CASE NO. 5749 CRB-3-12-4 : COMPENSATION REVIEW BOARD
CLAIM NO. 200173243

CHRISTOPHER DISOTELL : WORKERS' COMPENSATION
CLAIMANT-APPELLANT COMMISSION

v. : APRIL 25, 2013

LVI SERVICES, INC.
EMPLOYER

and

CHARTIS INSURANCE
INSURER
RESPONDENTS-APPELLEES

APPEARANCES

The claimant was represented by Richard W. Lynch, Esq., Lynch, Traub, Keefe & Errante, P.C., 52 Trumbull Street, P.O. Box 1612, New Haven, CT 06506.

The respondents were represented by Jason M. Dodge, Esq., Pomeranz, Drayton & Stabnick, LLC, 95 Glastonbury Boulevard, Glastonbury, CT 06033.

This Petition for Review from the April 17, 2012 Finding and Dismissal of the Commissioner acting for the Third District was heard on October 19, 2012 before a Compensation Review Board panel consisting of Commission Chairman John A. Mastropietro and Commissioners Jodi Murray Gregg and Daniel E. Dilzer.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has petitioned for review from the April 17, 2012 Finding and Dismissal of the Commissioner acting for the Third District. We find no error and accordingly affirm the decision of the trial commissioner.

The trial commissioner made the following factual findings which are pertinent to our review. The claimant was hired by the respondent employer as an operating engineer in May 2010 and later became a supervisor. On January 27, 2011, the date of the claimant's injuries, the claimant along with his brother had been assigned by the employer to demolish a building owned by US Foods in Norwich, Connecticut. As required by the respondent employer, the claimant had received two certifications from the Occupational Health and Safety Administration (OSHA). The first certification was for OSHA 10, which involved ten hours of computer instruction in general safety training. The second program, OSHA 30, involved thirty hours of instruction in safety training. Both programs included training in the use of fall protection and fall harness systems, and the claimant testified that OSHA regulations require fall protection whenever a person is working more than ten feet off the ground.

On September 29, 2010, the claimant also completed an employer-sponsored safety program, an introduction to "Target Zero," which had as its goal zero accidents on the employer's jobs. The employer's health and safety officer, Nick Ferro, testified that the employer required that employees use fall protection when working at a height of six feet or more and submit a written fall hazard analysis to the director of health and safety, Gary Thibodeaux, for approval. The employer also had its own safety manual prepared

by Thibodeaux, a copy of which the claimant acknowledged having received. The claimant had been designated the "competent person" at the job site, which, according to Thibodeaux, is defined by OSHA as "someone that has the training and experience to recognize a hazard and has the authority to make corrective actions." September 6, 2011 Transcript, p. 147. Thibodeaux also testified that the employer required fall protection for anyone working at a height of six feet or more, and in light of the claimant's training and background, the claimant met the standard of "competent person" on the job site.

Nick Ferro testified that on January 25, 2011, two days before the date of injury, he met with the claimant at the job site and discussed, *inter alia*, the implementation of a fall protection plan. Ferro indicated that he confirmed that there was "adequate fall protection on the job site" on both January 25, 2011 and January 27, 2011. Id., at 176. On January 26, 2011, the claimant completed a Demolition Safety Supervisor Audit in which he indicated that the personal fall arrest equipment was "in good condition." Respondents' Exhibit 7. On the same date, the claimant also completed a "Daily Huddle – Project Safety Meeting Report" which documented that the required daily meeting had been held that day and the use of fall protection had been discussed.

The claimant acknowledged that he was aware of the employer's policy requiring fall protection for anyone working at a height of six feet or more and agreed with Ferro and Thibodeaux that the employer's standards for fall protection were stricter than OSHA's. However, the claimant also testified that he did not believe he had been provided with either enough manpower or the correct equipment to properly perform the

demolition and his request for different equipment was denied by the employer.[1] In addition, the claimant's father, himself a former employee of the respondent employer, testified that he considered the manner in which the job was being performed was too dangerous and different equipment should have been utilized. The claimant also testified at length regarding the pressure he felt from the employer to complete the job, and the claimant's former supervisor, John Kennedy, who is no longer with the employer, acknowledged that because the job was losing money for the employer, he had urged the claimant to finish the demolition "as quickly as possible." Id., at 72. Nevertheless, the claimant acknowledged that going up in a man-lift is inherently dangerous and his failure to use safety equipment was unreasonable and constituted a grave breach of OSHA and LVI rules. He also admitted that he had access to the protective equipment and had increased his risk of injury by failing to use fall protection equipment.

The trier concluded that the claimant was "well educated" in workplace safety and particularly in the use of fall protection equipment and, as such, it was his "duty and responsibility to use fall protection equipment." Conclusion, ¶ B. The trier determined that in light of the claimant's experience, knowledge of workplace safety, position as a supervisor, and training, the claimant's conduct was "reckless and unreasonable." Conclusion, ¶ D. The trier also concluded that it was serious and willful misconduct for the claimant to neglect to use the fall protection equipment, and that despite the claimant's testimony that he never intended to injure himself, willful misconduct is not limited to situations when a claimant either "verbally expresses his intention to flout safety rules or admits on testimony that he acted after consciously deciding to ignore

[1] A third individual had been assigned to work with the claimant and his brother on the date of the accident but he did not show up; John Kennedy testified that January 27, 2011 was a snow day and not everyone had reported to work. September 6, 2011 Transcript, p. 69.

safety rules." Conclusion, ¶ G. The trier found it was not credible to conclude that a "competent person" with the claimant's experience and training would neglect to use a safety harness when operating a man-lift several feet above a demolition site.

In addition, the trier found that the claimant's testimony regarding the alleged shortcomings of the equipment provided for the demolition was not the correct issue before the trier and, moreover, the pressure experienced by the claimant to complete the demolition as quickly as possible did not excuse his failure to use safety equipment. The trial commissioner dismissed the claim, declining, in light of the dismissal, to rule on the issue of whether the claimant was in the course of his employment when he was injured.

The claimant filed a Motion to Correct, which was granted in part.[2] On appeal, the claimant contends that the trial commissioner erroneously determined that the testimony regarding the equipment provided for the demolition was not the correct issue before the trier. The claimant also claims as error the trial commissioner's conclusion that the claimant's failure to use fall protection constituted willful misconduct. In addition, the claimant asserts that the trier erred in determining that it was not credible that a "competent person" would fail to use fall protection when operating a man-lift several feet above a demolition site. Finally, the claimant contends that the trier erroneously held that "willful misconduct" is not limited to situations "when a Claimant verbally expresses his intention to refuse to follow safety rules or admits on testimony that he acted after consciously deciding to ignore safety rules." Conclusion, ¶ G; Appellant's Brief, p. 29.

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[2] Our review of the balance of the proposed corrections suggests that the claimant is merely reiterating the arguments made at trial which ultimately approved unavailing. As such, we find no error in the trier's decision to deny the balance of the claimant's Motion to Correct. D'Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003).

The standard of deference we are obliged to apply to a trial commissioner's findings and legal conclusions is well-settled.

> … the 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).

We begin with an analysis of the claimant's assertion that the trial commissioner erroneously concluded that the testimony regarding the equipment and manpower provided by the employer was not the correct issue before the trier. The claimant asserts that the testimony "goes to the credibility of Claimant in stating that he forgot to use the harness and fall protection equipment because he was inexperienced with the equipment he was using, the manner in which it was being used, with only his brother to help him and that he was being rushed by his bosses to get the job done." Appellant's Brief, p. 27. We disagree with the claimant's interpretation of this finding for several reasons. First, we note that the trier specifically stated that she had found credible the claimant's

testimony regarding "the pressure he felt to complete the job quickly and his dissatisfaction with the equipment and manpower with which he was provided…." Conclusion, ¶ H. Moreover, while we recognize that the trier's statement that it was "not credible to conclude that a demolition supervisor, a 'competent person,' with the experience and training of the Claimant would fail to use a safety harness while operating a man-lift and working several feet above a demolition site," Conclusion, ¶ I, may appear on its face to be a credibility finding, we note that the trier also found that "[t]he pressure the Claimant was under to complete his work as quickly as possible, with the least number of man-hours, does not excuse his failure to use safety equipment." Conclusion, ¶ J. As such, it may be reasonably inferred that although the trier believed the claimant's testimony relative to the pressure he felt to complete the job and his dissatisfaction with the equipment and manpower he had been given, the concerns raised by the claimant simply did not rise to the level that would mitigate the trier's ultimate conclusion that the claimant's actions in going up in the man-lift without fall protection constituted willful misconduct. The trier retained the discretion to identify the latter as the issue properly before her and we find no error in her doing so.

The claimant also contends that the trier "failed to hold the Employer to its burden of proof on the special defense of 'willful misconduct' … but instead placed the burden of proof on the Claimant and ignored his testimony about why he forgot to use his fall protection." (Internal citation omitted.) Appellant's Brief, p. 9. In light of the claimant's testimony at trial that his failure to use fall protection was an "honest mistake" rather than an intentional attempt to injure himself, September 6, 2011 Transcript, p. 91, the claimant asserts that the "burden of proof was on the respondents to show that there was willful

misconduct and there was no credible testimony or evidence that failure to use the fall protection was willful rather than negligent." Id., at 28. However, our review of the evidentiary record indicates, contrary to the assertion of the claimant that the respondents adduced more than sufficient testimony from which the trial commissioner could properly infer that the claimant's actions constituted willful misconduct.

Section 31-284(a) C.G.S. absolves an employer from liability for payment of workers' compensation benefits in situations "when the personal injury has been caused by the wilful and serious misconduct of the injured employee or by his intoxication."[3] In Gonier v. Chase Companies, Inc., 97 Conn. 46 (1921), our Supreme Court defined misconduct as follows:

> Misconduct is any improper or wrong conduct. And when such misconduct is not trivial but grave in character, it becomes the serious misconduct of the statute, that is, improper conduct of a grave and aggravated character. Whether misconduct is serious is to be determined from its nature and not from its consequences…. Misconduct which exposed the deceased to serious injury would be serious misconduct. Not only must the misconduct be of this grave character, but under the statute it must also be wilful. By wilful misconduct is meant either intentional misconduct, that is, such as is done purposely with knowledge, or misconduct of such a character as to evince a reckless disregard of consequences to himself by him who is guilty of it. (Internal citation omitted.)

Id., at 55-56.

Moreover, "ordinary negligence could never be even serious misconduct, much less wilful misconduct.… No misconduct which is thoughtless, heedless, inadvertent or of the moment, and none which arises from an error of judgment, can be 'wilful and

[3] Section 31-284(a) C.G.S. (Rev. to 2011) states, in pertinent part: "An employer who complies with the requirements of subsection (b) of this section shall not be liable for any action for damages on account of personal injury sustained by an employee arising out of and in the course of his employment or on account of death resulting from personal injury so sustained, but an employer shall secure compensation for his employees as provided under this chapter, except that compensation shall not be paid when the personal injury has been caused by the wilful and serious misconduct of the injured employee or by his intoxication."

serious misconduct'…. Nor will every violation of a statute or a public regulation, or a rule, regulation, order or instruction of an employer, constitute wilful and serious misconduct." (Internal citations omitted.) Id., at 56.

The court also stated,

> [t]he defense of wilful and serious misconduct is an affirmative one. The burden of establishing it is on the employer…. Since the finding is one of fact, the court on review will not hold this conclusion erroneous unless the facts clearly show this to be so; and in reaching its decision the reviewing court will keep before it the fact that the employer has the duty of proving this defense. (Internal citation omitted.)

Id., at 58.

Subsequently, in Mancini v. Scovill Mfg. Co., 98 Conn. 591 (1923), the court slightly amended this definition, stating, relative to its prior statement in Gonier, supra, that "[m]isconduct which exposed the deceased to serious injury would be serious misconduct,"

> [w]e should have used 'might' for 'would' to express the idea of the context. Misconduct which exposed an employee to serious injury might or might not be serious misconduct, depending on whether the misconduct was of a grave and aggravated character, and whether its character was known to and appreciated by the employee.

Mancini, supra, at 597.

Thus, in Gonier, supra, our Supreme Court advised the Superior Court for New Haven County, which had reserved the claim, to affirm the trier's Finding and Award in a matter wherein the respondents had asserted the defense of willful misconduct. The claim was brought by a survivor of a painter who fell from scaffolding and died after suffering an attack of indigestion. Although the record indicated that the claimant had lost consciousness in the past following such attacks, and in fact three months earlier his

personal physician had recommended that he stop working in high places because of his susceptibility to these attacks, the record also indicated that just before his fall, the decedent had appeared to recover from the attack and did not fall until he attempted to stand up on the scaffolding and resume his duties. The court, remarking that the decedent had generally been able to anticipate such attacks in the past and protect himself, and "the doctor's advice may not have been in his memory" at the time of the attack, concluded that the trier had not erred in finding the claimant did not commit serious or willful misconduct. Id., at 58.

> [The claimant] did not continue to work knowing at this time of his liability to suffer one of these spells of unconsciousness which would be likely to cause him to fall, so that his course could not be found to have been done purposely with knowledge. Neither could it be said that the circumstances show on his part a reckless disregard of consequences for his own safety.

Id.

Similarly, in Mancini, the court again advised the Superior Court of New Haven County, which had reserved the matter, to affirm a *pro forma* award of the trial commissioner in a claim brought by a machine worker who sustained injuries while using a machine to crush pieces of brass. Although the record indicated that the foreman on the job had specifically instructed the claimant to use forceps, rather than her fingers, to place the brass pieces under the press, the claimant essentially disregarded this advice and, after using the forceps for some period of time, returned to placing the brass pieces on the press with her fingers and eventually injured her left index finger.[4] The court framed the issue as follows: "whether the violation of a reasonable safety-rule which had been

[4] The record indicated that because workers were paid by the piece, more experienced workers would generally use their fingers as it was faster.

brought to the attention of the claimant and which was customarily enforced is, under the laws of Connecticut, the equivalent of serious and willful misconduct." Id., at 595.

The court concluded that although the foreman had warned the claimant to use the forceps, "there was no attempt made to make this employee understand and appreciate the danger of this work, the reason for the use of the forceps, and the fact of the safety-rule and the reason for its existence." Id., at 600. As such, although the claimant's disregard of the foreman's instructions was "improper," the trier could not have found serious misconduct unless "it appeared that the plaintiff fully knew and appreciated that her misconduct would expose her to serious injury, and, so knowing and appreciating, did the act in violation of her instruction, from which her injury resulted." Id.

However, in a case of somewhat more recent vintage, Paternostro v. Arborio Corp., 56 Conn. App. 215 (1999), *cert. denied*, 252 Conn. 928 (2000), our Appellate Court affirmed the trier's denial of § 31-306 C.G.S. benefits to the widow of an individual who, while employed as a member of a road crew, was struck and killed by an automobile while walking across Interstate 84.[5] The decedent, who was found to have been intoxicated at the time of his death, had "parked the company truck on the left shoulder of the highway and, in contravention of company policy, walked across three highway lanes to fix a sign located on the right shoulder of the highway." Id., at 216. The court noted that the commissioner had found that although the decedent was a union

[5] Sec. 31-306 (Rev. to 1999) states, in pertinent part: "(a) Compensation shall be paid to dependents on account of death resulting from an accident arising out of and in the course of employment or from an occupational disease as follows:
(1) Four thousand dollars shall be paid for burial expenses in any case in which the employee died on or after October 1, 1988. If there is no one wholly or partially dependent upon the deceased employee, the burial expenses of four thousand dollars shall be paid to the person who assumes the responsibility of paying the funeral expenses.
(2) To those wholly dependent upon the deceased employee at the date of his injury, a weekly compensation equal to seventy-five per cent of the average weekly earnings of the deceased calculated pursuant to section 31-310…."

steward who was responsible for "[communicating] with management regarding safety and personnel issues," id., at 221, he had consumed alcohol while on duty, in contravention of company policy, and "the area where the decedent attempted to cross the highway was at a dimly lit and heavily traveled sharp curve in the interstate highway." Id. In light of these findings, the court, having defined reckless misconduct as "highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent," Dubay v. Irish, 207 Conn. 518, 533 (1998), *quoting* W. Prosser and W. Keeton, Torts (5th Ed.) 34, p. 214, concluded that the decedent's multiple "rules violations could properly be considered to be grave, aggravated and highly unreasonable conduct representing an extreme departure from ordinary care, where a high degree of danger existed." Paternostro, supra. Of particular note to our analysis is the court's observation that, "[a]s a member of the sign crew and as the union steward, [the decedent] was trained and familiar with the safety procedures for erecting the warning signs." Id., at 216.

Turning to the matter at bar, we note at the outset that the transcript of the formal hearing held in this matter on September 6, 2011 is indeed rife with testimony from the claimant attesting to his concerns about the pressures he felt to complete the demolition job quickly and his misgivings regarding the suitability of the equipment and the sufficiency of the "manpower" he had been given to do it. See, e.g., September 6, 2011 Transcript, pp. 17-30, 76-79. We also note that the claimant indicated that he "forgot" to use a safety harness, id., at 24, 87, and that his failure to use the safety equipment was "an accident," id., at 89, 117, and an "honest mistake." Id., at 91. However, the claimant also testified that (1) he underwent safety training prior to coming to work for LIV, id., at

97; (2) he completed the OSHA 10 and OSHA 30 training modules as required by LIV, both of which contained information relative to fall protection, id., at 99-100; (3) he completed an in-house management/supervisory program, id., at 97; and (4) he was given a copy of the in-house safety handbook (which contained a section devoted to fall protection), signed a document acknowledging its receipt and agreeing to abide by the rules in the handbook, and passed a written examination based on the handbook. Id., at 97-101.

The claimant also conceded that in view of his role as a supervisor, he had an obligation to follow the employer's rules and safety procedures, id., at 101, and that if he saw another worker operating a man-lift without a safety harness, it was his responsibility to tell that individual to use the proper equipment. Id., at 114. The claimant indicated that he had conducted the daily "safety huddle" on the date of his injury at which the use of fall protection was discussed, id., at 104-105, the required safety equipment was "easily accessible," id., at 108, and he was familiar with how to use it. Id., at 115. Finally, the claimant admitted that his failure to wear the safety equipment constituted "highly unreasonable conduct" and a "grave breach" of OSHA and LIV rules. Id., at 117.

In addition to the testimony proffered by the claimant, the trier heard testimony offered by several representatives of the employer.[6] John Kennedy, the claimant's project manager on the date of injury, indicated that the claimant occupied a supervisory role with the employer and, as such, was responsible for telling other workers to utilize

[6] The claimant's father, William Disotell, himself a former employee of LIV, also testified. While he echoed many of the claimant's concerns relative to the manpower and equipment provided for the demolition, he also admitted that his son's decision not to use fall protection was a violation of both OSHA and LIV rules. September 6, 2011 Transcript, p. 124.

safety protection.[7] Id., at 41, 59. Kennedy also testified that on January 24 through January 27, 2011, the claimant ran the daily "safety huddles" at which fall protection was one of the issues discussed. Id., at 58. Kennedy stated that the claimant's use of the man-lift placed the claimant in a "high degree of danger," and the claimant had increased the risk to himself by his failure to use fall protection. Id., at 60-61.

The respondents also called Gary Thibodeaux, the respondent employer's director of health and safety. Thibodeaux confirmed the claimant had received OSHA training in addition to the employer-sponsored safety training, and indicated that the claimant, as an approved supervisor, had a "duty" to "ensure safe work practices." Id., at 132. Thibodeaux opined that the claimant was "well versed" in fall protection, id., at 133, and had prematurely embarked on the beam removal before submitting the required fall protection plan. Id., at 143. Thibodeaux indicated that the claimant, as the "competent person" on the job site, had "the training and experience to recognize a hazard and [had] the authority to make corrective actions."[8] Id., at 146-147. Thibodeaux testified that if the claimant had been wearing a safety harness, he would not have hit the ground and been injured; thus, the claimant's failure to wear safety protection was a substantial contributing factor to his injuries and a breach of LVI rules and constituted highly unreasonable conduct.[9] Id., at 153-155.

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[7] John Kennedy indicated that he had been laid off by the employer in spring of 2011 and testified under a subpoena. September 6, 2011 Transcript, pp. 34-35.

[8] At trial, Gary Thibodeaux testified that OSHA, in its report following the accident, initially challenged LVI's claim that the claimant was the designated on-site "competent person" and LVI was appealing the citation. September 6, 2011 Transcript, p. 148. The record indicates that in a settlement agreement between OSHA and the employer dated January 3, 2012, OSHA deleted this particular citation. Respondents' Exhibit I.

[9] Gary Thibodeaux testified that it was his understanding that the claimant had actually gone up in the man-lift twice; first, to cut some bolts in the beam and then, when the beam still would not come down, a second time in an attempt to cut the beam itself. September 6, 2011 Transcript, p. 164.

The respondents also called Nick Ferro, a health and safety officer for LVI. As had Kennedy and Thibodeaux, Ferro confirmed that the claimant had completed the in-house safety training, passed the employer safety manual examination, and obtained OSHA 10 and OSHA 30 training. Id., at 169-170. Ferro also concurred with Kennedy and Thibodeaux that the claimant, in light of his role as a supervisor, was responsible for making sure that other employees utilized fall protection. Id., at 171. Ferro indicated that he met with the claimant at the work site on January 25, 2011 and they discussed the necessity for coming up with a fall protection plan. Id., at 171-173. Ferro stated that there was sufficient, "easily accessible" fall protection equipment at the work site, id., at 175-176, and he was actually on his way back to the worksite on January 27, 2011 to begin the engineering plan when he received a phone call regarding the accident. Id., at 185. As had the prior witnesses for the respondent, Ferro testified that the claimant's failure to wear protective equipment was a substantial contributing factor to his injuries, a "grave breach" of LVI and OSHA rules, and constituted highly unreasonable conduct. Id., at 179-180.

Having reviewed the foregoing, we find that under the particular facts of this matter, the record provides ample support for the trier's determination that the claimant's decision to ascend in a man-lift without utilizing the required safety protection constituted willful and serious misconduct as contemplated by § 31-284(a) C.G.S. The record shows that the claimant, by his own admission, had not only been extensively trained in safety procedures but, in light of his role as a supervisor, was also responsible for ensuring that other individuals on the work site utilized appropriate protection as well. It may thus be reasonably inferred that the trier found the facts of this matter to be far

more on point with the factual pattern found in Paternostro, supra, than the fact patterns of either Gonier, supra, or Mancini, supra. Moreover, although the claimant has gone to great lengths to characterize his failure to utilize safety equipment as a momentary lapse in judgment, e.g., "thoughtless, heedless, inadvertent or of the moment," Appellant's Brief, p. 16, *quoting* Gonier, supra, at 56, we find, rather, that the instant record provides a more than adequate basis for the trier's conclusion that the claimant's conduct was "reckless and unreasonable." Conclusion, ¶ D.

In addition, we find, contrary to the assertion of the claimant, that the trial commissioner correctly held that a finding of willful misconduct is not limited to situations "when a Claimant verbally expresses his intention to refuse to follow safety rules or admits on testimony that he acted after consciously deciding to ignore safety rules." Appellant's Brief, p. 29. See also Conclusion, ¶ G. We find support for the trier's determination in Gonier, supra, wherein the court explicitly stated that willful misconduct can be "either intentional misconduct, that is, such as is done purposely with knowledge, or misconduct of such a character as to evince a reckless disregard of consequences to himself by him who is guilty of it." Gonier, supra, at 55-56. See also Caraher v. Sears, Roebuck & Co., 124 Conn. 409, 415 (1938). Thus, while the claimant is accurate in his assertion that the record contains no evidence that the claimant ever intended to hurt himself, a reasonable reading of Gonier also makes it clear that a finding of willful misconduct is not restricted to such a scenario.

Again, as stated previously herein, under the particular facts of this matter, we find it was well within the trier's discretion to assess the claimant's actions against the context of the relevant case law and render the decision that the claimant's actions

constituted willful misconduct. This board is simply not empowered to reverse such a discretionary finding on review absent a finding of clear error.

> Whether one violation or repeated violations will constitute wilful and serious misconduct must depend upon the circumstances, notably upon the nature of the misconduct and the character of the statute, regulation, rule, order or instruction violated. Each case must be weighed and determined by its own circumstances. What is serious [misconduct] is primarily a question of fact, as is a finding of negligence. So similarly, what is wilful misconduct is a question of fact.

Gonier, supra, at 57.

There is no error; the Finding and Dismissal of the Trial Commissioner acting for the Third District is hereby affirmed.[10]

Commissioners Jodi Murray Gregg and Daniel E. Dilzer concur in this opinion.

[10] No expert testimony was adduced relative to whether the claimant may have sustained his injuries by being struck by the steel beam while still in the man-lift. In light of the lack of an evidentiary record on the issue, we decline to review the trier's findings in this regard on appeal. See Conclusions, ¶¶ L, M.