CASE NO. 5855 CRB-6-13-6 : COMPENSATION REVIEW BOARD
CLAIM NO. 601062468

ADRIAN G. KIELBOWICZ
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: JUNE 12, 2014

TILCON CONNECTICUT, INC.
EMPLOYER

and

LIBERTY MUTUAL INSURANCE GROUP
INSURER
RESPONDENTS-APPELLEES

APPEARANCES: The claimant was represented by Colin P. Mahon, Esq., Mahon, Quinn & Mahon, PC, 636 Broad Street, PO Box 2420, Meriden, CT 06450-4336.

The respondents were represented by Erik S. Bartlett, Esq., McGann, Bartlett & Brown, LLC, 111 Founders Plaza, Suite 1201, East Hartford, CT 06108.

This Petition for Review from the May 28, 2013 Finding and Dismissal of the Commissioner acting for the Sixth District was heard January 24, 2014 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Stephen B. Delaney and Michelle D. Truglia.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant in this matter has appealed from a Finding and Dismissal of his claim. He argues that the facts of this case demonstrate that his fall and subsequent injuries while employed at the Tilcon quarry was the result of a compensable injury. The trial commissioner, however, found that the claimant was not a credible witness and the evidence demonstrated the claimant's injury was merely contemporaneous with his employment, and therefore not compensable. After reviewing the facts and the law we are satisfied the trial commissioner ruled correctly in this matter. We affirm the Finding and Dismissal.

The following facts are pertinent to our consideration of this matter. The claimant testified that he had first started working at the Tilcon quarry in 1989 and worked on a seasonal basis, getting laid off at the start of winter and being called back to work in the spring. He also said that for a time he was permanently laid off due to the weak economy. He returned to Tilcon again in 2005. He was rehired for the second shift and his work duties included inspecting and replacing screen units, splicers on conveyors, repairing and replacing idlers, checking and adding oil as necessary to machinery, and miscellaneous housekeeping. His last day of work in 2010 was December 10 and in the spring of 2011 he received a call from Jose Mercado advising him as to his return to work. His immediate supervisor was Henry Czerwienski, the second shift supervisor for maintenance. His work shift started at 2:30 p.m. on March 21 and he said he felt a little fatigued on March 21, 2011 due to a change in his sleep schedule, but otherwise felt good. He said he did not consume any alcoholic beverages on March 21, 2011.

Following a ten minute "pep talk" which the claimant attended, he said he went out with Mr. Czerwienski to attend to various tasks at the quarry. He said he then was dropped off by his supervisor where he began cleaning off a utility truck. He took this truck to Unit 22, where he intended to take a ladder off the truck, secure it against the truck, and climb the ladder to do conveyor repair. He said the area of the conveyer he repaired was about 9 to 9 1/2 feet off the ground and that the ladder was a fold-out type ladder of about 6-8 feet in length. The claimant said that he had completed his repairs and then started untying the ladder when, "[E]verything went backwards and to the right, the ladder flexed to the right, I never even seen the ground coming." His next memory is waking up in New Britain General Hospital Intensive Care Unit at about 10:20 p.m. He went to pick up his head and passed out. He said he woke up the next day and was told by the nurse he had had a bad accident, and had sustained head injuries and had staples in his head. He also saw that his right shoulder was black, blue, and orange, and that he was in restraints. He eventually required surgery to repair a torn tendon and rotator cuff.

The claimant testified that prior to March 21, 2011, he had never suffered from seizures or convulsions. He testified he had had three convictions for drunk driving, the first 18 years ago and the most recent in May of 2008. After the third conviction he would only drink on weekends, except when he was laid off. He described moderate alcohol use during his layoff period, but also admitted he had falsely stated at a July 25, 2011 deposition that he had stopped drinking after the March 21, 2011 incident. He also denied knowledge at that deposition of having been hospitalized at Midstate Medical Center for a hernia on July 23, 2011, claiming not to remember that hospitalization. The medical records of this admission indicate he told the doctors there that he drinks six to

eight beers a day with a shot or two of hard liquor and that he had had a recent alcohol binge. The Commissioner also noted a note in the Midstate report that says that the claimant told his treaters that he drinks 12 beers daily and several shots of Jameson Whiskey. He denies having told them that. The claimant denied abusing alcohol.

The claimant said that he was in good health on March 21, 2011. He did not feel hot, sweaty, or flush and did not tremble. He was sleepy, but not irritable. He does not recall telling any of his co-workers that he was warm and flush on that day. The claimant said that he was untying a ladder when he fell off of it, and he remembers falling, but he does not know whether his hard hat fell off, but it probably would have fallen off. He does not remember the ambulance ride or being restrained, nor does he remember being diagnosed as suffering from alcohol withdrawal, and said the first time he had heard that was from defense counsel at the formal hearing. He said he had not called his supervisor from the hospital and denied telling Mr. Czerwienski that he has no idea what happened on March 21, 2011.

Mr. Czerwienski testified that he has been employed by Tilcon as a maintenance supervisor for about thirteen years and was the claimant's direct supervisor for about one year. When he was working with the claimant on the morning of March 21, 2011, he asked the claimant what he had done over the winter. The claimant told him that he just drank a lot of beer. Mr. Czerwienski also said at the safety meeting at the beginning of the shift the claimant looked a little more nervous than usual. He seemed to be hot and his face had red and white blotches on it. When he was working with the claimant on the first job, the claimant said that he was getting hot and wanted to take his coveralls off. Instead of taking off his coveralls, he took off a shirt and sweatshirt because he said that

it was hot and humid. Mr. Czerwienski said that the weather was actually wet, rainy, damp, cold, and raw. After working together with the claimant, he asked the claimant to set up a repair job on the belt at Unit 22 and he went to the switchhouse. About a minute later Mr. Czerwienski said a co-worker of the claimant, Ludie Wright, called to tell him that the claimant was on the ground shaking. He ran over to where the claimant was and found him on the ground next to the pickup truck. He was shaking, struggling to breathe and had some foaming of the mouth. He was not responsive. His hard hat was on the side of his head and his glasses were on his face. There was no rope on the ladder or anywhere at the scene. There was also no mud on the ladder.

Mr. Czerwienski said that when he found the claimant he held the claimant's face up so he wouldn't ingest water from the mud and puddle of water that he was laying in. He said the claimant was found about five or six feet away from the ladder with his head toward the side of the truck and his feet were closest to the conveyor. He said had the claimant fallen backwards off the ladder, he would have hit the door of the truck. Mr. Czerwienski also testified that the claimant had asked him on more than one occasion what had happened on March 21, 2011, and had hoped he could shed some light on the events.

Ludie Wright also testified at the formal hearing. He said he had worked with the claimant on a daily basis from 2008 to 2011 and that the claimant would talk about having a few beers each night when he would get off of work. He recalls working on March 21, 2011 because it was the first day back to work after a seasonal layoff. When the claimant arrived, he asked how the claimant was doing. Mr. Kielbowicz responded that he was not doing too well. He was having problems with his apartment and had had

an argument with his girlfriend. He also said that he did a lot of drinking over the off season. On March 21, 2011 he saw the claimant do a job with Mr. Czerwienski and then saw the claimant set up near the Unit 22 conveyor. Mr. Czerwienski drove up and asked the claimant if he needed a hand, but the claimant said that he was all set. He looked away for one or two seconds and then saw the claimant on the ground. At no time was the claimant on the ladder. After seeing the claimant on the ground, he immediately called Mr. Czerwienski and told him that the claimant was on the ground. He ran over to the claimant and saw that he was struggling to breathe. The claimant's hard hat was on the side of his head, his face was in the mud and his glasses were cocked on the side of his face. Mr. Wright testified that there was no rope present, either on the ladder or on the ground. The ladder was not tied off and there was no fresh mud on the ladder. Mr. Wright also confirmed Mr. Czerwineski's account of the weather that day being cold, damp and raw.

The testimony of Marc J. Bayer, M.D., who testified at a deposition on January 13, 2013, was admitted into evidence. Dr. Bayer testified he has been Professor of Emergency Medicine at the UConn School of Medicine and the Chief of the Division of Toxicology at UConn School Health Center; as well as Medical Director of the Connecticut Poison Control Center since 1992. Dr. Bayer testified that the claimant was not intoxicated at the time of the accident. He said the claimant most likely suffered a seizure on March 21, 2011 from alcohol withdrawal. People who are chronic alcoholics who suddenly stop drinking, over a period of several days there's a severe withdrawal phenomenon that can lead to tremulousness, agitation and then coma, convulsions and a condition known as delirium tremens, which is actually life-threatening. These

symptoms were noted in the claimant's case. The claimant suffered from seizures, rhabdomyolysis, and metabolic acidosis. Dr. Bayer said that whether the claimant had fallen from a ladder or fallen while standing on the ground that his opinion was the cause of the fall was an alcohol withdrawal seizure. He noted that the source of his position that the claimant may have fallen off a ladder was the hospital report.

Based on this record the trial commissioner concluded the claimant's testimony was inconsistent, unreliable, and not credible, while the testimony of Ludie Wright and Henry Czerwienski was credible and persuasive. The commissioner found there was no rope present at the site of the incident and that the evidence does not support the claimant's position that he was on the ladder at the time of the fall. Therefore, the claimant's head and shoulder injuries were a consequence of an alcohol withdrawal seizure. As the claimant's injuries did not arise out of his employment, the trial commissioner dismissed the claim in its entirety.

The claimant did not file a Motion to Correct, but did file a Motion for Articulation seeking to have the commissioner explain his reasoning. This motion was granted in part and the trial commissioner stated that he did not consider the respondents' affirmative defenses and that the basis of the Finding and Dismissal was the claimant's testimony was inconsistent, unreliable and not credible, while the testimony of Ludie Wright and Henry Czerwienski was persuasive and credible. As the claimant did not meet his burden of proof the claim was dismissed. The claimant has now pursued this appeal. The gravamen of the claimant's appeal was that the facts of this case were controlled by the precedent in Savage v. St. Aeden's Church, 122 Conn. 343 (1937) and that basically any fall at a Connecticut worksite which may be described as idiopathic

was compensable. We find Savage distinguishable on both factual and legal grounds and therefore do not find this matter compensable.

We note that the claimant did not file a Motion to Correct in this case. Therefore, we may give facts found by the trial commissioner conclusive effect. Stevens v. Raymark Industries, Inc., 5215 CRB-4-07-4 (March 26, 2008), *appeal dismissed*, A.C. 29795 (June 26, 2008). On appeal, we generally extend deference to the decisions made by the trial commissioner. "As 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." Daniels v. Alander, 268 Conn. 320, 330 (2004). The Compensation Review Board cannot retry the facts of the case and may only overturn the findings of the trial commissioner if they are without evidentiary support, contrary to the law, or based on unreasonable or impermissible factual inferences. Kish v. Nursing and Home Care, Inc., 248 Conn. 379 (1999) and Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Nonetheless, while we must provide deference to the decision of a trial commissioner, we may reverse such a decision if the commissioner did not properly apply the law or reached a decision unsupported by the evidence on the record. Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007). We also note that in cases wherein causation of an injury is contested the trial commissioner's " . . . findings of basic facts *and* his finding as to whether those facts support an inference that the plaintiff's injury arose from his employment are subject to a highly deferential standard of review." Blakeslee v. Platt Bros. & Co., 279 Conn. 239, 253-254 (2006). (Emphasis in the original.)

The trial commissioner in his response to the Motion for Articulation made clear that the central reason that he denied the claim was that he did not find the claimant a credible witness and found the respondents' witnesses credible and persuasive. As the claimant presented live testimony to the trial commissioner, we cannot revisit this decision on appeal. See Burton v. Mottolese, 267 Conn. 1 (2003), where the Supreme Court indicated we must affirm the commissioner's determination.

> 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, supra, 40.

The Appellate Court recently restated the primacy of a trial commissioner in resolving issues of evidentiary credibility in Baron v. Genlyte Thomas Group, LLC, 132 Conn. App. 794 (2012). In Baron, the court opined as follows:

> The commissioner, as finder of fact, is the sole arbiter of credibility; *Samaoya v. Gallagher*, 102 Conn. App. 670, 673–74, 926 A.2d 1052 (2007); and it is within the discretion of the commissioner ''to accept some, all or none of the plaintiffs testimony.'' *Gibbons v. United Technologies Corp*., 63 Conn. App. 482, 487, 777 A.2d 688, cert. denied, 257 Conn. 905, 777 A.2d 193 (2001).

Id., at 804.

In the present matter the claimant and the respondents' witnesses offered diametrically opposed narratives as to the events of March 21, 2011. The claimant

testified he was injured falling off a ladder. The version of events accepted by the trial commissioner was the claimant never attempted to climb a ladder and instead, simply collapsed due to circumstances unrelated to any duty of his employment. The only conclusion we can reach after reviewing these circumstances is that the claimant attempted to persuade the commissioner of a factual narrative that the commissioner found to be without merit. There is no precedent we are aware of where a claimant's core testimony has been found to be false and then the claimant subsequently was awarded benefits.[1] On the other hand, there is abundant precedent that when a claimant offers testimony to the commissioner which is directly refuted by credible witnesses their claim is denied and we have affirmed this denial on appeal. See for example, Ialacci v. Hartford Medical Group, 5306 CRB-1-07-12 (December 2, 2008). See also Vaughan v. North Marine Group, 5695 CRB-4-11-11 (January 4, 2013).

> We have lengthy and consistent legal precedent that when a trial commissioner does not find the claimant's account of injury credible under these circumstances the claim is dismissed, and we have upheld these dismissals. See Serrano v. Bridgeport Towers Apt., LLC, 5572 CRB-4-10-7 (September 29, 2011); Roberto v. Partyka Chevrolet, Inc., 5542 CRB-3-10-3 (February 8, 2011); Connors v. Stamford, 5484 CRB-7-09-7 (July 23, 2010); Baker v. Hug Excavating, Inc., 5443 CRB-7-09-3 (March 5, 2010); O'Leary v. Wal-Mart Associates, Inc., 5395 CRB-3-08-11 (October 27, 2009); Darby v. Hart Plumbing Company, 5325 CRB-2-08-2 (February 4, 2009) and Smith v. Salamander Designs, Ltd, 5205 CRB-1-07-3 (March 13, 2008).

Id.

[1] We acknowledge there are cases where a claimant may have misstated certain facts, or offered self-serving or embellished testimony on certain issues and the trial commissioner concluded that the totality of the evidence supported a finding of compensability. This is not such a case. The claimant offered testimony on a central point which was directly refuted by witnesses the commissioner found persuasive. We cannot intercede in the fact finding province of the trial commissioner in reaching a decision based on weighing the candor of the claimant.

We also find our precedent in Pupuri v. Benny's Home Service, LLC, 5697 CRB-2-11-11 (November 5, 2012) on point herein, especially as the claimant in this matter argues on appeal that he should be awarded benefits for an injury which essentially is grounded in circumstances outside the workplace. In Pupuri, the claimant argued that his back injuries were due to lifting stones at a quarry. A witness who observed the claimant shortly after this alleged incident testified the claimant was not injured at that time, and the trial commissioner found this witness credible. The claimant argued that notwithstanding this testimony, the respondent had offered no alternative explanation for his condition. We rejected this argument and pointed out, *citing* DiNuzzo v. Dan Perkins Chevrolet Geo. Inc., 294 Conn. 132, (2009) that it was the claimant's burden to prove compensability.

> As the Supreme Court held in DiNuzzo, supra, " . . . the humanitarian spirit of [the act] does not entitle the [court] to suspend the injured worker's burden of proof, [or] to change the rules of our legal system so that the onus of disproving causation is thrust upon the [employer or the insurer]." Id., at 150-151. The trial commissioner's findings indicate that the treating physician himself suggested the claimant's ailments may have been degenerative or idiopathic in nature. The circumstances herein are similar to other cases when evidence presented at the formal hearing suggested an alternative cause for an injury other than a work-related incident. See Burns v. Southbury, 5608 CRB-5-10-11 (November 2, 2011), Torres v. New England Masonry Company, 5289 CRB-5-07-10 (January 6, 2009) and Do v. Danaher Tool Group, 5029 CRB-6-05-12 (November 28, 2006).

Therefore, even if we were not to hold that the claimant's prevarications constituted a bar to recovery, we would hold that the precedent governing the compensability of idiopathic injuries supported the Finding and Dismissal. However, we believe that in this instance the claimant's lack of candor reaches a level which was inherently inconsistent with an award of benefits. See Mankus v. Mankus, 4958 CRB-1-

05-6 (August 22, 2006), *aff'd*, 107 Conn. App. 585 (2008), *cert. denied*, 288 Conn. 904 (2008). In Mankus, the claimant obtained an award essentially through a default judgment when the putative employer did not attend a hearing. Following an investigation the Second Injury Fund moved to reopen and set aside the award, as the claimant's putative employer said he had been told not to attend the hearing by the claimant. We held "[w]e do not condone the use of misrepresentation or artifice by either claimants or respondents in proceedings before this Commission." Id. We have consistently followed this standard in the years since. See Seiler v. Ranco Collision, LLC, 5377 CRB-1-08-9 (August 27, 2009), "Whether the claimant was injured in the manner he described is the central issue in this case. The trial commissioner found the claimant unworthy of belief on this point. Unless the claimant is a credible witness they cannot prevail before this Commission. See Toroveci v. Globe Tool & Metal Stamping Co., Inc., 5253 CRB-6-07-7 (July 22, 2008) and Ialacci v. Hartford Medical Group, 5306 CRB-1-07-12 (December 2, 2008)."

The trial commissioner found the claimant lacked credibility and failed to prove that he was injured in the manner in which he testified. Having found the claimant failed in his burden of proof that he sustained a compensable injury the commissioner dismissed the claim. We find this decision is entirely consistent with the evidence credited by the commissioner, extensive precedent and unambiguous public policy against the moral hazard of rewarding false testimony. The decision can be sustained solely on those grounds.

Nonetheless, the claimant argues that even after crediting the respondents' evidence that his injury should be deemed compensable based on the precedent in

Savage, supra. We note that Blakeslee, supra, was the last reported Appellate Court or Supreme Court case to cite Savage, supra, and indeed, the only reported case to cite Savage in the past half century.[2] In Savage, a painter was found deceased with a fractured skull on a hard floor at the base of a ladder. Id., 345. The decedent had not been seen for hours prior to his discovery and hence, there were no witnesses to the fatal event. Id. The trial commissioner found that the decedent's injuries occurred in the course of and arose out of his employment. The respondents appealed, arguing that while the decedent was in the "course of his employment," his injuries "did not arise out of his employment." Id., 347. The respondents noted that the decedent had a heart murmur and therefore the claimant failed to meet their burden to prove the injury was a result of the employment. Id., 346. The Supreme Court rejected that defense, noting that while the initial impetus to the fatal event, whether a medical emergency or merely slipping, could not be determined, the decedent was in the course of his employment on a ladder when the event occurred and a fall was among the risks inherent in the job the decedent was performing. Id., 348.

In Blakeslee, supra, the claimant suffered an epileptic seizure at his place of employment. The claimant then sustained orthopedic injuries at the hands of his co-

[2] While we note that Savage v. St. Aeden's Church, 122 Conn. 343 (1937) was cited as valid authority within the past decade in Blakeslee v. Platt Bros. & Co., 279 Conn. 239 (2006), we also note, in the interim we find the Connecticut Supreme Court ruled on a very similar factual circumstance, did not cite Savage as authority, and reached an entirely different result. In Kulis v. Moll, 172 Conn. 104 (1976) a workman was found stricken at the bottom of a ladder and was driven to a local hospital by his employer. The claimant in Kulis did not file a claim for benefits within the statutory one year period and the Supreme Court held that the transportation following the injury did not meet the "medical care exception" to the notice statute. "Here, there was no evidence to indicate whether the plaintiff, when found on the ground, had suffered a sudden illness, an accidental fall or even an external assault before his employer, responding to his humane instincts, drove the plaintiff to the hospital." Id., 111-112. By the logic of Savage, the employer in Kulis should have been presumed to have known a compensable injury had occurred and therefore the need for formal notice was superfluous to engage the authority of this Commission, as the medical care exception to § 31-294c C.G.S. was satisfied. The decision in Kulis does not cite Savage, reached an entirely different outcome, and we are puzzled as to how the two decisions are reconcilable.

workers, who were restraining him. The trial commissioner concluded the initial seizure did not arise out of the claimant's employment and the subsequent injuries were a sequalae of that event. Id., 245. This tribunal affirmed the denial, Blakeslee v. Platt Brothers & Co., 4761 CRB-5-03-12 (October 8, 2004), *rev'd*, 279 Conn. 239 (2006), but the Supreme Court reversed our decision. How they chose to do so sheds light on how we should rule on this case. The Supreme Court initially cited Savage for this proposition "[w]hatever predisposing physical condition may exist, if the employment is the immediate occasion of the injury, it arises out of the employment because it develops within it.'' Id. However, the Supreme Court's majority decision then engaged in an extensive review of the issue of "mutual benefit"; concluding that the claimant's injuries had occurred at the hands of co-workers seeking to rescue a stricken colleague, and had the co-workers been injured in the course of that rescue, those injuries would clearly have been compensable. Id., 248-252.

The claimant argues that when traumatic injuries occur in the workplace that are sequalae of some nonoccupational medical condition, the Savage precedent deems those injuries automatically compensable. Claimant's Brief, pp. 11-12. We are not persuaded. If that were indeed the standard, then the Supreme Court's decision in Blakeslee would not have included a lengthy discussion of the need for "mutual benefit" to accrue to the employer prior to finding such injuries compensable.[3] In addition, the decision in

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[3] The critical legal conclusion in Blakeslee v. Platt Bros. & Co., 279 Conn. 239 (2006) was contained on pages 250 and 251where the Supreme Court opined as follows on the "mutual benefit" it found present in that circumstance.

> In light of the commissioner's finding that the plaintiff's coworkers had rendered aid to prevent injury not only to the plaintiff, but also to other workers, the *only* reasonable inference from this fact is that, contrary to the board's conclusion, the coworkers' actions were undertaken to benefit both the plaintiff *and* the defendant. Given this mutual benefit, the injuries sustained as a result

Blakeslee clearly describes the initial seizure as "noncompensable." Id., 240. We also note that the dissenting opinion by Chief Justice Sullivan in Blakeslee reviewed the legal reasoning behind Savage at great length. Id., 255-261. This opinion deemed much of the verbiage of the Savage opinion as mere dicta and not binding authority. Id., 260-261. While a dissenting opinion is not binding on this tribunal, we find much of the legal reasoning herein relevant to the issue of when an idiopathic medical condition can create a compensable injury; especially when considered in the context of subsequent appellate authority.

A review of appellate precedent issued since Blakeslee indicates that in order to find compensability, a claimant must establish to the trial commissioner's satisfaction a clear nexus between his or her employment and the injury for which benefits are being claimed. We look first to Birnie v. Electric Boat Corporation, 288 Conn. 392 (2008). In Birnie, the Supreme Court outlined the following test for compensability of an injury.

> We begin with an examination of the substantial factor standard, as applied in workers' compensation cases pursuant to the state act. Not long after the enactment of the state act, this court construed the statutory requirement that an injury ''arise out of'' the employment; General Statutes § 31-275 (1); to mean that there must exist *a* causal connection between the employment and the injury. See, e.g., *Mann* v. *Glastonbury Knitting Co*., 90 Conn. 116, 119, 96 A. 368 (1916) (injury '' 'arises out of' the employment, when there is apparent to the rational mind . . . *a* causal connection between the conditions under which the work is required to be performed and the resulting injury'' [emphasis added]); *Larke* v. *Hancock Mutual Life Ins. Co*., 90 Conn. 303, 309, 97 A. 320

> thereof must fall within the scope of the general rule that an injury sustained in the course of employment also arises out of the employment.

If the claimant's injury in the present case were the result of injuries received in the course of being rescued by his co-workers, Blakeslee would suggest that his injuries would be deemed compensable. The record indicates the claimant was not injured in that manner, however, and the trial commissioner made no finding of mutual benefit in the present case. We are unable to infer such benefit was present from the record herein.

> (1916) (''[t]he term 'arising out of' in [the state act] points to the origin or cause of the injury'' and ''[i]t presupposes *a* causal connection between the employment and the injury'' [emphasis added]). This court further construed the requirement simply to mean that there must exist ''*some* causal connection'' before determining that the injury arose out of the employment. (Emphasis added.) *Madore* v. *New Departure Mfg. Co*., 104 Conn. 709, 712, 134 A. 259 (1926); id. (''in every case there must be apparent *some* causal connection between the injury and the employment . . . before the injury can be found to arise out of the employment'' [emphasis added; internal quotation marks omitted]); *Porter* v. *New Haven*, 105 Conn. 394, 396, 135 A. 293 (1926) (same).
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> The term 'aris[ing] out of' also was construed to mean that the employment be a contributing proximate cause of the injury; *Mann* v. *Glastonbury Knitting Co*., supra, 90 Conn. 119; for purposes of distinguishing compensable injuries from those that were ''merely contemporaneous or coincident with the employment.'' *Madore* v. *New Departure Mfg. Co*., supra, 104 Conn. 713; see also *Mahoney* v. *Beatman*, 110 Conn. 184, 192, 147 A.2d 762 (1929) (''the doctrine of proximate cause . . . mean[s] in law no more than a cause which is *not so remote* in efficiency as to be dismissed from consideration by the court'' [emphasis added; internal quotation marks omitted]).

Id., 409-410.

The Birnie decision also cited Norton v. Barton's Bias Narrow Fabric Co., 106 Conn. 360 (1927) for the proposition that injuries that are "merely contemporaneous or coincidental with the employment" are not compensable injuries. Id., 411. The decision also cited Norton, supra, for the proposition that unless one's employment "*materially or essentially contributes* to bring about an injury" that the "substantial factor" test was not met and the injury was not compensable. Id., 412. (Emphasis in original.)

The next year the Supreme Court opined on the quantum of evidence needed to prove causation in DiNuzzo, supra. The court reversed the finding of compensability reached in a § 31-306 C.G.S. claim, finding the evidence supportive of compensability

inadequate. In doing so, the Court promulgated the following standard to determine causation.

> [I]n Connecticut traditional concepts of proximate cause constitute the rule for determining . . . causation [in workers' compensation cases]. *McDonough* v. *Connecticut Bank & Trust Co.*, 204 Conn. 104, 118, 527 A.2d 664 (1987); accord *Solonick* v. *Electric Boat Corp.*, 111 Conn. App. 793, 799, 961 A.2d 470 (2008) (same), cert. denied, 290 Conn. 916, 965 A.2d 555 (2009). [T]he test of proximate cause is whether the defendant's conduct is a substantial factor in bringing about the plaintiff's injuries. . . . Further, it is the plaintiff who bears the burden to prove an unbroken sequence of events that tied his injuries to the [defendant's conduct]. . . . The existence of the proximate cause of an injury is determined by looking from the injury to the negligent act complained of for the necessary causal connection. . . . This causal connection must be based [on] more than conjecture and surmise. . . . An actual cause that is a substantial factor in the resulting harm is a proximate cause of that harm. . . . The finding of actual cause is thus a requisite for any finding of proximate cause. (Citation omitted; internal quotation marks omitted.) *Winn* v. *Posades*, 281 Conn. 50, 56–57, 913 A.2d 407 (2007).

Id., 141-142.

The issue of whether one's employment was the proximate cause behind the claimant's injury was the issue considered in a later case involving § 31-306 C.G.S. benefits, Sapko v. State, 305 Conn. 360 (2012). We note that in Sapko the Supreme Court affirmed the denial of benefits in a case where noncompensable events were an intervening cause behind the demise of the deceased. Id., 367-368. The Supreme Court cited DiNuzzo, supra, as authority for the proposition that it is the burden of a claimant to establish compensability based on a theory of proximate cause. Id., 372. The Supreme Court in Sapko also pointed out the paramount role of the trial commissioner is to determine, based on the record, whether a claimant establishes that his or her employment is the proximate cause of an injury.

> The question of proximate causation . . . belongs to the trier of fact because causation is essentially a factual issue. . . . It becomes a conclusion of law only when the mind of a fair and reasonable [person] could reach only one conclusion; if there is room for a reasonable disagreement the question is one to be determined by the trier as a matter of fact. (Citations omitted; internal quotation marks omitted.) *Stewart* v. *Federated Dept. Stores, Inc.*, supra, 611.

Id., 373.

This standard was most recently applied by the Appellate Court in Turrell v. Dept. of Mental Health & Addiction Services, 144 Conn. App. 834 (2013). In Turrell the claimant appealed from the denial of benefits for back surgery she claimed was due to a work related injury. The Appellate Court affirmed the denial.

> [Our Supreme Court] has defined proximate cause as [a]n actual cause that is a substantial factor in the resulting harm . . . . The question of proximate causation . . . belongs to the trier of fact because causation is essentially a factual issue. . . . It becomes a conclusion of law only when the mind of a fair and reasonable [person] could reach only one conclusion; if there is room for a reasonable disagreement the question is one to be determined by the trier as a matter of fact. (Citations omitted; internal quotation marks omitted.) *Sapko* v. *State*, 305 Conn. 360, 372–73, 44 A.3d 827 (2012). [W]hether a sufficient causal connection exists between the employment and a subsequent injury is . . . a question of fact for the commissioner.

Id., 845.

At this juncture it would be appropriate to note the factual distinctions between the present case and Savage, supra, as they are critical in the analysis of whether proximate cause exists between the claimant's employment and his injury. In Savage, the claimant was hired as a painter and fell off a ladder sustaining fatal injuries. By climbing the ladder the claimant was providing a benefit to his employer and was engaged in labor which the respondent hired the claimant to perform. Falling off a ladder and sustaining a

traumatic injury while painting is surely “a risk involved in the employment or incident to it or to the conditions under which it is required to be performed. . .” Blakeslee, supra, 244. When an injury occurs under such circumstances that it arises out of the employment, it is clear a fact finder can determine that the work was the proximate cause of the injury.

The facts herein are simply not on point with Savage. The commissioner found that the claimant never deployed a ladder. Based on testimony from contemporaneous witnesses who were found credible, the trial commissioner found that the claimant was in a flat muddy area and fell down on the ground. The trial commissioner found that the claimant was at a point between performing specific tasks for the respondent when he was stricken. We cannot ascertain from these facts how the claimant’s employment was a proximate cause of his injury, as the injury clearly was of a character which would have occurred in the same manner had the claimant not been at his workplace. The record is bereft of any finding that the claimant’s employment contributed in any fashion to his injury. While the claimant was physically present at his place of employment at the time of the injury, the facts herein do not compel the finder of fact to conclude that “mutual benefit” was present. There is also no evidence that the claimant was injured due to the acts of co-workers, hence, Blakeslee, supra, is factually distinguishable as well.

Given the factual distinctions with Savage and the weight of recent Supreme Court and Appellate Court precedent regarding the necessity for claimants to prove a nexus between employment and injury; we find the precedent in Savage is inapplicable to this case. We thus look at recent precedent before the Compensation Review Board to

ascertain if the result in this case is consistent with other cases where the issue of whether the claimant's injury arose out of the employment was litigated.

Earlier this year we decided Tyskiewicz v. Danbury, 5839 CRB-7-13-5 (April 4, 2014), which was another case involving a traumatic injury where the respondent contested causation. In Tysiewicz, the claimant was injured while fighting a fire and could not recall exactly what had prompted his fall. The trial commissioner concluded that the fall was mostly likely caused by tripping over an obstacle, being hit by falling debris or by a syncopal episode triggered by work–related stress. The respondents argued that an idiopathic syncopal episode *could* have triggered the fall, and therefore the claimant failed to prove his injury arose from his employment. We affirmed the award, as we concluded the trial commissioner could have found the respondents' evidence unpersuasive, the claimant's expert persuasive, and find that the claimant's injury was a risk involved in the employment for a firefighter. In the present case the only triggering factor for the claimant's injury was found to be non work-related (i.e. an alcohol withdrawal seizure) and the claimant was not engaged in a stressful or laborious activity akin to fire fighting when he was stricken.

We distinguished Tyskiewicz on the facts from two other CRB cases which we find are controlling over this scenario: Loehfelm v. Stratford-Board of Education, 5710 CRB-4-11-12 (November 14, 2012) and Vitti v. Richards Conditioning Corp., 5247 CRB-7-07-7 (August 21, 2008). Both cases involve injuries which the trial commissioner found were merely contemporaneous with the claimant's work hours. In Loehfelm the claimant fell in a stairwell at work where there was no evidence any hazardous condition was present, and the evidence credited by the trial commissioner was that the fall was

triggered by a prior noncompensable injury. Our decision in Loehfelm *cited* Birnie, supra, as controlling authority over causation standards, and affirmed the commissioner's decision to deny the claim.[4] In Vitti, supra, the claimant sustained a heart attack during his hours of employment and the trial commissioner did not find his expert witness who opined work was a substantial factor behind that event persuasive; therefore the cardiac event was noncompensable. We affirmed that decision as essentially a "dueling expert" case. Id. We also noted that the claimant's injury in Vitti was akin to the initial injury in Blakeslee, supra, which the Supreme Court described as "noncompensable." In the present case the claimant has presented no expert testimony linking the triggering mechanism of his injury with his employment; hence the trial commissioner could not find such a fact. DiNuzzo, supra.

We find the precedent in Loehfelm and Vitti on point herein. The factual record does not compel the trial commissioner to find, as a matter of law, that the claimant's employment was the proximate cause of his injury. Turrell, supra, at 845.

To prevail before this commission a claimant must be a truthful witness. The claimant must also present credible evidence that his or her employment was the proximate cause of the injury for which an award is being sought. The claimant's testimony herein was found not credible and he did not present evidence his injury arose out of his employment. Therefore, trial commissioner could reasonably conclude the claimant did not prove that his injury was anything other than merely contemporaneous

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[4] The claimant has attempted in his brief to distinguish this case from the fact pattern in Loehfelm v. Stratford-Board of Education, 5710 CRB-4-11-12 (November 14, 2012). See Claimant's Brief, p. 12. We do not see any material distinction between a fall contemporaneous with work hours triggered by a prior noncompensable motor vehicle accident and a fall contemporaneous with work hours triggered by an alcohol withdrawal seizure unrelated to work. Therefore, we find Loehfelm controlling precedent.

with his employment and, as such, properly dismissed the claim. This decision is consistent with precedent, the facts on the record and public policy.

We affirm the Finding and Dismissal.[5]

Commissioners Stephen B. Delaney and Michelle D. Truglia concur in this opinion.

[5] Both parties in this matter presented authority from courts in other jurisdictions, which are not binding on this panel. Atkinson v. United Illuminating Company, 5064 CRB-4-06-3 (April 19, 2007). We have decided not to rely on these cases as we find existing Connecticut precedent adequately addresses the issues at hand.