CASE NO. 6214 CRB-7-17-8 : COMPENSATION REVIEW BOARD
CLAIM NO. 400033474

MUSLUM AYNA : WORKERS' COMPENSATION
CLAIMANT-APPELLANT : COMMISSION

v. : MARCH 6, 2019

GRAEBEL/CT MOVERS, INC.
EMPLOYER

and

LIBERTY MUTUAL INSURANCE GROUP
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by John T. Bochanis, Esq., Daly, Weihing & Bochanis, 1776 North Avenue, Bridgeport, CT 06604.

The respondents were represented by Lawrence R. Pellett, Esq., and Timothy D. Ward, Esq., McGann, Bartlett & Brown L.L.C., 111 Founders Plaza, Suite 1201, East Hartford, CT 06108.

This Petition for Review from the July 28, 2017 Finding and Dismissal of Michelle D. Truglia, the Commissioner acting for the Fourth District, was heard May 25, 2018 before a Compensation Review Board panel consisting of Commission Chairman Stephen M. Morelli and Commissioners Jodi Murray Gregg and David W. Schoolcraft.[1]

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

OPINION

STEPHEN M. MORELLI, CHAIRMAN. The claimant has appealed from a July 28, 2017 Finding and Dismissal (finding) concluding that he did not prove that he was entitled to temporary total disability benefits pursuant to General Statutes § 31-307[2] as a result of the Osterlund doctrine.[3] The claimant argues that the commissioner erred in not crediting the medical evidence and vocational evidence which he submitted in support of his claim. The respondents contend that this matter is essentially an effort to retry the facts of the case on appeal.

We have reviewed the record and conclude that the commissioner was not persuaded by the claimant's evidence that he had no work capacity. She found the evidence presented by the respondents, indicating that the claimant not only had a work capacity but was also employable, more credible and persuasive. Since the commissioner's decision in this matter was supported by a substantial quantum of probative evidence, it will not be disturbed by an appellate panel. Therefore, we affirm the Finding and Dismissal.

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[2] General Statutes § 31-307 (a) states: "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 per cent 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."

[3] See Osterlund v. State, 135 Conn. 498 (1949). The Osterlund doctrine holds that even if a claimant is found to have some capacity to perform gainful employment, the claimant may be entitled to temporary total disability benefits if the claimant's physical condition is such that he or she "cannot in the exercise of reasonable diligence" find someone who will hire him. Id., 506.

Commissioner Michelle D. Truglia (commissioner) reached seventy-nine findings of fact and ten conclusions in the finding. We summarize the record as follows. The commissioner noted that the claimant's injuries had been the subject of prior formal hearings by other commissioners. The claimant was a native of Turkey who was fifty-two years old at the time of the hearing. He testified as to becoming a naturalized American citizen in 1994 and as to his marriages and prior relationships. The commissioner noted that although the claimant's first languages were Turkish and Kurdish, he gave direct and cross-examination testimony at trial without the aid of an interpreter.

The claimant testified that he commenced working for the respondent in 1992 or 1993 as a laborer moving household and office furniture and sustained two injuries while working there. The first injury occurred in 1996 and the second injury occurred in 1998. The claimant testified that as a result of the two injuries, he has undergone four surgeries; however, his attorney argued that he has had five procedures to the cervical spine. The commissioner listed five cervical disc procedures performed on the claimant between September 1999 and August 2008. The claimant now seeks approval for another surgery in the form of a discectomy and fusion with decompression of the spinal cord at the C4-C5 level. The claimant testified that his treating physician would also favor removing the previous plate from the C5-C6 level and putting in a new plate at the C4-C5 level. See Findings, ¶ 10; April 6, 2016 Transcript, pp. 29-30; Claimant's Exhibit B (April 14, 2015 office note).

At the formal proceeding, the commissioner noted the claimant's testimony regarding his present condition. The claimant testified that he feels pain in his neck and

shoulders "almost every other day" and it radiates into his right arm. Findings, ¶ 11, *quoting* April 6, 2016 Transcript, pp. 30-31. He also testified regarding his pain medications. He has been treating with Pardeep Sood, M.D., for pain management since approximately October 2003, and currently takes Percocet, Valium, Ambien, Naprosyn and an unspecified topical cream for pain. He testified that the medications do not eliminate his pain but they reduce it. He also receives periodic epidural shots from Sood. The commissioner noted that there was inconsistent testimony relative to how long these injections provided relief to the claimant. At the hearing, the claimant testified to obtaining three months of relief from this treatment, but he told the respondents' examiner, Michael E. Karnasiewicz, M.D., that he received "only a couple of weeks of relief." Respondents' Exhibit 1, Deposition Exhibit 2. Although the claimant testified the treatment sometimes makes him feel nauseous and dizzy, he also testified that Sood allows him to drive to New Jersey and to engage in international travel to Turkey.

The claimant testified that his activities are limited because of his pain. On a daily basis, he watches television and drives to see his friends or to the store. He is able to wash his dishes and clothes. The claimant said he could lift between twenty-five and thirty pounds. He asks his friends to help him with heavy lifting. He testified that he can sit for approximately one hour to one hour and a half at a time. He also testified that he utilizes E-Z pass toll tags and drives into New Jersey and New York to visit family and friends. In addition, he testified that he traveled back and forth to Turkey several times in the years following his various surgeries and to Ocean City, Maryland with Zuleyha (Zuhal) Bicakci. [4]

[4] As of the date of the formal proceedings, it was not clear if claimant was engaged to, or married to, Zuleyha (Zuhal) Bicakci.

In the proceedings below, the respondents presented photographic evidence of the claimant and family members engaged in a sightseeing trip to New York City. The commissioner noted Bicakci had in her possession numerous photos of her and the claimant in New York City and in Turkey. See Findings, ¶¶ 16-17. The commissioner also noted that the claimant testified that he had not worked since 2000 and was currently collecting social security disability income; however, she noted findings from a prior formal hearing indicating that the claimant had engaged in remunerative activities between 2003 and 2006. Regarding the claimant's testimony relative to lifting restrictions, the commissioner also noted that the respondents presented evidence that the claimant carried suitcases with him on a trip to Turkey.

The commissioner also considered the opinions of two different vocational experts, Albert J. Sabella, a Vocational Rehabilitation Counselor, who testified for the claimant, and Kerry A. Skillin, a Certified Rehabilitation Counselor, who testified for the respondents. Sabella testified that he examined the claimant on March 3, 2015, and administered a test of academic ability called the Wide Range Achievement Test, Fourth Edition. On this test, the claimant tested as reading at a second-grade level, spelling and writing at a first-grade level, and performing math equations at a fourth-grade level. Sabella described the claimant's prior employment as that of a warehouse person who also worked as a truck driver. He said the claimant currently had a lifting capacity of ten to twenty pounds but repetitive lifting was problematic. Sabella did not perform a labor telephonic market survey regarding the jobs the claimant could perform within his limitations; he explained that he chose not to do so because in his opinion, those studies

are "unreliable." Findings, ¶ 29, *quoting* June 29, 2016 Transcript, p. 57. Sabella did not administer the Wechsler Intelligence Test to the claimant.

On cross-examination, Sabella indicated that he was unaware of the frequency of the claimant's travel to Turkey, New York City and New Jersey. He also opined that the claimant's medication affected his ability to drive but was apparently unaware that Sood had cleared the claimant to drive to New Jersey and New York. Sabella noted that the claimant did not have a GED or a high-school diploma and he considered this factor in evaluating the claimant's employability. In conclusion, Sabella opined that the claimant is not "a viable candidate for employment because he's been out of work for a protracted period of time and he has chronic, self-reported pain." Findings, ¶ 40; see also June 29, 2016 Transcript. pp. 102-103.

Skillin offered a vocational opinion of the claimant on behalf of the respondents. She said she conducted a five-hour interview with the claimant, reviewed his records, administered standardized vocational tests, and conducted a labor market analysis. She noted that at the interview, she did not observe some of the physical limitations the claimant had reported to his physicians. She said the claimant was able to fill out a sample job application with only one spelling error, and she opined that he had sufficient skill to fill out basic forms. She also administered the Wide Range Achievement Test to the claimant and he achieved a higher score than when Sabella had administered the test. She administered the Kauffman Functional Skills Test to the claimant and he demonstrated that he was able to read basic English. The claimant was administered a Test of Nonverbal Intelligence and tested at the level of borderline intelligence, which result Skillin deemed very inconsistent with the claimant's presentation given that he was

able to follow and understand directions. She also opined that the claimant's "past employment history would also indicate that his cognitive ability would have been higher than someone who would be deemed borderline intelligent." Findings, ¶ 45.

Skillin believed that the claimant provided inconsistent results on the Wechsler Memory Scale test and the results suggested that he "may not have put forth a full effort on the test." Findings, ¶ 48. Skillin's labor market survey indicated that the claimant could perform various jobs in his current condition. Examples of such jobs included: a movie ticket seller; a bench assembly position assembling small parts; a membership greeter at a gym; or a non-emergency livery dispatcher. She opined that the claimant could perform these alternative jobs rather than returning to his former employment as a laborer or driver. She noted that in the interview, the claimant did not need to take a break during the interview process or the testing period and he indicated that he is engaged in a constant level of sedentary-to-light social activities; in addition, the claimant drove himself to her office in Windsor. Skillin also discussed the difference in testing methodology between the tests she administered and the tests performed by Sabella as well as the difference in professional certifications between herself and Sabella. Her overall conclusion was that the claimant had a work capacity and was employable.[5] Findings, ¶ 51; see also Respondents' Exhibit 16, p. 35.

The commissioner also considered the opinion of the claimant's treating physician, Patrick P. Mastroianni, M.D. The commissioner noted that on June 14, 2010, Mastroianni opined that the claimant's physical condition made "it virtually impossible

[5] In her July 28, 2017 Finding and Dismissal, the commissioner used the term "work capacity." It is of course well settled that pursuant to the Osterlund doctrine, a claimant may have a limited work capacity yet still be unable to obtain remunerative employment. However, in finding Skillin persuasive and credible, the commissioner in the present matter clearly adopted Skillin's opinion that the claimant had a wage-earning capacity.

for [the claimant] to carry out most types of sedentary work." Claimant's Exhibit B. On October 29, 2013, he opined that the claimant's shoulder motion was extremely limited and it was possible that he was experiencing a "frozen shoulder" disruption. Id. His June 16, 2014 letter to claimant's counsel stated that as of October 29, 2013, the claimant was disabled "by severe chronic pain syndrome." Id. Mastroianni's September 2, 2014 letter to claimant's counsel deemed Sood's pain management ineffective at reaching "an acceptable level of pain control" and stated that the claimant was still disabled. Id.

Images of the claimant's neck were taken on April 6, 2015. Subsequent to that imaging, an April 14, 2015 letter from Mastroianni to Sood discussed stenosis at C4-5 and C3-4 of the claimant's spine and suggested that the claimant undergo a discectomy and fusion at C4-5. Sood issued a report on July 23, 2015, noting that the claimant was experiencing recurring neck and upper extremity pain. The report also noted that the claimant was taking pain medication which provided "60 to 70% relief." Claimant's Exhibit A. However, Sood did not find any obvious visible mass on the claimant's spine or neck. The claimant had a 100 percent cervical range of motion on both the right and left side, and his cervical extension and flexion was 100 percent. He had normal motor strength and his upper extremities had normal bulk and tone. The claimant's principal complaint was that he woke up at night with neck and shoulder pain.

The commissioner also considered the opinion of the respondents' medical examiner, Michael E. Karnasiewicz, M.D. In a January 8, 2015 report, Karnasiewicz found no sign of nerve or spinal cord compression. Although the claimant complained of diminished sensation in his right thumb and index finger, this complaint was associated with a previous problem with the C6 nerve root. The claimant also complained of neck

and shoulder pain, and Karansiewicz found that the medical management of the claimant's chronic pain was reasonable and necessary. He opined that the MRI had provided no evidence which would support the need for a further surgery and the claimant's issues were due to numerous failed spinal surgeries.

Karnasiewicz performed a follow-up examination on June 25, 2015. He found no change and determined that the stenosis at C4-5 was stable. He believed that any additional surgery undertaken to address the claimant's pain was "doomed to fail." Respondents' Exhibit 1, p. 11. There were no new signs of nerve or spinal cord compression. The claimant's pain was not the result of disc bulges or osteophytes but, rather, was the result of the old surgeries. In his report of June 25, 2015, Karnasiewicz opined that the claimant, who did not show signs of either radioculopathy or myelopathy, had a sedentary work capacity. See Respondents' Exhibit 1, Deposition Exhibit 1.

Based on these factual findings, the commissioner concluded that the "claimant's credibility was severely compromised," noting that he engaged in an active social and recreational life despite claiming that he received only limited relief from pain medications, had "no life," and experienced a limited range of motion. Conclusion, ¶ A. Among the factors relevant to a determination of total disability cited by the commissioner were the claimant's extensive travel itinerary and the inconsistent narratives of his medical treatment and physical activity he provided to the expert witnesses in the case.[6]

[6] In Conclusion, ¶ B, Commissioner Truglia recited credibility determinations reached by Commissioner Charles F. Senich in a 2009 formal hearing. However, given that sufficient probative evidence supports the trial commissioner's overall conclusion, we deem this harmless error. See Peters v. Corporate Air, Inc., 14 Conn. Workers' Comp. Rev. Op. 91, 1679 CRB-5-93-3 (May 19, 1995).

The commissioner identified deficiencies in Sabella's vocational evaluation which caused her to not credit its findings: to wit, the lack of a labor market survey, deviation from standardized test protocols, and a narrative from the claimant which she deemed inaccurate. She determined that Skillin's vocational evaluation, which concluded that the claimant had a work capacity and was employable, was more credible and persuasive. The commissioner also found Karnasiewicz' medical opinion more credible and persuasive than those of the claimant's treating physicians relative to the claimant's current work capacity. She found credible the medical, vocational and photographic evidence demonstrating that the claimant has a light-duty work capacity. In addition, she found no evidence that the claimant was seeking employment. As a result, she determined that the claimant was not entitled to temporary total disability benefits under either the Osterlund doctrine or any other provision of Chapter 568, and explained her rationale in Conclusion, ¶ H.[7] She also concluded that the additional surgery proposed by Mastroianni was not warranted.

Before proceeding to the merits of the claimant's appeal, it is necessary to review the legal appropriateness of the commissioner's ruling on the claimant's motion to correct and the claimant's amended motion to correct. Because of the unusual procedural circumstances surrounding the claimant-appellant's attempt to correct the commissioner's findings, we review the various filings and responses in somewhat greater depth than we might ordinarily accord such an issue on review.

[7] In Conclusion, ¶ H, the commissioner stated the following: "By refusing to look for employment 'reasonably within his capacity to perform,' the claimant has not exercised the requisite 'reasonable diligence' to obtain employment, nor has he put himself in the position of being able to prove that with the exercise of 'reasonable diligence,' he is still not able to find an employer who will employ him because of his work-related injury. Accordingly, the claimant cannot meet the Osterlund standard. Osterlund v. State, 135 Conn. 498, 506 (1949)."

According to our records, the claimant filed an extension of time to file a motion to correct on August 8, 2017. The motion sought to extend the time for filing the motion to correct until August 16, 2017. In examining the claimant's motion for extension of time to file a motion to correct, we note that the claimant sought an extension "to August 16, 2017 in order to formulate and complete its motion to correct the Commissioner's Finding and Dismissal which was rendered on July 28, 2017." Claimant's Motion for Extension of Time filed August 8, 2017. Thus, the commissioner granted the claimant up to August 16, 2017, to complete the motion to correct.

The claimant filed a motion to correct on August 11, 2017. In her August 14, 2017 "Ruling on Claimant's Motion to Correct of August 11, 2017" the commissioner stated:

> The claimant's Motion to Correct of August 11, 2017 is substantially argumentative and simply attempts to reargue the case at hand by setting forth the claimant's self-serving opinions in his favor. Further, the motion fails to cite to any specific pages in the testimony or to set forth any relevant portions of the documentary evidence to support any assertions that the trial commissioner's opinions were either incorrect or unsupportable, as required under the provisions of Conn. Workers' Comp. Reg. Sec. 31-301-4.

The commissioner then ordered "[t]hat the claimant's Motion to Correct of August 11, 2017 be, and hereby is, **DENIED** in its entirety." (Emphasis in the original.) On August 16, 2017, the claimant filed a "Claimant's Amended Motion To Correct." On August 17, 2017, the commissioner denied the amended motion to correct, noting that the motion was "[d]enied for untimeliness; no leave granted to file second Motion to Correct."

We are not persuaded that the commissioner's rulings denying the motion to correct or the amended motion to correct constitute legal error. The motion to correct

dated August 10, 2017, and filed August 11, 2017, to which the commissioner's initial ruling applies, sought fifty corrections to the July 28, 2017 Finding and Dismissal. Clearly, the original motion to correct filed on August 11, 2017, is as described in the commissioner's August 14, 2017 ruling, i.e., without references to any specific portions of the evidence supporting the requested corrections. It is not the obligation of the trial commissioner to "cull" the record and find support for the corrections sought. Platt v. UTC/Pratt & Whitney Aircraft Div., 3 Conn. Workers' Comp. Rev. Op. 3, 10, 164 CRD-6-82 (August 16, 1985); see also Sorrentino v. Cersosimo, 103 Conn. 426, 429 (1925); Hatcher v. State of Connecticut/UConn Health Center, 5903 CRB-1-13-12 (January 22, 2015); R. Carter et. al., 19A Connecticut Practice Series: Workers' Compensation Law (2008) § 22:6, pp. 9-10.

With regard to the claimant's amended motion to correct, our review indicates that none of the proposed corrections request the specific deletion of a paragraph and/or a substitution consistent with the proposed correction. Therefore, anyone reviewing the proposed correction is left to speculate whether the claimant's correction is in addition to the commissioner's finding or represents an entire substitution. In addition, the commissioner cited, to a meticulous degree, the exact location in the evidentiary record where support for the factual findings could be found. We also note that some of the proposed corrections do not appear to correlate to the commissioner's findings. For example, the claimant's request to correct Findings, ¶ 13, states in part that "[t]he claimant did not testify that he drives to New Jersey on a daily basis." Nowhere in Findings, ¶ 13, did the commissioner indicate that the claimant testified that he drives to New Jersey on a daily basis.

The remainder of the proposed corrections relate to matters that are undisputed, not admitted, or, even if granted, would not compel a different outcome. As such, the proposed corrections provide no basis for overturning the commissioner's findings but, rather, represent the claimant's preference as to how the trier should have assessed the evidence.

There is no doubt that another commissioner might have exercised his or her discretionary powers and ruled differently. However, the ruling by the commissioner on the motion before us was a proper exercise of the commissioner's authority. On review, although we accord "every reasonable presumption in favor of the [trier's] action," Burton v. Mottolese, 267 Conn. 1, 54 (2003), we will consider whether the commissioner's action constitutes an abuse of discretion. "An abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors." In re Shaquanna M., 61 Conn. App. 592, 603 (2001). We find no abuse of discretion.

Moreover, even if this board were to consider the individual legal appropriateness of the corrections sought in the amended motion to correct, we would not disturb the factual findings and conclusions of the commissioner. As our Appellate Court stated in Testone v. C. R. Gibson Co., 114 Conn. App. 210, *cert. denied*, 292 Conn. 914 (2009):

> In concluding that the board properly declined to order the commissioner to correct her findings, this court, in D'Amico v. Dept. of Correction, 73 Conn. App. 718, 812 A.2d 17 (2002), *cert. denied*, 262 Conn. 933, 815 A.2d 132 (2003), noted: "We will not change the finding of the commissioner unless the record discloses that the finding includes facts found without evidence or fails to include material facts which are admitted or undisputed…. It [is] the commissioner's function to find the facts and determine the credibility of witnesses … and a fact is not admitted or undisputed merely because it is uncontradicted…. A material fact is one that

> will affect the outcome of the case." (Citation omitted; internal quotation marks omitted.) Id., 727-28. Thus, a motion to correct is properly denied when the additional findings sought by the movant would not change the outcome of the case. See Brinson v. Finlay Bros. Printing Co., No. 4307 CRB-1-00-10 (November 1, 2001), aff'd, 77 Conn. App. 319, 823 A.2d 1223 (2003); Fusco v. J. C. Penney Co., No. 1952 CRB-4-94-1 (March 20, 1997).

Id., 221-222.

We believe that a completed motion to correct is one that comports with the format prescribed by Administrative Regulation § 31-301-4 and pertinent case law. We are not persuaded, and nor should the claimant have interpreted, that the granting of an extension of time represented the opportunity to submit a first draft of a motion to correct for the commissioner's consideration and then, upon learning of the motion's procedural deficiencies, to file a more refined motion to correct for the commissioner's review. Having concluded that the commissioner was not obligated to grant the proposed corrections, we now turn to the merits of this appeal.

The standard of deference we are obliged to apply to a 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, supra, *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 essence of the claimant's appellate argument is that his evidence in support of temporary total disability was so compelling that, pursuant to our Appellate Court's analysis in Bode v. Connecticut Mason Contractors, The Learning Corridor, 130 Conn. App. 672, *cert. denied*, 302 Conn. 942 (2011), the instant commissioner acted unreasonably in denying this relief. We note that a number of other claimants have raised this argument on appeal before this board and we have not found it persuasive. For example, in Ferrua v. Napoli Foods, Inc., 6137 CRB-5-16-9 (July 27, 2017), *aff'd*, 185 Conn. App. 904 (October 9, 2018) (per curiam), the claimant adopted a similar argument. In that case (which, coincidentally, involved the same vocational experts), we rejected the contention that Bode compelled a finding of total incapacity, stating:

> In Bode, there was no testimony inconsistent with the claimant's documentary evidence and therefore no evidence in the record that justified nonreliance on his doctors' opinions. In contrast, in the case at bar, both sides presented evidence. Moreover, the trial commissioner fully considered the opinions of both Dr. Mushaweh and Mr. Sabella and cited their opinions at some length. He specifically found Mr. Sabella's opinion not credible. He was permitted to do so because he found the claimant's testimony was not credible and found the testimony of the respondents' expert witness, Ms. Skillin, credible and persuasive. Therefore, although there "must be some basis in the record to support the [trier of fact's] conclusion that the evidence of the [expert witness] is unworthy of belief," such evidence appears as of record herein. (Internal quotation marks omitted.)

Id.

In the present matter, as was the case in Ferrua, the opinions of the claimant's treating physician and his vocational expert were challenged by expert witnesses retained

by the respondents. Unlike the factual circumstances in Bode, in which the trial commissioner failed to credit the claimant's uncontroverted vocational report, in the case at bar, Sabella's report was challenged by an alternative vocational report presented by the respondents. The commissioner offered an extensive review of what she perceived to be the deficiencies in Sabella's report on behalf of the claimant.

Although the claimant argues that the commissioner may have misinterpreted certain specifics in that report and reached an inaccurate conclusion regarding the claimant's presentation to Sabella, we must respect the unequivocal opinion of the commissioner reflecting that she deemed Skillin's report and methodology far more persuasive. Skillin concluded that the claimant had a work capacity and offered a detailed explanation of jobs in the marketplace she believed the claimant could perform. 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), *appeal withdrawn*, A.C. 27853 (September 12, 2006). In the matter at bar, the commissioner accepted Skillin's opinion, which opinion was not consistent with an award of benefits pursuant to our Supreme Court's reasoning in Osterlund.

Our conclusion herein is consistent with this board's holding in Pereira v. State/Department of Developmental Services, 6204 CRB-3-17-6 (August 1, 2018), in which the parties disputed whether the claimant qualified for temporary total disability benefits under the Osterlund doctrine. In Pereira, the claimant presented an opinion from Sabella indicating that she lacked a work capacity, and the trial commissioner in that case found Sabella's opinion more credible and persuasive than the opinion provided by the respondents' expert. We cited Dellacamera, supra, for the proposition that a trial

commissioner is permitted to rely on expert testimony he or she finds more persuasive. Although the respondents in Pereira pointed to a number of cases in which the claimant's evidence was found inadequate, we noted that "[i]n 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." [8] Id.

In addition, in Jodlowski v. Stanley Works, 169 Conn. App. 103, (2016), our Appellate Court affirmed the prerogative of a trial commissioner to determine which evidence he or she deems probative and persuasive relative to the issues presented at the hearing. "The [commissioner] alone is charged with the duty of initially selecting the inference [that] seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court." Id., 108-109. The claimant also takes issue with elements of Karnasiewicz' report, arguing that the doctor's diagnosis of spinal stenosis, coupled with the claimant's ongoing pain management treatment for chronic pain, was inconsistent with Karnasiewicz' opinion that the claimant had a work capacity. It is of course axiomatic that "[i]t is the trial commissioner's function to assess the weight and credibility of medical reports and testimony." Gillis v. White Oak Corp., 49 Conn. App. 630, 637, *cert. denied*., 247 Conn 919 (1998). In light of the "holistic approach" adopted by our Appellate Court in O'Connor v. Med-Center Home Health Care, Inc., 140 Conn. App. 542, 554-555, *cert. denied*, 308 Conn. 942 (2013), regarding the assessment of total disability, we do not find erroneous the commissioner's conclusion that Karnasiewicz

[8] We also note that in Pereira v. State/Department of Developmental Services, 6204 CRB-3-17-6 (August 1, 2018), the trial commissioner found the claimant's testimony "mostly credible and persuasive" while in the present matter, the trial commissioner found "the claimant's credibility was severely compromised." Conclusion, ¶ A. When a witness offers live testimony, the fact-finder's assessment of the credibility of the witness is generally impervious to appellate review. See Baron v. Genlyte Thomas Group, LLC, 132 Conn. App. 794, 804, *cert. denied*, 303 Conn. 939 (2012), *citing* Samaoya v. Gallagher, 102 Conn. App. 670, 673-74 (2007).

offered a reliable opinion on the issue of work capacity.[9] In spite of the arguments presented by the claimant, the commissioner was not obligated to find the opinions of Mastroianni or Sood more reliable or persuasive. See O'Reilly, supra; Zezima v. Stamford, 5918 CRB-7-14-3 (May 12, 2015); Dellacamera, supra.

The claimant also argues that he did not meet the "tenets of employability" standard delineated by this board in Howard v. CVS Pharmacy, Inc., 5063 CRB-2-06-3 (April 4, 2007), *appeal withdrawn*, A.C. 28732 (March 6, 2008). However, the commissioner noted that the claimant appeared to engage in an active social life, including numerous trips out of state and overseas. See Conclusion, ¶¶ A.1.-A.5. The commissioner could have reasonably relied upon this evidence in choosing to credit expert opinion suggesting that the claimant had the ability to obtain remunerative employment. See Anderson v. Target Capital Partners, 5615 CRB-6-10-12 (January 3, 2012); Smith v. Waterbury, 5326 CRB-5-08-3 (February 4, 2009).

The commissioner's decision in this matter was supported by a substantial quantum of probative evidence. In accordance with our Supreme Court's analysis in Fair, supra, we, as an appellate panel, must therefore affirm the finding.

There is no error; the July 28, 2017 Finding and Dismissal of Michelle D. Truglia, the Commissioner acting for the Fourth District, is accordingly affirmed.

Commissioners Jodi Murray Gregg and David W. Schoolcraft concur in this opinion.

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[9] Although the claimant did not raise the issue of additional surgery at oral argument before this tribunal, he did seek corrections on this issue and raised the issue in his reasons for appeal. We note that the commissioner found Karnasiewicz credible and persuasive, and Karnasiewicz opined against further surgery. The commissioner was permitted to rely on this opinion. See Dellacamera v. Waterbury, 4966 CRB-5-05-6 (June 29, 2006), *appeal withdrawn*, A.C. 27853 (September 12, 2006). In any event, a trial commissioner is the ultimate judge of a claimant's need for additional medical treatment. See Cervero v. Mory's Association, Inc., 5357 CRB-3-08-6 (May 19, 2009), *aff'd*, 122 Conn. App. 82, *cert. denied*, 298 Conn. 908 (2010).