CASE NO. 6481 CRB-7-22-9 CLAIM NO. 700188583	:	COMPENSATION REVIEW BOARD
ERNEST T. BRITT CLAIMANT-APPELLANT	:	WORKERS' COMPENSATION COMMISSION
v.	:	AUGUST 18, 2023
COS COB TV AND AUDIO EMPLOYER		
and		
UTICA NATIONAL INSURANCE GROUP INSURER RESPONDENTS-APPELLEES		

APPEARANCES:

The claimant was represented by John T. Bochanis, Esq., Daly, Weihing & Bochanis, 1776 North Avenue, Bridgeport, CT 06604.

The respondents were represented by Lauren E. Mansfield, Esq., Mullen & McGourty, P.C., 2 Waterside Crossing, Suite 102A, Windsor, CT 06095.

This Petition for Review from the August 18, 2022 Finding and Award/Denial of Jodi Murray Gregg, Administrative Law Judge acting for the Seventh District, was heard January 27, 2023 before a Compensation Review Board panel consisting of Chief Administrative Law Judge Stephen M. Morelli and Administrative Law Judges Toni M. Fatone and Soline M. Oslena.

OPINION

STEPHEN M. MORELLI, CHIEF ADMINISTRATIVE LAW JUDGE. The claimant has petitioned for review from the August 18, 2022 Finding and Award/Denial of Jodi Murray Gregg, Administrative Law Judge acting for the Seventh District. Upon our review of this matter, we affirm in part and reverse in part.

The administrative law judge identified multiple issues for determination at the formal hearings including compensability, medical treatment, medical bills, and total incapacity indemnity benefits. During the course of the formal hearing process, the administrative law judge heard live testimony from the claimant; Cassie Mecsery, the owner/wife of the owner of the employer-respondent; and Tasia Matacchieri, the bookkeeper for the employer-respondent. The testimony of Sean Mecsery, owner, was taken via deposition. Deposition transcripts from the claimant and Cassie Mecsery were also entered into the record as full exhibits. The administrative law judge also reviewed various medical records, workers' compensation commission forms, and some business records of the employer-respondent.

Upon the close of the record, the administrative law judge found the following facts that are relevant to our review.

The claimant was employed as a store manager for the employer-respondent on February 24, 2020 when he felt a pop in his back while moving a television from his car into the store. See Findings, ¶¶ 1, 7(o). The claimant notified his employer and his co-worker about his back injury on the date of the incident. See Findings, ¶¶ 7(s), 7(t). A First Report of Injury documented that the employer was notified of a low back injury on February 24, 2020. See Claimant's Exhibit A. During the course of the morning on

February 24, 2020, the claimant's back pain became progressively worse, resulting in him leaving work early. See Findings, ¶ 7(u).

On February 25, 2020, the claimant was seen by Janki Sharma, M.D., at DOCS Urgent Care of Norwalk (DOCS), at which time he provided a past medical history of back pain following a motor vehicle accident, as well as 10/10 pain since the prior day when he was lifting a television. See Claimant's Exhibit C and Findings, ¶ 8. Follow-up was undertaken at DOCS on February 27, 2020 and February 28, 2020. X-rays performed on February 27, 2020 revealed mild degenerative facet arthrosis without any acute abnormality. The claimant was referred to an orthopedist and was given a disability note until after an orthopedic consultation. See Claimant's Exhibits C-D and Findings, ¶¶ 9-11.

Robert Brady, M.D., of OrthoConnecticut, examined the claimant on February 28, 2020. Brady noted that the x-rays were essentially normal with only mild degenerative disease and that, while the claimant had moderately restricted range of motion, he was neurologically intact and had no signs of nerve root tension. Brady diagnosed the claimant with a strain of the lumbar region after lifting a heavy television, prescribed Baclofen and a Prednisone taper, and referred him to physical therapy. No mention of the claimant's work capacity was made in Brady's report. See Claimant's Exhibit E and Findings, ¶ 12.

After only two sessions of physical therapy, see Claimant's Exhibit G, the claimant was evaluated by Eric Katz, M.D., an orthopedic surgeon, on April 28, 2020. Katz diagnosed an acute musculoligamentous strain with left lumbar radiculopathy and recommended an MRI and continued physical therapy. Katz also opined that the

claimant's condition was causally related to the February 24, 2020 work incident and kept the claimant out-of-work. See Claimant's Exhibit I and Findings, ¶ 14.

There is no record of the claimant undergoing an MRI subsequent to April 28, 2020. We also note that the record is somewhat confusing with respect to the last date on which the claimant received medical treatment. There are no medical reports or disability notes contained within the record subsequent to April 28, 2020. Nevertheless, the trial judge references an April 28, 2022 evaluation with Dr. Katz. See Findings, ¶ 14. Neither party filed a motion to correct. The claimant, however, did cite to the April 28, 2020 report from Katz in his memorandum in support of appeal. He goes on to claim error, though, because the trial judge denied a claim for temporary total disability benefits through April 28, 2021.[1]

Based on the testimony and the documentary evidence, the administrative law judge found the claimant's testimony to be credible and persuasive. She further found the medical reports from Sharma, Brady, Katz, and the physical therapist to be credible and persuasive. She did not find the testimony of Cassie Mecsery to be persuasive. The administrative law judge, therefore, found all medical treatment through the date of the decision to have been reasonable and necessary and ordered the respondents to accept the claim. The administrative law judge, however, did not find that the claimant was totally disabled as a result of his injury and dismissed the claim for total disability benefits from the date of loss through April 28, 2021.

[1] Claimant's Exhibit I is actually a medical report from Katz dated April 28, 2020. There is nothing in the record regarding either an April 28, 2021 or April 28, 2022 report as cited by either the administrative law judge or claimant's counsel. The proper avenue for any correction of the date of the evaluation would have been a motion to correct. Nevertheless, since this decision is based on the actual record, any scrivener's error is considered harmless error. See Hernandez v. American Truck Rental, 5083 CRB-7-06-4 (April 19, 2007).

The claimant appealed the administrative law judge's decision and argued that it was error to dismiss the claim for total disability benefits because such an award was supported by the record.[2] Furthermore, the claimant contended that the administrative law judge's reference to an April 28, 2022 evaluation by Katz rather than an April 28, 2021 evaluation was erroneous.

We begin our analysis of this matter with a recitation of the well-settled standard of appellate review.

> [T]he role of this board on appeal is not to substitute its own findings for those of the trier of fact. Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 451 (2001). The trial commissioner's role as factfinder encompasses the authority to determine the credibility of the evidence, including the testimony of witnesses and the documents introduced into the record as exhibits. Burse v. American International Airways, Inc., 262 Conn. 31, 37 (2002); Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999). If there is evidence in the record to support the factual findings of the trial commissioner, the findings will be upheld on appeal. Duddy v. Filene's (May Department Stores Co.), 4484 CRB-7-02-1 (October 23, 2002); Phaiah v. Danielson Curtain (C.C. Industries), 4409 CRB-2-01-6 (June 7, 2002). This board may disturb only those findings that are found without evidence and may also intervene where material facts that are admitted and undisputed have been omitted from the findings. Burse, supra; Duddy, supra. We will also overturn a trier's legal conclusions when they result from an incorrect application of the law to the subordinate facts, or where they are the product of an inference illegally or unreasonably drawn from the facts. Burse, supra; Pallotto v. Blakeslee Prestress, Inc., 3651 CRB-3-97-7 (July 17, 1998).

McMahon v. Emsar, Inc., 5049 CRB-4-06-1 (January 16, 2007).

Before assessing the merits of the claimant's appeal, we reiterate that the claimant has the burden of proof to establish, not only the compensability of his injuries, but also his entitlement to indemnity benefits.

[2] The only issue that was appealed and subject to review by this board is the decision regarding total disability.

> [A] plaintiff is entitled to total disability benefits under § 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. . . . Our Supreme Court has defined total incapacity to work as the inability of the employee, because of his injuries, to work at his customary calling or at any other occupation he might reasonably follow.

(Internal quotation marks omitted.) O'Connor v. Med-Center Home Health Care, Inc., 140 Conn. App. 542, 550 (2013), *cert. denied*, 308 Conn. 942 (2013), *quoting* Diaz v. Pineda, 117 Conn. App. 619, 623-24 (2009).

As the Appellate court explained in Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 454 (2001), *quoting* Cummings v. Twin Tool Mfg., Co., 40 Conn. App. 36, 42 (1996), "[t]he plaintiff bore the burden of proving an incapacity to work, and 'total incapacity becomes a matter of continuing proof for the period claimed.'" (Internal quotation marks omitted.) The Court further stated that "[t]he law does not require the [respondent] to prove that the plaintiff was not totally disabled because the plaintiff did not prove the existence of a total disability caused by her work-related injury in the first instance." Id., Dengler, 454.

The respondent has argued that the finding of total disability is a factual issue to be determined by the trial judge and, therefore, it should not be overturned by this board. The claimant agrees with the respondent that the question of total disability is a finding of fact for the trial judge but argues that there is an inherent contradiction between the trial judge's findings that the claimant was credible and that the opinions of Sharma, Brady, and Katz were credible and persuasive, with her holding that he was not entitled to total disability benefits. While we agree that the "determination of total disability [benefits] is essentially a factual determination . . . ." Corcoran v. Amgraph Packaging, Inc., 4819 CRB-2-04-6, 4948 CRB-2-05-5 (July 26, 2006) *citing* Dellacamera v. Waterbury,

4966 CRB-5-05-6 (June 29, 2006), *citing* Lentini v. Connecticut College, 4933 CRB-2-05-4 (May 15, 2006) and Arnott v. Taft Restaurant Ventures, LLC, 4932 CRB-7-05-3 (March 1, 2006), we must also acknowledge that the trial judge's finding can be challenged if she "did not properly apply the law or has reached a finding of fact inconsistent with the evidence presented at the formal hearing." Dellarocco v. Old Saybrook, 5324 CRB-8-08-2 (January 16, 2009) *citing* Caraballo v. Specialty Foods Group, Inc./Mosey's Inc., 5082 CRB-1-06-4 (July 3, 2007). Furthermore,

> [W]e are bound by the subordinate facts found by the commissioner unless those findings are clearly erroneous. . . . A factual finding is clearly erroneous only in cases in which the record contains no evidence to support it, or in cases where there is evidence, but the reviewing court is left with the definite and firm conviction that a mistake has been made.

(Citation omitted; internal quotation marks omitted). O'Connor v. Med-Center Home Health Care, Inc., 140 Conn. App. 542, 549 (2013), *quoting* Brymer v. Clinton, 302 Conn. 755, 765 (2011).

Thus, unlike the claimant's reliance on Fantasia v. Milford Fastening Systems, 4332 CRB-4-00-12 (January 15, 2002)[3], we do not necessarily believe that a finding of credibility with respect to causation and compensability automatically results in an inconsistency should the trial judge not find that a claimant is totally disabled, especially in light of the relatively minor nature of the current claimant's diagnosis and the lack of ongoing medical support for the claimed period of disability.

We further note that awards regarding entitlement to indemnity benefits must be based on competent evidence. "Competent evidence does not mean any evidence at all.

[3] We note that the compensation review board decision cited by the claimant was remanded for an articulation by the trial commissioner, that the articulation was appealed to this board, and that this board's decision was subsequently appealed to the Appellate Court, which held that the trial judge did not actually issue an articulation but, instead, issued an entirely different decision thereby necessitating a *de novo* review by a different commissioner. See Fantasia v. Milford Fastening Systems, 86 Conn. App. 270 (2004).

It means evidence on which the trier properly can rely and from which it may draw reasonable inferences." (Internal quotation marks omitted.) Sierra v. C & S Wholesale Grocers, Inc., 128 Conn. App. 78, 82-83 (2011), *cert. denied*, 301 Conn. 924 (2011), *quoting* Hummel v. Marten Transport, Ltd., 114 Conn. App. 822, 845 (2009), *cert. denied*, 293 Conn. 907 (2009).

In the current action, the medical evidence is somewhat sparse. Per the administrative law judge's decision, the claimant sustained a compensable back injury on February 24, 2020. A total disability note was issued by Sharma on February 28, 2020. There was, however, no mention of the claimant's work capacity by Brady, who noted that the x-rays were essentially normal with mild degeneration. Neither of the Access Physical Therapy reports commented on work capacity. On April 28, 2020, though, Katz offered a preliminary diagnosis of acute musculoligamentous strain with left lumbar radiculopathy and opined that the claimant was disabled from work. Katz' April 28, 2020 report was the last medical report entered into the record. The respondents did not offer any medical opinion contradicting these findings and/or opinions of the attending medical providers. Furthermore, although "the evaluation of whether a claimant is totally disabled is a holistic determination of work capacity, rather than a medical determination." O'Connor, supra, 554, *citing* Bode v. Connecticut Mason Contractors, The Learning Corridor, 130 Conn. App. 672 (2011), *cert. denied*, 302 Conn. 942 (2011). In the case at hand, the claimant also failed to produce any evidence of unsuccessful job searches or vocational evaluations.

Based on a review of the medical reports and the administrative law judge's finding that the claimant's testimony was credible, we sustain in part and reverse in part

her findings and conclusions with respect to the claimant's eligibility for total disability benefits. As previously set forth, two different doctors opined that the claimant was totally disabled from employment following the February 24, 2020 incident. The claimant also testified as to his status in the immediate aftermath of his injury. The respondents, however, did not offer an expert opinion to challenge this claim. Since the administrative law judge found that the claimant sustained a compensable injury and, since the only expert medical opinions on the subject of work capacity supported a finding of total disability benefits at least through April 28, 2020, it was error for her to disregard those opinions. Subsequent to April 28, 2020, however, the claimant failed to pursue the recommended MRI, did not continue with physical therapy, and did not present any evidence of ongoing treatment and/or of his work capacity despite him being able to avail himself of treatment through the Husky program. Given the claimant's burden of proof, therefore, it cannot be found that he carried that burden with respect to any eligibility for benefits subsequent to April 28, 2020. The administrative law judge was, therefore, correct in holding that the claimant was not entitled to any benefits subsequent to April 28, 2020.

This matter is remanded to the trial judge for the issuance of an order for the respondents to pay total disability benefits, taking into account any salary and/or benefits that might have been paid by the respondent, if any, from February 25, 2020 through April 28, 2020. The finding regarding eligibility for benefits subsequent to April 28, 2020, however, is affirmed.

Administrative Law Judges Toni M. Fatone and Soline M. Oslena concur in this Opinion.