

CASE NO. 6334 CRB-7-19-6  
CLAIM NO. 700155971

: COMPENSATION REVIEW BOARD

CATHERINE DIPISA  
CLAIMANT-APPELLANT

: WORKERS' COMPENSATION  
COMMISSION

v.

: SEPTEMBER 23, 2020

BETHEL HEALTH & REHABILITATION CENTER  
EMPLOYER

and

WORKERS' COMPENSATION TRUST  
INSURER  
RESPONDENTS-APPELLEES

APPEARANCES:

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

The respondents were represented by Judith A. Murray,  
Esq., Letizia, Ambrose & Falls, 667-669 State Street,  
Second Floor, New Haven, CT 0651.

This Petition for Review from the May 24, 2019 Finding of  
Brenda D. Jannotta, Commissioner acting for the Seventh  
District, was heard on February 28, 2020 before a  
Compensation Review Board panel consisting of  
Commission Chairman Stephen M. Morelli and  
Commissioners William J. Watson III and Toni M. Fatone.

## OPINION

STEPHEN M. MORELLI, CHAIRMAN. The claimant has petitioned for review from the May 24, 2019 Finding (finding) of Brenda D. Jannotta, Commissioner acting for the Seventh District (commissioner). We find harmless error and accordingly affirm the decision of the commissioner.<sup>1</sup>

The commissioner identified two issues for determination at the formal hearing: (1) whether the claimant's bilateral trochanteric bursitis is causally related to the claimant's injury of April 4, 2010; and (2) whether future medical treatment for the claimant's lumbar spine condition is reasonable or necessary. The following factual findings are pertinent to our review. On April 4, 2010, the claimant, who was employed by the respondent employer as a supervisor/manager of the dining room, sustained a compensable injury to her back when, while placing a tray of dishes in the dish room, she twisted and felt a popping and pain down her leg. The claimant had a pre-existing back injury which she sustained on October 29, 2001, and for which she was assessed a 10 percent permanent partial disability by Christopher J. Cassels, M.D., on December 6, 2001. The claimant settled this case on April 30, 2003, for \$16,500.

The claimant treated with David L. Kramer, M.D., an orthopedic specialist, and David Levi, M.D., a pain management specialist. Between June 1, 2010, and June 7, 2016, the claimant underwent an extensive regimen of conservative treatment including physical therapy, chiropractic adjustments, pain management, and various

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

injections. On February 20, 2014, Levi performed a percutaneous nucleoplasty/IDET procedure on the claimant's lower lumbar spine. On June 7, 2016, Kramer performed a left-side discectomy at L5-S1.<sup>2</sup>

On June 8, 2017, Kramer placed the claimant at maximum medical improvement from a surgical perspective, noting that a recent MRI showed no evidence of residual nerve root compression. Kramer opined that the claimant would require long-term pain management and referred her to a physiatrist to address her chronic lumbar myofascial pain.

On the same date, Levi diagnosed the claimant with bilateral trochanteric bursitis which he attributed to the claimant's post-surgery sleeping position. Prior to this visit, the claimant had no difficulty walking on her heels and toes and her gait was fine. In a report dated July 5, 2017, Levi recommended bilateral hip bursa injections and opined that if the injections were authorized, the claimant would be at maximum medical improvement at that point. In this report, Levi also disagreed with Kramer's referral of the claimant to a physiatrist, stating that he felt it would be of "little benefit" because "in essence ... what she has at this point is the endpoint of her injury." Respondents' Exhibit 3, p. 2. However, at a subsequent deposition, Levi opined that it would be beneficial for the claimant to see a physiatrist because it could help "functionally restore her back to a place where she can go to work." Claimant's Exhibit C, p. 28.

In correspondence dated July 25, 2017, Kramer opined that within a reasonable degree of medical probability, he concurred with Levi's opinion that the claimant's

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<sup>2</sup> The claimant stopped working in November 2015.

trochanteric bursitis was related to her lumbar condition as a result of walking with an awkward gait.

On September 27, 2017, the claimant underwent a respondents' medical examination (RME) with John M. Beiner, M.D., who opined that the claimant's trochanteric bursitis was not related to her lumbar spine injury of April 4, 2010. Beiner further opined that the claimant did not require any additional treatment for the lumbar spine injury.

On February 26, 2018, Gerald J. Becker, M.D., performed a commissioner's examination. Becker also opined that the claimant's trochanteric bursitis was not related to her work injury of April 4, 2010. Becker noted that the claimant is 5'4 <sup>3</sup>/<sub>4</sub>" tall, weighs 230 pounds, and has a body mass index of 38. As such, Becker indicated that the claimant's excessive weight may be contributing to the alleged bilateral trochanteric bursitis. Becker did not recommend any additional surgery for the claimant's lumbar spine; he also did not recommend any additional injections as they are "palliative at best and certainly not curative." Respondents' Exhibit 7, p. 3. Becker discouraged the use of narcotic medications and instead recommended the claimant try a neurological medication such as Topamax. He also recommended weight loss and physical exercise. Becker placed the claimant at maximum medical improvement as of February 26, 2018, with a 17 percent permanent partial disability to the lumbar spine, 7 percent of which he attributed to the claimant's April 4, 2010 date of injury and 10 percent to the claimant's pre-existing condition.

On June 19, 2018, Kramer reviewed Becker's report and also placed the claimant at maximum medical improvement. However, although he agreed with Becker's 17 percent permanent partial disability rating, he attributed all of the permanency to the April 4, 2010 date of injury. Kramer further opined that the claimant still required oral pain medication and should follow up with a pain management physician.

At a deposition held on December 28, 2018, Beiner, on the basis of additional information including Becker's report of February 26, 2018, stated that his opinion that the claimant did not require any additional treatment by a physiatrist or any other medical provider for her injury of April 4, 2010, was unchanged. He recommended that the claimant be weaned from Percocet and the weaning process be directed by a physician.

The claimant testified at formal hearings held on September 26, 2018, and November 27, 2018. She indicated that it is difficult for her to get a good night's sleep and she experiences "piercing pain" if she lies on one side for too long. September 26, 2018 Transcript, p. 26. The claimant testified that she sustained a prior disk herniation at L5-S1 in 2001 and received a permanency award of 10 percent for that injury. The claimant stated that she "totally forgot" about the earlier award because "it was nothing" and she "really [didn't] remember much of it." *Id.*, 33-34. The claimant subsequently conceded that the settlement amount of \$16,500 which she was paid for that injury "was a lot of money back then." *Id.*, 46. She further testified that she did not inform Kramer or Levi about the prior herniation because she did not recall either of those doctors asking her about her medical history.

Neither Kramer nor Levi mentioned the claimant's prior lumbar spine injury in their reports. At his deposition, Levi testified that he was not aware of the claimant's prior disk herniation and had never reviewed the October 2001 MRI. See Claimant's Exhibit C, pp. 35-37. The respondents were not made aware of the claimant's prior back injury until 2016.

When queried regarding the non-narcotic policy of Mitchell Prywes, M.D., the physiatrist to which Kramer had referred the claimant, the claimant replied that she was "fine" with that and preferred a more "holistic" approach. *Id.*, 35. She indicated that she had not found chiropractic treatment or physical therapy helpful because both had felt "temporary, like a little Band Aid." November 27, 2018 Transcript, p. 9. She testified that she was divorced on January 7, 2009, and slept on a couch from January 2009 until June 2016. The claimant also indicated that she suffered from plantar fasciitis, which can make walking difficult. Levi, at his deposition, testified that sleeping on a couch for years could cause hip bursitis, and also agreed that plantar fasciitis could cause an uneven gait.

Based on the foregoing, the commissioner determined that the claimant was not found credible at times "due to her inability to remember details of her medical history." Conclusion, ¶ B. The commissioner found credible and persuasive Becker's opinion concluding that the claimant's trochanteric bursitis was not related to the work injury of April 4, 2010, and the claimant's excessive weight might be contributing to her pain. In addition, the commissioner found credible and persuasive Becker's recommendation that

the claimant should not undergo any additional surgery or injections and further noted that Becker had discouraged the use of narcotic medications.

The commissioner also found credible and persuasive Beiner's opinion concluding that the claimant's trochanteric bursitis was not related to the claimant's work injury of April 4, 2010, and the claimant did not require any additional medical treatment for that injury. In addition, the commissioner found credible and persuasive Beiner's recommendation that the claimant be weaned from Percocet and the weaning process be supervised by a physician.

The commissioner found less persuasive Kramer's opinion that the claimant's trochanteric bursitis was related to her lumbar condition due to an awkward gait. The commissioner noted that Levi had opined that the claimant's trochanteric bursitis was caused by the claimant's sleeping position following her surgery in June 2016. However, at his deposition, Levi agreed that bursitis could be caused by sleeping on a couch and that plantar fasciitis could cause an uneven gait. The commissioner therefore found Levi's opinion on the issue of causation less persuasive in light of "the multiple opinions rendered on potential causes for the bursitis condition." Conclusion, ¶ F.

The commissioner concluded that the claimant's bilateral trochanteric bursitis was not related to her injury of April 4, 2010. She also determined that the claimant had reached maximum medical improvement for that injury and did not require any additional treatment for the lumbar spine as such treatment would be "palliative at best." Conclusion, ¶¶ C, H. Finally, the commissioner concluded that based on the medical opinions proffered by Becker and Beiner, the claimant should be weaned from narcotics.

The commissioner therefore denied and dismissed the claim for trochanteric bursitis and denied any additional treatment for the claimant's work-related injury of April 4, 2010. The commissioner also ordered that additional hearings be held to address the narcotics weaning process.

The claimant filed a motion to correct, which was denied in its entirety save for the granting of several "scrivener's" corrections to either substitute a direct quotation from the record in place of the commissioner's language or to correct a citation to the record. On appeal, the claimant contends that the commissioner made a number of factual errors pertaining to the medical reports in evidence and then proceeded to draw impermissible inferences from her flawed findings. The claimant therefore contends that the commissioner erroneously denied and dismissed the claim for trochanteric bursitis and argues that the denial of additional medical treatment associated with the claimant's lumbar spine injury constituted an abuse of discretion.

The standard of review we are obliged to apply to a trial 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 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).



Thus, “it is ... immaterial that the facts permit the drawing of diverse inferences. The [commissioner] alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court.” Fair v. People’s Savings Bank, 207 Conn. 535, 540 (1988), *quoting* Del Vecchio v. Bowers, 296 U.S. 280, 287 (1935).

We begin our analysis with the claim of error relative to the commissioner’s denial and dismissal of the trochanteric bursitis claim. We note at the outset that the issue for determination by the commissioner was essentially whether the trochanteric bursitis constituted a sequela of the lumbar spine injury sustained by the claimant on April 4, 2010. It is of course well-settled that “all the medical consequences and sequelae that flow from the primary injury are compensable,” Sapko v. State, 305 Conn. 360, 381 (2012), provided there exists the “requisite causal connection between the primary injury and the subsequent injury.” *Id.*, 386. However:

When ... it is unclear whether an employee’s [subsequent injury] is causally related to a compensable injury, it is necessary to rely on expert medical opinion.... Unless the medical testimony by itself establishes a causal relation, or unless it establishes a causal relation when it is considered along with other evidence, the commissioner cannot reasonably conclude that the [subsequent injury] is causally related to the employee’s employment. (Citations omitted; internal quotation marks omitted.)

Marandino v. Prometheus Pharmacy, 294 Conn. 564, 591–92 (2010), *quoting* DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132, 142-143 (2009). *See also* Struckman v. Burns, 205 Conn. 542, 554–55 (1987).

In the present matter, as noted previously herein, the respondents presented the deposition transcript and September 27, 2017 RME report of John M. Beiner, M.D., in support of their position that the claimant’s trochanteric bursitis is not a sequela of the

claimant's April 4, 2010 injury. In her findings, the commissioner, citing to Beiner's RME report, stated that Beiner "opined that the Claimant's trochanteric bursitis is not related to her work injury." Findings, ¶ 20. This finding was inaccurate; nowhere in this report does Beiner even mention the claimant's trochanteric bursitis. See Respondents' Exhibit 6. Moreover, at his deposition, when initially queried under direct examination regarding the claimant's bursitis, Beiner replied:

I guess, the best thing for me to say is I don't really have an opinion. It wasn't something that we discussed at the time I saw her. I wasn't asked about trochanteric bursitis, as far as I can recall. And so, I don't really have an opinion one way or another that way.

Respondents' Exhibit 11, p. 13.

Beiner then further opined that the claimant's post-operative trochanteric bursitis was not related to the injury of April 4, 2010 because Beiner did not believe the June 2016 surgery performed by Kramer was causally related to that injury.<sup>3</sup> When respondents' counsel informed Beiner that Becker had attributed the bursitis to the claimant's weight and attempted to solicit a hypothetical opinion from him on that issue, claimant's counsel objected, and respondents' counsel replied, "[w]ell, unfortunately ... at the time that Dr. Beiner looked at your [client], this was not clearly an issue in the case yet." *Id.*, 27. That remark was a factual misstatement; the evidentiary record indicates that the claimant had reported the trochanteric bursitis to Kramer more than three months before the respondents' medical examination, on June 8, 2017. Finally, when pressed

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<sup>3</sup> Beiner indicated that he concurred with Kramer's initial opinion that the claimant had reached maximum medical improvement one year following the date of injury, although he had described that injury as a "simple lumbosacral strain," Respondents' Exhibit 6, p. 3, and referred to Kramer's 5 percent permanent partial disability rating at that time as "generous." Respondents' Exhibit 11, p. 34.

once again for his opinion regarding the etiology of the trochanteric bursitis, Beiner replied:

I do not believe that the [claimant's] trochanteric bursitis, if it – if it wasn't an issue when I saw her, but if that's a problem for her ongoing, there is any medical reason to relate that to her surgery – I mean, to her work injury.

Id., 28.

It is of course axiomatic 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). However, it is equally well-settled that “[i]nferences may only be drawn from competent evidence. ‘Competent evidence’ does not mean any evidence at all. It means evidence on which the trier properly can rely and from which it may draw reasonable inferences.” Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 451 (2001).

Thus, in light of the foregoing precepts regarding the sufficiency of expert evidentiary submissions, we are unable to sustain the commissioner's conclusions with regard to Beiner's opinion relative to the compensability of the claimant's trochanteric bursitis. Given that Beiner did not even address this condition in his RME report of September 27, 2017, and in view of the overall tenor of his testimony at his deposition, we are unable to discern a reasonable basis for the commissioner's inferences regarding the credibility and persuasiveness of this evidence.

However, we note that the commissioner also found credible and persuasive Becker's commissioner's examination report of February 26, 2018. As previously discussed herein, Becker did address the claimant's trochanteric bursitis in his report, noting that "Dr. Kramer indicated in a letter of July 23, 2017, that the patient's trochanteric bursitis was related to her lumbar condition. It was felt to be the result of an awkward gait."<sup>4</sup> Respondents' Exhibit 7, p. 2. Moreover, Becker further opined that the claimant's weight "may well be contributing to the claimed trochanteric bursitis as opposed to any effect that her injury in 2010 would have on subsequent development of trochanteric bursitis. I do not believe that there is any relationship between trochanteric pain and her work injury of 2010." Respondents' Exhibit 7, p. 4.

The claimant has challenged this opinion, characterizing Becker's report as "rather breezy," Appellant's Brief, p. 10, and contending that Becker lacked the "factual insight," *id.*, possessed by the claimant's treaters and was therefore "unaware of the Claimant's sleeping history and the fact that she changed her sleeping posture as a result of the numerous procedures on her back." *Id.*, 7. We are not so persuaded.

It is of course well-established that "[t]he most important facet of a [commissioner's] examination is its impartiality and reliability. Where there is reason to question those qualities, the examination is of little use to the trial commissioner."

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<sup>4</sup> In this correspondence, which was actually dated July 25, 2017, Kramer opined as follows: "Dr. Levi has diagnosed this claimant as having trochanteric bursitis and has associated this condition with her lumbar condition, which has been known to be work-related. Trochanteric bursitis is an overuse inflammatory condition that can result from an awkward gait pattern imposed by lumbar spinal dysfunction. As such, I am willing to state, within a reasonable degree of medical probability, that the patient's trochanteric bursitis condition, as noted by Dr. Levi is related to her lumbar condition and that Dr. Levi's proposed treatment is reasonable and necessary." Claimant's Exhibit A.

Chery v. Community Visiting Nurse & Home Care, 3654 CRB-7-97-7

(February 13, 1998). However, in the present matter, there is nothing in the record which would suggest that, consistent with the Workers' Compensation Commission procedure for commissioners' examinations generally, Becker was not presented with the customary package of reports, agreed upon in advance by the parties, documenting the claimant's pertinent prior medical treatment. In fact, our review of the medical history portion of Becker's report indicates that it contained several references to Levi's treatment of the claimant. Thus, absent a reasonable evidentiary basis for concluding that the commissioner's examination performed by Becker was in some way deficient, we are reluctant to impose additional obligations on a commissioner's examiner which would interfere with the commissioner's ultimate discretion to "to assess the weight and credibility of medical reports and testimony." O'Reilly v. General Dynamics Corp., 52 Conn. App. 813, 818 (1999).

As such, although we are unable to sustain the commissioner's findings with regard to Beiner's opinion, we deem those findings harmless error, see D'Amico v. Dept. of Correction, 73 Conn. App. 718, 729 (2002), *cert. denied*, 262 Conn. 933 (2003), and conclude that the commissioner's reliance upon Becker's opinion provided an adequate basis for her decision to dismiss the claim for trochanteric bursitis. This is particularly so in light of the fact that the commissioner was presented with a number of competing theories relative to the etiology of the claimant's trochanteric bursitis, and ultimately concluded that she had found "Levi's opinions on the issue of causation to be less

persuasive due to the multiple opinions rendered on potential causes for the bursitis condition.” Conclusion, ¶ F.

The claimant has also asserted that the commissioner’s denial of additional medical treatment associated with the claimant’s lumbar spine injury constituted an abuse of discretion, contending that the commissioner erred in “ignoring [the claimant’s] extensive treatment history by saying that any future back treatment is unreasonable and unnecessary.” Appellant’s Brief, p. 4. It is of course axiomatic that “[a]n abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors.” In re Shaquanna M., 61 Conn. App. 592, 603 (2001). Our review of the commissioner’s finding in the present matter indicates that she concluded the claimant did not require any additional treatment for her back injury because the treatment would be “palliative at best.” Conclusion, ¶¶ C, H. It may be inferred that the commissioner based this conclusion on Becker’s report wherein the doctor opined that the claimant was “not a candidate for any further surgery nor do I believe that she is a candidate for any further injections as these are palliative at best and certainly not curative.”<sup>5</sup> Respondents’ Exhibit 7, p. 3. We have previously alluded to the discretion afforded commissioners “to reject or accept evidence and to believe or disbelieve any expert testimony,” Tartaglino, supra. Nevertheless, in light of the fact that Becker’s opinion specifically referenced only additional surgery and injections, we would likewise

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<sup>5</sup> In his report of February 26, 2018, Becker recommended that the claimant undergo a trial of Topamax. At the formal hearing of November 27, 2018, the claimant testified that Levi had prescribed Topamax for her at an office visit earlier that month. See November 27, 2018 Transcript, p. 8.

limit the scope of the commissioner's conclusions in this regard to those treatment modalities, and leave the claimant to her proof in establishing any future eligibility for additional medical treatment in association with the work-related lumbar spine injury of April 4, 2010. See Murchison v. Skinner Precision Indus., Inc., 162 Conn. 142, 151 (1972); Dengler, supra, 454.

Finally, the claimant contends that the commissioner erroneously denied her motion to correct. As stated previously herein, the commissioner denied the motion in its entirety save for the granting of several "scrivener's" revisions. Insofar as the commissioner's denial of the proposed corrections pertaining to Beiner's opinion was inconsistent with the board's analysis as presented herein, the denial of those proposed corrections likewise constituted harmless error.<sup>6</sup> We also note that the commissioner revised Findings, ¶ 47, wherein the commissioner had found that the claimant "has plantar fasciitis," to reflect that "[t]he Claimant testified that she had been treating for plantar fasciitis and that plantar fasciitis gave her difficulty walking 'at the time.'"<sup>7</sup> July 2, 2019 "Ruling on Claimant's June 17, 2019 Motion to Correct," p. 3. Our review of the balance of the proposed corrections would seem to indicate that the claimant was merely reiterating arguments made at trial which ultimately proved unavailing. We therefore find no error in the commissioner's denial of the balance of the motion to

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<sup>6</sup> See proposed corrections to Findings, ¶¶ 20, 21, 33; Conclusion, ¶ D; and Conclusion, ¶ I, with regard to the reference to Beiner's opinion.

<sup>7</sup> Our review of the evidentiary record indicates that the claimant testified at trial that she had treated for plantar fasciitis with Kramer on January 6, 2011, and with Levi on April 29, 2013. At Levi's deposition, the doctor acknowledged that plantar fasciitis was a recurring condition which could cause an altered gait. See Claimant's Exhibit C, pp. 38-40. However, neither of the reports referencing the claimant's treatment for plantar fasciitis were entered into the record, and the respondents proffered no other documentation or testimony from which could be drawn any reasonable inferences regarding either the severity or duration of the claimant's bouts with plantar fasciitis since 2013.

correct, given that the proposed corrections seem to reflect the claimant's desire "to have the commissioner conform his findings to the [claimant's] view of the facts." D'Amico, supra, 728.

There is harmless error; the May 24, 2019 Finding of Brenda D. Jannotta, Commissioner acting for the Seventh District, is accordingly affirmed.

Commissioners William J. Watson III and Toni M. Fatone concur in this Opinion.