CASE NO. 6305 CRB-3-19-1 CLAIM NO. 300114733	: COMPENSATION REVIEW BOARD
DENNIS LOPEZ CLAIMANT-APPELLEE	: WORKERS' COMPENSATION COMMISSION
v.	: DECEMBER 11, 2019

FIRST GROUP AMERICA, INC.
EMPLOYER

and

GALLAGHER BASSETT SERVICES, INC.
THIRD-PARTY ADMINISTRATOR
RESPONDENTS-APPELLANTS

APPEARANCES:

The interests of the claimant were represented by Scott W. Williams, Esq., Williams Law Firm, L.L.C., 2 Enterprise Drive, Suite 412, Shelton, CT 06484.

The interests of the respondents were represented by Dominick C. Statile, Esq., and Jessica N. Kipphut, Esq., Montstream Law Group, L.L.P., P.O. Box 1087, Glastonbury, CT 06033-6087.

This Petition for Review from the January 10, 2019 Finding and Award of Scott A. Barton, Commissioner acting for the Third District, was heard on June 21, 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 respondents have petitioned for review from the January 10, 2019 Finding and Award (finding) of Scott A. Barton, Commissioner acting for the Third District (commissioner). We find no error and accordingly affirm the decision of the commissioner.

The commissioner, having identified as the issue for determination the claimant's entitlement to temporary partial disability benefits pursuant to General Statutes § 31-308 (a) for the period of July 17, 2017, until September 28, 2017, made the following factual findings which are pertinent to our review of this matter.[2] On August 7, 2016, the claimant, while in the performance of his duties for the employer, suffered an injury to his left non-master shoulder. The respondents accepted compensability of the injury and provided workers' compensation benefits in the form of indemnity payments and medical treatment.

At trial, the claimant testified that he began his employment with the respondent employer in June 2013, after having graduated from Porter and Chester Institute with a certificate as an automotive technician. Although initially he was responsible for

[2] General Statutes § 31-308 (a) states in relevant part: "If any injury for which compensation is provided under the provisions of this chapter results in partial incapacity, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of the difference between the wages currently earned by an employee in a position comparable to the position held by the injured employee before his injury … and the amount he is able to earn after the injury … except that when (1) the physician or the advanced practice registered nurse attending an injured employee certifies that the employee is unable to perform his usual work but is able to perform other work, (2) the employee is ready and willing to perform other work in the same locality and (3) no other work is available, the employee shall be paid his full weekly compensation subject to the provisions of this section. Compensation paid under this subsection shall not be more than one hundred per cent, raised to the next even dollar, of the average weekly earnings of production and related workers in manufacturing in the state, as determined in accordance with the provisions of section 31-309, and shall continue during the period of partial incapacity, but no longer than five hundred twenty weeks. If the employer procures employment for an injured employee that is suitable to his capacity, the wages offered in such employment shall be taken as the earning capacity of the injured employee during the period of the employment."

performing minor repairs to the employer's buses, he was eventually promoted to the position of diesel technician, at which time he began to perform more complicated routine repairs such as oil changes and tire and brake maintenance. Following the shoulder injury on August 7, 2016, the claimant initially sought treatment at a local emergency department in New Haven. Subsequently, the claimant presented at Concentra, whose providers referred him to Michael R. Redler, M.D., an orthopedic surgeon.

The medical providers at Concentra returned the claimant to light duty, and the respondents were able to accommodate the claimant's restrictions for a short time. The claimant was eventually placed on temporary partial disability benefits pursuant to § 31-308 (a) when office work was no longer available, and he performed job searches until he underwent surgery with Redler on March 27, 2017. Following a successful surgery, the claimant was released to restricted duty on May 30, 2017, and on June 1, 2017, the respondents filed a notice to discontinue benefits which was administratively approved on the same date without objection.

The claimant testified that when he was released to light duty, he contacted the senior location manager, Paul, regarding his desire to return to work, at which time he was informed that his job was no longer available, his employment was being terminated, and he would be sent a termination letter via certified mail.[3] The claimant confirmed that he did receive a certified letter from the employer stating that his employment was being terminated effective June 2, 2017, for having "been absent from work since

[3] The claimant was unable to provide Paul's last name.

November 10, 2016" and "exhausted all unpaid leave of absence granted [to him]."[4] Claimant's Exhibit I.

The claimant further testified that even though Paul had informed him he was preparing a termination letter, the claimant was left with the impression that he might be able to return to work "if [he] got better and the job was still there…." Findings, ¶ 11, *quoting* August 14, 2018 Transcript, p. 25. The claimant explained that it was his impression that "getting better" meant obtaining a release to full duty. The claimant returned to Redler on July 7, 2017, and it was the claimant's belief at that time that he still had a light-duty work capacity. The claimant testified that at this office visit, he discussed with Redler his desire to return to work and his need for a release to full duty. In response to questioning by the commissioner, the claimant stated "that although Dr. Redler was willing to release him to full duty in order to get his job back, Dr. Redler believed that he actually had a light-duty work capacity." Findings, ¶ 13; see also August 14, 2018 Transcript, p. 28.

On redirect examination, the claimant explained that he had requested a release to full duty despite knowing that he had work restrictions "[b]ecause First Student stated that there was some policy that they would not accommodate their employees for temporary duty for more than a period of 90 days and I exhausted that time." August 14, 2018 Transcript, p. 52. The claimant further testified that his supervisors would accommodate his restrictions if he returned to work, and he could ask one of the other mechanics for assistance if he was required to perform a task that was beyond the scope of his restrictions.

[4] The commissioner noted that the employer's correspondence of June 1, 2017, did not reflect that the claimant had been receiving workers' compensation benefits during his absence.

The commissioner noted that in the "History of Present Illness" portion of Redler's July 7, 2017 report, the doctor stated that the claimant's employment had been terminated by the employer. See Claimant's Exhibit G. The commissioner further noted that although the doctor had released the claimant to "regular duty," he also prescribed additional physical/occupational therapy and asked the claimant to return in eight weeks. Id.

Following his release to full duty, the claimant contacted Richard Dilger at First Student about returning to work. Dilger indicated that he would speak with Paul, leaving the claimant with the impression that his old job was available and he would receive a phone call confirming his return date. After waiting for a couple of weeks, during which time he was not contacted by anyone at First Student, he called several individuals regarding his status. He testified that Angel Serrano told him that Paul had indicated he could return to his former job but he would have to reapply on line. The claimant did so, and subsequently received a response indicating that he was not "qualified" for the position.[5] Findings, ¶ 18, *quoting* August 14, 2018 Transcript, p. 33. Despite this response, however, the claimant still believed his old job was available and he was going to get it back.

Eventually, the claimant went into the employer's shop to inquire why he had not been formally contacted about returning to his former employment, at which time he spoke with Mike Florenzano, his union steward. Although Florenzano assured the claimant that he was "supposed to return back to work," a formal offer was never made. Findings, ¶ 19, *quoting* August 14, 2018 Transcript, p. 35.

[5] It may be reasonably inferred that the commissioner, upon hearing this testimony, was not reassured that the employer had been acting in good faith.

On July 17, 2017, the respondents filed a notice (form 36) seeking to discontinue the claimant's temporary partial disability benefits on the basis of Redler's July 7, 2017 report releasing the claimant to full duty. The form 36 was administratively approved on July 17, 2017, as no objection was filed. The claimant testified that he stopped preparing written job searches on July 29, 2017, because the respondents had indicated they would not continue to pay him to do the searches. At that point, he began to primarily apply for positions on line, such as diesel technician, United States postal worker, or cashier at a grocery store or pharmacy. On September 11, 2017, the claimant enrolled in a training program in order to obtain a commercial driver's license; he also continued to perform approximately five or six job searches a week. The claimant testified that he received two job offers during this period, both of which he rejected.[6]

On September 29, 2017, the claimant again saw Redler, at which time the doctor released the claimant to unrestricted duty. The commissioner noted that in his report of that date, the doctor advised the claimant to return to see him "as needed." Claimant's Exhibit G. The commissioner also noted that the doctor stated the following:

> We gave him a work note back on July 7 stating regular duty. This was done however with the understanding that he would go back but have any kind of help he needed for overhead lifting heavy lifting greater than 20 lb. Instead of this being the case apparently he was terminated. This was not the intention of the note. It was also given to him with the understanding that he could perform his job as a mechanic without heavy lifting. Those restrictions therefore should have been written with a note at that time. This was our error.

Id.

[6] At the formal hearing held on August 14, 2018, the claimant indicated that he turned down both job offers because he still believed he would be returning to his former position with the respondent employer. See Transcript, p. 39.

At his deposition, Redler offered the following testimony relative to his understanding of the claimant's desire to return to his former employment:

> I think it's been my experience not infrequently with a workers'-comp-type injury whereby for a variety of reasons, it could be insurance coverage, it could be a mandate of the company, that they can only return if they can, quote/unquote, do regular duty; however, an awful lot of companies who acknowledge that but who want their employee back will say, listen, bring him back regular duty but we'll make certain that if there's something that's out of what he can handle, we'll get him some help. That's for the kind and caring company, and we see it frequently. I think I was led to believe that was the case there which is why we were able to write for regular duty. It ended up being to his detriment, as it turned out. And I think that I probably, if I had done a better job, could have spelled out more completely in terms of what I called regular duty in the previous note.

Claimant's Exhibit H, pp. 27-28.

Redler also confirmed that although he had released the claimant to full duty in his July 7, 2017 office note, the claimant still had work restrictions at that time. He testified that he provided the full-duty release because the claimant had led him to believe that his restrictions would be "honored" by the employer. Id., 28. The doctor offered the following explanation relative to situations in which an employee seeks a release to full duty even though the employee has restrictions:

> Sometimes it depends on the company policy, that the concept of it has to be written as regular duty or they won't take you back at all. Or if you've been out for a certain amount of time, you've exhausted light duty and you have to do regular duty. We see this frequently, so that though it's not in a majority, having that statement whereby regular duty where you know that there's an agreement that they'll help him out for those heavy activities is not uncommon.

Id., 33.

Redler also testified that he believed the claimant was being honest with him regarding his purported agreement with the employer and the significance of the July 10, 2017 release to full duty.[7]

On March 20, 2018, Commissioner Charles F. Senich approved a voluntary agreement memorializing an 8-percent permanent partial disability award for the August 7, 2016 injury to the claimant's left shoulder, with a date of maximum medical improvement of September 29, 2017. The claimant began employment with the United States Post Office on June 25, 2018, for which he was earning $17.42 per hour at the time of the formal hearing.

On the basis of the foregoing, the commissioner concluded that the testimony of the claimant was fully credible and persuasive, and the claimant had "justifiably sought a full-duty release to work from Dr. Redler based upon direct communication with supervisors." Conclusion, ¶ L. He determined that agents of the employer had led the claimant to believe he would be able to return to his former employment if he provided a release to full duty. The commissioner also found that the claimant's supervisors had led the claimant to believe that assistance would be provided if the claimant was required to perform work activities which exceeded his actual work capacity.

The commissioner further found that at the July 7, 2017 office visit with Redler, "the Claimant communicated his desire to obtain a full-duty work release," Conclusion, ¶ M, and although Redler believed the claimant had a restricted work capacity, he agreed to provide a release to full duty because he believed the claimant would be given assistance in performing heavier assignments. The commissioner specifically cited as

[7] Redler testified that he based his understanding of the claimant's situation "on the fact that I assumed that the conversations I was having with Mr. Lopez were earnest and accurately reflected the conversations he was having with his employer." Claimant's Exhibit H, p. 34.

support for this finding the "History" section of Redler's July 7, 2017 report, Redler's September 29, 2017 report, and the doctor's "compelling deposition testimony confirming his decision to release the Claimant to full duty on July 10, 2017, even though he was of the actual opinion Mr. Lopez still had work restrictions."[8] Conclusion, ¶ N.

The commissioner also noted that "Dr. Redler provided a detailed explanation of his understanding and experience with employers who are willing to accommodate employee restrictions in exchange for full-duty releases due to insurance requirements." Id. The commissioner concluded that Redler's reports were "mostly credible and persuasive," Conclusion, ¶ O, particularly his explanation for why he released the claimant to full duty on July 10, 2017, even though he believed the claimant's work capacity was restricted.

The commissioner concluded that the claimant had satisfied his burden of proof that he was temporarily partially disabled from July 10, 2017, until he attained maximum medical improvement on September 29, 2017. He further concluded that the claimant had performed "adequate" job searches during this time period which demonstrated "that he was ready and willing to work within his light-duty restrictions." Conclusion, ¶ P. The commissioner ordered the respondents to pay temporary partial benefits pursuant to General Statutes § 31-308 (a) from July 17, 2017, until September 29, 2017, subject to a credit for any payments already made during this period.

The respondents filed a motion to correct which was denied in its entirety, and this appeal followed. On appeal, the respondents contend that the commissioner's

[8] The commissioner noted that Redler's July 7, 2017 report indicated: (1) that the claimant informed the doctor that he had been terminated from his employment; (2) the doctor prescribed additional physical/occupational therapy; and (3) the doctor requested that the claimant return for an office visit in eight weeks.

finding "contains numerous conclusions and omissions that are unsupported, or unreasonably drawn from the subordinate facts." Appellants' Brief, p. 6. In particular, the respondents argue that the commissioner erred in awarding benefits "while a valid approved Form 36 was in existence and uncontested." Id., 7. The respondents further contend that the commissioner erred in finding Redler's September 29, 2017 report more reliable than his initial report of July 7, 2017. The respondents also claim as error the commissioner's denial of their motion to correct.

The standard of deference we are obliged to apply to a trial commissioner's findings and legal conclusions is well settled.

> [T]he role of this board on appeal is not to substitute its own findings for those of the trier of fact. Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 451 (2001). The trial commissioner's role as factfinder encompasses the authority to determine the credibility of the evidence, including the testimony of witnesses and the documents introduced into the record as exhibits. Burse v. American International Airways, Inc., 262 Conn. 31, 37 (2002); Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999). If there is evidence in the record to support the factual findings of the trial commissioner, the findings will be upheld on appeal. Duddy v. Filene's (May Department Stores Co.), 4484 CRB-7-02-1 (October 23, 2002); Phaiah v. Danielson Curtain (C.C. Industries), 4409 CRB-2-01-6 (June 7, 2002). This board may disturb only those findings that are found without evidence, and may also intervene where material facts that are admitted and undisputed have been omitted from the findings. Burse, supra; Duddy, supra. We will also overturn a trier's legal conclusions when they result from an incorrect application of the law to the subordinate facts, or where they are the product of an inference illegally or unreasonably drawn from the facts. Burse, supra; Pallotto v. Blakeslee Prestress, Inc., 3651 CRB-3-97-7 (July 17, 1998).

McMahon v. Emsar, Inc., 5049 CRB-4-06-1 (January 16, 2007).

We begin with the respondents' contentions relative to the commissioner's decision to award benefits even though the claimant neither timely contested the form 36

when it was filed or moved to open the form 36 when he decided to seek temporary partial disability benefits. As the respondents correctly point out, "the method by which an employer may seek to discontinue benefits to an employee," Appellants' Brief, p. 7, is governed by the provisions of General Statutes § 31-296 (b), which state:

> Before discontinuing or reducing payment on account of total or partial incapacity under any such agreement, the employer or the employer's insurer, if it is claimed by or on behalf of the injured employee that such employee's incapacity still continues, shall notify the commissioner and the employee, by certified mail, of the proposed discontinuance or reduction of such payments. Such notice shall specify the reason for the proposed discontinuance or reduction and the date such proposed discontinuance or reduction will commence. No discontinuance or reduction shall become effective unless specifically approved in writing by the commissioner. The employee may request a hearing on any such proposed discontinuance or reduction not later than fifteen days after receipt of such notice.

In Anguish v. TLM, Inc., 14 Conn. Workers' Comp. Rev. Op. 195, 2286 CRB-7-95-1 (July 13, 1995), *appeal dismissed for lack of final judgment*, A.C. 15034 (October 26, 1995), *cert. denied*, 235 Conn. 934 (1995), this board stated that "[w]e have interpreted the term 'hearing' as used in § 31-296 C.G.S. to mean a single emergency informal hearing that should be held as soon as possible after the claimant has objected to the Form 36." Id., 196, *citing* Stryczek v. State/Mansfield Training School, 14 Conn. Workers' Comp. Rev. Op. 32, 1765 CRB-2-93-6 (May 4, 1995). We then went on to remark that:

> This is not to say, however, that the claimant is not entitled to challenge the Form 36 in a subsequent formal hearing…. The claimant will still have the opportunity to present evidence, cross-examine witnesses and obtain a reviewable record at a formal evidentiary hearing, which ordinarily should be held shortly after the Form 36 is approved.

Id., 196-7.

We have also previously observed that when a claimant challenges an initial ruling on a form 36 in a subsequent formal hearing, "the previous ruling has no precedential weight. The issue is tried de novo." DeMartino v. L.G. Defelice, Inc., 3524 CRB-4-97-1 (February 18, 1998).

In the present matter, the respondents contend that "[p]rocedurally, the claimant failed to meet his burden in proving that he was entitled to temporary partial disability benefits as he failed to first contest the approved Form 36." Appellants' Brief, p. 8. The respondents further contend that "[i]n addition to failing to object to the approved Form 36 or seeking a hearing to contest it, the claimant did not file a Motion to Re-open the Form 36." Id., 9. Therefore, because "the Form 36 remained valid, the Commissioner erroneously found the claimant was entitled to temporary partial disability benefits for the same time period in which he was found to be at full-duty capacity pursuant to the approved Form 36." Id., 10. The respondents argue that this finding was "both logically and legally impossible. The claimant cannot be temporarily partially disabled and have a full-duty work capacity at the same time." Id.

We recognize that the appeal at bar does present a somewhat unusual situation in that the claimant did not object to the form 36 when it initially issued. However, we note at the outset that the language of § 31-296 contains no reference to "re-opening" a form 36; nor does it suggest any procedural requirement for challenging a commissioner's action on a form 36 beyond the procedure that is always available to either party: namely, a formal hearing on the merits of the claimed entitlement, which is exactly what occurred here.

Even more important, our review of the evidentiary record in this appeal indicates that at the formal hearing, the claimant provided a plausible explanation for why he did not challenge the form 36 when it issued, and the commissioner found this explanation credible. We therefore agree with the claimant that the respondents are seeking to elevate "form over substance" in contending that the commissioner, under the particular circumstances of this claim, did not retain the discretion to rule on the subject form 36 at a formal hearing when it had not previously been challenged at an informal hearing. "[A] trier is not required to treat a Form 36 as if it has been filed in a vacuum, without taking into account the context of the events that have preceded it." Covaleski v. Casual Corner, 4419 CRB-1-01-7 (June 27, 2002). Rather, a commissioner is expected to take all pertinent facts into consideration when reaching a determination relative to whether respondents have been prejudiced by a claimant's failure to challenge the form 36 within the recommended statutory time frame.[9] The commissioner's decision illustrates that he reviewed the totality of the circumstances in this matter and then proceeded to issue a ruling in favor of the claimant, and it was well within his discretion to do so.

> In all cases and hearings under the provisions of this chapter, the commissioner shall proceed, so far as possible, in accordance with the rules of equity. He shall not be bound by the ordinary common law or statutory rules of evidence or procedure, but shall make inquiry, through oral testimony, deposition testimony or written and printed records, in a manner that is best calculated to ascertain the substantial rights of the parties and carry out the provisions and intent of this chapter….

General Statutes § 31-298.

[9] We also note that this board has previously observed "that the legislature's use of the term 'may' [in General Statutes § 31-296] indicates that the time for contesting the Form 36 is directory as opposed to mandatory," and when "the ten day provision is not complied with, it is within the commissioner's discretion as to whether the claimant shall be permitted to challenge an otherwise approved Form 36." Santiago v. Metropolitan Insurance Co., 12 Conn. Workers' Comp. Rev. Op. 388, 391, 1631 CRB-6-93-1 (September 1, 1994), *appeal dismissed*, A.C. 14008 (February 3, 1995), *citing* Farricielli v. Personnel Appeal Board, 186 Conn. 198, 203 (1982).

The respondents also contend that the commissioner erred in concluding that Redler's "retraction report" of September 29, 2017, was more reliable than his initial report of July 7, 2017, which report was "contemporaneous to a medical examination of the claimant and clearly and explicitly provided a full-duty release." Appellants' Brief, p. 10. We find this claim of error utterly without merit; it is well-settled that "[i]t is the quintessential function of the finder of fact to reject or accept evidence and to believe or disbelieve any expert testimony…. The trier may accept or reject, in whole or in part, the testimony of an expert." (Internal citations omitted.) Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999).

Moreover, as discussed previously herein, both Redler and the claimant offered plausible, and corroborating, explanations for the discrepancies between the two reports, which explanations were found credible by the commissioner. The respondents argue that the irregularities attendant upon the two reports serve to undercut Redler's credibility in light of his testimony which clearly demonstrated his understanding of the role that physicians play in the workers' compensation forum and the importance of accuracy in medical reports which assist a commissioner in determining the type and amount of benefits to which a claimant may be entitled. We are not so persuaded; rather, it appears that Redler's testimony reflecting his familiarity with the workers' compensation forum did not lead the commissioner to the inexorable conclusion that the discrepancies in the medical reports were due to a lack of candor on the part of either Redler or the claimant

but, instead, to the inference that Redler understood why an individual with restrictions would feel compelled to seek a full-duty release in order to resume employment.[10]

The respondents' claims of error notwithstanding, we are not persuaded that the resolution of this appeal hinges upon the sufficiency, or alleged insufficiency, of the evidence presented. This is particularly so given that the respondents presented no rebuttal witnesses or additional medical opinion which could serve to challenge the testimony of the claimant at trial or Redler's reports and deposition testimony. Rather, it is clear that the adjudicatory issues before the commissioner primarily implicated the credibility of the claimant and his treating physician. With regard to the claimant, the commissioner was required to determine the veracity of his testimony regarding not what the agents of the employer may or may not have actually said, but what the claimant believed he was being told. With regard to the credibility of the claimant's treating physician, the commissioner was required to assess the persuasiveness of Redler's rationale for relying on the representations of the claimant in issuing a full-duty release before he believed the claimant was physically ready to return to work without restrictions.

As noted previously herein, the commissioner, in his decision, stated that he found the testimony of the claimant "fully credible and persuasive." Conclusion, ¶ L. He also "specifically" found credible Redler's rationale for issuing the claimant a release to full duty on July 10, 2017, despite his opinion that the claimant's work capacity continued to be restricted. Conclusion, ¶ O. It is of course axiomatic that such credibility determinations are "uniquely and exclusively the province of the trial commissioner,"

[10] The respondents point out that Redler did not communicate directly with the employer but, rather, "relied solely on the representations made to him by the claimant." Appellants' Brief, p. 11. We do not believe that Redler was under any obligation to "verify" the information being conveyed to him by his patient.

Smith v. Salamander Designs, Ltd, 5205 CRB-1-07-3 (March 13, 2008), and are not generally subject to reversal on review. As such, lacking any convincing justification to do so, we therefore decline to reverse the commissioner's credibility findings in the present matter.

The respondents also claim as error the commissioner's denial of their motion to correct. Our review of the proposed corrections indicates that the respondents were merely reiterating arguments made at the formal hearing which ultimately proved unavailing. As this board has previously observed, when "a motion to correct involves requested factual findings which were disputed by the parties, which involved the credibility of the evidence, or which would not affect the outcome of the case, we would not find any error in the denial of such a motion to correct." Robare v. Robert Baker Companies, 4328 CRB-1-00-12 (January 2, 2002).

There is no error; the January 10, 2019 Finding and Award of Scott A. Barton, Commissioner acting for the Third District, is accordingly affirmed.

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