CASE NO. 5934 CRB-6-14-5 : COMPENSATION REVIEW BOARD
CLAIM NO. 800159128

DEAN MAURICE
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: MARCH 24, 2015

HEALTHTRAX INTERNATIONAL, INC.
EMPLOYER

and

LIBERTY MUTUAL INSURANCE CO.
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant filed the appeal on his own behalf. At the trial level the claimant was represented by Frank Costello, Esq., McCarthy, Coombes & Costello, LLP, 61 Russ Street, Hartford, CT 06106.

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

This Petition for Review from the February 3, 2014 Finding and Dismissal of the Commissioner acting for the Eighth District was heard November 21, 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. It is black letter law that this Commission cannot award benefits for injuries to a claimant unless they are "arising out of and in the course of his employment." See § 31-275(1) C.G.S.[1] The claimant in this case argues that the injuries he sustained falling out of a truck which was returning from a sports bar arose out of and were in the course of his employment. The trial commissioner did not find the evidence supported this conclusion and dismissed the claim. The claimant has appealed, but we find that the trial commissioner's conclusions were reasonable based on the record presented. We affirm the Finding and Dismissal.

The trial commissioner reached the following factual findings at the conclusion of the Formal hearing. The parties stipulated that the claimant, Dean Maurice, was employed by the respondent Healthtrax, a Connecticut firm, on June 18, 2007 and was doing work during that period on a facility the firm owned in Rhode Island. Healthtrax paid for the claimant's lodging and meals while he was in Rhode Island. The claimant testified that he had worked for Healthtrax for a few years prior to that time and he was part of a work crew that did repairs or renovations on fitness centers operated by Heathtrax. When the work was performed out of state the claimant would be provided lodging. The claimant said the work crew supervisor had a company issued credit card to pay for groceries. The claimant testified that the typical work day when a crew was out

[1] This statute reads as follows:
(1) "Arising out of and in the course of his employment" means an accidental injury happening to an employee or an occupational disease of an employee originating while the employee has been engaged in the line of the employee's duty in the business or affairs of the employer upon the employer's premises, or while engaged elsewhere upon the employer's business or affairs by the direction, express or implied, of the employer. . . ."

of town was eight to ten hours but he had no memory of when he started or finished work on June 18, 2007.

At 10:53 p.m. on June 18, 2007 a report of the Seekonk, MA police department indicated that Patrolman Gerard LaFleur, Jr. was dispatched to Fall River Avenue to investigate a man down in the road. Claimant's Exhibit B. The officer came upon a co-worker of the claimant, Daniel Jankowski, and another individual who were standing over the claimant. Mr. Jankowski told the officer the claimant had fallen out of a truck owned by Healthtrax when it was travelling between 30 and 40 miles per hour. Mr. Jankowski also told the police that he and the claimant had been drinking at a nearby establishment, Tort's Sports Bar, and when the claimant became agitated Mr. Jankowski decided they should return to the Ramada Inn. On the trip back the claimant fell out of the passenger door. The report also indicated the claimant did not normally wear a seat belt.

Mr. Jankowski spoke with Detective Thomas Piquette of the Seekonk police who concluded the incident did not involve foul play. Detective Piquette also investigated the truck and concluded the passenger side door was operable with no physical defects. Mr. Jankowski told Detective Piquette the passenger side door opened partially on occasion but never completely opened. Id.

The respondents presented a report from an expert witness, Dr. Marc J. Bayer, who reviewed the claimant's medical records. Dr. Bayer is a board certified toxicologist and Chief of Toxicology at the UConn Health Center. After reviewing the claimant's medical records Dr. Bayer concluded that at the time he was injured the claimant had a whole blood alcohol level of 0.205% and Dr. Bayer opined that to reach this level the

claimant would need to have consumed approximately nine alcoholic beverages one hour prior to the accident. The standard for driving while intoxicated in Connecticut is a 0.08% blood alcohol level. Dr. Bayer concluded the claimant was intoxicated at the time of his injury and this was a substantial cause of the accident, as the claimant "would have likely manifested the following signs and symptoms; Increased self-confidence; decreased inhibitions; Diminution of attention, judgment, and control; . . . Some muscular incoordination; Disorientation, mental confusion; dizziness." Respondents' Exhibit 3.

The trial commissioner noted that the claimant testified at the formal hearing that he denied drinking to excess when he went out of town for work. The claimant denied ever drinking at work or when he was going to return to work. The claimant said he would usually have three drinks at dinner when he went out of state on work assignments. He also testified that the meal including drinks would be put on the company credit card. The claimant did not remember what other employees were present on this particular work trip but believed that Dan Jankowski and Dan's son went on the trip. The police report did not reference any other employees of Heathtrax at the accident site besides the claimant and Mr. Jankowski.

Based on these factual findings the trial commissioner concluded that the claimant's testimony was not credible. He found the claimant failed to demonstrate that the trip to the bar in Massachusetts was incidental to his work in Rhode Island. The claimant was unable to ascertain when his work day ended on the day he was injured and therefore could not establish that the trip to the bar was not simply for the pleasure of himself and his co-worker. As a result, the claimant could not demonstrate that his trip to the bar arose in the course of his employment. The commissioner further noted that he

found Dr. Bayer a persuasive and credible witness as to the amount of alcohol the claimant had consumed before his injury and the impact that would have had on his faculties. Therefore, the commissioner concluded the claimant was intoxicated at the time of his injury. The commissioner also discounted the claimant's assertion that the truck door was defective and this led to his injuries. The commissioner concluded that whether or not the claimant was in the course of his employment when he was injured that his intoxication was a substantial factor in his sustaining an injury. The commissioner also did not accept the claimant's position that the respondent paid for the alcohol consumed on the night of the incident, noting that the claimant produced no corroborating evidence on that point. Therefore, the trial commissioner dismissed the claim.

The claimant filed two motions for extension of time to respond to the Findings and Dismissal. The first motion was granted but the second motion was denied. He did not file a Motion to Correct but did file a Petition for Review and Reasons for Appeal. The gravamen of his argument is that there were various inaccuracies in the police report relied upon by the trial commissioner. The central inaccuracy according to the claimant is that the interior door handle to the truck was broken at the time of his injuries. As the claimant views the circumstances, the proximate cause of his injuries was the malfunctioning door handle. The claimant also argues that Healthtrax was responsible for paying for the food and beverage consumed the night of the incident and that the records that would document this should be obtained to complete the record. The claimant, who is a self-represented party, further raised the issue at oral argument before our tribunal that Dr. Bayer's opinion on causation should be given no weight. As

claimant views the situation, the intoxication of the truck's driver should not be imputed to him. The claimant further argues that the defective door handle was the cause of his accident, and not as Dr. Bayer opined, intoxication. After considering these arguments, we are not persuaded the Finding and Dismissal should be reversed.

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).

As we noted it is black letter law that this Commission cannot award benefits for injuries to a claimant unless they are "arising out of and in the course of his employment." See § 31-275(1) C.G.S. If a claimant's injuries are sustained under

circumstances that do not arise out of his or her employment benefits cannot be awarded under Chapter 568 regardless of the claimant's level of sobriety. In reviewing the scenario herein we note that it is extremely similar to the fact pattern in Mleczko v. Haynes Construction Co., 5109 CRB-7-06-7 (July 17, 2007), *aff'd*, 111 Conn. App. 744 (2008). In Mleczko the claimant was injured after eating dinner with a former co-worker while crossing a street. He testified that he had stayed into the evening near the construction site where he was working as he had been expecting a roofer to arrive; and therefore the injuries arose out of his employment. The trial commissioner, however, credited other testimony that the roofer had notified the claimant he was not arriving at the worksite that evening and the claimant went out to dinner after his workday had ended. On appeal we sustained the trial commissioner's dismissal of the claim as "[t]his board cannot reverse a trial commissioner's factual determination as to whether an activity is social in nature or part of one's duties of employment." The Appellate Court affirmed this decision as "the commissioner was free to credit the defendant's version of events, which was that the plaintiff was engaged in a social venture and was not doing anything to benefit his employer when he has injured while crossing Broad Street after leaving the off premises restaurant." Id., 750.

We cannot distinguish Mleczko from the present case. In Mleczko that claimant's position that his travel to a restaurant and his injuries returning from that restaurant occurred while he was engaged with his employer's business was not credited by the trier of fact. In the present case, the claimant's position that he spent his evening at Tort's Sports bar with Mr. Jankowski while engaged with his employer's business was not accepted by the trial commissioner. Since the claimant did not persuade the trial

commissioner that his evening at a bar with a co-worker was anything other than a social venture, the commissioner was obligated to find any injuries sustained by the claimant returning from this venue noncompensable.[2]

Since we conclude that the record does not establish a nexus between the respondent's business and the claimant's journey to Tort's, we need not rely on the issue of the claimant's intoxication to sustain the Finding and Dismissal.[3] However, after consideration of the claimant's argument we do believe that the commissioner's decision may be sustained on that issue as well. Under the statute, injuries sustained by an employee when intoxication is a substantial factor behind the cause of the injury are noncompensable.[4] Notwithstanding the claimant's position, the trial commissioner could

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[2] We note that the trial commissioner did not cite § 31-275(16)(B)(i) C.G.S. in the Finding and Dismissal but we believe upon review this constitutes alternative grounds to affirm this decision. This statute reads as follows.

(B) "Personal injury" or "injury" shall not be construed to include:

(i) "An injury to an employee that results from the employee's voluntary participation in any activity the major purpose of which is social or recreational, including, but not limited to, athletic events, parties and picnics, whether or not the employer pays some or all of the cost of such activity. . . ."

In Stoll v. Windsor/Board of Education, 5743 CRB-1-12-4 (April 2, 2013), we cited this statute and noted that this statute creates a "general rule barring compensability for recreational accidents. See, e.g., Brown v. United Technologies Corp./Pratt & Whitney Aircraft Div., 5145 CRB-8-06-10 (October 23, 2007), *aff'd*, 112 Conn. App. 492 (2009)." As the trial commissioner in this case concluded the claimant failed to demonstrate the journey to Tort's Sports Bar was to advance the respondents' business, this statute would appear to bar recovery.

[3] The fact that the claimant was not rendering a service to his employer at the time he was injured is dispositive of his arguments concerning the alleged defective door handle in the firm's truck. This situation is governed by Mulligan v. Oakes, 128 Conn. 488 (1942) which holds that when an employee is allowed to use an employer's vehicle outside the period he or she is employed, and is injured in a motor vehicle accident while traveling in the employer's vehicle, he or she was "granted a privilege to depart from the course of his employment" and injuries during that period were "not entitled to compensation." Id., 491. The precedent in Mulligan indicates that any injury sustained in an employer's motor vehicle during a period where the employee is not rendering a service to the employer is outside the scope of Chapter 568, regardless of the condition of the employer's vehicle.

[4] This statute reads as follows;
"**Sec. 31-284. Basic rights and liabilities. Civil action to enjoin noncomplying employer from entering into employment contracts. Notice of availability of compensation.** (a) An employer who complies with

rely on the opinion of Dr. Bayer to conclude the claimant was intoxicated at the time of his injuries, who also specifically opined that intoxication was a substantial factor in the claimant's injuries. See Respondents' Exhibit 3. The blood alcohol level for the claimant when he was injured was similar to that of the deceased employee in Paternostro v. Arborio Corp., 3659 CRB-6-97-8 (September 8, 1998), *aff'd*, 56 Conn. App. 215, 220 (1999), *cert. denied*, 252 Conn. 928 (2000). The first prong of the test under § 31-284(a) C.G.S. to deny compensability of a claim (i.e., the claimant's intoxication) was clearly established in the record and the claimant offered no expert opinions challenging Dr. Bayer's opinion, merely the claimant's denial that he drank alcohol to excess on business trips.

Under Paternostro and similar cases such as St. Germaine v. Buckingham Restaurant & Pizza, Inc., 4343 CRB-8-01-1 (January 10, 2002) it is necessary to demonstrate both that the claimant was intoxicated and a nexus between the claimant's intoxication and the harmful event that injured the claimant in order to apply the statutory defense. In Paternostro the decedent attempted to cross Interstate 84 on foot and was hit by a car, and a reasonable person could infer that the decedent's intoxication made such an event more likely than had the claimant been sober.[5] In St. Germaine, the claimant

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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 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."

[5] We do note that in Paternostro v. Arborio Corp., 3659 CRB-6-97-8 (September 8, 1998), *aff'd*, 56 Conn. App. 215 (1999), *cert. denied*, 252 Conn. 928 (2000), the trial commissioner found the decedent's violation of company safety rules (including a ban on drinking alcohol on the job) prior to his demise so egregious as to constitute willful and serious misconduct, and it was not necessary to find that the decedent's intoxication caused his death. Id., at 218-222. There is no allegation on the record herein that Mr. Maurice violated any safety rule promulgated by the respondents and no finding by the trial commissioner that his actions constituted willful and serious misconduct.

had a blood alcohol level of 0.35% and the trial commissioner concluded that this level of intoxication made the claimant unable to appreciate the hazard of transporting a vat of hot oil over a slippery floor. The trier of fact found the claimant's intoxication was a substantial factor causing his injury and as the record supported this conclusion the Compensation Review Board affirmed the dismissal.

In the present case we have reviewed the record, in particular Dr. Bayer's report, and find he specifically concluded alcohol intake was a substantial factor in the claimant's injuries. We also believe it a reasonable inference that whether or not the door handle in the truck was functioning properly, someone with the level of intoxication the claimant possessed on the evening of June 18, 2007 would be more apt than a sober person to either fail to properly close the truck door or notice that it had not properly closed. It would also seem reasonable that, akin to the situation in St. Germaine, an intoxicated person would not fully appreciate the risks an allegedly defective truck door would pose in one's travel back from Tort's Sports Bar. While the precise circumstances of the claimant's injury are not definitive,[6] we believe it was a reasonable conclusion by the trial commissioner that since it was far less likely a sober person would fall out of a moving truck that the claimant's intoxication was a substantial factor in his injury. This would concur with the opinion rendered by Dr. Bayer.

The claimant argues finally that evidence could be obtained to establish the respondent paid for the alcoholic beverages consumed at Tort's Sports Bar the night he was injured. The claimant did not present this evidence at the formal hearing and

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[6] In the Seekonk Police Report (Claimant's Exhibit B) Mr. Jankowski told the officers that he had driven some ways down the road prior to realizing the claimant had fallen out of the truck, did not know how he fell out of the truck, and had gone back to find him.

therefore we find the precedent in Reeve v. Eleven Ives Street, LLC., 5146 CRB-7-06-10 (November 5, 2007) governs this issue. In Reeve the claimant argued he was employed at the time he was injured, but the trial commissioner was not persuaded he was employed by the bar where he was injured, as he submitted no documentation to substantiate his claim. Since "[t]he only evidence before the trial commissioner supportive of the requisite jurisdictional fact of employment was the claimant's uncorroborated deposition testimony" and the claimant was not found persuasive "[w]e cannot find the trial commissioner's conclusion on this threshold issue was clearly erroneous." Id.[7] Similar to the situation in Reeve, the trial commissioner did not find the claimant's testimony to be credible and persuasive. Since the claimant did not persuade the trial commissioner that Healthtrax paid for the alcoholic beverages he consumed, directed him and his co-worker to go to the bar, or derived any mutual benefit from his visit to Tort's Sports Bar, the trial commissioner properly found the claimant's injury was outside the scope of Chapter 568.

Our holding in Wierzbicki v. Federal Reserve Bank of Boston, 4147 CRB-1-99-11 (December 19, 2000) is dispositive of this appeal. "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."[8]

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[7] In Reeve v. Eleven Ives Street, LLC, 5146 CRB-7-06-10 (November 5, 2007) we upheld a denial of the claimant's Motion to Submit Additional Evidence, citing Pantanella v. Enfield Ford, Inc., 65 Conn. App. 46, 57-58 (2001). Were the claimant in this case to seek to admit additional evidence, it would be denied for the reasons stated in Reeve, supra.

[8] At oral argument before our tribunal counsel for the respondents concurred with the claimant that the Finding and Dismissal appears to have misstated the probable speed of the truck when he fell out. The claimant cites his discharge summary from UConn Health Center dated June 28, 2007 for this position. We do not find this issue is material to the legal issues under consideration and the errors cited by the claimant in his appeal of the Finding and Dismissal, including the allegedly inaccurate names in the Seekonk Police

We affirm the Finding and Dismissal.

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

Reports cited in this decision, constitutes harmless error on appeal. See Reeve v. Eleven Ives Street, LLC, 5146 CRB-7-06-10 (November 5, 2007).