CASE NO. 03754 CRB-03-97-12
CLAIM NO. 300035607 : COMPENSATION REVIEW BOARD

ROBERT MIKULA
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

FIRST NATIONAL SUPERMARKETS : MAY 11, 1999
EMPLOYER
SELF-INSURED

and

TRAVELERS INSURANCE CO.
INSURER
RESPONDENTS-APPELLEES

and

SHAW'S SUPERMARKETS
EMPLOYER
SELF-INSURED

and

SEDGWICK JAMES OF CONNECTICUT
SELF-INSURED ADMINISTRATOR
RESPONDENTS-APPELLANTS

APPEARANCES: The claimant was represented by Steven Cousins, Esq., 2563 Main St., Stratford, CT 06497.

The respondent First National as a self-insured was represented by Michael McAuliffe, Esq., Pomeranz, Drayton & Stabnick, 95 Glastonbury Blvd., Glastonbury, CT 06033-4412.

The respondents First National and Travelers were represented by Suzanne Fetter, Esq., Sizemore Law Offices, 1 Civic Center Plaza, 3CC, Hartford, CT 06103.

The respondent Shaw's Supermarkets was represented by Brian Prindle, Esq., 72 Bissell St., Manchester, CT 06040-5304.

This Petition for Review from the December 16, 1997 Finding and Award of the Commissioner acting for the Third District was heard September 18, 1998 before a Compensation Review Board panel consisting of the Commission Chairman Jesse M. Frankl and Commissioners Michael S. Miles and Stephen B. Delaney.

OPINION

JESSE M. FRANKL, CHAIRMAN. The respondent Shaw's Supermarkets has petitioned for review from the December 16, 1997 Finding and Award of the Commissioner acting for the Third District. It argues on appeal that the trier erred by finding that the claimant suffered a new injury while working for Shaw's as opposed to a recurrence of a previous injury, and that he erred by concluding that the claimant was entitled to benefits under § 31-308(a). We affirm the trial commissioner's decision.

The claimant first began working for the respondent First National as a grocery clerk in 1986. His job required much bending and lifting. In 1988, he suffered a back injury while stocking shelves, and felt intense pain. The accident kept him out of work for six months, and caused a 10% permanent partial impairment of his back according to Dr. Garver. The claimant eventually returned to work doing the same job. In January 1993, he suffered another back injury while stocking shelves, and was compensated for it pursuant to a voluntary agreement with Travelers. He was again injured in November 1993, although the claimant testified he remembered little about that injury, which was accepted by First National as a self-insured.

Dr. Garver noted in 1994 that the claimant's permanent partial impairment level remained at 10%, with continuing low back pain. Dr. Robinson found that the claimant had advanced degenerative disc disease, and that he should not lift loads greater than 15-20 pounds. The claimant testified that after 1993, he was no longer required to stock shelves. He continued to work at First National until October 1996, when he was laid off after First National merged with another company and sold off the Orange store in which the claimant worked. Shaw's, the purchaser of that store, hired the claimant in April 1997 to do work similar to that which he performed at First National, except that he was again required to stock shelves. On May 27, 1997, while removing merchandise from a pallet, he felt pain in his back and was sent home. A day later, the pain had worsened, and the claimant returned for treatment with Dr. Garver.

Dr. Garver told the claimant that he could do light work. The claimant testified that he looked for such work, but could not find any. He also was ruled ineligible for unemployment compensation because he was deemed to be disabled and unready to work. In an August 1997 report, Dr. Garver determined that the claimant had suffered an exacerbation of his pre-existing condition by virtue of the May 1997 lifting incident. He was of the opinion that the claimant was temporarily totally disabled.

The trial commissioner concluded that the claimant aggravated his pre-existing impairments as a result of the May 27, 1997 lifting incident and became partially disabled, whereupon he fruitlessly looked for light duty work. The commissioner ordered Shaw's to pay the claimant six months of compensation for temporary partial disability, as well as six percent interest on compensation unpaid the claimant. Shaw's has appealed that decision to this board.

The appellant first argues that the trier erred by finding that the claimant suffered an accidental injury while employed by Shaw's. Whether an injury has occurred, and whether it is a relapse of a previous injury or a new injury, is a determination of fact. Where circumstances could arguably support different findings, the trial commissioner must decide based upon the evidence which finding is most appropriate. McBreairty v. D.B.D., Inc., 13 Conn. Workers' Comp. Rev. Op. 259, 260, 1781 CRB-7-93-7 (April 18, 1995). This board will not retry the facts, nor will it review decisions that depend upon the weight of the evidence or the credibility of the witnesses. Id., 261, *citing* Adzima v. UAC/Norden Division, 177 Conn. 107, 118 (1979).

Dr. Garver stated in a June 4, 1997 report that the claimant was "with pain in the low back with radiation down both legs. This has become much worse since he has been doing a lot of lifting and bending at work." Claimant's Exhibit A. As the appellant points out, Dr. Garver also stated on August 18, 1997 that the May 1997 incident apparently occurred "when the patient's job activities were changed and he was returned to a stocking type of activity. This caused development of back pain and essentially was an exacerbation of his preexisting condition. This did not represent a specific new pathologic injury to the patient, but did cause a specific flair-up [sic] of his preexisting condition." The appellant characterizes this as not an injury, but a "temporary aggravation based on performing duties beyond the claimant's restrictions." Brief, p. 8.

The lacuna in this argument, though, is the recognition of the fact that the claimant would not have suffered this aggravation had he not been required to stock shelves at Shaw's. The claimant had been able to work within restrictions for two years following his last injury in November 1994. When Shaw's hired him in April 1997, it

assigned him duties outside those restrictions, and the claimant injured his back again. We believe that the performance of duties beyond one's work restrictions is the sort of intervening circumstance that may reasonably distinguish a simple relapse from a new injury within the meaning of the Workers' Compensation Act. The fact that Dr. Garver did not identify a new pathologic injury, i.e., a physical change in the structure of the claimant's back, did not preclude this incident from being an injury under the Act. See, e.g., Pothier v. Stanley-Bostich, 3411 CRB-3-96-8 (Jan. 21, 1998) (playful poke in sides by co-worker that aggravated pre-existing condition caused claimant tremendous pain, and constituted an injury). Thus, we find no error in the trier's conclusion that the claimant suffered a compensable injury while working at Shaw's on May 27, 1997.

The other argument raised by the appellant is that there was insufficient evidence for the trier to find that the claimant was entitled to § 31-308(a) benefits based upon temporary partial incapacity. The only evidence offered regarding the claimant's inability to find suitable light duty employment was the testimony of the claimant himself, who stated that he had looked for work after being injured at Shaw's. Transcript, pp. 38-39, 54-56. He also stated that he had tried to obtain a light duty position at Shaw's, but it had fallen through for some reason. Id., 54. The appellant argues that this evidence is not substantial enough to establish that work was unavailable under § 31-308(a). "Based on the mere fact that the claimant said he looked for work, the Commissioner can not conclude that the claimant was unable to secure appropriate work." Brief, p. 12.

Our Appellate Court has stated that there is no work search requirement in § 31-308(a). Shimko v. Ferro, 40 Conn. App. 409, 414 (1996). A claimant may demonstrate

the unavailability of employment by other evidentiary means as well. Id. Although a mere representation by a claimant that he has looked for work is hardly overwhelming evidence, it is not beyond the discretion of the trier to rely on such a statement if, in conjunction with the other evidence in the case, it appears that there was no suitable light duty work available for the claimant. Here, the respondents did not contradict the claimant's testimony that he looked for work. We must presume from the findings that the trier found this testimony credible. As we may not disturb a trial commissioner's evaluation of credibility, we must affirm the trier's finding on this matter also.

The trial commissioner's decision is hereby affirmed.[1]

Commissioners Michael S. Miles and Stephen B. Delaney concur.

[1] The claimant requests in his brief that this board offer guidance regarding the need for a commissioner to enter a § 31-301(f) order against an employer or insurer to pay benefits pending appeal now that the Second Injury Fund is no longer implicated by the statute. As that issue is not before us, and the statute may be amenable to different interpretations, we believe it inappropriate to rule on that matter here.