CASE NO. 6300 CRB-8-18-12 CLAIM NOS. 800194899 & 800194900	:	COMPENSATION REVIEW BOARD
RONALD MORTON CLAIMANT-APPELLANT	:	WORKERS' COMPENSATION COMMISSION
v.	:	OCTOBER 31, 2019
EXPRESS EMPLOYMENT SERVICES, INC. EMPLOYER		
and		
SEDGWICK CMS, INC. INSURER RESPONDENTS-APPELLEES		

APPEARANCES:

The claimant was represented by Christopher J. Holland, Esq., Carter Mario Injury Lawyers, 158 Cherry Street, Milford, CT 06460.

The respondents were represented by Christopher J. D'Angelo, Esq., Strunk, Dodge, Aiken, Zovas, 200 Corporate Place, Suite 100, Rocky Hill, CT 06067.

This Petition for Review from the November 15, 2018 Finding and Dismissal of Peter C. Mlynarczyk, the Commissioner acting for the Eighth District, was heard May 17, 2019 before a Compensation Review Board panel consisting of Commission Chairman Stephen M. Morelli and Commissioners Charles F. Senich and Daniel E. Dilzer.[1]

[1] We note that two motions for extension of time were granted during the pendency of this appeal.

OPINION

STEPHEN M. MORELLI, CHAIRMAN. The claimant has appealed from a Finding and Dismissal (finding) issued by Commissioner Peter C. Mlynarczyk (commissioner), who dismissed his claim for benefits from alleged work injuries to his left thumb, hand and right shoulder. The claimant argues that this dismissal was due to the commissioner not crediting what he believes was compelling evidence from his treating physician, and had the commissioner drawn reasonable inferences from this evidence, the injuries would have been deemed compensable. The respondents argue that the commissioner simply did not find the claimant credible and a credibility determination by a trier of fact should not be disturbed by an appellate body. We note that it is black-letter law that any medical evidence reliant on a claimant's narrative can be discounted if the commissioner deems the claimant not to be a credible witness. See Abbotts v. Pace Motor Lines, Inc., 4974 CRB-4-05-7 (July 28, 2006), *aff'd*, 106 Conn. App. 436, *cert. denied*, 287 Conn. 910 (2008). Accordingly, as the commissioner did not find the claimant credible, we affirm the finding.

The commissioner noted that the respondents presented witnesses who testified at the formal hearing as to the alleged injuries. Damaris Diaz testified that since 2013 she has been employed by Express Employment Services, Inc. (Express) as a Staffing Consultant and she was responsible for managing their hiring process. See Findings, ¶ 2.a. She stated that all new hires received a pre-employment package including an employee handbook, which directed employees to report work injuries immediately. The claimant had acknowledged receipt of this handbook. See Findings, ¶ 2.b. She testified that the claimant called on June 27, 2016, and spoke with Carlie Dubois. During that

conversation, the claimant indicated "that his left thumb was hurting from a previous injury. . . . June 6, 2018 Transcript, p. 12. The claimant called and spoke with Diaz on July 1, 2016. He was made aware that he needed to fill out an Incident Report. He mentioned "the left thumb . . . and he felt that he needed therapy for it. That's what he told me over the phone." Id., 14. Diaz also testified that she had not been advised of the claimant having a shoulder injury until he came in and filled out the Incident Report on July 8, 2016, for his left thumb. "[H]e included a right shoulder injury, which he never mentioned over the phone." Id., 14. Another Express employee, Carlie Dubois, also testified she was the front office coordinator in June 2016 and her job included fielding calls from newly hired employees. She also stated she had a phone conversation with the claimant on June 27, 2016, and he said his left thumb was bothering him from a prior work injury. See Findings, ¶ 3.a-b.

An employee of Habasit America, where the claimant had been working at the time of the alleged injuries, also testified. Marc Russell stated that he is employed as a production supervisor and directly supervised the claimant in June 2016. See Findings, ¶ 4.a. He testified that the claimant never reported an injury to him. See Respondents' Exhibit 2, p. 16.

The commissioner also reviewed the medical records and noted that the claimant was treated at The Hospital of Central Connecticut (HCC) on June 26, 2016. At that visit, the claimant reported chronic right shoulder and knee pain as well as left thumb pain which had occurred gradually over the prior two months. See Claimant's Exhibit A.1.a. The claimant was also treated by Terrence R. Donahue, M.D., on September 12,

2016. At that visit, the claimant reported he felt a "pop" on June 23, 2016, when he injured his left thumb at work. See Claimant's Exhibit A.3.b.

Based on this record the commissioner reached the following conclusions:

A) The Claimant's testimony is inconsistent with the medical records and the testimony of the other witnesses.
B) The testimony of the Claimant lacked credibility and was, therefore, not persuasive.
C) The witnesses who testified on behalf of the Respondent were credible and persuasive.

Conclusion, ¶¶ A-C.

As a result, the commissioner dismissed the claim for benefits. The claimant filed a timely motion to correct (motion). The motion sought to add additional findings as to the claimant's medical history; including references to three physicians the commissioner did not cite in the findings, another treating physician, Richard F. Scarlett, M.D., and two physicians who performed respondents' medical examinations; Duffield Ashmead, M.D. and Peter R. Barnett, M.D. The claimant believes that the full medical history in this matter is supportive of compensability. The motion also included removing the conclusion that the claimant was not a credible witness and replacing it with a conclusion that the claimant was credible; and replacing the conclusion that the respondents' witnesses were credible with a conclusion that they were not credible. The commissioner denied this motion in its entirety and the claimant has pursued this appeal. The appeal focuses on the claim that the medical evidence overwhelmingly supports a finding that he sustained compensable injuries and it was error for the commissioner not to be persuaded.

The standard of deference we are obliged to apply to a commissioner's findings and legal conclusions on appeal is well-settled. "The trial commissioner's factual findings and conclusions must stand unless they are without evidence, contrary to law or

based on unreasonable or impermissible factual inferences." Russo v. Hartford, 4769 CRB-1-04-1 (December 15, 2004), *citing* Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Moreover, "[a]s with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial court could have reasonably concluded as it did." Burton v. Mottolese, 267 Conn. 1, 54 (2003), *quoting* Thalheim v. Greenwich, 256 Conn. 628, 656 (2001). "This presumption, however, can be challenged by the argument that the trial commissioner did not properly apply the law or has reached a finding of fact inconsistent with the evidence presented at the formal hearing." Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

The gravamen of the claimant's appeal herein is that upon a full review of the record it is apparent that the commissioner's conclusions were unreasonable. We noted the standard of review for such claims in Dudley v. Radio Frequency Systems, 4995 CRB-8-05-9 (July 17, 2006).

> The scope of review of a trial court's factual decision on appeal is limited to a determination of whether it is clearly erroneous in view of the evidence and pleadings. . . . Conclusions are not erroneous unless they violate law, logic or reason or are inconsistent with the subordinate facts. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. (Citations omitted; internal quotation marks omitted.)

Id., *quoting* Moutinho v. Planning & Zoning Commission, 278 Conn. 660, 665-666 (2006).

We also note that the commissioner's decision was largely based on determining the claimant did not offer credible testimony. As an appellate body, our ability to review this determination is severely limited.

> 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. (Internal quotation marks omitted.)

Burton, supra, 40, *quoting* Briggs v. McKeeny, 260 Conn. 296, 327 (2002).

The commissioner concluded that the claimant's testimony was not credible and was not consistent with the medical records presented. The claimant testified that when he injured his thumb at work he notified both his supervisor at the jobsite where he worked, Habasit, and the appropriate individuals at Express. See April 26, 2017 Transcript, pp. 11, 23-24. He stated the thumb pain came on gradually. Id., 12. He also testified that after he suffered shoulder pain when he lifted a large boat of tubes, he reported this to his supervisor. Id., 14. He described the pain as a "pop" in his shoulder. Id.

The production supervisor at Habasit, Russell, testified at his deposition that the claimant never reported either a thumb or a shoulder injury to him. See Respondents' Exhibit 2, pp. 11, 16-17. Diaz and Dubois said that on June 27, 2016, the claimant had called Express and said he was suffering a thumb injury, but they both believed it was an old injury unrelated to work. See June 6, 2018 Transcript, pp. 12, 38 and 47.

The relevant medical records during this period indicate that on June 26, 2016, the claimant presented at HCC. The notes from that encounter stated the patient had "[t]humb Pain L Side for 2 Month(s). The Onset is Gradual." Claimant's Exhibit A.1.a. The notes continued "patient with left thumb pain for months" and a review of an X-ray found "likely subluxation and healed fx." Id. The treating notes also indicate the triage nurse indicated the claimant's chief complaint was knee pain. Id. Meanwhile, Donahue's treating note of September 12, 2016, described the onset of the claimant's thumb pain as "sudden" and having a duration of "2-3 months." Claimant's Exhibit A.3.b. The note further states the thumb pain "getting worse since injury at work where he felt a 'pop' in his L thumb MP and has pain and swelling weakness since." Id. Donahue issued an Addendum on December 28, 2016, which stated:

> The pop and pain and injury to Mr. Morton's L thumb has come about directly from his injury at work on June 23, 2016 when he was washing squeezing and twisting tubes at work on that day. The injury resulted in a rupture of his Abductor Pollicus Longus Tendon from its insertion at the MP joint of his L thumb.

Id.

After considering this evidence, the commissioner was not persuaded by the claimant's narrative as to his thumb injury being credible. We note in particular, the inconsistencies between the HCC reports contemporaneous with the alleged date of injury, which suggest that the claimant sustained a repetitive trauma injury over an extended period of time, as opposed to Donahue's reports, which adopt the claimant's later narrative of sustaining a single traumatic "pop" injury. We believe that the commissioner could look to this discrepancy to question the entirety of the claimant's narrative. In addition, the commissioner found that the respondents' witnesses were

credible. It is black-letter law that if no evidence presented at a hearing is found to be reliable by the commissioner, then the claim must be dismissed. See Toroveci v. Globe Tool & Metal Stamping Co., Inc., 5253 CRB 6-07-7 (July 22, 2008). In particular, we note that an appellate tribunal at this juncture cannot revisit the opinions of Donahue, as those opinions were inconsistent with the other evidence which was found credible as to the claimant's injury.[2]

We reach a similar conclusion regarding the claimant's shoulder injury. There were similar discrepancies presented between the records from the HCC examination of June 26, 2016 (Exhibit A.3), which reference pre-existing shoulder pain[3] and did not reference any traumatic work injury to the claimant, and the subsequent treatment notes of Bristol Hospital (Claimant's Exhibit B.1) and UConn Health Center (Claimant's Exhibit B.2) reliant on the claimant's narrative. As a result, we do not believe the commissioner was obligated to find that the injury occurred as the claimant or the doctors' reports indicated, as these were based on the claimant's narrative. The commissioner determined that the claimant lacked credibility based on the totality of the evidence.

The claimant sought to have the commissioner adopt the medical opinions of his treaters and the respondents' experts which supported a finding of compensability in his motion to correct, but the commissioner denied this motion in its entirety. We may infer

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[2] As this tribunal held in Ben-Eli v. Lowe's Home Improvement Center, 5006 CRB-3-05-10 (November 16, 2006), "[o]ne can only expect the trier of fact to render a decision based on what evidence actually says, not what it should have said." The claimant had an opportunity to clarify the record prior to the closing of the record herein by deposing Donahue, but chose not to. See DeLorge v. Norwich, 6286 CRB-2-18-8 (August 5, 2019) n.3, *citing* Berube v. Tim's Painting, 5068 CRB-3-06-3 (March 13, 2007).

[3] The claimant did not testify to an exact date of injury at the formal hearing, but claimed to have reported this to his employer. "I think it was after the 4th of July holiday." April 26, 2017 Transcript, p. 14. We note that Barnett's RME of December 19, 2016 cites a "6/30/2016" injury, see Claimant's Exhibit B.3, but this is not corroborated by the claimant's hearing testimony nor any other lay witness. We note the claimant cited an injury date of June 30, 2016, in his form 30C.

that the commissioner ultimately found this medical evidence was neither probative nor persuasive, for the reasons stated in Abbotts, supra. This decision was consistent with precedent in Vitti v. Richards Conditioning Corp., 5247 CRB-7-07-7 (August 21, 2008), *appeal withdrawn*, A.C. 30306 (September 29, 2009) and 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).

> When a party files a Motion to Correct this is an effort to bring factual evidence to the trial commissioner's attention in an effort to obtain a Finding that is consistent with such facts. When a trial commissioner denies such a motion, we may properly infer that the commissioner did not find the evidence submitted probative or credible. Vitti v. Richards Conditioning Corp., 5247 CRB-7-07-7 (August 21, 2008). On appeal, our inquiry is limited to ascertaining if this decision was arbitrary or capricious. Id. The leading case on this point is Beedle v. Don Oliver Home Improvement, 4491 CRB-3-02-2 (February 28, 2003). (Footnote omitted.)
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> We also note that virtually all of the "undisputed facts" cited by the respondent in their Motion to Correct were derived from testimony, which the trier was not required to believe even if those statements were uncontradicted or otherwise corroborated. Duddy [v. Filene's (May Department Stores Co.) 4484 CRB-7-02-1 (October 23, 2002)], Pallotto v. Blakeslee Press, Inc., 3651 CRB-3-97-7 (July 17, 1998). The trier's denial of those corrections implies that he was not swayed by this testimony, and we cannot invade his sphere of authority by reappraising the evidence and drawing a contrary inference on appeal. Sendra v. Plainville Board of Education, 3961 CRB-6-99-1 (Jan. 20, 2000).

Brockenberry, supra.

As the Appellate Court held in Baron v. Genlyte Thomas Group, LLC, 132 Conn. App. 794, *cert. denied*, 303 Conn. 939 (2012),

> [t]he 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.' *Gibbons* v. *United Technologies Corp*., 63 Conn. App. 482, 487, 777 A.2d 688, cert. denied, 257 Conn. 905, 777 A.2d 193 (2001). We will not disturb the commissioner's assessment of the plaintiff's testimony in that respect.

Id., 804.

The commissioner in this matter could reasonably discount the claimant's testimony and therefore reasonably discount any medical evidence reliant on the claimant's narrative.

As a result, our precedent requires us to affirm the Finding.

Commissioners Charles F. Senich and Daniel E. Dilzer concur in this opinion.