CASE NO. 6456 CRB-1-21-12 CLAIM NO. 100222618	:	COMPENSATION REVIEW BOARD
TIMOTHY K. BROWN CLAIMANT-APPELLEE	:	WORKERS' COMPENSATION COMMISSION
v.	:	SEPTEMBER 23, 2022
COCA COLA BOTTLING COMPANY EMPLOYER		
and		
LIBERTY MUTUAL INSURANCE COMPANY INSURER RESPONDENTS-APPELLANTS		

APPEARANCES:

The claimant was represented by Dominic D. Perito, Esq., Kocian Law Group, 356 Middle Turnpike West, Manchester, CT 06040.

The respondents were represented by Lynn M. Raccio, Esq., Tentindo, Kendall, Canniff & Keefe, LLP, 510 Rutherford Avenue, Hood Business Park, Boston, MA 02129.

This Petition for Review from the November 23, 2021 Finding and Dismissal by Toni M. Fatone, Administrative Law Judge acting for the First District, was heard on June 24, 2022 before a Compensation Review Board panel consisting of Chief Administrative Law Judge Stephen M. Morelli and Administrative Law Judges Daniel E. Dilzer and Carolyn M. Colangelo.[1]

[1] Effective October 1, 2021, the Connecticut Legislature directed that the phrase "Administrative Law Judge" be substituted when referencing a workers' compensation commissioner. See Public Acts 2021, No. 18, § 1.

OPINION

STEPHEN M. MORELLI, CHIEF ADMINISTRATIVE LAW JUDGE: The respondents have appealed from the November 23, 2021 Finding and Dismissal of Toni M. Fatone, Administrative Law Judge acting for the First District, wherein she determined the effective date of a form 36 filed by the respondents in this case should be February 22, 2021 and not October 1, 2020, the date sought by the respondents. The respondents argued this decision was against the weight of the evidence presented at the formal hearing, while the claimant argued that this decision was a judgment call which was supported by probative evidence the administrative law judge decided to credit. Given the deference we generally extend to fact finders weighing contested evidence at formal hearings, we affirm the Finding and Dismissal.[2]

The following facts were found at the conclusion of the formal hearing. The claimant sustained a compensable knee injury while training at work on June 3, 2020 and sought treatment at Concentra after the incident, at which time he was diagnosed with a left knee sprain. The claimant decided not to treat further with Concentra and presented at New England Orthopedic Surgeons (NEOS) on June 8, 2020. The claimant was seen by Melissa Mol-Pelton, Physician Assistant, under the supervision of Jennie Garver, an orthopedic surgeon. At this examination, a quad tendon rupture or partial quad tendon rupture was suspected and an MRI was ordered to further assess his injury. An out-of-work note was provided until the MRI could be obtained. The claimant returned to NEOS on June 30, 2020, at which time he was diagnosed with an MCL sprain with chondral defect of the patellofemoral compartment. Physical therapy was ordered, an

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

out-of-work note was provided for thirty days, and a follow-up appointment was scheduled for July 28, 2020. See Claimant's Exhibit B.

On July 28, 2020, the claimant returned to NEOS and was examined by Mol-Pelton, who released him to light duty work with restrictions. The claimant inquired about arthroscopic intervention and was advised that he would need to discuss debridement with one of the surgeons. This discussion occurred on September 3, 2020, with Martin J. Luber, an orthopedic surgeon at NEOS. Luber opined that the claimant's MCL sprain had resolved. He also noted that the claimant continued to suffer with some residual patellofemoral pain which should resolve over time. Luber did not believe arthroscopic surgery would be beneficial and recommended conservative treatment such as injections, which the claimant declined. The claimant was maintained on light duty for another six weeks until the next follow-up visit. Luber recommended that if the claimant was unable to be cleared for full duty work at that time, corticosteroid injections or Visco supplementation should be considered to get him back to work. See Claimant's Exhibit B.

On September 10, 2020, the respondents sent a letter to Luber inquiring as to the link between the claimant's condition and the June 3, 2020 work injury. On September 14, 2020, Luber responded as follows: "patella femoral disease likely pre-dated his knee injury but it is now his 1° symptom generator and the reason he remains out of work." Administrative Notice 3. Subsequent to receiving Luber's response, the respondents filed a form 36 dated September 28, 2020 and received by the Commission on October 1, 2020, which sought to discontinue "ongoing TPD on the basis that [the claimant's] continued disability is related to a non-work related issue." Form 36 filed October 1,

2020; see also Findings, ¶ 9. The form 36 stated, "[p]er Dr. Luber, a pre-existing condition is the primary cause of his ongoing pain and need for disability." Findings, ¶ 9. The form 36 was contested by the claimant.

Luber issued another letter concerning the claimant's condition on November 5, 2020, which stated the following: The claimant's

> overall need for treatment is directly related to his work accident, although I do not believe that the 'trochlear defect' seen by MRI is directly related to or has been caused by his work injury. The patient has been working for greater than 12 years since his previous patellar tendon reconstruction without limitations or restrictions. After his work injury in June 2020, the patient has subsequently been out of work or at least on limited capacity and does require treatment. Therefore, his current course of treatment has been both reasonable and appropriate and is directly caused by his work injury, 06/03/2020.

Claimant's Exhibit B - Letter of November 5, 2020 from Dr. Martin Luber; see also Findings, ¶ 10.

The claimant continued his treatment at NEOS. On November 8, 2020, he was examined by Mol-Pelton, who observed no change in his symptoms and noted he reported that he was only allowed one physical therapy visit because workers' compensation had not allowed any more visits. The claimant's sixty days of light duty had expired and he was sent home from work. The claimant was given orders for more physical therapy, was kept on light-duty status, and was advised to follow up with Luber in six weeks. See Findings, ¶ 11. He returned to NEOS on February 17, 2021 for ongoing evaluation and was seen by Luber. The claimant was counseled to continue to manage his residual patellofemoral discomfort conservatively and work on progressive strength training. He was further advised that, if he had ongoing symptoms of patellofemoral pain, this was related to his chondral defect to the trochlear, and that

cartilage restoration through allograft could be considered. Luber stated that the claimant's chondral damage was related to his original patellar tendon injury 12 years earlier. The claimant was to recheck with NEOS on an as needed basis and Luber released the claimant to full duty on February 22, 2021. See Findings, ¶ 12.

The administrative law judge also reviewed the respondents' medical examination performed by Michael J. Kaplan, an orthopedic surgeon, and his subsequent opinions. Subsequent to the February 5, 2021 exam, Kaplan noted the claimant finished his light duty and was still not working. See Claimant's Exhibit E. Kaplan further found that the claimant's current problems were related to the 2008 non-work-related injury with only minor exacerbation from the June 3, 2020 workplace injury. Kaplan found the MCL sprain of June 3, 2020 to be resolved. He further opined the claimant suffered from:

> Patellofemoral chondromalacia, posttraumatic and referable to the injuries of 2008 with a self-limiting and mild exacerbation from recent injury at work. At this point, the care rendered has been absolutely appropriate and I would agree that no further surgery or operation is predictable. Certainly injection of medicines as recommended by his primary orthopedist and gradual return to work as tolerated is appropriate. He is likely capable of going back to a full duty soon and a Functional Capacity Exam might be helpful also.

Claimant's Exhibit E.

Kaplan further opined that the clamant was at maximum medical improvement as of February 5, 2021, and could return to work in "short order." The administrative law judge noted Luber never offered an opinion as to MMI but did release the clamant back to full duty on February 22, 2021.

Based on these facts, the administrative law judge concluded that Luber's opinions were persuasive that the claimant remained light duty from the workplace injury of June 3, 2020, until he released the claimant from light duty to full duty on February 22, 2021. She did not find Kaplan's opinion persuasive that the claimant achieved maximum medical improvement as of February 5, 2021, without a date certain for return to full duty and further treatment recommended. Therefore, the administrative law judge held that the claimant was not capable of full duty until February 22, 2021. As a result, she ordered that the form 36 received by the Commission on October 1, 2020 be granted effective February 22, 2021.

The respondents filed a motion for articulation/reconsideration and a motion to correct in response to the Finding and Dismissal. The motion for articulation/reconsideration argued that ample medical evidence supported the form 36 which was received by the Commission on October 1, 2020, and asked the administrative law judge to reconsider the Finding and Dismissal. This motion was denied in its entirety. The motion to correct sought to have the administrative law judge add findings consistent with test results that indicated the claimant's knee sprain had resolved, his symptoms were the result of a prior non-compensable knee injury, and that Luber's opinions were persuasive except for his November 5, 2020 causation opinion on the claimant's disability. The administrative law judge denied this motion in its entirety and this appeal ensued. The gravamen of this appeal is that it was error for the trier of fact to have credited Luber's November 5, 2020 causation opinion instead of other evidence on the record inconsistent with this opinion.

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." 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 basis of the respondents' argument on appeal is that the causation opinion stated in Luber's November 5, 2020 letter should not have been credited as it was inconsistent with his prior opinions, including those affixed to the form 36, and the opinion of Kaplan. As the respondents view this situation, the claimant failed to meet the burden as enunciated in Cassella v. O & G Industries, 6017 CRB-4-15-5 (June 27, 2018), as after the filing of the form 36 "the claimant's disability was due to factors other than the compensable injury." Id. The claimant argues that this case turned on the trier of fact's evaluation of contested evidence and that Luber's letter, coupled with the factual circumstance that the claimant remained out of work subsequent to the June 3, 2020 injury, met the standard of proving that incident was a "substantial contributing factor" in

his continued disability consistent with the precedent in Birnie v. Electric Boat Corp., 288 Conn. 392 (2008). We are persuaded by the paradigm presented by the claimant.

We have a long history of extending great deference to the fact-finding prerogative of administrative law judges as "[t]here are few principles of jurisprudence more fundamental than the principle that a trier of fact must be the one party responsible for finding the truth amidst conflicting claims and evidence." O'Connor v. Med-Center Home Healthcare, Inc., 4954 CRB-5-05-6 (July 17, 2006). We also note that our Supreme Court has held that "it is proper to consider medical evidence *along with all other evidence* to determine whether an injury is related to the employment." (Emphasis in original.) Marandino v. Prometheus Pharmacy, 294 Conn. 564, 595 (2010), *quoting* Murchison v. Skinner Precision Industries, Inc., 162 Conn. 142, 151 (1972). We have, therefore, long endorsed the authority of a trier of fact to evaluate medical evidence. See O'Reilly v. General Dynamics Corp., 52 Conn. App. 813, 817-18 (1999). We have further held that it is the quality of evidence, not the quantity of evidence, which is decisive in resolving contested matters before this Commission. "In this sense 'weight' means the *qualitative* value of the evidence presented. The trial commissioner decided the claimant presented the superior qualitative evidence. 'As the finder of fact, the trier has the sole authority to decide what evidence is reliable and what is not . . . .' Byrd v. Bechtel/Fusco, 4765 CRB-2-03-12 (December 17, 2004)." Arnott v. Taft Restaurant Ventures, LLC, 4932 CRB-7-05-3 (March 1, 2006).

In this case, the administrative law judge was presented with Luber's September 14, 2020 opinion that the claimant's June knee injury had substantially resolved, as well as his revised opinion of November 5, 2020. The respondents argued that Luber should

be held to his initial opinion. It is not the province of this board, however, to assess the weight and/or credibility assigned to the opinions of expert witnesses by the administrative law judge. Since a reasonable fact finder could decide that the claimant's 2020 knee injury exacerbated his prior 2008 injury to some extent and duration, despite the treater and the respondent's examiner offering a somewhat different perspective as to the impact of the more recent compensable injury, we will not disturb those findings.

Furthermore, we note that when a medical witness offers divergent opinions as to an issue, a trier of fact is permitted to choose the opinion that he or she believes to be more reliable. See Jelliffe v. Kennedy Center, Inc., 6104 CRB-4-16-6 (June 16, 2017), *aff'd*, 186 Conn. App. 904 (December 25, 2018) (Per Curiam). In Jelliffe, the treating physician, who concurred with the original form 36 filed in the case, revised his opinion in reliance upon the reports of another physician. The trier of fact did not find that second physician's opinion persuasive and credible and, therefore, chose to discount the treater's revised opinion. The claimant argued that pursuant to Risola v. Hoffman Fuel of Danbury, 5120 CRB-7-06-8 (July 20, 2007), *dismissed for lack of final judgment*, A.C. 29056 (October 18, 2007), the trier of fact was bound to credit a later, revised opinion from the same witness. After examining Risola, however, we found it stood for the discretion of a trier of fact to determine which medical opinions he or she found most persuasive.

In footnote 2 of Risola, we pointed out "[w]e want to reiterate that there is no certainty that the most recent opinion of a physician must automatically be the most credible." Id. Obviously, the converse is also true, as a physician can change or clarify his or her opinion such that the subsequent opinion may be found credible. "We have

held that it is within the discretion of the trial commissioner to accept some, but not all, of a physician's opinion. Nasinka v. Ansonia Copper & Brass, 13 Conn. Workers' Comp. Rev. Op. 332, 335-36, 1592 CRB-5-92-12 (April 27, 1995)." Lopez v. Lowe's Home Improvement Center, 4922 CRB-6-05-3 (March 29, 2006). See also, O'Connor, supra, and Williams v. Bantam Supply Co. Inc., 5132 CRB-5-06-9 (August 30, 2007).

In Allen v. Connecticut Transit, 6036 CRB-3-15-9 (June 9, 2016), the treating physician reached a causation opinion which the administrative law judge found reliable while the respondents claimed it was inconsistent with the body of the evidence. In the Allen case, the treating physician concluded a bus accident was a substantial contributing factor in the claimant's need for surgery and the administrative law judge found this opinion persuasive. This opinion was challenged on the grounds that the incident was minor and the claimant had a pre-existing non-compensable injury to the same body part. We affirmed the administrative law judge's decision, citing O'Reilly, supra, for the deference we must provide to a trier of fact who evaluates contested medical evidence.[3] We also noted that, similar to the case herein where the respondents did not depose Luber, the respondents did not depose the claimant's treating physician so as to challenge his allegedly deficient opinion. "When a party chooses not to depose a medical witness the trial commissioner may rely on their reports 'as is' and draw any reasonable inferences from this evidence." Allen, supra, *quoting* Berube v. Tim's Painting, 5068 CRB-3-06-3 (March 13, 2007). In the current case, the administrative law judge drew

[3] In Allen v. Connecticut Transit, 6036 CRB-3-15-9 (June 9, 2016), we noted the factual and legal congruence of this case with Hadden v. Capitol Region Education Council, 5843 CRB-1-13-5 (May 20, 2014), *aff'd*, 164 Conn. App. 41 (2016), where we affirmed a determination that a subsequent compensable injury was a substantial contributing factor in their current disability, despite a significant preexisting condition.

inferences from Luber's November 5, 2020 letter and his later February 2021 report that the claimant remained partially disabled until February 22, 2021 as a result of his compensable June 2020 injury. We do not find these inferences unreasonable.

We now turn to the denial of the motion to correct and the motion for articulation/reconsideration. As for the motion to correct, we find no error in the administrative law judge's denial of the respondents' motion to correct. The administrative law judge could have determined that these proposed corrections were not material or probative to her determination of the hearing and she was not obligated to accept a litigant's view of the evidence. See D'Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003); 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); and Liano v. Bridgeport, 4934 CRB-4-05-4 (April 13, 2006). As for the motion for articulation/reconsideration, as we pointed out in Haines v. Turbine Technologies, Inc., 5932 CRB-6-14-4 (March 9, 2015), issues related to causation are generally straightforward and not issues "where the trial court's decision contains some ambiguity or deficiency reasonably susceptible of clarification." Biehn v. Bridgeport, 5232 CRB-4-07-6 (September 11, 2008), *appeal withdrawn*, A.C. 30336 (March 9, 2011) *quoting* Alliance Partners, Inc. v. Oxford Health Plans, Inc., 263 Conn. 191, 204 (2003). We do not believe the administrative law judge was obligated to grant an articulation of this decision.

The administrative law judge in this case accepted the opinion of the claimant's treating physician as to the cause of the claimant's disability and the duration of his

disability. In light of the "totality of the evidence" standard enunciated in Marandino, supra, we do not find that conclusion unreasonable. We affirm the November 23, 2021 Finding and Dismissal of Toni M. Fatone, Administrative Law Judge acting for the First District.

Administrative Law Judges Daniel E. Dilzer and Carolyn M. Colangelo concur in this Opinion.