CASE NO. 5820 CRB-3-13-2 : COMPENSATION REVIEW BOARD
CLAIM NO. 300095891

EUGENE AVINO : WORKERS' COMPENSATION
CLAIMANT-APPELLEE COMMISSION

v. : FEBRUARY 10, 2014

STOP & SHOP SUPERMARKET
COS. LLC/AHOLD USA
EMPLOYER

and

ACE INSURANCE COMPANY
c/o MAC RISK MANAGEMENT, INC.
INSURER
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by Timothy E. Welsh, Esq., Paladino & Welsh, LLC, 33 Main Street, Suite P, Old Saybrook, CT 06475.

The respondents were represented by David J. Weil, Esq., Nuzzo & Roberts, LLC, One Town Center, P.O. Box 747, Cheshire, CT 06410.

This Petition for Review from the January 17, 2013 Finding and Award of the Commissioner acting for the Eighth District was heard on August 30, 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 January 17, 2013 Finding and Award of the Commissioner acting for the Eighth 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.[1] The claimant began working for the respondent supermarket on December 5, 1975, first as a part-time meat cutter, then as a full-time meat cutter, assistant head meat cutter, and, eventually, meat manager. In 1987, the claimant left the respondent's employ to run his own sandwich shop; in 1993 he began working with a construction company as a production manager.[2] In 1994, the claimant was laid off from this position when the employer went bankrupt, and in September 1994, the claimant returned to working as a part-time meat cutter, this time for Edwards Supermarkets. In the spring of 1995, the claimant was promoted to meat manager and remained with Edwards until Edwards merged with Stop & Shop in 1996. The claimant was then hired by Shaw's Supermarkets as a meat manager until 1997, when he returned to work for the respondent, initially as head meat cutter and then meat manager. The claimant is still currently employed by the respondent, although in 2008 he gave up the position of meat manager in order to work as a meat cutter.

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[1] Given that the trier's findings relative to the claimant's left shoulder injury have not been appealed, we will confine our discussion herein to an analysis of the trier's findings relative to compensability of the claimant's repetitive trauma claim for a bilateral knee injury.

[2] The production manager was responsible for supervising residential remodeling projects such as the construction of patio rooms and the installation of doors and windows. September 20, 2012 Transcript, p. 9.

The claimant testified that in his role as a meat manager, he was required to clean and stock the meat cases, rotate the stock, unload bulk orders, organize the freezer, take inventory, order meat, and assist with cutting. To carry out these responsibilities, he had to lift and stack various products weighing up to 80 pounds. The job of meat manager also required repetitive bending, squatting, overhead lifting, and twisting while stocking shelves, rotating inventory, and cutting meat.

On January 31, 2008, the claimant began treating with Christopher B. Lynch, M.D., for bilateral knee pain. At this time, the claimant had end-stage arthritis in both knees. When the claimant was sixteen years old, he underwent medial and lateral open mensiscectomies, and at nineteen, he again underwent the same procedure on his right knee. At his deposition, Lynch testified that these procedures almost always lead to some sort of osteoarthritis, and the claimant had undergone these procedures forty years ago. Lynch diagnosed the claimant as suffering from bilateral end-stage degenerative joint disease of the knees, and testified that he began discussing knee replacement with the claimant in 2008. He also testified that Alan Reznick, M.D., had discussed knee replacement with the claimant back in 2003. The claimant ultimately underwent bilateral knee replacement in June 2012, and underwent a second surgery three weeks later when he developed an abscess on his right knee which required re-opening the knee to clear the abscess.[3]

Lynch testified that the heavy work performed by the claimant exacerbated the claimant's knee symptoms. In a report dated December 8, 2011, Lynch stated that the

[3] The trier granted a proposed correction sought by the respondents in their Motion to Correct clarifying that the claimant's surgery occurred on June 13, 2012.

arthritic changes in the claimant's knees are "probably multifactorial," Findings, ¶ 14; Claimant's Exhibit C, p. 1, and opined that the claimant probably would have developed significant arthritis in his knees "whether or not he worked as a meat cutter." Id. However, although the arthritis was not the result of the claimant's job, the activities performed by the claimant, "in particular the heavy lifting and the deep squatting, likely has aggravated his underlying condition and required him to have replacement earlier than he potentially would have had he had a more sedentary job." Findings, ¶ 15; Claimant's Exhibit C, p. 1.

On May 9, 2012, the claimant underwent a Respondents' Medical Examination with Peter Jokl, M.D. Jokl diagnosed the claimant as suffering from pre-existing advanced osteoarthritis of both knees and opined that although the claimant's duties as a meat cutter aggravated the claimant's osteoarthritis, those duties were not a substantial contributing factor in its development.

Based on the foregoing, the trial commissioner found the claimant credible and persuasive relative to his testimony that his position with the respondent employer required repetitive bending, lifting, kneeling, squatting, twisting and lifting on a daily basis over many years. The trier also found Lynch credible and persuasive relative to his opinion that the claimant's job duties aggravated the underlying osteoarthritis and required the claimant to undergo knee replacements earlier than he might have had he worked at more sedentary employment. The trier did not find credible or persuasive Jokl's opinion relative to the compensability of the claimant's knee injuries. The trier

determined that the medical care rendered to the claimant was reasonable and necessary and ordered the respondents to pay the associated medical expenses.

The respondents filed a Motion to Correct, which was granted in part relative to the date of the claimant's surgery and denied in part, and this appeal followed. On appeal, the respondents assert that the trier erroneously concluded that the claimant's employment was a substantial contributing factor to the claimant's need for bilateral knee replacement surgery in that the facts in evidence did not reasonably support such a conclusion. The respondents also contend that the trial commissioner's refusal to grant the entirety of their Motion to Correct constituted error.

We begin with a recitation of the well-settled standard of review we are obliged to apply to a trial commissioner's findings and legal conclusions. "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). Thus, "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, at 540, *quoting* Del Vecchio v. Bowers, 296 U.S. 280, 287 (1935).

Turning to the merits of the appeal, as mentioned previously herein, the respondents assert that the trier erroneously concluded that the claimant's employment was a substantial contributing factor to the claimant's need for bilateral knee replacement surgery in that the facts in evidence did not reasonably support such a conclusion. It is of course well settled that "traditional concepts of proximate cause furnish the appropriate analysis for determining causation in workers' compensation cases." Dixon v. United Illuminating Co., 57 Conn. App. 51, 60 (2000). As such, "the test for determining whether particular conduct is a proximate cause of an injury [is] whether it was a substantial factor in producing the result." (Internal quotation marks omitted.) Paternostro v. Arborio Corp., 56 Conn. App. 215, 222 (1999), *cert. denied*, 252 Conn. 928 (2000), *quoting* Hines v. Davis, 53 Conn. App. 836, 839 (1999). In Birnie v. Electric Boat Corp., 288 Conn. 392 (2008), our Supreme Court stated that "[i]t has been determined that the substantial factor standard is met if the employment "'*materially or essentially contributes* to bring about an injury….'" (Emphasis in the orginal.) Id., at 412, *quoting* Norton v. Barton's Bias Narrow Fabric Co., 106 Conn. 360, 365 (1927).

It should be noted, however, that:

> [t]he term "substantial" … does *not* connote that the employment must be the *major* contributing factor in bringing about the injury; … nor that the employment must be the *sole* contributing factor in development of an injury…. In accordance with our case law, therefore, the substantial factor causation standard simply requires that the employment, or the risks incidental thereto, contribute to the development of the injury in *more than a de minimis way*.[4]

[4] In Sapko v. State, 305 Conn. 360 (2012), the Supreme Court revisited the passage discussing the substantial contributing factor test in Birnie v. Electric Boat Corp., 288 Conn. 392 (2008) and observed that a full reading of the passage should make it "evident that we did not intend to lower the threshold beyond that which had previously existed." Sapko, supra, at 391. The court explained that in Birnie, the court "was confronted with determining whether the substantial factor test was more or less rigorous than the test

(Citations omitted, emphasis in the original.) Birnie, supra, at 412-413.

In order to establish the requisite causal connection between the employment and the injury, a claimant "must demonstrate that the claimed injury (1) arose out of the employment, and (2) in the course of the employment…."[5] Sapko v. State, 305 Conn. 360, 371 (2012). "The determination of whether an injury arose out of and in the course of employment is a question of fact for the commissioner." Spatafore v. Yale University, 239 Conn. 408, 418 (1996). It is therefore axiomatic that "the injured employee bears the burden of proof, not only with respect to whether an injury was causally connected to the workplace, but that such proof must be established by *competent evidence*." (Emphasis in the original.) Dengler v. Special Attention Health Services, Inc., 62 Conn. App 440, 447 (2001), *quoting* Keenan v. Union Camp Corp., 49 Conn. App. 280, 282 (1998). "'Competent evidence' does not mean any evidence at all. It means evidence on which the trier properly can rely and from which it may draw reasonable inferences." Dengler, supra, at 451. Thus, "[u]nless causation under the facts is a matter of common knowledge, the plaintiff has the burden of introducing expert testimony to establish a

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applied by federal administrative law judges in adjudications involving the federal law. As a result, it is clear that the court's aim was not to clarify – much less alter – the substantial factor test but to explicate it in such a way as to facilitate a fair comparison with the federal test in question." Id.

[5] Section 31-275(1) C.G.S. (Rev. to 2011) states that "'[a]rising 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…." "Proof that the injury arose out of the employment relates to the time, place and circumstances of the injury…. Proof that the injury occurred in the course of the employment means that the injury must occur (a) within the period of employment; (b) at a place the employee may reasonably be; and (c) while the employee is reasonably fulfilling the duties of the employment or doing something incidental to it." (Citation omitted.) Spatafore v. Yale University, 239 Conn. 408, 418 (1996), *quoting* McNamara v. Hamden, 176 Conn. 547, 550-551 (1979).

causal link between the compensable workplace injury and the subsequent injury." Sapko, supra, at 386.

Turning to the matter at bar, we note, as mentioned previously herein, that the claimant submitted into evidence the deposition of his treating physician, Christopher B. Lynch, M.D. At this deposition, Lynch testified that the surgeries undergone by the claimant in his teens "almost always" lead to osteoarthritis, Respondents' Exhibit 3, p. 10, and indicated that he had diagnosed the claimant with "bilateral end stage degenerative joint disease in both knees." Id., at 23. Noting that he had reviewed the job description for the position of meat cutter along with an affidavit furnished by the claimant attesting to his work-related duties, Lynch testified that "twisting component" of the claimant's job "is not good for arthritic knees, because you're sort of coming out of the train tracks, that you eroded into the bone." Id., at 27; see also Claimant's Exhibit C. Lynch also testified that lifting would constitute "weight that he's putting across those joints" which, while it might not worsen the osteoarthritis, would worsen the symptoms. Id., at 27-28. Lynch explained that the course of treatment rendered to a patient was generally dependent upon the patient's symptoms rather than the results seen on imaging studies such as X-rays and that in this case, "[t]he pain is being caused by the work." Id., at 29.

Lynch also testified that squatting, rather than kneeling, probably contributed significantly to the claimant's symptoms. "Squatting is a high stress. It's the highest – of all the things you can do, squatting is the highest stress across the knee joint." Id., at 32. Lynch went on to state that "[i]f you're combining that with more weight because you're

lifting and squatting, that's even more weight that you're putting across the knee joint … [which] would potentially cause the pain from the arthritis to manifest." Id. Under cross-examination, Lynch reiterated that the claimant's heavy work "exacerbated his symptomatology," id., at 38, and that "increased weight across the joint will cause increasing pain, and will cause a more rapid progression of the arthritis." Id., at 41-42.

The claimant also submitted into the record Lynch's report of December 8, 2011 in which the doctor stated that the claimant's "heavy activities such as the lifting, which does place more stress across the joint and the deep squatting repetitively, which also causes increased stresses across the knee joint did contribute significantly to the quick progress of the degenerative knee disease." Claimant's Exhibit C, p. 1. Lynch did indicate that the underlying arthritis was not the result of the claimant's job and opined that the claimant "would have required knee replacement at some point down the line even if he had performed a sedentary job for his entire life." Id. However, Lynch then went on to state that "the activities that [the claimant] did perform at the job, in particular the heavy lifting and the deep squatting, likely has aggravated his underlying condition and required him to have replacement earlier than he potentially would have had he had a more sedentary job." Id.

In addition to the foregoing, the claimant testified at trial regarding the physical requirements of his employment, describing in detail the activities associated with the ordering, storage, and rotation of the inventory, which consisted of boxes of meat

weighing anywhere from fifty-five to eighty-five pounds.[6] September 20, 2012 Transcript, p. 19. The claimant testified that he was expected to unload delivery pallets containing boxes of meat and place the boxes into the cooler, which entailed "a lot of lifting and twisting and turning and it is all boxes that are of substantial weight." Id., at 23. The claimant also indicated that he was responsible for stocking the meat case, which "involved lifting, putting [the product] on a U boat, taking it out to the floor, unpacking it and putting it into the meat case; bottom shelf, middle shelf, top shelf." Id., at 25. The claimant also testified that he switched roles from meat manager to meat cutter in 2008 because he "couldn't take the walking any more." Id., at 38. However, the claimant indicated that even cutting meat involved repetitive bending, twisting and turning because "part of cutting on a band saw is constant twisting, okay? You don't just use your hands. If you use just your hands you get carpal tunnel faster. You are constantly twisting, catching with your left hand, putting that product onto the bench to your left." Id., at 46.

Having reviewed the foregoing, we find that the instant record provided ample support for the trier's conclusion that the claimant's job duties were a significant contributing factor to the claimant's need for knee replacement surgery. The respondents point out that in the RME report of May 9, 2012, Peter Jokl, M.D., concluded that the claimant's "occupation as a meat cutter aggravated but is not a substantial contributing factor to the end-stage osteoarthritis in either the right or the left knee." Respondents' Exhibit 2, p. 4. As such, the respondents contend that both Lynch and Jokl "stated that the claimant's knee injuries in the 1960s caused the osteoarthritis and his employment

[6] As mentioned previously herein, the affidavit furnished by the claimant to Christopher Lynch, M.D., also provides an extensive description of the job requirements for the position of meat cutter and/or meat manager with the respondent grocer. See Claimant's Exhibit C.

merely aggravated his conditions." Appellants' Brief, p. 10. While this assertion would appear to be a reasonable summary of Jokl's opinion, the trier was not required to draw any particular inference from Jokl's report, as "[i]t is the quintessential function of the finder of fact to reject or accept evidence and to believe or disbelieve any expert testimony. The trier may accept or reject, in whole or in part, the testimony of an expert." (Internal citations omitted.) Tartaglino v. State/Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999).

Moreover, we do not find that this assertion by the respondents accurately characterized Lynch's opinion. While Lynch may not have used the precise terminology sought by the respondents, our review of the entirety of Lynch's testimony indicates that it provided a more than adequate basis for the inferences drawn by the trial commissioner relative to the claimant's need for knee replacement surgery. "Whether an expert's testimony is expressed in terms of a reasonable probability that an event has occurred does not depend upon the semantics of the expert or his use of any particular term or phrase, but rather, is determined by looking at the entire substance of the expert's testimony." Struckman v. Burns, 205 Conn. 542, 555 (1987).

In addition, as this board observed in Carter v. Aramark Corp, 4785 CRB-2-04-2 (April 28, 2005), "[i]n workers' compensation cases an 'employer takes the employee in the state of health which it finds the employee….' If an employee's pre-existing condition is substantially accelerated by an employment activity, the resulting injury may be compensable." (Internal citation omitted.) Id., *quoting* Epps v. Beiersdorf, 41 Conn. App. 430, 435 (1996). Given that the trier reasonably inferred, based on the testimony

provided by both Lynch and the claimant, that the claimant's pre-existing osteoarthritis was indeed "accelerated by the employment activity," we decline to reverse the trier's findings in this matter.

Finally, the respondents contend that the trier's failure to grant the remaining proposed correction in their Motion to Correct constituted error. Our review of that proposed correction indicates that the respondents were merely reiterating the arguments made at trial which ultimately proved unavailing. As such, we find no error in the trier's decision to deny the respondents' Motion to Correct. D'Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003).

There is no error; the January 17, 2013 Finding and Award of the Commissioner acting for the Eighth District is accordingly affirmed.

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