CASE NO. 5921 CRB-3-14-3 : COMPENSATION REVIEW BOARD
CLAIM NO. 300097665

RUBEN VELAZQUEZ
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: JUNE 5, 2015

CUSTOM RECYCLING
EMPLOYER

and

LIBERTY MUTUAL INSURANCE
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Stuart A. Margolis, Esq., Berdon, Young & Margolis, PC, 132 Temple Street, New Haven, CT 06510.

The respondents were represented by Christopher J. Powderly, Esq., Law Offices of Meehan, Turret & Rosenbaum, 101 Barnes Road, 3rd Floor, Wallingford, CT 06492.

This Petition for Review[1] from the March 6, 2014 Finding and Dismissal of the Commissioner acting for the Third District was heard January 30, 2015 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Randy L. Cohen and Stephen M. Morelli.

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

# OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The Supreme Court has delineated a clear test as to whether this Commission can award benefits for an injury. "To be entitled to workmen's compensation, the claimant had the burden of proving that his injuries were sustained in the course of his employment and that they arose out of that employment." Hills v. Servicemaster of Connecticut River Valley, Inc., 155 Conn. 214, 216 (1967). The claimant in this matter argues that the injury he received to his left middle finger at his workplace arose out of his employment. The trial commissioner was not persuaded by the claimant's evidence and she dismissed his claim for benefits. The claimant has appealed this dismissal, but after considering his arguments on appeal, we conclude the decision herein was a factual determination and the trial commissioner has a sufficient evidentiary basis to support her decision. We affirm the Finding and Dismissal.

The trial commissioner reached the following factual findings in this case. The claimant, Ruben Velazquez, alleged he suffered a work related injury to the middle finger of his left, non-master hand on April 6, 2011, while working for the respondent-employer Custom Recycling. He said the injury he sustained to the middle finger of his left, non-master hand on April 6, 2011 occurred while he was working. The respondents filed a timely Form 43 disclaiming responsibility for the injury as they alleged it did not arise from or occur in the course of the claimant's employment. The commissioner noted the testimony of the claimant's former co-worker, Isaiah Torres, as to the operation of the saw where the claimant was injured. Evidence as to the level of the claimant's impairment from his injury was submitted by the claimant's treater, Dr. Michael Matthew, plastic surgeon and hand specialist from Yale School of Medicine.

The claimant, who according to his counsel has a limited command of the English language, chose to testify without an interpreter. He testified that his job with the respondent was to build pallets. When he did not have pallets to build he said he was sent to other machines to do other tasks. He further testified he was injured when he lacerated his left middle finger while using a table saw to cut a piece of wood on a 45-degree angle. He testified that he did this because his brother-in-law, Carlos Rodriguez, "…called by me to cut that piece to fix the table." Findings, ¶ 11. He testified that his brother-in-law needed this wood cut for a workbench and testified he had used the table saw that caused his injury previously. The claimant agreed, when asked, however, that he had never used the specific saw to cut a piece of wood in the same way he was using it the day he was hurt. He also admitted he had not asked his supervisor, Aneudi Peres, for permission to use the saw. He confirmed that his brother-in-law was not his boss, and said the reason he was asked to cut this wood was his brother-in-law "called me to do that cut for him because he can't use the machine." Findings, ¶ 18. On the day of his injury, the claimant testified he was building pallets but he had stopped that job some time before his injury to do other work. He said he had been pulled off to do some other work before his brother-in-law sought his assistance in fixing the workbench.

The respondents presented two written statements with the claimant's signature as evidence. They were authenticated by Donald Ardito, Sales Manager and Assisting Operations Manager. He testified that he and Karen Fitzgerald, a secretary, met with the claimant when both of these documents were signed. Respondents' Exhibit 2 was handwritten by Ms. Fitzgerald and it stated, "I was cutting a piece of wood on the table saw for my brother-in-law. This was not work related. As I was cutting the wood my

glove got caught by the blade and pulled my hand cutting my left middle finger." Respondent's Exhibit 4 was typed and on company stationery. It stated, "4/6/11: While cutting a piece of wood for his brother-in-law, Ruben's glove became caught by the blade pulling his hand in, cutting the middle finger of his left hand. And, "4/12/11: Ruben was disciplined for performing personal task during working hours." Both documents were signed by the claimant. The claimant testified he did not understand what was written on either document, but he had signed them. "Karen was there with me when Ardito said I was going to be fired if I didn't sign the papers and so I had to sign it." Findings, ¶ 26. The claimant also said he believed that if he did not return to work he would be fired, even though he was injured.

Mr. Ardito testified that he had never threatened the claimant with the loss of his job. He and Karen had met with the claimant, and he had told the claimant what was written on both papers before the claimant signed them. He also testified that the claimant was not going to be terminated for using a machine on a personal project, but that employees are not free to decide what jobs they will do. All work assignments are made by the shop foreman, Aneudi Peres. Any changes in assignments during the workday are also made by the foreman. Mr. Ardito further testified that employees are sometimes ordered to do something other than their usual job, but any changes are ordered by Mr. Peres.

Aneudi Peres, the claimant's supervisor, testified that on occasion the claimant would use the saw on which he was injured, but always at his orders. Mr. Peres further testified the claimant's regular job was to make the pallets, and that the saw which the claimant was injured while using is only used for cutting long runners. He said the

claimant was injured while on break time and he was not supposed to be doing what he was doing. Mr. Peres testified the claimant would have needed to ask him to stop doing one job and begin another; and that any employee needed to ask him for permission to use the saw which the claimant was using when he was injured. Mr. Peres testified he had never known the claimant, before his injury, to use the saw without permission, nor did other employees use the saw without Mr. Peres' permission.

Based on this evidence on the record, the trial commissioner concluded there was no persuasive credible evidence that the claimant was performing work for the respondent-employer when he cut his finger on the saw on April 6, 2011. She found the claimant was using the saw without permission, which was required to use the saw, and the totality of the evidence was that the injury occurred when the claimant was doing something other than his work for the respondent-employer. Although the claimant's injury arose during the hours of his employment, the commissioner found it did not arise out of his employment. Therefore, she concluded the claimant did not suffer a work-related injury on April 6, 2011.

The claimant did not file a Motion to Correct in this matter. Instead he filed an appeal arguing that the trial commissioner failed to properly credit evidence that would have supported a finding of compensability for this injury. He cites Anderton v. WasteAway Services, LLC, 91 Conn. App. 345 (2005) and McNamara v. Hamden, 176 Conn. 547 (1979) for the principle that an injury sustained during working hours is compensable even if it does not emanate from actions which are specifically directed by an employee's supervisor. After reviewing these cases and subsequent precedent, we are not persuaded the trial commissioner erred.

We reach this decision primarily as, "[t]he 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). Nonetheless, we may correct a commissioner's misinterpretations of the law, or misapplication of the law to the subordinate facts found. Sullivan v. Madison, 4893 CRB-3-04-12 (June 9, 2006).

We note that the claimant did not file a Motion to Correct. Therefore, pursuant to Stevens v. Raymark Industries, Inc., 5215 CRB-4-07-4 (March 26, 2008), we may give the facts found by the trial commissioner conclusive effect. The trial commissioner found that the claimant had not been directed by a supervisor to use the saw in which he was injured and was injured when his brother-in-law sought his assistance to cut wood. The trial commissioner also found that the claimant was not permitted to use this saw without his supervisor's permission, had not to his supervisor's knowledge previously used this saw without such permission, and on the day of his injury had not received permission to use this saw. Therefore, we may distinguish this case on the facts from Anderton, supra, where the claimant had been specifically directed by his supervisors to play basketball and had then gotten hurt. Id., 349. The facts found herein are also distinguishable from the facts in McNamara, supra, where the injury occurred due to a customary activity approved of or acquiesced to by the employer. Id., 554. The trial commissioner herein credited the testimony of Mr. Peres that what the claimant had done was not directed by a supervisor and was outside the scope of what he was supposed to be doing for his employer. See Findings, ¶¶ 35-40.

This does not conclude our inquiry however, because we must ascertain if the outcome in this case is in accord with other precedent governing our decisions. There is lengthy precedent where an injury sustained while the claimant is engaged in a minor deviation from his or her duties at work remains compensable within the scope of § 31-275(1) C.G.S. See Kish v. Nursing & Home Care, 248 Conn. 379 (1999), where what was deemed an inconsequential deviation from one's employment did not negate coverage under our Act. The Appellate Court has most recently restated the vitality of this principle in McMorris v. New Haven Police Dept., 156 Conn. App. 822 (2015). The employer in McMorris argued that since the claimant's children were in his car en route to a day care center during a commuting injury that the claimant deviated from his duties and should be denied compensability. The Appellate Court explained why this situation did not bar compensability.

> Moreover, we cannot conclude that the plaintiff's travel constituted a significant deviation from his work route. The defendants contend that the plaintiff's travel constituted a deviation because he intended to take his children to day care. We conclude that the facts of this case fall well within the rule of compensability articulated by our Supreme Court in *Kish* v. *Nursing & Home Care, Inc*., supra, 248 Conn. 379. To be compensable, ''the plaintiff's injury must have occurred (1) at a place where [the plaintiff] reasonably may have been and (2) while [the plaintiff] was reasonably fulfilling the duties of . . . employment or doing something incidental to it.'' Id., 383. In Kish, the claimant sustained injuries while she was driving to a medical supply house to fetch a commode for one of her patients, which her supervisor instructed her not to do. Id., 381. While she was driving to the medical supply house, she stopped to mail a greeting card and was struck by a motor vehicle as she crossed the street. Id. On appeal, our Supreme Court stated that many years ago it recognized that '[n]o exact statement, applicable in all cases, can be made as to what is incidental to an employment. *Stakonis* v. *United Advertising Corp*., 110 Conn. 384, 390, 148 A. 334 (1930)." Although we remain unwilling to assay an exhaustive taxonomy of acts that are incidental to [employment], the present appeal calls

> upon us to clarify the contours of our law. For present purposes, it suffices to explain that the term of art incidental embraces two very different kinds of deviations: (1) a minor deviation that is so small as to be disregarded as insubstantial . . . and (2) a substantial deviation that is deemed to be incidental to [employment] because the employer has acquiesced to it. If the deviation is so small as to be disregarded as insubstantial, then the lack of acquiescence is immaterial.' (Citation omitted; internal quotation marks omitted.) Kish v. Nursing & Home Care, Inc., supra, 389.

Id., 831-832.

As we previously noted, the evidence credited by the trial commissioner is inconsistent with a finding that the claimant's employer had acquiesced to the claimant using this saw for any purpose which his foreman had not directed him to perform. We look to the precedent in Mazzone v. Connecticut Transit Co., 240 Conn. 788 (1997) for guidance. In Mazzone, the claimant was, similar to the claimant herein, on the employer's premises and injured during a break period. He sustained injuries falling out of a parked bus where he had chosen to eat lunch. The Supreme Court concluded the claimant there met two prongs of a three prong test for compensability; that his injury occurred "(a) within the period of the employment; (b) at a place [he] may reasonably [have been]; and (c) while [he was] reasonably fulfilling the duties of the employment or doing something incidental to it." Id., 793. The Supreme Court concluded as a matter of law the claimant met the first and third prong. However, in reviewing the record the Supreme Court found the record as to the second prong—whether the employer had acquiesced to employees eating in parked buses—was too vague to reach a definitive conclusion and ordered a remand. Id., 796-798.

In the present case we believe the issue of whether the claimant was able to use the saw in the manner which caused his injury was addressed in a manner adverse to the

claimant by the trial commissioner. Since "an employer retains the right to prohibit its employees from entering certain parts of the employment premises. . . ." id., 796, this determination makes it difficult to reverse the dismissal of this claim. The testimony of Aneudi Peres supports this conclusion. Therefore, we look to the issue of mutual benefit. The claimant argues on appeal that the work his brother-in-law asked him to do was for the benefit of their employer, as he argues it involved the repair of a workbench at the workplace. This would establish that the claimant's injury occurred in the course of conduct where the employer derived a benefit, and therefore the injury would be compensable. This was not a fact found by the trial commissioner, however, and we may reasonably infer that she was not persuaded of the validity of this narrative. In any event, the determination of whether a claimant's activity at the time of his or her injury benefits an employer is a quintessentially fact driven exercise. King v. State/Department of Correction, 5339 CRB-8-08-4 (March 20, 2009).

Therefore, since we are unable to find from the facts herein that the employer acquiesced to the act which caused the claimant's injury, or derived a mutual benefit from the act that caused the injury, we must ascertain if the act was a deviation from the duties of employment which was so minor as to negate the absence of acquiescence or benefit. Such a minor deviation is essentially "incidental" to the employment. The facts herein are that the claimant had previously used the saw where he sustained his injury. See Findings, ¶¶ 4-5, ¶¶ 13-17 and ¶ 32. He was requested by his brother-in-law and co-worker to use this saw because his brother-in-law did not know how to use it. Findings, ¶ 18. This clearly creates a close question in our mind as to the magnitude of the deviation from the duties of employment the claimant was engaged in at the time he was

injured. A reasonable fact finder in our view clearly could, consistent with the precedent in Kish, supra, find this deviation too insignificant as to negate coverage for this injury.

The trial commissioner in this case, on the other hand, reached a determination that the deviation from the duties of employment in this case was too significant to make the injury incidental to employment. This determination has long been determined to be a factual determination for the trial commissioner to reach. See Herbst v. Hat Corporation of America, 130 Conn. 1 (1943). Citing a number of decisions on the issue of deviation, the Supreme Court held,

> In all of these cases the injury occurred during working hours and while the employee was doing something for his own benefit. The true test is analogous to that applied to determine whether a deviation in agency terminates that relationship. "….the trier must take into account, not only the mere fact of deviation, but its extent and nature relatively to time and place and circumstances, and all the other detailed facts which form a part of and truly characterize the deviation, including often the real intent and purpose of the servant in making it.

Id., 7.

Since the trial commissioner cited factual findings supportive of her decision against compensability, we must extend great deference to her conclusions drawn from these facts. Under these circumstances we must extend "every reasonable presumption in favor of the action." Daniels v. Alander, 268 Conn. 320, 330 (2004). We outlined the extent of that presumption in Berube v. Tim's Painting, 5068 CRB-3-06-3 (March 13, 2007),

> 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 and Zoning Commission, 278 Conn. 660, 665-666 (2006).

We are not persuaded by the claimant that the trial commissioner drew an unreasonable inference from the evidence on the record. We do not conclude that as a matter of law that the trial commissioner was obligated to find the claimant's deviation from his duties of employment was insignificant.[2] We are also not persuaded that the trial commissioner failed to properly apply the law to the facts herein. Sullivan, supra. It is black letter law that "[t]he [claimant] has the burden of proving that the injury claimed arose out of the employment and *occurred in the course of the* employment. There must be a conjunction of [these] two requirements . . . to permit compensation." Brown v. Dept. of Correction, 89 Conn. App. 47, 51 (2005). (Emphasis in original.)

The trial commissioner concluded that the claimant did not meet his burden of persuasion. While as noted this was a very close case on the facts and the law, we are not persuaded that this conclusion was "clearly erroneous." Berube, supra.

Therefore, we affirm the Finding and Dismissal.

Commissioners Randi L. Cohen and Stephen M. Morelli concur in this opinion.

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[2] We note that in Kish v. Nursing & Home Care, 248 Conn. 379 (1999), the claimant's actions were in the course of a journey which a reasonable person would find had benefitted her employer; i.e. delivering a commode to a disabled client. Id., 381-382. Since the facts found by the trial commissioner in this case were inconsistent with such a finding of mutual benefit, we are hard pressed to reverse a finding that the deviation in this case from the duties of employment was so significant that the injury was rendered noncompensable.