CASE NO. 6256 CRB-5-18-3 CLAIM NO. 500002667	: COMPENSATION REVIEW BOARD
ANTHONY J. MAURIELLO CLAIMANT-APPELLANT	: WORKERS' COMPENSATION COMMISSION
v.	: MARCH 22, 2019
CRAFTSMEN LITHO EMPLOYER	
and	
SENTRY INSURANCE COMPANY INSURER RESPONDENTS-APPELLEES	

APPEARANCES:

The claimant was represented by Ross T. Lessack, Esq., The Dodd Law Firm, L.L.C., Ten Corporate Center, 1781 Highland Avenue, Suite 105, Cheshire, CT 06410.

The respondents were represented by Brian E. Prindle, Esq., Law Office of Brian E. Prindle, P.O. Box 1208, Manchester, CT 06045.

This Petition for Review from the March 9, 2018 Finding and Dismissal of Christine L. Engel, Commissioner acting for the Fifth District, was heard September 28, 2018 before a Compensation Review Board panel consisting of the Commission Chairman Stephen M. Morelli and Commissioners Jodi Murray Gregg and David W. Schoolcraft.

OPINION

STEPHEN M. MORELLI, CHAIRMAN. The claimant has petitioned for review from the March 9, 2018 Finding and Dismissal (finding) of Commissioner Christine L. Engel (commissioner) acting for the Fifth District. In the proceedings before the commissioner, the claimant sought benefits for a left hip injury. It is the claimant's contention that his left hip injury was causally related to his accepted back injury.

The following pertinent facts are relevant to our inquiry. On November 10, 1986, the claimant suffered a back injury that arose out of and in the course of his employment. Following that injury, the claimant underwent three back surgeries between 1986 and 2005 performed by Michael E. Karnasiewicz, M.D. The spinal surgery performed in 2005 was a spinal fusion. In January 2005, the claimant complained of left-sided pain in the buttock and groin area.[1] In March 2007, Karnasiewicz assessed the claimant as having a 35 percent permanent partial disability of the lumbar spine.

The claimant continued to treat with Karnasiewicz for his back. On August 21, 2006, the claimant underwent an MRI of his hips. "The radiologists' impression was 'within normal limits.'" Findings, ¶ 7, *quoting* Claimant's Exhibit A. See also Claimant's Exhibit F. The claimant also consulted with William F. Flynn, Jr., M.D., regarding his left hip pain. In a March 6, 2008 MRI of the claimant's left hip ordered by Flynn, "[m]oderate degenerative changes of both hips" were noted. Findings, ¶ 12, *quoting* Claimant's Exhibit F.

[1] In Findings, ¶ 4, the commissioner states, "[O]n January 12, 2005, Dr. Karnasiewicz noted the claimant had right buttock and groin pain for which he was referred to Dr. Bavesh Patel. (Claimant's Exhibit A)." Our review of this exhibit indicates that the finding should have reflected pain in the left buttock and groin region. Claimant's Exhibit A, which is a compendium of Karnasiewicz' reports, includes a note dated January 12, 2005, from Lara B. Kosky, PA-C, indicating that the claimant presented with right buttock and groin pain. However, in a note attributed to Karnasiewicz dated May 16, 2006, Karnasiewicz corrected the reference to right groin pain and explained that Kosky's note should have referenced left groin pain.

On August 2, 2016, Flynn opined that the claimant was in need of a total left hip replacement. It was also Flynn's opinion that the claimant's "lumbar spine condition and subsequent fusion is absolutely a substantial contributing factor leading to the need for a left hip replacement in this patient." Findings, ¶ 15, *quoting* Claimant's Exhibit C.

The ultimate issue presented for review is whether the commissioner erred in failing to find that the claimant's need for a total replacement of his left hip was compensable; i.e., that his accepted 1986 work-related injury to his lumbar spine was a substantial factor in his need for left hip surgery. It is well-settled that whether a prior compensable injury is a substantial factor in a subsequent injury is a question of fact to be determined by the trial commissioner. It is a conclusion that flows from the trier's factual findings. See Marandino v. Prometheus Pharmacy, 294 Conn. 564 (2010).

Appellate scrutiny of a trier's factual determinations requires that we accord great deference to such factual findings and conclusions. They will not be disturbed unless without evidence, contrary to law or based on unreasonable or impermissible factual inferences. See Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Moreover, this body does not engage in de novo review. The weight and credibility assigned to the evidence presented before the trial commissioner will not be disturbed unless it results from an abuse of discretion. See Goulbourne v. State/Department of Correction, 5955 CRB-1-14-8 (July 29, 2015).

For the foregoing reasons, we are very reluctant to overturn a trier's factually dependent conclusion regarding the compensability of an injury. See Hart v. Federal Express Corp., 321 Conn. 1 (2016). The issue before the commissioner was whether the accepted 1986 back injury was the proximate cause of the claimant's need for a hip

replacement. As one might expect, the expert medical opinions offered were not in agreement. Karnesiewicz and Flynn were of the opinion that there was a causal relationship between the claimant's lumbar spine injury and the proposed hip replacement.

The respondents' medical examiner, John M. Keggi, M.D., opined that the 2005 lumbar spine fusion was not a substantial factor in the degeneration of the claimant's hip. Findings, ¶ 40; *citing* Respondents' Exhibit 2, pp. 15-16. John D. McCallum, M.D., was the commissioner's medical examiner, and the trier interpreted McCallum's opinion and testimony as unsupportive of the claim that the 2005 back surgery was a substantial factor in the need for a hip replacement. See Conclusion, ¶¶ G, H.

On appeal, the claimant argues that it was an abuse of discretion by the commissioner to interpret McCallum's report as she did. The claimant contends that the trier "simply ignored the whole of Dr. McCallum's testimony." Appellant's Brief, p. 14. The claimant contends that the commissioner erred in stating, inter alia: "The claimant's attorney's citation to Birnie v. Electric Boat Corp. [288 Conn. 392 (2008)] and a suggestion that a factor which is more than de minimis, as explained to Dr. McCallum during his deposition, is a substantial factor is contrary to Voronuk v. Electric Boat Corp., [118 Conn. App. 248 (2009)] and Sapko v. State … [305 Conn. 360 (2012)]." Conclusion, ¶ I.

The claimant essentially asks that we accept his assertion that McCallum's opinion and testimony can only be reasonably viewed as supporting a conclusion that the legal standard of proximate cause was met and therefore the left hip condition is compensable. Furthermore, once we have accepted his view of this evidence, the

claimant argues that we must find that the trier erred in failing to articulate her basis for not relying on the opinion of McCallum, the commissioner's examiner. We are not persuaded by the claimant's argument.

The claimant contends that it was an abuse of discretion for the trier to interpret McCallum's opinion in the manner that she did; however, this claim of error is without merit. In Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999), our Appellate Court stated that, "[t]he trier may accept or reject, in whole or in part, the testimony of an expert." Id., *citing* Smith v. Smith, 183 Conn. 121, 123 (1981). Additionally, the Tartaglino court noted that it was within a commissioner's discretion to disregard the conclusion of a commissioner's examiner when the record contains other medical opinions which are supportive of a different conclusion. See Tartaglino, supra, 195-196, *citing* Gillis v. White Oak Corp., 49 Conn. App. 630, 638, *cert. denied*, 247 Conn. 919 (1998).

As our Appellate Court stated in Biasetti v. Stamford, 123 Conn. App. 372, *cert. denied,* 298 Conn. 929 (2010):

> It is … immaterial that the facts permit the drawing of diverse inferences. The [commissioner] alone is charged with the duty of initially selecting the inference which seems most reasonable, and [the commissioner's choice], if otherwise sustainable, may not be disturbed by a reviewing court. (Internal quotation marks omitted).

Id., 382, *quoting* Six v. Thomas O'Connor & Co., 235 Conn. 790, 799 (1996).

In addition, the commissioner referenced an exchange between claimant's counsel and McCallum in which they discussed the legal standard for determining proximate cause of an injury. It is axiomatic that the proximate cause standard requires a determination of whether an incident that arose out of and in the course of employment

was a "substantial factor" in the claimed injury. The meaning of the term "substantial factor" was thought to be a matter of settled law until our Supreme Court issued its opinion in Birnie, supra.

In Birnie, the court reviewed the concept of proximate causation and held that "[i]n accordance with our case law, therefore, the substantial factor causation standard simply requires that the employment, or the risks incidental thereto, contribute to the development of the injury in *more than a de minimis way*." (Emphasis in the original.) Id., 412-13 (footnote omitted). Subsequent to its decision in Birnie, our Supreme Court, in Sapko v. State, 305 Conn. 360 (2012), reviewed the legal landscape regarding proximate causation and the appellant's contention that the court had diminished the standard for proximate cause in Birnie. The Sapko court held that the proximate cause standard both pre-Birnie and post-Birnie was the same.

> [I]n reaching our conclusion in Birnie, we undertook an in-depth examination of the contributing and substantial factor standards to facilitate a comparison of the two tests. It was in this context that we observed that the substantial factor test requires that the employment contribute to the injury "in more than a de minimis way." Id., 413. The "more than … de minimis" language is preceded, however, by statements explaining that "the substantial factor standard is met if the employment *materially or essentially contributes* to bring about an injury"; (emphasis in original) id., 412; which, by contrast, "does *not* connote that the employment must be the *major* contributing factor in bringing about the injury … nor that the employment must be the *sole* contributing factor in development of an injury." (Citation omitted; emphasis in original.) Id. Thus, it is evident that we did not intend to lower the threshold beyond that which previously had existed.

Id., 391.

The Sapko court continued:

> On the contrary, as the Appellate Court has explained: "The procedural posture that provided the context in which the court in

> Birnie addressed the substantial factor test, as well as the context in which the [relevant] quoted language … appears, underscores [the Appellate Court's] conclusion…. [I]n Birnie, when [the court] set out the history and parameters of the substantial factor test, it was confronted with determining whether the substantial factor test was more or less rigorous than the test applied by federal administrative law judges in adjudications involving the federal law. *As a result, it is clear that the court's aim was not to clarify - much less alter - the substantial factor test but to explicate it in such a way as to facilitate a fair comparison with the federal test in question. The substantial factor test remains as it was prior to Birnie…."* (Emphasis added.)

Id., 391-92, *quoting* Voronuk v. Electric Boat Corp., 118 Conn. App. 248, 255 (2009).

Assuming, arguendo and, in our opinion, quite charitably, that McCallum's testimony can be construed as supportive of diverse inferences, it is the province of the trial commissioner to determine the inference which is most reasonable. Gillis, supra. Here, any inference drawn from McCallum's testimony which the claimant contends is supportive of his position is undermined by the claimant's description of the proximate cause standard as "de minimis."[2] We therefore conclude that the trier's finding and conclusion does not demonstrate an abuse of discretion.

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[2] From Joint Exhibit 1 [December 17, 2015 deposition of John D. McCallum, M.D.], pp. 10-11, 12.
BY ATTORNEY LESSACK:
Q. Okay. So Dr. Flynn does give the opinion, and Dr. Karnasiewicz as his neurosurgeon, that there is a relationship between the hip condition and the back condition. And you disagree with that?
A. Well, I think that the back imparts a greater stress on the hip. Is it sufficient to meet the criteria? And I guess what you have to summarize to me is what percent of the ultimate end point of this hip has to be a result of the back's contribution.

So I'm not dismissing the back as a contributor to his ultimate need for a hip because, in fact, if you can't move your back and your hip is a problem, there is no ability to compensate for limited function. So, to my point, I need to know where you view that threshold for what is materially and substantially worsened.
Q. Well, you probably know, you've been asked I'm sure many times about substantial contribution?
A. Right.
Q. Substantial contribution can be less than 50 percent. There can be many factors that substantially contribute to a condition. In this case, it could be the back, it could be or I guess it is the underlying osteoarthritis. It could be activity, it could be other things that substantially contribute. So the percentage is less than 50 percent.

It's your opinion as to whether it's more than what's called de minimis, or it materially contributes to the need for the hip replacement, or it accelerates the condition to such an extent that the back condition materially contributed to that acceleration.

Additionally, the commissioner's conclusion is supported by Keggi's opinions and testimony. Thus, if one were to subscribe to the generous view that McCallum's testimony supports the claimant's view, the misapplication of the court's analysis in Birnie to the claimant's description of the proximate cause standard certainly provides sufficient justification for why the commissioner did not rely on McCallum's testimony and adopt the inference urged by the claimant.

Finally, the claimant contends that it was error for the commissioner to deny his motion to correct. The corrections sought by the claimant are merely an expression of his preferred view of the facts. Fact-finding is within the purview of the commissioner and, as previously stated herein, factual findings will not be disturbed unless error is shown. In the present matter, the claimant has not demonstrated error on the part of the commissioner. See D'Amico v. Dept. of Correction, 73 Conn. App. 718, 727-728 (2002), *cert. denied*, 262 Conn. 933 (2003).

The March 9, 2018 Finding and Dismissal of Christine L. Engel, the Commissioner acting for the Fifth District, is accordingly affirmed.

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

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Q. You did ask what percentage, and there is no magic percentage. It's whether it's more than de minimis, a material contribution. That's basically what the legal definition of "substantial" is.