CASE NO. 6480 CRB-2-22-7 CLAIM NO. 200151751	:	COMPENSATION REVIEW BOARD
CARMEN CRUZ CLAIMANT-APPELLANT	:	WORKERS' COMPENSATION COMMISSION
v.	:	MAY 19, 2023

INTERIM HEALTHCARE OF EASTERN & SOUTHWESTERN CONNECTICUT
EMPLOYER

and

AMERICAN HOME ASSURANCE COMPANY
INSURER
RESPONDENTS-APPELLEES

and

SECOND INJURY FUND
RESPONDENT-APPELLEE

APPEARANCES:

The claimant was represented by John Kardaras, Esq., 124 Jefferson Street, Hartford, CT 06106.

The respondent was represented by Sabina Kania, Esq., and Dominic A. Secondo, Esq., Solimene & Secondo, LLP, 1501 East Main Street, Suite 204, Meriden, CT 06450.

The Second Injury Fund was represented by Patrick Finley, Esq., Assistant Attorney General, Office of the Attorney General, 165 Capitol Avenue, Hartford, CT 06106.

This Petition for Review from the June 30, 2022 Finding and Dismissal of Soline M. Oslena, Administrative Law Judge acting for the Second District, was heard November 18, 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.

OPINION

STEPHEN M. MORELLI, CHIEF ADMINISTRATIVE LAW JUDGE. The claimant herein has appealed from a Finding and Dismissal (finding) of her claim for a scarring award. She argues that the decision of the administrative law judge was inconsistent with the statute and the evidence presented at the formal hearing.[1] Upon review, we conclude that as the administrative law judge did not find the claimant credible and did not find that the claimant's nonfacial scars handicapped her from job opportunities, that she reasonably could dismiss this claim. Therefore, we affirm the Finding and Dismissal.

The administrative law judge found the following facts at the conclusion of the formal hearing on this matter. On June 4, 2004, the claimant sustained a compensable injury to her right knee for which she underwent treatment, including a total right knee

[1] General Statutes § 31-308 (c) states: "In addition to compensation for total or partial incapacity or for a specific loss of a member or use of the function of a member of the body, the administrative law judge, not earlier than one year from the date of the injury and not later than two years from the date of the injury or the surgery date of the injury, may award compensation equal to seventy-five per cent of the average weekly earnings of the injured employee, calculated pursuant to section 31-310, after such earnings have been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act made from such employee's total wages received during the period of calculation of the employee's average weekly wage pursuant to said section 31-310, but not more than one hundred per cent, raised to the next even dollar, of the average weekly earnings of production and related workers in manufacturing in the state, as determined in accordance with the provisions of section 31-309, for up to two hundred eight weeks, for any permanent significant disfigurement of, or permanent significant scar on, (A) the face, head or neck, or (B) on any other area of the body which handicaps the employee in obtaining or continuing to work. The administrative law judge may not award compensation under this subsection when the disfigurement was caused solely by the loss of or the loss of use of a member of the body for which compensation is provided under subsection (b) of this section or for any scar resulting from an inguinal hernia operation or any spinal surgery. In making any award under this subsection, the administrative law judge shall consider (1) the location of the scar or disfigurement, (2) the size of the scar or disfigurement, (3) the visibility of the scar or disfigurement due to hyperpigmentation or depigmentation, whether hypertrophic or keloidal, (4) whether the scar or disfigurement causes a tonal or textural skin change, causes loss of symmetry of the affected area or results in noticeable bumps or depressions in the affected area, and (5) other relevant factors. Notwithstanding the provisions of this subsection, no compensation shall be awarded for any scar or disfigurement which is not located on (A) the face, head or neck, or (B) any other area of the body which handicaps the employee in obtaining or continuing to work. In addition to the requirements contained in section 31-297, the administrative law judge shall provide written notice to the employer prior to any hearing held by the administrative law judge to consider an award for any scar or disfigurement under this subsection."

replacement. See Findings, ¶ 3. Gordon A. Zimmerman, M.D., the claimant's treating orthopedist, assigned a 45 percent permanent partial impairment rating of the right knee on June 26, 2019. See Findings, ¶ 4. Subsequent to that rating, voluntary agreements were approved and the permanent partial disability benefits owed to the claimant for this injury were paid. See Findings, ¶ 5. Thereafter, the claimant made a claim for benefits pursuant to General Statutes § 31-308a, which were awarded at a reduced rate and for which the claimant was paid in full. See Findings, ¶ 6.

The claimant now claims an entitlement to compensation benefits pursuant to General Statutes § 31-308 (c) due to her disfigurement and scar. The claimant alleges the scarring on her right knee handicaps her in obtaining and continuing to work, while the respondent contests the entitlement to a scar evaluation on the ground that the claimant does not meet the statutory requirements to receive a scar award for the right knee. See Findings, ¶¶ 7-8. The administrative law judge took administrative notice of her scar evaluation that she performed on July 14, 2021, which noted "[p]ermanent and significant visible scar measuring 7" length x ½" width vertically located on the right knee." Findings, ¶ 9.a.

Reviewing the evidence, the administrative law judge noted that in a letter dated May 18, 2020, Zimmermann stated,

> Ms. Carmen Cruz does have hypersensitivity of her scar after her replacement. . . . The scar definitively does cause hypersensitivity and discomfort. Given the scar's causation as far as discomfort is concerned, it would likely hinder her ability to get certain types of work where she would be required to kneel, squat, or do other things with her knee which might exacerbate her scar sensitivity.

Findings, ¶ 10 *quoting* Claimant's Exhibit D.

The administrative law judge also noted that prior to her knee injury, the claimant was employed as a home health aide. At the formal hearing, "the claimant testified that she has sensitivity on her scar which prevents her from wearing pants and can only wear shorts which affects her ability to work. She would not feel comfortable wearing shorts. She is also unable to kneel and adequately bend, and unable to stand for long periods." Findings, ¶ 12. The claimant also testified that "she lives alone and is able to meet her own daily needs, including preparing food, eating, dressing, and bathing as well as light pick up and care for a small dog." Findings, ¶ 13.

Based on this record, the administrative law judge concluded that the claimant's testimony that her knee scar hindered her work opportunities was unpersuasive. She also concluded that, "[w]hile this scar is undoubtedly hypersensitive and uncomfortable, I do not find that this scar handicaps her in obtaining or continuing to work and is therefore not entitled to an award for said scar pursuant to § 31-308 (c) of the Connecticut General Statutes." Conclusion, ¶ E. As a result, she dismissed the claim for § 31-308 (c) benefits. The claimant filed a motion to correct seeking a wholesale revision of the finding based on Zimmerman's May 18, 2020 report that she contends should have compelled an award of benefits. See Claimant's Exhibit D. The administrative law judge denied this motion in its entirety and the claimant pursued this appeal. The gravamen of her appeal was that, since Zimmerman's report was uncontradicted, that it was reversable error not to credit this report and award the claimant benefits for her knee scar. The respondent argued that, given the statutory limitations on awarding benefits to nonfacial scars, the administrative law judge could reasonably determine the claimant failed to meet her burden of persuasion. We find the respondent's position more meritorious.

On appeal, we generally extend deference to the decisions made by the administrative law judge. "As 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." Daniels v. Alander, 268 Conn. 320, 330 (2004), *quoting* Burton v. Mottolese, 267 Conn. 1, 54 (2003). The Compensation Review Board cannot retry the facts of the case and may only overturn the findings of the administrative law judge if they are without evidentiary support, contrary to the law, or based on unreasonable or impermissible factual inferences. Kish v. Nursing and Home Care, Inc., 248 Conn. 379, 384 (1999) and Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). In addition, the burden of proof in a workers' compensation claim for benefits rests with the claimant. Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440 (2001).

Our precedent has clearly delineated that, when a scar is not on the face, neck or head, a claimant must demonstrate to the satisfaction of the trier of fact that the scar has hindered him or her from pursuing an identifiable job opportunity in order to be awarded benefits. See McClain v. Marketstar Corporation, 5604 CRB-4-10-11 (October 25, 2011). In McClain, we examined the statute and concluded, "[t]he statute does not permit the Commission to grant an award for a scar elsewhere on a claimant's body unless it impairs his or her ability to find work or perform work." Id. In reviewing the record, we noted:

> The claimant in the present case had not been unable to find work. She had been able to continue to work at her job and had received raises. The record does not demonstrate the claimant was objectively handicapped in her ability to perform her job for the respondent. The record does not reflect the claimant was impeded from obtaining any desired job opportunities, responsibilities or

> assignments. The sole basis for the trial commissioner's findings was the claimant's uncorroborated subjective opinion that other people were distracted by the scar.

Id.

This tribunal found the claimant's evidence speculative, and consequently we vacated the award in McClain for nonfacial scars. This tribunal has also ruled on the issue of whether a claimant can collect benefits for a nonfacial scar when their work opportunities are significantly impeded by a compensable permanent partial disability. In Duffy v. International Paper Co., 5860 CRB-2-13-17 (July 2, 2014), *appeal withdrawn*, A.C. 37104 (June 22, 2015), the claimant sought a scar award for his toes after an amputation of those toes left him permanently partially disabled. Finding this scenario a "mirror image" of McClain, supra, we noted, "[t]he claimant has not returned to work but an examination of the medical evidence could lead a reasonable fact finder to conclude the claimant's disfigurement is not the proximate cause of his inability to perform gainful employment." Id. As a result, in Duffy, we concluded that,

> *if* the claimant's scar contributed to the claimant's difficulty in obtaining employment, then an award under the statute may issue. If, however, the claimant has such a scar but the proximate cause of the claimant's inability to obtain employment is the injury itself, the trial commissioner may decide to deny the additional award available under the statute.

(Emphasis in original.) Id.

In the present case, we do not find an averment that the claimant has been unable to obtain any specific employment as a result of her nonfacial scars. The averment herein is that the scars are painful and inhibit her ability to work. This places the burden of persuasion upon the claimant to prove a hinderance to her work opportunities, and this burden becomes insurmountable when, as in this case, the administrative law judge does

not find her testimony persuasive. The administrative law judge reached this conclusion after observing her live testimony at the formal hearing. We have long standing precedent that an administrative law judge is the sole judge of witness credibility, and this judgment is essentially impervious to appellate review if the judge observes live testimony.

> Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude. . . . An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom. . . . As a practical matter, it is inappropriate to assess credibility without having watched a witness testify, because demeanor, conduct and other factors are not fully reflected in the cold, printed record. ([Citations omitted;] internal quotation marks omitted.) Briggs v. McWeeny, 260 Conn. 296, 327 (2002); Mottolese v. Burton, 267 Conn. 1, 40 (2003).

Liano v. Bridgeport, 4934 CRB-4-05-4 (April 13, 2006), *quoting* Lewis v. Statewide Grievance Committee, 235 Conn. 693, 709-10 (1996).

In Baron v. Genlyte Thomas Group, LLC, 132 Conn. App. 794 (2012), *cert. denied*, 303 Conn. 939 (2012), our Appellate Court restated the primacy of the trier of fact in resolving issues of evidentiary credibility.

> The commissioner, as finder of fact, is the sole arbiter of credibility; Samaoya v. Gallagher, 102 Conn. App. 670, 673-74, 926 A.2d 1052 (2007); and it is within the discretion of the commissioner 'to accept some, all or none of the plaintiff's testimony.'

Id., 804, *quoting* Gibbons v. United Technologies Corp., 63 Conn. App. 482, 487, *cert. denied*, 257 Conn. 905 (2001).

As a result, we must respect the determination of the administrative law judge that the claimant did not persuade her that the impact of her nonfacial scar reached the level necessary under our statutes to award benefits.

The claimant argues, however, that she presented an uncontroverted report from Zimmerman supporting her claim and pursuant to the precedent in Sanchez v. Edson Manufacturing, 5980 CRB-6-15-1 (October 6, 2015), *aff'd*, 175 Conn. App. 105 (2017), this required the administrative law judge to adopt the conclusions of the report. We do not agree with this reasoning for a number of reasons. We note that the claimant's interpretation of Sanchez was based on uncontroverted medical evidence which is not actually congruent with the facts in that decision.[2] Furthermore, Sanchez has been cited numerous times as authority by the Compensation Review Board and in none of those cases have we applied that precedent to rule against the manner in which an administrative law judge chose to weigh and evaluate the merits of evidential submissions. See Reveron v. Compass Group, 6358 CRB-5-19-11 (September 16, 2020), *appeal withdrawn*, A.C. 44276 (January 21, 2021).[3]

In addition, reliance on Sanchez, supra, as grounds to overturn this ruling is unwarranted when the administrative law judge refused to adopt reliance on the

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[2] In Sanchez v. Edson Manufacturing, 5980 CRB-6-15-1 (October 6, 2015), multiple medical witnesses offered opinion evidence and this tribunal noted the trier of fact had to weigh the relative merit of the inconsistent opinions. "The commissioner further concluded the opinions and conclusions of Dr. Selden to be more persuasive in part than those of Drs. O'Holleran and Barnett on the issues of extent of disability and need for further medical treatment. . . . The claimant has now commenced the instant appeal. The gravamen of his appeal was that the trial commissioner erred by reliance on Dr. Selden's opinions. The claimant believes Dr. O'Holleran and Dr. Barnett offered the more persuasive and credible testimony and their opinions would support finding that the compensable injury was not self-limiting." Id.

[3] In Reveron v. Compass Group, 6358 CRB-5-19-11 (September 16, 2020), *appeal withdrawn*, A.C. 44276 (January 21, 2021), while *citing* Sanchez v. Edson Manufacturing, 5980 CRB-6-15-1 (October 6, 2015), 175 Conn. App. 105 (2017), we pointed out that, "our precedent, most notably DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132 (2009), established the need for a claimant to establish a nexus of proximate cause between his or her condition and the compensable injury to support a bid for benefits. '[T]he test of proximate cause is whether the defendant's conduct is a substantial factor in bringing about the plaintiff's injuries. . . . Further, it is the plaintiff who bears the burden to prove an unbroken sequence of events that tied his injuries to the [defendant's conduct]. . . .' Id., 142." Reveron, supra. We further pointed out in Reveron that, "'[i]t is the trial commissioner's function to assess the weight and credibility of medical reports and testimony,' O'Reilly v. General Dynamics Corp., 52 Conn. App. 813, 818 (1999), *quoting* Iannotti v. Amphenol/Spectra-Strip, 13 Conn. Workers' Comp. Rev. Op. 319, 321 1829 CRB-3-93-9 (April 25, 1995), *aff'd*, 40 Conn. App. 918 (1996) (per curiam)." Reveron, supra. We, therefore, deferred to the trier of fact's assessment as to the probative value of a medical opinion.

Zimmerman report when it was presented to her in the motion to correct and the denial of this correction was reasonable given the statements in that report. Furthermore, with respect to the claimant's argument that the administrative law judge's finding failed to make a detailed assessment of the merits of Zimmerman's report, we note that the claimant specifically brought the issue of the probative value of the Zimmerman report to the administrative law judge's attention in her motion to correct, seeking to have this report used as the basis to award benefits, and the administrative law judge denied the correction. Based on our precedent, she was permitted to do so.

> He argues that the Motion to Correct should have been granted as it included what he regarded as material and undisputed evidence which would have supported a conclusion of total disability. We believe that the trial commissioner could have considered this evidence, but ultimately found the evidence was neither probative nor persuasive. This decision was consistent with precedent in Vitti v. Richards Conditioning Corp., 5247 CRB-7-07-7 (August 21, 2008) and 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)], where this tribunal held as follows:
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> When a party files a Motion to Correct this is an effort to bring factual evidence to the trial commissioner's attention in an effort to obtain a Finding that is consistent with such facts. When a trial commissioner denies such a motion, we may properly infer that the commissioner did not find the evidence submitted probative or credible. Vitti v. Richards Conditioning Corp., 5247 CRB-7-07-7 (August 21, 2008). On appeal, our inquiry is limited to ascertaining if this decision was arbitrary or capricious.

Anderson v. Target Capital Partners, 5615 CRB-6-10-12 (January 3, 2012).

We may reasonably infer, consistent with this precedent, that the administrative law judge could have denied the proposed correction as not being supported by evidence she deemed persuasive and her failure to do so was neither arbitrary nor capricious. Furthermore, after reviewing Claimant's Exhibit D, we do not believe it was sufficiently

definitive as to the claimant's scar-related job impediments to overcome the standard in Duffy, supra. Zimmerman opined that the claimant's scar "likely hinder her ability to get certain types of work" which included jobs where she "would be required to kneel, squat, or do other things with her knee which might exacerbate her scar sensitivity." Claimant's Exhibit D. The record, however, did not point to any specific job opportunity that the claimant had been denied.[4] This opinion could be construed as suggesting that the underlying injury, and not the scar, was the proximate cause of her possible impediments to employment. This places this opinion squarely within the precedent of Duffy, supra, where we affirmed the decision that when an injury, and not a scar, is the proximate cause of a claimant's difficulties in seeking employment, a scar award does not have to be issued to the claimant.

The claimant has also argued that it was error for the administrative law judge to not address the entirety of Zimmerman's report in the recitation of facts that she found. We are not persuaded by this argument as an administrative law judge in a finding must only recite those facts on the record they deem material to the decision they reached. We find that this sufficiently complies with Administrative Regulation § 31-301-3 where an administrative law judge's findings must detail the facts that he or she found and the conclusions based on those facts he or she reached. "Thus, by the express terms of § 31-301-3 of the regulations, the scope of the commissioner's finding and award is limited to the 'ultimate, relevant and material facts essential to the case." Cable v. Bic Corp., 270 Conn. 433, 440 (2004), *quoting* Luciana v. New Canaan Cemetery Assn., 3644 CRB-7-97-7 (August 12, 1998).

[4] See McClain v. Marketstar Corporation, 5604 CRB-4-10-11 (October 25, 2011) and Atkinson v. United Illuminating Company, 5064 CRB-4-06-3 (April 19, 2007).

Returning to the precedent in Duffy, supra, we believe this case also addresses the alleged claim of error raised by the claimant wherein she argues the administrative law judge committed reversable error in Conclusion, ¶ F, by using the term "preventing" instead of "handicaps" to describe the level of detriment to the claimant's job prospects required to issue an award under our scar statute.[5] We concur with the claimant that the statute does use the term "handicap" one's job opportunities which may reasonably be construed to imply a lesser burden on the claimant to establish her claim than the term "preventing." In any event, we note the administrative law judge used the correct statutory term in Conclusion, ¶ E and we believe, to the extent an inconsistency may exist, the appropriate standard was applied to the facts of this case. Furthermore, we believe both the statute and our precedent place the burden on the claimant to establish that the impact of the scar in impeding a claimant's job opportunities created a greater impediment to the claimant than the initial injury for which the claimant had already received a permanency award. Consequently, a reasonable fact-finder could conclude, in this case, that even the lesser threshold to award benefits the claimant advances had not been met.

We do not find the record herein compelled the trier of fact, as a matter of law, to award the claimant a scar award. Accordingly, we affirm the June 30, 2022 Finding and Dismissal of Soline M. Oslena, Administrative Law Judge acting for the Second District.

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

[5] Conclusion, ¶ F states: "Based on the totality of the evidence presented including my examination of the Claimant, I do not find that the Claimant's scarring and/or disfigurement to her right knee is preventing the Claimant from obtaining gainful employment."