CASE NO. 6295 CRB-4-18-10 CLAIM NO. 400101101	:	COMPENSATION REVIEW BOARD
JOHN CHOLAKIAN CLAIMANT-APPELLANT	:	WORKERS' COMPENSATION COMMISSION
v.	:	NOVEMBER 4, 2021

CITY OF BRIDGEPORT/POLICE DEPARTMENT
EMPLOYER
SELF-INSURED

and

PMA MANAGEMENT CORPORATION
THIRD-PARTY ADMINISTRATOR
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented at oral argument by Daniel P. Hunsberger, Esq., Maurer and Associates, P.C., 26 Catoonah Street, No. 1099, Ridgefield, CT 06877. At the trial level and at the initiation of this appeal, the claimant was represented by William J. Varese, Esq., Law Office of William J. Varese, 672 White Plains Road, Trumbull, CT 06611.

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 Petition for Review from the October 4, 2018 Findings and Dismissal by Randy L. Cohen, the Administrative Law Judge acting for the Fourth District, was heard July 30, 2021 before a Compensation Review Board panel consisting of Chief Administrative Law Judge Stephen M. Morelli and Administrative Law Judges Peter C. Mlynarczyk and Daniel E. Dilzer.[1]

[1] Effective October 1, 2021, the Legislature directed that the phrase "Administrative Law Judge" be substituted when referencing a workers' compensation commissioner. See Public Act 21-18.

OPINION

STEPHEN M. MORELLI, CHIEF ADMINISTRATIVE LAW JUDGE. The claimant has appealed from the Findings and Dismissal (findings) issued on October 4, 2018 by Administrative Law Judge Randy L. Cohen acting for the Fourth District, which dismissed his claim of a knee injury sustained on January 12, 2016. The claimant argues that the administrative law judge made unreasonable inferences from the evidence on the record in dismissing this claim and erred by not finding him to be a credible witness. The respondents argue that the claimant is seeking to retry this case on appeal and disturb the assessment reached by the administrative law judge as to the probative value of the claimant's evidence and testimony. We conclude the respondents offer a more persuasive argument as to the facts and the law herein. Therefore, we affirm the Findings and Dismissal.[2]

We discussed the factual basis of this matter in considering the claimant's earlier motion for the submission of additional evidence. Notwithstanding that recitation of the facts, the following synopsis is relevant to the discussion of this appeal.

The claimant, a Bridgeport police officer, alleged an injury to his left knee on January 12, 2016 while he was at the gun range in order to recertify his firearms qualifications. The claimant testified that he went down onto his right knee, felt a tear in his left knee, and experienced immediate burning and pain. He further testified that he had difficulty standing and needed assistance from Mario Pirulli, a fellow officer, to get back on his feet. Although he was in excruciating pain, the claimant alleged that he

[2] We note that two motions for extension of time and four motions for continuance were granted during the pendency of this appeal.

completed the program but was still limping when he left the firing range. The administrative law judge, however, viewed a video of the office area near the firing range filmed on the day of the incident and determined that the claimant was moving about freely and appeared to be in little distress. The claimant was not limping nor did he appear to be in pain. See Findings, ¶ 15.

Pirulli testified via deposition at which time he recalled that an "individual complained of a hurt knee" but could not remember whether he saw the claimant limping after complaining of knee pain. Pirulli further testified that the "drop to the knee" exercise does not involve a sudden collapse of the knee. Pirulli did not recall whether he assisted the claimant up from the floor. Findings, ¶ 16.

Another officer, Pedro Garcia, provided a written statement and also testified via deposition. Garcia stated that the claimant did have trouble standing up, required assistance from Pirulli, and was complaining of knee pain. According to Garcia, though, the claimant did not ask to leave or for the opportunity to go to the doctor.

The claimant presented at St. Vincent's Hospital on January 12, 2016 and complained of difficulty with weight bearing. X-rays taken at that visit were negative. It was also noted that there was no effusion, warmth, or swelling. The impression was a knee sprain and the claimant was directed to follow-up with an orthopedist.

On January 13, 2016, the claimant presented to Bridgeport Urgent Care with continuing complaints related to the left knee. He was directed to take over-the-counter medications and was given a note to remain out of work until he was examined by an orthopedist.

James Fitzgibbons, an orthopedic surgeon, evaluated the claimant on January 20, 2016. Fitzgibbons noted that the claimant was very tentative while moving about the office and was very sensitive to any part of his exam. It was also noted that the claimant was able to straight leg raise and had resolving stages of ecchymosis over the anterior aspect of the proximal leg. A January 15, 2016 MRI of the left knee was negative. Fitzgibbons diagnosed the claimant with a left knee strain and soft tissue edema. Fitzgibbons also noted that the claimant "seems to be clinically in more distress than I would expect given the MRI findings." Findings, ¶ 21. Nevertheless, Fitzgibbons provided an updated narrative letter in which he quoted the history of the injury as given by the claimant and in which he opined that, within a reasonable degree of medical probability, the claimant's left knee condition was likely the result of the incident at the firing range.

Based on this record, the administrative law judge found that the claimant was not credible and persuasive with respect to his mechanism of injury. In making that determination, the administrative law judge noted (1) the claimant was aware that, if he returned to work for one day after being out of work for 89 consecutive weeks for a prior injury, he would not be terminated; (2) the resolving stages of ecchymosis over the anterior aspect of the proximal leg as documented in the medical records were suggestive of a prior left leg injury; (3) the claimant's testimony that he went down on his right knee did not correlate to bruising to the left knee; (4) Garcia's testimony was not fully credible; (5) Pirulli's testimony was not fully credible; and (6) since Fitzgibbon's causation opinion was based solely on the claimant's subjective history, it was not fully credible and persuasive. The administrative law judge, therefore, held that the claimant

did not sustain a left knee injury that arose out of and in the course of his employment. See Conclusions, ¶¶ A-G.

The claimant filed a motion to correct these findings seeking corrections of findings, ¶ 8-9, 15-16, 18, 24-25; as well as conclusion, ¶ C. The administrative law judge denied each of these corrections with the exception of finding, ¶ 18, as to the name of the emergency medical facility where the claimant was treated after the incident at the firing range. The instant appeal followed.

The standard of deference we are obliged to apply to an administrative law judge'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." <u>Russo v. Hartford</u>, 4769 CRB-1-04-1 (December 15, 2004), *citing* <u>Fair v. People's Savings Bank</u>, 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." <u>Burton v. Mottolese</u>, 267 Conn. 1, 54 (2003), *quoting* <u>Thalheim v. Greenwich</u>, 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." <u>Christensen v. H & L Plastics Co., Inc.</u>, 5171 CRB-3-06-12 (November 19, 2007).

We also pointed out recently in <u>Blakey v. US Laboratories</u>, 6384 CRB-5-20-3 (March 11, 2021):

> [c]iting <u>Sapko v. State</u>, 305 Conn. 360 (2012); <u>DiNuzzo v. Dan Perkins Chevrolet Geo, Inc.</u>, 294 Conn. 132 (2009) and <u>Voronuk v.</u>

> Electric Boat Corp., 118 Conn. App. 248 (2009), we concluded 'our appellate courts have restated the need for claimants seeking an award under Chapter 568 to present reliable, nonspeculative evidence and to carry their burden of proof that there is a clear nexus of proximate cause between employment and injury.' Larocque [v. Electric Boat Corporation, 5942 CRB-2-14-6 (July 2, 2015)], supra.

Blakey, supra.

In order for the claimant to prevail on appeal, we would have to determine, as a matter of law, that the evidence he presented was so compelling it required the award of benefits.[3]

The claimant argues that there are numerous findings of fact for which the administrative law judge drew an unreasonable inference from the evidence. However, we note that, while the claimant now asserts deficiencies with findings, ¶ 5, 10, 17, 19-20, there were no corrections sought to these findings in the motion to correct. Therefore, as we held in Stevens v. Raymark Industries, Inc., 5215 CRB-4-07-4 (March 26, 2008), *appeal dismissed*, A.C. 29795 (June 26, 2008), "we must accept the validity of the facts found by the trial commissioner . . . . " Id. We note that the administrative law judge denied the other substantive corrections proposed by the claimant. We stated the standards for granting or rejecting proposed corrections in Vallier v. Cushman & Wakefield, 5822 CRB-1-13-2 (February 21, 2014). "The trial commissioner is not obligated to adopt the legal opinions and factual conclusions of a litigant. Liano v.

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[3] The claimant rests much of his argument based on this tribunal's recent decision in Galinski v. Beaver Tree Service, L.L.C., 6361 CRB-1-19-12 (December 9, 2020), *appeal withdrawn*, A.C. 44442 (August 24, 2021). He claims this stands for the proposition that this tribunal should intercede on humanitarian grounds to reverse a perceived injustice. This misreads our rationale for overturning the administrative law judge's decision in Galinski. We determined in that case that the respondents, who advanced an affirmative statutory intoxication defense under General Statutes § 31-384 (a), could not prevail based on our interpretation of the statute. Galinski does not stand for this tribunal reassessing a factual determination by a factfinder that the claimant did not prevail as to his or her initial burden of persuasion.

Bridgeport, 4934 CRB-4-05-4 (April 13, 2006) and D'Amico v. Dept. of Correction, 73 Conn. App. 718 (2002). A trial commissioner may also conclude the evidence he or she chose not to cite in his or her Findings was not deemed probative. Vitti v. Richards Conditioning Corp., 5247 CRB-7-07-7 (August 21, 2008)." Id. Finally, "a motion to correct is properly denied when the additional findings sought by the movant would not change the outcome of the case." Hammond v. Bridgeport, 139 Conn. App. 687, 704 (2012), *citing* Krol v. A.V. Tuchy, Inc., 135 Conn. App. 854, 863 (2012). We must, therefore, ascertain if there were valid reasons for these denials.

We will review some of the specific findings where the trier denied corrections and for which the claimant now asserts error. While some of the requested corrections pertain to the claimant's testimony, which we will discuss later in greater detail, others focus on the trier's evaluation of medical evidence. In findings, ¶ 6, the administrative law judge noted a November 18, 2015 examination in which a medical provider referenced that the claimant had bruising on his elbow and legs. The claimant argues that as he was treating for cellulitis, this was irrelevant and unrelated to his later knee injury and should not have been considered by the administrative law judge. The finding does, however, accurately cite the medical report. It is black-letter law that the finder of fact has the prerogative to weigh all the evidence in the record and accord it the weight they deem appropriate. See Nelson v. Revera, Inc., 5977 CRB-5-15-1 (September 21, 2015), *citing* Marandino v. Prometheus Pharmacy, 294 Conn. 564, 594 (2010). Similarly, the claimant alleged error pertaining to findings, ¶ 9, wherein the administrative law judge cited treatment records wherein it was noted that the claimant stated he was taking Ambien and may have passed out and fallen down. See Respondents' Exhibit 1,

November 20, 2015 notes of Ross Richter, M.D. A trier of fact, however, is permitted to consider whether a non-work-related injury or condition could be potentially responsible for an alleged work-related injury. See Zezima v. Stamford, 5918 CRB-7-14-3 (May 12, 2015). Given the aforesaid standard for granting a motion to correct, as well as the underlying factual determinations, we find no error in the administrative law judge's denial of the motion to correct with respect to the references to the medical records.

The claimant also challenges the determination made by the administrative law judge as to the value of the testimony of Pirulli and Garcia, both of whom testified via deposition. See Claimant's Exhibits F-G. During their depositions, both Pirulli and Garcia stated that they did not recall various specifics as to the incident. In light of their equivocal testimony, we find no error in the administrative law judge not finding their testimony reliable.

As for the administrative law judge's evaluation of the claimant's live testimony there is extensive precedent which states such determinations are essentially inviolate on appeal. See the Appellate Court's opinion in Baron v. Genlyte Thomas Group, LLC, 132 Conn. App. 794, *cert. denied*, 303 Conn. 939 (2012):

> The commissioner, as finder of fact, is the sole arbiter of credibility; *Samaoya v. Gallagher*, 102 Conn. App. 670, 673-74, 926 A.2d 1052 (2007); and it is within the discretion of the commissioner 'to accept some, all or none of the plaintiff's testimony.' *Gibbons v. United Technologies Corp.*, 63 Conn. App. 482, 487, 777 A.2d 688, cert. denied, 257 Conn. 905, 777 A.2d 193 (2001).

Id., 804.

In assessing the claimant's credibility, the administrative law judge had the benefits of hearing the live testimony of the claimant and of viewing the video taken at

the firing range on January 12, 2016. After viewing that video, and considering the testimony presented, the administrative law judge found:

> 12. 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, and excruciating pain in his left knee.
>
> 13. The claimant testified that he could not stand back up from kneeling on one knee and Officer Mario Pirulli assisted him to stand. The claimant testified that he was in excruciating pain but finished the qualification.
>
> 14. The claimant testified that the pain subsided as he exited the firing range and entered the office area where he called his sergeant and lieutenant. The claimant stated that at the time he was 'favoring his right leg' and was 'limping outside' as he went to his car.
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> 15. A video of the claimant on January 12, 2016 in the 'office area' after his qualification rounds was viewed at the Formal Hearing and showed the claimant moving about freely and in little distress. The claimant is not seen limping nor does he appear to be in pain.

Findings, ¶¶ 12-15.

The administrative law judge was, therefore, left unpersuaded that the claimant sustained a significant knee injury that arose out of and in the course of his employment on January 12, 2016. In Barbee v. Sysco Food Services, 5892 CRB-8-13-11 (October 16, 2014), *aff'd*, 161 Conn. App. 902 (2015) (per curiam), we affirmed an administrative law judge who dismissed a claim based on his assessment of the claimant's narrative and a surveillance video showing the claimant's activities when she claimed to be injured. See also Camp v. Lupin Pharmaceuticals, Inc., 5936 CRB-6-14-5 (April 24, 2015), *appeal withdrawn*, A.C. 37932 (November 14, 2016). "Our precedent as we restated in Barbee, supra, is that a trial commissioner is extended great latitude to ascertain whether a

claimant's narrative is consistent with video evidence presented to the tribunal." Id. As the trier of fact determined that the claimant's narrative was not supported by video evidence, we must respect her determination.

This assessment is also dispositive with respect to the claimant's contention that the administrative law judge erred by not relying on the causation opinions of FitzGibbons, his orthopedic surgeon. The claimant argues this opinion was "not based solely on the subjective history provided by Detective Cholakian . . ." but to the extent his opinion was influenced in any manner by what the administrative law judge deemed to be an unreliable narrative our precedent permits the opinion to be discounted in toto. Additional Memorandum in Support of Claimant's Appeal, p. 21.

> 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. See Abbotts v. Pace Motor Lines, Inc., 4974 CRB-4-05-7 (July 28, 2006), *aff'd*, 106 Conn. App. 436 (2008), *cert. denied*, 287 Conn. 910 (2008); Baker v. HUG Excavating, Inc., 5443 CRB-7-09-3 (March 5, 2010) and Do v. Danaher Tool Group, 5029 CRB-6-05-12 (November 28, 2006).

Camp, supra. (Footnote omitted.)

The administrative law judge in the current matter was left unpersuaded by the claimant's testimony and evidence that the etiology of his knee ailment was due to a compensable injury sustained on January 12, 2016. This review is, therefore, governed by Wierzbicki v. Federal Reserve Bank of Boston, 4147 CRB-1-99-11 (December 19, 2000), *appeal dismissed*, A.C. 21533 (June 14, 2001), in which it was held that "[i]f the trier is not persuaded by the claimant's evidence, there is nothing that this board can do to override that decision on appeal." Id.

There is no error; the October 4, 2018 Findings and Dismissal of Randy L. Cohen, Administrative Law Judge acting for the Fourth District, is accordingly affirmed.

Administrative Law Judges Peter C. Mlynarczyk and Daniel E. Dilzer concur in this Opinion.