CASE NO. 6316 CRB-5-19-3 CLAIM NO. 500167586	:	COMPENSATION REVIEW BOARD
LORRAINE SMITH CLAIMANT-APPELLEE	:	WORKERS' COMPENSATION COMMISSION
v.	:	MARCH 10, 2020

REGALCARE AT WATERBURY, LLC
EMPLOYER

and

STATE AUTOMOBILE MUTUAL INSURANCE CO., LLC
INSURER
RESPONDENTS-APPELLANTS

APPEARANCES:

The interests of the claimant were represented by Barry S. Moller, Esq., Cramer & Anderson, L.L.P., 51 Main Street, New Milford, CT 06776.

The interests of the respondents were represented by Karen A. Acquarulo, Esq., The Law Offices of Solimene & Secondo, L.L.P., 1501 East Main Street, Suite 204, Meriden, CT 06450.

This Petition for Review from the February 27, 2019 Finding and Decision by Carolyn M. Colangelo, the Commissioner acting for the Fifth District, was heard August 30, 2019 before a Compensation Review Board panel consisting of Commissioners Peter C. Mlynarczyk, David W. Schoolcraft and Daniel E. Dilzer.

OPINION

PETER C. MLYNARCZYK, COMMISSIONER. The respondents have appealed from a Finding and Decision (finding) by Commissioner Carolyn M. Colangelo (commissioner) awarding the claimant benefits for a work-related knee injury. The respondents argue that the evidence presented was insufficient to find the claimant sustained a compensable knee injury. They also assert error from the commissioner's decision not to rely on the opinion of the commissioner's medical examiner, and claim it was error for the commissioner to admit an addendum to a respondents' medical examination (RME) into evidence. The claimant argues that the case turned on the commissioner's evaluation of witness credibility and medical opinions, and that such determinations must be affirmed on appeal. She also argues that the commissioner adhered to the requirements of due process in this case. We are persuaded by the claimant's arguments and therefore we affirm the finding.

The commissioner reached the following factual determinations in the finding. She noted that on November 3, 2016, the claimant was employed by the respondent as a CNA and on that date, she was in the lobby of her place of employment about to begin her break. She often took a break in the lobby so she could respond to call lights. At that time, she felt and heard her right knee pop as she was taking a seat on a couch. "When the incident occurred, the claimant was beginning to sit and her 'leg was probably to the side' because she had to get by a coffee table that was in front of the couch." Findings, ¶ 4 *quoting* Respondents' Exhibit 5. A witness to the incident reported, "Lorraine went to sit down and her [right] knee made a popping sound as she grimaced in pain." Later

that evening, the claimant was seen limping while she walked. Findings, ¶ 5 *quoting* Claimant's Exhibit A-B.

The claimant first sought medical treatment with a PA-C at Concentra who diagnosed a strain of the right knee, observed swelling, prescribed physical therapy, and referred her to T. Michelle Mariani, M.D. See Findings, ¶ 6. The claimant did not go to work on November 4th or 5th of 2016**.** On November 7, 2016, the claimant saw her primary-care physician, Dr. Stephen Rubenstein, who diagnosed her with **"**internal derangement or a torn medial meniscus of her right knee." See Findings, ¶¶ 7-8.

After returning to work in late November, the claimant continued to experience pain and returned to Rubenstein in December 2016. He ordered an MRI, which was performed on January 3, 2017, and showed a "complex tear along the posterior horn of the medial meniscus." Findings, ¶ 11 *quoting* Claimant's Exhibit E. On January 19, 2017, the claimant consulted with Mariani, who recommended surgical intervention. The claimant underwent right knee arthroscopy, partial medial meniscectomy and chondroplasty and medial femoral condyle on February 10, 2017. See Findings, ¶ 12. The commissioner then made the following finding:

> Mariani stated, "while the patient does have pre-existing right knee degenerative joint disease . . . she did have an injury that was directly related to her work injury." She stated it was also possible that the work incident may have exacerbated something that previously was not symptomatic. (Footnote omitted.)

See Findings, ¶ 13 *quoting* Claimant's Exhibit F.

On June 29, 2017, Peter R. Barnett, M.D., performed a RME. The commissioner quoted the following language from his report:

> [T]his individual was also found to have a tear of the medial meniscus of the right knee. Whether this was a preexisting

> problem cannot be determined. The history provided by this individual would suggest that the incident which occurred on November 3, 2016, either aggravated underlying preexisting problems of the right knee or potentially resulted in the tear of the medial meniscus of the right knee.

Findings, ¶ 14 *quoting* Respondents' Exhibit 2, pp. 3-4. The commissioner also found that Barnett offered an addendum to his RME report on November 6, 2017 which stated as follows:

> It remains my opinion that this individual's degenerative issues in the right knee were developmental, preexisting, and unrelated to the work-related incident on November 3, 2016. The history obtained from this individual . . . would suggest the sequelae stemming from this incident either aggravated a potential underlying preexisting medial meniscal tear or potentially resulted in the development of the medial meniscal tear.

Findings, ¶ 15 *quoting* Respondents' Exhibit 3, p. 2.

The commissioner also reviewed the treatment records of Rubenstein from prior to the November 3, 2016 incident. The claimant testified that she treated with him for right knee pain in March of 2016, but the pain subsided, and she did not continue treating or take any medication. The commissioner found Rubenstein's records do not show any treatment for right knee pain or injuries from March of 2016 until November of 2016. She found that at his deposition, Rubenstein testified he examined the claimant in March of 2016 and had no "significant suspicion of internal derangement or a meniscus tear . . . ." Findings, ¶ 18 *quoting* Claimant's Exhibit H, pp. 20-21.

A commissioner's examination was performed by Michael J. Kaplan, M.D., on January 23, 2018. Dr. Kaplan stated it was "unclear as to whether or not the meniscal tear would be related to the insult of 11/03/2016, although there is no torsional mechanism that would support it. It is more likely that she had a degenerative tear that

was preexisting that became symptomatic for which attention was appropriately rendered. At this point, there is potential that she will have worsening course with degenerative disease and any further attentions or interventions should not be considered causal to the event of 11/03/2016, but rather as a consequence of her degenerative disease and completely independent of the event of 11/03/2016.'" Findings, ¶ 19 *quoting* Commissioner's Exhibit 1, p. 2.

Based on these factual findings, the commissioner concluded the claimant was a credible and persuasive witness, particularly in distinguishing her medical situation both before and after the November 3, 2016 incident. She found the opinions of Mariani and Rubenstein credible and persuasive, and noted that they were consistent with the claimant's narrative and noted that they differentiated between treatment of the claimant before and after the alleged work injury. She did not find Barnett's opinion persuasive and did not find Kaplan's opinion as to causation persuasive, as it relied in part on finding the claimant had not sustained a torsional injury to her knee, and the commissioner found that the claimant had offered credible testimony as to how she injured her knee. As a result, the commissioner concluded the "[c]laimant suffered a compensable injury to her right knee on November 3, 2016, which directly led to or accelerated her need for a right knee surgery on February 10, 2017." Conclusion, ¶ I.

The respondents sought five corrections to the findings which sought to add additional testimony to the finding. The commissioner denied this motion to correct. The respondents also filed a motion for articulation seeking the commissioner to expound on her reasoning for not crediting Kaplan's opinion. The commissioner denied this motion and the respondents have pursued this appeal. The gravamen of this appeal

centers upon the respondent's belief that the testimony of the claimant does not conform with the medical opinions associating a torsional force as causing her meniscus tear.

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).

Upon review of the respondents' arguments we find they boil down to a simple proposition: the commissioner erred by not adopting the methodology and conclusions presented by the commissioner's examiner. As the respondents see it, since Kaplan did not believe the mechanism of injury described by the claimant would cause a torn meniscus, such an injury must be noncompensable. Our precedent, however, allows a commissioner to accept the opinion of a treating physician over that of a commissioner's examiner. See Madden v. Danbury Hospital, 5745 CRB-7-12-4 (April 22, 2013).

In Madden, the commissioner concluded that the treating physicians who opined the claimant had sustained a repetitive trauma injury were more persuasive and credible than the commissioner's examiner, who opined the claimant had not sustained such an injury. We affirmed this decision, noting that it is for the trial commissioner to determine if the employment is a proximate cause of the disablement, and that this board may not substitute its own findings for those of the commissioner. Id., *citing* Love v. William W. Backus Hospital, 5255 CRB-2-07-8 (June 24, 2008). See also Sanchez v. Edson Manufacturing, 5980 CRB-6-15-1 (October 6, 2015), *aff'd*, 175 Conn. App. 105 (2017).

In Madden, we pointed out that when a commissioner finds other expert opinions were more persuasive than the opinion of the commissioner's examiner, she may choose to rely on those opinions. In a "dueling expert" case that is her prerogative. Dellacamera v. Waterbury, 4966 CRB-5-05-6 (June 29, 2006), n.1. (Footnote omitted.) See also Strong v. UTC/Pratt & Whitney, 4563 CRB-1-02-8 (August 25, 2003), "[i]f on review this board is able to ascertain a reasonable diagnostic method behind the challenged medical opinion, we must honor the trier's discretion to credit that opinion above a conflicting diagnosis." Id. The commissioner had a proper basis supporting her conclusion.

We have reviewed the testimony of the claimant at the formal hearing and at her deposition, where counsel for the respondent examined her at length. She testified to sitting on a couch "sideways" and then feeling a pop in her right knee at the time of the incident. October 4, 2018 Transcript, p. 18. She further explained that this knee pain was at a different location than the knee pain she experienced earlier in March of 2016, and that that ailment had been asymptomatic prior to this injury. Id., p. 37. In her

deposition of September 28, 2017 (Respondents' Exhibit 5), she testified that "my leg was probably to the side because we had to get by the coffee table" p. 81 and that when she sat down she felt a pop in the front of her knee. Id. She further said the knee pain she experienced in March of 2016 "wasn't the same." Id., p. 83.[1]

The commissioner found this testimony credible and having observed the claimant's testimony at the formal hearing, had the right to deem it reliable. See Burton, supra, 40; see also Baron v. Genlyte Thomas Group, LLC, 132 Conn. App. 794, 804, *cert. denied*, 303 Conn. 939 (2012).

The medical witnesses whom the commissioner found credible and persuasive relied upon the claimant's narrative as to her mechanism of injury, and found it sufficiently explained how she tore the meniscus in her right knee. See Claimant's Exhibit H, pp. 15-18, wherein Rubenstein described the claimant presenting with a torn meniscus following the November 3, 2016 incident**.** See also, and Joint Exhibit A, a November 3, 3017 letter wherein Mariani opines that the workplace injury caused this condition, see also Joint Exhibit 2, pp. 13-15; p. 50, p. 55, pp. 63-64. While the respondents believe the commissioner should have given Kaplan's opinion greater weight she was not obligated to do so.[2]

As we pointed out in Carroll v. Flattery's Landscaping, 5385 CRB-8-08-10 (September 24, 2009), when commissioners choose not to accept the opinion of a

[1] We note that at his deposition, Rubenstein expounded at some length on how the claimant's knee ailments of March 2016 and preexisting condition impacted a different portion of the knee than her November 3, 2016 incident. See Claimant's Exhibit H, pp. 41-47.

[2] The respondents argue that the absence of the term "torsional" in the opinions of Rubinstein and Mariani render their opinions less valid than that of Kaplan. The commissioner could infer however, that all of the experts were presented with the same narrative as to how the claimant was injured and there was merely a difference of opinion as to whether that mechanism of injury would cause the claimant to tear her meniscus.

commissioner's examiner they generally should proffer a reason why they found another expert more persuasive. The commissioner here did so in Conclusion, ¶¶ E, H, wherein she clearly provided her rationale for finding the treating physicians' opinions as to causation more persuasive than that offered by Kaplan. The commissioner noted Kaplan's opinion was based on his assumption the mechanism of injury was not "torsional," which assumption she found inconsistent with the claimant's credible testimony at the formal hearing. Conclusion, ¶ H. Having observed the claimant's testimony, the commissioner was in the best position to determine whether the mechanism of injury described and/or demonstrated by the claimant was "torsional." On the other hand, she expressly said why she found the opinions of Mariani and Rubenstin persuasive, i.e., because they were consistent with the diagnostic imaging and the claimant's testimony about the nature and chronology of her symptoms. Conclusion, ¶ E.

This bears on another claim of error, the commissioner's decision not to grant the motion for articulation. Given the commissioner's clear explanation, in Conclusion, ¶¶ E, H, of her reasons for accepting the opinion of the treaters over that of Kaplan, we find no fault in her declining to articulate. See Brown v. State/Dept. of Correction, 4609 CRB-1-03-1 (December 17, 2003).

The respondents also claim error from the decision of the commissioner to deny their motion to correct. The commissioner could reasonably determine that none of these corrections would have compelled a different result in this case, as they essentially restated evidence in the record. Moreover, two of the corrections involve the opinions of Barnett, whom the commissioner did not rely upon. When a trier of fact is not persuaded by testimony, or finds evidence not probative or credible, they are not obligated to grant a

motion to correct. 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).

We finally address the claim by the respondents that the decision by the commissioner to reopen the record in order to make Barnett's addendum to his RME report a full exhibit was error and violated due process. By way of background, Barnett's original RME report [Respondents' Exhibit 2] was admitted at the October 14, 2018 formal hearing as full exhibit by agreement. The respondent argues that it only agreed to this because it believed the addendum would also be admitted. See Respondents' Brief, p. 11.[3] However, the commissioner declined to mark the addendum [Respondents' Exhibit 3] as a full exhibit because Barnett had not been deposed. Id. The formal hearing was continued to give the parties time to submit deposition testimony from Mariani and/or Barnett. At a follow-up formal hearing on November 1, 2018, the transcript of Mariani's September 24, 2018 deposition was entered, but no deposition testimony of Barnett was proffered. Instead, the respondents argued for exclusion of both of Barnett's reports, but the commissioner denied the motion. The evidentiary record was closed at that time with the original RME report being a full exhibit and the addendum still an exhibit for identification only. On December 17, 2019, the parties submitted their proposed findings and the record was closed. Thereafter, however, the commissioner opened the record, *sua sponte*, and at a formal hearing on February 20, 2019, admitted the addendum as a full exhibit [Respondents' Exhibit 3].

[3] The original RME report was actually proffered by the claimant, because she felt it beneficial to her case. This was presumably the same reason the respondents wanted to have the RME report either excluded from the record or supplemented by the addendum, which the respondents feel benefits its case.

On appeal, the respondents argue that the commissioner abused her discretion by initially admitting the original report but not the addendum, because by excluding the addendum the commissioner did not have the full context of Barnett's opinion. That is hard to reconcile with the argument, that the commissioner also committed error in reversing herself and allowing the addendum into evidence. In fact, the respondents' grievance here is founded on the assumption that the trial commissioner never really considered the addendum; that she only decided to admit it at the last minute, while she was writing her decision, in order to avoid being reversed on appeal. We find no basis for that allegation. For one thing, the fact that the commissioner quoted from the addendum belies the notion that she did not consider it. Moreover, in this case we believe the commissioner would have no cause for subterfuge because she would have been well within her rights to admit the RME report and still exclude the addendum.

We have long recognized the right of a claimant to introduce a favorable RME report without having to take the examiners deposition. See, e.g., Giovino v. West Hartford, 1912 CRB-1-93-12 (May 12, 1995). (In that case, the commissioner admitted the report over the objection of the respondent, but gave the respondent an opportunity to call the examiner as a witness, which the respondent declined to do.) We have examined our precedent since Giovino and find that in the absence of obvious prejudice to a litigant, see Ghazal v. Cumberland Farms, 5397 CRB-8-08-11 (November 17, 2009), we have provided great leeway to a trial commissioner to ascertain what evidence is deemed probative and admissible. "Our case law clearly states, 'a trial commissioner has broad discretion to determine the admissibility of evidence, and an evidentiary ruling will not be set aside absent a clear abuse of that discretion.'" Keeney v. Laidlaw Transportation,

5199 CRB-2-07-2 (May 21, 2008), *quoting* Lamontagne v. F&F Concrete Corporation, 5198 CRB-4-07-2 (February 25, 2008). In this case, the respondents were aware of Barnett's report and had the opportunity to depose him if they wished to clarify his opinions. See Berube v. Tim's Painting, 5068 CRB-3-06-3 (March 13, 2007).[4]

Moreover, even if Barnett's RME report and the addendum had been excluded from the record, it would make no difference because the commissioner did not ultimately rely on Barnett's opinion and we believe the opinions of Rubenstein and Mariani sufficiently support the result found by the commissioner. Therefore, we find no error.

There was a sufficient quantum of probative evidence supportive of finding the claimant's injury compensable in this case.

There is no error; the February 27, 2019 Finding and Decision of Carolyn M. Colangelo, the Commissioner acting for the Fifth District, is accordingly affirmed.

Commissioners David W. Schoolcraft and Daniel E. Dilzer concur in this opinion.

[4] The addendum in question was a letter Barnett generated after reviewing a transcript of the claimant's deposition, which had been sent to him by the respondents. Barnett noted inconsistencies between what the claimant said in her deposition and what she had told him, and he said this raised questions about the claimant's recall of her symptoms prior to the date of injury. Still, he reiterated his prior opinion that the working injury had not caused the degeneration in the claimant's knee, and said that the question of whether she tore the meniscus in that accident would depend on "the credibility and reliability of the historical information being provided by this individual." Respondents' Exhibit 3, p.2. That reliability is a question that the commissioner resolved in the claimant's favor.