CASE NO. 6469 CRB-1-22-3 CLAIM NO. 800209203	:	COMPENSATION REVIEW BOARD
GLENN ASBERRY CLAIMANT-APPELLEE	:	WORKERS' COMPENSATION COMMISSION
v.	:	FEBRUARY 21, 2023

BUNKER HILL PROPERTIES, INC.
EMPLOYER

and

AMGUARD INSURANCE COMPANY
INSURER
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by Gregory C. Goodstein, Esq., Law Offices of Gregory Goodstein, LLC, 129 Arundel Avenue, West Hartford, CT 06107.

The respondents were represented by Timothy D. Ward, Esq., McGann, Bartlett & Brown, 111 Founders Plaza, Suite 1201, East Hartford, CT 06108.

This Petition for Review from the January 31, 2022 Finding and Award by Toni M. Fatone, the Administrative Law Judge acting for the First District, was heard August 26, 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 respondents have appealed from a Finding and Award determining that the claimant, Glenn Asberry, was totally disabled as the result of compensable injuries he sustained while employed by the respondent-employer. The Administrative Law Judge, Toni M. Fatone, concluded after a formal hearing that the claimant's treating physician offered persuasive opinions linking the claimant's condition to a work injury and that this work injury left him totally disabled. The respondents argued that this was an unreasonable inference based on the evidence presented. The claimant argued that the respondents were merely seeking to relitigate the facts. Upon reviewing the record, we find the administrative law judge reached a reasonable decision and, therefore, we affirm the Finding and Award.

The administrative law judge reached the following factual findings pertinent to our consideration of this appeal. She noted that it was undisputed that the claimant was employed by the respondent-employer, Bunker Hill Properties, Inc., as a maintenance worker at a property known as Hunter Crossing in Middletown. See Findings, ¶ 1. She further noted that the claimant testified that on July 6, 2020 he was working at Hunter Crossing when his supervisor, Shaylene Alicea, directed him to remove refrigerators and stoves from abandoned apartments and move them closer to a dumpster. The claimant also stated he was working alone and had to lift the appliances, and while in the process of lifting one of them, he felt his right shoulder pop. He testified that he has continued to feel right shoulder pain since that injury. See Findings, ¶ 2.

The claimant testified that either on the day after the incident or the next day, he reported his injury to Alicea. Alicea confirmed that by July 9, 2020, she had heard from the claimant that he had hurt his shoulder and was not coming into work. She said the claimant did come to work on July 13, 2020 and was assigned light duty. She inquired about the claimant's shoulder and said the claimant told her "he didn't have any complaints." Findings, ¶ 3, *citing* August 10, 2021 Transcript, p. 52. She further testified that she told the claimant, that if he didn't feel well enough to perform light duty, he should see a doctor as he needed to file a report as to the injury. Alicea also testified the claimant never told her he had been hurt at work and had not told her he was injured moving refrigerators. See id., p. 53.

The administrative law judge noted that the claimant sought treatment at Saint Francis Hospital and Medical Center emergency room on July 15, 2020. Alicea confirmed the claimant sent her a text message that he was going to the hospital due to the pain in his shoulder. See Findings, ¶ 6. The administrative law judge took notice that the observations of the claimant at Saint Francis Hospital and Medical Center by Usra Qureshi and Dr. Peter R. Quinby, both medical providers at Saint Francis Hospital and Medical Center, differed from the other medical providers who treated the claimant. Qureshi's patient history, taken between 1:06 a.m. and 1:43 a.m., states the claimant experienced right-sided shoulder pain approximately two days earlier and related that to reaching out for salt at dinner and feeling something pop. The report further stated that the patient denied injury or trauma to the shoulder. An X-ray was ordered and read by Quinby, who placed the claimant in a sling, referred him to an orthopedist, prescribed

Naproxen, and concluded that he was "suspicious for rotator cuff injury." Claimant's Exhibit C, see also Findings, ¶ 7.

The claimant testified that since the treatment at Saint Francis Hospital and Medical Center did not resolve his shoulder pain, he sought out another specialist. See Findings, ¶ 8, *citing* June 16, 2021 Transcript, pp. 67-68. He also testified that he believed that if he filed a workers' compensation claim he could lose his job. See Findings, ¶ 5, *citing* August 10, 2021 Transcript, p. 91. He said he went back to work and was to be given light duty, but the work provided was not light duty but was his regular job duties before the injury. See Findings, ¶ 9, *citing* id., pp. 94-95. He found himself unable to do this job because of his right shoulder and eventually stopped going to work.

On July 29, 2020, the claimant was examined by Dr. Michael A. Miranda. Miranda's patient history noted "he was moving a heavy refrigerator and felt a pop in his right shoulder." Claimant's Exhibit D, see also Findings, ¶ 10. Miranda's notes further stated, "I am very suspicious of a rotator cuff injury." Id. Miranda gave the claimant a G-Force brace, ordered an MRI, and issued an out-of-work note to the claimant until the MRI results could be obtained. After the initial out-of-work note covering July 29, 2020 to August 12, 2020, Miranda issued a second out-of-work note covering August 19, 2020 to September 9, 2020.

Miranda subsequently issued a medical report on November 4, 2020, wherein he noted that the MRI revealed "near full-thickness tear of the rotator cuff, specifically the supraspinatus." Claimant's Exhibit D. He noted the claimant continued to have persistent severe pain and recommended a corticosteroid injection and follow-up in two

weeks and "[i]f improved, start physical therapy. If he has failure to improve, consider surgical intervention. He remains unavailable for work." Id. Miranda then issued a letter to claimant's counsel dated November 9, 2020, wherein he confirmed the claimant's right shoulder injury was causally related to the work he performed on July 6, 2020 for his employer and stated that further treatment of the shoulder was causally related to that injury, and the claimant "has been temporarily totally disabled" since his first evaluation on July 29, 2020. Claimant's Exhibit D, see also Findings, ¶ 13.

Miranda was deposed by the respondents on April 4, 2021, and the administrative law judge found that he reiterated the opinions he presented in his November 9, 2020 letter. See Findings, ¶ 14.

The administrative law judge also noted that testimony was presented by Shalom Lipschitz, vice president of the firm employing Alicea and the claimant. The administrative law judge found he was only at this property two or three times a month. While Lipschitz testified that he did not speak with the claimant about his injury, the administrative law judge found the claimant credibly refuted this testimony.[1] See Findings, ¶ 15, *citing* August 20, 2021 Transcript, pp. 27, 86-88.

Based on this record, the administrative law judge concluded the claimant was a credible witness and that neither Alicea nor Lipschitz were credible or persuasive witnesses. She concluded that Miranda's opinions were persuasive that the claimant sustained a compensable injury on July 6, 2020, his further treatment was causally related to this injury, and that the claimant remained temporarily totally disabled as a result of

[1] Lipschitz testified that he had seen the claimant at Hunters Crossing after the date of the contested injury, but the claimant had said nothing about his injury. See August 20, 2021 Transcript, pp. 26-27. The claimant testified that he had seen Lipschitz at the worksite and discussed the nature of his injury with him at length. Id., pp. 86-88.

this injury. Therefore, she ordered the respondents to pay medical benefits and temporary total disability benefits until a form 36 was approved by the commission.

The respondents filed a motion to correct focused on two issues. They claimed that the witnesses who said the claimant was not working alone should be credited and that Miranda's opinion should have been found persuasive only as to causation and not as to the claimant being totally disabled, as they contend that Miranda actually opined the claimant had a light-duty capacity. The administrative law judge denied this motion in its entirety and the respondents pursued this appeal.[2] The gravamen of the appeal is that the claimant did not establish that he is totally disabled and should not be awarded these benefits.

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). "This presumption, however, can be challenged by

[2] The respondents' reasons for appeal originally listed among the claims of error the award of future medical treatment to the claimant. We note the respondents did not brief this issue nor address it before our tribunal, hence we deem this issue abandoned on appeal. See Christy v. Ken's Beverage, Incorporated, 5157 CRB-8-06-11 (December 7, 2007) and St. John v. Gradall Rental, 4846 CRB-3-04-8 (August 10, 2005). In any event, we find no conflict between the order herein and our holding in Hodio v. Staples, Inc., 5152 CRB-3-06-10 (October 3, 2007). Had the respondents intended to contest medical treatment due to the claimant, they could have sought a respondents' medical examination and filed a form 36 to discontinue treatment if the results of the examination, in their judgment, warranted this remedy. See Pereira v. State/Department of Developmental Services, 6204 CRB-3-17-6 (August 1, 2018). The respondents did not seek a RME in this case and did not file a form 36 prior to the formal hearing.

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).

In evaluating this appeal, we must look to the precedent our courts have set forth in determining whether a meritorious claim for temporary total disability has been presented to the commission. In particular, we look to cases such as O'Connor v. Med-Center Home Health Care, Inc., 140 Conn. App. 542 (2013) and Bode v. Connecticut Mason Contractors, The Learning Corridor, 130 Conn. App. 672 (2011). As our Appellate Court held in Bode:

> Whether a claimant is realistically employable requires an analysis of the effects of the compensable injury upon the claimant, in combination with his pre-existing talents, deficiencies, education and intelligence levels, vocational background, age, and any other factors which might prove relevant. This is of course the analysis that commissioners regularly undertake in total disability claims . . . . A commissioner always must examine the impact of the compensable injury upon the particular claimant before him.

Id., 681, *quoting* R. Carter et al., 19 Connecticut Practice Series: Workers' Compensation Law (2008 Ed.) § 8:40, p. 301.

Subsequent to its decision in Bode, our Appellate Court issued its decision in O'Connor, supra. In O'Connor, the respondents challenged the adequacy of the claimant's medical evidence supporting a bid for temporary total disability award. Our Appellate Court affirmed the award of benefits as "*Bode* highlighted that the evaluation of whether a claimant is totally disabled is a holistic determination of work capacity, rather than a medical determination. Moreover, *Bode* categorically rejected the notion that claimants must present a particular kind of evidence to meet their burden of proving their total disability." Id., 554. We also note that, apart from medical evidence, an

administrative law judge may consider lay testimony in determining if a claimant is totally disabled.

> 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).

Fortin v. Southern Connecticut Gas Company, 6387 CRB-3-20-4 (March 31, 2021).

The argument presented by the respondents is that while the claimant's treater, Miranda, clearly opined in his November 9, 2020 report and at his April 14, 2021 deposition that the claimant was physically unable to perform his prior job as a maintenance worker due to his work injury, that the claimant retained a sedentary work capacity. They point to this colloquy at Miranda's deposition.

> Counsel: But I think I just have to do one crazy followup about it, and let's not try to go beyond the scope of -- let's keep this narrowed out. But overall from July 6 through the present is it your opinion that he [the claimant] has a light or sedentary work capacity?
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> Miranda: Yes.
>
> Counsel: Okay. Is that opinion based on reasonable medical probability?
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> Miranda: Yes.

Respondents' Exhibit 2, p. 32.

Nonetheless, we note that Miranda also clearly opined that the claimant would not have a work capacity in any occupation that required him to perform any physical labor. Counsel for the claimant conducted this colloquy, regarding Miranda's November 9, 2020 letter.

Counsel: I just would ask you to reconcile what his work status was, and if you can break it down from July 6 through the current time -- November 9, 2020 report, in response to number 5 you indicate that "Mr. Asberry is temporarily totally disabled from his work position," but then in response to Attorney Ward's inquiry you indicated that at some point he was temporarily partially disabled.

I would just ask to the extent you're able, if you could just identify from basically July 6, 2020 through the present time what his status was or at what period would be temporary partial and what period would be temporary total.

Miranda: Yeah, sure. So in that letter I say he's totally disabled from his current work position, that is of heavy lifting, etcetera, okay? The way I heard Attorney Ward's question was that he was -- did he have a work capacity at all, and I would say that he potentially could have at that time.

He would have a work capacity of say inability to lift, carry, push, pull, you know, sedentary duties, but that's not consistent with his work position. So I was asked really two separate questions, two different questions.

So now answering your current question. If you're asking me specifically about his job and his current position doing maintenance work, I would say he's disabled from that.

Id., pp. 30-31.

Miranda also answered "yes" to a question as to whether an inability to use one's right arm would functionally temporarily totally disable the claimant from working as a maintenance worker. Id., pp. 31-32. The respondents argue that this is insufficient to support the award given the witness's opinion that the claimant "potentially" could have a sedentary work capacity. Id., p. 31. We note that neither party presented any vocational evidence as to the claimant's employability, unlike cases such as Pereira v.

State/Department of Developmental Services, 6204 CRB-3-17-6 (August 1, 2018). We do find similarities between this case and Pereira; however, these similarities cause us to affirm the findings.

In Pereira, the finder of fact found the claimant, who had sustained a spine and shoulder injury, was a credible witness and discounted evidence proffered as to her potential employability by noting her lack of formal education and her work history, which had exclusively been at jobs requiring physical labor such as housekeeping at a state institution and being a seamstress. In the present case, the administrative law judge specifically found the claimant to be credible. The testimony of the claimant was that he had dropped out of high school prior to receiving a diploma, see June 16, 2021 Transcript, pp. 45-47, and that his entire work history had been at physically demanding jobs such as being an auto mechanic. See id., pp. 47-48. The claimant testified he had never held a desk job. See id., p. 48. The claimant also testified that he could not perform the work he was assigned at Hunter Crossing following his injury. See June 16, 2021 Transcript, pp. 81-82. Therefore, on the facts, this case resembles Pereira, where this tribunal affirmed the award of temporary total disability benefits to a claimant with no history of sedentary employment.

In Romanchuk v. Griffin Health Services, 5515 CRB-4-09-12 (October 20, 2010), we stated that an administrative law judge should consider the "totality of the factors" in ascertaining whether at the time of the formal hearing the claimant has proven he is entitled to temporary total disability benefits.[3] The "totality of the factors" in this case

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[3] The respondents could have attempted to limit the duration of temporary total disability benefits by filing a form 36 with appropriate documentation challenging the claimant's entitlement to such benefit consistent with General Statutes Section 31-296 (b), but had not done so prior to the finding being issued. See Duntz v. Ales Roofing and Caulking Co., 5772 CRB-6-12-8 (July 22, 2013).

are simple. The claimant has been totally disabled by his treating physician from performing the only types of work in which the record suggests he is employable.[4] As a result, we find no error in Administrative Law Judge Fatone awarding the claimant temporary total disability benefits.

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

[4] As a result, we find no error from the denial of the respondents' motion to correct. The correction pertaining to claimant's manner of work was not material to the outcome of this decision and the corrections sought pertaining to whether the claimant was temporarily totally disabled were based upon an evaluation of the evidence which the administrative law judge rejected. See Avino v. Stop & Shop Supermarket, 5820 CRB-3-13-2 (February 10, 2014), *citing* D'Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003).