

CASE NO. 5779 CRB-8-12-9
CLAIM NO. 800154659

: COMPENSATION REVIEW BOARD

SUZANNE CHOWANIEC
CLAIMANT-APPELLEE

: WORKERS' COMPENSATION
COMMISSION

v.

: SEPTEMBER 9, 2013

TOWN OF MIDDLEFIELD
EMPLOYER

and

PMA CUSTOMER SERVICE CENTER
INSURER
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by Laura Ondrush, Esq., The
Dodd Law Firm, L.L.C., Ten Corporate Center, 1781
Highland Avenue, Suite 105, Cheshire, CT 06410.

The respondents were represented by Colette S. Griffin,
Esq., Howd and Ludorf, L.L.C., 65 Wethersfield Avenue,
Hartford, CT 06114-1190.

This Petition for Review from the September 4, 2012
Finding and Award of the Commissioner acting for the
Eighth District was heard on April 26, 2013 before a
Compensation Review Board panel consisting of
Commission Chairman John A. Mastropietro and
Commissioners Charles F. Senich and Peter C.
Mlynarczyk.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondents have petitioned for review from the September 4, 2012 Finding and Award of the Commissioner acting for the Eighth District. We find error and accordingly affirm in part and reverse in part the decision of the trial commissioner.¹

The trial commissioner made the following factual findings which are pertinent to our review. As of September 17, 2006, the claimant was, and had been for a significant period of time, a volunteer firefighter with the respondent town's volunteer fire company. The claimant was also employed full-time as a nurse. On the date in question, the claimant was setting up a volunteer fire company fundraising booth at the Durham Fairgrounds a week or so before the fair was scheduled to begin. Once the fair began, the booth would be manned by members of the volunteer fire company, and the funds raised would be used to pay for firefighting equipment, social events, etc. The claimant had been involved in this project in prior years and it was "part of her committee assignment." Findings, ¶ 4. While setting up the booth, the claimant fell off a ladder and sustained an injury to her left leg. The claimant was taken to Middlesex Hospital Emergency Room and thereafter came under the care of Bruce Moeckel, M.D. As a result of the injury to her left leg, the claimant was out of work for a period of time.

The trial commissioner identified as the primary issue before him the question of whether § 7-314(a) was applicable to the injury of September 17, 2006.² Noting that he

¹ We note that two motions for extension of time were granted during the pendency of this appeal.

² Section 7-314(a) C.G.S. (Rev. to 2005) states: "Wherever used in this section and sections 7-314a and 7-322a ...the term 'fire duties' includes duties performed while at fires, while answering alarms of fire, while answering calls for mutual aid assistance, while returning from calls for mutual aid assistance, while

found the claimant's "claim to be the most credible," Conclusion, ¶ 12, the trier concluded that § 7-314(a) was applicable and the claimant's fundraising activities were part of the claimant's duties as a member of the volunteer fire company "as defined, expressly or implicitly, by Section 314(a)." Conclusion, ¶ 13. The trial commissioner determined that the claimant's left leg injury of September 17, 2006 "arose out of and in the course of her employment as a volunteer firefighter for the respondent," Conclusion, ¶ 14, and ordered the respondents to "pay all reasonable and necessary benefits" associated with the claim.³ Conclusion, ¶ 15.

The respondents filed a Motion to Correct and a Motion for Articulation, both of which were denied in their entirety, and this appeal followed. On appeal, the respondents raise a number of issues, the gravamen of which is that the trial commissioner erred in concluding that § 7-314(a) C.G.S. applied to the claimant's injury of September 17, 2006 and, even if, *arguendo*, § 7-314(a) C.G.S. did apply, the trier erroneously determined that the circumstances surrounding the claimant's activities at the fundraising booth satisfied the provisions of the statute.

The standard of review we are obliged to apply to a trial commissioner'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

directly returning from fires, while at fire drills or parades, while going directly to or returning directly from fire drills or parades, while at tests or trials of any apparatus or equipment normally used by the fire department, while going directly to or returning directly from such tests or trials, while instructing or being instructed in fire duties, while answering or returning from ambulance calls where the ambulance service is part of the fire service, while answering or returning from fire department emergency calls and any other duty ordered to be performed by a superior or commanding officer in the fire department...."

³ Section 31-275(1) C.G.S. (Rev. to 2005) states: "Arising out of and in the course of his employment' means an accidental injury happening to an employee or an occupational disease of an employee originating while the employee has been engaged in the line of the employee's duty in the business or affairs of the employer upon the employer's premises, or while engaged elsewhere upon the employer's business or affairs by the direction, express or implied, of the employer...."

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 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).

We begin with the respondents’ claim of error relative to the applicability of the provisions of § 7-314(a) C.G.S. to the claimant’s injury of September 17, 2006. The respondents contend that the trial commissioner improperly applied § 7-314(a) C.G.S. given that the statute “does not pertain to compensability of certain activities engaged in by volunteer firefighters, but rather discusses activities subject to and exempted from disclosure pursuant to the Freedom of Information Act (“FOIA”). Appellants’ Brief, p. 9. As such, the statute does not provide “any direction whatsoever concerning a volunteer firefighter’s entitlement to workers’ compensation benefits, which is governed by § 7-314a and § 7-314b.”⁴ *Id.* Having examined the language of the statutes in question, we

⁴ Section 7-314a C.G.S. (Rev. to 2005), which is entitled “Death, disability and injury benefits. Presumption,” states, in pertinent part: “(a) Except as provided in subsections (e) and (f) of this section, active members of volunteer fire departments and active members of organizations certified as a volunteer ambulance service in accordance with section 19a-180 shall be construed to be employees of the municipality for the benefit of which volunteer fire services or such ambulance services are rendered while in training or engaged in volunteer fire duty or such ambulance service and shall be subject to the jurisdiction of the Workers' Compensation Commission and shall be compensated in accordance with the provisions of chapter 568 for death, disability or injury incurred while in training for or engaged in volunteer fire duty or such ambulance service.”

Section 7-314b (C.G.S.) (Rev. to 2005), which is entitled “Collection of workers' compensation benefits by volunteer firefighters and members of volunteer ambulance services,” states: “(a) Any active member of a

do not find persuasive the respondents' interpretation of the scope of the statute's provisions.

We note at the outset that § 7-314 C.G.S. is entitled, "Definitions. Exemption from Freedom of Information Act," and § 7-314(a) specifically states, inter alia, that:

Wherever used in this section *and sections 7-314a and 7-322a, ...* the term 'fire duties' includes duties performed while at fires, while answering alarms of fire, while answering calls for mutual aid assistance, while returning from calls for mutual aid assistance, while directly returning from fires, while at fire drills or parades, while going directly to or returning directly from fire drills or parades, while at tests or trials of any apparatus or equipment normally used by the fire department, while going directly to or returning directly from such tests or trials, while instructing or being instructed in fire duties, while answering or returning from ambulance calls where the ambulance service is part of the fire service, while answering or returning from fire department emergency calls *and any other duty ordered to be performed by a superior or commanding officer in the fire department...."* (Emphasis added.)

Section 7-314(a) C.G.S.

It is thus quite clear that § 7-314(a) C.G.S. specifically contemplates its application to § 7-314a C.G.S. Turning, then, to an examination of § 7-314a C.G.S., we

volunteer fire company or department engaged in volunteer fire duties or any active member of an organization certified as a volunteer ambulance service in accordance with section 19a-180 may collect benefits under the provisions of chapter 568 based on the salary of his employment or the amount specified in subsection (b) of section 7-314a, whichever is greater, if said firefighter or volunteer ambulance service provider is injured while engaged in fire duties or volunteer ambulance service.

"(b) As used in this section, the terms 'fire duties' includes duties performed while at fires, answering alarms of fire, answering calls for mutual aid assistance, returning from calls for mutual aid assistance, at fire drills or training exercises, and directly returning from fires, 'active member of a volunteer fire company or department' includes all active members of said fire company or department, fire patrol or fire and police patrol company, whether paid or not paid for their services, 'ambulance service' includes answering alarms, calls for emergency medical service or directly returning from calls for the emergency situations, duties performed while performing transportation or treatment services to patients under emergency conditions, while at any location where emergency medical service is rendered, while engaged in drills or training exercises, while at tests or trials of any apparatus or equipment normally used in the performance of such medical service drills, and 'active member of an organization certified as a volunteer ambulance service in accordance with section 19a-180' includes all active members of said ambulance service whether paid or not paid for their services."

"(c) The provisions of subsection (a) of this section shall only apply if the volunteer firefighter or volunteer ambulance service provider is unable to perform his regular employment duties."

note that the statute, which is entitled “Death, disability and injury benefits. Presumption,” states, inter alia, the following:

(a) Except as provided in subsections (e) and (f) of this section, active members of volunteer fire departments and active members of organizations certified as a volunteer ambulance service in accordance with section 19a-180 shall be construed to be employees of the municipality for the benefit of which volunteer fire services or such ambulance services are rendered while in training or engaged in volunteer fire duty or such ambulance service and *shall be subject to the jurisdiction of the Workers' Compensation Commission and shall be compensated in accordance with the provisions of chapter 568 for death, disability or injury incurred while in training for or engaged in volunteer fire duty or such ambulance service.* (Emphasis added.)

Section 7-314a C.G.S.

Having reviewed the exact language of the statutes in question, we disagree with the respondents’ contention that the provisions of § 7-314(a) C.G.S. are inapplicable to the matter at bar, given that the statute specifically provides for the award of workers’ compensation benefits to claimants who are injured while carrying out the enumerated statutory duties. We are similarly unpersuaded by the respondents’ attempt to limit the scope of the definition set forth in § 7-314(a) C.G.S. to the provisions of § 7-314(b) C.G.S.⁵ Our review of § 7-314(b) C.G.S. indicates that the statute pertains to the exclusion of volunteer fire department records regarding “fraternal or social matters” from the disclosure requirements of the Freedom of Information Act. While it cannot be disputed that fundraising activity would likely be considered a fraternal or social matter,

⁵ Section 7-314(b) C.G.S. (Rev. to 2005) states: “The records and meetings of a volunteer fire department which is established by municipal charter or constituted as a not-for-profit Connecticut corporation shall not be subject to the provisions of the Freedom of Information Act, as defined in section 1-200, if such records and meetings concern fraternal or social matters. Records and meetings concerning matters of public safety, expenditures of public funds or other public business shall be subject to disclosure under said sections.”

the FOIA status of fundraising activity pursuant to § 7-314(b) C.G.S. does not appear to have any relevance to the matter before us.

Moreover, in Evanuska v. Danbury, 285 Conn. 348 (2008), the Supreme Court, in conducting its analysis of whether claimants' participation in a "work party" convened for the purpose of repairing the firehouse roof fell within the statutory definition of "fire duties," relied upon the definition of fire duties as set forth in § 7-314(a) C.G.S.⁶ The Evanuska court identified "two possible procedural routes to obtain workers' compensation benefits for volunteer firefighters," *id.*, at 361, and drew a distinction between obtaining workers' compensation via § 7-314(a) C.G.S. and § 7-314b C.G.S., noting that the latter statute, which contains a more narrow definition of fire duties, is available only to active volunteer firefighters who have both "been injured while performing 'fire duties' *and* are unable to perform regular employment duties...."⁷ (Emphasis in the original). *Id.* In discussing the differing eligibility standards for benefits under the two statutes, the court noted that the legislature did not limit the definition of fire duties in § 7-314(a) C.G.S. when it enacted § 7-314b C.G.S. "The legislature's failure similarly to limit the definition of 'fire duties' under § 7-314(a) when they enacted § 7-314b in 1995; see Public Acts 1995, No. 95-243, § 2; reinforces our conclusion that it did not intend for the scope of § 7-314(a) to be limited to fire fighting or training situations." *Id.*

⁶ In Evanuska v. Danbury, 285 Conn. 348 (2008) the Supreme Court, in reversing the Appellate Court and this board's affirmance of the trier's dismissal of the claim, concluded that the trial commissioner had applied an incorrect interpretation of § 7-314(a) C.G.S. and remanded the matter for additional findings. The Supreme Court did not hold that the provisions of the statute were inapplicable to the facts as presented.

⁷ See footnote 4, *supra*.

In light of the foregoing, we therefore find no error in the trier commissioner's decision to apply the provisions of § 7-314(a) C.G.S. in reaching his findings in the instant matter.

In a separate claim of error, the respondents also assert that the trial commissioner's findings in this matter must be reversed because "the claimant has produced no evidence supporting that she was ordered and/or required to attend the Durham Fair on September 17, 2006." Appellants' Brief, p. 17. In light of the lack of evidence adduced on this point, the respondents aver that the trial commissioner should have dismissed the claim, and his failure to do so constituted a break with the binding precedent set forth in Evanuska, supra. We agree.

As referenced previously herein, in Evanuska, the Supreme Court was called upon to determine whether two volunteer firefighters who sustained injuries while repairing the roof of the firehouse during a "work party" were "engaged in 'fire duties,' as defined in General Statutes § 7-314(a)" at the time of their injuries.⁸ Id., at 350. Noting that the "catch-all provision," id., at 366, (i.e., "any other duty ordered to be performed by a superior or commanding officer,") is not defined by the statute, the court determined that pursuant to the "common meaning," id., at 358, of the terms, "in order to obtain compensation, the plaintiffs must have had an obligation, due to their position as volunteer firefighters, to perform firehouse repairs; they must have been commanded or instructed to make the repairs; and that instruction must have come from a person or persons of higher rank or authority." Id., at 359. The court observed:

It is common knowledge that volunteer firefighters have been called on to perform community service calls, such as rescuing a

⁸ The claim was originally brought by three volunteer firefighters, one of whom subsequently withdrew from the appeal.

cat stranded in a tree or providing fire safety lessons at a local school *or to participate in fundraising activities necessary to support firehouse needs*, to name but a few tasks that firefighters might be obligated to perform. (Emphasis added.)

Id., at 362.

However, the court also remarked that “[w]hether any such undertaking would constitute a ‘fire duty’ under § 7-314 (a), however, necessarily would depend on the facts of each case establishing a duty ordered to be performed by a superior or commanding officer.” Id., fn. 8. As such, the court concluded that,

when applying § 7-314 (a), the commissioner carefully must assess testimony stating that volunteer firefighters ‘donated’ or ‘volunteered’ time or were ‘ordered’ to attend an event.... Therefore, when examining the record to determine if a ‘duty [was] ordered to be performed by a superior or commanding officer’ pursuant to § 7-314 (a), the commissioner should consider whether the firefighter could decline the assignment without cause and without the possibility of adverse consequences rather than whether the firefighter ‘volunteered’ or ‘donated’ time.

Id., at 366-367.

Turning to the matter at bar, we note that at trial, the claimant initially testified that she was preparing the booth for the Durham Fair as a result of “an ordered work detail.” April 23, 2012 Transcript, p. 9. See also p. 12. However, she later stated that she was a member of the Durham Fair committee and “every year we order work details a couple of times prior to the Durham Fair opening to set the building up, to clean it, to put up signs, to do any work that needs to get done on the building in order for it to run.” Id., at 14. As such, it cannot be reasonably inferred from the claimant’s testimony that the activities entailed in booth preparation occurred as a direct result of an order from a supervising or commanding officer. Furthermore, when queried as to whether there were “any requirements from the Town of Middlefield fire department that you participate in

the Durham, at the Durham Fair,” the claimant replied, “[i]t is requested that every firefighter at least work on one committee every year for the fundraising.” *Id.* Our review of the record did not reveal any additional testimony by the claimant on this issue.

The trier’s findings as to compensability are therefore highly problematic, given that the term “requested” is not synonymous with “required.” Moreover, no additional testimony was elicited from the claimant relative to the consequences which might stem from a volunteer firefighter’s refusal to participate in either the Durham Fair booth or fundraising activities in general. In fact, Peter Tyc, the chief of the Middlefield fire department at the time of the claimant’s formal hearing, offered essentially un rebutted testimony to the effect that serving on a committee was “requested, not required,” *id.*, at 21, and there were no adverse consequences for a volunteer firefighter failing to serve on a committee.⁹ *Id.* Similarly, Terry Parmelee, the chief of the Middlefield fire department at the time of the claimant’s injury, testified at deposition that while every member of the fire company was asked to sign up for three shifts at the booth, “[n]ot every member will work the fair booth, nor are they ordered to work the fair booth.” Respondents’ Exhibit 1, p. 22.

⁹ On direct examination, Peter Tyc testified as follows:

Q: So in other words, this was something that you basically were required to do if you weren’t on any other committees, correct?

A: No.

Q: Okay. What do you mean by that?

A: As far as required to be on a committee?

Q: Yes.

A: It is requested, not required.

Q: Okay. And what happens if somebody is not on a committee in the volunteer fire department?

A: Nothing.

Q: Okay. So have you known people who have not been on a committee in any given time?

A: Yes.

Q: And so they still remain with the department?

A: Yes.

April 23, 2012 Transcript, p. 21.

We would point out that the evidentiary record in the instant matter differs significantly from the record in Evanuska, supra, in which a copy of the application for volunteer membership in the fire company was submitted into evidence. This document, which listed the duties expected of a volunteer firefighter, specifically stated that one of the duties was to “[p]articipate in company functions such as work nights, *company fund raisers*, and attend wakes of deceased members of the company or of their immediate families.” (Emphasis added.) Evanuska, supra, at 352, fn. 3. The document also indicated that “[i]f the applicant, after six months, does not comply with these regulations, [t]he applicant shall be dismissed from this company and forfeit the application fee.” Id. In addition, the Evanuska record contained testimony from the vice chairman of the fire company’s board of managers indicating “that active members were obligated to attend work parties such as the one in effect on October 19, 2002, unless the member’s primary job or some family obligation prevented their attending....” Id., at 351. The vice chairman also “stated that disciplinary action could be taken against active members for their failure to appear at work parties....”¹⁰ Id., at 352.

In the instant matter, the trial commissioner stated that he “[accepted] the claimant’s position and testimony” and found “her claim to be the most credible.” Conclusion, ¶ 12. It is well-settled that findings of credibility are generally not subject to appellate review, given that “it is inappropriate to assess credibility without having watched a witness testify, because demeanor, conduct and other factors are not fully

¹⁰ In a concurrence to the Appellate Court case in this matter, Judge Gruendel remarked, “[t]o my mind, the commissioner’s factual findings indicate that, although the chief of the [fire] company never expressly commanded their participation, the plaintiffs and other members nevertheless were required to take part in work nights if they wanted to remain with the [fire] company. In the face of that reality, the argument that the participation merely was expected fails.” Evanuska v. Danbury, 99 Conn. App. 42, 52-53 (2007). (Gruendel, J., concurring.)

reflected in the cold, printed record.” Burton v. Mottolese, 267 Conn. 1, 40 (2003).

However, our review of the record indicates that the claimant’s testimony, even if taken in its entirety, simply does not allow for the reasonable inference that the circumstances surrounding the claimant’s activities at the Durham Fair fundraising booth on the date of injury satisfy the conditions necessary for the collection of benefits pursuant to § 7-314(a) C.G.S. in the manner contemplated by our Supreme Court in Evanuska. The claimant’s testimony does not suggest that she was participating in the Durham Fair fundraising activities as a result of an order from a commanding officer or that her failure to participate in the fundraising activities would result in “adverse consequences.” Evanuska, supra, at 367. As such, we are unable to sustain the findings of the trial commissioner in this regard.

The trial commissioner also found that the claimant’s fundraising activities were “part of her duties as defined, expressly or implicitly, by Section 314(a). The fundraising activities were for the benefit of the volunteer fire company.” Conclusion, ¶ 13.

Although we have determined that the record as presented does not support the inference that the claimant’s fundraising activities satisfies the requirements of § 7-314(a) C.G.S., we do concede that the claimant’s activities were indisputably for the benefit of the volunteer fire company. This is particularly so given that former Fire Chief Parmelee testified that the proceeds from the company’s fundraising activities were used to pay for firefighting equipment, thereby sparing the municipality the expense of paying for the equipment.¹¹ Respondents’ Exhibit 1, p. 27. We are also cognizant of the Supreme

¹¹ Former Fire Chief Parmelee testified that the fundraising “helps offset the cost to buy equipment.... We have bought extracation [sic] equipment with that. We have bought our special firefighting gear that we wear. That costs a lot of ... money. We use our funds to help offset the cost so the town taxes didn’t have to go up.” Respondents’ Exhibit 1, p. 27.

Court's admonition in Evanuska, supra, that a trial commissioner, in interpreting the meaning of the statutory phrase "any other duty ordered to be performed," § 7-314(a) C.G.S., must be,

mindful of the unique nature, in the realm of workers' compensation, of volunteer fire fighting. Every time a volunteer firefighter responds to a fire or emergency call or undertakes any action in his or her capacity as a firefighter, he or she is volunteering or donating time. Unlike a paid employee, a volunteer firefighter cannot be docked pay or deprived of employment benefits if he or she fails to meet attendance or other job requirements. Rather, as the evidence in the present case suggests, firefighters may be subject to disciplinary action or dismissal for failure to meet such requirements.

Id., at 366.

Nevertheless, while we realize that this decision is not without certain public policy implications, we also must recognize that as the law currently stands, entitlement to workers' compensation benefits under § 7-314(a) C.G.S. for injuries arising from fundraising activities does not hinge upon an assessment of the benefits derived by the municipality as a result of those fundraising activities.

Finally, the respondents claim as error the trial commissioner's denial of their Motion to Correct. Insofar as the trier's denial of the proposed corrections was inconsistent with the findings presented herein, the denial constituted error.¹²

There is error; the September 4, 2012 Finding and Award of the Commissioner acting for the Eighth District is hereby reversed.

Commissioners Charles F. Senich and Peter C. Mlynarczyk concur in this opinion.

¹² In light of the findings presented herein, we decline to address the respondents' additional claims of error.