CASE NO. 6354 CRB-5-19-10 : COMPENSATION REVIEW BOARD
CLAIM NO. 300094739

LUIS BORRERO : WORKERS' COMPENSATION
CLAIMANT-APPELLANT COMMISSION

v. : OCTOBER 16, 2020

RYDER INTEGRATED SERVICES
EMPLOYER

and

RYDER SERVICES CORPORATION
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by John J. D'Elia, Esq., D'Elia Gillooly DePalma, L.L.C., Granite Square, 700 State Street, New Haven, CT 06511.

The respondents were represented by Ralph A. Russo, Esq., Law Offices of Ralph A. Russo, 2389 Main Street, Glastonbury, CT 06033.

This Petition for Review from the September 27, 2019 Finding and Decision by Charles F. Senich, the Commissioner acting for the Fifth District, was heard April 24, 2020 before a Compensation Review Board panel consisting of Commission Chairman Stephen M. Morelli and Commissioners Randy L. Cohen and William J. Watson III.[1]

[1] We note that one motion for extension of time was granted during the pendency of this appeal.

OPINION

STEPHEN M. MORELLI, CHAIRMAN. The claimant has petitioned for review from the September 27, 2019 Finding and Decision (finding) by Charles F. Senich, the Commissioner acting for the Fifth District (commissioner). We find no error and accordingly affirm the decision of the commissioner.

The commissioner identified the following issues to be addressed at the formal hearing: (1) a trial de novo relative to a form 36 (Notice of Intention to Reduce or Discontinue Benefits) filed on May 3, 2017, and granted on the basis of an April 26, 2017 Respondents' Medical Examination (RME) report issued by Michael A. Miranda, M.D.; (2) the claimant's eligibility for temporary partial disability benefits pursuant to General Statutes § 31-308 (a); and (3) the claimant's eligibility for temporary total disability benefits pursuant to General Statutes § 31-307.[2]

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[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."

General Statutes § 31-307 states: "If any injury for which compensation is provided under the provisions of this chapter results in total incapacity to work, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of the injured employee's average weekly earnings as of the date of the injury, calculated pursuant to section 31-310 … but the compensation shall not be more than the maximum weekly benefit rate set forth in section 31-309 for the year in which the injury occurred. No employee entitled to compensation under this section shall receive less than twenty per cent of the maximum weekly compensation rate, as provided in section 31-309, provided the minimum payment shall not exceed seventy-five per cent of the employee's average weekly wage, as determined under section 31-310, and the compensation shall not continue longer than the period of total incapacity."

The commissioner also noted the following:

> At the outset of this formal hearing, the issues were outlined and agreed to by counsel. At the formal hearing on March 7, 2018, pursuant to the transcript, page 11, beginning at line 10, I (Commissioner) stated: "Attorney D'Elia, it's my understanding that you're objecting to the Form 36 and your objection on behalf of the Claimant is that one, the claimant is not at maximum medical improvement and you're claiming that the claimant is temporarily totally disabled as of the filing of the 36 or in the alternative, temporary partial?"
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> Mr. D'Elia: "Correct."

September 27, 2019 Finding and Decision, Statement of the Case.

The commissioner made the following factual findings which are pertinent to our review of this matter. The claimant sustained compensable injuries to his left and right knees and has undergone multiple surgeries on both knees, including a bilateral arthroplasty in 2010. On April 26, 2017, Miranda performed an RME and subsequently reported that he had spent more than two hours viewing surveillance videotapes which "document Mr. Borrero's performing activities of daily living which are beyond what he reported as his capacity. Specifically, climbing ladders, carrying groceries and walking without a limp." Commissioner's Exhibit 1, p. 3. Miranda also noted that the claimant had not been wearing any braces and, despite the claimant having told Miranda he was unable to stand for more than ten to fifteen minutes at a time, the surveillance videos showed the claimant "standing on a ladder painting his second floor porch from 4:32 in the afternoon consistently to 5:57 in the afternoon." Id.

In the "Impression" portion of his report, Miranda opined that the claimant had reached maximum medical improvement following bilateral knee replacements and stated that although the claimant "does have some functional limitations as a result of

some of his laxities, it is certainly not to the degree that he reports." Id. Miranda further opined that the claimant had a work capacity and could lift five to ten pounds throughout the day while "spending four hours on his feet and four hours sedentary duties with minimal squatting and climbing." Id. Miranda also reviewed the prior permanency ratings of 20 percent to both knees which had been assigned in February 2014 by John M. Aversa, M.D., and increased the ratings to 25 percent for the right knee and 28 percent for the left. See Respondents' Exhibit 10 [Respondents' Deposition Exhibit 5].

At a deposition taken on November 29, 2017, Miranda reiterated that the claimant had a work capacity and had reached maximum medical improvement with a permanent partial disability to both knees. In a follow-up report dated March 5, 2018, Miranda, noting the "discrepancy between [the claimant's] complaints and his function as demonstrated on the [surveillance] videotapes," Respondents' Exhibit 11 [Respondents' Deposition Exhibit 1, p. 2], stated that he did "not consider [the claimant] to be an accurate historian." Id. However, Miranda also opined that the claimant, "on clinical exam … does demonstrate instability of his arthroplasty, and it is my impression that this is worse than last April. As a result, he is likely heading for another revision…. Regarding his work status, he is certainly capable of doing sedentary work as opposed to being totally incapacitated."[3] Id. At a second deposition taken on February 13, 2019, Miranda repeated the opinion reflected in his report of March 5, 2018, testifying that the claimant was capable of light duty but would require additional surgery in the future. See Respondents' Exhibit 11, p. 7.

[3] Miranda further opined that his opinion regarding the claimant's work status was retroactive to November 29, 2017. See Respondents' Exhibit 11 [Respondents' Deposition Exhibit 1, p. 2].

In a report dated June 2, 2017, the claimant's treating physician, John F. Irving, M.D., stated that he had reviewed Miranda's April 26, 2017 RME report and "[agreed] with [the] "work capacity qualifications that he listed" with regard to lifting, standing, squatting and climbing. Respondents' Exhibit 10 [Respondents' Deposition Exhibit 7, p. 2]. Irving also indicated that he agreed with the increased permanency ratings assigned by Miranda and further opined that the claimant "may at some point in the future require revision surgery." Id.

In a subsequent report dated August 16, 2017, Irving stated that "[t]he best thing [the claimant] can do is again vigorously keep his muscles in condition and strength," Claimant's Exhibit B, and opined that "[s]urgical solutions are radical and very defining, in that the only solution now is a revision to rotating hinge prostheses, which would by definition eliminate all instability." Id. Irving indicated that he had discussed this surgery with the claimant but was "reluctant to offer this to him" id., because "[t]hese operations 'burn bridges' and should be considered operations as [a] last resort…." Id. Irving recommended that the claimant settle his workers' compensation claim and set aside funds for what he considered to be "inevitable revisions to rotating hinge prostheses." Id.

In a report dated November 29, 2017, Irving indicated that he had discussed several surgical options with the claimant and the claimant would let him know if he wanted to proceed. At a deposition taken on June 6, 2018, Irving testified that the claimant could perform light duty or sedentary work. See Respondents' Exhibit 3, p. 25. He further opined that in light of the continuing instability of the claimant's left knee, "the only option to stabilize that knee is to do yet another revision or redo … and that's to

take out the current components in the left knee … and then put in a knee that actually has a hinge in it much like a door hinge so there would be no reliance on any natural ligaments in the knee." Id., pp. 28-29. When queried, Irving asserted that he was ready to proceed with that surgery if the claimant decided he wanted to do so.

At a second deposition taken on March 7, 2019, Irving confirmed that he agreed with the permanent partial disability ratings previously assigned by both Aversa and Miranda, given that the ratings "were based on the patient at that point in time…." Respondents' Exhibit 10, p. 19. Irving also reiterated that because the claimant's condition was likely to worsen over time, the permanency ratings were "a moving target," id., and indicated that the surgery was scheduled for May 2019.

The claimant testified at trial, stating that he had looked for work within his restrictions and submitted job search forms in 2017 and 2018. The commissioner took administrative notice of an order which he had issued on November 20, 2018, authorizing surgery on the claimant's left knee with Irving, which surgery was to "take place within 45 days from the date of this order." Findings, ¶ 17, *quoting* November 20, 2018 Order.

On the basis of the foregoing, the commissioner approved the form 36 as of its filing date of May 3, 2017, and concluded that the respondents had fulfilled their obligations pursuant to General Statutes 31-296.[4] The commissioner determined that as

[4] General Statutes § 31-296 (b) states: "Before discontinuing or reducing payment on account of total or partial incapacity under any such [voluntary] 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. Any such request for a hearing shall be given priority over requests for hearings on other matters. The commissioner shall not approve any such discontinuance or reduction prior to the expiration of the period for requesting a hearing or the completion of such hearing, whichever is later. In any case where the

of May 3, 2017, the claimant had a work capacity and had reached maximum medical improvement; the claimant therefore was entitled to permanent partial disability benefits from that date forward. The commissioner denied the claim for temporary total disability benefits and temporary partial disability benefits pursuant to § 31-308 (a).[5]

The commissioner further concluded that Miranda's testimony, opinions and reports, were "fully credible and persuasive as to the issues presented." Conclusion, ¶ I. In addition, the commissioner determined that Miranda's report of April 26, 2017, wherein the doctor opined that the claimant had reached maximum medical improvement and had a work capacity, was also "fully credible and persuasive as to the issues presented." Conclusion, ¶ J. The commissioner found Miranda's report of March 5, 2018, wherein the doctor again indicated that the claimant had a work capacity, also "fully credible and persuasive as to the issues presented." Conclusion, ¶ L.

The commissioner did not find Irving's testimony, opinions or reports credible or persuasive relative to the issues presented, including the issue of maximum medical improvement. The commissioner noted that on June 2, 2017, Irving indicated "that the claimant had a work capacity and may at some point in the future require revision surgery," Conclusion, ¶ P, and further noted that Irving, on November 29, 2017, "reported that the claimant would advise as to how he wanted to proceed." Conclusion, ¶ Q. The commissioner also noted that at a deposition held on June 6, 2018, Irving

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commissioner finds that an employer has discontinued or reduced any payments made in accordance with this section without the approval of the commissioner, such employer shall be required to pay to the employee the total amount of all payments so discontinued or the total amount by which such payments were reduced, as the case may be, and shall be required to pay interest to the employee, at a rate of one and one-quarter per cent per month or portion of a month, on any payments so discontinued or on the total amount by which such payments were reduced, as the case may be, plus reasonable attorney's fees incurred by the employee in relation to such discontinuance or reduction."

[5] At the formal hearing held on March 7, 2018, claimant's counsel indicated that post-specific temporary partial disability benefits had not been requested.

testified that "the only option to stabilize that knee is to do yet another revision or redo … but we'll be very successful if he chooses to do it…."[6] Respondents' Exhibit 3, p. 28. The commissioner determined that the claimant's testimony was not fully credible or persuasive, and concluded that the decision whether and when to undergo additional surgery had been left up to the claimant.

In accordance with his findings, the commissioner, in addition to approving the May 3, 2017 form 36, ordered the respondents to commence payment of permanent partial disability benefits as of that date and indicated that all such payments made on or after that date would be deemed advances against permanent partial disability benefits without prejudice.

The claimant filed a motion to correct, which was denied in its entirety, and this appeal followed. On appeal, the claimant contends that the commissioner found facts which were not in evidence and then rendered a decision predicated on erroneous factual findings. The claimant indicates that although he disagrees with the maximum medical improvement date of May 3, 2017, the gravamen of his appeal is that the claimant's work status should have reverted to temporary total disability as March 5, 2018, given that Miranda does not provide an opinion as to work capacity after this date and Irving opined that the claimant was temporarily totally disabled. The claimant also argues that the commissioner erred in failing to state a reason why he credited Miranda's opinion rather than Irving's. As such, the claimant contends that the payments to the claimant for the period of May 3, 2017, to March 5, 2018, should be deemed permanent partial disability

[6] In Conclusion, ¶ R, the commissioner noted that the date of Irving's deposition was June 16, 2018. We deem this harmless scrivener's error. See D'Amico v. Dept. of Correction, 73 Conn. App. 718, 729 (2002), *cert. denied*, 262 Conn. 933 (2003).

benefits and any benefits paid subsequent to March 5, 2018, should be deemed temporary total disability benefits.

We begin our analysis with a recitation of the well-settled standard of deference we are obliged to apply to a trial commissioner's findings and legal conclusions.

> [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).

As previously noted herein, the proceedings giving rise to the present appeal included inter alia a trial de novo following the approval of a form 36 filed by the respondents on May 3, 2017. The form 36, which was approved effective June 2, 2017, was predicated on Miranda's RME report of April 26, 2017 and sought to convert payments made to the claimant after June 2, 2017, from temporary total disability

benefits to advances against permanent partial disability benefits.[7] The provisions of § 31-296 permit a claimant to "request a hearing on any such proposed discontinuance or reduction not later than fifteen days after receipt of such notice." In Pagan v. Carey Wiping Materials Corp., 144 Conn. App. 413, *cert. denied*, 310 Conn. 925 (2013), our Appellate Court stated that "the initial ruling on a Form 36 may be challenged at a subsequent formal [evidentiary] hearing, at which the previous ruling has no precedential weight. The issue is tried de novo." (Citation omitted; emphasis omitted.) Id., 421, *quoting* Brinson v. Finlay Bros. Printing Co., 77 Conn. App. 319, 327 (2003).

At the commencement of the trial de novo in the present matter, the commissioner identified as the issues in dispute the claimant's objection to the May 3, 2017 form 36 as well as the claimant's eligibility for temporary total or, in the alternative, temporary partial disability payments. See March 7, 2018 Transcript, p. 3. The commissioner stated that it was his understanding that the time frame in question relative to the claimant's eligibility for these disability benefits was as of the date of the filing of the form 36, a statement to which claimant's counsel agreed. See March 7, 2018 Transcript, p. 11; see also September 27, 2019 Finding and Decision, Statement of the Case.

Nevertheless, over the course of two additional formal hearings, evidence was presented relative to the claimant's alleged ongoing entitlement to either temporary total or temporary partial benefits, and the commissioner rendered his decision based on this evidence. We believe the commissioner retained the discretion to do so, given that this

[7] The form 36 appears to have been granted retroactively following a pre-formal hearing held on January 24, 2018. See Commissioner's Exhibit 3; Respondents' Exhibit 9. The commissioner presiding over the pre-formal hearing indicated that he was approving the form 36 as of June 2, 2017, the date of the report wherein Irving had indicated he agreed with Miranda's opinion regarding the claimant's work capacity. The commissioner noted that the claimant had again become temporarily totally disabled as of November 29, 2017, but this issue was not addressed at the pre-formal hearing. See Commissioner's Exhibit 3.

board has previously observed that a "commissioner is entitled to consider a broad range of issues at a subsequent formal hearing on a Form 36, including whether a claimant continues to be totally disabled." Papa v. Jeffrey Norton Publishers, Inc., 4486 CRB-3-02-1 (February 25, 2003).

Turning to the claimant's first claim of error, the claimant contends that although he disagrees with the commissioner's determination that he reached maximum medical improvement as of April 26, 2017, the gravamen of the appeal is the commissioner's denial of temporary total disability benefits during the time period between Miranda's report of March 5, 2018, and the claimant's left knee surgery in May 2019, when the parties ostensibly agreed that the claimant was once again temporarily totally disabled.

The claimant also points out that although Miranda found the claimant had a work capacity at both his initial RME examination of April 26, 2017, see Commissioner's Exhibit 1; Respondents' Exhibit 6, and his RME follow-up on March 5, 2018, see Respondents' Exhibit 11 [Respondents' Deposition Exhibit 1], Miranda never saw the claimant after March 5, 2018, and he offered no opinion regarding the claimant's work capacity following the March evaluation at his deposition on February 13, 2019. The claimant further contends that "Irving declared the claimant temporarily totally disabled after that date." Appellant's Brief, p. 8. It is therefore the claimant's position that the commissioner erred in relying on Miranda's opinion because he was "missing the subordinate facts for stating the claimant had a work capacity after March 5, 2018." Id., 10.

Our review of the evidentiary record indicates that Miranda, after issuing his initial RME report on April 26, 2017, testified by deposition held on November 29, 2017,

that at the time he conducted the RME, he concluded the claimant had a work capacity. See Respondents' Exhibit 1, p. 8. Miranda was given the opportunity to review Irving's report of June 2, 2017, and noted that Irving had agreed with his permanency ratings and assessment of the claimant's work capacity. Id., 31. In his follow-up report of March 5, 2018, Miranda stated that the claimant was "certainly capable of doing sedentary work as opposed to being totally incapacitated. This would be retroactive to November 29, 2017 [the date of his first deposition]." Respondents' Exhibit 11 [Respondents' Deposition Exhibit 1]. At a second deposition taken on February 13, 2019, Miranda reiterated that the claimant had a sedentary work capacity as of the March 5, 2018 examination.

On June 2, 2017, Irving issued a progress note wherein he stated that he concurred with the "work capacity qualifications" and permanency ratings assigned by Miranda in his April 26, 2017 RME.[8] Respondents' Exhibit 10 [Respondents' Deposition Exhibit 7, p. 2]. On that same date, he issued a work status report indicating that the claimant could return to work, albeit with restrictions, on June 5, 2017. Respondents' Exhibit 3 [Respondents' Deposition Exhibit 3]. On August 16, 2017, Irving issued another work status report indicating that the claimant was temporarily totally disabled. On November 29, 2017, Irving issued one work status report indicating that the claimant could "[c]ontinue to work with previous restrictions," Claimant's Exhibit B, and another work status report indicating both that the claimant could "[c]ontinue to work with previous restrictions," and was temporarily totally disabled. Id. On December 8, 2017, Irving issued a work release form indicating that the claimant was totally disabled. Id.

[8] Miranda had indicated that the claimant "can work, that he can lift 5 to 10 pounds throughout the day and spend at least four hours consecutively on his feet, but has to limit squatting and climbing." Respondents' Exhibit 10 [Respondents' Deposition Exhibit 7, p. 2].

At a deposition held on June 6, 2018, Irving reiterated that he agreed with Miranda's permanency ratings and his assessment of the claimant's work capacity. Irving also testified that although the claimant did have a limited work capacity, he was not totally disabled. Irving explained that when he had indicated the claimant was totally disabled, he "thought of this in terms of [the claimant's] previous job since there were no accommodations, to the best of my knowledge, being made for retraining or light duty work or anything. So, you know, there was never an ability for him to return to his work." Respondents' Exhibit 3, p. 21. Irving agreed that the claimant "could do some other light or sedentary work." Id.

Later in the deposition, Irving reiterated that when he had indicated the claimant was totally disabled in the June 2, 2017 and November 29, 2017 work status reports, he "was thinking in terms of his previous job since there was no other mention of any other alternative…." Id., 23. When presented with a third report in which he had indicated the claimant was totally disabled, Irving denied that the claimant was "totally disabled from any kind of work at all," id., 24, and stated that "I clearly was thinking in terms of, again, of what his prior employment was, and I would ask him pretty regularly again just for him to remind me about his job."[9] Id. When queried as to whether his "opinion would still be that [the claimant] could do light or sedentary work but not the work he was doing at the time of injury," id., 25, Irving replied, "[t]hat's correct. He, in all fairness, could have been a candidate to do a sedentary job." Id.

[9] Respondents' counsel did not specifically identify this report during the deposition but a review of the exhibits allows for the reasonable inference that the report in question was Irving's work release form of December 8, 2017. See Respondents' Exhibit 3 [Respondents' Deposition Exhibit 5].

At a subsequent deposition held on March 7, 2019, Irving testified that although the claimant's symptoms had worsened after June 2017, the claimant, as of an office visit in February 2019, was "still capable of performing light or restricted duty." Respondents' Exhibit 10, p. 13. In addition, Irving agreed that the permanency ratings assigned by Miranda were predicated on the claimant's recovery from the total knee replacement surgery prior to June 2017, when the claimant's symptoms began to worsen. Irving also confirmed that at his deposition held on June 6, 2018, he did not consider the claimant to be at maximum medical improvement. He also did not believe the claimant was currently at maximum medical improvement given that the surgery to insert a rotating hinge in his left knee was pending for May 2019.

It is the claimant's contention that he was temporarily totally disabled for the time period between March 5, 2018 and his surgery of May 2019 because he "had a downhill course after that as documented by Dr. Irving." Appellant's Brief, pp. 13-14. That may well be the case. However, our review of the evidentiary record in this matter indicates that the latest medical report submitted into the record is Miranda's follow-up RME report of March 5, 2018, which clearly did not conclude that the claimant was totally disabled. We agree with the claimant's contention that "there is no opinion from Dr. Miranda beyond March 5, 2018, that established the claimant had a work capacity." Appellant's Brief, p. 7. However, there is likewise no report in the record from Miranda, or any other doctor for that matter, opining that the claimant was totally disabled.

We are therefore unpersuaded by the claimant's contention that "the commissioner decided to let [Miranda's March 5, 2018 report] stand as a 'blank check' for the respondents on the issue of work capacity even in spite of the evidence against

this that the commissioner also cites in his Finding and Decision." Id., 14. This is particularly so given that Irving, as late as February 2019, also believed the claimant had a sedentary work capacity. It is axiomatic that a claimant bears "the burden of proving an incapacity to work, and 'total incapacity becomes a matter of continuing proof for the period claimed.'" (Internal quotation marks omitted.) Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 454 (2001), *quoting* Cummings v. Twin Tool Mfg. Co., 40 Conn. App. 36, 42 (1996). A claimant's entitlement to temporary total disability benefits does not hinge solely on a respondent's inability to prove that a claimant is *not* eligible for such benefits.

It is equally well-settled that "the injured employee bears the burden of proof, not only with respect to whether an injury was causally connected to the workplace, but that such proof must be established by *competent evidence*." (Emphasis in the original.) Dengler, supra, at 447, *quoting* Keenan v. Union Camp Corp., 49 Conn. App. 280, 282 (1998). "'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, supra, at 451. Absent contemporaneous medical reports or compelling testimony attesting to the claimant's total disability status, the commissioner had no basis for the reasonable inference that the claimant was entitled to temporary total disability benefits for the period between the follow-up RME with Miranda on March 5, 2018, and his knee surgery in May 2019.

Despite this relative dearth of medical documentation, the record reflects that the respondents resumed temporary total disability payments to the claimant in November 2017. At the formal hearing on March 7, 2018, the parties indicated that the payments to

the claimant were still ongoing; however, at the formal hearing held on January 30, 2019, claimant's counsel reported that the payments stopped without explanation in December 2018. Given that the record appears to reflect a lack of consensus regarding exactly which type of benefits were being paid to the claimant, for which time periods, and the reason for their termination, we would strongly advise that the respondents provide an accounting of benefits so that the parties may appropriately classify the payments to the claimant. This is particularly so given that the commissioner, in his finding, ordered that all permanent partial disability payments "will be deemed advances against permanent partial benefits *without prejudice*." (Emphasis added.) Order, ¶ III.

The claimant has also challenged the commissioner's credibility findings relative to the expert opinions in this matter, contending that the commissioner erred in failing to state a reason for concluding that Miranda's reports and testimony were more credible than Irving's. The claimant points out that our Supreme Court has held that "[w]here the trial court rejects the testimony of a plaintiff's expert, there must be some basis in the record to support the conclusion that the evidence of the [expert witness] is unworthy of belief." (Citations omitted; internal quotation marks omitted.) Loring v. Planning & Zoning Commission, 287 Conn. 746, 759 (2008), *citing* Builders Service Corporation v. Planning & Zoning Commission, 208 Conn. 267, 294 (1988). As such, the claimant asserts that "Connecticut law requires that at least some rational basis be provided for the conclusions reached by the trial commissioner when evaluating the evidence, and reasons should be given to support the trial commissioner's determination." Appellant's Brief, p. 12.

It is of course well-settled in workers' compensation jurisprudence 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). We are aware that our Supreme Court has held that when expert opinions are submitted into the record in documentary, rather than testamentary, form, "the deference that we normally would give to the commissioner on issues of credibility is not warranted … because we are as able as he [is] to gauge the reliability of those documents." Pietraroia v. Northeast Utilities, 254 Conn. 60, 75 (2000).

However, as discussed previously herein, the opinions of Miranda and Irving on the issue of the claimant's work capacity are essentially the same, although they do not apply to exactly the same time periods. While there may be a difference of opinion between the doctors with respect to the claimant's date of maximum medical improvement, that issue is not the subject of the instant appeal. Second, we note that the commissioner specifically noted that he did not find "the claimant fully credible and persuasive as to all of the issues before me." Conclusion, ¶ T. This board has previously observed that:

> A claimant's credibility also bears heavily on whether medical testimony reliant on his or her narrative is to be given weight by the trial commissioner. When a trial commissioner does not find the claimant credible, the commissioner is entitled to conclude any medical evidence which relied on the claimant's statements was also unreliable…. We may reasonably infer this would provide justification for the trial commissioner discounting the opinions of the claimant's treating physicians. (Internal citations omitted.)

Anderson v. Target Capital Partners, 5615 CRB-6-10-12 (January 3, 2012).

Finally, the claimant claims as error the commissioner's denial of his motion to correct. Our review of the proposed corrections indicates that the claimant was merely reiterating arguments made at trial relative to the claimant's disability status which ultimately proved unavailing. As such, we find no error in the commissioner's decision to deny the motion to correct. See D'Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003).[10]

There is no error; the September 27, 2019 Finding and Decision by Charles F. Senich, the Commissioner acting for the Fifth District, is accordingly affirmed.

Commissioners Randy L. Cohen and William J. Watson III concur in this Opinion.

[10] On March 9, 2020, the respondents filed a motion to dismiss on the basis that the claimant had not yet submitted the brief which was due on February 27, 2020. Our review of the record indicates that also on March 9, 2020, the claimant filed a motion for extension of time to file his brief until March 16, 2020. On March 10, 2020, the respondents were granted an extension of time to file their brief until April 3, 2020. The claimant's brief was filed on March 13, 2010. Given that the respondents did not address the motion to dismiss either in their brief or at oral argument before this tribunal, we deem the motion abandoned on appeal. See Christy v. Ken's Beverage, Incorporated, 5157 CRB-8-06-11 (December 7, 2007); St. John v. Gradall Rental, 4846 CRB-3-04-8 (August 10, 2005), *appeal withdrawn*, A.C. 26883 (February 14, 2006).