CASE NO. 5865 CRB-4-13-7 : COMPENSATION REVIEW BOARD
CLAIM NO. 400088156

TREVOR CLARK : WORKERS' COMPENSATION
CLAIMANT-APPELLEE COMMISSION

v. : JULY 11, 2014

METRO ROOFING SUPPLIES, INC.
EMPLOYER

and

LIBERTY MUTUAL INSURANCE GROUP
INSURER
RESPONDENTS/APPELLANTS

APPEARANCES:

The claimant was represented by Andrew Bottinick, Esq., Carter Mario Injury Lawyers, 532 Wolcott Street, Waterbury, CT 06705.

The respondents were represented by Vincent Di Palma, Esq., Law Offices of Loccisano, Turret & Rosenbaum, 101 Barnes Road, 3rd Floor, Wallingford, CT 06492.

This Petition for Review from the June 27, 2013 Finding and Award of the Commissioner acting for the Fourth District was heard on January 24, 2014 before a Compensation Review Board panel consisting of Commission Chairman John A. Mastropietro and Commissioners Stephen B. Delaney and Michelle D. Truglia.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondents have petitioned for review from the June 27, 2013 Finding and Award of the Commissioner acting for the Fourth District. We find no error and accordingly affirm the decision of the trial commissioner.

The trial commissioner made the following factual findings which are pertinent to our review. The claimant testified that he sustained injuries when the flatbed boom truck he was driving partially fell through a wooden bridge following a delivery of shingles for roof construction. The claimant injured his back, neck, right leg, and left shoulder, and reported that he also began to suffer from headaches following the accident. The claimant denied that he was given any special instructions for the delivery or was told by company supervisors or co-workers not to drive the truck over the bridge. Moreover, although the words "Small wood bridge!" appeared at the top of the invoice for the delivery, the claimant denied the notation was there when he was given the paperwork and speculated that it was probably written on the invoice after the accident.

The claimant testified that he has been a truck driver for thirteen years and knew that he needed to inspect the bridge before driving over it. When he arrived, he looked under the side of the bridge along with Mike Hopp, the individual who was receiving the delivery. Hopp told him that a dumpster had previously been delivered over the bridge but it was up to the claimant as to whether he wanted to try and drive the truck over. The claimant crossed the bridge safely, boomed the material to the roof, and then began backing the truck across the bridge because it was not possible to turn around. While

backing out, the claimant was being guided by Hopp and another gentleman on either side of the truck when he heard a crack and the front of the truck slid down inside the crevice of the bridge. The back tire came off the ground and the outriggers and booms were touching the ground on the left side.

At trial, Hopp testified that he owns his own construction business and has bought supplies from the instant employer for years. He indicated that it was the claimant's decision to drive the truck over the bridge; he thought the claimant was driving quickly and it sounded like he changed gears as he drove over.[1] Hopp said that he had hoped the claimant would keep the truck tires over the bridge beams as he and the claimant had discussed, but for some reason the claimant did not; rather, for reasons unknown to Hopp, the claimant stopped the truck on the bridge. After the truck stopped, the decking with the front tire on it snapped and the front end of the truck fell in. Hopp opined that the claimant must have kept the truck tires directly over the beams coming in or the bridge would have snapped at that point.

Richard Santarsiero testified that he handles sales for the employer. He indicated that he was working in the office on the date of the accident and remembered hearing his supervisor, Charles DeSantis, tell the claimant not to drive over the wooden bridge at Hopp's job site. Santarsiero stated that apart from one divider for the boss's office, the rest of his workspace is a large open area he shares with his co-workers. Santarsiero testified that he gave the invoice for the delivery to Hopp's worksite to the claimant, and remembered the words "Small wood bridge" were written on the invoice. He indicated

[1] The claimant denied changing gears when he initially drove over the bridge.

that he believed Sal Pregno, who took the order, wrote the notation, and recalled that Pregno told the claimant several times not to drive over the bridge. Santarsiero also reminded the claimant after DeSantis had spoken with the claimant.

Michael Felizardo, assistant manager for the employer, testified that he heard DeSantis tell the claimant not to drive over the wooden bridge. Felizardo stated that an employee has "zero" discretion to deviate from an order given by DeSantis. Findings, ¶ 11; March 12, 2013 Transcript, p. 89. Sal Pregno also testified, indicating that he handles sales for the employer and took the call from Hopp, who alerted Pregno about the wooden bridge. Pregno testified that he wrote the notation on the invoice, and "[e]veryone in the office discussed it and decided it would not be a good idea to go over the bridge." Findings, ¶ 12. Pregno stated that the claimant was present for the discussion, appeared to understand the directions, and left without saying anything. Pregno also indicated that the notation regarding the bridge was written on the copy of the invoice that went to the warehouse where the material for the delivery was being stored. He testified that it is company practice to verbalize an order many times when necessary, such as when there is a safety issue.

DeSantis, the branch manager for the employer, testified that he also instructed the claimant not to drive over the bridge. He indicated that he speaks with the driver "every single time" there is a safety issue and does not rely on a written notation. Findings, ¶ 14; March 12, 2013 Transcript, p. 112. He stated that he fired the claimant for insubordination when the claimant returned to work following the accident. He testified that he did not know why the claimant decided to violate his orders this time

after never having done so during the previous six years of his employment with the company. DeSantis also stated that he was probably the first person to tell the claimant not to drive over the bridge, and the other individuals in the office said it afterwards. He did not find it odd that they repeated what he had said, and indicated that he may have gone into his office and not heard his order being repeated. He could not recall who first told the claimant not to cross the bridge after he did, or who next repeated it after that person.

Having heard the foregoing, the trial commissioner concluded that the claimant's testimony was credible. He found that "the claimant reasonably investigated the safety of the bridge, made a determination consistent with his authority as a truck driver to drive the truck over the bridge, and that the incident of the front of the truck snapping the bridge was an unfortunate accident." Conclusion, ¶ e. The trier also found DeSantis credible relative to his testimony that he instructed the claimant not to drive over the bridge, noting that "[t]he termination of the claimant for insubordination was close in time to the incident and lends credence to the testimony." Conclusion, ¶ d. Having determined that "even though the claimant was told not to drive over the wood bridge and did so anyway, the ignoring of his supervisor's instructions did not rise to the level of willful and serious misconduct as defined by CGS 31-284(a)," Conclusion, ¶ f, the trial commissioner concluded that the injuries sustained by the claimant on April 12, 2012 arose out of and during the course of his employment.[2] The trial commissioner ordered

[2] Section 31-284(a) C.G.S. (Rev. to 2012) states, in pertinent part: "An employer who complies with the requirements of subsection (b) of this section shall not be liable for any action for damages on account of personal injury sustained by an employee arising out of and in the course of his employment or on account of death resulting from personal injury so sustained, but an employer shall secure compensation for his

the respondents to pay the medical and indemnity benefits associated with the claim until such time as a Form 36 is approved by the Workers' Compensation Commission per § 31-296 C.G.S.[3]

The respondents filed a Motion to Correct which was denied in its entirety, and this appeal followed. On appeal, the respondents contend that the trial commissioner erred in concluding that the claimant's injuries arose out of and in the course of his employment. In addition, the respondents argue that the claimant's decision to drive his truck over the bridge in direct contravention of his supervisor's orders constituted serious and willful misconduct such that the employer has no liability for those injuries pursuant to the provisions of § 31-284 C.G.S.

We begin our analysis with the well-settled standard of deference we are obliged to apply to a trial commissioner's findings and legal conclusions.

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employees as provided under this chapter, except that compensation shall not be paid when the personal injury has been caused by the wilful and serious misconduct of the injured employee or by his intoxication…."

[3] Section 31-296(b) C.G.S. (Rev. to 2012) states, in pertinent part: "Before discontinuing or reducing payment on account of total or partial incapacity under any such agreement, the employer or the employer's insurer, if it is claimed by or on behalf of the injured employee that such employee's incapacity still continues, shall notify the commissioner and the employee, by certified mail, of the proposed discontinuance or reduction of such payments. Such notice shall specify the reason for the proposed discontinuance or reduction and the date such proposed discontinuance or reduction will commence. No discontinuance or reduction shall become effective unless specifically approved in writing by the commissioner. The employee may request a hearing on any such proposed discontinuance or reduction not later than fifteen days after receipt of such notice. Any such request for a hearing shall be given priority over requests for hearings on other matters. The commissioner shall not approve any such discontinuance or reduction prior to the expiration of the period for requesting a hearing or the completion of such hearing, whichever is later. In any case where the commissioner finds that an employer has discontinued or reduced any payments made in accordance with this section without the approval of the commissioner, such employer shall be required to pay to the employee the total amount of all payments so discontinued or the total amount by which such payments were reduced, as the case may be, and shall be required to pay interest to the employee, at a rate of one and one-quarter per cent per month or portion of a month, on any payments so discontinued or on the total amount by which such payments were reduced, as the case may be, plus reasonable attorney's fees incurred by the employee in relation to such discontinuance or reduction."

> … the role of this board on appeal is not to substitute its own findings for those of the trier of fact. Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 451 (2001). The trial commissioner's role as factfinder encompasses the authority to determine the credibility of the evidence, including the testimony of witnesses and the documents introduced into the record as exhibits. Burse v. American International Airways, Inc., 262 Conn. 31, 37 (2002); Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999). If there is evidence in the record to support the factual findings of the trial commissioner, the findings will be upheld on appeal. Duddy v. Filene's (May Department Stores Co.), 4484 CRB-7-02-1 (October 23, 2002); Phaiah v. Danielson Curtain (C.C. Industries), 4409 CRB-2-01-6 (June 7, 2002). This board may disturb only those findings that are found without evidence, and may also intervene where material facts that are admitted and undisputed have been omitted from the findings. Burse, supra; Duddy, supra. We will also overturn a trier's legal conclusions when they result from an incorrect application of the law to the subordinate facts, or where they are the product of an inference illegally or unreasonably drawn from the facts. Burse, supra; Pallotto v. Blakeslee Prestress, Inc., 3651 CRB-3-97-7 (July 17, 1998).

McMahon v. Emsar, Inc., 5049 CRB-4-06-1 (January 16, 2007).

Relative to the merits of the instant matter, it is should be noted at the outset that in order to recover for an injury under the Workers' Compensation Act, a claimant must demonstrate "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. In order to establish a causal connection between the injury and employment, a claimant's evidence "must demonstrate that the claimed injury (1) 'arose out of the employment,' and (2) 'in the course of the employment.'" Id., 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 result 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). An injury occurs in the course of the employment when "it takes place (a) within the period of the employment, (b) at a place where the employee may reasonably be, and (c) while [the employee] is reasonably fulfilling the duties of the employment or doing something incidental to it." Stakonis v. United Advertising Corporation, 110 Conn. 384, 389 (1930).

However, as referenced previously herein, § 31-284(a) C.G.S. absolves an employer from liability for payment of workers' compensation benefits to an injured employee "when the personal injury has been caused by the wilful and serious misconduct of the injured employee or by his intoxication."[4] In Gonier v. Chase Companies, Inc., 97 Conn. 46 (1921), our Supreme Court examined whether a claimant's decision to resume working on a scaffolding, despite having experienced prior attacks of indigestion resulting in loss of consciousness, constituted misconduct. The court concluded that it did not, and defined "misconduct" as follows:

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

[4] See footnote 2, supra.

> character as to evince a reckless disregard of consequences to himself by him who is guilty of it. (Internal citation omitted.)

Id., at 55-56.

The Court also explained that:

> [o]rdinary negligence could never be even serious misconduct, much less wilful misconduct.… No misconduct which is thoughtless, heedless, inadvertent or of the moment, and none which arises from an error of judgment, can be "wilful and serious misconduct…." Nor will every violation of a statute or a public regulation, or a rule, regulation, *order or instruction of an employer*, constitute wilful and serious misconduct.

(Emphasis added; internal citations omitted.) Id., at 56.

Subsequently, in Mancini v. Scovill Mfg. Co., 98 Conn. 591 (1923), the court slightly amended this definition of misconduct, stating that "[m]isconduct which exposed an employee to serious injury might or might not be serious misconduct, depending on whether the misconduct was of a grave and aggravated character, and whether its character was known to and appreciated by the employee." Id., at 597. In Mancini, the court examined a claim brought by a machine worker who sustained injuries while using a machine to crush pieces of brass. Although the record indicated that the foreman on the job had specifically instructed the claimant to use forceps, rather than her fingers, to place the brass pieces under the press, the claimant disregarded this advice and, after using the forceps for some period of time, returned to placing the brass pieces on the press with her fingers and eventually injured her left index finger.[5] The court framed the issue as follows: "whether the violation of a reasonable safety-rule which had been brought to the

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

attention of the claimant and which was customarily enforced is, under the laws of Connecticut, the equivalent of serious and willful misconduct." Id., at 595, *quoting* "Pro Forma Award in favor of the plaintiff, by the Compensation Commissioner of the fifth district, filed by him in the Superior Court in New Haven County and reserved by that court."

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

However, in contrast to the holdings in Gonier, supra, and Mancini, supra, in Paternostro v. Arborio Corp., 56 Conn. App. 215 (1999), *cert. denied*, 252 Conn. 928 (2000), our Appellate Court affirmed the trial commissioner's denial of benefits to the widow of an individual who, while employed as a member of a road crew, was struck and killed by an automobile while walking across Interstate 84. The decedent, who was found to have been intoxicated at the time of his death, had parked his truck on the shoulder of the highway and attempted to cross the highway to fix a road sign. In reviewing the matter, the court noted that the decedent, "[a]s a member of the sign crew and as the union steward, … was trained and familiar with the safety procedures for

erecting the warning signs," id., at 216, and "the area where the decedent attempted to cross the highway was at a dimly lit and heavily traveled sharp curve in the interstate highway." Id., at 221. The court upheld the denial of benefits, concluding that the decedent's multiple "rules violations could properly be considered to be grave, aggravated and highly unreasonable conduct representing an extreme departure from ordinary care, where a high degree of danger existed." Id. See also Dubay v. Irish, 207 Conn. 518, 533 (1998), *quoting* W. Prosser and W. Keeton, Torts (5th Ed.) 34, p. 214.

Similarly, in Disotell v. LVI Services, Inc., 5749 CRB-3-12-4 (April 25, 2013), this board affirmed the trial commissioner's dismissal of a claim on the basis that the claimant's decision to ascend in a man-lift without utilizing the required safety protection constituted willful and serious misconduct as contemplated by § 31-284(a) C.G.S. The trier found it was not credible to conclude that a "competent person" with the claimant's experience and training would neglect to use a safety harness when operating a man-lift several feet above a demolition site. Noting that the claimant, by his own admission, had not only been extensively trained in safety procedures but, in light of his role as a supervisor, was also responsible for ensuring that other individuals on the work site utilized appropriate protection as well, this board remarked that, "[i]t may thus be reasonably inferred that the trier found the facts of this matter to be far more on point with the factual pattern found in Paternostro, supra, than the fact patterns of either Gonier, supra, or Mancini, supra." Disotell, supra.

Turning to the matter at bar, the respondents contend that at the time the claimant sustained his injuries, he was outside the scope of his employment because he had been

specifically instructed not to drive over the bridge. As such, the claimant's injuries did not arise within the course of his employment because the claimant was not "reasonably fulfilling the duties of the employment or doing something incidental to it." McNamara, supra, at 551. However, the evidentiary record clearly demonstrates that the respondent employed the claimant in the capacity of a truck driver whose responsibilities entailed making deliveries which would presumably involve driving over bridges on a regular basis. In addition, the trier determined that the claimant's decision to drive over the bridge was "consistent with [the claimant's] authority as a truck driver."[6] Conclusion, ¶ e. Thus, in light of the nature of the claimant's professional responsibilities, we decline to find that the trial commissioner abused his discretion in concluding that the claimant sustained his injuries while engaged in the performance of those duties.

Moreover, we are not persuaded that the trial commissioner erred in refusing to find that the claimant's decision to disregard DeSantis' instructions rose "to the level of willful and serious misconduct as defined by CGS 31-284(a)." Conclusion, ¶ f. The trial commissioner found credible the claimant's testimony that he inspected the bridge prior to attempting to make the delivery. Such credibility determinations are exclusively the province of the trial commissioner and are not subject to reversal on appeal. Burton v. Mottolese, 267 Conn. 1, 54 (2003). The respondents argue that the fact that the claimant inspected the bridge was "absolutely irrelevant in the bigger context of the claimant's failure to follow orders," Appellant's Brief, p. 21, because if the claimant had followed the directions given to him by DeSantis, he would not have been injured. However, we

[6] The claimant also testified that he has been a truck driver for more than thirteen years and that the weight of the materials for delivery in question was less than 1,000 pounds in a truck that could hold more than 10,000 pounds. March 12, 2013 Transcript, pp. 41, 39.

note that the claimant in Mancini, supra, also sustained injuries while disregarding a direct order from a supervisor, and the Supreme Court held that her injuries were compensable because the record did not demonstrate that "the plaintiff fully knew and appreciated that her misconduct would expose her to serious injury…." Id., at 600. In the matter at bar, it was entirely reasonable for the trial commissioner to infer that once the claimant had inspected the bridge to his satisfaction, the claimant may have also failed to realize that his actions "would expose [him] to serious injury…" Id.

It is also worthy of mention that in Gonier, supra, the court observed that the determination of "[w]hether misconduct is serious is to be determined from its nature *and not from its consequences*…." (Emphasis added.) Id., at 55. The trial commissioner in the instant matter concluded "that the incident of the front of the truck snapping the bridge was an unfortunate accident." Conclusion, ¶ e. Thus, although there is no question that the claimant's decision to drive over the bridge led to an unfavorable result, it may be reasonably inferred that the trial commissioner considered the precautions taken by the claimant prior to the accident to be consistent with appropriate safety standards rather than a violation of them. As such, the trial commissioner arrived at a result more reflective of the holdings of Gonier, supra, and Mancini, supra, rather than Paternostro, supra. Given the high degree of discretion afforded to such determinations as evidenced by our higher courts' reasoning in these cases and their progeny, we do not find that he committed reversible error in doing so.

> The defense of wilful and serious misconduct is an affirmative one. The burden of establishing it is on the employer…. Since the finding is one of fact, the court on review will not hold this conclusion erroneous unless the facts clearly show this to be so;

> and in reaching its decision the reviewing court will keep before it the fact that the employer has the duty of proving this defense.

(Internal citation omitted.) Gonier, supra, at 58.

The respondents also raise as error the trial commissioner's denial of their Motion to Correct. Our review of the proposed corrections indicates that the respondents are 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, *aff'd*, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003).

There is no error; the June 27, 2013 Finding and Award of the Commissioner acting for the Fourth District is accordingly affirmed.

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