CASE NO. 5809 CRB-3-12-12 : COMPENSATION REVIEW BOARD
CLAIM NO. 300085149

ROXANNE CUNNINGHAM : WORKERS' COMPENSATION
CLAIMANT-APPELLANT COMMISSION

v. : DECEMBER 31, 2013

SAINT RAPHAEL HEALTHCARE SYSTEM
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLEE

and

PMA OF NEW ENGLAND
ADMINISTRATOR

APPEARANCES:

The claimant was represented by Brian J. Mongelluzzo, Esq., and Nicholas R. Mancini, Esq., Law Offices of Brian J. Mongelluzzo, LLC, 1336 West Main Street, Suite 1B, Waterbury, CT 06708.

At oral argument, the respondent was represented by Neil J. Ambrose, Esq., Letizia, Ambrose & Falls, P.C., 667-669 State Street, New Haven, CT 06511. At the proceedings below, the respondent was represented by Michael P. McGoldrick, Esq., Siegel, O'Connor, O'Donnell & Beck, P.C., 150 Trumbull Street, Hartford, CT 06103.

This Petition for Review from the November 23, 2012 Finding and Dismissal of the Commissioner acting for the Third District was heard on June 28, 3013 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 claimant has petitioned for review from the November 23, 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.[1]

The trial commissioner made the following factual findings which are pertinent to our review. The claimant, who has been a registered nurse since 1985, alleged that she sustained compensable injuries when she fell on a raised section of sidewalk outside her employer's facility. The claimant testified that she was on an unpaid lunch break at the time and was returning to her work station after having gone to the employer's on-premises cafeteria to buy soup for a co-worker. The claimant explained that she had offered to pick up the soup because the co-worker was too busy. When the claimant discovered that the cafeteria did not have the soup, she decided to go out the front door of the hospital and walk along the sidewalk to re-enter by a side door located near Chapel Street; it was at this point that she fell.

The claimant indicated that she had been outside for approximately ten or twelve minutes when the accident occurred. When queried as to why she had not simply re-traced her steps, the claimant testified that on occasion she preferred to return to her work station by way of the sidewalk in order to get some fresh air. Although the claimant indicated that several times a week she would smoke during her lunch break at the employer-designated smoking area located on the other side of Sherman Street, she testified that on the date in question, she had not done so. After the fall, the claimant

[1] We note that a motion for extension of time was granted during the pendency of this appeal.

testified that she went back to her unit to wash her hands and encountered her supervisor, who instructed her to go to the occupational health center for treatment. After going to the occupational health center, the claimant returned to her unit to finish her charting.

Patricia Sullivan, the claimant's supervisor, also testified at the formal hearing. She remembered that the claimant had come to her office around 1:00 p.m. on March 10, 2009 looking "very disheveled and upset," May 7, 2012 Transcript, p. 72, to report that she had tripped on Sherman Avenue. On March 12, 2009, Sullivan prepared a "Supervisor's Accident Investigation Report" indicating that the claimant had fallen on Sherman Avenue and had injured her knee, the palms of her hands, and her forehead. Sullivan also completed an "Employer's First Report of Occupational Injury or Illness" on the same date indicating that the claimant was on Sherman Avenue during her lunch break when the incident occurred. This report also indicated that the claimant had injured her knee and forehead. Sullivan did not recall that the claimant's hands were bleeding after the incident but, rather, that they appeared to be scraped.

Sullivan also testified regarding the time sheets for the claimant and the co-worker for whom the claimant had ostensibly tried to purchase the soup. Sullivan confirmed that the claimant's time sheet showed that she had "punched out" at 12:52 p.m. on March 10, 2009 and punched back in at 12:57 p.m. Sullivan explained that the nursing care coordinator punched back in for the claimant following the incident. Sullivan also testified that the co-worker was scheduled to work from 7:00 a.m. to 11:00 a.m. on March 10, 2009 and had punched out for the day at 12:04 p.m.

The claimant provided rebuttal testimony indicating that the co-worker in question would occasionally continue working after she had punched out and that is what

had occurred on the date of the incident. The claimant denied having told Sullivan that she fell on Sherman Avenue. The claimant also testified that she went to purchase the soup because the co-worker was busy with charting; however, respondent's counsel pointed out that at the claimant's deposition, the claimant had indicated that she had gone because the co-worker was "tied up with a patient."

Sullivan also provided rebuttal testimony indicating, inter alia, that the co-worker did not have a history of continuing to work after punching out. The trial commissioner found that this statement was bolstered by the fact that the co-worker had evidently worked an extra hour on the date in question but remained on the clock. In addition, Sullivan also testified as to her belief that being "tied up with a patient" was not the same thing as doing paperwork. Transcript, pp. 107-108. In addition, she indicated that the Sherman Avenue entrance was a very popular entrance because it leads directly into the unit where the claimant worked and was therefore easier than using the front entrance.

The claimant did not return to work after the accident, and ultimately underwent bilateral laminotomies at L4-5 on June 9, 2009. She returned to work within three months after her surgery but was terminated from employment sometime in the beginning of December 2009.

On the basis of the foregoing, the trial commissioner concluded that the claimant failed to meet her burden of proof that the injuries she sustained following the incident of March 10, 2009 arose out of and in the course of her employment with the respondent. The claim was dismissed, and the claimant filed an extensive Motion to Correct which was denied in its entirety. In a wide-ranging appeal, the claimant seeks a reversal on the

basis that the facts found by the trier were unsupported by the evidence, arbitrary or capricious. We are not so persuaded.

It is axiomatic that in order to recover for an injury under the Workers' Compensation Act, a claimant must demonstrate "that the injury is causally connected to the employment." Spatafore v. Yale University, 239 Conn. 408, 417 (1996). "The determination of whether an injury arose out of and in the course of employment is a question of fact for the commissioner." Id., at 418. Such a determination is therefore subject to the customary deference an appellate body such as ours must afford the factual findings and legal conclusions of the trial commissioner. "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).

In order to establish the pre-requisite causal connection between injury and employment, a claimant's evidence must satisfy a two-pronged standard. The evidence "must demonstrate that the claimed injury (1) 'arose out of the employment,' and (2) 'in the course of the employment.'" Spatafore, supra, at 417-418, *quoting* Bakelaar v. West Haven, 193 Conn. 59, 67 (1984); McNamara v. Hamden, 176 Conn. 547, 556 (1979). "Speaking generally, an injury 'arises out of' an employment when it occurs in the course of the employment and as a proximate cause of it. An injury which is a natural and

necessary incident or consequence of the employment, though not foreseen or expected, arises out of it." Larke v. Hancock Mutual Life Ins. Co., 90 Conn. 303, 309 (1916). Moreover, "[t]he conditions of employment which expose the employee to an injury which arises out of the employment are such as are peculiar to this employment, and not such exposures as the ordinary person is subjected to." Id., at 310.

Relative to the analysis of whether an injury has occurred in the course of the employment, "the claimant has the burden of proving that the accident giving rise to the injury took place (a) within the period of the employment; (b) at a place [the employee] may reasonably [have been]; and (c) while [the employee was] reasonably fulfilling the duties of the employment or doing something incidental to it." Kish v. Nursing & Home Care, Inc., 248 Conn. 379, 383 (1999), *quoting* Mazzone v. Connecticut Transit Co., 240 Conn. 788, 793 (1997) (internal quotation marks omitted). See also Stakonis v. United Advertising Corporation, 110 Conn. 384, 389 (1930). "These three parts of the required proof of the 'in the course of employment' test correspond, respectively, to the 'time, place and circumstances of the accident.'" Mazzone, supra, at 793, *quoting* McNamara, supra, at 550 (1979); Stakonis, supra.

Turning to the matter at bar, we note at the outset that the trier concluded that the injuries sustained by the claimant occurred on a public sidewalk and "did not occur on the employer's premises or at a location they controlled." Conclusion, ¶ K. This board has previously observed that "[a]lthough almost any workers' compensation award contains numerous factual findings, the success or failure of a claimant's case often hinges upon one particular inference that the trier has drawn." Davis v. State/University of Connecticut, 3822 CRB-2-98-5 (August 17, 1999). In the instant matter, the trier's

factual finding relative to the location of the accident is significant, given that § 31-275(1) C.G.S. specifically limits the scope of injuries "arising out of and in the course of his employment" to accidental injuries which occur either on the premises of the employer "or while [the claimant is] engaged elsewhere upon the employer's business or affairs by the direction, express or implied, of the employer…."[2] Section 31-275(1) C.G.S.

Moreover, in Flodin v. Henry & Wright Mfg. Co., 131 Conn. 244 (1944), our Supreme Court observed that "[t]he word 'premises' is less inclusive than 'property' and ordinarily does *not* include the sidewalk in front of the place of employment." Id., at 247. (Emphasis added.) The Flodin court affirmed the Superior Court's dismissal of the claim arising from injuries sustained when the employee fell on the public sidewalk directly in front of his employer's factory, stating, "[i]n the necessary use of the sidewalk in front of the defendant's factory to reach his place of employment, [the claimant] was exercising a right which was his own, a right which differed neither in kind nor degree from that enjoyed by any other member of the general public." Id., at 247-248.

The trier's finding that the claimant's fall occurred on a public sidewalk therefore dictates the context within which the merits of this appeal must be evaluated, given that "the criteria used in analyzing whether an injury occurred in the course of a claimant's employment differ depending on whether or not the employer controls the property upon which the claimant is hurt." Davis, supra. Thus, when:

---

[2] Section 31-275(1) C.G.S. (Rev. to 2009) 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…."

> a lunchtime injury takes place on the employer's premises, that injury may be said to have occurred 'in the course of employment, even though the [lunch] interval is technically outside the regular hours of employment in the sense that the worker receives no pay for that time and is in no degree under the control of the employer, being free to go where he pleases.'

Mazzone, supra, at 794, *quoting* 1A A. Larson and L. Larson, Workmen's Compensation (1966) § 21.21 (a), pp. 5-6.

Moreover, it is well-settled that the "[t]emporary suspension of work by an employee for a permitted rest period, or lunch hour, or for satisfying the wants of nature … have not been generally held sufficient to break the continuity of the employment," Vitas v. Grace Hospital Society, 107 Conn. 512, 515 (1928).

> Acts of ministration by a servant to himself, such as quenching his thirst, relieving his hunger, protecting himself from excessive cold, performance of which while at work are reasonably necessary to his health and comfort, are incidents to his employment and acts of service therein within the Workmen's Compensation Acts, though they are only indirectly conducive to the purpose of the employment. Consequently no break in the employment is caused by the mere fact that the workman is ministering to his personal comforts, or necessities….

Lovallo v. American Brass Co., 112 Conn. 635, 639 (1931) (citations omitted), *quoting* 1 Honnold on Workmen's Compensation (1917) p. 381.

However, claims arising from injuries which occur on premises either owned or controlled by an employer are generally distinguished from cases wherein an employee has sustained an injury while no longer on the premises of the employer. Therefore, "when the employee with fixed time and place of work has left the premises for lunch, he is outside of the course of his employment if he falls, is struck by an automobile crossing the street, or is otherwise injured." Spatafore, supra, at 421, *quoting* 1 A. Larson & L. Larson, Workmen's Compensation (1996) § 15.51, pp. 4-148 through 4-162. In such

situations, generally regarded as "going and coming" cases, "it is necessary for the commissioner to find a benefit to the employer before compensation will be awarded." McNamara, supra, at 552, *citing* McKiernan v. New Haven, 151 Conn. 496, 499 (1964).

> Because in these "going and coming" cases the injury has occurred to an employee acting outside the place and period of employment, in situations *tangential* to employment "the need arose to reach out for the additional element of employer benefit to make up for the fact that employees going to or coming from work do not satisfy both of the first two course-of-employment requirements, place and period of employment."

Spatafore, supra, *quoting* McNamara, supra, at 553.

For example, "[t]he 'mutual benefit' concept has been applied to parking lots for over fifty years," Meeker v. Knights of Columbus, 5115 CRB-3-06-7 (July 3, 2007), based on the concept that "[t]he parking lot was maintained for the mutual benefit of the defendant and its employees, to provide a ready means of access to the plant and a ready means of parking the employees' automobiles in close proximity to the plant." Hughes v. American Brass Co., 141 Conn. 231, 233 (1954). The concept of mutual benefit has also been applied to situations wherein a claimant sustained injury "traveling on a public thoroughfare between two locations controlled by his employer." Id. See Kuharski v. Bristol Brass Corporation, 132 Conn. 563 (1946) (compensable injury sustained prior to claimant starting shift while claimant was crossing public street located between two buildings owned by the respondent); Russo v. Stop & Shop Companies, Inc., 4002 CRB-6-99-3 (March 22, 2000) (claimant sustained compensable injury after work in a fall on sidewalk leading to parking lot generally used by store employees); and Cimmino v. Hospital of St. Raphael, 4230 CRB-3-00-5 (September 13, 2001) (claimant on unpaid

lunch break sustained compensable injuries while crossing public street located between his place of employment and a parking garage owned by the employer).[3]

In the matter at bar, the trial commissioner found "that at the time of the March 10, 2009 incident, the Claimant was attending to her personal comfort and needs by going outside for some fresh air." Conclusion, ¶ I. This board has previously observed that "injuries involving issues of personal comfort and which occur off the employer's premises require a stricter scrutiny…," Renckowski v. Yale University, 11 Conn. Workers' Comp. Rev. Op. 48, 53 1292 CRD-3-91-9 (March 18, 1993), relative to whether the circumstances satisfy "the third prong of the Stakonis test requiring that the injury occur 'while the employee is reasonably fulfilling the duties of the employment or doing something incidental to it.'" Id., at 53, *quoting* Stakonis, supra, at 389. Such factual determinations are generally within the trier's discretion. Thus, while the claimant attempts to challenge this finding, we note that the claimant herself testified that after having ascertained that the cafeteria did not have the soup she was trying to purchase for her co-worker, she "went out for a little fresh air and that would be [her] one opportunity to do it." May 7, 2012 Transcript, p. 21. See also Transcript, p. 63.

We also note that the trier specifically did not find the claimant credible relative to her contention that she intended to purchase soup for a co-worker, given that the evidentiary record indicated that the co-worker in question had punched out an hour

[3] However, in Mleczko v. Haynes Construction Company, 5109 CRB-7-06-7 (July 17, 2007), this board affirmed the trier's dismissal of a claim brought by an individual who was injured on a public street while supposedly returning to the job site after a restaurant dinner. In light of testimony from other witnesses indicating that there had been no business purpose requiring the claimant to remain downtown, the trial commissioner rejected the claimant's argument that the accident had occurred on premises controlled by the employer and found that the claimant was not reasonably fulfilling the duties of employment at the time he was injured.

before the accident occurred. Conclusion, ¶ G. See also Respondent's Exhibit 7. This board is not empowered to reverse credibility findings on review.

> Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude . . . . An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom . . . . As a practical matter, it is inappropriate to assess credibility without having watched a witness testify, because demeanor, conduct and other factors are not fully reflected in the cold, printed record.

Burton v. Mottolese, 267 Conn. 1, 40 (2003).

Finally, we note that at trial, the claimant testified that her supervisor did not request that the claimant (1) purchase soup for the co-worker; (2) perform any particular task in particular on her lunch break; or, (3) walk outside to get some fresh air on her lunch break. Transcript, pp. 53-54. Thus, in light of the claimant's testimony as to her rationale for leaving the employer's premises to walk on the public sidewalk and the trier's findings as to the credibility of the claimant relative to the purchase of the soup for the co-worker, we find no error in the trier concluding that the purpose of the claimant's activities was to attend to her personal comfort rather than for the mutual benefit of herself and her employer. [4]

[4] Given that the evidence presents no basis for the inference that the employer either directed or benefitted from the claimant's actions, we find no error in the trier's conclusion "that the issue of whether the Claimant was or was not intending to retrieve food for a coworker prior to the incident is irrelevant to the ultimate conclusion in this case that the Claimant's injury did not arise out of or in the course of her employment." Conclusion, ¶ G. This is particularly so in light of the trial commissioner's finding that he did not find the claimant credible relative to her contention that she intended to purchase soup for a co-worker.

The claimant also argues that the employer's "acquiescence" in its employees' use of the public sidewalk around the building served to bring the sidewalk within the sphere of the employer's control. Appellant's Brief, p. 37. This argument presumably relies in part on our Supreme Court's reasoning in Stakonis, supra, wherein the court stated:

> If an employee is obeying specific instructions of the employer, though outside the sphere of his original employment, he is still in the course of his employment. Not only so, but if he is doing something entirely outside his obligatory duty which he is merely permitted by his employer to do, but without specific instructions, for their mutual convenience, he is still within the course of his employment.

Id., at 389-390.

However, in the matter at bar, as mentioned previously herein, the claimant testified that she had stepped outside in order to get some fresh air. As such, we find the trier properly rejected the claimant's argument relative to employer acquiescence given that, absent any evidence attesting to the existence of either an employer directive or mutual convenience, "[t]he fact that the employer 'contemplated' that [a claimant] would use the sidewalk is not sufficient to take it out of the general rule." Flodin, supra, at 248, *quoting* Drouin v. Chelsea Silk Co., 122 Conn. 129, 134 (1936). This is particularly so in light of the trier's finding relative to Sullivan's testimony indicating that "employees are free to do whatever they want on their lunch breaks including leaving the Respondent's premises to attend to personal needs and comforts." Conclusion, ¶ S. Similarly, we find no merit in the claimant's contention that the employer's failure to implement a company policy prohibiting the employees' use of the public sidewalk during the lunch break

provides a reasonable basis for inferring that the employer acquiesced in the activity such that the premises could be deemed subject to the employer's control as a matter of law.[5]

The claimant also challenges the trier's finding that the claimant sustained her injuries on Sherman Street rather than Chapel Street, and argues that because the Chapel Street entrance was not open to the public but, rather, required an employee badge for entry, the Chapel Street entrance constituted premises which were under the control of the employer. It is unassailable that this board has previously stated that "[f]or the purposes of a workers' compensation claim, we have used 'premises' to refer to any area that is under the care, custody or control of the employer." LeBlanc v. Aramark Corp., 3693 CRB-2-97-9 (November 24, 1998). However, our review of the record indicates that although the claimant did indeed testify that she sustained injuries while attempting to re-enter the hospital on Chapel Street, the claimant's supervisor testified that when she saw the claimant just after the accident occurred, the claimant told her the incident had occurred on Sherman Street, and the supervisor subsequently filled out the reports of injury accordingly. Transcript, pp. 72, 79-81. See also Respondent's Exhibit 8 (Supervisor's Accident Investigation Report); Respondent's Exhibit 9 (Employer's First Report of Occupational Injury or Illness).

[5] The claimant also asserts that, consistent with Davis v. State/University of Connecticut, 3822 CRB 2-98-5 (August 17, 1999), the trial commissioner erred in failing to find that the sidewalk surrounding the hospital constituted a campus and, as such, was part of the employer's premises. We can find no support in the record for such an assertion, apart from testimony offered by the claimant's supervisor attesting to her understanding that the smoking area on Sherman Avenue could be deemed part of the employer's premises. Relative to that testimony, we would point out that the amount of probative value to be assigned to a witness's speculation regarding a legal conclusion lies well within the trier's discretion. Second, while it may be possible to bring a viable claim for injuries sustained within an employer-designated smoking area, in the matter at bar, the claimant specifically testified that although she did on occasion visit the Sherman Avenue smoking area on her lunch break, on the date in question, she did not do so. May 7, 2012 Transcript, pp. 21, 57-58.

As mentioned previously herein, it is well-settled that determinations as to credibility are solely within the discretion of the trier. Burton, supra. Moreover, it is not the purview of this board to challenge the trier's reliance on contemporaneous evidence in drawing his inferences. We therefore find no error in the trier's conclusion that the accident occurred at the Sherman Street entrance rather than the Chapel Street entrance. As such, the claimant's contentions regarding the employer's alleged control over the mechanics of entry at Chapel Street entry are unavailing.

Having reviewed the evidentiary record, we find no grounds which would justify reversing the trial commissioner's determination that the claimant failed to meet her burden of proof that the injuries she sustained on March 10, 2009 arose out of and in the course of her employment with the respondent. "It is … immaterial that the facts permit the drawing of diverse inferences. The [commissioner] alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court." Fair, supra, 540 (1988), *quoting* Del Vecchio v. Bowers, 296 U.S. 280, 287 (1935).

There is no error; the November 23, 2012 Finding and Dismissal of the Commissioner acting for the Third District is accordingly affirmed.[6]

[6] In light of our affirmance of the trier's dismissal of the claim on jurisdictional grounds, we decline to address the claims of error relative to whether the claimant's need for medical treatment was causally related to the injuries sustained on March 10, 2009. However, with specific regard to the claimant's challenge to the trier's ability to order a Commissioner's Examination in the absence of a prior Respondent's Medical Examination, we would draw the claimant's attention to the plain language of § 31-294f (a) C.G.S. (Rev. to 2009), which states, in pertinent part: "An injured employee shall submit himself to examination by a reputable practicing physician or surgeon, *at any time while claiming or receiving compensation*, upon the reasonable request of the employer *or* at the direction of the commissioner." (Emphasis added.)

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