

CASE NO. 6295 CRB-4-18-10 : COMPENSATION REVIEW BOARD
CLAIM NO. 400101101

JOHN CHOLAKIAN : WORKERS' COMPENSATION
CLAIMANT-APPELLANT COMMISSION

v. : MAY 13, 2021

CITY OF BRIDGEPORT/POLICE
DEPARTMENT
EMPLOYER
SELF-INSURED

and

PMA MANAGEMENT CORPORATION
THIRD-PARTY ADMINISTRATOR
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by William J. Varese, Esq., Law Office of William J. Varese, 672 White Plains Road, Trumbull, CT 06611 and Daniel P. Hunsberger, Esq., Maurer and Associates, P.C., 26 Catoonah Street, No. 1099, Ridgefield, CT 06877.

The respondents were represented by Christine M. Yeomans, Esq., Law Office of Christine M. Yeomans, LLC, 4 Research Drive, Suite 402, Shelton, CT 06484.

This Motion for Additional Evidence regarding the Petition for Review from the October 4, 2018 Findings and Dismissal by Randy L. Cohen, the Commissioner acting for the Fourth District, was heard April 30, 2021 before a Compensation Review Board panel consisting of Commission Chairman Stephen M. Morelli and Commissioners David W. Schoolcraft and Soline M. Oslena.¹

¹ We note that a motion for extension of time and four motions for continuance were granted during the pendency of this appeal.

RULING RE: MOTION FOR ADDITIONAL EVIDENCE

STEPHEN M. MORELLI, CHAIRMAN. The claimant has moved to submit additional evidence pursuant to Administrative Regulation § 31-301-9 in this matter.² He argues that his prior counsel, who died after the completion of the formal hearing in this matter and after having filed an appeal on the claimant's behalf, failed to introduce certain evidence before the trial commissioner, Randy J. Cohen (commissioner),

The evidence which was not proffered by claimant's former counsel in the proceedings below included a number of medical reports, progress notes and a dated opinion letter. The claimant argues that had this additional evidence been presented, the trial commissioner could have reached a different conclusion as to whether he sustained a compensable injury. Upon review, we find that this evidence was available prior to the closing of the record in this case and is essentially cumulative to what claimant's prior counsel introduced into the record at the formal hearing. Moreover, we are not persuaded that the additional evidence the claimant seeks to proffer would compel the commissioner to reach a different conclusion. As a result, we do not find the standards for the admission of additional evidence have been satisfied. See e.g., Diaz v. Pineda, 117 Conn. App. 619 (2009), (party seeking to offer additional evidence must demonstrate good reasons why evidence was not offered in the proceedings before the commissioner).

² Administrative Regulation § 31-301-9 states: "If any party to an appeal shall allege that additional evidence or testimony is material and that there were good reasons for failure to present it in the proceedings before the commissioner, he shall by written motion request an opportunity to present such evidence or testimony to the compensation review division, indicating in such motion the nature of such evidence or testimony, the basis of the claim of materiality, and the reasons why it was not presented in the proceedings before the commissioner. The compensation review division may act on such motion with or without a hearing, and if justice so requires may order a certified copy of the evidence for the use of the employer, the employee or both, and such certified copy shall be made a part of the record on such appeal."

The following facts are germane to the issues pertinent herein. The claimant is a Bridgeport police officer who was out of work for an extended time due to a compensable injury. On January 12, 2016, he went to the gun range in Stratford to recertify his qualifications so as to go back to his prior assignment. The claimant testified that during the firearm qualifications he was required to get down on one knee and fire his weapon. He testified that during the second round of qualifications he went down on his right knee and felt a tearing, burning, excruciating pain in his left knee. He said that after this he could not stand and needed assistance from another officer, Mario Pirulli, to get back on his feet. The claimant said although he was in excruciating pain, he completed the program and the pain subsided when he left the firing range. He said at the time he was favoring his right leg and limping. The commissioner, however, viewed a video of the office area near the firing range filmed on the day of the incident and determined the claimant was moving about freely and in little distress. The claimant was not limping nor did he appear to be in pain. See Findings, ¶ 15.

The commissioner cited testimony offered by Pirulli at his deposition wherein he said he recalled that an “individual complained of a hurt knee.” He could not recall whether he saw the claimant limping after complaining of knee pain. He further testified that the “drop to the knee” exercise does not involve a sudden collapse to the knee and did not recall whether he assisted the claimant up from his one knee position. Findings, ¶ 16.

Another officer, Pedro Garcia, was also deposed and said that over a year after the incident he was asked by his superior officer to provide a written statement as to the firing range incident. Garcia said after the claimant was shooting he had trouble standing

back up and Pirulli assisted the claimant. Garcia recalled that the claimant was complaining of knee pain, but did not ask to leave and go to the doctor.

The finding also cited the claimant seeking medical treatment subsequent to the alleged January 12, 2016 incident at the firing range. The claimant presented at St. Vincent's Hospital later that day and complained of being unable to bear weight on his left knee.³ X-rays were taken and were negative. There was no effusion, no warmth, no swelling. There were no objective findings. The impression was knee strain. The claimant was directed to follow up with an orthopedist.

On January 13, 2016, the claimant presented to Bridgeport Urgent Care Center with continued left knee complaints. The commissioner found the notes from that examination indicated the claimant appeared to be anxious and inquisitive. He was directed to take over the counter medication and was given a work note stating not to return to work until he was examined by an orthopedist.

The claimant was examined by James FitzGibbons, M.D., on January 20, 2016. FitzGibbons found that the claimant was; very tentative when moving about the office; "able to straight leg raise"; very sensitive to any part of his exam; and had resolving stages of ecchymosis over the anterior proximal leg area. The claimant underwent an MRI of his knee on January 15, 2016, which was negatives for tears and FitzGibbons's evaluation was that the claimant suffered a left knee strain, and had soft tissue edema. "The doctor noted in his January 20, 2016 report that the claimant 'seems to be clinically in more distress than I would expect given the MRI findings.'" Findings, ¶ 21.

³ We note that the commissioner's original finding of October 4, 2018 was corrected in part to reflect that the claimant was treated at St. Vincent's Hospital and not Bridgeport Hospital as originally indicated in Findings, ¶ 18. See the claimant's motion to correct filed October 12, 2018 and granted in part October 15, 2018.

The commissioner also noted the claimant was out of work for eight months after the incident and did not present contemporaneous out of work notes. She also noted FitzGibbons provided an undated letter quoting the history of the injury as provided by the claimant and stating that within a reasonable degree of medical probability the claimant's injury to his left knee occurred during the firing range activity.

Based on this record, the commissioner reached the following conclusions:

- A. I do not find the claimant to be credible and persuasive with respect to his mechanism of injury.
- B. I find that the claimant was aware that if he returned to work for one day after being out of work for 89 consecutive weeks that he would not be terminated.
- C. I find that the claimant may have sustained an injury to his left leg prior to January 12, 2016 as evidenced by the resolving stages of ecchymosis over the anterior proximal leg area found by Dr. FitzGibbons during his January 20, 2016 exam. The claimant testified that he went down on his right knee during the firing qualification and therefore would not have sustained bruising to the left knee.
- D. I do not find the testimony of Officer Garcia fully credible and persuasive.
- E. I do not find the testimony of Officer Pirulli fully credible and persuasive.
- F. I find that the claimant did not sustain a left knee injury arising out of and in the course of his employment with the City of Bridgeport.
- G. I find that the causation opinion provided by Dr. FitzGibbons is solely based on the subjective history provided by the claimant and therefore not fully credible and persuasive.

Conclusion, ¶¶ A-G.

The claimant's counsel filed a motion to correct and the granted correction did not materially change any of the substantive findings. See footnote 3. He then filed an appeal to this tribunal arguing among the averments of error that the commissioner; did not properly credit evidence supportive of compensability, reached unwarranted conclusions as to witness credibility, did not fairly evaluate the video evidence, and

should not have considered issues as to lost time when the hearing was only for the purpose of adjudicating compensability. After filing an appeal on behalf on the claimant, William J. Varese, Esq., died. The claimant's new counsel now seeks to admit evidence that he admits was available at the time of the formal hearing but that Varese declined to present.

The evidence the claimant seeks to add is as follows:

1. Two-page office visit notes of Dr. John Langeland, dated 1/15/16 recommending a MRI of left knee (Attached as Exhibit A);
2. Two-page MRI report of the left knee from Advanced Radiology Consultants, dated 1/15/16, which describes "mild fraying of the articular cartilage" (Attached as Exhibit B);
3. 15-pages of office visit notes of Dr. James FitzGibbons, dated 1/27/16, 2/16/16, 3/2/16, 3/22/16, 4/12/16, 5/3/16, 5/24/16 and 7/26/16, all describing "Left knee strain, soft tissue edema", "Left knee strain, traumatic prepatellar bursitis, pes bursitis", having the left knee "aspirated of 10 cc's of joint type fluid" or "chondromalacia" (Attached as Exhibit C);
4. Two-page office visit notes of Dr. Lauren Fabian, dated 5/20/2016, stating that the January MRI showed "prominent subcutaneous soft tissue edema about the patella and quadriceps fat pad with minimal joint effusion" (Attached as Exhibit D);
5. 34-pages of the office visit notes concerning Cholakian's physical therapy (Attached as Exhibit E).

Claimant's Motion for Additional Evidence dated November 13, 2020, p. 5.

The claimant argues that had this additional evidence been considered his account of having sustained his knee injury at the firing range would have been found persuasive by the commissioner. We are not persuaded by this argument.

In our tribunal's decision in Diaz v. Pineda, 5244 CRB-7-07-7 (July 8, 2008), *aff'd, rev'd in part on other issue*, 117 Conn. App. 619 (2009), we discussed the

established standard for admitting additional evidence after a decision has been reached by a trial commissioner.

We have a number of concerns with the claimant's strategy in bringing favorable evidence directly to the board's attention in this manner. A party who wishes to submit additional evidence to this board must prove that they had good reasons not to present such evidence at the formal hearing Carney-Bastrzycki v. Hospital for Special Care, 4722 CRB-6-03-9 (September 3, 2004). The respondent Second Injury Fund (The "Fund") points out that in Smith v. UTC/Pratt & Whitney, 3134 CRB 3-95-6 (June 4, 1996) we held the moving party in such a motion must establish the evidence could not have been obtained at the time of the original hearing. The Fund points to the absence of any referral from the treating physician to Dr. Rubinstein and the record does not reflect the claimant made an effort to obtain this testimony prior to the hearing by utilizing this avenue. The claimant also did not make any request to the trial commissioner seeking to change the claimant's treating physician. We believe this would have been a better direction for the claimant to have pursued. See Anderson v. R & K Spero Company, 4965 CRB-3-05-6 (February 21, 2007), *aff'd*, 107 Conn. App. 608 (2008) (trial commissioner has discretion to approve change in treating physicians).

The Fund cites two recent decisions from this board where we have denied motions to add evidence pursuant to Admin. Reg. § 31-301-9 i.e. Fratino v. Harry Grodsky & Co., Inc., 5087 CRB-7-06-5 (May 8, 2007) and Christy v. Ken's Beverage, Incorporated, 5157 CRB-8-06-11 (December 7, 2007). We are not persuaded this case warrants a different result, as we find granting this motion would be inconsistent with our reasoning in Green v. General Motors Corporation New Departure, 5111 CRB-6-06-7 (August 21, 2007), where we held "[w]e agree with the respondents that the claimant's motion to submit additional evidence is an effort to try the case in an inappropriate piecemeal fashion. Schreiber v. Town & Country Auto Service, 4239 CRB-3-00-5 (June 15, 2001)." *Id.* Therefore, we deny the Motion to Submit Additional Evidence.

Id. (Footnote omitted.)

The evidence the claimant seeks to add are primarily medical reports which he claims lend further support to the opinions and reports ascribed to FitzGibbons and which are included in the record below. Were the underlying finding reliant primarily on an

assessment of the adequacy of the claimant's medical evidence we might find this motion more applicable to the issues addressed in the Findings and Dismissal. However, we find that the medical evidence herein is essentially cumulative to what was already considered by the commissioner. See Valenti v. Norwalk Hospital, 5871 CRB-3-13-8 (July 16, 2014), *appeal dismissed*, A.C. 37054 (April 6, 2015). Moreover, our precedent in Calinescu v. CFD Associates, 13 Conn. Workers' Comp. Rev. Op. 298, 1794 CRB-8-93-8 (April 21, 1995), *aff'd*, 40 Conn. App 912 (1996) (per curiam), suggests that when a claimant's narrative as to how he or she was injured is the central issue such additional evidence should not be considered. In Calinescu, we rejected the motion to submit additional evidence as we did not believe "that this evidence is reasonably likely to produce a different result." *Id.*, n.1.

The motion herein is therefore the type of piecemeal litigation we do not endorse. See Gibson v. State/Department of Developmental Services - North Region, 5422 CRB-2-09-2 (January 13, 2010). We also are not persuaded by the claimant's argument concerning the good reason to admit this evidence. He argues that as his attorney was allegedly in declining health that he failed to fully litigate this matter. We cannot find objective corroboration for this claim. The record does not reflect any missed deadlines or hearings. The commissioner's conclusion in this matter rests on her assessment of the claimant's testimony. It strikes us as doubtful that the additional evidence claimant's present counsel seeks to admit would result in the commissioner drawing a different conclusion than the one she reached in this matter. We will not second guess the wisdom

or legal strategy employed by claimant's former counsel in his decision as to what evidence he chose to present.⁴

For the foregoing reasons, we deny the motion for additional evidence.

Commissioners David W. Schoolcraft and Soline M. Oslena concur.

⁴ At oral argument, claimant's counsel argued that cases involving the alleged ineffective assistance of defense counsel in criminal cases should be applied to our proceedings under Chapter 568. We note that there is no current precedent to that effect. In addition, in the case counsel cited, Johnson v. Commissioner of Correction, 330 Conn. 520 (2019), the court refused to second guess trial strategy of counsel in not calling certain witnesses. *Id.*, 568-70.