CASE NO. 6089 CRB-2-16-4 : COMPENSATION REVIEW BOARD
CLAIM NO. 200189827

ROCKO MAGISTRI
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

: MAY 10, 2017

NEW ENGLAND FITNESS DISTRIBUTORS
EMPLOYER

and

TECHNOLOGY INSURANCE CO.
INSURER
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by Mark Merrow, Esq., Law Offices of Mark Merrow, LLC, 760 Saybrook Road, Middletown, CT 06457.

The respondents were represented by David Davis, Esq., McGann, Bartlett & Brown, LLC, 111 Founders Plaza, Suite 1201, East Hartford, CT 06108.

This Petition for Review[1] from the March 24, 2016 Finding & Award of Daniel E. Dilzer, the Commissioner acting for the Second District, was heard January 27, 2017 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Christine L. Engel and Peter C. Mlynarczyk.

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

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondents have appealed from a March 24, 2016 Finding & Award which determined that the injuries the claimant, Rocko Magistri, sustained in an auto accident were compensable. The respondents argue that the Finding reached by the trial commissioner was in error because they believe that as the cause of the claimant's auto accident was sleep apnea, the precedent in Kielbowicz v. Tilcon Connecticut, Inc., 5855 CRB-6-13-6 (June 12, 2014) made the claimant's injury noncompensable. We disagree. We find that the facts herein are considerably different from Kielbowicz and support the trial Commissioner's Finding that the employer was receiving a benefit from the claimant's activities at the time of his injury. An injury sustained while performing a service for the employer is compensable. As a result, we affirm the Finding & Award.

The trial commissioner noted in his Finding & Award that many of the facts in this case were uncontested. The parties agreed that the claimant was an employee of the respondent, and the claimant's sleep apnea was a substantial contributing factor in the motor vehicle accident which occurred in the scope of the claimant's employment with the respondent. The claimant is employed by the respondent as a service technician and his work required him to travel and to prepare paperwork for work at home. On July 13, 2015 the Claimant testified that he prepared his reports for work at his home around 6:00 a.m. He did paperwork for about three hours and then got into the work van and proceeded to his employer's office when he was involved in a motor vehicle accident. He was operating a van owned by his employer and was driving directly to the respondent's office to turn in the report and quotes he had prepared at home and to pick

up some parts for work. The claimant was paid for his time preparing paperwork and travelling to his office.

En route to his office on July 13, 2015, the claimant was in an auto accident. The claimant testified he was unsure if he fell asleep at the wheel on that date prior to the accident. He sustained a fractured L2 vertebrae as a result of the accident and was taken by ambulance to be treated at Johnson Memorial Hospital. The claimant treated with David Kruger, M.D., who kept the claimant out of work from the date of the accident through October 11, 2015. Ira Pollack, M.D., the claimant's treater for his diagnosed sleep apnea, indicated that the motor vehicle accident of July 13, 2015 was almost certainly secondary to falling asleep at the wheel and was attributable to the claimant's obstructive sleep apnea.

Based on these facts, the trial commissioner determined the claimant's injuries arose out of and were in the course of his employment as a result of the July 13, 2015 motor vehicle accident. He ordered the respondents to pay the indemnity and medical benefits associated with this injury. The respondents filed a Motion to Correct and a Motion for Articulation seeking different findings supportive of a denial of the claim or, in the alternative, for the trial commissioner to expound on his rationale for compensability. The trial commissioner denied both motions in their entirety. The respondents have now pursued the instant appeal focused primarily on their argument that the result in this case is inconsistent with the holding in Kielbowicz, supra.

The standard of deference we are obliged to apply to a trial commissioner's findings and legal conclusions is well-settled. "The 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). Moreover, "[a]s 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…." Burton v. Mottolese, 267 Conn. 1, 54 (2003), *quoting* Thalheim v. Greenwich, 256 Conn. 628, 656 (2001). "This presumption, however, can be challenged by the argument that the trial commissioner did not properly apply the law or has reached a finding of fact inconsistent with the evidence presented at the formal hearing." Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

In the present case, the facts were stipulated. The parties agree that the claimant was injured while driving a company-owned vehicle on company business. Our general rule governing the application of § 31-275(1) C.G.S.[2] would make these injuries compensable, even if the claimant was "off the clock" at the time of his injury. See DeOliveira v. Florenee Cleaning, LLC, 6024 CRB-4-15-8 (June 6, 2016), *citing* King v. State/Department of Correction, 5339 CRB-8-08-4 (March 20, 2009).

> In King the claimant had completed his shift but was directed by his supervisors to return a vehicle they provided to him to be garaged at his home immediately after work, and he was injured between his work and his home. Since "'the work of the employee' created the 'necessity for travel' to bring the state-owned car to Meriden on the evening of January 18, 2007," the claimant's injuries in King were compensable. Again, the respondent in King received a "mutual benefit" by virtue of the

[2]Sec. 31-275 (1) C.G.S. (Rev. to 2015) states: "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…."

> claimant garaging their vehicle at a location they deemed beneficial to their purposes.

DeOliveira, supra.

In the present case, the respondents permitted the claimant to do paperwork for his job at his home, provided the claimant with a company car, and presumably were aware this car was garaged at the claimant's home. Since, unlike the claimant in King, the claimant herein was being paid for his travel time, the trial commissioner clearly could find this injury arose out of and in the course of the claimant's employment. See Labadie v. Norwalk Rehabilitation Services, Inc., 274 Conn. 219 (2005); Kolomiets v. Syncor International Corp., 252 Conn. 261 (2000); and Dombach v. Olkon Corporation, 163 Conn. 216 (1972). The claimant clearly was providing a "mutual benefit" to his employer at the time of his injury.

The trial commissioner in Kielbowicz, supra, reached the opposite conclusion as to whether the claimant in that case was rendering a service to his employer at the time of his injury. In Kielbowicz, the commissioner rejected the claimant's narrative that he had fallen off a ladder and been injured. Instead, the commissioner found the claimant had been injured when, while standing on level ground, he suffered an alcohol-withdrawal seizure. "The version of events accepted by the trial commissioner was the claimant never attempted to climb a ladder and instead, simply collapsed due to circumstances unrelated to any duty of his employment." Id.[3] While the claimant attempted to argue that precedent in Savage v. St. Aeden's Church, 122 Conn. 343 (1937) compelled an

[3]We note that Kielbowicz v. Tilcon Connecticut, Inc., 5855 CRB-6-13-6 (June 12, 2014) can also be distinguished from this case because in Kielbowicz, the trial commissioner found the claimant's testimony unworthy of belief, and we noted that this Commission has long-standing precedent against the moral hazard of rewarding untruthful testimony. See Mankus v. Mankus, 4958 CRB-1-05-6 (August 22, 2006), *aff'd*, 107 Conn. App. 585 (2008), *cert. denied*, 288 Conn. 904 (2008). In the present case, the facts presented were stipulated and the claimant's credibility was not at issue.

award of benefits for an idiopathic workplace injury, we distinguished Savage on both factual and legal grounds from the situation in Kielbowicz, citing in part the Supreme Court's opinion in Blakeslee v. Platt Bros. & Co., 279 Conn. 239 (2006).

> At this juncture it would be appropriate to note the factual distinctions between the present case and Savage, supra, as they are critical in the analysis of whether proximate cause exists between the claimant's employment and his injury. In Savage, the claimant was hired as a painter and fell off a ladder sustaining fatal injuries. By climbing the ladder the claimant was providing a benefit to his employer and was engaged in labor which the respondent hired the claimant to perform. Falling off a ladder and sustaining a traumatic injury while painting is surely "a risk involved in the employment or incident to it or to the conditions under which it is required to be performed…." Blakeslee, supra, 244. When an injury occurs under such circumstances that it arises out of the employment, it is clear a fact finder can determine that the work was the proximate cause of the injury.
>
> The facts herein are simply not on point with Savage. The commissioner found that the claimant never deployed a ladder. Based on testimony from contemporaneous witnesses who were found credible, the trial commissioner found that the claimant was in a flat muddy area and fell down on the ground. The trial commissioner found that the claimant was at a point between performing specific tasks for the respondent when he was stricken. We cannot ascertain from these facts how the claimant's employment was a proximate cause of his injury, as the injury clearly was of a character which would have occurred in the same manner had the claimant not been at his workplace. The record is bereft of any finding that the claimant's employment contributed in any fashion to his injury. While the claimant was physically present at his place of employment at the time of the injury, the facts herein do not compel the finder of fact to conclude that "mutual benefit" was present. There is also no evidence that the claimant was injured due to the acts of co-workers, hence, Blakeslee, supra, is factually distinguishable as well.
>
> Given the factual distinctions with Savage and the weight of recent Supreme Court and Appellate Court precedent regarding the necessity for claimants to prove a nexus between employment and injury; we find the precedent in Savage is inapplicable to this case.

Kielbowicz, supra.

In this case, we find the claimant's operation of a motor vehicle in the course of his employment is indistinguishable from the actions of the Savage claimant climbing a ladder to paint and subsequently sustaining an injury. In both cases, the claimant was providing a service to his employer at the time he was injured. If one is operating a motor vehicle in the course of one's employment, being involved in an accident is "a risk involved in the employment or incident to it or to the conditions under which it is required to be performed…." Blakeslee, supra, 244, *quoting* Labadie, supra, 228.[4] We believe that the trial commissioner could reasonably find, pursuant to the facts of this case, that the claimant's injuries were compensable.

The respondents argue that since the claimant's motor vehicle accident was precipitated by his sleep apnea, a medical condition unrelated to his employment, the proximate cause analysis of causation utilized in Sapko v. State, 305 Conn. 360 (2012) and Birnie v. Electric Boat Corp., 288 Conn. 392 (2008) would require an appellate tribunal to find an intervening non-employment factor was the proximate cause of the claimant's injury, thus negating compensability. We disagree. We note that subsequent to Birnie and Sapko, our Appellate Court in Turrell v. Dept. of Mental Health & Addiction Services, 144 Conn. App. 834, *cert.denied*, 310 Conn. 930 (2013), clarified that it is the duty of the trier of fact to ascertain what he or she believes is a substantial factor behind a claimant's injury.

[4] Presumably if the claimant herein had engaged in illegal, unsanctioned or reckless behavior while operating a company motor vehicle and sustained an injury as a result of such conduct, we would anticipate the employer to raise a statutory defense to liability pursuant to § 31-284(a) C.G.S. or § 31-275(1)(C) C.G.S. See 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) and Disotell v. LVI Services, Inc., 5749 CRB-3-12-4 (April 25, 2013), *appeal withdrawn* , AC 35652. The respondents did not present any averment to that effect in the present case.

> [Our Supreme Court] has defined proximate cause as [a]n actual cause that is a substantial factor in the resulting harm…. The question of proximate causation … belongs to the trier of fact because causation is essentially a factual issue…. It becomes a conclusion of law only when the mind of a fair and reasonable [person] could reach only one conclusion; if there is room for a reasonable disagreement the question is one to be determined by the trier as a matter of fact…. (Citations omitted; internal quotation marks omitted.) [W]hether a sufficient causal connection exists between the employment and a subsequent injury is … a question of fact for the commissioner.

Id., 845, *quoting* Sapko, supra, 372-73, 385.

In the present case, the trial commissioner could have reasonably determined that the claimant's sleep apnea would not have led to his injuries had he not been operating his employer's motor vehicle at the time when this medical condition occurred. In this sense, the operation of a motor vehicle is similar to climbing a ladder, see Savage, supra; entering a fire scene, see Tyskiewicz v. Danbury, 5839 CRB-7-13-5 (April 4, 2014); or climbing a scaffold, see Gonier v. Chase Companies, Inc., 97 Conn. 46 (1921). All of these cases involved claimants who provided a service to their employer under circumstances where some level of heightened risk of injury was inherent in providing the service. These circumstances can be distinguished from cases such as Clements v. Aramark Corporation, 6034 CRB-2-15-10 (July 18, 2016), *appeal pending*, AC 39488, and Loehfelm v. Stratford-Board of Education, 5710 CRB-4-11-12 (November 14, 2012), where the claimants sustained injuries while merely walking around the employer's premises. The trial commissioner, when presented with the stipulated facts in this case, could reasonably determine that the claimant's employment was a proximate cause of his injuries, and consequently could award the claimant benefits under Chapter 568.

The trial commissioner reached a reasonable determination based on the facts and the law in this case.

Therefore, we affirm the Finding & Award.

Commissioners Christine L. Engel and Peter C. Mlynarczyk concur in this opinion.

CERTIFICATION

THIS IS TO CERTIFY THAT a copy of the foregoing was mailed this 10th day of May 2017 to the following parties:

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