CASE NO. 6376 CRB-1-20-1 CLAIM NOS. 100170752, 100170556 & 601029477	:	COMPENSATION REVIEW BOARD
ROBERT J. CAREY CLAIMANT-APPELLANT	:	WORKERS' COMPENSATION COMMISSION
v.	:	APRIL 30, 2021

STATE OF CONNECTICUT/
UCONN HEALTH CENTER
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLEE

and

GALLAGHER BASSETT
SERVICES, INCORPORATED
ADMINISTRATOR

APPEARANCES:

The claimant was represented by Mark E. Blakeman, Esq., Michelson, Kane, Royster & Barger, P.C., 10 Columbus Boulevard, Hartford, CT 06106.

The respondent was represented by Donna Summers, Esq. and Marie Gallo-Hall, Esq., Assistant Attorney General, Office of the Attorney General, 165 Capitol Avenue, P.O. Box 120, Hartford, CT 06141-0120.

This Petition for Review from the January 15, 2020 Finding and Dismissal/Award by Daniel E. Dilzer, the Commissioner acting for the First District, was heard October 23, 2020 before a Compensation Review Board panel consisting of Commissioners Randy L. Cohen, William J. Watson III and David W. Schoolcraft.[1]

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

OPINION

RANDY L. COHEN, COMMISSIONER. The claimant in this matter has appealed from a Finding and Dismissal/Award (finding) issued by Commissioner Daniel E. Dilzer (commissioner).[2] In this decision, the commissioner granted a form 36 filed by the respondent terminating the claimant's temporary total disability benefits. The claimant asserts error from this decision, and also argues the commissioner failed to address all the pending medical issues in this matter in the finding. Upon review, we find that the issue as to the claimant's work capacity was a matter of weighing factual evidence and a sufficient quantum of evidence was presented on the record supportive of the commissioner's decision. As for the question presented as to approval of the claimant's 2019 surgery, this issue may be properly addressed at future hearings. Accordingly, we affirm the finding.

The present dispute emanates from compensable injuries the claimant sustained to his back while in the employ of the respondent, UConn Health Center. The claimant, an administrative correctional nurse, sustained his first injury in 1999 falling off a chair. This incident resulted in a lumbar discectomy at the L5-S1 level. See Findings, ¶ 2. Subsequent to this procedure, the claimant came under the care of W. Jay Krompinger, M.D., who revised that surgery in 2000 and then performed a lumbar fusion at L5-S1 in 2003. Four months after the 2003 procedure, the claimant returned to full-duty. See Findings, ¶¶ 3-4. The claimant sustained another back injury and a knee injury as the result of a broken chair at work on July 13, 2008. The respondent accepted the

[2] The respondent filed a timely petition for review that is now deemed to be abandoned.

compensability of this injury. See Findings, ¶ 6.[3] The knee injury necessitated a 2011 knee replacement surgery and was the subject of a voluntary agreement in 2012 which awarded the claimant a 40 percent permanent partial disability for his right knee.[4]

In 2009, the claimant told Krompinger he had serious left thigh pain which resulted in an MRI of his lumbar spine being performed on March 10, 2009. Krompinger opined that this test showed abnormality at the L4-5 level but did not require surgical intervention at that time. The claimant was released to light-duty work and directed to follow up with pain management. See Findings, ¶¶ 8-10. On October 8, 2009, Krompinger noted the claimant had retired and assigned a 5 percent permanent partial disability rating in addition to the previous 25 percent permanency rating to the claimant's lumbar spine with a twenty-pound lifting restriction. See Findings, ¶ 11. Krompinger also ordered another lumbar MRI as the claimant was showing signs of nerve irritation which was performed on April 13, 2010. The respondent contested compensability of the L4-L5 disc herniation found on that MRI. Respondent's expert, Aris Yannopoulos, M.D., said he did not believe the claimant's L4-L5 disc herniation was related to the prior injuries as the 2009 MRI did not show evidence of a disc herniation at that level. He also opined that fusions do not predispose patients to adjacent level disc herniations. See Findings, ¶¶ 13-14.

A commissioner's examination was ordered which was performed by Clinton Jambor, M.D., on November 11, 2010. He opined that the claimant's low back symptoms were exacerbated by his injury on November 13, 2008. In a February 21, 2013

[3] We believe the commissioner herein is referring to the accepted November 13, 2008 injury the claimant sustained. We will afford this no weight as a scrivener's error. D'Amico v. Dept. of Correction, 73 Conn. App. 718, 729 (2002), *cert. denied*, 262 Conn. 933 (2003).

[4] The Commissioner also found the claimant sustained an accepted left shoulder injury which is not the subject of this appeal.

report, Jambor also opined that the claimant was at maximum medical improvement with a 30 percent permanent partial disability rating and a sedentary work capacity. See Findings, ¶¶ 15, 17. On January 29, 2013, Krompinger also opined the claimant had a sedentary work capacity, but on April 9, 2013, Krompinger diagnosed the claimant with increased segment disease at L4-L5 with L4 nerve root dysfunction. He recommended a decompression and fusion at L4-L5 and believed these increased symptoms disabled the claimant from work. See Findings, ¶¶ 16, 18. On July 22, 2013, Krompinger put screws in the claimant's spine at the L4-L5 level, an interbody caged device in those disc spaces, and decompressed the claimant's nerve roots at L4 and L5. He later explained the L4-L5 segment needed to be fused because of progressive degeneration enhanced by the L5-S1 fusion. By October 2013, Krompinger opined the claimant had a sedentary work capacity. See Findings, ¶¶ 19-20.

During 2014 and 2015, Krompinger and Yannopoulos reviewed the claimant's progress. Krompinger noted that the claimant had four surgical procedures to his back, two lumbar discectomies and an anterior lumbar fusion at L5-S1, which led to a fusion at the L4-L5 segment. He also suspected that there were screw fractures and raised the claimant's disability rating for the lumbar spine to 37 percent. See Findings, ¶ 21. On May 19, 2015, Yannopoulos examined the claimant and noted that the claimant had surgery at L4-L5 but this had not changed his pain level or functional capacity. He continued to believe the claimant had a sedentary work capacity. See Findings, ¶ 23. Krompinger testified that as of October 14, 2015, the claimant did not have a full-time work capacity but did opine that he had a part-time sedentary work capacity in 2015, 2016, 2017 and 2018. See Findings, ¶ 24.

The respondent, in 2015 filed a number of forms 36 seeking to convert or discontinue disability benefits to the claimant, asserting he had reached maximum medical improvement, had a work capacity and had not provided proof of ongoing disability. See Respondent's Exhibits 8-10. The June 1, 2015 form 36 sought to have the claimant's benefits converted to temporary partial benefits, while a July 17, 2015 form 36 sought to discontinue indemnity benefits. A form 36 was filed by the respondent on March 8, 2017, asserting the claimant reached maximum medical improvement and had a work capacity. This form was approved on December 21, 2017, effective August 11, 2017. See Findings, ¶¶ 25-28, 31. The respondent also had the claimant examined by another physician, David Kruger, M.D., on January 30, 2017. Kruger opined he did not believe the L4-L5 surgery was related to either the 1999 or 2008 work injuries and due to the claimant's pain medication usage and weight he did not recommend surgery. Kruger also believed that due to the claimant's dependance on narcotics that he was totally disabled and would find it very unlikely that the claimant would return to work. See Findings, ¶¶ 29-30.

During the period from August to October 2017, the respondent conducted video surveillance of the claimant. These videos depicted the claimant engaged in construction work at his house including working on a roof while framing a window, climbing a ladder, operating a mini-excavator and cleaning construction debris. While the claimant had presented at medical appointments wearing a back brace, he was not seen on the videos wearing a brace. See Findings, ¶ 33. Prior to disclosure of this surveillance the claimant had testified at a deposition that he could not walk on uneven surfaces or without a brace or a cane, could not climb a ladder, lift anything, carry heavy objects or

do construction work at his home. See Findings, ¶ 35. The commissioner also noted that on March 20, 2017, the claimant obtained a building permit for an addition to his house wherein he represented the cost of the work to be $100,000 and he would be doing the work himself. See Findings, ¶ 34.

In 2018, Krompinger was considering another surgery for the claimant when he reviewed the video surveillance. See Findings, ¶ 32. After reviewing this evidence, he opined the claimant was capable of doing some activity on a limited basis, but noted that the surveillance was for one hour periods and "I think with a painful pseudoarthrosis, which is what he has, you can do anything for an hour." Findings, ¶ 36, *quoting* Claimant's Exhibit V, p. 24. Krompinger opined that the 2008 work injury was a substantial factor in the development of the adjacent segment injury but attributed the bulk of the responsibility on the 1999 injury, attributing the larger cause being degeneration enhanced by effects of the L5-S1 fusion. He placed 75 percent of the weight on the 1999 work injury and 25 percent on the 2008 work injury. See Findings, ¶ 37.

Based on these facts, the commissioner concluded the claimant was not a credible witness. He did find Krompinger persuasive on a number of issues. He found him credible and persuasive that the claimant's L4-L5 disc herniation and subsequent treatment was causally related to the 1999 work injury, "including the surgery related to the L4-L5 disc herniation." Conclusion, ¶ C. He adopted Krompinger's disability rating for the claimant assigning a 37 percent permanent partial disability rating for the lumbar spine with an MMI date of July 8, 2014. He found Krompinger opined that the claimant was totally disabled from April 4, 2013 to October 1, 2013, during the period associated

with his 2013 lumbar surgery and subsequently had a sedentary part-time work capacity in 2015, 2016, 2017 and 2018. Accordingly, the commissioner granted the June 1, 2015 form 36 and denied the June 17, 2015 form 36.[5]

The claimant filed a motion to correct seeking to amend the conclusions to have both the July 22, 2013 surgery and the March 4, 2019 surgeries deemed compensable. See Conclusion, ¶ C. The commissioner denied this motion and the claimant has pursued this appeal. He argues that it was error to deny the motion to correct. He also argues that the commissioner drew unreasonable inferences from Krompinger's opinions as to the issue of work capacity and it was procedurally improper to address the June 1, 2015 form 36 at this hearing. The respondent argues that the issue of the 2019 surgery was outside the scope of the issues considered at the formal hearing, there was no procedural error as to addressing the pending forms 36 and that as to work capacity the claimant is merely trying to reargue the facts. We find the respondent's position persuasive and therefore affirm the finding.

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

[5] We note that other forms 36 were cited in the finding but not in the commissioner's conclusion. We may presume that in the absence of having been approved by the commissioner, following a formal hearing, that they were denied as matter of law. See Spatafore v. Yale University, 2011 CRB-3-94-4 (September 14, 1995), *aff'd,* 239 Conn. 408 (1996).

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 turn first to the issue of the March 4, 2019 surgery and the claimant's motion to correct. The claimant asserts error from denial of this motion, which would have specifically deemed the 2019 surgery as due to the compensable injury. We note that this surgery occurred long after the commencement of this hearing and was not a noticed issue. The respondent points out that at the commencement of the hearing the issue of medical treatment was raised and the commissioner noted that as the claimant had an accepted injury he was entitled to see his treating physician. See May 16, 2018 Transcript, pp. 57-59. When pressed further, the commissioner noted medical treatment was not a noticed issue. Id, p. 60. Later, the commissioner summed up the benefits being contested as "the temporary total, temporary partial and all that" and counsel for the respondent added "and perhaps, Commissioner, 31-308a, post Specific." Id., p. 71. Counsel for the claimant then stated, "I would like to narrow the issues as much as possible, you know." Id., p. 72. As a result, at the onset of the formal hearing the parties were not intending to litigate further surgery and the trial commissioner decided not to rule on this issue at this juncture.

Recently in Arrico v. Stamford, 6345 CRB-7-19-9 (November 17, 2020), *appeal pending*, A.C. 44409 (December 2, 2020) and A.C. 44488 (January 8, 2021), this tribunal

pointed out the importance of ensuring that contested issues of medical treatment are fully and fairly litigated. If the commissioner believed that the issue of determining whether the 2019 surgery for the claimant was compensable should be resolved at a future hearing, we believe he was within his right to reach that decision. See Martinez-McCord v. Judicial Branch, 5055 CRB-7-06-2 (February 1, 2007).[6] The claimant can press forward with this request at a future properly noticed hearing if he so desires.

We now turn to the issue of work capacity. The claimant argues that the trial commissioner erred in this regard as he believes that while the commissioner properly found Krompinger a credible and persuasive witness, his reports do not support the conclusions reached wherein the claimant was found to have a work capacity with the exception of a relatively short period proximate to his 2013 surgery. We note that even when a medical witness is found to be persuasive and credible a trial commissioner is not obligated to accept all of their opinions. See Lopez v. Lowe's Home Improvement Center, 4922 CRB-6-05-3 (March 29, 2006) and Williams v. Bantam Supply Co., Inc., 5132 CRB-5-06-9 (August 30, 2007). We also note the claimant did not seek any corrections in his motion to correct on this issue, and generally in the absence of doing so we give a commissioner's factual findings conclusive effect. See Stevens v. Raymark Industries, Inc., 5215 CRB-4-07-4 (March 26, 2008), *appeal dismissed*, A.C. 29795 (June 26, 2008).

Nonetheless, we have reviewed the record to see if the commissioner's conclusions were reasonably supported by evidence in the record. In Krompinger's

[6] In Martinez-McCord v. Judicial Branch, 5055 CRB-7-06-2 (February 1, 2007), the claimant, such as the claimant in the present case, argued she had submitted sufficient evidence on an issue for the trial commissioner to rule at the prior hearing and it was error not to have done so. We rejected this argument and believe that this precedent governs this issue herein.

deposition, he testified that after reviewing the surveillance videos that the claimant had sufficient work capacity to work as a general contractor on a home renovation project. See Claimant's Exhibit V, p. 65. He also testified that as of October 2013, the claimant was not disabled from all gainful employment and "[h]e could do sedentary work. I would have allowed him to do that." Id., p. 44. And that as of October 15, 2013, "he had a part-time sedentary capability of work." Id., p. 46. When asked if the claimant had a work capacity as of 2015, Krompinger agreed that the claimant "could have done something very part-time, sedentary . . . ." Id., pp. 47-48. Krompinger agreed that this opinion also applied for 2016 and 2017. Id., pp. 49-50. After reviewing the totality of Krompinger's records, the commissioner could reasonably conclude after considering this testimony that the claimant had not been more severely disabled at a point either prior to or subsequent to the period in which he been filmed engaged in strenuous construction work. Similar to Tarantino v. Sears Roebuck & Co., 5939 CRB-4-14-5 (April 13, 2015), it is apparent the treater backed away from his prior opinions once properly informed of the circumstances of which he had not been aware, and the commissioner in this case properly responded to the more accurate opinion.

In any event, as our Appellate Court stated in Sellers v. Sellers Garage, Inc., 80 Conn. App. 15 (2003), *cert. denied*, 267 Conn. 904 (2003), "[t]he plaintiff is entitled to total disability benefits under General Statutes § 31-307 (a) only if he can prove that he has a total incapacity to work . . . . The plaintiff [bears] the burden of proving an incapacity to work." Id., 20. The trial commissioner found the claimant not to be a credible witness and cited evidence documenting a number of activities he engaged in for

which one normally receives remuneration.[7] Since a trial commissioner must consider the totality of the circumstances in determining whether a claimant is totally disabled, see O'Connor v. Med-Center Home Health Care, Inc., 140 Conn. App. 542, 554 (2013), *cert. denied*, 308 Conn. 942 (2013), we find the claimant did not meet his burden of proof.

We now turn to the claimant's averment that it was error for the commissioner to have ruled on the two forms 36 filed in 2015, one of which he granted in 2020. The claimant avers that under the statute, the commissioner should have acted on these motions in writing within days of their submissions but cites no precedent from this tribunal nor the Appellate or Supreme Court interpreting the law in that manner. Instead, the argument presented is that due to the doctrine of laches it would be inequitable for the Commission to grant this relief. For the reasons cited in Kalinowski v. Meriden, 5028 CRB-8-05-11 (January 24, 2007), we reject this argument.

In Kalinowski, the trial commissioner concluded after a contested hearing that a nearly fifteen year delay in bringing a claim for benefits to the commission prejudiced the respondent. We affirmed, *citing* Tinaco Plaza, LLC v. Freebob's, Inc., 74 Conn. App. 760, 776 (2003), that "[a] conclusion that a plaintiff has been guilty of laches is one of fact for the trier and not one which can be made by this court, unless the subordinate facts found make such a conclusion inevitable as a matter of law." The claimant in this matter did not bring the issue of laches before the trial commissioner for adjudication and as this claim has been actively litigated with numerous formal and pre-formal hearings between

[7] We note the factual similarities with a number of cases wherein we have affirmed the decision of a trial commissioner to deny temporary total disability benefits to claimants found engaged in similar activities. See Savageau v. Stop & Shop Companies, Inc., 5808 CRB-3-12-12 (November 7, 2013); Ritch v. Connecticut Materials Testing Labs, 5766 CRB-7-12-7 (October 24, 2013); Clukey v. Century Pools, 5683 CRB-6-11-9 (August 22, 2012), and Smith v. Federal Express Corp., 5405 CRB-7-08-12 (December 1, 2009).

2015 and 2020, any conclusion that the respondent "slept on their rights" clearly cannot be found "inevitable as a matter of law." Id. The claimant seeks to have us consider this factual issue for the first time on appeal. As an appellate body, we will not adjudicate an issue for the first time when it was not litigated before the trial commissioner. See Haines v. Turbine Technologies, Inc., 5932 CRB-6-14-4 (March 9, 2015).

We believe that on all the issues cited in this appeal that the trial commissioner reached a reasonable determination based on the record presented. Therefore, there is no error; the January 15, 2020 Finding and Dismissal/Award of Daniel E. Dilzer, the Commissioner acting for the First District, is accordingly affirmed.

Commissioners William J. Watson III and David W. Schoolcraft concur in this Opinion.