CASE NO. 6366 CRB-5-19-12 CLAIM NO. 500166953	:	COMPENSATION REVIEW BOARD
RICHARD ROUSSEAU CLAIMANT-APPELLEE	:	WORKERS' COMPENSATION COMMISSION
v.	:	FEBRUARY 3, 2021

ACRANOM MASONRY, INCORPORATED
EMPLOYER

and

LIBERTY MUTUAL INSURANCE
INSURER
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by Michael R. Kerin, Esq., Kerin Law Offices, P.C., 120 Broad Street, Milford, CT 06460.

The respondents were represented by Christopher J. Powderly, Esq., Meehan, Turret & Rosenbaum, 108 Leigus Road, First Floor, Wallingford, CT 06492.

This Petition for Review from the December 5, 2019 Finding and Decision by Carolyn M. Colangelo, the Commissioner acting for the Fifth District, was heard June 26, 2020 before a Compensation Review Board panel consisting of Commissioners Randy L. Cohen, William J. Watson III and Brenda D. Jannotta.[1]

[1] We note that two motions for extension of time were granted during the pendency of this appeal.

OPINION

RANDY L. COHEN, COMMISSIONER. The respondents have appealed from a Finding and Decision (finding) issued on December 5, 2019 by Commissioner Carolyn M. Colangelo (commissioner) which found that the claimant's need for a hip replacement was the result of a compensable injury. The commissioner reached this conclusion by finding that the claimant's treating physician was more persuasive than the commissioner's medical examiner. The respondents' appeal argues that this decision was improper, and somehow shifted the burden of persuasion in this case. On the legal issues we find this decision indistinguishable from numerous other cases where a commissioner has found another medical witness more persuasive than the commissioner's examiner and we have affirmed those decisions, see Smith v. RegalCare at Waterbury, LLC, 6316 CRB-5-19-3 (March 10, 2020) and Madden v. Danbury Hospital, 5745 CRB-7-12-4 (April 22, 2013). Having examined the record we find that there was sufficient probative evidence presented for the commissioner to reach her conclusion. We therefore affirm the Finding.

The following facts are relevant to this appeal. The claimant was employed by the respondent, Acranom, on October 26, 2015, doing masonry work when he lifted a large steel beam, twisted and then felt a sharp pain in his right side. He continued working until the end of his shift, returned home, continued to feel pain, and presented at Concentra on October 28, 2015. The commissioner noted this was the assessment at that examination:

> Patient reports injuring his lower back this past Monday when he lifted a heavy beam and twisted to the right on a planted lower extremity. Patient states that he experienced acute onset of pain,

> however continued to work and finish his shift. Patient states that over the past 2 days his symptoms progressively worsened . . . . Patient c/o pain and associated stiffness about the right lower lumbosacral region of his back. Patient c/o pain about the anterior aspect of his proximal thigh/hip.

Findings, ¶ 5, *quoting* Claimant's Exhibit B.

The staff at Concentra observed that the claimant was standing "with slight left lateral shift and lean to offload the right lower extremity." Findings, ¶ 6, *quoting* Claimant's Exhibit B. As a result, he was prescribed physical therapy and pain medication, and was taken out of work. On October 29, 2015, Concentra examined the claimant again and noted a pain rating of 8-9/10. X-rays and an MRI would be performed on the claimant's hip following his injury. The preliminary interpretation of the October 30, 2015 X-ray was "[m]oderate OA of the right hip [noted,] questionable comminuted fracture of the femoral neck." Findings, ¶ 9 *quoting* Claimant's Exhibit B. The November 6, 2015 MRI of the right hip showed "[m]oderate subchondral cystic changes and surrounding bone marrow edema . . . at the medial aspect of the right acetabulum extending from anterior to posterior." Findings, ¶ 10, *quoting* Claimant's Exhibit E.

"The claimant testified that prior to the October 26, 2015, incident he had never injured his hip, sought medical treatment for his hip, taken pain medication for his hip, or limped as a result of pain in his hip." Findings, ¶ 11. He did office work following the injury until he was laid off, and then returned to work as a mason in late March 2016, at which time his hip pain returned.

The commissioner noted that on August 21, 2016, the claimant's treating physician, Patrick Duffy, M.D., discussed the need for a total right hip replacement. See Findings, ¶ 14, *citing* Claimant's Exhibit C. Duffy later testified "the October 26, 2015,

incident: (1) rendered a previous asymptomatic condition symptomatic; (2) hastened the need for surgery; and (3) caused a material or substantial worsening of the claimant's pre-existing condition." Findings, ¶ 16. He also testified that the initial X-ray revealed a question of whether there was fracture into one of the subchondral cysts and that such a fracture "is very difficult to see" and that that the MRI reading of bone marrow edema in the medial aspect of the right acetabulum extending from the anterior to posterior was consistent with a trauma because "[i]f it was degenerative, it would have been in both hips." Findings, ¶¶ 17-18, *quoting* February 21, 2019 Hearing Transcript, pp. 32, 55-56. Duffy also testified that X-rays showed the claimant's hip condition had degenerated due to arthritis between 2015 and 2019. See Findings, ¶ 19.

The respondents had the claimant examined by their expert, Dante A. Brittis, M.D., who issued a report dated January 16, 2017 that opined that the incident of October 26, 2015 was not a substantial factor in the claimant's eventual need for the total right hip replacement. See Findings, ¶ 20, *citing* Respondents' Exhibit 1. Brittis said that there had not been a fracture but only significant degenerative changes to the claimant's hip. In an addendum to his initial report he concluded:

> The incident on October 26, 2015 was an aggravation of an underlying issue but it did not cause the arthritis nor did it cause the arthritis to worsen. It was already end stage arthritis. It is my belief within reasonable medical probability that [the] injury was not a substantial cause for the eventual need for hip arthroplasty (replacement).

Findings, ¶ 22, *quoting* Claimant's Exhibit F.

There was a commissioner's examination performed in this case by Christopher Lena, M.D., on May 17, 2017. Lena concluded after that examination as follows:

> 49-year-old gentleman with bilateral acetabular protrusio which predisposes him to a pincer impingement in the hip which caused

> the degeneration of his hip arthritis bilaterally which he is suffering some increased discomfort on the right compared to the left side.

Claimant's Exhibit D.

Lena elaborated as to his opinions as to the source of the claimant's hip ailments as follows:

> While I do believe [that] he is approaching a candidacy for a total hip replacement on both sides, I believe that the major cause for this is related to his pre-existing genetic condition of bilateral acetabular protrusio with a deep socket and essentially a pincer impingement. He has developed long-standing arthritic changes and while there was a small aggravation of it in the episode in the elevator, I do not believe it was a significant material contributor to the progression of his arthritic changes as I anticipate that he had the same arthritic changes and that there has been no change in the progression of his arthritis secondary to that incident just a slight aggravation of it and so once again, I do not believe that the 10/26/2015 date of injury was a substantial contributing factor for the need for the total hip replacement.

Findings, ¶ 24, *quoting* Claimant's Exhibit D.

The commissioner's examiner was found by the commissioner to have reiterated his position as to the lack of workplace causation for the claimant's hip injury at a number of depositions. He did state "a fracture of the acetabular protrusio on the acetabular side might hasten the need for a hip replacement, but after reviewing the X-rays of the claimant's hip, indicated he saw no evidence of such a fracture." Findings, ¶ 26. He also contested the radiologist's reading of the MRI. See Findings, ¶ 27.

Based on this record the commissioner concluded the claimant was a credible witness as to the narrative of events and the issues presented. She found that the claimant sustained a compensable right hip injury on October 26, 2015. She found the claimant had established that a total right hip replacement was reasonable or necessary. As for the

causation of this injury and the need for treatment the commissioner cited the following evidence:

> E. I find Dr. Duffy's opinion that the October 26, 2015 incident (1) rendered a previous asymptomatic condition symptomatic; (2) hastened the need for a total right hip replacement and (3) caused a material or substantial worsening of the claimant's pre-existing condition fully credible and persuasive. His opinion comports with the balance of the evidence, including the testimony of the claimant as to his medical history and the chronology of his symptoms. Dr. Duffy's opinion also comports with the diagnostic imaging in evidence, including the X-rays from 2015 and 2019, as well as the MRI report in evidence which shows bone marrow edema at the medial aspect of the right acetabulum.
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> F. Given that I find the claimant credible, I do not find the opinion of Dr. Lena persuasive as to the issues before me. Furthermore, I find the opinion of the claimant's treating physician to be more convincing due to his familiarity with the claimant's condition and course of treatment.

Conclusion, ¶¶ E-F.

Accordingly, she found the need for the claimant's hip replacement was due to the October 26, 2015 compensable injury. The respondents filed a motion to correct seeking a number of corrections, most notably to remove Conclusion F as allegedly misstating the appropriate legal standard to establish causation of an injury and a claim that Duffy had not viewed a 2015 MRI film but that Lena had. The motion also sought to find the claimant's hip replacement not compensable. The commissioner granted only one correction which was to correct a scrivener's error. The respondents then moved for an articulation as to why the commissioner found Duffy more persuasive than Lena. The commissioner responded noting that Lena's opinion was reliant upon a belief that the claimant had experienced long standing hip pain prior to the October 26, 2015 work

accident. Since the claimant had testified that he had not suffered from hip pain until his work accident and the commissioner found this testimony credible, the commissioner determined that Duffy's opinion, which was consistent with the claimant's narrative, was the more reliable opinion. The respondents have now appealed to this tribunal arguing that the evidence to support this conclusion was inadequate and that the commissioner failed to apply the appropriate legal standard in her decision.

The standard of deference we are obliged to apply to a commissioner's findings and legal conclusions on appeal 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).

The central point raised by the respondents is the claim that the commissioner did not apply a proper causation standard in this case. They suggest that the consideration of the claimant's credibility in this matter was irrelevant and the sole issue that should have been considered at the hearing was the credibility of medical opinions. We do not

believe this theory accurately reflects our precedent and therefore we are not persuaded. Given the differences in opinion between Duffy and Lena, the claimant's testimony that he was not suffering hip pain prior to his accident was material to resolving this dispute. Moreover, as the commissioner outlined in her articulation, she weighed all the evidence and, in our judgment, comported with the precedent we have established in evaluating disputes as to causation. That standard, as we enunciated in Larocque v. Electric Boat Corporation, 5942 CRB-2-14-6 (July 2, 2015), requires that a plaintiff "present reliable, nonspeculative evidence and to carry their burden of proof that there is a clear nexus of proximate cause between employment and injury." Id.

However, it has not been our law that proof of such a nexus must be limited solely to medical evidence. In Nelson v. Revera, Inc., 5977 CRB-5-15-1 (September 21, 2015), we cited Marandino v. Prometheus Pharmacy, 294 Conn. 564 (2010), for the proposition that the Supreme Court held it was a trial commissioner's prerogative to "consider medical evidence *along with all other evidence* to determine whether an injury is related to the employment." Id., 595 (Emphasis in original.) In considering the medical evidence in the context of the other evidence she deemed credible the trial commissioner followed this precedent, and did not, as the respondents suggest, shift the burden of proof in this dispute.

The respondents appear to argue that it was error to find the treating physician's familiarity with the claimant's condition as legitimate grounds to credit his opinion. See Respondents' Brief, p. 7. They fail to explain how this differs in any fashion from our

affirmance of similar determinations in Madden, supra, and Smith, supra.[2] As we pointed out in Smith:

> Upon review of the respondents' arguments we find they boil down to a simple proposition: the commissioner erred by not adopting the methodology and conclusions presented by the commissioner's examiner. As the respondents see it, since Kaplan did not believe the mechanism of injury described by the claimant would cause a torn meniscus, such an injury must be noncompensable. Our precedent, however, allows a commissioner to accept the opinion of a treating physician over that of a commissioner's examiner. See Madden v. Danbury Hospital, 5745 CRB-7-12-4 (April 22, 2013).
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> In Madden, the commissioner concluded that the treating physicians who opined the claimant had sustained a repetitive trauma injury were more persuasive and credible than the commissioner's examiner, who opined the claimant had not sustained such an injury. We affirmed this decision, noting that it is for the trial commissioner to determine if the employment is a proximate cause of the disablement, and that this board may not substitute its own findings for those of the commissioner. Id., *citing* Love v. William W. Backus Hospital, 5255 CRB-2-07-8 (June 24, 2008). See also Sanchez v. Edson Manufacturing, 5980 CRB-6-15-1 (October 6, 2015), *aff'd*, 175 Conn. App. 105 (2017).
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> In Madden, we pointed out that when a commissioner finds other expert opinions were more persuasive than the opinion of the commissioner's examiner, she may choose to rely on those opinions. In a "dueling expert" case that is her prerogative. Dellacamera v. Waterbury, 4966 CRB-5-05-6 (June 29, 2006), n.1. (Footnote omitted.) See also Strong v. UTC/Pratt & Whitney, 4563 CRB-1-02-8 (August 25, 2003), "[i]f on review 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." Id. The commissioner had a proper basis supporting her conclusion.

Id.

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[2] Indeed, in Madden v. Danbury Hospital, 5745 CRB-7-12-4 (April 22, 2013), the trial commissioner did not offer an articulation as to her grounds for finding the treater more credible than the commissioner's examiner, but we affirmed this decision as the rationale could be discerned from the text of the finding. Here, the commissioner was asked to articulate her reasoning and responded with a cogent explanation.

Therefore, our decision must rest on whether Duffy offered a reasonable opinion supportive of finding the claimant's need for a hip replacement was due to the compensable injury. We believe that he did. Our review of the record indicates that as of Duffy's examination of the claimant on November 25, 2015, he diagnosed him with "posttraumatic DJD, right hip" and noted the claimant presented with an antalgic gait on his right side. Claimant's Exhibit C. Duffy's notes at later examinations consistently document this antalgic gait. Duffy's letter to counsel dated October 27, 2016, presented an unequivocal opinion that the claimant's 2015 work injury was a substantial contributing factor in his need for hip replacement surgery. Duffy reiterated this opinion in a January 7, 2019 letter. See Id.

Moreover, Duffy offered live testimony at the formal hearing. After being cross-examined by respondents' counsel the trial commissioner found the opinions he presented to be persuasive and credible. At the hearing, he testified as to the claimant presenting with an antalgic gait. See February 21, 2019 Hearing Transcript, p. 16. He also testified that he had reviewed the November 6, 2015 MRI results and that it was consistent with the X-ray reports he reviewed depicting a right hip injury.[3] See id., p. 19. Duffy testified that had the claimant suffered from significant hip pain prior to the October 26, 2015 incident, he would have expected the claimant to have treated for this condition with a primary care physician to obtain prescription pain medicine, and no records of that had been presented to him. See id., pp. 26, 47. The treater on the stand reiterated his written opinion "that the incident of 10/26/15 rendered a previously asymptomatic condition symptomatic." Id., p. 27. Duffy also offered an explanation for

[3] The respondents have argued that Lena actually viewed the MRI and not just the radiologist report, and claim Duffy only read the report, and therefore argue Lena's opinions should have been granted greater credence. This is inconsistent with Duffy's testimony at the formal hearing.

why he did not agree with Lena's opinion as to causation, explaining that he associated the edema shown on the diagnostic tests as evidence of trauma, and he believed the evidence was that edema was present only on the right hip. See id., pp. 60-63.[4] Duffy summed up his opinion as follows:

> It's pretty simple. I've got a mechanism of injury. I've got a history. I've got a patient who has complaints that are consistent with that history of injury. We've got diagnostic studies that show, yes, he has preexisting problems with that hip but they were asymptomatic. We have an objective study, which is that MRI which shows there's a difference between the right hip and the left hip and that edema would be consistent with a trauma. And now we've shown today that it has progressed.

Id., p. 66.

After reviewing the evidence and the law we believe that our precedent in Hadden v. Capitol Region Education Council, 5843 CRB-1-13-5 (May 20, 2014), *aff'd*, 164 Conn. App. 41 (2016), governs this case. In Hadden, the claimant suffered from preexisting multiple sclerosis and the respondents argued that her disability was due to that condition and was not the sequalae of a workplace assault. The trial commissioner found for the claimant and this tribunal affirmed the decision, *citing* Strong v. UTC/Pratt & Whitney, 4563 CRB-1-02-8 (August 25, 2003), "[i]f on review 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." We believe that sufficient medical evidence was presented to establish that a workplace injury exacerbated the claimant's preexisting hip ailments and accelerated his need for hip replacement surgery. This evidence met the standard delineated in Larocque, supra,

[4] While the respondents have argued that the evidence as reviewed by Lena suggests bilateral edema, which they argue demonstrates bilateral degenerative changes, the record indicates the claimant continuously presented with an antalgic gait favoring his right side.

and the decision of the commissioner to find a treater more persuasive than a commissioner's examiner comports with precedent in Madden, supra, and Smith, supra.[5]

There is no error; the December 5, 2019 Finding and Decision of Carolyn M. Colangelo, the Commissioner acting for the Fifth District, is accordingly affirmed.

Commissioners William J. Watson III and Brenda D. Jannotta concur in this Opinion.

[5] We affirm the commissioner's denial of those corrections sought in the motion to correct which she denied. We may reasonably infer that she did not find the evidence cited in those proposed corrections either probative or persuasive. See Brockenberry v. Thomas Deegan d/b/a Tom's Scrap Metal, Inc., 5429 CRB-5-09-2 (January 22, 2010), *aff'd*, 126 Conn. App. 902 (2011) (per curiam); Vitti v. Richards Conditioning Corp., 5247 CRB-7-07-7 (August 21, 2008), *appeal withdrawn*, A.C. 30306 (September 29, 2009).