CASE NO. 6163 CRB-3-16-12 : COMPENSATION REVIEW BOARD
CLAIM NO. 700170481

JOHN RAUSER : WORKERS' COMPENSATION
CLAIMANT-APPELLANT COMMISSION

v. : OCTOBER 20, 2017

PITNEY BOWES, INC.
EMPLOYER

and

SEDGWICK CMS, INC.
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Maureen E. Driscoll, Esq., Driscoll Law Offices, L.L.C., 1077 Bridgeport Avenue, Suite 100, Shelton, CT 06484.

The respondents were represented by Michael M. Buonopane, Esq., McGann, Bartlett & Brown, L.L.C., 111 Founders Plaza, Suite 1201, East Hartford, CT 06108.

This Petition for Review[1] from the November 28, 2016 Finding and Dismissal of Jack R. Goldberg, the Commissioner acting for the Third District, was heard May 19, 2017 before a Compensation Review Board panel consisting of Commissioners Christine L. Engel, Daniel E. Dilzer and Peter C. Mlynarczyk.

[1] We note that motions for extension of time were granted during the pendency of this appeal.

OPINION

CHRISTINE L. ENGEL, COMMISSIONER. The claimant appeals from the November 28, 2016 Finding and Dismissal of Commissioner Jack R. Goldberg acting for the Third District.

A brief summary of the factual circumstances giving rise to the claim is as follows. On or about June 11, 2014, the claimant was in Spokane, Washington, for a business trip. The claimant was employed by the respondent-employer as a director of channel management. In that employment capacity, the claimant had a significant role in the sales strategy for the respondent-employer's products.

On June 11, 2014, the claimant met with the respondent-employer's sales staff in Spokane, Washington. On that evening, the claimant and some members of the Spokane sales team went to a local restaurant, Fast Eddie's, where food and alcohol were consumed. Convening at Fast Eddie's was an after-work event organized by two Spokane-based employees, Sean Johnson and Tricia Lopez. While at Fast Eddie's, the topics discussed were largely of a social nature.

At some point, the claimant and others departed Fast Eddie's and went on to visit an establishment known as Borracho's, where the claimant continued to imbibe alcohol.[2] Sometime after midnight on June 12, 2014, the claimant and Sean Johnson, a co-worker, left Borracho's. Shortly after exiting Borracho's, and while walking towards the

[2] There was testimony provided that in the course of conversation that evening, the claimant also made some comments that were inappropriate and offensive. We presume that this testimony was offered so as to support an inference as to the claimant's intoxication level and that the nature of discussions was not in furtherance of the employer's business. If the purpose of the testimony was to cast the character of the claimant in a bad light, we remind all that workers' compensation is a no-fault remedy. The character of a claimant neither assures nor bars entitlement to the remedy. Character assessment is only relevant to the fact finder's assignment of the weight and credibility to be accorded to the evidence and to the trier's determination as to whether any of the affirmative defenses permitted by statute have been satisfied.

establishment's parking lot, the claimant was assaulted by five men. The assailants were unknown to the claimant and his co-worker.

The beating inflicted by the perpetrators upon the claimant resulted in life-threatening injuries. The claimant required immediate hospitalization and significant periods of post-hospital rehabilitation in both Washington and in Connecticut.[3]

The assault suffered by the claimant resulted in a number of injuries. Although the claimant's condition has improved, he still suffers from the consequences from some of his injuries. He is afflicted with a diminished sense of taste and smell, and a diminished facileness when performing certain cognitive functions.

The gravamen of the claimant's appeal asks whether the trial commissioner erred in failing to find the injuries sustained by the claimant as a result of the assault were compensable, i.e., arose out of and in the course of employment. Before proceeding to review this issue, we acknowledge that the claimant has raised certain procedural challenges. Specifically, the claimant contends that the trier erred in failing to grant all the corrections sought in his Motion to Correct. While Commissioner Goldberg granted some of the corrections requested, the claimant contends that the commissioner's failure to grant certain other corrections constitutes error.

One set of corrections sought by the claimant concerns the testimony of the respondents' toxicologist, Marc Bayer, M.D. The claimant argues that it was error for the trial commissioner to allow Dr. Bayer to testify and offer an opinion as an expert witness and for the commissioner to rely on the testimony and opinions of Dr. Bayer.

[3] The claimant was initially treated at WSH Sacred Heart Medical Center and transferred to St. Luke's Rehabilitation Institute in Spokane. He was then treated in Connecticut at Gaylord Hospital.

The procedural basis for the objection asserted by the claimant is that the respondents did not disclose Dr. Bayer as a potential expert witness until after the formal hearing sessions commenced. The claimant argues that pursuant to Practice Book § 13-4, the respondents should have disclosed their intention to call Dr. Bayer.

Practice Book § 13-4 provides that in civil actions heard by the Superior Court, a party must disclose the name and other pertinent details in advance of commencing a trial.[4] We note that formal hearings conducted under our Act are governed, in part, by General Statutes § 31-298. General Statutes § 31-298 accords the commissioner a fair degree of latitude in terms of the formal hearing process.[5] Proceedings under our Act are administered so as to encourage a policy of open discovery. Millette v. Wal-Mart, 4429 CRB-5-01-8 (July 19, 2002). That governing policy puts proceedings in this forum on a different footing from those in Superior Court. Consequently, a commissioner is not compelled to apply the Practice Book Rules of the Superior Court in the administration of the procedural aspects of formal hearings; cf. General Statutes § 31-301 (e).[6]

That is not to say that formal hearings held in this tribunal may not be guided by the Practice Book Rules for Superior Court, nor that those rules do not provide authority

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[4] Practice Book § 13-4 (a) provides: "A party shall disclose each person who may be called by that party to testify as an expert witness at trial, and all documents that may be offered in evidence in lieu of such expert testimony, in accordance with this section. The requirements of Section 13-15 shall apply to disclosures made under this section."

Practice Book § 13-4 (b) provides in relevant part: "A party shall file with the court and serve upon counsel a disclosure of expert witnesses which identifies the name, address and employer of each person who may be called by that party to testify as an expert witness at trial, whether through live testimony or by deposition."

[5] General Statutes § 31-298 provides in relevant part: "In all cases and hearings under the provisions of this chapter, the commissioner shall proceed, so far as possible, in accordance with the rules of equity. He shall not be bound by the ordinary common law or statutory rules of evidence or procedure, but shall make inquiry … in a manner that is best calculated to ascertain the substantial rights of the parties and carry out the provisions and intent of this chapter."

[6] General Statutes § 31-301 (e) provides in relevant part: "The procedure in appealing from an award of the commissioner shall be the same as the procedure employed in an appeal from the Superior Court to the Supreme Court, where applicable."

for particular procedural aspects of this tribunal's hearing process. However, there is a fundamental difference between the manner in which trials are scheduled and conducted in Superior Court and the manner in which hearings are held in workers' compensation matters. Superior Court civil trials are generally scheduled to be heard from beginning to end, without interruption, whether it takes a day, a week, or longer to conclude the trial.

In the more than one hundred years of hearings held under the Workers' Compensation Act, formal hearings have been scheduled in interim sessions. In part, such a method of scheduling allows the claimant who carries the burden of proof to offer the testimony of witnesses in a manner that accommodates the witness. [7] Additionally, such a scheduling method serves the needs of medical providers who may be called to testify before a commissioner. Flexibility in the scheduling of formal hearings, where medical professionals may testify, is an accommodation to those whose primary objective is to provide care to injured workers, not expert opinions in a legal forum.

We have long recognized the important role of medical practitioners in the resolution of issues and determination of benefit eligibility. Without the cooperation of medical practitioners and their opinions and assessments, fact-finding would be delayed and a vastly more onerous process. Without some scheduling flexibility, we would subvert the public policy that underpins our Act and promises access to a certain and expedient remedy. Powers v. Hotel Bond Co., 89 Conn. 143 (1915).

[7] As an example, if there is a dispute as to the mechanism of a claimed injury that occurred while the claimant was on the employer's premises, it is very likely that the witnesses to the accident are other employees. Would an employer want to be confronted with a situation in which a number of employees were expected to testify for some uncertain duration, periods of time that could easily conflict with the employer's business hours? The disruption to the employer's business is not difficult to envision. Thus, scheduling of formal hearings in segmented sessions supports the needs of both claimants and respondents.

In Wysocki v. Bradley & Hubbard Co., 113 Conn. 170 (1931), our Supreme Court discussed the antecedent statute of General Statutes § 31-315 [General Statutes (Rev. to 1918) § 5355] and noted:

> While we recognize a real analogy in some respects between the decisions and procedure of a commissioner and those of a court, it is not a complete analogy. "The liberal spirit and policy of the Compensation Act [Pub. Acts 1913, c. 138, as amended] should not be defeated or impaired by a too strict adherence to procedural niceties." McCulloch v. Pittsburgh Plate Glass Co., 107 Conn. 164, 167, 140 Atl. 114. An award of a compensation commissioner, for example, resembles more nearly an interlocutory than a final judgment, and the Compensation Act contemplates that it shall be open to modification during the compensation period whenever the exigencies of the situation demand it in order to do justice between a claimant and a respondent.

Id., 178.

In Donaldson v. Duhaime, 4213 CRB-6-00-3 (April 30, 2001), this tribunal stated, "[a]lthough Practice Book § 13-4 prescribes specific rules regarding the disclosure of witnesses in Superior Court proceedings, the workers' compensation arena has no standard of formal pleading, and the rules of evidence do not technically apply under § 31-298."

Neither the legislative drafters of the initial Workers' Compensation Act, nor all the legislative stewards who have followed, would contemplate mandating a scheduling policy that contravenes a stated policy objective. What is of paramount consideration in the procedural administration of the Act is consistency with due process guarantees. Taking the claimant's complaint one step further, we must ask if the claimant's due process rights were impacted by the trier's actions, i.e., was the claimant denied the opportunity to cross-examine Dr. Bayer? Clearly not, as evidenced by claimant's

counsel's cross-examination of Dr. Bayer at the June 22, 2016 session of the formal hearing. June 22, 2016 Transcript, pp. 49–73.

As the fact finder, the trial commissioner may accept or reject expert testimony in whole or in part. Sellers v. Sellers Garage, Inc., 155 Conn. App. 635 (2015). The claimant may disagree with Dr. Bayer's expert opinion. We note that the trier's granting of certain portions of the claimant's corrections relating to Dr. Bayer's testimony would seem to reflect Commissioner Goldberg's careful consideration of the doctor's testimony and even his agreement with the claimant as to certain aspects. We therefore find no error in the weight and credibility the trier accorded Dr. Bayer's testimony and opinion.

We now return to the issue of whether the trial commissioner erred in failing to conclude that the claimant's injuries sustained as a result of the assault in Spokane, Washington, arose out of and in the course of employment. There is no question that the claimant's presence in Spokane was prompted by a business trip while in the employ of the respondent-employer. However, in order to demonstrate compensability, the claimant must prove "that the injury claimed arose out of the employment and *occurred in the course of* the employment." (Emphasis in the original.) Kolomiets v. Syncor International Corp., 252 Conn. 261, 266 (2000).

On June 8, 2014, the claimant and another business associate flew to Spokane, Washington. On June 9 and 10, 2014, the claimant met with various sales representatives. On June 10, 2014, the claimant and some sales personnel went out for dinner. Food and alcohol were consumed. The business associate with the highest rank in the respondent-employer's organizational hierarchy, Jonathan Allen, paid the bill.

Regarding the June 11, 2014 gathering at Fast Eddie's, Tricia Lopez testified that Sean Johnson, another employee, suggested the idea of meeting after work at Fast Eddie's. She testified that she sent out the email to the parties who were invited to attend. Jonathan Allen instructed her that she could keep the restaurant tab open until 8 p.m. or until $500 was spent, whichever occurred first. The total food and alcohol tab by 8 p.m. was less than $500.

The trial commissioner found, "any food or drink that was consumed at [Fast] Eddie's and at Borracho's after 8 p.m. to be purely social in nature and unrelated to the business interests of Pitney Bowes." Conclusion, ¶ m. The trier thereafter concluded that the events occurring after 8 p.m. until the midnight hour were a substantial deviation from the claimant's employment. Conclusion, ¶ n.

To demonstrate compensability, a claimant must prove "that the injury claimed arose out of the employment and *occurred in the course of* the employment." Kolomiets, supra. The Kolomiets court also noted our Supreme Court has held that whether the proximate cause of the injury occurred in the course of employment requires consideration of whether, at the time of the injury, the claimant was: (a) within the period of the employment; (b) at a place the employee may reasonably have been; and (c) fulfilling the duties of the employment or doing something incidental to it. Id., 267.

In Kolomiets, the claimant was a delivery vehicle driver for radioactive materials. The claimant initiated his delivery route and then realized his wallet and driver's license were at his home. After completing a delivery, the claimant deviated from his route so that he could return to his home to retrieve his driver's license and wallet. While driving to his home, the claimant was involved in an automobile accident. Compensability

turned on whether the claimant, at the time of the accident, was engaged in a minor deviation "not so unreasonable and unwarranted as to preclude him from receiving workers' compensation benefits" or whether the claimant "was engaged in a completely separate side trip when he was injured." Id., 264, *quoting* Kolomiets v. Syncor International Corp., 51 Conn. App. 523, 526 (1999). The court concluded that the matter was compensable because the claimant was injured while performing a minor deviation in his job as a delivery driver. Id., 274.

The fundamental question which must be answered here is whether, at the time of the injury, the claimant had deviated from his employment and was not doing something incidental to his employment. Pertinent to this inquiry, the trial commissioner found that after 8 p.m. on June, 11, 2016, the claimant was no longer serving the business interests of the employer. The consumption of food, alcohol and nature of the discussions occurring after 8 p.m. on June 11, 2016, constituted a substantial deviation from activities related to the respondent-employer's business.[8] As the Kolomiets court reminds us, whether a deviation from the employment is so minor as to not interrupt the causal link between the employment and the injury or, stated another way, if the activities in which the claimant is engaged at the time of the injury constitute a substantial deviation, is a factual determination. Such factual determinations will not be disturbed unless they are contrary to law, without evidence, or based on unreasonable or impermissible factual

[8] November 28, 2016 Finding and Dismissal, Conclusion, ¶ l, states: "I find the claimant discussed business matters at [Fast] Eddie's for a brief time, but that any business purpose inuring to the benefit of the employer ended by the time the tab was paid at 8 p.m. at the instigation of the highest ranking company officer."

November 28, 2016 Finding and Dismissal, Conclusion, ¶ m, states: "I find any food or drink that was consumed at [Fast] Eddie's and at Borracho's after 8 p.m. to be purely social in nature and unrelated to the business interests of Pitney Bowes."

inferences. Fair v. People's Savings Bank, 207 Conn 535 (1988). On review, we are not persuaded that the trier's conclusion violates this appellate standard.

Both the commissioner and the respondents reference Luddie v. Foremost Ins. Co., 5 Conn. App. 193 (1985). See Conclusion, ¶ n and Respondents' Brief, pp. 7-9. In Luddie, the claimant was an insurance claims adjuster who agreed to meet a policyholder in New London, Connecticut. The claimant and the policyholder discussed the insurance problem confronting the policyholder. The policyholder, who lived in Saugus, Massachusetts, did not have transportation home. The claimant agreed to drive him to Hartford, Connecticut, so that he could make arrangements to return home. Ostensibly while on route to Hartford, the claimant and her passenger went to the Plainfield dog track and stopped at a restaurant. Afterwards, they went to the claimant's home where the claimant took a shower and then, at about 3 a.m., while driving to Hartford, they were involved in an automobile accident in Andover, Connecticut. The Appellate Court affirmed the conclusion of this tribunal that the claimant, at the time of her injury, was not "engaged … in the business or affairs of her employer." Id., 196.

The Luddie court stated:

> In determining whether an unauthorized deviation from the employment is so slight as not to relieve the employer from liability, or of such character as to constitute a temporary abandonment of employment, "[t]he true test is analogous to that applied to determine whether a deviation in agency terminates that relationship." Herbst v Hat Corporation of America, 130 Conn. 1, 7, 31 A. 2d 329 (1943). "[T]he trier must take into account, not only the mere fact of deviation, but its extent and nature relatively to time and place and circumstances, and all the other detailed facts which form a part of and truly characterize the deviation, including often the real intent and purpose of the servant in making it." Ritchie v. Waller, 63 Conn. 155, 165, 28 A. 29 (1893).

Id., 196-97.

The Luddie court noted, "[i]n taking her course for the purpose intended (to take a shower), the plaintiff was doing nothing incidental to her employment." Id., 197. The court also instructs that the conclusion that the injury did not arise out of or occur in the course of employment is to be reviewed on the basis of whether the conclusion was an abuse of discretion. Id., 196.

In support of his appeal, the claimant also cites our Supreme Court's holding in Dombach v. Olkon Corporation, 163 Conn. 216 (1972). In Dombach, the claimant was injured in an auto accident. At the time of the accident, the claimant was a service engineer who was directed by his supervisor to be in Skaneateles, New York, on a Sunday evening so that the claimant would be able to be on the premises of a client requiring service on Monday morning.

The claimant was informed of his assignment on the Friday before he was to be in Skaneateles. The claimant requested that he be permitted to drive his car containing his service tools to the Skaneateles customer site, as opposed to using an airline for transportation. The claimant, who had relocated from Toronto, Canada, to Stamford, Connecticut, approximately three months prior to the accident, asked his supervisor if he could drive to Toronto and then go to the customer's premises. The claimant informed his supervisor that while in Toronto, he would retrieve a trunk containing his winter clothing and visit friends. The claimant's supervisor assented to the request.

On Friday night, the claimant left Stamford, Connecticut, and was involved in an auto accident within an hour of his departure. The trial commissioner in Dombach concluded that the claimant's injuries were not compensable as they resulted from travel

that was for his "own personal business because he was not intending to go to Skaneateles that Friday night." Id., 223.

The Dombach court cited Chief Justice Benjamin Cardozo's opinion in Matter of Marks [Marks' Dependents] v. Gray, 251 N.Y. 90, 167 N.E. 181 (1929), wherein he stated, inter alia, "the pertinent inquiry is whether the employment or something else has set the traveler forth on his journey." Dombach, supra, 224. The test described by Chief Justice Cardozo is referred to as the dual-purpose test.

Certain factual elements are worth noting in Dombach because they serve to distinguish the factual scenario of the case at bar from Dombach. In Dombach, the claimant's injury occurred on a public highway on the route he would have driven to arrive in Skaneateles. Second, the claimant did not have a fixed place of employment. Third, and perhaps most important as it relates to this matter, the claimant received the permission of the supervisor to go to Toronto in the course of his business trip to Skaneateles.

In the present matter, the respondent-employer's permission or encouragement of the claimant's social activities can only be inferred to support the time the claimant spent at Fast Eddie's. After 8 p.m. on the evening in question, the claimant no longer enjoyed the express consent or implied acquiescence of his employer for his social pursuits.

The evidence herein demonstrates that the matter at hand is one in which "'the facts permit the drawing of diverse inferences. The [commissioner] alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court.' Fair v. People's Savings Bank, 207 Conn. 535, 540 (1988), *quoting* Del Vecchio v. Bowers, 296 U.S.

280, 287 (1935)." Baker v. Moylan Property Services, 6133 CRB-8-16-8 (August 9, 2017).

We therefore affirm the November 28, 2016 Finding and Dismissal of the Commissioner acting for the Third District.

Commissioners Daniel E. Dilzer and Peter C. Mlynarczyk concur.