CASE NO. 6282 CRB-7-18-7 : COMPENSATION REVIEW BOARD
CLAIM NO. 700173778

ERIC HYDE : WORKERS' COMPENSATION
CLAIMANT-APPELLANT COMMISSION

v. : JULY 10, 2019

BRANSON ULTRASONICS
CORPORATION
EMPLOYER

and

HELMSMAN MANAGEMENT SERVICES, INC./
LIBERTY MUTUAL INSURANCE COMPANY
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Jennifer H. Collins, Esq., Cramer & Anderson, L.L.P., 30 Main Street, Suite 204, Danbury, CT 06810.

The respondents were represented by Scott Wilson Williams, Esq., Williams Law Firm, L.L.C., 2 Enterprise Drive, Suite 412, Shelton, CT 06484.

This Petition for Review from the June 25, 2018 Finding and Dismissal of Michelle D. Truglia, the Commissioner acting for the Seventh District, was heard January 25, 2019 before a Compensation Review Board panel consisting of Commission Chairman Stephen M. Morelli and Commissioners Peter C. Mlynarczyk and David W. Schoolcraft.

OPINION

STEPHEN M. MORELLI, CHAIRMAN. The claimant has appealed from a Finding and Dismissal (finding) in which the commissioner rejected his claim that his shoulder injuries were caused by his employment as a machine operator. The claimant argues that the commissioner relied on witnesses whose testimony was too inconsistent to have been persuasive. We note that the claimant has the burden of persuasion in proceedings before the Workers' Compensation Commission. See Jones v. Connecticut Children's Medical Center Faculty Practice Plan, 131 Conn. App. 415 (2011); Lentini v. Connecticut College, 4933 CRB-2-05-4 (May 15, 2006). Having reviewed the record, we are satisfied that the commissioner could have reasonably determined that the claimant failed to meet his burden of persuasion. We therefore affirm the finding.

The following factual findings are relevant to our consideration of this appeal. The issues for determination were whether the claimant sustained a compensable left shoulder injury during the eight-year period of employment between 2007 and April 6, 2015, and whether he was entitled to temporary total disability benefits subsequent to that event. The claimant has been employed by the respondent employer as a toolmaker since 2008 and worked primarily on two different vertical mill machines, both of which were known as the "Bridgeport" (machine). The claimant was able to either sit or stand at the machine depending upon the length of the program for his project. The commissioner elaborated on the mechanism of this machine in her finding.

> 8. The claimant creates metal objects by bolting metal down onto the bed of his Bridgeport machine or by inserting the metal into a vice. He has inserted metal that has been smaller than a penny and has also made horns out of 100 pounds of titanium (14" x 14"). He may also have to file a piece of metal to ensure that it's flat before

> adding a cutter to the machine. He then programs the machine using the "low" computer on the side of the machine. While looking at the applicable blueprint he may have to raise or lower his machine with the "knee handle" depending upon the tool size and how deep he needs to cut.
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> 9. The claimant testified that he operates the "knee handle" with his left arm and shoulder. He states that you could switch out and use your right arm and shoulder if you are uncomfortable, but it was designed to be used with a left arm and shoulder. He states that in order to move the cutting device 1 inch, he would have to crank the "knee handle" 10 times. According to the claimant, he's cranking up and down with the "knee handle" approximately 1500 pounds of machine and there is no hydraulic aspect to the crank. The claimant testified that it's all mechanical and that the machine is geared down so "you have to do a full crank to move it 100/1000th of an inch. So 10 cranks would be 1 inch." The claimant testified that if you move the cutter one-half inch the effort involved is not that bad, however, if you do that every day moving up and down 4 to 5 inches, that becomes more difficult. It is the claimant's testimony that you really have to put your whole body, including your shoulder, into cranking the Bridgeport.

Findings, ¶¶ 8-9, *citing* April 10, 2017 Transcript, pp. 54-61.

The claimant stated that he had been working on this machine for about eight years prior to seeking compensation benefits for a claimed April 6, 2015 date of injury. He stated that a "power knee assist" was added to the machine at some point during December 2015, after he had been injured. Findings, ¶ 12, *quoting* April 10, 2017 Transcript, p. 68. The claimant verified that he has to "put [his] whole body into it" when he cranks the machine. July 20, 2017 Transcript, p. 7. The claimant further testified that although he had previously filed workers' compensation claims for other body parts, he had never sustained an injury to his left shoulder. The claimant also testified regarding his recreational use of firearms, but stated that this activity did not involve his left arm or shoulder. However, he did indicate that he had performed some overhead work with his left arm.

The claimant initially treated with Western Connecticut Health Network Corporate Health Care, and then started treating with Daniel N. Fish, M.D. Fish eventually performed a left shoulder diagnostic surgical arthroscopy with subacromial decompression and posterior labral debridement on October 20, 2016. The claimant returned to work on December 6, 2016, with a fifty-pound lifting restriction.

The claimant also offered testimony regarding the manner in which he operated the machine. At the April 10, 2017 formal hearing, he indicated that he did not know how much time he spent using the knee crank. See Transcript, p. 97. At a deposition held on September 3, 2015, the claimant testified that the reason he injured his shoulder was "one hundred percent" due to repetitive motion on the machine while using the knee crank. Respondents' Exhibit 2, p. 98. He also testified at deposition that while using the machine, he would spend more than 50 percent of his time operating the knee crank. Id., 100.

Several other witnesses provided testimony at trial. David Osterman, the director of EHS for the respondent employer, indicated that he came to know the claimant while they were working together on a safety committee at the employer's place of business. Osterman testified that after the claimant filed his claim for a shoulder injury, Osterman went to observe how the machine is used and then prepared a document describing how the machine operates. Osterman testified that he received input from the claimant as well as two other employees, Dave Walker and Tom Mann, in preparing this document. In Osterman's opinion, the claimant used the machine 2 to 3 percent of the time, which translated into approximately six minutes over the course of three or four hours.

In January 2016, the employer installed a monitoring device on the Bridgeport, the purpose of which was to measure the frequency of use of the power knee and to assist Osterman in the preparation of his official report. After reviewing the monitor results and consulting with the claimant's co-workers, Osterman concluded that his original assessment of 2 to 3 percent was more accurate than the 50 percent figure attested to by the claimant. Between January 7, 2016, and August 25, 2016, the monitoring device on the claimant's machine indicated that it was used for only 2.6 hours. The commissioner found that:

> The monitoring figures for the month of February, 2016, revealed that the claimant used the knee crank only 0.8% of his total work time. Similarly, in August, he used it only 0.75%. The data that Mr. Osterman gathered would suggest that the claimant operated the handcrank for less than 1% of his time rather than 50% of his time.

Findings, ¶ 19, *citing* July 20, 2017 Transcript, pp. 27-29.

Under cross-examination, Osterman admitted that only one of the two machines operated by the claimant was monitored, and the claimant's activity prior to January 2016 was not monitored. In addition, Osterman testified he did not review the work activities engaged in by the claimant between January and August 2016, when the monitor was placed on the claimant's primary machine.

The commissioner also considered the opinions of two medical witnesses. In support of the claim, the claimant offered the medical opinion propounded by Fish. The commissioner noted that the initial report submitted to the employer following the claimant's May 5, 2015 examination indicated that the claimant's injury was not work-related; rather, that report diagnosed rotator cuff tendonitis. See Respondents' Exhibit 4.

At a deposition held on March 3, 2016, Fish testified that the claimant had presented on May 5, 2015, complaining of left shoulder pain of approximately one month's duration. An X-ray taken at that time was normal, and the claimant received a Depo-Medrol shot in his left arm. The claimant was again examined in May and June of 2015; in June, Fish administered a second Depo-Medrol shot and the claimant underwent an MRI which was also normal. In July, the claimant was still experiencing discomfort, and Fish administered a third Depo-Medrol shot and recommended physical therapy. On August 24, 2015, the claimant described his pain level as "moderate to severe," and Fish prescribed an anti-inflammatory. Claimant's Exhibit G.

During the autumn of 2015, the claimant continued treating with Fish. On December 28, 2015, Fish diagnosed mild pain and continued the claimant on anti-inflammatory medications.[1] At his deposition, Fish testified that he had not viewed the knee crank on the machine, but if the claimant had used it 50 percent of the time, this would be sufficient to conclude that the claimant's use of the machine was a causal factor in the claimant's shoulder condition. He noted that the claimant had stated numerous times that he felt the crank on the machine was causing his shoulder to be more painful, but during the course of his treatment with Fish, the claimant never discussed how heavy it was or how often he used it.

As of the date of the deposition, Fish did not diagnose a permanent impairment of the claimant's shoulder or perceive the need for additional treatment apart from over-the-counter medications; however, later that same year, he did perform shoulder

[1] In Findings, ¶ 30.k., the commissioner referred to the December 28, 2015 office visit as a "final visit." Our review of the record indicates that Fish did offer this testimony at his deposition on March 3, 2016. However, the claimant returned to Fish on March 17, 2016, and subsequently underwent left shoulder surgery with Fish on October 20, 2016.

surgery on the claimant. On August 25, 2016, an MRI arthrogram of the left shoulder taken prior to the October 20, 2016 surgery revealed an "[a]bnormal appearance of the inferior portion of the posterior labrum of the left shoulder without detachment or acute tear but the appearance is suggestive of the possibility of prior tearing with subsequent granulation and/or fibrosis. Slight posterior, inferior bony glenoid deficiency. No rotator cuff abnormality." Claimant's Exhibit F.

Fish offered two opinion letters regarding the claimant's shoulder condition. The first, dated November 17, 2015, opined that the claimant's left shoulder injury was "directly and causally related to his repetitive duties while working at Branson Ultrasonics Corporation." Claimant's Exhibit J. The second letter, dated April 25, 2016, discussed repetitive trauma to the claimant's left shoulder due to his use of a left-sided crank. In this correspondence, Fish assigned a permanent partial disability rating to the claimant's shoulder of 4 percent. Claimant's Exhibit I.

The respondents presented an opinion letter dated January 4, 2017, from their medical expert, Thomas J. Danyliw, M.D. Danyliw, after visiting the worksite and reviewing the claimant's medical records and deposition testimony proffered by Fish, noted that the claimant's diagnosis was "left shoulder impingement." Respondents' Exhibit 11, p. 2. Danyliw further noted that both the claimant and his treating physician concurred that the shoulder had been aggravated by overhead use, which was consistent with this diagnosis. He stated that the use of the knee lift crank on the machine required virtually no overhead use, and the shoulder impingement was not caused by the claimant holding his arm at a level below shoulder height. He stated that he personally used the

knee lift crank on the machine and did not find the amount of force required to be excessive.

Danyliw also noted the discrepancy between the length of time the claimant reported using the machine and the duration documented by the employer, and opined that it "would not meet anyone's definition of repetitive." Findings, ¶ 40, *quoting* Respondents' Exhibit 11, p. 2. He further opined that "[t]he shoulder position while using firearms … is a risk factor for shoulder impingement." Id. Danyliw indicated that the claimant's use of the knee lift crank on the Bridgeport machine "was not a causative factor in [the claimant's] left shoulder impingement." Id.

Both the claimant and the respondent submitted CDs demonstrating the use of the machine; the claimant's CD demonstrated him using the machine himself.

Based on the foregoing factual record, the commissioner concluded that Fish was "not well-versed" regarding the claimant's activities on the machine, Conclusion, ¶ A, and some of his reports were inconsistent. Fish had diagnosed the claimant with impingement syndrome, which both he and Danyliw agreed is primarily caused by overhead work. However, Danyliw opined that the claimant's condition was not work-related because the use of the machine did not require the degree of repetitive overhead activity necessary to cause shoulder impingement.

The commissioner noted that the claimant's own testimony suggested that he performed "minimal" overhead work on the machine, and this factor was corroborated by the video evidence submitted to the record. Conclusion, ¶ E. The commissioner deemed the claimant's testimony inconsistent relative to his use of the machine, and found that "the claimant's body mechanics while using the machine were not conducive to

producing impingement syndrome." Conclusion, ¶ G. As a result, she concluded the claimant did not sustain a work-related left shoulder injury and dismissed his claim.

The claimant filed a motion to correct which identified alleged flaws in Osterman's testimony and sought proposed corrections relative to the claimant's contentions that the testimony offered by Fish should have been found credible and persuasive while the testimony offered by Danyliw should not have been deemed persuasive. The commissioner denied the motion, ruling that it was untimely pursuant to the provisions of Administrative Regulations § 31-301-4.[2] The claimant has pursued this appeal, and is essentially restating the arguments presented in his motion to correct.

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 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

[2] Administrative Regulations § 31-301-4 states: "If the appellant desires to have the finding of the commissioner corrected he must, within two weeks after such finding has been filed, unless the time is extended for cause by the commissioner, file with the commissioner his motion for the correction of the finding and with it such portions of the evidence as he deems relevant and material to the corrections asked for, certified by the stenographer who took it, but if the appellant claims that substantially all the evidence is relevant and material to the correction sought, he may file all of it so certified, indicating in his motion so far as possible the portion applicable to each correction sought. The commissioner shall forthwith, upon the filing of the motion and of the transcript of the evidence, give notice to the adverse party or parties."

with the evidence presented at the formal hearing." Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

It is also equally well-settled that "[i]n order to recover pursuant to [the Workers' Compensation Act], 'a [claimant] must prove that the claimed injury is connected causally to the employment by demonstrating that the injury (1) arose out of the employment and (2) occurred in the course of the employment.'" (Internal quotation marks omitted.) Jones v. Connecticut Children's Medical Center Faculty Practice Plan, 131 Conn. App. 415, 423 (2011), *quoting* McFarland v. Dept. of Developmental Services, 115 Conn. App. 306, 310, *cert. denied*, 293 Conn. 919, 979 (2009). In the present matter, the commissioner concluded that the claimant failed to satisfy this standard, and the role of this board is to ascertain whether such a conclusion was reasonable.

Our review of the claimant's appellate brief indicates that to a great extent, the claimant was primarily engaged in restating the same testimony offered at the formal hearing relative to the manner in which he operated the machine over a period of many years. The claimant further argues that the commissioner's failure to rely upon this testimony constituted error. The claimant characterizes the respondents' description of the claimant's use of the primary machine as "self serving," Appellant's Brief, p. 7, and contends that because Osterman was not a machinist, the commissioner should not have relied upon his testimony. With regard to the medical evidence, the claimant points out that Fish was familiar with his condition and performed surgery on his shoulder. The claimant contends that these circumstances should have compelled the commissioner to

accord greater weight to the opinion proffered by Fish rather than Danyliw, given that Danyliw never examined the claimant and was not an orthopedic surgeon.

The respondents contend that the claimant's arguments on appeal are essentially an attempt to have an appellate panel reweigh the evidence and usurp the fact-finding function of the commissioner. It is the respondents' position that the commissioner offered a cogent explanation as to why she found their evidence more persuasive than the claimant's and this board is obligated to respect this determination.

It appears that the commissioner believed that in order to conclude that the claimant's injury was caused by his employment, the evidence needed to demonstrate that the claimant engaged in extensive repetitive overhead activities. However, neither Osterman's testimony nor the various statistical reports submitted into evidence indicated that the claimant performed extensive overhead work. The commissioner retained the discretion to credit the statistical reports as well as Osterman's testimony, particularly in light of the fact that claimant's counsel was afforded the opportunity to cross-examine this witness. See July 20, 2017 Transcript, pp. 32-39, 48-49.

Moreover, it should be noted that when the issue of whether a claimant's job duties were sufficient to cause the injury in question has been contested, this board has deferred to the commissioner's evaluation of the factual evidence presented. In Madden v. Danbury Hospital, 5745 CRB-7-12-4 (April 22, 2013), we reiterated the standard articulated in Love v. William W. Backus Hospital, 5255 CRB-2-07-8 (June 24, 2008), stating that "[i]t is well settled that the responsibility rests with the trial commissioner to determine whether the facts admitted into a trial record establish causation."[3]

[3] The claimant also argues that the commissioner's decision to credit the testimony of Fish rather than Danyliw constituted error. We are not so persuaded; although a commissioner may credit the opinion of a

In any event, as previously discussed herein, the claimant bore the burden of persuasion in proving that his employment was the proximate cause of his injuries. See Sapko v. State, 305 Conn. 360, 372 (2012); DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132, 142 (2009); Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 454 (2001). Given that proximate causation "becomes a conclusion of law only when the mind of a fair and reasonable [person] could reach only one conclusion…," we may infer that the commissioner in the present matter simply found the claimant's evidence unpersuasive. Sapko, supra, 373. A commissioner is obligated to evaluate the medical evidence in its totality in order to determine its reliability, and in the matter at bar, the commissioner simply reached a determination adverse to the claimant. See Marandino v. Prometheus Pharmacy, 294 Conn. 564, 595 (2010); O'Reilly v. General Dynamics Corp., 52 Conn. App. 813, 818-19 (1999).[4]

There is no error; the June 25, 2018 Finding and Dismissal of Michelle D. Truglia, the Commissioner acting for the Seventh District, is accordingly affirmed.

Commissioners Peter C. Mlynarczyk and David W. Schoolcraft concur in this Opinion.

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claimant's surgeon over other medical witnesses, he or she is not obligated to do so. See Burns v. Southbury, 5608 CRB-5-10-11 (November 2, 2011). Moreover, "[t]he [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." (Internal quotation marks omitted.) Jodlowski v. Stanley Works, 169 Conn. App. 103, 108-9 (2016), *quoting* Estate of Haburey v. Winchester, 150 Conn. App. 699, 714, *cert. denied*, 312 Conn. 922 (2014). Although the claimant contends that Danyliw's opinion contained discrepancies, the resolution of any such discrepancies is reserved to the commissioner's discretion. See Williams v. Bantam Supply Co., Inc., 5132 CRB-5-06-9 (August 30, 2007); Goldberg v. Ames Department Stores, 4160 CRB-1-99-2 (December 19, 2000).

[4] The claimant also argues that it was error to deny his motion to correct. We find that the commissioner was legally empowered to deny this motion, given that a commissioner is not bound to accept the view of the case presented by a litigant. See D'Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003); Brockenberry v. Thomas Deegan d/b/a Tom's Scrap Metal, Inc., 5429 CRB-5-09-2 (January 22, 2010), *aff'd*, 126 Conn. App. 902 (2011) (per curiam); Liano v. Bridgeport, 4934 CRB-4-05-4 (April 13, 2006).