Scott A. Barton, Daniel E. Dilzer and Stephen M. Morelli.[1] [2]

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

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

OPINION

SCOTT A. BARTON, COMMISSIONER. This case requires us to evaluate the notice standards of General Statutes § 7-433c as defined in our Supreme Court's decision in Ciarlelli v. Hamden, 299 Conn. 265 (2010).[3] The trial commissioner, Randy L. Cohen (commissioner), concluded in her July 26, 2017 Finding and Orders (finding) that, based on the evidence presented, the claimant had received a diagnosis of hypertension more than twelve months prior to filing his claim for benefits, and therefore the claim for hypertension benefits was time-barred. The claimant argues that he received a formal diagnosis of hypertension from his treating physician within the twelve-month period prior to filing his claim for benefits and, therefore, the commissioner's conclusion was not supported by the evidence. The respondents argue that the claimant had the burden of persuading the commissioner that his claim was filed in a jurisdictionally timely manner

[3] General Statutes § 7-433c states: "(a) Notwithstanding any provision of chapter 568 or any other general statute, charter, special act or ordinance to the contrary, in the event a uniformed member of a paid municipal fire department or a regular member of a paid municipal police department who successfully passed a physical examination on entry into such service, which examination failed to reveal any evidence of hypertension or heart disease, suffers either off duty or on duty any condition or impairment of health caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability, he or his dependents, as the case may be, shall receive from his municipal employer compensation and medical care in the same amount and the same manner as that provided under chapter 568 if such death or disability was caused by a personal injury which arose out of and in the course of his employment and was suffered in the line of duty and within the scope of his employment, and from the municipal or state retirement system under which he is covered, he or his dependents, as the case may be, shall receive the same retirement or survivor benefits which would be paid under said system if such death or disability was caused by a personal injury which arose out of and in the course of his employment, and was suffered in the line of duty and within the scope of his employment. If successful passage of such a physical examination was, at the time of his employment, required as a condition for such employment, no proof or record of such examination shall be required as evidence in the maintenance of a claim under this section or under such municipal or state retirement systems. The benefits provided by this section shall be in lieu of any other benefits which such policeman or fireman or his dependents may be entitled to receive from his municipal employer under the provisions of chapter 568 or the municipal or state retirement system under which he is covered, except as provided by this section, as a result of any condition or impairment of health caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability. As used in this section, 'municipal employer' has the same meaning as provided in section 7-467.

(b) Notwithstanding the provisions of subsection (a) of this section, those persons who began employment on or after July 1, 1996, shall not be eligible for any benefits pursuant to this section."

and he failed to do so. We conclude that the respondents' position is more persuasive and the evidence on the record was sufficient to allow a reasonable fact finder to conclude that the claimant was diagnosed with hypertension more than one year prior to commencing his claim for benefits. Pursuant to Ciarlelli, supra, such a claim would be time-barred. We therefore affirm the finding.

The commissioner reached the following factual findings. The claimant had been a uniformed firefighter for the City of Danbury from 1985 until his non-disability retirement in 2015. The pre-employment physical at the time of his employment showed no evidence of hypertension or heart disease. The events in this matter were set into motion as a result of the Danbury Fire Department's respirator certification physical examination on or about February 28, 2003, which examination directed the claimant to seek further medical attention. He was examined by John Fisher, P.A.-C., who found that the claimant's heartbeat was "very irregular, his urine contained blood and there were 'obvious signs of edema.'" Findings, ¶ 5; see Claimant's Exhibit A. The claimant decided not to be transported to the local emergency room and instead was examined later in the day by his primary care physician, Theodore J. Blum, M.D. The claimant testified that at that visit, Blum examined him and prescribed medication for an irregular heartbeat and high blood pressure.

The claimant further testified that when he filled the prescription, he also filled out some forms as advised by his union. The commissioner summarized the forms as follows:

> a. A "Supervisor's Report of Accident" form. It listed a date of injury of March 2, 2003. Under "Nature of Injury" it said "HYPERTENSION/CARDIAC." It further stated that "Annual Physical Revealed Hypertension; Edema; Cardiac

> Problem; and Blood in Urine." The witness to the event was stated to be John Fisher P.A. This form was given to Assistant Chief Steven Williams on March 29, 2003. It was date stamped as received by the Insurance Department on April 1, 2003.
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> b. "First Report of Injury" form, citing March 1, 2003 as the date of injury. The form states: "Went to Corporate Health Care for annual physical. John Fisher P.A. advised me to seek medical attention as soon as possible. He stated my heart was very irregular, my urine had blood in it, there was obvious signs of edema.'" This form was signed by the claimant on March 29, 2003. It was date stamped as received by the Insurance Department on April 1, 2003. (Emphasis in the original.)

Findings, ¶¶ 8.a-b.

The claimant testified that he then sought assistance from his union representative in filling out a form 30C, as the union representative had filled out virtually all his prior notices of claim. The form 30C listed the injured body part as "Heart" and described the injury as follows: "Went for department physical, John Fisher, P.A. advised me to seek medical attention as soon as possible. He stated my heart was very irregular, my urine had blood in it, there were obvious signs of edema." Findings, ¶ 10; see Claimant's Exhibit A. The form 30C was signed by Kevin S. Plank, Vice President, dated April 9, 2003, and stamped as received by the Seventh District Office of the Workers' Compensation Commission on April 16, 2003. The form 30C listed the claimant's date of injury as March 1, 2003, and the claimant conceded that it did not contain the word "hypertension." The claimant also conceded that he was actually diagnosed with hypertension on May 6, 2002. The respondents filed a form 43 dated April 29, 2003.

Blum has been the claimant's primary care physician since 1984 and testified regarding how he generally addresses hypertension cases and, more specifically, how he

addressed the claimant's situation. The commissioner summarized his testimony as follows:

> a. The current definition of hypertension is persistently elevated blood pressure, with "elevated" being equal to or greater than 140/90, and "persistent" as persisting over three to four separate appointments with no other obvious cause of the elevation. [See Respondents' Exhibit 2, p. 7.]
> b. If either the systolic or the diastolic number is persistently elevated it can generate a diagnosis of hypertension.
> c. If he determines that a patient has hypertension, the initial treatment generally consists of lifestyle modifications such as dietary changes, weight loss, regular exercise, and monitoring intake of salt and alcohol.
> d. Although the claimant had some isolated blood pressure readings that were above either 140 systolic or 90 diastolic between 1994 and 2000, he did not make a diagnosis of hypertension … "based on the context I was seeing him in. I thought there were a number of aggravating factors elevating the blood pressure other than for the disease of hypertension."

Findings, ¶¶ 15.a-d.

The commissioner also noted the blood pressure readings that Blum had taken of the claimant during the period between 1990 and 2002 when he treated him.[4] Blum testified that "[i]n reviewing the readings from April, August and November of 1998, there was a consistent pattern of an elevated blood pressure…. [Blum] addressed lifestyle changes at that point, i.e., stopping smoking." Findings, ¶ 17.a. "At the May 26, 2000 visit he advised the claimant to keep a food diary, lose weight and return for re-examination." Findings, ¶ 17.b. "He could not recall if he had advised the claimant

[4] The commissioner noted the following blood pressure readings: a. September 10, 1990: 140/100; b. October 23, 1992: 124/90; c. March 1, 1993: 144/86; d. March 9, 1994: 150/90; e. March 11, 1994: 150/86; f. April 7, 1995: 120/92 and 132/92; g. September 6, 1995: 124/94 and 124/88; h. December 21, 1996: 126/92; i. April 6, 1998: 130/94; j. August 4, 1998: 124/90; k. November 4, 1998: 124/90; l. May 23, 2000: 146/100; m. May 26, 2000: 154/90 and 132/88; n. August 22, 2000: 136/102 and 134/100; o. August 30, 2000: 142/100; 140/92; and 140/90; p. September 13, 2000: 126/100 and 140/94; q. October 13, 2000: 136/90; r. December 11, 2000: 134/90; s. January 17, 2001: 120/80; t. August 3, 2001: 140/90; u. October 12, 2001: 122/80; v. January 9, 2002: 132/90; w. April 3, 2002: 150/100 and 140/92; x. May 6, 2002: 146/100 and 150/96. Findings, ¶¶ 16.a-x.

that he was concerned about hypertension at that point, but he agreed it was important to inform patients of conditions he was concerned about." Id.

"At the August 22, 2000 visit he noted that the claimant had elevated blood pressure that he would recheck in one week, and he told the claimant to reduce his sodium. The recheck was scheduled as he was 'concerned' that the claimant was hypertensive and he likely would have informed the claimant that he was concerned about hypertension at that time." Findings, ¶ 17.c; *quoting* Respondents' Exhibit 2, p. 31. "Although the claimant had four blood pressure readings in late August of 2000 that were within his definition of 'hypertension,' [Blum] was only concerned about hypertension but had not yet diagnosed it. He was also concerned about depression and how much the claimant's emotional state was adding to the blood pressure concerns." Findings, ¶ 17.d. "The claimant's blood pressure readings in August and September of 2000 were 'in a range that could be defined as hypertension,' and as a result of those readings he informed the claimant he needed to reduce his salt intake and take serious action with regard to his blood pressure." Findings, ¶ 17.e, *quoting* Respondents' Exhibit 2, p. 33.

Blum testified at length regarding the circumstances in 2000. "Based on the blood pressure readings in August and September of 2000, at the September 13, 2000 visit he discussed having the claimant begin medication if his blood pressure did not improve. He does not recall specifically what he told the claimant, but it is reasonable to assume that he would have told the claimant why he would need to take medication." Findings, ¶ 17.f. "Generally, he would inform a patient who had these blood pressure readings like the claimant's … that he was contemplating putting them on medication. 'That the blood pressure is elevated, hypertension diagnosis is based on there's [sic]

increased risk for heart disease, stroke, kidney failure.'" Findings, ¶ 17.g, *quoting* Respondents' Exhibit 2, p. 37.

Blum testified that "[o]n September 13, 2000 he did not write a diagnosis of hypertension in the chart. Therefore he did not tell the claimant he was hypertensive." Findings, ¶ 17.h. See also Respondents' Exhibit 2, p. 37. "He assumes that he did not tell the claimant that he was hypertensive because he did not define it in his notes as hypertension until May 6, 2002, but he cannot definitively say that he did not tell him that he was hypertensive." Findings, ¶ 17.i. Blum acknowledged that "[b]ased on his earlier testimony with regard to a diagnosis of hypertension, i.e. a series of three to four blood pressure readings in the range as stated 140 and above and over 90, with regard to the numbers alone the claimant was hypertensive. However, within the context of what else was going on, he did not make the diagnosis." Findings, ¶ 17.j. He further noted that "[o]n October 13, 2000 he recorded the claimant's blood pressure as 136/90, which had a hypertensive diastolic figure. He again discussed with the claimant issues related to his elevated blood pressure at that visit." Findings, ¶ 17.k.

"On December 12, 2001 Corporate Health recorded the claimant's blood pressure at 152/100 and 150/106. Their assessment was elevated blood pressure. The report indicates that the exam findings were discussed with the claimant and he was advised to change his diet, exercise and follow up with his primary physician." Findings, ¶ 18. "On January 9, 2002, Dr. Blum recorded the claimant's blood pressure as 152/100 and 150/106." Findings, ¶ 19. "Dr. Blum testified that on April 3, 2002, he recorded the claimant's blood pressure as 150/100 and 140/92. At that point he advised the claimant that he was concerned with his blood pressure and that he wanted him to return in one

month for a recheck." Findings, ¶ 20. "Dr. Blum testified that on May 6, 2002 he recorded the claimant's blood pressure as 146/100 and 150/96. At that point he officially diagnosed hypertension and began the claimant on Lotensin for his high blood pressure." Findings, ¶ 21.

The claimant testified that "[h]e does not recall Dr. Blum telling him that he suffered from the disease of hypertension prior to 2003," Findings, ¶ 22.a., but had no "reason to disbelieve that Dr. Blum's chart prior to May 2002 indicated the potential for blood pressure medication."[5] Findings, ¶ 22.b. "He recalled occasions when Dr. Blum took his blood pressure … 2-3 times during the same visit." Findings, 22.c. "He does not recall receiving the diagnosis of hypertension on May 6, 2002, nor receiving the prescription for blood pressure medication, but that Dr. Blum recommended that he lose weight at that visit as he was overweight." Findings, 22.d. He testified that "Dr. Blum always told him the blood pressure readings but did not believe he used the word 'hypertension,' although he was aware of the fact that he had 'an issue related to hypertension' that Dr. Blum was concerned about." Findings, ¶ 22.e, *quoting* November 2, 2016 Transcript, p. 4. "He was aware that the weight loss Dr. Blum had recommended over the years was important for his overall health, including his blood pressure. Prior to his March 1, 2003 physical he had ongoing discussions with Dr. Blum about the fact that his weight was having an adverse impact on his blood pressure." Findings, ¶ 22.f.

[5] We note that there appears to be a scrivener's error in the July 26, 2018 Finding and Orders in that findings relative to the testimony of both the claimant and Martin J. Krauthamer, M.D., were identified as "Findings, ¶ 22." For purposes of clarity in this Opinion, we will refer to the findings predicated on the claimant's testimony as "Findings, ¶ 22" and to those predicated on Krauthamer's testimony as "Findings, ¶ 24."

The commissioner also noted the testimony and opinions of the respondents' medical examiner, Martin J. Krauthamer, M.D. Krauthamer "performed a respondent's medical exam on April 24, 2015. He had the opportunity to review all of the claimant's medical records as well as to complete a history and physical examination of the claimant. He testified that hypertension is 'high blood pressure' or 'blood pressure that is elevated.' Most U.S. physicians agree that 140/90 begins the abnormal/elevated range…. A patient can have diastolic hypertension, systolic hypertension, or hypertension where both numbers are abnormal." Findings, ¶ 23, *quoting* Respondents' Exhibit 3, p. 8.

Krauthamer also testified that "[t]here is documented evidence that the claimant had hypertension well before 2003 with clear indication that he had been told about it" and "[h]is review of the claimant's records was inconsistent with Dr. Blum's testimony that he did not diagnose hypertension until May 6, 2002." Findings, ¶¶ 24.a-b. He noted that "[t]he first treatment recommendations for blood pressure include behavior and risk modification, which could include reducing salt consumption, weight loss, increased exercise. The second step for treatment includes medication." Findings, ¶ 24.c. Krauthamer said that after "reviewing the claimant's blood pressure readings from April, August and November of 1998 he would have been very concerned about hypertension in 1998 and he would have started the claimant on medication by that time had he been his patient." Findings, ¶ 24.d.

He also noted that "[p]hysicians tend to avoid the term 'hypertension' because it can alarm patients, and instead use 'elevated blood pressure' because it sounds 'more gentle' while referring to the same condition." Findings, ¶ 24.e, *quoting* Respondents' Exhibit 3, p. 26. He also opined that "[t]aking the blood pressure readings from

August 22, August 30 and September 13, 2000 would as a whole unquestionably constitute a diagnosis of hypertension, regardless of whether or not the patient was suffering from depression." Findings, ¶ 24.d. He elaborated on that opinion as follows:

> On August 22, 2000, he was seen by Dr. Blum. The blood pressure was 136/102, rechecked 134/100 (indicating he was concerned about it). Also a comment in the note states "elevated BP." At the bottom of that section are two items: Symbols standing for (check bp in one week and decrease sodium). This strongly suggests that a discussion was had by Dr. Blum with Mr. Perry at that time about his blood pressure. At a visit a week later (August 30, 2000) his blood pressure was 142/100 and was repeated three times (140/92, 140/90). A comment at the bottom of the note states "borderline BP-wt was discussed." Later that year, on September 13, 2000, the blood pressure was 126/100, repeated 140/94. At the bottom of the note Dr. Blum concludes (symbols for) "if there is no change in blood pressure start medication." Medication was started in 2003. Accordingly I feel that there is documented evidence that Mr. Perry had hypertension well before 2003 with clear indication that he had been told about it.

Findings, ¶ 24.h, *quoting* Respondents' Exhibit 3, Deposition Exhibit 1.

Based on this record, the commissioner concluded that the claimant's form 30C was sufficient to put the respondents on notice that he was claiming benefits for hypertension, in part because the form referenced the department physical which had noted hypertension. She found that the totality of the circumstances, including the first report of injury, placed the respondents on notice and the "respondent has not shown that it was prejudiced by the inartfully drafted Form 30C, nor as a result of the claimant's error in misstating what he claims to be the actual date of diagnosis." Conclusion, ¶ B. The commissioner found "Dr. Krauthamer's definition of hypertension as 'high blood pressure' or 'blood pressure that is elevated' of 140/90 or above, and recorded at least twice one or two weeks apart, to be both credible and persuasive." Conclusion, ¶ D.

The commissioner found Dr. Blum credible on a number of issues: his definition of hypertension; that "if he determines that a patient has hypertension, the initial treatment generally consists of lifestyle modifications such as dietary changes, weight loss, regular exercise, and monitoring intake of salt and alcohol;" Conclusion, ¶ G, and that "prior to taking the claimant's blood pressure a second time at any given visit he would have advised the claimant that he had concerns about his blood pressure." Conclusion, ¶ J. She found both "the claimant and Dr. Blum credible that on occasions Dr. Blum took [the claimant's] blood pressure 2-3 times during the same visit." Conclusion, ¶ K. The commissioner also found "the claimant credible that Dr. Blum told him his blood pressure readings at his visits and that he was aware that he had an issue related to hypertension that Dr. Blum was concerned about." Conclusion, ¶ L. The commissioner also found "that a total of seven blood pressure readings were hypertensive from August 22, 2000 to September 13, 2000." Conclusion, ¶ N.

Relative to that same time period, the commissioner found "Drs. Blum and Krauthamer credible and persuasive that the claimant was hypertensive during the period from August 22, 2000 to September 13, 2000." Conclusion, ¶ O. She also found "Dr. Blum credible that at the September 13, 2000 visit, as a result of his blood pressure readings he discussed having the claimant begin medication if his blood pressure did not improve and instructed him in initial treatment for high blood pressure by way of lifestyle changes." Id. She found "Dr. Blum credible that at the September 13, 2000 visit it is reasonable to assume that he would have told the claimant why he needed to take the medication." Conclusion, ¶ P.

However, the commissioner did not find "Dr. Blum credible that he failed to tell the claimant he was hypertensive in September of 2000," Conclusion, ¶ S, and she did "not find the claimant credible that Dr. Blum had not advised that he suffered from hypertension prior to 2003." Conclusion, ¶ T. She found "Dr. Krauthamer to be credible and persuasive that there is documented evidence that the claimant had hypertension well before 2003 with clear indication that he had been told about it." Conclusion, ¶ R. The commissioner concluded that although the claimant's form 30C was adequate, it had been filed more than one year after he had received a diagnosis of hypertension and was thus untimely. The commissioner therefore dismissed the claim.

The claimant and the respondents filed motions to correct. The claimant also filed a motion for articulation. The commissioner denied each motion in its entirety, and the claimant has appealed. He argues that the commissioner's conclusion as to the date of his hypertension diagnosis was reached without reliable evidence. He specifically believes the commissioner erred in her reliance on Krauthamer's opinion. The respondents argue that this was an issue of fact which the commissioner resolved in a manner adverse to the claimant. They also argue that the form 30C, which did not specifically reference "hypertension," was inadequate to confer jurisdiction to the Workers' Compensation Commission over this condition. Upon review, we find these issues are within the fact-finding prerogatives of the commissioner and, given the deference we must provide as an appellate panel, we defer to her judgment.

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).

Before reviewing the substance of the commissioner's decision, we begin by addressing the notice issues raised by the respondents in their brief. Had this claim been improperly initiated, the commissioner would not have had jurisdiction to award benefits. See Kuehl v. Z-Loda Systems Engineering, Inc., 265 Conn. 525 (2003). The respondents argue that the failure to specifically mention the word "hypertension" within the four corners of the form 30C deprives us of jurisdiction over that condition. They cite Holston v. New Haven Police Dept., 323 Conn. 607 (2016), for the proposition that hypertension is a separate malady from heart disease and a party may seek benefits for either illness. The claimant contends that the terms of General Statutes § 31-294c (c) govern this inquiry and notes that the statute states, in part, that "[n]o defect or inaccuracy of notice of claim shall bar maintenance of proceedings unless the employer shows that he was ignorant of the facts concerning the personal injury and was prejudiced by the defect or inaccuracy of the notice." We find the claimant's position better reasoned.

The commissioner in this matter made specific factual findings that the respondents were not prejudiced by the terms of the claimant's notice because at the time the notice was filed, they had specific documentation in their possession from the physical examination performed by John Fisher, P.A.-C., indicating that the claimant had hypertension at the time he filed his claim. The respondents argue that Funaioli v. New London, 52 Conn. App. 194 (1999), can be distinguished from the facts of this case, but we are not so persuaded.

In Funaioli, a first report of injury affixed to correspondence from counsel was found by the commissioner to be sufficient to constitute notice of claim. Id., 196. When a claimant files a form 30C, and a first report of injury delineating the claimant's condition is in the respondents' possession, we believe that a commissioner can also determine that the respondents have received adequate notice that the claimant is seeking benefits for those conditions.[6] We believe that the "totality of circumstances" standard was clearly met in this matter. Id., 198, *quoting* Hayden-Leblanc v. New London Broadcasting, 12 Conn. Workers' Comp. Rev. Op. 3,5, 1373 CRD-2-92-1 (January 5, 1994). See also Berry v. State/Dept. of Public Safety, 5162 CRB-3-06-11 (December 20, 2007). The respondents were not found to have been prejudiced and were able to present a defense to this claim. As such, we turn to the issue of whether the claim in this matter

[6] The respondents have noted that the claimant's form 30C was completed by a union official, see Findings, ¶ 10, but in light of our Appellate Court's decision in Mehan v. Stamford, 127 Conn. App. 619 (2011), *cert. denied*, 301 Conn. 911 (2011), we do not believe that circumstance has any impact upon the validity of the claim as filed. We also find inapposite the respondents' citation to Bradford v. Griffin Health Services Corp., 5878 CRB-4-13-9 (March 23, 2017), *appeal withdrawn*, A.C. 40330 (February 1, 2018), as grounds to invalidate the notice. See Respondent/Appellee City of Danbury's Reply to "Brief of Claimant/Crossclaim Appellee" dated March 26, 2018, pp. 8-9. Bradford dealt solely with the obligations of a respondent when filing a disclaimer. As this tribunal has previously observed, once a properly noticed claim goes to a hearing, the trial commissioner has great latitude "to follow the evidence where it leads." DiDonato v. Greenwich, 5431 CRB-7-09-2 (May 18, 2010).

was brought more than one year after the claimant had been diagnosed with hypertension and, pursuant to Ciarlelli, supra, is therefore time-barred.

In Ciarlelli, our Supreme Court rejected what could be deemed a "scienter standard" for assessing the timeliness of General Statutes § 7-433c claims and replaced it with a "diagnosis standard." Id., 300-301.

> Because General Statutes § 7-433c (a) provides for an award of benefits to an otherwise eligible claimant who "suffers … any condition or impairment of health caused by hypertension or heart disease resulting in his death or his … disability," it stands to reason that a formal diagnosis of hypertension or heart disease, communicated to an employee by his or her physician, constitutes the "injury" that triggers the running of the limitation period of § 31-294c. Indeed, under § 7-433c, a claimant may recover benefits for hypertension only if he suffers from that condition; a claimant is not entitled to benefits merely because he exhibits symptoms consistent with hypertension, such as elevated blood pressure, from time to time. Furthermore, requiring that an employee file a notice of claim for hypertension benefits only after he has been informed by a medical professional that he is suffering from that condition, and not merely from its symptoms, is consistent with the principle that, as a remedial statute … § 7-433c must be liberally construed in favor of the claimant. (Internal citation omitted.)

Id., 298-299.

Our Supreme Court reiterated that the determination of when a claimant has been diagnosed with hypertension is a factual question.

> Thus, although the issue of when the limitation period of § 31-294c begins to run in any given case remains a question of fact for a workers' compensation commissioner, evidence that an employee merely knew of past elevated blood pressure readings, or was advised by his or her physician to make certain lifestyle changes in response thereto, is not sufficient to trigger the limitation period in the absence of evidence that the employee formally had been diagnosed with hypertension by a medical professional and advised of that diagnosis.

Id., 301.

Our Supreme Court also suggested that a "totality of circumstances" approach should be utilized by a trial commissioner when determining whether a claimant actually had received a diagnosis of hypertension.

> Of course, this standard is not so inflexible as to require a finding in all cases that the medical professional used the term "hypertension" in communicating the diagnosis to the employee. For example, evidence that an employee was prescribed antihypertensive medication for the treatment of high blood pressure related to hypertension, and not some other illness, likely would support a finding that the employee formally had been diagnosed with hypertension and knew, or should have known, of that diagnosis.

Id., n.18.

A year after our Supreme Court issued Ciarlelli, it ruled on two somewhat similar cases involving the timeliness of § 7-433c claims. In Brymer v. Clinton, 302 Conn. 755 (2011), the court reversed the decision reached by the commissioner, and affirmed by this board, that the claim was untimely. Invoking the Ciarlelli standard that "there must be evidence establishing that the claimant knew that he or she suffered from hypertension, a showing that ordinarily will be made only upon proof that the claimant was informed of that diagnosis by a medical professional," id., 764, the court concluded that this tribunal had applied an incorrect legal standard. Reviewing the evidence, the court noted that one witness "clarified his direct testimony, explaining that the plaintiff had *not* suffered from hypertension between 1995 and 2002 because all but one of his blood pressure readings during that time period fell within normal limits." (Emphasis in the original.) Id., 766. Having determined that the evidence did not support a finding that the claimant had been diagnosed with hypertension more than one year prior to filing his claim, the court reversed the dismissal of his claim.

Our higher courts reached different results in Roohr v. Cromwell, 302 Conn. 767 (2011), and Conroy v. Stamford, 161 Conn. App. 691 (2015), *cert. denied*, 320 Conn. 917 (2016). In Conroy, our Appellate Court reviewed Roohr in great detail. We quote from that opinion:

> More recently, in Roohr v. Cromwell, 302 Conn. 767, 31 A.3d 360 (2011), our Supreme Court applied its holding in Ciarlelli to a case with underlying facts that are materially similar to the facts underlying the present appeal. Thus, our Supreme Court's analysis in Roohr guides our resolution of this appeal. In Roohr, the plaintiff, Thomas Roohr, was a municipal police officer who successfully passed a preemployment physical examination that revealed no evidence of hypertension or heart disease. Id., 769. On April 29, 2002, nearly twenty years after Roohr had been hired as an officer, Roohr began to see a new primary care physician. During his first visit on April 29, 2002, Roohr recorded elevated blood pressure readings. Id., 770. Roohr continued to visit the primary care physician throughout 2002 and 2003 and he continued to record elevated blood pressure readings. Id. Finally, during a visit on October 17, 2003, after Roohr recorded another elevated blood pressure reading, his primary care physician prescribed him medication for hypertension. Id. Roohr thereafter filed a claim for § 7-433c benefits in March, 2004. Id. The defendant town of Cromwell moved to dismiss Roohr's claim as untimely under § 31-294c (a), arguing that Roohr had been diagnosed with hypertension on April 29, 2002. Id. In a subsequent deposition, Roohr's primary care physician testified that during Roohr's initial visit on April 29, 2002, he had *diagnosed* Roohr with hypertension and had discussed the condition with him, despite not having prescribed him medication for treatment. Id. The physician also testified that during Roohr's subsequent office visits, he recommended that Roohr make lifestyle changes to help address his high blood pressure. Id. Roohr testified before the trial commissioner that he did not remember the physician diagnosing him with hypertension on his initial April 29, 2002 visit, but that he did recall talking about diet, weight loss, and possibly his blood pressure. Id. Thus, Roohr averred that his March, 2004 claim was timely because he had not been diagnosed with hypertension until the date that his physician prescribed him medication on October 17, 2003. Id., 771. The trial commissioner found that Roohr had been formally diagnosed with hypertension on April 29, 2002, and concluded that his claim

> for benefits was therefore untimely. Id. The compensation review board affirmed the decision and Roohr appealed. Id., 768–69.
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> On appeal, our Supreme Court affirmed the decision of the board upholding the trial commissioner's dismissal of Roohr's claim because the evidence clearly showed that he had been diagnosed with hypertension during his April 29, 2002 visit to his primary care physician. Id., 771. Most notably, our Supreme Court noted that "[t]here is nothing in Ciarlelli to support [Roohr's] contention that a diagnosis of hypertension is insufficient to trigger the one year limitation period of § 31- 294c (a) unless the diagnosis is accompanied by a prescription for hypertensive medication. Because [Roohr's] physician testified, and the commissioner expressly found, that [Roohr] was, in fact, diagnosed with hypertension and informed of that diagnosis more than one year before he filed his claim, the board properly upheld the commissioner's dismissal of [Roohr's] claim for benefits under § 7-433c." (Emphasis in the original.)

Conroy, supra, 704-706, *quoting* Roohr, supra, 771.

In Roohr, our Supreme Court indicated that a diagnosis of hypertension need not be accompanied by a prescription for medication to trigger the time period for commencing a hypertension claim under § 7-433c. The commissioner was persuaded, notwithstanding the claimant's denial, that the claimant had been diagnosed with hypertension more than one year prior to filing a claim, and therefore the claim was time-barred. In Conroy, however, our Appellate Court upheld a factual finding of the commissioner which had been affirmed by this board. That finding was that the claimant's physician had **not** diagnosed hypertension at a point more than one year prior to the claimant filing his claim. In so doing, the Conroy court distinguished the case from Roohr, supra, on the facts. Conroy, supra, 707-708.

In this matter, the commissioner determined that the claimant had been diagnosed with hypertension no later than September 13, 2000 and, based on our Supreme Court's analysis in Ciarlelli, the claim was untimely. The claimant argues there was insufficient

evidence to support this determination and this conclusion constitutes an abuse of discretion. We therefore examine the record to ascertain if this conclusion was reasonable based on the evidence presented. At the outset, we note that between May 23, 2000 and October 13, 2001, the claimant exhibited no fewer than eleven elevated blood pressure readings. See Findings, ¶ 16.l-q. Therefore, this case does not factually resemble Brymer, supra. Nonetheless, we must ascertain if the commissioner could reasonably determine that a diagnosis of hypertension was conveyed to the claimant at that time.

The respondents point out that Krauthamer conducted a records review and determined, based on this review, that the claimant had been advised of a hypertension diagnosis. See Findings, ¶ 24.h. The respondents note that the commissioner found Krauthamer to be a credible witness on this issue. See Conclusion, ¶ Q. The claimant argues that Krauthamer's opinion was speculative and unsupported by the objective facts. We note that the commissioner specifically found that the claimant's treating physician, Blum, was not credible regarding his testimony that he failed to tell the claimant he was hypertensive in September 2000.[7] See Conclusion, ¶ S. Determinations as to witness credibility are within the exclusive realm of a trier of fact, Burton, supra, but we may reverse a commissioner's decision if we find it "clearly erroneous." Berube v. Tim's Painting, 5068 CRB-3-06-3 (March 13, 2007), *quoting* Moutinho v. Planning & Zoning Commission, 278 Conn. 660, 665-666 (2006).

[7] It appears from Blum's deposition testimony that he declined to diagnose hypertension because he ascribed the claimant's persistently elevated blood pressure to a number of other medical conditions. See Respondents' Exhibit 2, pp. 45-49. We have not been presented with any expert opinion indicating that hypertension must be diagnosed in a manner which is mutually exclusive of other coincidental conditions; nor are we aware of any case law relative to § 7-433c claims which establishes this standard.

The commissioner and Krauthamer both reviewed Blum's deposition as well as his treatment notes. Blum testified that a patient with persistent elevated blood pressure would be diagnosed as hypertensive. See Respondents' Exhibit 2, p. 7. On May 23, 2000, Blum examined the claimant and identified hypertensive blood pressure readings. Id., 24-25. He examined the claimant three days later and said the purpose of taking a second blood pressure reading was that he was "concerned with" the claimant's blood pressure, id., 26, and that he "probably" explained that he was concerned about the elevated blood pressure and also explained the reason for the second reading. Id., 27. He stated that he would usually inform a patient "[t]hat it could potentially be the disease of hypertension" but that "I don't remember. I would say perhaps" when asked if he explained it to the claimant at that juncture. Id.

Blum testified that he took two blood pressure readings of the claimant which were hypertensive at his August 22, 2000 visit and then examined the claimant eight days later, when two blood pressure readings were also hypertensive. Id., 29-30. Blum testified that at the August 22, 2000 visit, he recommended that the claimant decrease his salt intake and said "let's recheck in a week." Id., 30. The purpose of the recheck was due to Blum's concern that the claimant was hypertensive. Id., 31. Blum said he would have informed the patient he was coming back because of blood pressure readings and "probably" informed the claimant he was concerned about hypertension. Id.

The claimant returned to see Blum on September 13, 2000. Blum testified that on that date, the claimant again had elevated blood pressure and he prescribed Celexa for the claimant. Id., 32-33. Blum agreed that at that point, the claimant's blood pressure readings "were in a range that could be defined as hypertension." Id. Blum discussed the

medication with the claimant, id., 38, and agreed that the purpose of the medication was to address hypertension. Id. Blum testified that if the claimant's blood pressure was elevated, he would discuss medication with the claimant given that a hypertension diagnosis was based on "the increased risk for heart disease, stroke, kidney failure." Id., 37. Nonetheless, although Blum said he discussed the issue of hypertension with the claimant at the September 13, 2000 visit, he also said "I did not give him a diagnosis of hypertension at that time." Id., 36-38.

We find Blum's testimony consistent with Findings, ¶¶ 17.f. and 17.g. Blum apparently discussed the issue of hypertension extensively with the claimant during the summer of 2000, conveyed to the claimant the information that he had demonstrated a number of consistently elevated blood pressure readings, and discussed whether medication would be necessary. The factual circumstances in this claim therefore closely resemble the fact pattern in Roohr, supra, in which the claimant had been apprised of his elevated blood pressure readings for an extended period but claimed not to have been diagnosed with hypertension.

The instant claimant argues that the evidence does not support a finding of a "definitive diagnosis of hypertension." Claimant's Brief, p. 12. We note that the commissioner did not find either Blum or the claimant credible on this point. See Conclusion, ¶¶ S, T. A trial commissioner is not obligated to accept testimony as credible even if it is unrefuted. See Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999). We believe that the commissioner could have reasonably determined, based on the totality of the circumstances, that the various communications from Blum to the claimant on or prior to September 13, 2000,

were sufficiently definitive to constitute a diagnosis of hypertension. This position was supported by the respondents' expert witness. We believe the commissioner's conclusion was therefore consistent with the standard delineated in Ciarlelli, supra, n.18.

Conversely, we believe that the claimant's position in this matter constitutes an application of the "magic words" standard which was rejected by our Supreme Court in Struckman v. Burns, 205 Conn. 542, 555 (1987). In the matter at bar, the commissioner examined "the entire substance of the expert's testimony," id., to determine whether the claimant's treating physician had diagnosed hypertension. As our Appellate Court held in Estate of Haburey v. Winchester, 150 Conn. App. 699 (2014), *cert. denied*, 312 Conn. 922 (2014), "law does not demand metaphysical certainty in its proofs." Id., 716, *quoting* Curran v. Kroll, 118 Conn. App. 401, 408 (2009), *aff'd*, 303 Conn. 845 (2012). We also note that it is the obligation of a claimant to establish that he or she has properly initiated a claim within jurisdictional time limits. Davila v. Mimi Dragone, Inc., Dragone & Sons L.L.C., 6152 CRB-4-16-11 (November 28, 2017). Based on the totality of the evidence, we do not find that the commissioner's determination relative to the date of diagnosis was unreasonable, and affirm the commissioner's conclusion that the claim was commenced in an untimely manner.

There is no error; the July 26, 2017 Finding and Orders of Randy L. Cohen, the Commissioner acting for the Fourth District, are accordingly affirmed.

Chairman Stephen M. Morelli and Commissioner Daniel E. Dilzer concur in this opinion.