CASE NO. 5908 CRB-4-14-2 : COMPENSATION REVIEW BOARD
CLAIM NO. 400088034

ISAIAS CHANTEC
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: APRIL 29, 2015

FABIAN LIMA d/b/a MAGIC TOUCH WINDOW CLEANING and PHILLIP M. FOURTIN, MAGIC TOUCH SERVICES, LLC
EMPLOYERS
NO RECORD OF INSURANCE
RESPONDENTS-APPELLEES

and

SECOND INJURY FUND
RESPONDENT-APPELLEE

APPEARANCES:

The claimant was represented by Nickola J. Cunha, Esq., 2494 Whitney Avenue, Hamden, CT 06518.

The respondents Fabian Lima and Phillip M. Fourtin appeared on their own behalf.

The respondent Second Injury Fund was represented by Michael J. Belzer, Esq., Assistant Attorney General, Office of the Attorney General, 55 Elm Street, PO Box 120, Hartford, CT 06141-0120.

This Petition for Review[1] from the December 30, 2013 Findings and Orders of the Commissioner acting for the Fourth District was heard December 19, 2014 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Stephen B. Delaney and Michelle D. Truglia.

[1] We note that an extension of time and a postponement were granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. One axiom of workers' compensation law has been "the claimant has the burden of proving that he has sustained a compensable injury." Toroveci v. Globe Tool & Metal Stamping Co., Inc., 5253 CRB-6-07-7 (July 22, 2008). The claimant argues that he was injured in an accident that occurred at a job site where he was employed by the respondents. The trial commissioner was not persuaded by his testimony and dismissed the claim. The claimant has appealed this decision but we conclude this was a factual determination committed to the trier of fact. We affirm the Findings and Orders.

The trial commissioner found the following facts at the conclusion of the formal hearing which are pertinent to our consideration. She found the claimant worked for the respondents Fabian Lima and Phillip Fourtin and their firm Magic Touch Services LLC, as a seasonal laborer in their window cleaning and power washing business. The claimant worked in 2011 at a rate of $9.00 per hour and on March 8, 2012 was rehired at the rate of $10.00 per hour. On the afternoon of April 5, 2012 the claimant was washing windows at a job site, a residential home located at 470 Pequot Road, Southport, CT. The respondents left the job site for a period of 15 to 20 minutes and when they returned they were advised either by the claimant or a co-worker that the claimant had fallen off the roof. The respondent Mr. Lima provided Ibuprofen to the claimant. The job at that home was completed that day and the claimant and his co-workers loaded the company van and left the worksite. From April 6, 2012 through April 21, 2012 the claimant reported to work for the respondents, performing his usual duties.

On April 22, 2012 the claimant went to the emergency room at Yale-New Haven Hospital with a chief complaint of right foot pain/swelling. The claimant provided the following history: "two weeks ago, while cleaning windows, slid down roof on right leg, fell ten feet landing on heel-unable to put weight down on foot-also midline lumbar back pain, no numbness or tingling…." He was diagnosed with acute compression fractures of L1 and L2 and L5-S1 pars fracture. X-rays of the right foot were negative. At the hospital, the claimant was given Ibuprofen, Valium and Oxycodone and told to avoid heavy lifting. The claimant returned to Yale-New Haven for follow-up on May 8, 2012, where he related a narrative of having fallen off a roof onto his feet two weeks previously. No loss of consciousness was reported. He was prescribed medication and directed to follow up with a primary care physician. On June 5, 2012 the claimant returned to the Neurosurgery Clinic at Yale New Haven Hospital. At that time, Dr. Michael DiLuna reported that a set of plain films performed on that day showed excellent healing of the lumbar compression fractures, but persistent L5 pars defects. The claimant was fitted for a lumbar brace and the doctor noted that he would not achieve pain relief for another couple of months. The claimant was given Flexiril and advised to follow up in two months.

On January 22, 2013 the claimant was seen by Dr. Michael Connair, an orthopedic surgeon. On that date, Dr. Connair reported that the claimant is a 30-year-old construction worker who suffered an injury on April 5, 2012 while, "washing windows on a ladder and fell from the ladder 9' to 10' directly onto his back; he struck his head. Though old records state he did not lose consciousness, he and the translator today state that he probably lost consciousness for about six minutes after the fall." Findings, ¶ 20.

On January 22, 2013 Dr. Connair recommended physical therapy, an MRI and stated that the claimant was not suitable for his job in construction at that time. The trial commissioner noted that the respondents were not insured for workers' compensation and the respondents had not paid for the claimant's medical treatment. On the other hand, the respondents paid without prejudice two payments of $500.00 each totaling $1,000.00 toward temporary total disability benefits to the claimant. Additionally, the respondents paid without prejudice weekly temporary total disability benefits at the rate of $150.00 for twenty five (25) weeks through December 22, 2012, totaling $3,900.00.

The commissioner noted the claimant's testimony supporting his claim. He testified he fell about nine feet from a lower roof of the house and he told Mr. Lima when he fell that his leg and his back hurt a lot. After he fell, he blacked out for about five minutes. Mr. Lima gave him medicine but did not offer to take him to the hospital. When he fell he did not ask anyone to call an ambulance. He preferred to tell the respondents about having fallen and to let them make the decision. In the approximately 17 days that he continued to work after the accident he complained to Mr. Lima that his back and legs hurt. After a few weeks, he still had pain and he asked Mr. Lima again and again to go to the hospital, but did not receive an answer. Since April 22, 2012 he has not worked. This is due to his health and the recommendation of the doctor.

The commissioner also noted the principals of the claimant's employer testified at the hearing. Phil Fourtin testified that by 2012 they knew the claimant was afraid of heights and limited his work to the first floor. In the regular course of business, the claimant would climb the six-foot ladder or the stepladder, which is about three feet. These ladders have a wider base and are steadier than the taller, extension ladders. On

April 5, 2012, after hearing that the claimant supposedly had a fall, he was surprised because the claimant wasn't supposed to be on any ladder and he wasn't supposed to be on a roof at all, especially the roof that was just power-washed and was still wet. On that day Mr. Fourtin said there were no signs of blood around the house, and the claimant didn't appear to be injured. He was not limping, nor did he have blood on his clothes or head. He showed no signs whatsoever of someone who had just fallen from a roof. In the two weeks following the incident the claimant worked normally without any complaint and did not request any medicine or medical attention. The claimant stopped working at the end of his shift on April 21, 2012 without explanation and did not return subsequent phone calls.

Fabian Lima also testified. He did not witness the claimant's fall but did not think he was dishonest as to it happening. He has a hard time believing that the claimant got hurt from such a small height. He gave the claimant Ibuprofen on April 5, 2012 because he always gives the guys something when they say they're hurt. However, he didn't believe the claimant was experiencing discomfort on that day based on his appearance and demeanor. He corroborated the testimony of Mr. Fourtin that the claimant was never supposed to be doing second floor work. Mr. Lima further said that the claimant did not appear injured after the incident and "came to work every single day after that, happy, singing, working just as hard as everybody else. Never showed any kind of symptoms of any nature." Findings, ¶ 25d. The respondents also submitted time sheets documenting the claimant's hours of work until the week of April 16-22, 2012.

Based on these subordinate facts the trial commissioner concluded the claimant was not credible as to any of the issues presented, and the trial commissioner was not

persuaded that the claimant sustained an injury arising out of and in the course of his employment on April 5, 2012. The trial commissioner found the medical evidence presented unreliable as it was dependent on the claimant's narrative, which the commissioner found full of inconsistencies. The trial commissioner conversely found Mr. Lima and Mr. Fourtin to be persuasive and credible witnesses. The commissioner therefore denied and dismissed the claim, including the claimant's bid for sanctions against the respondents.

The claimant filed a Motion for Clarification and a Motion to Correct. The trial commissioner denied both motions in their entirety. The claimant has commenced this appeal. His central argument is that the trial commissioner's factual findings, in particular Conclusion, ¶ F, were "clearly erroneous" as per the precedent in Berube v. Tim's Painting, 5068 CRB-3-06-3 (March 13, 2007), and therefore the commissioner's factual findings should not be affirmed on appeal. Since the claimant believes the respondents failed to present a sufficient defense to his claim, he seeks to have sanctions imposed pursuant to § 31-288(b) C.G.S and § 31-300 C.G.S. We are not persuaded by these averments of error.[2]

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[2] We delineated the "clearly erroneous" standard in Dudley v. Radio Frequency Systems, 4995 CRB-8-05-9 (July 17, 2006).

> The scope of review of a trial court's factual decision on appeal is limited to a determination of whether it is clearly erroneous in view of the evidence and pleadings. . . . Conclusions are not erroneous unless they violate law, logic or reason or are inconsistent with the subordinate facts. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. (Citations omitted; internal quotation marks omitted.)

Citing Moutinho v. Planning & Zoning Commission, 278 Conn. 660, 665-666 (2006).

A conclusion that the trial commissioner does not find the claimant's uncorroborated narrative credible is not "clearly erroneous" since the trier of fact is the sole finder of witness credibility. 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).

We note many parallels to other cases we have dealt with where the claimant sought benefits for an unwitnessed accident. In some of these cases such as Berube, supra, the trial commissioner found the claimant's narrative of injury credible and persuasive and we affirmed this factual finding on appeal. Nonetheless, there are also cases involving unwitnessed accidents where the trial commissioner was not persuaded by the claimant's testimony that their injury occurred in the course of his or her employment and the claim was dismissed. See Vaughan v. North Marine Group, 5695 CRB-4-11-11 (January 4, 2013). We find the circumstances herein indistinguishable from Vaughan; thus we do not find the factual findings "clearly erroneous" and we find we must affirm them on appeal. Indeed, we find this discussion from Vaughan dispositive of the claimant's argument.

> Many of these issues presented by the claimant are essentially derivative of a single question: was the claimant's account of his injury credible? We note that the record shows there were no witnesses to the January 25, 2005 incident. 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.

In the present case the claimant presented his testimony as to falling off a low roof and then sustaining a significant back injury; but offered no corroborating witnesses. The trial commissioner simply did not find this testimony credible and she was entitled to

reach this determination. The issues raised on appeal as to the absence of findings regarding notice of injury or noting the employer-employee relationship are irrelevant to the manner in which the claimant sustained his injury. It is black letter law that we may not revisit the findings of credibility a trial commissioner reaches after observing the testimony of a live witness.

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

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

Since the trial commissioner did not accept the claimant's narrative of events she was under no obligation to credit any medical evidence he presented which was derivative of his narrative, even if it was uncontroverted by any evidence from the respondents. We are compelled to follow the precedent in Abbotts v. Pace Motor Lines, Inc., 4974 CRB-4-05-7 (July 28, 2006), *aff'd*, 106 Conn. App. 436 (2008), *cert. denied*, 287 Conn. 910 (2008) and Do v. Danaher Tool Group, 5029 CRB-6-05-12 (November 28, 2006), which stand for precisely that proposition.

The trial commissioner was also permitted to find Mr. Lima and Mr. Fourtin credible and persuasive witnesses. 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). These witnesses testified to the claimant exhibiting little or any signs of injury

after the alleged incident, and therefore would create a reasonable basis to conclude the claimant's injury was not linked to his employment.

This determination is dispositive of the claimant's bid for sanctions for undue delay and unreasonable contest. A trial commissioner must have a factual predicate from the record in order to impose sanctions upon a respondent, McFarland v. Dept. of Developmental Services, 115 Conn. App. 306, 322-323 (2009). If a respondent prevails on the issue of whether the claimant sustained a compensable injury a trial commissioner need not address the issues of sanctions, especially as their award is discretionary. Kuhar v. Frank Mercede & Sons, Inc., 5250 CRB-7-07-7 (July 11, 2008).

The claimant finally argues that it was error for the trial commissioner to deny the Motion to Correct and to deny the Motion for Clarification. We find no error. We may properly infer from the trial commissioner's decision the commissioner did not find the evidence submitted probative or credible, Brockenberry, supra. We also find no error in the trial commissioner's denial of the Motion for Clarification. Biehn v. Bridgeport, 5232 CRB-4-07-6 (September 11, 2008) stands for the proposition "'[a]n articulation is appropriate where the trial court's decision contains some ambiguity or deficiency reasonably susceptible of clarification. . . .' Alliance Partners, Inc. v. Oxford Health Plans, Inc., 263 Conn. 191, 204 (2003), *citing* Miller v. Kirschner, 225 Conn. 185, 208 (1993)." A trial commissioner need not articulate his or her reasoning when a case involves "fairly straightforward questions of causation."[3] Haines v. Turbine Technologies, Inc., 5932 CRB-6-14-4 (March 9, 2015).

[3] As we pointed out in Buonafede v. UTC/Pratt & Whitney, 5499 CRB-8-09-9 (September 1, 2010), conclusions based on witness credibility are generally not ambiguous.

In Marandino v. Prometheus Pharmacy, 294 Conn. 564 (2010), the Supreme Court held it was a trial commissioner's prerogative to "consider medical evidence *along with all other evidence* to determine whether an injury is related to the employment." Id., at 595. (Emphasis in original.) The trial commissioner did not find the claimant credible and was not persuaded by the evidence he presented. "If the trier is not persuaded by the claimant's evidence, there is nothing that this board can do to override that decision on appeal." Wierzbicki v. Federal Reserve Bank of Boston, 4147 CRB-1-99-11 (December 19, 2000), *appeal dismissed*, A.C. 21533 (2001).

We are bound by the precedent in Wierzbicki to affirm the Findings and Orders.

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