CASE NO. 6075 CRB-3-16-2 : COMPENSATION REVIEW BOARD
CLAIM NO. 300109072

NANCY DEFOREST : WORKERS' COMPENSATION
CLAIMANT-APPELLEE COMMISSION

v. : APRIL 6, 2017

YALE NEW HAVEN HOSPITAL
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLANT

APPEARANCES:

The claimant was represented by Donald G. Walsh, Jr., Esq., Donald G. Walsh, P.C., 61 Cherry Street, Unit C-2, Milford, CT 06460.

The respondent was represented by James A. Mongillo, Esq., Letizia, Ambrose & Falls, P.C., 667-669 State Street, 2nd Floor, New Haven, CT 06511.

This Petition for Review[1] from the January 29, 2016 Finding and Award of the Commissioner acting for the Third District was heard on December 16, 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 respondent, Yale-New Haven Hospital, has appealed from a Finding and Award reached by Commissioner Jack R. Goldberg which determined that the injury its employee, the claimant Nancy DeForest, sustained was compensable. As the respondent views this circumstance, the injury in question, which occurred on a public sidewalk during the claimant's lunch hour, was not incidental to her employment and therefore not compensable. We have reviewed the record and the relevant precedent and determine that the trial commissioner reached a reasonable conclusion as to the facts and the law. We affirm the Finding and Award.

Commissioner Goldberg reached the following findings of facts at the conclusion of the formal hearing. The claim results from an incident that occurred about 12:45 p.m. on March 18, 2014. The claimant, who was employed as a radiation therapist at Smilow Cancer Hospital, had completed her lunch and was walking to her car in the nearby garage to get change so she could buy coffee later in the day. She said she slipped on ice when crossing from Howe Street across North Frontage Road. The claimant had to be transported from the accident site to the hospital by EMT's, where she underwent surgery and was hospitalized for two days after the incident. The claimant was disabled from work due to her injuries for six months but has returned to work.

The claimant offered testimony as to her parking arrangements with the respondent. She was issued an electronic access card by her employer that enabled her to access the parking garage. She needed to swipe the card to access the garage. She said she was charged on a bi-weekly basis for use of the garage which was about a five or six minute walk from where she worked. The claimant said she did not know if Yale-New

Haven owned the garage but parking was provided to her as an employee and she paid Yale-New Haven to park there. The claimant further testified that she was not working through her lunch hour when she was injured, had not informed a supervisor she would be going to her car over lunch break, and was not carrying out any duties of employment at the time she was injured.

The claimant's supervisor, Jayne Gregory, also testified at the hearing. She testified that employees were free to leave the hospital premises over lunch so long as they returned at the end of their break. She also said that some staff members in her department ate lunch at a cafeteria or outside at food trucks. She testified she did not know who owned the garage where Yale-New Haven employees parked.

Based on this evidence, the trial commissioner concluded that the claimant was credible, she was free to leave the employer's premises during her lunch hour, and employees of the respondent did eat outside the premises at the food trucks. The claimant was an employee of the respondent on the day she was injured and paid her employer so she could use the parking garage it provided to employees. The claimant was injured in front of the parking garage the respondent provided on March 18, 2014. Commissioner Goldberg determined the garage was an extension of the employer's premises and was provided for the mutual convenience of the employer and its employees, consistent with the precedent in Cimmino v. Hospital of St. Raphael, 4230 CRB-3-00-5 (September 13, 2001). The trial commissioner determined the claimant's activity of going to her car in the garage during her lunch break was "incidental to her employment" consistent with the standards outlined in Brown v. United Technologies Corp., 112 Conn. App. 492,498 (2009) as the activity was regularly engaged in on the

employer's premises within the period of employment and with the employer's approval or acquiescence. As a result, the claimant's injury arose out of and in the course of her employment and was compensable.

The respondent filed a Motion to Correct seeking to clarify the location of the claimant's injury and remove references to the Brown and Cimmino cases. The trial commissioner denied this Motion in its entirety and the respondent has pursued this appeal. The gravamen of its appeal is based on its belief that as the claimant was injured on a public street, and not on its corporate premises, the precedent in Flodin v. Henry & Wright Mfg. Co., 131 Conn. 244 (1944) makes the claimant's injury noncompensable. It also claims that the trial commissioner erred by not determining, consistent with the precedent in Cunningham v. Saint Raphael Healthcare System, 5809 CRB-3-12-12 (December 31, 2013), *appeal dismissed*, AC36453 (September 16, 2014) that the claimant's activities at the time she was injured were solely due to addressing issues of "personal comfort" and therefore not incidental to her employment.

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 & Home Care, Inc., 248 Conn. 379, 384 (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).

We note many similarities between the fact pattern in this case and our decision in Meeker v. Knights of Columbus, 5115 CRB-3-06-7 (July 3, 2007). In Meeker,the claimant was injured on a downtown New Haven public street between her office and a parking lot where employees at her firm parked. The injury in Meeker occurred in the morning before the claimant had reached her office and the respondents cited Flodin, supra, as grounds for finding the injury outside the scope of Chapter 568. We found this argument unpersuasive, citing precedent subsequent to Flodin, supra, limiting that precedent.

> The trial commissioner placed great weight on the fact that the respondents furnished free parking at this location to their employees. In examining the concept of "mutual benefit" we take notice that employers frequently offer free parking as a fringe benefit to recruit and retain employees. We also take notice that parking in a downtown location is generally a scarce commodity. The "mutual benefit" concept has been applied to parking lots for over fifty years. "The parking lot was maintained for the mutual benefit of the defendant and its employees, to provide a ready means of access to the plant and a ready means of parking the employees' automobiles in close proximity to the plant." Hughes v. American Brass Co., 141 Conn. 231, 233 (1954).
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> We also find this concept of "mutual benefit" has long been recognized when the employee is injured traveling on a public thoroughfare between two locations controlled by his employer. In 1946 the Connecticut Supreme Court issued its opinion in Kuharski v. Bristol Brass Corporation, 132 Conn. 563 (1946). In Kuharski the claimant was injured crossing the street between two buildings owned by the respondent. At the time the claimant was not at work, rather he was obtaining approval for extra gasoline rations prior to starting his shift. The court held "[t]he

> commissioner was therefore justified in concluding, in effect, that the plaintiff in crossing the street, was in a place where he could reasonably be in furtherance of his employment and the injury arose in the course of his employment." Id., 566. The court distinguished the Kuharski case from a case relied on by the respondents in this matter, Flodin v. Henry & Wright Mfg. Co., 131 Conn. 244 (1944) as "[i]n the case at bar the plaintiff was not using the street as one of the general public but in reasonably pursuing an incident of his employment. The Flodin case is not controlling." Supra, 567.

Meeker, supra.

In the present case, the claimant was injured between where she parked her car and her workplace. The respondent argues that the evidence on the record is not consistent with the facts in Meeker, supra. It points out that there is no evidence that Yale owned the garage where the claimant parked. This is correct. However, both the claimant and her supervisor offered testimony at the formal hearing that Yale-New Haven obtained this parking on behalf of its employees, collected money from employees and paid the garage, and provided swipe cards to access the parking facility. October 20, 2015 Transcript, pp. 10-11 and p. 27. We believe this record, albeit somewhat cursory, suggests that the claimant was directed by her employer as to where she was able to park. We believe the record allows for the reasonable inference that the respondent obtained parking for the claimant at the location where she parked and this constituted a mutual benefit for both the employer and employee. See Russo v. Stop & Shop Co., 4002 CRB-6-99-3 (March 22, 2000), where an off-site parking lot was deemed "an extension of the employment premises." Id., *quoting* Bushey v. Iseli Co., 2 Conn. Workers' Comp. Rev. Op. 20, 120 CRD-5-82 (May 23, 1983), *aff'd*, 3 Conn. App. 370 (1985), *cert.*

denied, 196 Conn. 803 (1985).[2] It is also self-evident that the respondent knew that the claimant would traverse public roads and sidewalks between where she parked and where she worked. The claimant therefore was injured at a location where the respondent directed her to be, or where, at a minimum, it had acquiesced to her presence.

While the locus of this injury was clearly within the scope of the precedent in Meeker, the claimant was not injured at the start or conclusion of the work day but, rather, over her lunch hour. The trial commissioner found Brown, supra, on point wherein an injury during an employee's break in the business day may still be compensable if the employee's activities were regular and acquiesced to by the employer. The respondent challenges this conclusion, as well as the trial commissioner's reliance on the precedent in Cimmino, supra. While we find factual differences between this case and the cases relied upon by the trial commissioner, we do not find them so significant as to compel a different result.

The respondent points out that in Cimmino, supra, although the claimant was injured crossing a public street in New Haven which was between his place of employment and a parking garage owned by his employer, the purpose of the claimant's trip was to repair his car, which he utilized for work-related purposes. Therefore, the respondent argues that while a trier of fact could readily identify mutual benefit to the employer in Cimmino, supra, the claimant's trip to the garage in this case was solely for her own personal benefit. As such, the respondent argues that this case is

[2] We note that in Russo v. Stop & Shop Co., 4002 CRB-6-99-3 (March 22, 2000), the respondents argued that because they were not the legal owner of the parking lot where the claimant parked, this fact made the claimant's injury noncompensable. We held that if the parking lot was where employees of the respondent customarily parked, the fact that the respondent did not own the lot did not negate a finding that "mutual benefit" existed, making injuries en route to the lot compensable.

indistinguishable from Cunningham, supra. In Cunningham, the claimant took a break from work at a hospital, was injured while walking on a public sidewalk, and the trial commissioner concluded the injury was noncompensable. While clearly the precedent in Cunningham is relevant to this inquiry, we do not find that it mandates a reversal in this case, in part due to certain factual distinctions we can discern.

In Cunningham, the claimant's narrative as to what she was doing on the public sidewalk appears to have been inconsistent with evidence presented by the respondent's witness. This tribunal noted that the trier of fact specifically rejected a central averment presented by the claimant: that her purpose in leaving the workplace was to buy soup for a co-worker. It appears that having found the claimant in Cunningham not to be a credible witness, the trial commissioner determined that her entire narrative was inherently unreliable. We found that on appeal we must affirm such a factual finding.

> This board has previously observed that "[a]lthough almost any workers' compensation award contains numerous factual findings, the success or failure of a claimant's case often hinges upon one particular inference that the trier has drawn." Davis v. State/University of Connecticut, 3822 CRB-2-98-5 (August 17, 1999). In the instant matter, the trier's factual finding relative to the location of the accident is significant, given that § 31-275(1) C.G.S. specifically limits the scope of injuries "arising out of and in the course of his employment" to accidental injuries which occur either on the premises of the employer "or while [the claimant is] engaged elsewhere upon the employer's business or affairs by the direction, express or implied, of the employer...." Section 31-275(1) C.G.S.

Id.[3]

[3] We note that in Davis v. State/University of Connecticut, 3822 CRB-2-98-5 (August 17, 1999), although the respondents argued that because the claimant was injured crossing a public street which should render the injury noncompensable, the entire campus at UConn could essentially be determined to be a single premises and that crossing public streets was a necessary adjunct to going from one portion of the campus to another.

The trial commissioner relied in his decision on the precedent in Brown, supra. In that case, the claimant engaged in power walking around her employer's corporate campus during her lunch break and in so doing sustained an injury. The trial commissioner concluded that her employer had acquiesced to this activity and therefore the claimant's injury was incidental to her employment. On appeal, we found that this conclusion was untenable. Brown v. United Technologies Corp., 5145 CRB-8-06-10 (October 23, 2007), *aff'd*, 112 Conn. App. 492 (2009), *appeal dismissed*, 297 Conn. 54 (2010). However, the Appellate Court reversed on that point while affirming the dismissal of the claim on other grounds.[4] The Appellate Court cited Spatafore v. Yale University, 239 Conn. 408 (1996) for the proposition that whether a claimant's actions are incidental to employment is a quintessential factual determination.

> In Spatafore, our Supreme Court stated: "A finding of a fact of this character [whether the injury arose out of the employment] is the finding of a primary fact…. This ordinarily and in this case presents a question for the determination of the commissioner and we have no intention of usurping his function…. This rule leads to the conclusion that unless the case lies clearly on the one side or the other the question whether an employee has so departed from his employment that his injury did not arise out of it is one of fact.… The [board] is, therefore, bound by the findings of fact made by the commissioner, unless additions, corrections or modifications of findings of fact are made…." (Internal quotation marks omitted.) Spatafore v. Yale University, supra, 419–20.

Brown, supra, 499.

In Brown, the Appellate Court also pointed out that when a certain course of conduct by employees is acquiesced to by an employer, then injuries which occur while engaging in this conduct may be deemed compensable. Under those circumstances, the

[4] The Appellate Court in Brown v. United Technologies Corp, 112 Conn. App. 492 (2009) determined that the "social-recreational exception" to recovery delineated in § 31-275(16)(B)(i) C.G.S. barred recovery in the case. Id., 504.

employer must demonstrate that the claimant's deviation from his or her normal duties of employment was so material as to be beyond what the respondent had acquiesced to in order to avoid liability for the injury.

> [W]hen determining whether the activity is incidental to the employment, the following rule should be applied: If the activity is regularly engaged in on the employer's premises within the period of the employment, with the employer's approval or acquiescence, an injury occurring under those conditions shall be found compensable." McNamara v. Hamden, 176 Conn. 547, 556, 398 A.2d 1161 (1979). "[T]he 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. (Citation omitted.)

Brown, supra, 501, quoting Kish v. Nursing & Home Care, Inc., 248 Conn. 379, 389, 727 A.2d 1253 (1999).

In reviewing the circumstances in Brown as to the compensability of a lunch hour injury, the Appellate Court cited Mazzone v. Connecticut Transit Co., 240 Conn. 788 (1997) as an example of a situation where the employer had acquiesced to employees eating lunch inside buses over their break period and, because it had become an accepted and normal part of the daily routine at work, it had become incidental to the employment. Brown, supra, 503-504. Having reviewed the facts herein, the trial commissioner accepted the position of the claimant that the employer had allowed its employees to leave the premises over their lunch breaks and that crossing public sidewalks proximate to the worksite was ubiquitous enough for Yale-New Haven employees to render this activity incidental to the employment. Given the paramount nature of a fact finder in these cases, we cannot find that this conclusion was erroneous as a matter of law.[5]

[5] Given the primary role of a fact finder in determining whether a claimant's activities in leaving the work premises are incidental to employment, we conclude that on the facts one could reasonably find the claimant's activities in Spatafore v. Yale University, 239 Conn. 408 (1996) (going to a union meeting) and

We also note that the facts and result of this case are extremely similar to another case where an employee at a health care facility left his workplace over lunch and was injured in a parking lot. In Walsh v. Omni Medical Service, 5323 CRB-3-08-2 (April 22, 2009), the claimant went to his automobile during his lunch hour to use a cell phone for a personal call. While the claimant was returning to work, he slipped and fell on some ice in the parking lot. The trial commissioner in Walsh concluded that the injury arose out of the claimant's employment. We affirmed that decision, since based on the facts in that case, the claimant was where he reasonably would have been expected to be at the time of his injury and going to a parked car would be something the claimant would regularly engage in. We determined that precedent held "that Hughes, supra, and Cimmino, supra, clearly establish that a parking lot provided to employees is an adjunct to the workplace and injuries suffered at such a location can be deemed compensable." Id.

In a case such as this one, where the decision as to compensability is a heavily fact-driven exercise, finding the claimant's narrative credible was a critical element to awarding her benefits for her injury. We believe that the totality of the circumstances here are too similar to Cimmino, supra, Russo, supra, Meeker, supra, and Walsh, supra, to overrule the trial commissioner.

Therefore, we affirm the Finding and Award.

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

Cunningham v. Saint Raphael Healthcare System, 5809 CRB-3-12-12 (December 31, 2013), *appeal dismissed*, AC36453 (September 16, 2014) (claimant's narrative of activity found not credible by the trial commissioner) were not incidental to employment. Meanwhile, we find that a trial commissioner could reasonably determine that going to a parking garage over the lunch hour, as in this case, would be incidental to employment.

CERTIFICATION

THIS IS TO CERTIFY THAT a copy of the foregoing was mailed this 6th day of April 2017 to the following parties:

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