

CASE NO. 6303 CRB-1-19-1 : COMPENSATION REVIEW BOARD  
CLAIM NO. 100201573

ROLAND PRAIRIE : WORKERS' COMPENSATION  
CLAIMANT-APPELLANT COMMISSION

v. : NOVEMBER 21, 2019

UTC/UTAS/HAMILTON SUNDSTRAND  
EMPLOYER

and

AIG CLAIMS SERVICES  
INSURER  
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Allan M. Rothenberg, Esq., Rothenberg & Cianciola, L.L.C., 20-30 Beaver Road, Suite 100, P.O. Box 290767, Wethersfield, CT 06109-2244.

The respondents were represented by Jennifer A. Hock, Esq., Pomeranz, Drayton & Stabnick, L.L.C., 95 Glastonbury Boulevard, Suite 216, Glastonbury, CT 06033-4453.

This Petition for Review from the December 21, 2018 Finding and Dismissal by Daniel E. Dilzer, the Commissioner acting for the First District, was heard June 21, 2019 before a Compensation Review Board panel consisting of Commissioners Peter C. Mlynarczyk, Scott A. Barton and Carolyn M. Colangelo.<sup>1</sup>

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<sup>1</sup> We note that a motion for extension of time and a motion for continuance were granted during the pendency of this appeal.

## OPINION

PETER C. MLYNARCZYK, COMMISSIONER. The claimant in this matter has appealed from a Finding and Dismissal (finding) issued by Commissioner Daniel E. Dilzer (commissioner) which determined that the claimant's cervical spine physical therapy sessions in late 2017 and early 2018 were not related to his August 18, 2015 compensable injury, and therefore, not compensable. The claimant argues that this treatment should have been deemed diagnostic in nature and even if the commissioner concluded the claimant's cervical spine condition was not compensable, these treatments should have been determined to be reasonable and necessary medical treatment under General Statutes § 31-294d.<sup>2</sup> The respondents argue that the evidence on the record supports the commissioner's determination and the claimant is essentially relitigating a factual determination made by the commissioner on appeal. We find the commissioner herein reached a reasonable decision consistent with the statute. As a result, we affirm the finding.

The commissioner reached the following findings of fact which are relevant to our consideration of this appeal. He noted the parties agreed that the claimant had sustained a compensable injury on or about August 18, 2015, to his left shoulder and left elbow. The claimant had left rotator cuff surgery performed on August 9, 2016, by Gordon A. Zimmermann, M.D., and on June 27, 2017, a voluntary agreement was reached

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<sup>2</sup> General Statutes § 31-294d states: "(a) (1) The employer, as soon as the employer has knowledge of an injury, shall provide a competent physician or surgeon to attend the injured employee and, in addition, shall furnish any medical and surgical aid or hospital and nursing service, including medical rehabilitation services and prescription drugs, as the physician or surgeon deems reasonable or necessary. The employer, any insurer acting on behalf of the employer, or any other entity acting on behalf of the employer or insurer shall be responsible for paying the cost of such prescription drugs directly to the provider. If the employer utilizes an approved providers list, when an employee reports a work-related injury or condition to the employer the employer shall provide the employee with such approved providers list within two business days of such reporting."

establishing a permanency rating for the claimant's left shoulder and a date of maximum medical improvement of March 29, 2017. The claimant returned to Zimmermann on June 14, 2017, and indicated his shoulder was doing well until January of 2017, when he began experiencing cramping in his hand. See Findings, ¶ 3, *citing* Claimant's Exhibit B. The claimant reported no neck pain or numbness. *Id.* Zimmermann suggested an EMG and referred the claimant to Pietro A. Memmo, M.D., for a follow-up appointment. *Id.*

Memmo examined the claimant on September 11, 2017, and had a number of cervical imaging tests performed on the claimant which revealed the claimant had "spondylosis, left greater than right, disk space narrowing C5-C6, C6-C7. C3-C4: Slight grade 1 spondylolisthesis. Neural foramina narrowing of the left C4-C5 level." Claimant's Exhibit C. As it was suspected that the claimant's symptoms were the result of cervical radiculopathy, he was referred for a cervical spine MRI and EMG of the left upper extremity to ascertain the etiology of these symptoms. *Id.* On September 19, 2017, a cervical MRI revealed "[m]ultilevel cervical spondylosis with hypertrophic facet arthropathy and uncovertebral joint spurring resulting in severe left C3-C4, moderate left C4-C5, and severe bilateral C6-C7 foraminal stenosis. There is markedly severe left-sided hypertrophic facet arthropathy at the C3-C4 and C4-C5 levels." Claimant's Exhibit E. A repeat left shoulder MRI, performed on November 25, 2017, showed "no evidence of recurrent [rotator] cuff tear." Findings, ¶ 6, *quoting* Claimant's Exhibit B (Zimmermann's December 13, 2017 office note).

The claimant was referred on November 1, 2017, for physical therapy, which focused on his cervical spine and traction. This referral made specific mention of addressing "(a) neck postural and strengthening; (b) cervical traction, neck exercise

program; and (c) thoracic postural and strengthening.” Findings, ¶ 7 *citing* Claimant’s Exhibit C, physical therapy prescription. The claimant attended twenty-one physical therapy sessions between November 6, 2017, and February 6, 2018. See Findings, ¶ 9. The initial therapy notes stated chronic left shoulder pain was the primary focus, with cervicalgia as secondary. The notes for the December 17, 2017 session indicate the therapist noted cervicalgia as the primary focus, with chronic left shoulder pain as secondary. *Id.*

The claimant returned to Memmo’s office for an examination on December 18, 2017, wherein Brian Hill, A.P.R.N., noted the claimant reported that the physical therapist focused solely on his shoulder. See Claimant’s Exhibit C. The commissioner found, however, that this was not reflected in the physical therapy records which indicated the cervical spine and the shoulder were assessed by the therapist. *Id.*, see Claimant’s Exhibit H. At his December 18, 2017 examination, the claimant still said he was symptomatic. See Findings, ¶ 10, *citing* Claimant’s Exhibit H. The claimant was offered an injection by Memmo, to address his symptoms, but he declined that course of action, preferring to continue physical therapy. *Id.*

The commissioner noted that at a November 16, 2017 examination, Andrew E. Caputo, M.D., reviewed the right upper extremity EMG and determined this EMG disclosed left cubital tunnel syndrome and also suggested cervical radiculitis. This treater related the left cubital tunnel diagnosis and need for surgery to the claimant’s August 18, 2015 work injury. See Findings, ¶ 12, *citing* Claimant’s Exhibit D. A commissioner’s examiner, Daniel J. Mastella, M.D., concurred with Caputo’s opinion after a June 28, 2018 examination of the claimant and causally related the claimant’s left cubital tunnel

injury and need for ulnar nerve transposition surgery to the claimant's August 18, 2015 work-related injury. The claimant received left ulnar nerve surgery from Caputo on August 31, 2018. See Findings, ¶ 12.

On the other hand, the commissioner found that "[t]he Claimant has not provided a medical opinion relating his cervical symptoms to the August 18, 2015 accepted work injury or an opinion relating to the need for cervical physical therapy to the work-related injury." Findings, ¶ 11.

Based on these subordinate facts, the commissioner concluded that the claimant did not sustain a cervical injury on August 18, 2015, and his need for treatment of this condition was unrelated to the accepted work injury. As to the treatment provided, the commissioner concluded as follows:

I find the diagnostic testing done by the Claimant's treating physicians, i.e. cervical MRI, left upper extremity EMG and x-rays taken of the Claimant's cervical spine, were reasonable and necessary diagnostic tests undertaken to rule out a recurrent rotator cuff tear, and further find that those medical appointments with Drs. Zimmerman, Caputo and Mem[m]o to order and review the diagnostic tests and to diagnose the cause of the Claimant's symptoms were reasonable and necessary and hereby ORDER the Respondent to pay for the diagnostic testing ordered by Drs. Zimmerman, Caputo and Memo [typo in original] of the Claimant's cervical spine and pay for those medical appointments to evaluate, diagnose and review the testing.

(Emphasis in the original.) Conclusion, ¶ C.

As to physical therapy for the claimant's cervical spine, the commissioner dismissed the claim for benefits. See Conclusion, ¶ D. The claimant filed a motion to correct, seeking to substitute findings that his physical therapy sessions for his cervical spine should be deemed compensable as being a diagnostic tool to determine whether this

condition was the result of his work injury. The commissioner denied this motion in its entirety and the claimant has pursued this appeal, reiterating the arguments he presented in the motion to correct. As we believe it is within the commissioner's discretion to determine what modalities of treatment are related to a compensable injury, we do not find this argument persuasive.

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 claimant argues that it was error for the commissioner not to find that the physical therapy sessions were necessary diagnostic tests. He argues that at the time they were initiated, the etiology of the claimant's ailments were unclear and it was not until after they were completed was the decision reached to have the claimant undergo ulnar nerve surgery. He cites Pue v. First Student, 5270 CRB-3-07-9 (August 22, 2008), as

authority for his position that these treatments should be deemed compensable. In Pue, the respondents contested the compensability of various diagnostic tests related to the claimant's cardiac issues, and we affirmed the commissioner's decision in that case.

The fact that the trier of fact in Pue, supra, found those treatments to be compensable is a critical distinction and one which greatly limits the weight of this precedent against the facts herein. This tribunal stated the standard, in that case, as to how we should address the question of whether a modality of medical treatment is reasonable and necessary for a compensable injury.

Whether certain medical care and related testing constitutes reasonable and necessary medical treatment as that term has been construed pursuant to § 31-294d(a)(1) is a question of fact. Vannoy-Joseph v. State[/DMHAS], 5164 CRB-8-06-11 (January 29, 2008). See also, Anderson v. R & K Spero Co., 107 Conn. App. 608 (2008). As such the trial commissioner's determination will not be disturbed unless it is without evidentiary support, contrary to law or based on unreasonable or impermissible factual inferences. Fair v. Peoples Savings Bank, 207 Conn. 535 (1988).

Id.

The commissioner in this case reached a different factual determination as to whether the contested treatment was related to a compensable injury. As we held in Dudley v. Radio Frequency Systems, 4995 CRB-8-05-9 (July 17, 2006), we must conclude this determination was "clearly erroneous," quoting Moutinho v. Planning & Zoning Commission, 278 Conn. 660, 665-666 (2006), in order to overturn the commissioner's decision. The respondents argue that the chronology of events supports the commissioner's reasoning. They note that a variety of diagnostic tests they believe were sufficient to ascertain causation had all been conducted in September and early November 2017, including an EMG offering evidence of left ulnar nerve neuropathy,

prior to the claimant commencing his physical therapy sessions. They also argue that they never authorized this treatment and the claimant pursued this modality of treatment on his own initiative.<sup>3</sup> Given these circumstances, they believe it was a reasonable inference that the physical therapy being contested was “therapeutic” and not “diagnostic,” and since the claimant’s cervical spine ailments were not compensable, neither would be therapeutic measures for that body part.

Upon reviewing the factual findings herein, we believe that this was a reasonable inference for the commissioner to reach. The claimant had the burden of persuasion to prove that the physical therapy sessions he attended provided material assistance in the diagnosis of his ailments. If the commissioner could reasonably believe that these treatments offered no substantial diagnostic benefits that the authorized diagnostic tests did not, he could reasonably determine that they were not compensable. Having failed to convince the commissioner as to a factual question, and having placed the issue before the commissioner a second time by way of a motion to correct, which he denied,<sup>4</sup> we may not now declare this treatment was, as a matter of law, compensable.

We believe our discussion in Greco v. Precision Devices, Inc., 6265 CRB-8-18-4 (June 17, 2019), as to the power of a commissioner to ascertain whether a proposed modality of treatment is appropriate for the claimant is equally applicable to the commissioner’s power to ascertain if a modality of treatment is diagnostic in nature.

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<sup>3</sup> As we held in Freel v. West Haven Board of Education, 5102 CRB-3-06-6 (June 1, 2007), while initially unauthorized treatment may be retroactively authorized by a commissioner, a claimant does assume the risk that the commissioner will not retroactively authorize the treatment as reasonable and necessary.

<sup>4</sup> Since the claimant raised the issue of compensability of the physical therapy sessions in his motion to correct and the commissioner denied this relief, we must conclude the commissioner did not find the evidence presented supportive of this relief 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).



This tribunal has previously examined the standard for reviewing a commissioner's decision regarding the efficacy of medical treatment. In Attardo v. Temporaries of New England, Inc., 5858 CRB-2-13-7 (June 19, 2014), we restated the standard set forth in 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), which stands for the proposition that the decision regarding the optimal modality of treatment for an injured claimant belongs to the trier of fact.

Id.

We may not revisit the factual dispute presented by the claimant on appeal. As a result, we affirm the Finding and Dismissal.

Commissioners Scott A. Barton and Carolyn M. Colangelo concur in this Opinion.