CASE NO. 5952 CRB-7-14-7 : COMPENSATION REVIEW BOARD
CLAIM NO. 700158025

ALEX NORIEGA
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

: OCTOBER 21, 2015

JEREMY ROSA d/b/a PRISTINE PROPERTIES & LANDSCAPING
EMPLOYER
NO RECORD OF INSURANCE
RESPONDENT-APPELLANT

and

SECOND INJURY FUND
RESPONDENT-APPELLEE

APPEARANCES:

The claimant was represented by B.T. Canty, Esq., Law Office of B.T. Canty, 98 East Avenue, Norwalk, CT 06851.

The respondent-employer was represented by Stephan E. Seeger, Esq., Law Offices of S.J. Carriero, LLC, 810 Bedford Street, Suite 3, Stamford, CT 06901.

At the trial level the Second Injury Fund was represented by Kenneth Kennedy, Esq., Assistant Attorney General, Office of the Attorney General, 55 Elm Street, Hartford, CT 06114. The Fund did not participate in the appeal proceedings.

This Petition for Review[1] from the July 7, 2014 Finding and Award of the Commissioner acting for the Seventh District was heard August 28, 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 an extension of time and two postponements were granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant in this matter was injured in an altercation at work, filed a claim seeking benefits and received a Finding and Award. The respondent-employer has appealed arguing that the trial commissioner erred in finding the claimant was a credible witness, and that the trial commissioner should have credited that the claimant instigated the incident and his injuries should not be deemed compensable. It is black letter law that a trial commissioner is the sole judge of witness credibility. Since the trial commissioner in this matter found the claimant a credible witness after observing him testify, we may not second-guess her assessment. Therefore, we affirm the Finding and Award.

The trial commissioner found the following facts at the conclusion of the formal hearing. The claimant testified that he was hired by the respondent-employer Jeremy Rosa to do landscaping work and he worked for him from October 23, 2010 through November 3, 2010. He testified that the respondent would pick him up with two other workers, "Raymundo" and "Rojas" every morning in front of the Taco Bell restaurant on East Main Street in Stamford. Findings, ¶ 3. The claimant said that he was paid $12.00 per hour and worked approximately 30 to 35 hours per week. The claimant testified that on November 3, 2010, he was working at property in Stamford with three other people, Raymundo, Rojas and Victorino. He was raking leaves when Victorino came over to him ordering him to help pull up the leaves. The claimant testified that he told him "why don't you do it because you are not doing anything. He told me no, because I'm the boss here and I have to give you orders. I told him that I don't have to follow his orders. The only boss I have is Mr. Rosa. So I pointed to Mr. Rosa who was there." Findings, ¶ 6.

The claimant then said Victorino threw down a blower to the ground, picked up a rake and began to attack him. The claimant further testified that he tried to get Mr. Rosa's attention but he was some distance away, and that he told Victorino not to fight and picked up a rake to defend himself. He further testified that "I was looking to the side to catch Mr. Rosa's attention. So then I felt a blow that hit and I ran to Mr. Rosa. So I told Mr. Rosa that he had hit me in the eye. It was hurting me a lot and I had definitely lost my eye." Findings, ¶ 9.

The claimant said that Mr. Rosa drove him to Stamford Hospital emergency room following the incident. He was transferred from Stamford Hospital to Yale-New Haven Hospital for surgery on the same day. Surgeons there performed surgery to repair the claimant's ruptured globe in his right eye. The claimant was admitted overnight and was advised to follow up in one day for further evaluation. After his surgery, the claimant was placed out of work from November 4, 2010 through February 16, 2011 by a physician at Yale-New Haven, Dr. Claudia Costiblamco, M.D. The claimant now has total loss of vision in his right eye.

Mr. Rosa testified at the hearing. He said that he did not pay the claimant directly but through the claimant's uncle, Florentino Gamatto, who was a subcontractor. Mr. Rosa also testified that he provided the tools for the jobs and that he was the supervisor at the work site on November 3, 2010 the date of accident. Mr. Fabian Rojas Cuxum, also known as "Rojas", also testified at the hearing. He said that he was working for the respondent-employer on November 3, 2010 and that the claimant hit Victorino first. However, Mr. Cuxum further testified that he did not actually witness the accident. "I

just heard Victor tell Alex we need help and Alex saying you're not my boss and three seconds later I see Alex running with the eye." Findings, ¶ 18.

The commissioner noted that the respondent did not have a valid workers' compensation policy in effect on the day of the claimant's injury. The commissioner also cited over $30,000 in expenses that the claimant had incurred from various medical providers as a result of the incident. After considering the evidence the trial commissioner determined that the claimant's testimony was credible and persuasive and the testimony of Mr. Cuxum was not credible. The trial commissioner found the claimant was an employee of Pristine Properties and Landscaping on November 3, 2010 and he sustained a compensable injury on that date. She concluded the claimant was involved in a fight at work; however he was not the first aggressor. The claimant was performing his regular duties and was attacked by a co-worker after a verbal exchange. Therefore, the injuries that the claimant sustained were not as a result of willful and serious misconduct. The commissioner ordered the respondent to pay total disability benefits from the date of injury through February 16, 2011 and to pay for the reasonable and necessary medical treatment the claimant required due to this injury.

The respondent-employer filed a Motion to Correct seeking an additional hearing to address what he believed were errors in Conclusions A, B, D, F & I, alleging these conclusions were not supported by facts in evidence. The trial commissioner denied this Motion in its entirety. The respondent-employer filed a timely Petition for Review to this tribunal. The respondent, Second Injury Fund, who had a role in this case due to a § 31-355 C.G.S. order issued by the trial commissioner, filed a Motion for Articulation in regards to the appropriate compensation rate for the claimant. The trial commissioner

responded with an articulation as to the relief due to the claimant. The appeal has proceeded and both the respondent-employer and the claimant have submitted briefs and presented oral argument at our hearing on this appeal.[2]

The gravamen of this appeal is the respondent's view that the trial commissioner acted against the weight of the evidence to find the claimant credible. He believes that the weight of the evidence would support findings that the claimant initiated the altercation and his conduct was such that the resultant injuries did not arise out of his employment. The respondent argues that the probative evidence on the record contradicted the claimant's account that Victorino (identified in this brief as "Mr. Sic" and "Sic Mendoza")[3] was using a leaf blower at the time of the altercation. Respondent's Brief, p. 8. The respondent also argues that the claimant made statements close in time to the altercation to the Stamford police, and their report tends to corroborate the testimony of Mr. Cuxum. Respondent's Brief, pp. 7-10. The respondent argues that much of the claimant's testimony was self-serving and inconsistent, and since it was at odds with the narrative in the police report, the claimant should not have been found to have been credible. Respondent's Brief, pp. 11-13. The respondent cites Burse v. American International Airways, Inc., 262 Conn. 31 (2002) and Vallier v. Cushman & Wakefield, 5822 CRB-1-13-2 (February 21, 2014) as precedent supporting reversal of the Finding and Award, arguing the trial commissioner should have included material facts in the finding inconsistent with the claimant's narrative.

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[2] The claimant filed a Motion to Dismiss the respondent's appeal as the respondents did not file a timely brief. Since the appellant's brief was presented well before the hearing and presented a cogent argument supportive of reversing the Finding and Award, we deny the Motion in accordance with our precedent in Damon v. VNS of CT/Masonicare, 5413 CRB-4-08-12 (December 15, 2009).

[3] The transcript dated January 10, 2013 identified this individual as "Mr. Sik Mendoza" p. 7; "Mr. Victoriano Sik Mendoza, Victor" p. 30; and "Sik Mendoza" p. 42.

We are not persuaded by this argument. We note that factually and legally this case, which turned on witness credibility, is clearly distinguishable from Vallier, supra. In Vallier the claimant sought a correction to conform the relief in the Finding and Award to the medical opinions of an expert witness the trial commissioner had found persuasive and credible. We found it was error not to have granted this correction as it aligned the relief in the Finding and Award to the evidence the trial commissioner found reliable. In the present case, the respondent sought to reopen the proceedings to cause the trial commissioner to reconsider her conclusions as to witness credibility. As we held 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 trial commissioner is not obligated to grant a Motion to Correct when the proposed corrections involve evidence he or she does not find reliable or probative.[4]

We find our holding in Brockenberry dispositive of the central issue of this case: whether the trial commissioner could have relied on the narrative of the claimant in this matter. As we pointed out in that case "[w]e cannot revisit a trial commissioner's determination of credibility when witnesses present testimony for his consideration. Burton v. Mottolese, 267 Conn. 1, 40 (2003)." Id.[5] In Brockenberry the party found not

[4] Moreover, the Motion to Correct in this matter did not present specific factual findings the respondent sought to add to the Finding and Award, linked to evidence in the record which would have supported those findings. Instead, the respondent essentially sought to reargue the trial commissioner's conclusion as to witness credibility by way of holding an additional hearing. The trial commissioner was under no obligation as a matter of law to have granted this relief.

[5] In cases such as Tarantino v. Sears Roebuck & Co., 5939 CRB-4-14-5 (April 13, 2015) and Toroveci v. Globe Tool & Metal Stamping Co., Inc., 5253 CRB 6-07-7 (July 22, 2008), we have pointed out that the precedent in Burton v. Mottolese, 267 Conn. 1, 40 (2003) prevents us from reassessing the trial commissioner's evaluation of the credibility of a live witness on appeal. "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

to be credible at the formal hearing appealed on the basis that a Motion to Correct supportive of finding his testimony credible was denied. We pointed out "[t]he trier's denial of those corrections implies that he was not swayed by this testimony, and we cannot invade his sphere of authority by reappraising the evidence and drawing a contrary inference on appeal. Sendra v. Plainville Board of Education, 3961 CRB-6-99-1 (Jan. 20, 2000)." Id. We cannot reach a result on these facts inconsistent with the clear precedent delineated in Brockenberry. The trial commissioner could reasonably determine after hearing both witnesses that Mr. Noriega's account of the events of November 3, 2010 was persuasive and credible and Mr. Cuxum's were not.[6]

We also note that while the respondent argues at length that it was reversible error for the trial commissioner not to adopt the narrative outlined in the police report, our precedent stands for the proposition a trial commissioner is not obligated to rely on the statements in an official document if he or she finds witness testimony contesting this document sufficiently credible and persuasive. See Dsupin v. Wallingford, 5757 CRB-8-12-6 (November 1, 2013), where we affirmed a trial commissioner who found the opinions of an expert witness more persuasive than the conclusions contained in an official death certificate. We also find the Finding and Award does not conflict with precedent such as Stulginski v. Waterbury Rolling Mills Co., 124 Conn. 355 (1938) and Alling v. Davis & Geck, 4483 CRB-7-02-1 (December 20, 2002) regarding the potential compensability of injuries sustained subsequent to workplace altercations.

[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."

[6] When a trial commissioner finds a witness credible we have noted it is the role of the trier of fact to resolve whether evidentiary discrepancies may exist in their testimony. See Ramirez-Ortiz v. Wal-Mart Stores, 5492 CRB-8-09-8 (August 25, 2010).

The facts as found by the trial commissioner were that a dispute arose between co-workers at a job site as to whether one employee could give the other employee orders, and the dispute concluded with the claimant sustaining a serious eye injury. As we pointed out in O'Connor v. Med-Center Home Healthcare, Inc., 4954 CRB-5-05-6 (July 17, 2006), "[t]here are few principles of jurisprudence more fundamental than the principle that a trier of fact must be the one party responsible for finding the truth amidst conflicting claims and evidence." We cannot revisit a determination as to what evidence the trial commissioner concluded was more persuasive and probative. Arnott v. Taft Restaurant Ventures, LLC, 4932 CRB-7-05-3 (March 1, 2006). The evidence credited by the trial commissioner in this case supports her award of benefits to the claimant. Therefore, we affirm the Finding and Award.

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