CASE NO. 6387 CRB-3-20-4 CLAIM NOS. 300117781, 300054929, 300112924, 300112925 & 300119893	:	COMPENSATION REVIEW BOARD
ROBERT FORTIN CLAIMANT-APPELLEE CROSS-APPELLANT	:	WORKERS' COMPENSATION COMMISSION
v.	:	MARCH 31, 2021

SOUTHERN CONNECTICUT
GAS COMPANY
EMPLOYER

and

LIBERTY MUTUAL INSURANCE GROUP
INSURER
RESPONDENTS-APPELLANTS
CROSS-APPELLEES

and

HARTFORD ACCIDENT & INDEMNITY
INSURER
RESPONDENTS-APPELLEES

APPEARANCES: The claimant was represented by Robert F. Carter, Esq., Carter & Civitello, Woodbridge Office Park, One Bradley Road, Suite 305, Woodbridge, CT 06525.

The respondents Southern Connecticut Gas Company and Liberty Mutual Insurance Group were represented by Christopher J. Powderly, Esq., Meehan, Turret & Rosenbaum, 108 Leigus Road, First Floor, Wallingford, CT 06492.

The respondents Southern Connecticut Gas Company and Hartford Accident & Indemnity were represented by Jason E. Indomenico, Esq., Law Offices of David J. Mathis, One Hartford Plaza, Hartford, CT 06155.

This Petition for Review from the March 18, 2020 Finding and Orders by Scott A. Barton, the Commissioner acting for the Third District, was heard October 23, 2020 before a Compensation Review Board panel consisting of Commission Chairman Stephen M. Morelli and Commissioners William J. Watson III and David W. Schoolcraft.

OPINION

STEPHEN M. MORELLI, CHAIRMAN. The claimant and the respondent-insurer Liberty Mutual Insurance Group (Liberty Mutual), have both taken appeals from the Finding and Orders issued on March 18, 2020 by Commissioner Scott Barton (commissioner). At the conclusion of the formal hearing, the commissioner determined that the claimant was in need of right knee surgery and that surgery was necessitated by a series of compensable injuries, the latest having occurred on September 8, 1997. The commissioner also determined that the claimant had not proven he was entitled to temporary total disability benefits. Liberty Mutual, who was the insurer responsible for the 1997 injury, has appealed this decision arguing the claimant's need for surgery was exclusively due to prior injuries. The claimant has also appealed his denial of temporary total disability benefits. As we find both of these decisions were based on substantial evidence which the commissioner chose to credit, we find neither appeal persuasive, and therefore we affirm the Finding and Orders.

The commissioner issued forty-five factual findings and thirty-four conclusions in his findings. We will summarize those findings relevant to these appeals. The claimant commenced his career with the respondent-employer Southern Connecticut Gas Company in 1967 and shortly after he was hired became a pipe fitter. He testified that he

had to lift meters weighing as much as 350 pounds as part of his job. He had his first work-related injury in either 1968 or 1969, when he injured his back lifting a heavy water heater. He sustained a number of subsequent back injuries and the latest such injury was in 2009. The claimant returned to work after each such injury. He treated with Shirvinda Wijsekera, M.D., in 2008, for his back but was released from his care.

The commissioner also noted the claimant has sustained a number of knee injuries. On October 20, 1977, the claimant twisted his right knee in a pothole and later had surgery performed on that knee. The commissioner noted that an unsigned agreement was in the commission file recognizing the compensability of a torn meniscus, but also noted that in 2016 the Hartford Insurance Company had filed a form 43 denial of this injury. The claimant sustained another right knee injury on August 24, 1983, after stepping off a wall, which also led to surgery. The commissioner noted that a voluntary agreement approved in May 1984 was in the commission file for that injury where the Hartford acknowledged a 5 percent permanent partial disability rating from that incident.

The claimant then sustained a left knee injury at work on July 7, 1986, and subsequently treated with Kevin Lynch, M.D. The claimant said that while he returned to his regular duties following this incident, his left knee was chronically painful. He sustained another injury, this time to his bilateral knees, on September 8, 1997. This injury occurred when the claimant was squatting down to work on an appliance. The commissioner noted that two file numbers at the commission document this incident and that on file number 300117781, a voluntary agreement dated December 8, 2017, was approved establishing a 45 percent permanent partial disability rating for the claimant’s bilateral knees. Liberty Mutual signed this agreement, but on file number 300119893,

reflecting the same 1997 date of injury, Liberty Mutual filed a form 43 on July 5, 2018. The commissioner noted the claimant had been prescribed medicine such as Celebrex and Vioxx for his knee condition since 1986, and in 2001, his treater, Kevin Lynch, M.D., indicated the claimant would eventually need bilateral total knee replacement surgery. The commissioner quoted from his March 10, 2001 report:

> Mr. Fortin was again able to return to work and did reasonably well although he had persistent symptoms in regards to both knees until **9/8/97**. He states that at that time he was at work and was doing some activities that involved kneeling and some repetitive activity in regards to both of his knees. He states that following this his knees became **much worse** than they had been. (Emphasis added).

Findings, ¶ 17.

The claimant continued to treat for his knees with Kevin Lynch until this physician retired and then began treating with Alan Reznik, M.D., and Rowland Mayor, M.D. The commissioner found that despite his numerous injuries, the claimant continued to be a "go-to" employee for the respondent-employer as a result of his skills and experience. In 2005, the claimant sustained another right knee injury and treated with Reznik originally, and then with Christopher Lynch. After an examination on June 7, 2007, Christopher Lynch opined that the claimant had "x-ray evidence of significant end-stage degenerative changes in the knee and when he is ready, he is a candidate for knee arthroplasty [arthroscopy]."[1] Findings, ¶ 22. On November 29, 2007, Christopher Lynch continued to diagnose serious bilateral joint degeneration in both knees, with the right worse than the left, but noted the claimant was not ready at that time to proceed with

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[1] The Finding and Orders quote this as stating the claimant was a "candidate for knee arthroscopy." We examined Claimant's Exhibit A and have used the correct term in this report and deem the inaccuracy a harmless scrivener's error upon which we will place no weight. See D'Amico v. Dept. of Correction, 73 Conn. App. 718, 729 (2002), *cert. denied*, 262 Conn. 933 (2003).

surgery. See Findings, ¶ 23. The commissioner noted that this treater continued to reach similar findings and recommendations going forward as to the claimant's knees, and in December 2015, observed the claimant suffered from "bone-on-bone" osteoarthritis, yet this had "not really stopped any of his normal activities" despite the pain. Findings, ¶ 25. Christopher Lynch rated the claimant with a 50 percent impairment rating for each knee in his December 3, 2015 report.

On February 16, 2016, the respondent Liberty Mutual had their expert witness, Dante A. Brittis, M.D., conduct a respondents' medical examination (RME) of the claimant. The commissioner noted that Brittis offered the following opinions following the examination:

> It is my opinion that the progressive degenerative changes that are identified in Mr. Fortin's knees are the result of **multiple work-related injuries that have occurred during the course of his employment**. He relates clearly surgical procedures that were completed under workers' compensation's oversight in the 1970s and 1980s... There is no history of knee injury that predated his employment or with other outside activities. (Emphasis added.)

Findings, ¶ 26.

Brittis was asked to clarify his opinion and he issued a March 10, 2016 letter responsive to issues as to a September 8, 1997 date of injury. In this letter, he related the claimant's need for knee replacements as due to multiple work-related injuries that occurred during the course of his employment. The commissioner found that this letter did not limit causation solely to the 1977 and 1983 injuries and that Liberty Mutual did not depose Brittis. Subsequent to the RME, the claimant continued to treat with Christopher Lynch. Lynch responded on September 8, 2017, to an inquiry from claimant's counsel that the claimant's end stage bilateral degenerative joint disease limits

the claimant to continue to work. The commissioner noted that this was the first opinion the treater had offered on work capacity and did not state the claimant was totally disabled from all forms of employment. Christopher Lynch also offered opinions as to causation. While the commissioner noted his initial opinion was that he could not ascribe the claimant's arthritic knee condition to "work per se", in a follow-up report dated June 29, 2018, the treater opined that after reviewing the claimant's history of injuries, in particular as documented in Brittis' 2016 report, that "[t]hese injuries and these treatments, I do believe are ultimately the cause for Mr. Fortin's right knee arthritis and ultimately, the need for his right total knee replacement." Findings, ¶¶ 32-33.

The claimant began treating with Amit Lahav, M.D., for his knee issues and the claimant testified he would want Lahav to perform knee replacement surgery. In an October 26, 2018 medical report, Lahav noted that the claimant had sustained three different work-related knee injuries in 1977, 1983 and 1997, and noted that Brittis had opined as to work injuries causing the need for knee surgery and concluded "[i]t does appear with the records provided that he did have work-related injuries which has led to posttraumatic arthritis. I do concur that the need for knee replacement stems up from injuries to the knee years ago." Findings, ¶ 36. The commissioner noted that Lahav's opinion was not limited to any specific work injury.

The commissioner noted that the claimant retired from Southern Connecticut Gas Company in March 2010, at age 64, with a full pension and began collecting social security retirement benefits in September 2010. The claimant worked as a contractor moving meters until his knee problems made him unable to do so, as he testified that walking long distances and climbing stairs had become a challenge. He did testify to

being able to perform household chores such as cutting the grass and operating a snowblower. His testimony also indicated a number of non-knee ailments such as shoulder injuries and a heart condition. The claimant's position is that he has been totally disabled from employment since May 9, 2016. In support of this position, he cites records from his primary care physician, Michael F. Parker, M.D., and an opinion that Parker issued as to his work capacity as of May 9, 2016.

Based on this record, the commissioner concluded the claimant sustained a number of work-related knee injuries and that Liberty Mutual accepted the 1997 injury and agreed to a 45 percent impairment rating in a voluntary agreement. See Conclusion, ¶¶ D-H. The commissioner noted that Kevin Lynch opined the claimant's condition became much worse after the 1997 injury. See Conclusion, ¶ J. The commissioner also noted that while Christopher Lynch opined that the claimant had a 50 percent impairment rating in each knee, he did not offer an opinion that this had been caused by work injuries until after an inquiry from the claimant's attorney. He also noted Christopher Lynch had opined that increased pain had not stopped the claimant's work activities and this physician's opinion as to the claimant's work capacity was not issued until September 2017, in response to an inquiry from claimant's counsel. See Conclusion, ¶¶ N & O. The commissioner concluded that when Brittis opined that the claimant's "multiple work-related injuries" all contributed to the need for knee replacement, there was no indication he meant to exclude the September 8, 1997 injury. Conclusion, ¶ Q. The commissioner also noted that Lahav, who is the current treating physician, had recommended knee replacement surgery and ascribed the need for this surgery to the multiple work-related injuries sustained by the claimant. As for the claim for total disability benefits, the

commissioner noted the evidence supportive of this claim but also noted the claimant engaged in numerous household activities and had testified at the formal hearing without apparent distress.

As regarding the credibility of the witnesses, the commissioner concluded that the claimant, Brittis and Lahav were credible but found the opinions presented by Christopher Lynch not fully persuasive and credible. He did not find Parker's opinion as to the claimant's disability persuasive and credible. Consequently, the commissioner ordered Liberty Mutual as the carrier on the risk for the September 8, 1997 injury to pay for the claimant's arthroplasty surgery and denied the claimant's bid for temporary total disability benefits.

Both the claimant and Liberty Mutual filed motions to correct. The claimant's motion to correct argued that the medical evidence supported findings of total disability and ascribing causation of the claimant's knee injuries to the compensable injuries that occurred prior to 1997. The commissioner denied this motion in its entirety. Liberty Mutual's motion argued that the findings and conclusions of Brittis and Lahav should be restated so as to find the 1997 injury was not responsible for the claimant's need for surgery. The commissioner denied this motion in its entirety. Both parties have proceeded with their appeals. Since we determine that they are essentially contesting the commissioner's assessment of the evidence presented, we are not persuaded by the arguments presented herein.

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).

It is black-letter law that "[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." (Internal citations omitted.) Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 451 (2001). The issue before this panel is whether the commissioner could reasonably have found the 1997 injury a substantial factor in the claimant's present need for knee surgery. As our Supreme Court pointed out in Sapko v. State, 305 Conn. 360 (2012), "whether a sufficient causal connection exists between the employment and a subsequent injury is . . . a question of fact for the commissioner." Id., 385. "Only if no reasonable fact finder could have resolved the proximate cause issue as the commissioner resolved it will the commissioner's decision be reversed by a reviewing court." Id., 385-

86. See also Turrell v. Dept. of Mental Health & Addiction Services, 144 Conn. App. 834, 844-845 (2013).

The appellees note the similarities between the facts herein and the scenario we addressed in Wilson v. Maefair Health Care Centers, 5773 CRB-4-12-8 (August 8, 2013), *aff'd*, 155 Conn. App. 345 (2015). In Wilson, the claimant has sustained a number of neck injuries and the trial commissioner determined the most recent injury had materially increased the severity of her injury and determined that this injury was a substantial factor in her need for surgery. The carrier on the risk at the time of her most recent injury appealed, and we held that a sufficient quantum of probative evidence supported the commissioner's finding that the most recent injury made her preexisting disability materially and substantially worse.

Consistent with the holding in Marandino v. Prometheus Pharmacy, 294 Conn. 564 (2010), we will review the totality of the circumstances to ascertain if the claimant's 1997 injury materially and substantially increased his level of permanent disability. We note that subsequent to this incident Liberty Mutual agreed to voluntary agreements citing the September 8, 1997 date of injury which substantially increased the permanent disability rating on the claimant's knees. See Findings, ¶ 16. The trial commissioner also found that the opinions rendered by Brittis and Lahav included the 1997 knee injury as among the injuries creating the claimant's need for surgery. In Lahav's October 26, 2018 note, he states that the claimant's need for knee replacement "stems up from injuries to the knees years ago" and the note indicates that amongst one of those injuries was the September 8, 1997 incident. Claimant's Exhibit B. Brittis' February 16, 2016 independent medical examination report noted a "specific injury that is reported in the

actual cover letter in 1997" and stated, "the progressive degenerative changes that are identified in Mr. Fortin's knees are a result of the multiple work-related injuries that have occurred over the course of his employment." Claimant's Exhibit D. In his March 10, 2016 addendum, he reiterated, "I believe I state clearly in the final paragraphs that it is my opinion that his need for knee replacements is due to the multiple work-related injuries that occurred over the course of employment." While adding "[i]t would be impossible at this point to ascribe each of the individual events some component of apportionment." Id. As Liberty Mutual views this evidence, the failure of this evidence to specifically ascribe responsibility to the single September 8, 1997 date of injury makes the commissioner's conclusion an unreasonable inference. We disagree. A reasonable inference to draw from this evidence in our opinion was that these witnesses opined that each of the multiple compensable injuries the claimant sustained contributed to his need for knee replacements.[2] The fact that the voluntary agreements approved citing the 1997 injury greatly increased the claimant's disability rating clearly places this scenario as congruent to Wilson, supra, and we affirm the trial commissioner's determination in this case.[3]

We now turn to the claimant's appeal from his denial of temporary total disability benefits. The claimant argues that his evidence supportive of awarding these benefits

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[2] As counsel for the respondent-appellee points out, the effort herein to deconstruct the exact verbiage of the Brittis and Lahav reports constitutes a search for "magic words" proscribed in the precedent in Struckman v. Burns 205 Conn 542, 544-555 (1987).

[3] Liberty Mutual has asserted that the trial commissioner improperly read the evidence to reach a conclusion beyond what it said, and argues that was reversable error as a trier of fact must render a decision based on what the evidence says, not what is should have said. See Ben-Eli v. Lowe's Home Improvement Center, 5006 CRB-3-05-10 (November 16, 2006). We actually find this precedent works against the appellant, who appears to argue the evidence should have specifically discounted the 1997 date of injury, which it did not. Liberty Mutual failed to depose either Brittis or Lahav to elucidate upon their opinions, and therefore, we are bound by their reports "as-is." Berube v. Tim's Painting, 5068 CRB-3-06-3 (March 13, 2007).

was uncontroverted and it was an abuse of the commissioner's discretion not to credit this evidence. We are not persuaded.

We note that it is black-letter law that it is the claimant's burden to prove that they are entitled to an award for temporary total disability benefits. See Rohmer v. New Haven, 5811 CRB-3-12-12 (December 23, 2013). As noted above, this question is generally a factual matter where we have extended great deference to the conclusions of a trial commissioner. See Pereira v. State/Department of Developmental Services, 6204 CRB-3-17-6 (August 1, 2018). We also note that while a claimant may demonstrate that compensable injuries have caused them to no longer have an earning capacity at a physically demanding occupation, the commissioner may still not be satisfied that the claimant lacks any earning capacity at this time. See Franklin v. State/Dept. of Mental Health & Addiction Services, 5224 CRB-8-07-4 (April 11, 2008).

The evidence presented to the commissioner in support of awarding total disability benefits was the claimant's testimony and reports from the treating physicians. The findings cite Parker as opining that the claimant "has several orthopedic conditions which preclude his possibilities for employment in his profession as a pipe fitter." Findings, ¶ 43. The commissioner noted that Christopher Lynch opined he agreed with Parker that the claimant's orthopedic injuries "is going to limit his ability to continue with work in his current capacity." Findings, ¶ 31. The commissioner also noted the demeanor of the claimant at the hearing, noting that he was able to testify without pain or distress, and that he testified as to his ability to perform several household tasks. A trial commissioner who observes the testimony of a claimant may "evaluate the responses of the claimant at the formal hearing to reach a determination as to whether the claim is

meritorious and the claimant's medical condition objectively so debilitating as to warrant a finding of total disability." Liano v. Bridgeport, 4934 CRB-4-05-4 (April 13, 2006), cited in Leandres v. Mark IV Construction, Inc., 5159 CRB-4-06-11 (October 22, 2007). Given the totality of the circumstances, the trial commissioner could have determined that while Parker opined the claimant could not perform his old job that this was not conclusive proof that the claimant could not have performed some other form of remunerative work.[4]

In any event, our precedent does not stand for the premise that undisputed evidence is sufficient, as a matter of law, to compel an award of benefits. See Diaz v. Dept. of Social Services, 6072 CRB-3-16-1 (December 22, 2016), *aff'd*, 184 Conn. 538 (2018), *cert. denied*, 330 Conn. 971 (2019). The commissioner considered the claimant's evidence as to total disability and was not persuaded by it.[5] Since the trial commissioner cited other evidence in the record consistent with the conclusion he reached, we may not reweigh this evidence on appeal.

We do not find the trial commissioner's conclusions herein were unreasonable inferences from the evidence presented on the record.[6] Therefore, there is no error; the

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[4] As we held in Dudley v. Radio Frequency Systems, 4995 CRB-8-05-9 (July 17, 2006), the standard for awarding temporary total disability benefits is discussed in Osterlund v. State, 135 Conn. 498 (1949), as being "not the employee's inability to work at his customary calling, but the destruction of his capacity to earn in that or any other occupation which he may reasonably pursue." Id., 505.

[5] The claimant, in his brief points out that the trial commissioner made note that both opinions were responsive to inquiries from counsel and suggests this was not appropriate, and a remand to a different commissioner is necessary. We believe that this reference was not to suggest this raised a question as to credibility of the opinions, but merely to establish that prior to the claimant's voluntary retirement no medical professional had deemed him totally disabled and therefore, such an opinion had to be requested.

[6] Both the claimant and the appellant-respondent Liberty Mutual filed motions to correct, which the trial commissioner denied. We affirm the commissioner's denial of these motions to correct. We determine they were essentially efforts to reiterate arguments which the commissioner did not credit at the formal hearing and did not find 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).

March 18, 2020 Finding and Orders of Scott A. Barton, the Commissioner acting for the Third District, is accordingly affirmed.

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