CASE NO. 5874 CRB-5-13-8 : COMPENSATION REVIEW BOARD
CLAIM NO. 500127010

LIRIJE DAUTI, Dependent Spouse
of ZEJADIN DAUTI and the Estate
of ZEJADIN DAUTI
CLAIMANT-APPELLANT : WORKERS' COMPENSATION
COMMISSION

v.

: SEPTEMBER 5, 2014

LIGHTING SERVICES, INC.
EMPLOYER

and

PEERLESS INSURANCE COMPANY
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Eddi Z. Zyko, Esq., 120 Fenn Road, Middlebury, CT 06762-2515.

The respondents were represented by David A. Kelly, Esq., Montstream & May, LLP, Salmon Brook Corporate Park, 655 Winding Brook Drive, P.O. Box 1087, Glastonbury, CT 06033-6087.

This Petition for Review from the July 19, 2013 Finding and Dismissal of the Commissioner acting for the Sixth District was heard February 28, 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, Lirije Dauti, dependent spouse of Zejadin Dauti, has appealed from a Finding and Dismissal of her claim for benefits following the death of her husband. The trial commissioner concluded the death of Mr. Dauti due to a heart attack did not arise out of his employment and therefore was not compensable. The claimant has appealed arguing that the trial commissioner did not properly apply the law and did not properly credit evidence supportive of compensability. Upon reviewing the record and the applicable precedent, we are satisfied the trial commissioner reached a reasonable conclusion as to this case. We affirm the Finding and Dismissal.

The trial commissioner reached the following factual findings which pertain to the issue under appeal. We note that initially this claim had been dismissed due to what the respondents argued was a late filing, thereby depriving the Commission of jurisdiction. We reversed that decision, Dauti v. Lighting Services, Inc., 5553 CRB-5-10-5 (April 25, 2011), *aff'd*, 137 Conn. App. 795 (2012), and the Appellate Court affirmed our decision that the claim was jurisdictionally timely. As the claim was timely the commissioner needed to determine if Zejadin Dauti's death on September 28, 2000 arose out of his employment. The commissioner noted the parties stipulated that the decedent died on that day while in the course of his employment, but that the respondents denied the death arose out of the employment. The commissioner noted the testimony of Ira J. Kanfer, a medical examiner for the State of Connecticut. Dr. Kanfer performed the autopsy on the decedent and had performed between 3,000 and 4,000 autopsies during his 23 year career. He had prepared the death certificate for the decedent, whom he described as

having been in very bad cardiovascular condition at the time of his death at age 36. He said the decedent had a 100% occlusion of his main artery and that was why he died. He said the occlusion probably went on for years and the claimant died of arrhythmia from this long standing heart disease. The witness noted that the claimant could have climbed stairs to get to the second floor, where his fatal cardiac event occurred, and that could have been a physical stressor. However, the witness also testified the claimant could have died at any minute for any reason, and it just happened the claimant had been at work at Stop & Shop when the fatal event occurred.

A co-worker of the decedent, Tom Gleason, also testified at the hearing. In 2000 the decedent was one of the workers whom he supervised. Mr. Gleason said that Devin Nobrega was the claimant's apprentice at the time of his death, but had since passed away. Mr. Gleason said Mr. Nobrega told him he was with the decedent on the second floor of Stop & Shop and the decedent was sitting on a folding chair using a computer and suddenly said "Oh, No!" or a similar statement, and fell over. Mr. Gleason said Mr. Nobrega had not told him how he and the claimant reached the second floor, which could be accessed either by stairs or by an elevator. The decedent's brother, Tashjur Dauti, also testified at the hearing. He said he is the administrator of his brother's estate and he had spoken to Devin Nobrega on the day his brother died. He said Mr. Nobrega told him that after fixing various problems they had gone up the stairs to the second floor and the decedent started using a computer, and the next thing that happened the decedent said "Oh my God!" and collapsed.

Based on this testimony the trial commissioner concluded the decedent died of a heart arrhythmia on September 28, 2000 while in the course of his employment with

Lighting Services, Inc. The commissioner concluded there are two ways to get to the second floor of Stop & Stop's East Hartford store, which was where the fatal event occurred. To reach the second floor one could use the stairs or the elevator. The commissioner concluded that only the hearsay testimony of Tashjur Dauti supported finding that the decedent climbed the stairs prior to his death. Although Mr. Nobrega had died before the formal hearing, the absence of any recorded statement from this witness on this issue during his life rendered Mr. Dauti's testimony unreliable hearsay. In the absence of credible and persuasive evidence the claimant had been under work related exertion prior to his demise the trial commissioner could not find this had occurred. The trial commissioner further found Dr. Kanfer's testimony did not support a finding that the claimant's employment had been a substantial contributing factor in the death of the decedent. As a result the trial commissioner found that the claimant failed to meet her burden of proof that the death of the decedent arose out of his employment, and dismissed the claim.

The claimant filed a Motion to Correct which sought to add findings supportive of a conclusion that the decedent's heart attack was a compensable injury. The trial commissioner denied this Motion in its entirety. The claimant then filed the instant appeal. The gravamen of the appeal is that the trial commissioner failed to apply the correct legal standard governing a situation where an employee dies at the workplace. The claimant also asserts that the respondents had a "duty to rescue" the decedent and the alleged lapse in that duty makes the decedent's death a compensable injury. We will evaluate these contentions in accordance with our recent precedent.

As an initial administrative matter, we must address a Motion to Dismiss filed by the respondents. The respondents argue that the petition for review does not cite the correct dates of the trial commissioner's decision on the claim or on the claimant's Motion to Correct. We deny the Motion to Dismiss for the rationale stated in Vitoria v. Professional Employment & Temps, 5217 CRB-2-07-4 (April 4, 2008). We believe some indicia of prejudice to the respondents should generally exist before we dismiss a claim initiated in a timely manner, as the sole dispute herein is over the adequacy of the pleadings. A reasonable inference was that the claimant was appealing the most recent decision by the trial commissioner, as the inaccurate dates on the petition for review document dealt with an appeal which had been already decided. In addition the reasons of appeal filed by the claimant on August 20, 2013 clearly identify the issues under appeal and would have resolved any confusion which might have existed. The absence of prejudice indicates the Motion should be denied.

We turn to the merits of the claimant's appeal. The standard of deference we are obliged to apply to a trial commissioner's findings and legal conclusions is well-settled. "The trial commissioner's factual findings and conclusions must stand unless they are without evidence, contrary to law or based on unreasonable or impermissible factual inferences." Russo v. Hartford, 4769 CRB-1-04-1 (December 15, 2004), *citing* Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Moreover, "[a]s with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial court could have reasonably concluded as it did." Burton v. Mottolese, 267 Conn. 1, 54 (2003). "This presumption, however, can be challenged by the argument that the trial

commissioner did not properly apply the law or has reached a finding of fact inconsistent with the evidence presented at the formal hearing." Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007). We 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 claimant focuses on two primary issues in seeking to reverse the Finding and Dismissal on appeal. The claimant argues that there is a "presumption of compensability" when a worker is found dead at a work site and the respondents failed to rebut that presumption. The claimant cites Allen v. Northeast Utilities, 6 Conn. App. 498 (1986) for this proposition. The claimant also argues that Blaskeslee, supra, stands for the proposition that the respondents had a "duty to rescue" the decedent and since the decedent died as a result of the cardiac event, his death was compensable under Chapter 568 for that reason. We find neither argument persuasive.

We have reviewed the Allen case and note that it involved a situation where while the employee was found dead at the worksite, the claim was ultimately deemed not to be compensable. As a result, we do not find that as a matter of law this precedent suggests the present Finding must be overturned. The decision actually cites the presumption that one injured at work may be presumed to have been injured as a result of the employment, but further noted that this presumption "does not mandate that a particular conclusion be drawn by the trier." Allen, supra, 501. The Allen opinion further explained "[t]he

plaintiff's burden was to establish by competent evidence that the death for which the compensation was sought arose out of and in the course of the employment." Id., 502. The trial commissioner in this case concluded the death did not arise out of the employment. We must ascertain if that conclusion was supported by evidence on the record.

The claimant presented testimony from Dr. Kanfer, the medical examiner, as to the circumstances of the decedent's death. While the claimant may have believed this testimony would establish a *prima facia* case, the witness offered testimony to the effect that the decedent's fatal cardiac event was essentially inevitable and could have occurred either at the workplace or anywhere else. The commissioner reviewed this testimony and concluded it did not constitute probative evidence that the decedent's demise arose out of his employment.[1] We find our precedent on cardiac injuries is consistent with this conclusion.

The touchstone case on whether a cardiac injury in Connecticut may be deemed compensable is McDonough v. Connecticut Bank & Trust Co., 204 Conn. 104 (1987). In McDonough, the following standard was enunciated by the Supreme Court.

> Heart stress cases differ only in degree from other compensation cases involving causation in myriad different fact patterns. Only the factual nuances and difficulties of expert medical testimony distinguish such cases. In order to recover, a claimant must prove causation by a reasonable medical probability.

---

[1] The claimant points to various statements by Dr. Kanfer that had the decedent recently climbed a flight of stairs, that stress could have triggered the fatal cardiac event. The claimant argues the trial commissioner should have relied on these statements to find compensability. We do not agree. We find that the commissioner was not persuaded that the decedent had climbed stairs prior to his cardiac event as opposed to using an elevator to reach the second floor. In addition, we find the trial commissioner could have relied on those opinions by Dr. Kanfer which suggested the cardiac event was merely contemporaneous with the claimant's employment. "We have held that it is within the discretion of the trial commissioner to accept some, but not all, of a physician's opinion." Lopez v. Lowe's Home Improvement Center, 4922 CRB-6-05-3 (March 29, 2006).

Id., 118.

We do not find any testimony by Dr. Kanfer on the record that states to a reasonable medical probability or certainty that the decedent's employment was a substantial contributing factor in his fatal cardiac event. In Mehan v. Stamford, 5389 CRB-7-08-10 (October 14, 2009), *aff'd,* 127 Conn. App. 619 (2011), *cert. denied*, 301 Conn. 911 (2011), we restated the requisite standard of medical evidence required to establish causation of a compensable injury. *Citing* Struckman v. Burns, 205 Conn. 542 (1987), we pointed out the standard of "reasonable medical certainty" "is determined by looking at the entire substance of testimony." O'Reilly v. General Dynamics Corp., 52 Conn. App. 813, 817-818 (1999). Having reviewed Dr. Kanfer's testimony in its entirety, we cannot conclude that the trial commissioner reached an unreasonable conclusion that it failed to opine on the issue of causation to the standard required under McDonough, supra.

We have also reviewed two Appellate Court cases determined subsequent to McDonough, supra, to ascertain if the trial commissioner applied the correct legal standard for determining the compensability of a claim for cardiac injuries. In Chesler v. Derby, 96 Conn. App. 207 (2006) the claimant persuaded the trial commissioner that an extremely contentious board hearing precipitated the decedent's fatal heart attack. The Appellate Court, citing McDonough, reiterated that stress related physical injuries were compensable. Id., 213-215. In addition, it was noted that the treating physician opined the stress the decedent was under at the meeting was a significant factor in the sudden cardiac death. Id, 218-219. On the other hand, in Solonick v. Electric Boat Corporation, 5170 CRB-2-06-12 (January 9, 2008), *aff'd*, 111 Conn. App. 793 (2008), *cert. denied*,

290 Conn. 916 (2009) the trial commissioner concluded the claimant had not proven his cardiac injuries were due to work related stress. In Solonick, the Appellate Court pointed out that a claimant must establish a proximate cause between employment and injury to prove compensability. Citing McDonough, supra, the opinion stated,

> . . . the court emphasized that ''the trier must determine that there is a direct causal connection between the injury, whether it be the result of accident or disease, and the employment. The question he must answer is, was the employment a proximate cause of the disablement, or was the injured condition merely contemporaneous or coincident with the employment? (Internal quotation marks omitted.)"

Id., 799; Id., 117.

The Appellate Court in Solonick determined that the trial commissioner could rely on expert testimony he found persuasive that the claimant had not established proximate cause. Therefore, the Appellate Court affirmed dismissal of the claim.

We have recently examined precedent on the issue of proving causation of a compensable injury. In Kielbowicz v. Tilcon Connecticut, Inc., 5855 CRB-6-13-6 (June 12, 2014) we rejected the claimant's argument that precedent in Blakeslee, supra, made his injury compensable, and pointed to more recent precedent mandating persuasive evidence of proximate cause. "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)." Our review of Birnie, supra, Sapko v. State, 305 Conn. 360 (2012) and DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132 (2009), demonstrated our Supreme Court had made clear that claimants must prove employment is the proximate cause of their injury in order for the Commission to find the

injuries compensable. This position was summarized most recently in Turrell v. Dept. of Mental Health & Addiction Services, 144 Conn. App. 834 (2013).

> [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.

In Kielbowicz, supra, we also distinguished the facts in that case from another case the claimant relies on herein, Savage v. St. Aeden's Church, 122 Conn. 343 (1937). Savage was a case where a painter was found dead on a hard floor at the base of a ladder, and there had been no witnesses to the event. While the circumstances of that unwitnessed death created a nexus between employment and injury, we declined to apply this precedent to a case where witnesses were present at the time of the injury and the medical evidence pointed to causation factors unrelated to employment. In the present case the record demonstrated a co-worker was with the decedent at the time of his cardiac event, and the evidence of Dr. Kanfer did not substantiate a nexus to employment. Therefore, we do not find Savage on point herein.

The claimant further argues that the precedent in Blakeslee, supra, creates a "duty to rescue" on the part of the respondent. The claimant argues that this duty makes the death of the decedent compensable. We have reviewed Blakeslee and do not find the opinion stands for such a broad philosophy. In Blakeslee, the clamant suffered an initial

epileptic seizure which was not compensable but then sustained orthopedic injuries at the hands of co-workers who came to his rescue. As we noted in Kielbowicz, supra, the Supreme Court's decision in Blakeslee was largely based on the concept of "mutual benefit", noting that had co-workers been injured in the course of a rescue of Mr. Blakeslee, those injuries would have been compensable. Blakeslee, supra, 247-251. In the present case the medical evidence would suggest that the initial cardiac event was the proximate cause of the decedent's death. Unlike Blakeslee, this claimant is not seeking benefits for a subsequent injury suffered as a result of co-workers seeking to rescue or restrain the injured worker subsequent to an initial injury. Such an additional injury would be compensable, but the record herein is that the initial cardiac event proved fatal. As the trial commissioner found that injury was merely contemporaneous with employment we do not find Blakeslee governs the facts of this case. In addition, the claimant points to no other Connecticut precedent on point regarding this theory of recovery. Therefore, we are not persuaded that the trial commissioner erred on this issue.

The claimant further argues that the trial commissioner erred by denying the Motion to Correct. She argues that the commissioner failed to include pertinent facts in the Finding. We conclude that the trial commissioner did not find the evidence the claimant wanted to add to the Finding either persuasive or probative. Vitti v. Richards Conditioning Corp., 5247 CRB-7-07-7 (August 21, 2008). The trial commissioner is not obligated to adopt the legal opinions and factual conclusions of a litigant. D'Amico v. Dept. of Correction, 73 Conn. App. 718 (2002) and Liano v. Bridgeport, 4934 CRB-4-05-4 (April 13, 2006). A trial commissioner is also not obligated to clarify his or her reasoning in the Finding, as we held in Biehn v. Bridgeport, 5232 CRB-4-07-6

(September 11, 2008). We also note that it is the role of the trier of fact to weigh medical evidence, O'Reilly, supra, and a trial commissioner is under no obligation to either accept or reject evidence, Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999). As we pointed out in Brockenberry v. Thomas Deegan d/b/a Tom's Scrap Metal, Inc., 5429 CRB-5-09-2 (January 22, 2010), *aff'd*, 126 Conn. App. 902 (2011) (Per Curiam), a party must persuade this tribunal a commissioner was unreasonable in his or her decision to deny a Motion to Correct.

> When a party files a Motion to Correct this is an effort to bring factual evidence to the trial commissioner's attention in an effort to obtain a Finding that is consistent with such facts. When a trial commissioner denies such a motion, we may properly infer that the commissioner did not find the evidence submitted probative or credible. Vitti v. Richards Conditioning Corp., 5247 CRB-7-07-7 (August 21, 2008). On appeal, our inquiry is limited to ascertaining if this decision was arbitrary or capricious.

Id.

We decline to find this decision unreasonable as the trial commissioner could have reasonably concluded the expert witness presented by the claimant was not persuasive on the issue of causation. In addition, much of the testimony sought to be added to the record concerned the statements allegedly made by the now deceased Devin Nobrega. "This Commission's case law has been unequivocal. 'Our case law clearly states, 'a trial commissioner has broad discretion to determine the admissibility of evidence, and an evidentiary ruling will not be set aside absent a clear abuse of that discretion.' Lamontagne v. F & F Concrete Corp., 5198 CRB-4-07-2 (February 25, 2008)]. Keeney v. Laidlaw Transportation, 5199 CRB-2-07-2 (May 21, 2008).'" Valiante v. Burns Construction Company, 5393 CRB-4-08-11 (October 15, 2009). We do not find an abuse of that discretion.

We note the similarities between the facts of this case and Vitti, supra. In Vitti the claimant sustained a heart attack while at the workplace and asserted his injuries were compensable, citing Blakeslee, supra. We rejected the claimant's reliance on Blakeslee in that case and affirmed the denial of benefits as the trial commissioner was not persuaded by the claimant's expert witness on the issue of causation. As we cannot identify any material factual or legal distinction between this case and Vitti, *stare decisis* compels us to reach the same result. Therefore, we affirm the Finding and Dismissal.

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