CASE NO. 6140 CRB-4-16-10 : COMPENSATION REVIEW BOARD
CLAIM NO. 400094990

WANDA BAGLEY : WORKERS' COMPENSATION
CLAIMANT-APPELLEE COMMISSION

v. : JUNE 28, 2018

GARDNER HEIGHTS HEALTH
CARE CENTER, INC.
EMPLOYER

and

GALLAGHER BASSETT SERVICES, INC.
INSURER
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by Maria R. Altieri, Esq., 1836 Noble Avenue, Bridgeport, CT 06610-5310. Attorney Altieri did not appear at oral argument but, rather, requested that the appeal be heard on the papers.

The respondents were represented by Nicholas W. Francis, Esq., Law Office of Jonathan M. Zajac, L.L.C., P.O. Box 699, Avon, CT 06001-0699.

This Petition for Review from the September 29, 2016 Finding and Decision of Charles F. Senich, the Commissioner acting for the Fourth District, was heard December 15, 2017 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Christine L. Engel and Daniel E. Dilzer. [1]

[1] We note that a motion for extension of time was granted during the pendency of this appeal. Two other motions for extension of time were filed but deemed motions for postponement. See March 3, 2017 and July 6, 2017 rulings. Although oral argument was scheduled for November 17, 2017, claimant's counsel was unable to attend due to transportation issues and respondents' counsel agreed to a postponement. On November 21, 2017, claimant's counsel notified the Compensation Review Board that she would not be able to attend oral argument scheduled for December 15, 2017 and requested that the matter be heard on the papers.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondents have appealed from the September 29, 2016 Finding and Decision issued by Charles F. Senich, Commissioner acting for the Fourth District, concluding that the claimant sustained a compensable injury while shoveling snow off her car in her employer's parking lot on February 3, 2014. The respondents argue that the alleged injury did not occur in the course of employment and is not compensable. On appeal, we believe that the causation of the claimant's injury was a question of fact for the trial commissioner to address. Given that the evidence presented indicated that agents of the claimant's employer had plowed in the claimant's car, thereby necessitating that she remove the snow from her vehicle in order to leave the premises, the trial commissioner reasonably determined that this injury was compensable. We therefore affirm the Finding and Decision.

The following facts were found by the trial commissioner and are pertinent to our consideration of this appeal. The claimant filed claims asserting that she had sustained injuries at work on two different occasions: February 3, 2014 and March 11, 2014. The trial commissioner dismissed the March 11, 2014 claim and the claimant did not appeal that decision; as such, the February 3, 2014 incident is the subject of this appeal and our review is limited to the facts found relative to that date of injury. The trial commissioner found that the claimant had been employed by the respondent employer as a Certified Nursing Assistant [hereinafter "CNA"] since 1996. She testified that on February 3, 2014, she worked from 7:00 a.m. to 3:00 p.m. and, at the end of her shift, "punched out," walked to her car, and discovered that it had been plowed in with snow. She testified that

approximately six or seven inches of snow had fallen that day but the snow had stopped by the time her shift ended.

In his Finding and Decision, the trial commissioner cited verbatim the testimony offered by the claimant regarding what had transpired at the end of her shift.

> Like I stated, we proceeded to, I proceeded to vent, because I was upset that nobody didn't make that announcement for us to come and move the cars, and I couldn't get in my vehicle and leave. And you know, I'm already, I already had a problem driving in the snow. I mean, I'm like, I'm a nervous wreck. I drive, but it's, it's no picnic for me. I, I'm screaming all the way home and all the way back, but I do it because that's my job, I am to show up for work.
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> I went to the building. When I was exiting from coming out of the building I saw the shovel, so when I couldn't get my car out I went back to the building and went and got [the] shovel. And that's when I stated that Manuel was standing in the door, and he was like "What's wrong?" So, you know, I was telling him, and he came out the door, as I proceeded to go back to my car. And I started shoveling my car so I can get in my driver's door, and he was like "Well, give me the shovel." And I was like, I gave him the shovel. You know, he's offered to help. And I got in my car. I tried to drive the car, and I didn't get it out, and so he shoveled somewhere, some more where there was resisting, from moving the car, and to no avail. And then he decided to push the car, and asked me, you know, just gas it, you know, rock the car, push the car, and push the car, then the car eventually got out.

Findings, ¶ 6; December 9, 2015 Transcript, pp. 14-16.

The claimant testified that her car was parked in the respondent employer's parking lot at the back of the building and she needed to shovel the snow blocking the driver's side door. The trial commissioner also took note of the testimony of another employee of the respondent, Miguel Rivera. Rivera testified that the snow had piled up

around the cars in the parking lot on the date in question because of the snow plow, and he helped the claimant shovel her car out of the snow.

The claimant testified that after shoveling the snow, she felt a burning pain in her back. She went to work on February 4, 2014, and worked a full day, but on February 5, 2014, she called out of work because her back injury had gotten worse. She testified that she went to work on February 6, 2014, and reported her back injury to her supervisor. She was directed to go to Concentra for medical treatment and did so. The trial commissioner took note of the Concentra medical report for that date.

> This 47 year old female presents to the office complaining of back and upper arm pain. While at work on 2/3/14, the patient had to dig out her car with a shovel after the plow moved snow behind her car. The patient admits a maintenance employee came out and assisted her, but this was after she had already been shoveling. The patient admits the pain began the next day and has grown worse since that time. The pain is rated a 5/10 and is described as burning. The pain is felt over the upper and lower regions of the back and over bilateral upper posterior arms. The pain is exacerbated with movement and alleviated with laying down.

Findings, ¶ 18; Claimant's Exhibit A.

The claimant later sought treatment with her primary care physician, Dennis J. Williams, M.D. Dr. Williams' April 17, 2014 report states that the claimant was "originally injured shoveling snow 2/14 and exacerbated while at work." Findings, ¶ 31; Claimant's Exhibit D. The claimant eventually underwent treatment with John N. Awad, M.D., who opined on March 27, 2015 that "[i]t is my opinion that the work-related injury on 02/03/2014 is directly related to her current symptomatology." Findings, ¶ 33; Claimant's Exhibit F.

Based on this record, the trial commissioner concluded that the claimant had sustained a back injury in the course of her employment on February 3, 2014. He found

the claimant's narrative fully credible and persuasive relative to her contention that her injury resulted from having to dig her car out of the snow. He found that the respondent employer and/or its agent was responsible for the snow that was plowed up against the claimant's car. He further noted that the claimant was still on the respondent employer's property when she injured her back on the date in question. He found fully credible and persuasive the opinion of Dr. Williams indicating that the claimant had sustained an injury while shoveling snow in February 2014, and also found fully credible and persuasive Dr. Awad's opinion stating that the work-related injury of February 3, 2014 directly caused the claimant's back problems. He therefore directed the respondents to pay benefits to the claimant for the work-related injury sustained on February 3, 2014.

The respondents filed a motion to correct subsequent to the Finding and Decision. The proposed corrections indicated that because the claimant was "off the clock" at the time she commenced snow shoveling, and the use of the shovel was reserved for the maintenance staff, snow shoveling was not part of the claimant's job duties. As a result, the motion sought the conclusion that the claimant's injury did not arise out of the claimant's employment. The trial commissioner denied the motion in its entirety and the respondents have pursued this appeal.

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).

It is well-settled that an appellate tribunal such as ours is required to extend great deference to a trial commissioner's factual findings relative to whether an injury sustained by an employee is incidental to the employment. As our Appellate Court has pointed out, whether a claimant's actions are incidental to the employment is a quintessential factual determination.

> 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…. (Citations omitted; internal quotation marks omitted.)

Spatafore v. Yale University, 239 Conn. 418, 419-420 (1996), *quoting* Crochiere v. Board of Education, 227 Conn. 333, 347-348 (1993); see also Brown v. United Technologies Corp., 112 Conn. App. 492, 499 (2009), *appeal dismissed*, 297 Conn. 54 (2010).

The record in this matter reflects that the claimant was injured in the respondent employer's parking lot immediately after the conclusion of her workday. We have frequently upheld findings of compensability in situations in which an employer controls

a parking lot or provides parking as part of the employment relationship and an employee sustains an injury in the parking area. Case law holding that an employee's access to the parking area is "incidental to the employment" has been in place for over sixty (60) years. See Hughes v. American Brass Co., 141 Conn. 231 (1954). In Meeker v. Knights of Columbus, 5115 CRB-3-06-7 (July 3, 2007), the claimant was injured prior to commencing her workday, not in the parking lot procured by her employer but, rather, on a public street between her office and the parking lot. Nonetheless, the concept of mutual benefit was extended to the circumstances of this injury and we affirmed the commissioner's determination that the injury was compensable. See also DeForest v. Yale New Haven Hospital, 6075 CRB-3-16-2 (April 6, 2017).

Although the respondents acknowledge that the claimant was in a place where she could reasonably have been expected to be when she was injured, they dispute that the respondent-employer acquiesced in her decision to shovel out her car. The respondents argue that because snow removal was beyond the scope of the claimant's duties as a CNA, and the respondent-employer employed maintenance staff to handle the task of shoveling show, the claimant's injury was not compensable. We are not persuaded that the trial commissioner erred in concluding to the contrary, however. It is clearly implied in any employment relationship that once an employee has completed his or her duties, he or she is able to leave the premises and return home. In the present matter, the claimant found she was unable to do so, and the trial commissioner concluded that the claimant's car had been plowed in by an agent of the respondent-employer. It would be

unreasonable under these circumstances not to expect that the claimant might locate any tool at hand in order to extricate her car from the snow and return home.[2]

The claimant also introduced evidence indicating that the respondent employer did not notify her that the snow plow was going to plow in her car, and employees were generally given the opportunity to move their cars first so as to prevent such an eventuality from occurring. December 9, 2015 Transcript, pp. 13-14. We find that this factual scenario closely resembles the fact pattern in Katz v. Katz, 137 Conn. 134 (1950), in which an employee's commute home was disrupted by agents of the employer and the subsequent injury sustained by the employee was deemed compensable. In Katz, the claimant, who ordinarily was driven home after work, was directed to walk to a bus stop one evening after a snowstorm because no ride was available. The defendants were aware that the street had been plowed by the city and a high bank of snow remained on the side of the road. After leaving the workplace on foot, the claimant was struck by a car and sustained injury.

On appeal, the Supreme Court found that the factual circumstances indicated that the employer's decision had left the claimant with no alternative but to walk on a street with no sidewalk and thereby created a risk incidental to the employment. This risk rendered the claimant's injury compensable even though it had occurred on a public street after work hours. In the present matter, it may be reasonably inferred that had the respondent employer followed its general protocol of allowing employees to move their

[2] The respondents argue that because the respondent-employer had hired a maintenance employee to take care of shoveling snow, and this employee assisted the claimant in her efforts, they did not acquiesce in the claimant's use of a shovel to do her own shoveling. We find that whether the respondents acquiesced in the claimant's actions is a factual question which was resolved in a manner adverse to the respondents. We also note that the respondents did not introduce into evidence any employee memos or handbooks advising non-maintenance employees not to use the shovels on the premises; nor did the respondents contend that the snow removal equipment was stored in an inaccessible location, as apparently the shovel in question was accessible to the claimant at the time she chose to use it.

cars prior to plowing the parking lot, the claimant would not have sustained this injury. We therefore find that the court's analysis in Katz is clearly applicable to an injury sustained while extricating a car from an employee parking lot.

At oral argument before this tribunal, the respondents argued that Hayes v. Total Fulfillment Services, Ltd., 4482 CRB-4-02-1 (February 5, 2003), is on point and compels us to reverse the trial commissioner's decision in this claim. In Hayes, the claimant was injured while using a defective door handle in her own car during a work break, and no evidence was submitted into the record indicating that the respondent had anything to do with the state of repair of the claimant's own vehicle. "No unusual characteristic of the parking lot, or the actions of a fellow employee, contributed to cause the claimant's wound…." Id. Given, then, that Hayes is distinguishable on both the facts and the law, we do not find that this case compels us to reverse the trial commissioner in the matter at bar.

In the present matter, however, the actions of the respondent employer's agent in plowing in the claimant's car created the necessity for the claimant to extricate her vehicle. As such, an "unusual characteristic of the parking lot," i.e., the manner in which it had been plowed, did contribute to the claimant's injury in this case. We are therefore not persuaded by the respondents' reliance on Hayes, supra.

We find that the facts as presented in the evidentiary record in this matter provided a sufficient basis for the trial commissioner's conclusion that the claimant's injury arose out of her employment.[3] Such a determination cannot be retried on appeal.

[3] We affirm the trial commissioner's denial of the respondents' motion to correct. The trial commissioner is not obligated to adopt the legal opinions or factual conclusions of a litigant. D'Amico v. Dept. of Correction, 73 Conn. App. 718 (2002), *cert. denied*, 262 Conn. 933 (2003); Liano v. Bridgeport, 4934 CRB-4-05-4 (April 13, 2006). It may also be inferred that evidence not cited in the trial commissioner's

There is no error; the September 29, 2016 Finding and Decision of Charles F. Senich, the Commissioner acting for the Fourth District, is accordingly affirmed.

Commissioners Christine L. Engel and Daniel E. Dilzer concur in this opinion.

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findings was not deemed probative by the trial commissioner. Vitti v. Richards Conditioning Corp., 5247 CRB-7-07-7 (August 21, 2008), *appeal withdrawn*, A.C. 30306 (September 29, 2009).