

CASE NO. 6328 CRB-4-19-5
CLAIM NO. 400106130

: COMPENSATION REVIEW BOARD

JONAS BERNARD
CLAIMANT-APPELLANT

: WORKERS' COMPENSATION
COMMISSION

v.

: OCTOBER 15, 2020

SHOPRITE SUPERMARKET
EMPLOYER

and

AMGUARD INSURANCE COMPANY
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Maria R. Altieri, Esq., Attorney at Law, 1836 Noble Avenue, Bridgeport, CT 06110.¹ Attorney Altieri waived oral argument and the matter was considered on the papers.

The respondents were represented by Jason T. LaMark, Esq., Mullen & McGourty, P.C., 2 Waterside Crossing, Suite 102A, Windsor, CT 06095. Attorney LaMark waived oral argument and the matter was considered on the papers.

This Petition for Review from the April 9, 2019 Finding and Dismissal by Jodi Murray Gregg, the Commissioner acting for the Fourth District, was heard July 24, 2020 before a Compensation Review Board panel consisting of Commission Chairman Stephen M. Morelli and Commissioners William J. Watson III and Maureen E. Driscoll.²

¹ We note that during the pendency of this appeal, Attorney Altieri filed a Motion to Withdraw Appearance. In a Ruling Re: Motion to Withdraw as Counsel dated November 5, 2019, this tribunal denied her motion.

² We note that a motion for continuance was granted during the pendency of this appeal.

OPINION

STEPHEN M. MORELLI, CHAIRMAN. The claimant has appealed from the April 9, 2019 Finding and Dismissal (finding) reached by Commissioner Jodi Murray Gregg (commissioner). The claimant alleged that he was injured in a workplace altercation on July 29, 2017, and he argues that the commissioner erred by not crediting his treater's opinion as to the causation of his head and neck injuries. The respondents argue that after considering the testimony of a co-worker and a review of video surveillance, the commissioner simply concluded that the claimant was not a credible witness and therefore, could fully discount his claim that the incident in question caused his injuries. Having reviewed the briefs and the record, we determine that this was a question of fact, and sufficient evidence is present in the record to uphold the commissioner's conclusions that this claimant was not credible and that the claim should be dismissed. Pursuant to the precedent in Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988), we find no error. We affirm the finding.

The commissioner reached the following factual determinations in the finding. The claimant worked for about seven years for the respondent as an assistant produce manager when on July 29, 2017, he claimed he was injured in a workplace altercation. He told the commissioner that a dispute occurred between him and a co-worker named Antoine Love, who would not help move a pallet of goods. The claimant testified that Love "opened the door and pushed him in his chest with both hands and that he fell backwards and he hit the floor." Findings, ¶ 4. The claimant asserted that he suffered compensable injuries to his head and neck as a result of this incident. In response to the claimant's allegations, two additional lay witnesses testified at the trial. The first witness,

co-worker Taman Matar, testified that she observed Love pushing the claimant down. However, Matar reported that the claimant's head landed on top of empty cardboard boxes and not on the floor. The second witness was Frank Amici, respondent's human resources director. Amici investigated the claim and provided video surveillance of this incident for the commissioner's review. Amici testified that Love said he was annoyed by the claimant and acknowledged involvement in the altercation. Additionally, Amici reported that the claimant had not submitted any out of work notes from medical professionals to him after the altercation. The commissioner found the video documented the claimant being assaulted, falling down and regaining his footing after a few seconds.

The claimant submitted the report from Bridgeport Hospital emergency department dated July 30, 2017, into evidence. The report states that the claimant presented with a headache and dizziness as the result of a head injury at work. The physicians' assistant, Jillian Crowley, diagnosed the claimant with "acute post-traumatic headache, not intractable and neck pain." Findings, ¶ 12. On August 10, 2017, the claimant was examined by Philip A. Micalizzi, Jr., M.D., who diagnosed post-concussive syndrome as a result of the work injury. The claimant presented for a consultation with a neurologist, Phillip M. Barasch, M.D., on September 8, 2017. Barasch assessed the claimant with head trauma and neck pain as the result of the work incident. The claimant was also examined by Dario Zagar, M.D., a neurologist, on April 25, 2018. Zagar diagnosed post-traumatic headache and neck pain as a result of the work incident. The claimant was examined as well by Roger Kaye, M.D., who performed a neurological evaluation of the claimant on September 10, 2018. Kaye opined that CT findings provided "a basis in reality for the diagnosis of cervical sprain and post-traumatic

headaches,” both symptoms which the claimant attributed to the July 29, 2017 altercation. Claimant’s Exhibit DD, pp. 2-3.

The respondents had their examiner Stephen R. Conway, M.D., a neurologist, examine the claimant on January 16, 2018. Conway opined after the examination that he did not believe with any level of medical probability that the claimant sustained a head or neck injury as a result of the July 29, 2017 altercation. Based upon his examination of the claimant and review of the evidence, Conway could not correlate the claimant’s symptoms or any work restrictions to the event displayed in contemporaneous video surveillance. Conway was deposed on May 9, 2018 and testified that “[t]here’s absolutely no data from the incident to suggest that his injury was concussive. So, I think that those physicians, those health-care providers predicated their conclusions on information they obtained from him, which I don’t think were accurate.” Findings, ¶ 18 *quoting* Respondents’ Exhibit 2, p. 13. After viewing a video of the incident, Conway agreed there was symptom magnification and opined that there was no need for medical treatment. See Findings, ¶ 19.

Both Barasch and Micalizzi, Jr., were deposed and viewed the video surveillance at their depositions. Barasch said after viewing this that the claimant’s version of the incident was different than the video and there could be symptom magnification. See Findings, ¶ 20. Micalizzi, Jr., following a review of the video, testified that “[t]here is no way in this world that [that] injury would ever cause a concussion. That’s impossible. I say with absolute certainty.” Findings, ¶ 21 *quoting* Respondents’ Exhibit 17, p. 22.

Based on this record, the commissioner concluded that while a workplace incident occurred between the claimant and a co-worker on July 29, 2017, the incident did not

cause a compensable injury. She did not find the claimant's testimony credible or persuasive and did not find Zagar or Kaye's opinions or reports to be credible. The commissioner found Conway's reports and deposition testimony to be credible and persuasive. She found the deposition testimony of Barasch and Micalizzi, Jr., more credible than their reports as they had not viewed the video as of the date of their reports. Accordingly, she dismissed the claim for a head or neck injury.

The claimant filed a motion to correct seeking to substitute findings consistent with the award of benefits for this incident. The commissioner denied this motion in its entirety. The claimant has pursued this appeal arguing that he should have been found to have been a credible witness. Moreover, the claimant argues that the commissioner erred by discrediting evidence from his treaters which was sufficient to support an award of benefits for a head or neck injury. We are not persuaded by these arguments.

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 his live testimony at the formal hearing. 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).

The commissioner, after considering the testimony of the claimant’s co-worker and a review of the surveillance video, did not accept the claimant’s narrative that he hit his head and sustained a substantive injury as a result of the July 29, 2017 altercation. It is her duty to weigh the evidence, and we cannot intercede to reach a differing result if, as in this case, probative evidence supports her conclusions. See Jodlowski v. Stanley Works, 169 Conn. App. 103, 108-109 (2016).

The commissioner, by finding that the claimant was not credible, provided a basis for discrediting the medical evidence that might otherwise be considered supportive of

compensability. We note that our precedent stands for the proposition that if a commissioner believes a claimant is not a credible witness, he or she may determine that any medical opinion which is reliant on the claimant's narrative is also unreliable. See 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). The commissioner was in the best position to evaluate the medical opinions of the physicians, and her decision provides the rationale for why she discounted the opinions of Zagar and Kaye, as well as those opinions rendered by Barasch and Micalizzi, Jr., prior to reviewing the surveillance video. On the other hand, the commissioner could deem Conway's opinions to be persuasive and credible, and those opinions support the result reached in this case. See Strong v. UTC/Pratt & Whitney, 4563 CRB-1-02-8 (August 25, 2003).

The claimant raises one legal claim of error in this appeal unrelated to the evidence. He claims that the respondents "waived" entitlement to deny the claim because the form 43 disclaimer was inadequate to contest his medical evidence. The claimant points to no statutory provision or appellate precedent supportive of his position. Since it is well-settled that within the workers' compensation forum, the claimant bears the burden of persuasion in establishing that his employment was the proximate cause of his injuries, see Sapko v. State, 305 Conn. 360, 372 (2012); Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 447 (2001), we reject this argument.

In many ways, this case resembles Barbee v. Sysco Food Services, 5892 CRB-8-13-11 (October 16, 2014), *aff'd*, 161 Conn. App. 902 (2015) (per curiam). In that case, video evidence was inconsistent with the claimant's narrative and the trial commissioner decided to deny the claim. We affirmed that decision and as we find no material

distinction present between the cases, we are compelled to affirm the trial commissioner's decision herein.³

As there is no error; the April 9, 2019 Finding and Dismissal of Jodi Murray Gregg, the Commissioner acting for the Fourth District, is accordingly affirmed.

Commissioners William J. Watson III and Maureen E. Driscoll concur in this opinion.

³ 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).