CASE NO. 6368 CRB-7-20-1 CLAIM NO. 700160024	:	COMPENSATION REVIEW BOARD
KATHY A. VELKY CLAIMANT-APPELLANT	:	WORKERS' COMPENSATION COMMISSION
v.	:	DECEMBER 3, 2020
REGIONAL SCHOOL DISTRICT #12 EMPLOYER		
and		
CIRMA INSURER RESPONDENTS-APPELLEES		

APPEARANCES:

The claimant appeared at oral argument before the board as a self-represented party. At the trial level, the claimant was represented by Clayton J. Quinn, Esq., The Quinn Law Firm, L.L.C., 204 S. Broad Street, Milford, CT 06460.[1]

The respondents were represented by Colette S. Griffin, Esq., Howd & Ludorf, L.L.C., 65 Wethersfield Avenue, Hartford, CT 06114-1121.

This Petition for Review from the December 16, 2019 Finding and Dismissal of Michelle D. Truglia, the Commissioner acting for the Seventh District, was heard June 26, 2020 before a Compensation Review Board panel consisting of the Commission Chairman Stephen M. Morelli and Commissioners William J. Watson III and Carolyn M. Colangelo.[2]

[1] We note that during the pendency of this appeal, Attorney Quinn filed a motion to withdraw appearance. In a ruling re: motion to withdraw appearance dated February 19, 2020, this tribunal granted the motion.
[2] We note that three motions for extension of time were granted during the pendency of this appeal.

OPINION

STEPHEN M. MORELLI, CHAIRMAN. The claimant has appealed from a Finding and Dismissal (finding) wherein the trial commissioner, Michelle D. Truglia (commissioner), determined the claimant's need for rotator cuff surgery was not compensable. The claimant argues that this decision was against the weight of the medical evidence. Upon review we find this case turned on evaluating the persuasiveness of contested opinions as to the causation of the claimant's injury. The commissioner found the respondents' examiner and the commissioner's examiner, both of whom opined the need for surgery was not work related, more persuasive than the claimant's treating physician. Having reviewed the record, we find this conclusion reasonable and as an appellate panel we are compelled to affirm the finding.

The commissioner found the following facts which are pertinent to our inquiry. She noted that the claimant had sustained a fall down incident at work in 2011 that resulted in injuries to her back, shoulders and knees and that the parties had executed a voluntary agreement approved November 30, 2015, where the respondents accepted those injuries as compensable. See Findings, ¶¶ 1-4. Accordingly, the issue under dispute was the extent of the claimant's further disability from these injuries and whether the rotator cuff surgery performed by Dennis Rodin, M.D, on September 4, 2018, was causally related to the 2011 compensable injury. The commissioner reviewed the medical history of the claimant subsequent to the 2011 injuries. She noted that in 2012, the claimant underwent physical therapy for shoulder tendonitis. Richard Manzo, M.D., following an October 3, 2012 examination, opined the claimant was not a surgical candidate for her left shoulder. In late 2013, the claimant was referred to Rodin, who on January 14, 2014,

diagnosed the claimant with "frozen shoulder" and referred the claimant for physical therapy. On May 1, 2014, he recommended trigger point injections. Findings, ¶¶ 10-11.

In 2015, the claimant underwent both a respondents' medical examination (RME) and a commissioner's examination. The RME occurred January 23, 2015 and was performed by Kevin P. Shea, M.D. See Findings, ¶ 12. Shea opined that the claimant suffered from myofascial pain emanating from her trapezius and pectoralis major and did not see any evidence that her C5/6 disc or her rotator cuff were pain generators. He felt the claimant had reached maximum medical improvement but could benefit from further trigger point injections and physical therapy. Id. The commissioner's examination was performed on May 25, 2015 by Michael J. Kaplan, M.D. See Findings, ¶ 13. Kaplan opined that most of the claimant's symptoms were related to her scapula and paracervical musculature. He did not believe that the claimant's calcific changes to her shoulder were related to the compensable injury and further did not believe the claimant was a candidate for surgery. Id. Subsequent to those examination, on February 5, 2016, Rodin stated that despite the trigger point injections the claimant still felt pain and thought surgery was the next best option. See Findings, ¶ 15. On February 19, 2016, he diagnosed the claimant with left calcific rotator cuff tendonitis, which he believed to be multifactorial in nature. See Findings, ¶ 17. The claimant underwent an MRI of her left shoulder on November 10, 2016. The radiologist reported no evidence of a rotator cuff tear and no evidence of residual calcific tendonitis. See Findings, ¶ 18. On November 18, 2016, the claimant was examined again by Rodin who diagnosed her with left rotator cuff tendonitis and recommended an arthroscopy to assess what he believed to be a rotator cuff tear. See Findings, ¶ 19.

On December 18, 2016, Shea issued an opinion that the November 10, 2016 MRI showed the claimant's shoulder was essentially normal and there was no support for any arthroscopic procedure. Shea opined that tendonitis was often seen in patients over the age of sixty and was largely asymptomatic. See Findings, ¶ 20.

Rodin responded in a letter to claimant's counsel on March 1, 2017, disputing Shea's conclusions. See Findings, ¶ 21. He said Shea had not seen the actual diagnostic image of the 2016 MRI and he had. He also disagreed with Shea's opinion that the claimant's pain was the result of a trapezius strain, noting he had obtained positive results from a subacromial steroid injection, which Rodin believed indicated that she had bursitis resulting from rotator cuff tendonitis. Id. Shea's deposition was taken on May 11, 2017. See Findings, ¶ 22. Shea testified he had seen medical notes suggesting the claimant had cervical spondylosis and rotator cuff tendonitis predating her 2011 work injury. His November 17, 2015 examination indicated the claimant had a "frozen shoulder" condition at that time and he had not previously seen this develop three and half years after an injury. He therefore thought this condition was unrelated to the 2011 work injury. He restated his position the claimant had reached MMI as of January 23, 2015 and that he had seen no evidence of a rotator cuff tear as of that date. Shea deemed Rodin's proposal for surgery on the claimant's left shoulder in the absence of proof of a tear inappropriate. He also noted that as the claimant's "frozen shoulder" had dissipated that there was no need for surgery. He opined that whatever pain the claimant was experiencing was unrelated to the 2011 work injury. Shea also testified the claimant's 2016 MRI results showed improvement as her calcific tendonitis was gone. His

conclusion was the source of the claimant's pain was trapezius pain and the proposed surgery could make the claimant's situation worse. Id.

Kaplan provided an updated commissioner's examination on October 13, 2017. See Findings, ¶ 23. He opined that he did not believe surgery for the claimant was necessary as her range of motion was nearly complete and she did not have true adhesive capsulitis. He did not find support for surgery as the tendonitis and calcific changes were likely pre-existing to her fall at work and the cause of her condition was the result of a degenerative process. Id. Rodin continued to treat the claimant through 2017 and 2018 and continued to recommend an arthroscopic evaluation of the claimant's shoulder. See Findings, ¶ 24. Rodin's January 21, 2018 letter to claimant's counsel restated his opinion that the claimant's pain was causally related to her 2011 fall down incident at work. See Findings, ¶ 25. On September 4, 2018, Rodin performed left rotator cuff surgery on the claimant and after the surgery on October 2, 2018, sent a letter to claimant's counsel stating he believed the need for this surgery was due to the work incident in 2011, as the damage from that incident had progressed over the next seven years. See Findings, ¶¶ 26-28. Rodin found that by December 27, 2018, the claimant had a sedentary work capacity and returned her to full duty on February 4, 2019. See Findings, ¶¶ 31-32.

Shea issued a letter on February 14, 2019 to respondents' counsel that after his review of records, and that with a reasonable degree of medical certainty, he believed the claimant did not have a rotator cuff tear as of November 18, 2016. He further believed that the tear Rodin repaired in his 2018 surgery developed after the claimant's 2011 work injury and was not work related. See Findings, ¶ 33. He was deposed for a second time on May 2, 2019. See Findings, ¶ 34. He opined that he would find it difficult to believe

that neither MRI of the claimant, which were taken five years apart, would have failed to show a torn rotator cuff, although it could happen. He testified that while the surgical report of Rodin's 2018 surgery documents a rotator cuff tear, he did not believe the tear was related to the claimant's 2011 work injury and believes it developed subsequent to the claimant's 2016 MRI. He stated to a reasonable degree of medical probability it was unlikely that there was a rotator cuff tear as of the claimant's 2016 MRI and based on statistics, believed that the tear that was found was due to age related degenerative processes. He reiterated his position that diagnostic arthroscopies were inappropriate but based on the surgical report believes that the surgery herein was reasonable. Id.

Based on this record, the commissioner concluded that the August 31, 2011 and November 10, 2016 MRI's showed no evidence of a left rotator cuff tear. She found the opinions of Shea and Kaplan persuasive that this tear occurred after the 2016 MRI and was most likely due to natural degeneration. Accordingly, she found the claimant's 2018 surgery not to be compensable and dismissed the claim for benefits. The claimant filed a motion to correct and a motion to admit additional evidence. The motion to correct sought factual findings more favorable to the claimant's position and the motion to admit additional evidence sought to add reports issued by Rodin subsequent to the dismissal of her claim. The commissioner denied both motions and the claimant has proceeded with her appeal. Her central argument is that the opinions of her treater were less equivocal than those of the witnesses the commissioner credited, and therefore it was error for the commissioner to rule against her. We are not persuaded by this argument.

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 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).

We first must address the issue presented by the respondents asserting that the claimant's appeal should be dismissed pursuant to Practice Book § 85-1 for failure to prosecute the appeal. The respondents acknowledge the claimant commenced her appeal within the statutory time permitted under General Statutes § 31-301 (a), but argue her failure to submit a brief renders her appeal subject to dismissal. We note that shortly after this issue was raised the claimant submitted her appellate brief and outlined her claims of error well in advance of this tribunal hearing this appeal. We do not believe the respondents were prejudiced in their ability to defend against this appeal and therefore for the reasons stated in Francis v. Baymont Inn & Suites, 6239 CRB-1-18-1 (December 11, 2018) and Morales v. Bridgeport, 5551 CRB-4-10-5 (April 18, 2011), we will consider this appeal on the merits.

We have reviewed the claimant's brief and her argument at oral argument. We would like to address at the outset two issues that she has raised tangential to the record herein. She has suggested the trial commissioner in this case was biased in some fashion. We have reviewed the finding and conclude she considered all the evidence presented and applied the appropriate legal standard to her review. The claimant does not identify any ruling during the course of this proceeding wherein the commissioner acted to impede her ability to prosecute her claim for benefits. Moreover, had the claimant had concerns as to the impartiality of the commissioner it was incumbent upon her to raise those concerns during the course of the hearing. See Martinez-McCord v. State/Judicial Branch, 5647 CRB-7-11-4 (August 1, 2012). As those concerns were not raised at that time, we may not now consider them on appeal. See Haines v. Turbine Technologies, Inc., 5932 CRB-6-14-4 (March 9, 2015).

The claimant also argues that her former counsel did not effectively represent her at the hearing. She notes that he did not have her treater, Rodin, deposed or obtain additional expert witnesses on her behalf. The claimant believes that had that occurred she would have had a different result. This situation is akin to that of Serrano v. Bridgeport Towers Apt., LLC, 5572 CRB-4-10-7 (September 29, 2011), where the claimant argued counsel had not properly presented his claim.[3] Consistent with how we addressed those claims in Serrano, we must rule on the record that was presented at the formal hearing.

[3] In Serrano v. Bridgeport Towers Apt., LLC, 5572 CRB-4-10-7 (September 29, 2011), the claimant asserted error from the denial of a motion to submit additional evidence. We found no error from the commissioner denying that motion in that case. Based on the standards delineated in Serrano, we do not believe it was error to deny additional medical reports from Rodin which could have been obtained prior to the conclusion of the formal hearing.

We turn to the gravamen of this appeal, which is whether the commissioner reached a reasonable conclusion that the claimant's surgery was not the sequalae of the 2011 compensable fall down injury. We note that it was the claimant's burden to prove to the commissioner that her surgery was a compensable sequalae of her 2011 injury. Precedent such as DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132 (2009), has established the need for a claimant to establish a nexus of proximate cause between his or her condition and the compensable injury to support a bid for benefits. "[T]he test of proximate cause is whether the defendant's conduct is a substantial factor in bringing about the plaintiff's injuries. . . . Further, it is the plaintiff who bears the burden to prove an unbroken sequence of events that tied his injuries to the [defendant's conduct]. . . ." Id., 142.

The commissioner concluded the claimant failed to meet her burden of persuasion. We note that had she accepted Rodin's opinions she would have found the claimant's surgery compensable. She was not persuaded by his opinion because she found the opinions of Shea and Kaplan, who opined the claimant's rotator cuff tear was not caused by the 2011 injury, persuasive. The commissioner also noted that their opinions were consistent with the two post-injury MRI's which did not indicate the claimant had a torn rotator cuff. She also cited testimony from Shea where he opined the tear that Rodin repaired occurred due to degeneration and was not related to the compensable injury. Since there is a substantial quantum of probative evidence supportive of the commissioner's decision, we find our analysis in Burns v. Southbury, 5608 CRB-5-10-11 (November 2, 2011), dispositive of this dispute.

> We have long held if "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." Strong v. UTC/Pratt & Whitney, 4563 CRB-1-02-8 (August 25, 2003). We cannot intercede when a trial commissioner determines one witness is more persuasive than another in a "dueling expert" case. Dellacamera v. Waterbury, 4966 CRB-5-05-6 (June 29, 2006), footnote 1. We note that it is the claimant's burden to prove that a work-related accident is the cause of a recent need for surgery, see Marandino v. Prometheus Pharmacy, 294 Conn. 564 (2010) and Weir v. Transportation North Haven, 5226 CRB-1-07-5 (April 16, 2008). Indeed, in DiNuzzo, supra, the Supreme Court rejected the idea "that the onus of disproving causation is thrust upon the [employer or insurer]. Id., 151.

Id.

Since substantial medical evidence from Shea and Kaplan credited by the commissioner supports the decision herein, we as an appellate body are compelled to affirm it.[4] As there is no error; the December 16, 2019 Finding and Dismissal of Michelle D. Truglia, the Commissioner acting for the Seventh District, is accordingly affirmed.

Commissioners William J. Watson III and Carolyn M. Colangelo concur in this Opinion.

[4] We find no error from the commissioner's denial of the claimant's motion to correct, as the claimant was merely reiterating the arguments made at trial which ultimately proved unavailing. See D'Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003).