CASE NO. 6206 CRB-3-17-7 : COMPENSATION REVIEW BOARD
CLAIM NO. 400100261

CARL THOMAS : WORKERS' COMPENSATION
CLAIMANT-APPELLEE COMMISSION

v. : JULY 30, 2018

CITY OF BRIDGEPORT
EMPLOYER

and

PMA MANAGEMENT CORPORATION
OF NEW ENGLAND
ADMINISTRATOR
RESPONDENTS-APPELLANTS

APPEARANCES: The claimant was represented by Laura M. Mooney, Esq., Morrissey, Morrissey & Mooney, L.L.C., 203 Church Street, P.O. Box 31, Naugatuck, CT 06770.

The respondents were represented by Christine M. Yeomans, Esq., Driscoll Law Offices, L.L.C., 1077 Bridgeport Avenue, Suite 100, Shelton, CT 06484.[1]

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This Petition for Review from the June 22, 2017 Finding and Decision of Charles F. Senich, the Commissioner acting for the Fourth District, was heard January 26, 2018 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Scott A. Barton and Jodi Murray Gregg.[2]

[1] We note that the principal of Driscoll Law Offices, L.L.C., Maureen G. Driscoll, was appointed by the governor to be a workers' compensation commissioner on April 13, 2018. Attorney Driscoll did not appear at oral argument in this matter.
[2] We note that a motion for extension of time was granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondents have appealed from a Finding and Decision issued by Commissioner Charles F. Senich, the Commissioner acting for the Fourth District, concluding that the claimant's injury at a softball game occurred in the course of his employment. The respondents argue that this injury occurred in the course of a recreational event and, pursuant to General Statutes § 31-275 (16) (B) (i), the injury is not compensable.[3] Upon review, we find that on the facts and the law, this case is indistinguishable from Anderton v. WasteAway Services, LLC, 91 Conn. App. 345 (2005), wherein a sports injury sustained while the claimant was "on the clock" was deemed compensable. We affirm the Finding and Decision.

The trial commissioner found the following facts at the conclusion of the formal hearing in this case. The claimant was employed as a laborer by the City of Bridgeport [hereinafter "city"] in the Parks and Recreation Department [hereinafter "parks department"] on a seasonal basis. He was hired in April 2014, worked until December, and was re-employed in the same capacity in 2015. The city held a picnic for all city employees on September 18, 2015. One of the events scheduled for this picnic was a softball game between the parks department staff and the staff of the roadway department.[4] While playing in the softball game on September 18, 2015, the claimant sustained a fracture of the right femur in the course of running to first base.

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[3] General Statutes § 31-275 (16) (B) states: "'Personal injury' or 'injury' shall not be construed to include: (i) An injury to an employee that results from the employee's voluntary participation in any activity the major purpose of which is social or recreational, including, but not limited to, athletic events, parties and picnics, whether or not the employer pays some or all of the cost of such activity."

[4] The trial commissioner found that "[t]he respondent City of Bridgeport provided t-shirts for the employees participating in the softball game." Findings, ¶ 7. The deletion of this finding was granted by the trial commissioner in his August 14, 2017 "Ruling on Respondent's Motion to Correct." See Respondents' "Motion for Correction of the Finding and Award Dated June 22, 2017."

The claimant testified that he was recruited by a foreman in the parks department to play in the softball game because he played cricket, and softball was a similar sport to cricket. He further testified that the foreman said the claimant was a good hitter in cricket and that he needed to play with the team. The claimant said he believed his boss was intent on winning the game and that it was important to the department. He further testified that he felt compelled to play in the game.

> Q: Okay. Did you ever think that you had, that you could make the decision to play or not play baseball? The softball game?
>
> A: Well, that decision, I just as I said, I did want to make my department look good, my boss look good, so I played the game. I didn't know that it would come down to this.
>
> Q: Did you know you had a right to say no, to playing the game?
>
> A: No.
>
> Q: Okay. And were you on the clock when you were playing the game?
>
> A: Yeah.

May 26, 2016 Transcript, pp. 32-33.

The claimant further testified that he did not believe he could have refused to play in the game and, if he had, his boss would have been disappointed in him. He believed that in the current circumstances, he wouldn't have been called back to work the following spring. He believed that the perception that he was not a "team player" would have impacted his future employment. Id., 36.

The aforementioned foreman, Jose 'Junior' Negron, testified that the softball game was voluntary for any employees who wanted to play. Negron further testified that the claimant volunteered to play in the softball game on September 18, 2015, and the

claimant was never told he would be terminated if he did not attend the picnic or play in the softball game. He also testified that the claimant was a very good employee and never had to be supervised.

A manager for the parks department, Andrew Valeri, also testified. He said that he obtained the t-shirts for the game. He also testified that after the claimant's accident, he discussed the claimant's eligibility for workers' compensation and told him he "assumed that since he was on the clock there would be no problem." Id., 14. Valeri did not know until later that the city's insurance carrier had denied the claim.

Based on this record, the trial commissioner concluded that the claimant's testimony was fully credible and persuasive while the testimony of Valeri and Negron was not fully credible and persuasive. The trial commissioner determined that the claimant sustained a fracture of the right femur in the course of employment on September 18, 2015; the claimant's injury occurred during his work hours for the respondent employer; and the claimant was asked by the respondent employer to participate in the softball game giving rise to the claimant's injury.

In addition, the trial commissioner found that the softball game was a morale booster for the respondent employer and its employees, and the claimant believed he would be looked upon unfavorably by the respondent employer if he did not participate in the softball game. As a result, the trial commissioner found fully credible and persuasive the claimant's testimony that he did not have an option to refuse to play in the softball and therefore felt compelled by the respondent employer to participate in the softball game. Since the claimant was reasonably fulfilling the duties of his job when he was injured on September 18, 2015, his right leg injury was compensable.

The respondents filed an extensive motion to correct seeking findings that the respondents did not provide the t-shirts, participation in the softball game was purely voluntary, there were no employment consequences from not participating, the respondents derived no benefit from the softball game, and the claimant's injury was therefore not compensable. The respondents also sought a finding that General Statutes § 31-275 (16) (B) (i) barred an award for the injury. As discussed previously herein, the trial commissioner granted only the correction that the respondents did not provide t-shirts for the employees.

The respondents have pursued this appeal. They reiterate the arguments they presented in their motion to correct. They also cite Brown v. United Technologies Corp., 112 Conn. App. 492 (2009), *appeal dismissed*, 297 Conn. 54 (2010) (certification improvidently granted), as authority for reversing this decision. They argue that this was the sort of recreational accident that is now outside the scope of Chapter 568. However, we find that this case hinged on factual findings adverse to the respondents, and the facts as found by the trial commissioner cannot be distinguished from Anderton, 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).

We look to the facts in Anderton, supra, and cannot discern a meaningful difference between the facts in that case and the present case.

> The commissioner found that the plaintiff's "September 3, 1999 injury arose out of and in the course of his employment, as playing basketball with his employers that day was part of his employment." The commissioner also found that the basketball game was requested by the employers, it was played during working hours and the plaintiff believed that he had to agree to play with his employers and that if he refused, Dobson and his employers would not look favorably on him as an employee.

Id., 349.

In this case, the trial commissioner specifically determined that the claimant believed he would be looked upon unfavorably by the respondents if he did not participate in the softball game. We note that the claimant in this matter was a seasonal employee, and might have additional reasons to stay in good stead with his employer so that he would be rehired the following spring. The claimant's injury in this case was similar to that in Anderton as it occurred during working hours. While the respondents argue that the claimant's decision to participate in this softball game was purely voluntary, the claimant testified that his supervisor actively recruited him to play in part due to his perceived aptitude for the sport. Given the totality of the circumstances, we believe the trial commissioner could reasonably have concluded that the claimant's participation in the

game was expected and was incidental to his employment. We turn again to the holding of Anderton:

> In the present case, the activity in question was a basketball game occurring during working hours, thereby fulfilling the time requirement. The employers exercised some compulsion in that they invited the plaintiff and his supervisor to play and scheduled it during the plaintiff's work hours. It also was known that the employers were visiting the stadium because of the maintenance staff's poor performance. The plaintiff believed that if he refused to play, his employers and his supervisor would look on him unfavorably as an employee. Also, one of the employers acknowledged that the notion of playing basketball with employees was to benefit the company by boosting company morale and fostering employee loyalty.
> Those facts support the commissioner's finding that the plaintiff's injury arose out of and in the course of his employment, as playing basketball with his employers that day was part of his employment. The commissioner was free to draw such a conclusion from those facts….

Id., 351.

The respondents argue that General Statutes § 31-275 (16) (B) (i) barred an award for the injury. We note that the respondents raised a similar claim in Anderton and the Appellate Court rejected this argument. They also argue that the result in this matter was inconsistent with the holding in Brown, supra. Having reviewed the opinion in that case issued by then-Appellate Court Judge (now Supreme Court Chief Justice) Richard Robinson, we are not persuaded by this argument. The claimant in Brown was injured while walking by herself in a "purely voluntary" walk around her employer's facility during her lunch hour. Id., 495. We note that in Brown, the Appellate Court stated that if an employer approves of an activity which occurs during working hours, the activity can become incidental to the employment.

> When the activity in question is related to personal comfort, recreation, or horseplay and occurs regularly on the employer's

> premises, the activity becomes incidental if it is approved of or acquiesced in by the employer.

Id., 503-504; see also McNamara v. Hamden, 176 Conn. 547, 555 (1979).

Nonetheless, our Appellate Court found that under the facts in Brown, the provisions of General Statutes § 31-275 (16) (B) (i) barred recovery for the claimant's injury. The fact that Brown engaged in recreational activity of her own volition without any recruiting by her firm's management was a critical element in determining that her injury was not compensable under the statute.

> On the basis of the legislative history of the statute and the dictionary definition of "recreation," we conclude that § 31-275 (16) (B) (i) precludes coverage for the plaintiff's injury in this case. The statute was enacted after McNamara and was clearly intended to eliminate coverage under the act for injuries that occurred in a similar manner, i.e., those that occurred while the employee was engaged in an act for his or her relaxation or enjoyment on the employer's premises, even when there was employer approval or acquiescence to do so. Section 31-275 (16) (B) (i) shifts the focus of the inquiry from employer approval or acquiescence, as in McNamara, to an examination of the purpose of the employee's actions before the employee's injury will be compensable.

Id., 508-509.

In the present case, the trial commissioner examined the purpose of the employee's actions and found those actions factually dissimilar from the facts in Brown. While the claimant in Brown was engaged in an exercise regimen to improve her own health, the claimant in the present matter was found by the trial commissioner to have played softball so as to improve his standing with his supervisor, and he did so in response to a direct request from his supervisor to play in the game. As such, the trial commissioner, having found that the claimant was a credible witness, could readily determine that the claimant's decision to engage in this activity was not "purely

voluntary."[5] As we can easily distinguish this case on the facts from Brown, and cannot distinguish it on the law or the facts from Anderton, *stare decisis* leads us to affirm the Finding and Decision.[6]

Commissioners Scott A. Barton and Jodi Murray Gregg concur in this opinion.

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[5] In light of the fact that the claimant offered live testimony that the trial commissioner observed and deemed credible and persuasive, we cannot intercede in a credibility determination as to this witness. See Burton v. Mottolese, 267 Conn. 1, 40 (2003), *citing* Briggs v. McWeeny, 260 Conn. 296, 327 (2002).

[6] We uphold the trial commissioner's denial of those corrections he denied in the respondents' motion to correct. This motion sought to interpose the respondents' conclusions relative to the law and the facts presented and, as such, the trial commissioner retained the discretion to deny these corrections. See D'Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003); 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); Liano v. Bridgeport, 4934 CRB-4-05-4 (April 13, 2006).