CASE NO. 6384 CRB-5-20-3 CLAIM NO. 500169258	:	COMPENSATION REVIEW BOARD
LISA BLAKEY CLAIMANT-APPELLANT	:	WORKERS' COMPENSATION COMMISSION
v.	:	MARCH 11, 2021

US LABORATORIES
EMPLOYER

and

AMERICAN CASUALTY INSURANCE COMPANY
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Timothy P. Gunning, Esq., Gunning Law Firm, 685 State Street, Second Floor, New Haven, CT 06508.

The respondents were represented by Giovanna T. Giardina, Esq., Law Offices of Kathryn M.A. Young, 53 State Street, Fifth Floor, Boston, MA 02109.

This Petition for Review from the March 5, 2020 Finding and Decision by Carolyn M. Colangelo, the Commissioner acting for the Fifth District, was heard September 25, 2020 before a Compensation Review Board panel consisting of Commission Chairman Stephen M. Morelli and Commissioners Randy L. Cohen and William J. Watson III.

OPINION

STEPHEN M. MORELLI, CHAIRMAN. The claimant has appealed from a Finding and Decision (finding) issued by Commissioner Carolyn M. Colangelo (commissioner) on March 5, 2020. In the finding, the commissioner determined that while the claimant was involved in a compensable motor vehicle accident on August 17, 2017, this accident was not a substantial factor as to her March 2, 2018 cervical spine surgery. The claimant argues the commissioner erred by placing any weight on the opinion of the surgeon who performed the procedure or the opinion of the respondent's medical examiner, but should have found her medical expert persuasive. Since it is the duty of the trial commissioner to resolve disputes as to the persuasive value of medical evidence we are not persuaded by this argument. See O'Connor v. Med-Center Home Healthcare, Inc., 4954 CRB-5-05-6 (July 17, 2006). As a result, we find no error and affirm the finding.

The commissioner reached the following factual findings which are pertinent to this appeal. She found the claimant was employed as a traveling phlebotomist and was traveling on Interstate 84 to an appointment on August 17, 2017, when her car struck debris in the road and flipped over. She was extricated from her car and brought by ambulance to St. Mary's Hospital for treatment. The commissioner reached these findings as to her treatment immediately after the accident.

> 7. The hospital records from the day of the incident state: "Pt is a 54 year female BIBA [brought in by ambulance] after MVA . . . . Pt is unsure if she hit her head or lost consciousness but confirms feeling pain in her back and abdomen diffusely. She denies CP, SOB, HA, numbness." (Cl. Ex. A [ER record, Saint Mary's Hospital, page 3])

8. At the hospital, the claimant complained of abdominal pain and back pain and neck pain. (Cl. Ex. A [ER records, Saint Mary's Hospital - generally])

9. CT scans were done of the claimant's head, chest, neck, abdomen, and pelvis. All scans were read as normal with "no evidence of posttraumatic change." (Cl. Ex. A [ER record, Saint Mary's Hospital, page 5-6])

10. The cervical CT scan showed "extensive spondylitic changes and cervical fusions." At C3-C4 and C4-C5 there was "posterior disc bulge resulting in mild-to-moderate spinal stenosis." At C4-C5, the scan showed "moderate bilateral neural foraminal stenosis secondary to uncinate process and facet joint hypertrophy." At C6-C7 the scan showed "severe left and moderate to severe right neural foraminal stenosis secondary to facet joint and uncinate process hypertrophy." (Cl. Ex. A [ER record, Saint Mary's Hospital, page 6])

Findings, ¶¶ 7-10.

The claimant was released from St. Mary's on August 19, 2017, with a note authorizing her to return to work on August 29, 2017, but the commissioner found she did not return to work. The claimant did start treating with a chiropractor on August 29, 2017, and was diagnosed with several back and shoulder ailments. She treated with the chiropractor until September 19, 2017. She then was examined by an orthopedic physician, Arpad S. Fejos, M.D., on September 20, 2017. Fejos reported the claimant had a normal gait and did not exhibit weakness or sensory deficit. The claimant was next admitted to a hospital on November 2, 2017, when she was admitted to Yale-New Haven after suffering a nosebleed. At this examination she complained of back pain and attributed right-sided pain to a car accident. Other findings from this examination were that the review of the neck was normal and supple and the review of the musculoskeletal system stated, "normal range of motion." Findings, ¶ 19.

On November 6, 2017, the claimant returned to Yale-New Haven for a follow-up visit and reported headaches, neck strain, numbness and tingling in her right upper extremity and chronic back pain. She informed the treaters she was going to have an MRI and a lumbar MRI was performed on November 15, 2017. The notes of the November 15, 2017 visit indicate the claimant presented with an antalgic gait and reported right-sided body pain since her motor vehicle accident that had increased in the days prior to the exam. At her next visit at Yale-New Haven on November 29, 2017, she also presented with an antalgic gait and was referred to neurosurgery and directed to have further MRI's performed. MRI's of her thoracic and cervical spine were performed on December 9, 2017. A pre-operative consult was held on February 23, 2018, where the claimant reported chronic neck and back pain and attributed this to a bulging disc subsequent to her motor vehicle accident. On February 26, 2018, the claimant returned to Yale-New Haven. The note from this visit states, "[h]er cervical MRI (12/9) showed mild anterolisthesis of C4 and C5 associated with mass effect on the spinal cord with spinal canal stenosis and concern for spondylitic myelopathy given increased T2/STIR signal at the R lateral aspect of the cord. (she's had a previous fusion of C6-C7). (Cl. Ex. F [records, Yale New Haven Hospital])." Findings, ¶ 28.

On March 2, 2018, Luis Kolb, M.D., performed a "C3-T2 decompression and fusion, C4-C5 osteotomies, laminectomy, facetectomy, and foraminotomy on the claimant. (Cl. Ex. F [records, Yale New Haven Hospital])." Findings, ¶ 29. However, subsequent to performing this surgery Kolb did not affirmatively link the claimant's need for surgery to the compensable injury, opining that "I do not feel I can state within a

reasonable degree of medical certainty that the MVA was a substantial factor for her need for cervical spine surgery on 3/8/2018. (Cl. Ex. I)." Findings, ¶ 30.

The commissioner found the claimant had several injuries predating her 2017 motor vehicle accident, including a slip and fall incident in 2000 where she sustained a broken arm and motor vehicle accidents in 2004, 2011, 2012 and 2014. The claimant testified she had not been involved in some of the accidents documented in the record which led the commissioner to deem her a poor historian. See Findings, ¶¶ 33-34. The commissioner also noted the claimant had two prior cervical fusions, one in 1997 and the other in 2000, and that the notes pertaining to the 2000 procedure documented that "the claimant had a cervical disc herniation at C7 and a diagnosis of modified Brown-Sequard syndrome, an incomplete spinal cord injury that involves weakness on one side of the body with loss of sensation on the other side. (Resp. Ex. 1 [operative records, Yale New Haven Hospital]; see also Resp. Ex. 6 [report of Dr. Taylor])." Findings, ¶ 36.

The respondents had their expert, Glenn Taylor, M.D., examine the claimant on January 25, 2018. In a report after the examination, Taylor outlined the claimant's medical history:

> A cervical MR scan performed prior to the 12/17/2000 surgery was reported by the surgeon as demonstrating a well-healed interbody fusion at C5-6 with retrolisthesis and right and left-sided disc herniations at C6-7 with signal changes in the cord related to the trauma. . . . There is clear history of significant cervical myelopathy. The changes at C4-5 as demonstrated on her post injury 2017 scan likely represented adjacent level disease with degenerative subluxation of C4 on 5 above earlier performed cervical fusions. It is certainly possible that the motor vehicle crash of 2017 harmed the C4-5 intervertebral segment to the degree that it caused a spinal cord injury at this level. However it is equally possible that the cord changes at this level were pre-existing due to progressive degenerative stenosis that can

> commonly develop over time above surgically induced fusions of the cervical spine. Resp. Ex. 6 [Letter of Dr. Taylor]).

Findings, ¶ 37.

Taylor further opined as follows:

> Again, it cannot be determined whether the automobile accident definitively injured her cervical spine or the condition developed due to progressive adjacent level disc disease. Her preinjury neurologic status is key in determining whether there was objective deterioration on physical examination subsequent to the motor vehicle accident. Resp. Ex. 6 [Letter of Dr. Taylor]).

Findings, ¶ 38.

Additionally, Taylor opined:

> The claimant "has a past history of multiple automobile accidents associated with neck and lower back trauma for which she received permanent partial impairments. The relevance of these injuries as it relates to her need for subsequent cervical spine decompression and fusion as was performed in 2018 cannot be objectively determined. I do not believe the automobile accident of 8/19/17 resulted in a significant lower back injury given that her diagnostic imaging studies were essentially unchanged revealing only degenerative features without evidence of a traumatically induced condition." Resp. Ex. 6 [Letter of Dr. Taylor]).

Findings, ¶ 39.

The commissioner noted that at the hearing the claimant testified she still had pain in her neck, numbness in her hands, weakness in her legs and difficulty walking after the March 2, 2018 surgery. She also testified she had no pain or tingling in her arms before the 2017 accident. The commissioner also noted that subsequent to her February 10, 2014 car accident, the records at Yale-New Haven document she had pain radiating from her chest to her neck, into her shoulder and down her left arm. See Findings, ¶ 42. Two office notes of treatment for the claimant in 2015 were also noted that document her complaints of numbness in both hands and various fingers. See Findings, ¶¶ 43-44.

On February 6, 2019, Patrick P. Mastroianni, M.D., examined the claimant as an evaluator and not as a treating physician. The commissioner reviewed Mastroianni's deposition testimony as to the results of this examination and noted he testified his opinion was "adjacent disc disease was not a probable cause of the claimant's symptoms because he believed she was asymptomatic and did not have any significant symptoms between her 2000 surgery and the MVA of August 19, 2017." Findings, ¶ 46. In his report, he "diagnosed the claimant with: (1) Cervical myelopathy, (2) cervical stenosis C4-5, (3) anterolisthesis C4-5, (4) cervical cord compression C4-5, (5) kyphosis, and (6) post surgical changes C5-6 and C6-7." Findings, ¶ 47. Mastroianni further opined in his report:

> Based upon the information provide (sic) to me it is my conclusion that the motor vehicle accident of August 19, 2017 is the cause of diagnoses 1-5 listed above. Now although this patient certainly had prior spinal disease, the findings of anterolisthesis at C4-5 coupled with increasing stenosis of the central canal, coupled with symptoms and signs of cervical radiculopathy indicate that the August 19, 2017 motor vehicle accident is responsible for her current condition and her need for surgery. Cl. Ex. K [report of Dr. Mastroianni]).

Findings, ¶ 48.

Based on this record, the commissioner concluded the claimant was injured in a motor vehicle accident on August 17, 2017, in the course of her employment and received reasonable or necessary medical care afterwards from Yale-New Haven and New Haven Chiropractic Group. As to whether her surgery of March 2, 2018 was causally related to the compensable accident, the commissioner found Kolb's opinion fully credible and persuasive. She also found Taylor's opinion as to the impact of the accident as to the need for surgery fully credible and persuasive. She did not find the

claimant's testimony to be persuasive, and she found Mastroianni's opinion not to be credible nor persuasive. As a result, she determined that claimant had not met her burden of establishing the need for the March 2, 2018 surgery was causally related to the August 19, 2017 injury and dismissed the claim for benefits for this surgery.

The claimant filed a motion to correct that did not propose specific alternative findings of fact; rather it argued that it was erroneous for the commissioner to rely on the equivocal findings as to causation presented by Kolb and Taylor when Mastroianni proffered an unequivocal opinion supportive of finding the need for the 2018 surgery was caused by the compensable 2017 accident. The commissioner denied this motion and the claimant has pursued this appeal restating the arguments she presented in the motion to correct.

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).

As we have pointed out in a number of cases, the burden is on the claimant to prove that their need for medical treatment is the result of a compensable injury. See Larocque v. Electric Boat Corporation, 5942 CRB-2-14-6 (July 2, 2015). Citing Sapko v. State, 305 Conn. 360 (2012); DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132 (2009) and Voronuk v. 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, supra. In order for this tribunal to overcome the fact-finding presumption that we extend to a trial commissioner we would need to determine the claimant presented such a case and that it was "clearly erroneous" for the trial commissioner not to find this evidence more persuasive than the evidence relied upon by the respondents. Dudley v. Radio Frequency Systems, 4995 CRB-8-05-9 (July 17, 2006). We find the commissioner could reasonably have reached the decision that she made in the finding.

The claimant argues that Mastroianni presented the only unequivocal opinion as to causation and it was error not to accept this opinion. We do not agree as the commissioner did not find this opinion credible and persuasive. We note that this opinion was reliant to a great extent on the narrative of the claimant. The commissioner did not find the claimant's testimony persuasive and one may reasonably infer that this created a level of skepticism as to any expert opinion reliant upon her narrative. 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). The commissioner cited numerous medical reports noting the claimant had exhibited weakness and tingling in her extremities prior to the 2017 accident. See Findings, ¶¶ 42-44. However, Mastroianni discounted disc disease as a source of the claimant's current condition believing she had been asymptomatic in this regard prior to that incident.[1] Since the commissioner had reason to believe that a material assumption behind Mastroianni's opinion was inaccurate she could reasonably discount his opinion.

The commissioner found the opinions of Kolb and Taylor more persuasive and credible than that of the claimant's expert. We note that in cases where contested expert opinions are presented the commissioner generally can choose to credit whichever opinion he or she deems more persuasive. Dellacamera v. Waterbury, 4966 CRB-5-05-6 (June 29, 2006), *appeal withdrawn*, A.C. 27853 (September 12, 2006). The claimant argues that since Kolb admitted he does not offer causation opinions that his opinion herein should have been discounted. However, he was the claimant's surgeon and generally we have ruled favorably when a trial commissioner finds a surgeon's opinion reliable regarding the etiology of the condition he or she treated. See Burns v. Southbury, 5608 CRB 5-10-11 (November 2, 2011). Essentially, given the multiple prior injuries the claimant had sustained, Kolb was unable to place any weight as to the need for surgery on her most recent injury. This opinion was consistent with Taylor's opinion, who noted "[h]er past history is very significant." Respondents' Exhibit 6. The claimant argues that Taylor's opinion was rendered without fully understanding her pre-accident neurological condition. However, there is nothing in the record wherein this expert was asked to

[1] The claimant also testified as to not having pain or tingling in her arms prior to the 2017 accident. See Findings, ¶ 41.

reassess his initial opinion upon consideration of new facts. In the absence of the claimant deposing this witness or seeking to elicit an enhanced opinion, we believe the commissioner could consider this evidence as-is and draw whatever conclusions she deemed appropriate from it. See Berube v. Tim's Painting, 5068 CRB-3-06-3 (March 13, 2007).

In any event, even if we were to conclude that it was erroneous to place any weight on Kolb or Taylor's opinions we would still be compelled to affirm the dismissal. It is black-letter law that when there is no evidence presented at a hearing the commissioner finds credible the claim must be dismissed. See Toroveci v. Globe Tool & Metal Stamping Co., Inc., 5253 CRB-6-07-7 (July 22, 2008) and Warren v. Federal Express Corp., 4163 CRB-2-99-12 (February 27, 2001). The trial commissioner concluded after considering the claimant's testimony and reviewing Mastroianni's opinions that the claimant failed to meet the burden delineated in Larocque, supra. It is her prerogative to ascertain the probative value of the evidence presented. See Zezima v. Stamford, 5918 CRB-7-14-3 (May 12, 2015), *citing* O'Reilly v. General Dynamics Corp., 52 Conn. App. 813, 818 (1999).

As we held in Williams v. Bantam Supply Co., Inc., 5132 CRB-5-06-9 (August 30, 2007), "[w]hen the board reviews a commissioner's determination of causation, it may not substitute its own findings for those of the commissioner . . . . A commissioner's conclusion regarding causation is conclusive, provided it is supported by competent evidence and is otherwise consistent with the law. Dengler [v. Special Attention Health Services, Inc., 62 Conn. App. 440 (2001)], supra, 451." Finding the commissioner had a reasonable basis for her conclusions, we find no error and we affirm

the March 5, 2020 Finding and Decision of Carolyn M. Colangelo, the Commissioner acting for the Fifth District.

Commissioners Randy L. Cohen and William J. Watson III concur in this Opinion.