CASE NO. 6052 CRB-3-15-11 : COMPENSATION REVIEW BOARD
CLAIM NO. 300092421

TIMOTHY ARNOLD
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

: FEBRUARY 7, 2017

WALSH PCL JOINT VENTURE II
EMPLOYER

and

ARCH INSURANCE COMPANY
INSURER
and

GALLAGHER BASSETT SERVICES
ADMINISTRATOR
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by John B. Myer, Esq., The Nicholas Law Firm, LLC, 373 Prospect Street, Torrington, CT 06790.

The respondents were represented by Richard A. Knapp, Esq., Mullen & McGourty, PC, 2 Waterside Crossing, Suite 102A, Windsor, CT 06095.

This Petition for Review[1] from the November 9, 2015 Finding and Award of Thomas J. Mullins, the Commissioner acting for the Fifth District, was heard September 23, 2016 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Ernie R. Walker and Nancy E. Salerno.

[1] We note that a postponement was granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondents have appealed from a Finding and Award wherein the trial commissioner, Thomas Mullins, awarded the claimant, Timothy Arnold, benefits finding that his fall at his worksite was a compensable injury. The respondents argue that the claimant was in violation of safety rules at the time he was injured, and therefore any award for this injury is barred pursuant to § 31-384(a) C.G.S.[2] The claimant argues that the employer had the burden of proving that he engaged in willful and serious misconduct and the evidence did not support this affirmative defense. After reviewing the record and relevant precedent we conclude that Commissioner Mullins could reasonably determine that the respondents failed to prove their affirmative defense. We affirm the Finding and Award.

Commissioner Mullins found the following facts at the conclusion of the formal hearing on this matter. He found the claimant was employed as a carpenter foreman for the respondent Walsh PCL Joint Venture II on December 13, 2010. He had been a carpenter foreman for 15 years prior to that date and had worked for the respondent in that capacity for sixteen months as of that date. On December 13, 2010 the claimant was

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[2] 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 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. All rights and claims between an employer who complies with the requirements of subsection (b) of this section and employees, or any representatives or dependents of such employees, arising out of personal injury or death sustained in the course of employment are abolished other than rights and claims given by this chapter, provided nothing in this section shall prohibit any employee from securing, by agreement with his employer, additional compensation from his employer for the injury or from enforcing any agreement for additional compensation."

atop a picking beam while signaling to the crane operator to "boom up" when he was thrown from the beam and seriously injured. The commissioner found the claimant was familiar with fall protection requirements regarding tying off in work areas above six feet per OSHA regulations and the respondent's policy and procedure. The claimant also supervised others during his employment with the respondent to ensure compliance with OSHA and the respondent's safety policies, procedures, and regulations. The claimant testified that on the day he was injured that the tie-off protection safety gear (a lanyard) was available to him.

The claimant also testified that the available tie-off safety gear (i.e. the lanyard) would not have prevented his injury, as the lanyard was six feet in length; thus, by the time it would have deployed, he would have made contact with the ground. Moreover, there was nothing available to anchor the lanyard at a height sufficient to prevent the claimant from striking the ground. Mr. Arnold further testified it was common "standard operating procedure" *not* to be attached to a personal safety line when he, or others, removed picking beams at the heights the claimant was performing his duties on December 13, 2010. Findings, ¶ 10. The claimant testified he performed his duties in the same manner without tying off on approximately 20 previous occasions. Findings, ¶ 11. He said that his inability to tie off, along with the short distance from the picking beam to the ground below, contributed to his acting "of the moment," despite him at one point conceding his failure to use fall protection placed him in a high degree of danger. Findings, ¶ 12. Nonetheless, the claimant also testified that at the time of his injury on December 13, 2010, he *didn't feel* <u>*at that time*</u> that standing on the picking beam

signaling to the crane operator to boom up placed him in a high degree of danger. (Emphasis in the original.) Findings, ¶ 13.

The respondents presented testimony from a witness, Kenneth Payne, who was their health, safety and environmental manager. He testified he was familiar with OSHA and the respondent's safety regulations and policies. He testified the respondent's failure to provide and secure safety protection devices prior to the commencement of the claimant's performance of his work duties on December 13, 2010, was a "mistake in judgment." Findings, ¶ 15. The respondents also presented evidence that the claimant may have had substances in his bloodstream prohibited by the respondent, but the trial commissioner found this evidence was insufficient as to establishing the claimant was impaired at the time of the injury or had consumed alcohol or another proscribed substance on the day of his injury.

Based on these factual findings Commissioner Mullins concluded that the claimant's testimony was more credible and persuasive than the evidence presented by the respondent's witness. He concluded that the claimant's actions on the day of the accident were "of the moment" and did not constitute willful and serious misconduct. He elaborated on this in Conclusion, ¶ D.

> The claimant's credible testimony regarding the totality of circumstances on the date of injury, including the substantial number (20) of instances in which he performed virtually the same duties as those performed on the date of injury; the claimant's good faith belief at the time of injury that he did not believe his actions placed him in a high degree of danger; and the claimant's testimony that his actions were of the moment, are sufficient for the undersigned to infer and conclude that the claimant's actions at the time of injury constituted an error of judgment and was *not* willful and serious misconduct.

As a result the commissioner found the claimant's December 13, 2010 injury to be compensable and ordered the respondents to pay the appropriate indemnity and medical benefits for this incident. The respondents filed a Motion to Correct seeking to add findings based on testimony at the hearing that the claimant could have found some means to have appropriately harnessed himself at the worksite. The commissioner denied this motion and the respondents have pursued this appeal. They assert the trial commissioner erred in determining the claimant's actions herein did not constitute "willful and serious misconduct."

The gravamen of the respondents' appeal is their belief that this case is indistinguishable on the facts and the law from Disotell v. LVI Services, Inc., 5749 CRB-3-12-4 (April 25, 2013). In Disotell the claimant was a construction foreman who was injured while failing to follow the firm's safety policies. The trial commissioner in that case determined that these violations constituted "willful and serious misconduct" and denied benefits. We affirmed that decision on appeal. The appellants seek to have this tribunal find that the facts herein require reaching the same result as Disotell. We are not persuaded.

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).

The respondents essentially argue that since they believe this case is indistinguishable from Disotell that *stare decisis* mandates that we reverse the Finding and Award and find that the claimant's conduct herein rose to the level of willful and serious misconduct. They note that in both this case and in Disotell that the claimants sustained a fall on a construction site having failed to harness themselves so as to avoid a fall. They also note that in both cases the claimant was a foreman who was responsible for knowledge of company and federal safety rules, and informing subordinates as to compliance with these standards. They contend that given the amount of training the claimant received on the necessity of preventing falls that the actions of the claimant on the day of his injury constituted grave and serious misconduct which would bar compensability of his injuries.

While we note the extremely close congruity of this case with Disotell, and surely would find that precedent dispositive had the trial commissioner in this case ruled against the claimant, we are not persuaded that as a matter of law the facts herein mandate that the claimant was engaged in willful and serious misconduct at the time of his injury. We made quite clear in Disotell our decision was based on affirming the discretionary role a trial commissioner has in determining when a respondent has proven an affirmative

defense pursuant to § 31-284(a) C.G.S., citing Gonier v. Chase Companies, Inc., 97 Conn. 46 (1921).

> Again, as stated previously herein, under the particular facts of this matter, we find it was well within the trier's discretion to assess the claimant's actions against the context of the relevant case law and render the decision that the claimant's actions constituted willful misconduct. This board is simply not empowered to reverse such a discretionary finding on review absent a finding of clear error.
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> Whether one violation or repeated violations will constitute wilful and serious misconduct must depend upon the circumstances, notably upon the nature of the misconduct and the character of the statute, regulation, rule, order or instruction violated. Each case must be weighed and determined by its own circumstances. What is serious [misconduct] is primarily a question of fact, as is a finding of negligence. So similarly, what is wilful misconduct is a question of fact. Gonier, supra, at 57.

Disotell, supra.

A trial commissioner therefore has a great deal of discretion based on the specific facts of any given case to ascertain if the conduct of the claimant at the time of their injury rose to the level of "willful and serious misconduct." Commissioner Mullins concluded that the claimant's conduct did not reach this level. We note that in Findings, ¶ 10, the commissioner accepted the claimant's testimony that it was a common procedure not to be attached to a personal safety line at the height where he was working when he was injured. We also note that in Findings, ¶ 11, the commissioner noted the claimant testified he had done what he was doing at the time of his injury on about twenty prior occasions without incident. Finally, we note that in Findings, ¶ 9, the claimant testified that the readily available safety equipment would not have prevented the injuries he sustained. While the respondents challenged this finding in the Motion to Correct the trial commissioner denied the correction, and therefore we must presume he

did not find this evidence probative or persuasive. 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).[3]

We also note that subsequent to Disotell we considered a very similar argument presented by the respondents-appellants in Clark v. Metro Roofing Supplies, Inc., 5865 CRB-4-13-7 (July 11, 2014). In Clark the claimant was a truck driver directed to deliver building materials to a worksite, but instructed not to cross a wooden bridge to make the delivery. The driver inspected the bridge, thought it was in good condition and crossed the bridge, but while backing his truck out after the delivery the bridge broke and the claimant sustained injuries. The employer cited § 31-284(a) C.G.S. as a defense to the claim and asserted that the claimant's decision to disobey his directions caused his injury. The trial commissioner was not persuaded that the driver's misconduct was sufficiently egregious to bar an award, and the employer appealed. This tribunal found the precedent in Mancini v. Scovill Mfg. Co., 98 Conn. 591 (1923) relevant to our inquiry. In Mancini a claimant was injured when she used her fingers to pick up parts, instead of following company policy and using forceps. Since the claimant in Mancini had apparently done her job in that manner for an extended period without incurring an injury, the Supreme Court found she had not engaged in serious and willful misconduct, as defined by the statute, when she was injured.

[3] In Disotell v. LVI Services, Inc., 5749 CRB-3-12-4 (April 25, 2013) the respondents presented evidence the trial commissioner found persuasive that the claimant had in the days prior to the accident been extensively briefed on a fall protection plan, represented that the safety equipment on the job site was in good working order, and had attended a "safety huddle" to go over appropriate work standards earlier on the day he was injured. In this case it appears that the trial commissioner did not believe that the safety equipment readily accessible to the claimant when he was lifted and fell was likely to prevent his injury. Since it is the respondents burden under the statute to prove that the claimant's misconduct "caused" his injury; we believe a reasonable fact finder herein could reach a different conclusion on liability than in Disotell.

In Clark we determined that "we are not persuaded that the trial commissioner erred in refusing to find that the claimant's decision to disregard DeSantis' (the claimant's supervisor) instructions rose 'to the level of willful and serious misconduct as defined by CGS 31-284(a).'" Conclusion, ¶ f. The trial commissioner found credible the claimant's testimony that he inspected the bridge prior to attempting to make the delivery." Id. Since the claimant in Clark exercised reasonable judgment and determined that what he was about to do was unlikely to result in his injury, we determined the result had been an unfortunate accident and not the result of a reckless disregard for workplace safety. We cited Gonier, supra, for the principle that since it is the employer's burden to prove that the facts warrant the application of the affirmative defense under § 31-384(a) C.G.S. and,

> [s]ince the finding is one of fact, the court on review will not hold this conclusion erroneous unless the facts clearly show this to be so; and in reaching its decision the reviewing court will keep before it the fact that the employer has the duty of proving this defense.

Id., 58.

In the present case the claimant testified that he had done what he had done on the day of the accident approximately 20 times previously without mishap. He also testified his actions were within standard operating procedures for the jobsite. The trial commissioner credited him with a good faith belief his actions did not place him in danger. As a result, we do not believe it was an arbitrary or capricious decision for the trial commissioner to conclude that the claimant's violation of workplace safety rules were more similar to the lapses in Clark that did not rise to a level of willful and serious

misconduct than the violations in Disotell which the trial commissioner in that case found so egregious as to bar compensability.

Our case law under § 31-284(a) C.G.S. invests a great deal of discretion to our trial commissioners to ascertain if the specific facts in a given injurious incident rise to the level of statutory "willful and serious misconduct." Commissioner Mullins reached a conclusion in this specific case that in his opinion the facts presented did not rise to that standard.

As an appellate body we defer to this factual determination and affirm the Finding and Award.

Commissioners Ernie R. Walker and Nancy E. Salerno concur in this opinion.