CASE NO. 6289 CRB-4-18-9 CLAIM NO. 400104570	:	COMPENSATION REVIEW BOARD
DONNA DEMATTIA CLAIMANT-APPELLANT	:	WORKERS' COMPENSATION COMMISSION
v.	:	AUGUST 27, 2019

DUNKIN DONUTS
EMPLOYER

and

SELECTIVE INSURANCE COMPANY OF AMERICA
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

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

The respondents were represented by Gregory F. Lisowski, Esq., Pomeranz, Drayton & Stabnick, L.L.C., 95 Glastonbury Boulevard, Suite 216, Glastonbury, CT 06033-4412.

This Petition for Review from the August 13, 2018 Finding & Dismissal by Randy L. Cohen, the Commissioner acting for the Fourth District, was heard March 29, 2019 before a Compensation Review Board panel consisting of Commission Chairman Stephen M. Morelli and Commissioners Peter C. Mlynarczyk and David W. Schoolcraft.[1]

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

OPINION

STEPHEN M. MORELLI, CHAIRMAN. The claimant has appealed from the August 13, 2018 Finding & Dismissal (finding) in which Commissioner Randy L. Cohen (commissioner) determined that the claimant's fall at work was not the proximate cause of her right knee meniscal tear. She argues that the commissioner reached an unreasonable conclusion based on the evidence presented. We conclude that the commissioner was not persuaded by the claimant's testimony and evidence and as an appellate body we are not in a position to retry the facts. We affirm the Finding & Dismissal.

The commissioner reached the following factual findings relevant to our consideration. The claimant was employed by the respondent, Monroe Acquisitions, d/b/a Dunkin Donuts, on and prior to December 12, 2016. On that date, the claimant fell backwards while descending a ladder at work. As a result of that event, she alleges she sustained a compensable injury to her left knee, right knee and back. The respondents acknowledge that the claimant fell at work, but dispute the extent of her injuries; in particular, they contend that the fall was not a substantial contributing factor in the development of a meniscus injury to the claimant's right knee.

The claimant described the December 12, 2016 incident at her deposition. She testified that she struck her right knee on the ladder as she fell backwards, but later conceded that she did not remember how it happened. At the formal hearing, the claimant stated that she banged her right knee on a table near the ladder when she fell. She then testified that she twisted her right knee when she fell. She also testified that when she fell off the ladder things occurred so fast that she can't say what she banged her

knee on, she just knows it happened. The commissioner noted a security video showed the claimant climb up to the fourth rung of an A-frame ladder. The commissioner observed that as the claimant descended the ladder the view of her right knee was obscured by a yellow step ladder then she appeared to land on her buttocks. The video then showed the claimant getting up after a second or two, briefly holding her back, then immediately resuming work, walking over to the sink to wash a vent cover. Findings, ¶¶ 6, 7.

The claimant testified that while she was working at the sink she felt her right leg swelling up, so she sat in a chair for about twenty minutes with an ice pack on her right leg. She testified that the fall happened sometime before noon, and she stayed at work until her shift ended at 2:00 p.m. She testified that when she got home she saw her right knee was very swollen, so she elevated it and applied ice.

The claimant stated that on the day of the incident she informed her supervisor, Isaac Pinho, district manager, that she had fallen. Pinho testified that neither the claimant, nor the other two employees working that day, told him that she had been injured. He said that the claimant did not report her injury to him until January 3, 2017, at which time he prepared an incident report.[2] See Findings, ¶¶ 10, 11 and 13.

Two of the claimant's co-workers testified at the formal hearing. Carly Klittnick testified that she saw the claimant's fall out of the corner of her eye. She testified that later that day the claimant said she was in pain, and that she saw the claimant ice her knee. She did not tell Pinho of the incident. Nushon Scales was also working that day and stated she heard the claimant fall and saw her on the ground. She also saw the

[2] Findings, ¶ 13, lists this date as January 3, 2018. This is an obvious scrivener's error which we will afford no weight. See Hernandez v. American Truck Rental, 5083 CRB-7-06-4 (April 19, 2007).

claimant icing her knee that day, and said the claimant's knee was getting big. When Pinho came in later that day, she told him that the claimant fell off the ladder, but said she was not aware of any conversation about the claimant being injured. Findings, ¶ 15. See March 15, 2018 Transcript, pp. 16-21.

The claimant continued to work her regular job in the weeks following the accident.[3] The claimant testified that her knee "swelled up every day" during this time. Findings, ¶ 21. The claimant did not seek medical attention for her injury until January 4, 2017, when she went to OrthoFast, the walk-in facility for Orthopaedic Specialty Group, P.C. (OSG) in Fairfield. At that time she reported twisting her right knee at work on December 12, 2016, when she slipped off a ladder. She said the pain in her right knee had become severe, and she noticed increased swelling when she put full weight on her leg. See Findings, ¶ 17. Moha K. Ahuja, D.O., examined the claimant, and X-rays of the right knee revealed medial compartment narrowing and lateral patella tracking. He gave the claimant a brace, prescribed medication and physical therapy, and told her to follow up in 7-10 days. See Findings, ¶ 18.

The commissioner noted that between December 12, 2016, and the first examination at OrthoFast, the claimant had been examined on December 22, 2016 by Daniel Fombo, APRN, at Pain & Spine Specialists of Connecticut, L.L.C., where she was a patient of Robert Boolbol, M.D., a pain specialist. At that visit, the claimant reported "joint pain in lower extremities all joints and toes with no change in presentation from last month all due to fibromyalgia." Findings, ¶ 19, *quoting* Respondents' Exhibit 5. The exam indicated that the claimant's bilateral lower extremities were normal and

[3] "The claimant worked her full-time, full-duty shifts on December 14, 15, 16 and 17. December 18 was a day off. She then worked her full-time, full-duty shifts on December 19, 20, 21, 23 and 24." Findings, ¶ 12.

symmetric, with no focal motor deficits. Her gait was reported as normal and leg strength was within normal limits bilaterally. The commissioner noted that no right knee swelling was referenced in the treatment note and there was no mention of the December 12, 2016 fall, or of an injury to the right knee. The claimant also saw her primary care physician, Neil E. Smerling, M.D., on December 29, 2016, for an unrelated illness. Smerling's notes make no reference to the December 12, 2016 work incident or to the right knee condition, despite the claimant's testimony that she told him about it. Listed among the active problems present was osteoarthritis of both knees. Findings, ¶ 22; see Respondents' Exhibit 4.

Ahuja referred the claimant to Robert A. Stanton, M.D., at OSG, for bilateral knee pain. At the January 18, 2018 office visit, Stanton's diagnosis included "[o]steoarthritis, genu varum both knees." Findings, ¶ 23, *quoting* Claimant's Exhibit B. Stanton noted the claimant reported a history of frequent buckling and clicking in her right knee, and that the knee pain could wake her up at night. She denied any significant prior injuries to her knee. Id. Stanton ordered an MRI and his treatment note of February 14, 2017 indicates that the right knee MRI showed advanced osteoarthritic changes, as well as a tear involving the posterior third of the medial meniscus. He wrote: "I suspect that when she fell she traumatized her previously arthritic joint and most likely sustained a meniscal tear at that point." Stanton recommended surgery. Findings, ¶ 25. In a letter dated March 21, 2017, Stanton said the proposed surgery was to address the meniscal tear, which he related to the fall at work noting the claimant's history of not having had knee symptoms before that incident. See Findings, ¶ 26.

The commissioner noted that records from the claimant's pain management doctor, Robert Boobol, M.D., at the Pain & Spine Specialist of Connecticut, L.L.C., indicated she had complained of right leg pain and/or bilateral leg pain continuously since July 8, 2016. See Findings, ¶ 27. The commissioner also noted that September 17, 2015 and May 13, 2016 office notes from Smerling list osteoarthritis of both knees as an active problem for the claimant. See Findings, ¶ 28. She further noted that the respondents' expert witness, Thomas W. Dugdale, M.D., had examined the claimant on September 9, 2017. He diagnosed bilateral knee osteoarthritis, and a meniscal tear of the right knee that was most likely degenerative in nature. See Findings, ¶ 29. He noted that the claimant did not discuss her knee condition with her primary care physician or pain management physician in the weeks following the fall, and this suggested she had not sustained an acute injury to her right knee at that time. See Findings, ¶ 30.

Based on this record, the commissioner concluded that the claimant was not credible. She found elements of the testimony of Klittnick and Scales credible, but found neither had told Pinho the claimant had been injured when she had fallen off the ladder on December 12, 2016. She found the testimony of Pinho credible and persuasive that he had not been told the claimant was injured on December 12, 2016. She found Stanton's opinion to be unpersuasive, as it was substantially based on a narrative from the claimant which was not credible. She found Dugdale's opinions to be fully credible and persuasive. Therefore, she determined that, while the claimant did fall off a ladder in the course of her employment on December 12, 2016, the fall did not cause the claimant to sustain injuries to either her knees or her back. Accordingly, she dismissed the claim.

The claimant filed a motion to correct seeking a wholesale replacement of the factual findings with corrections indicating that the medical evidence supported the conclusion that the claimant's knee injury was compensable. The commissioner denied this motion in its entirety and the claimant has pursued this appeal. The gravamen of the appeal is that the weight of the evidence supports a finding of compensability. Such a claim of error implicates the analysis of our Supreme Court in Fair v. People's Savings Bank, 207 Conn. 535 (1988), which stands for the proposition that this board, as an appellate body, is bound to uphold a commissioner's factual findings if they are grounded in probative evidence.

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, supra. 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).

The commissioner in this matter found that the claimant was not a credible witness. The commissioner reached this conclusion after observing her live testimony at

the formal hearing.[4] We have long standing precedent that the trial commissioner is the sole judge of witness credibility and this judgment is essentially impervious to appellate review if the commissioner observes live testimony.

> Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude. . . . An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom. . . . As a practical matter, it is inappropriate to assess credibility without having watched a witness testify, because demeanor, conduct and other factors are not fully reflected in the cold, printed record. ([Citations omitted;] internal quotation marks omitted.) Briggs v. McWeeny, 260 Conn. 296, 327 (2002); Mottolese v. Burton, 267 Conn. 1, 40 (2003).

Liano v. Bridgeport, 4934 CRB-4-05-4 (April 13, 2006) *quoting* Lewis v. Statewide Grievance Committee, 235 Conn. 693, 709-10 (1996). In Baron v. Genlyte Thomas Group, LLC, 132 Conn. App. 794 (2012), *cert. denied*, 303 Conn. 939 (2012), our Appellate Court restated the primacy of the commissioner in resolving issues of evidentiary credibility.

> The commissioner, as finder of fact, is the sole arbiter of credibility; Samaoya v. Gallagher, 102 Conn. App. 670, 673-74, 926 A.2d 1052 (2007); and it is within the discretion of the commissioner 'to accept some, all or none of the plaintiff's testimony.'

Id., 804, *quoting* Gibbons v. United Technologies Corp., 63 Conn. App. 482, 487, *cert. denied*, 257 Conn. 905 (2001).

There is also long standing precedent that when a physician's opinion is based upon a narrative from a less than credible claimant, the commissioner is empowered to

[4] The respondents' in their brief, point to various discrepancies in the claimant's testimony as to the mechanism of her injury at the formal hearing and her prior deposition testimony. Appellees' Brief, pp. 5-6, *citing* December 13, 2017 Transcript, pp. 59-62 and Respondents' Exhibit 7, pp. 62-64.

find such an opinion unreliable. Such was the case in Pupuri v. Benny's Home Service, LLC, 5697 CRB-2-11-11 (November 5, 2012). In that case this board observed that if a commissioner does not find the claimant's narrative of events credible, the entire claim can be deemed unmeritorious.[5]

In the present case, the commissioner noted that, while it was uncontroverted that the claimant fell off a ladder, in the weeks following that fall she treated with two medical providers whose notes did not mention a work incident. These facts offer a reasonable basis to question whether the claimant's meniscal tear was the result of the claimant's December 12, 2016 fall at work. The medical records did indicate the claimant had long standing osteoarthritis in her knees and the claimant had been treating with a pain management doctor long before this incident. Dr. Dugdale unequivocally opined that the right medial meniscus tear "was most likely degenerative." Findings, ¶ 29; see Respondents' Exhibit 1, p. 3. Given these facts, we cannot conclude that the conclusions reached by Dugdale were unreasonable, or that the commissioner could not reasonably have found Dugdale's opinions persuasive.

This case is on point with our recent decision in Ayna v. Graebel/CT Movers, Inc., 6214 CRB-7-17-8 (March 6, 2019), where we cited our Appellate Court's opinion in Jodlowski v. Stanley Works, 169 Conn. App. 103 (2016), as to the commissioner's prerogative to determine what evidence he or she deems persuasive. "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

[5] "We note that our precedent stands for the proposition that if a trial commissioner believes a claimant is not a credible witness, he may determine that any medical opinion which is reliant on the claimant's narrative is also unreliable." Pupuri, supra, *citing* Abbotts v. Pace Motor Lines, Inc., 4974 CRB-4-05-7 (July 28, 2006), *aff'd*, 106 Conn. App. 436 (2008), *cert. denied*, 287 Conn. 910 (2008).

reviewing court." (Citations omitted; internal quotation marks omitted.) Id., 108-109, *quoting* Estate of Haburey v. Winchester, 150 Conn. App. 699, 714, *cert. denied*, 312 Conn. 922 (2014).

Essentially, the commissioner was presented with the testimony of the claimant, whom she found lacked credibility, and the opinion of her treating physician, which she found unpersuasive. On the other hand, the commissioner found the opinions of the respondents' expert to be persuasive. This is a classic "dueling expert" case and under these circumstances we must defer to the commissioner's judgment. Dellacamera v. Waterbury, 4966 CRB-5-05-6 (June 29, 2006), *appeal withdrawn*, A.C. 27853 (September 12, 2006). As we cannot identify any action the commissioner took which was improper as a matter of law, we must conclude the claimant's dispute is with the commissioner's fact-finding. As we believe evidence supports the result the commissioner reached and we do not find her conclusions "clearly erroneous," Berube v. Tim's Painting, 5068 CRB-3-06-3 (March 13, 2007), *citing* Moutinho v. Planning & Zoning Commission, 278 Conn. 660, 665-666 (2006), we must affirm the Finding & Dismissal.[6] [7]

There is no error; the August 13, 2018 Finding & Dismissal by Randy L. Cohen, the Commissioner acting for the Fourth District, is accordingly affirmed.

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

[6] We affirm the commissioner's denial of the motion to correct. We may reasonably infer that she did not find the evidence cited in the claimant's motion to correct probative or persuasive. See 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); Vitti v. Richards Conditioning Corp., 5247 CRB-7-07-7 (August 21, 2008), *appeal withdrawn*, A.C. 30306 (September 29, 2009).

[7] At the formal hearing, the claimant sought sanctions for undue delay. In light of the fact that the respondents in this matter prevailed on the substantive issues, we are not persuaded that the commissioner erred in declining to levy sanctions against them. See Montenegro v. Palmieri Food Products, 5701 CRB-3-11-11 (November 15, 2012).