CASE NO. 6231 CRB-7-17-11 : COMPENSATION REVIEW BOARD
CLAIM NO. 700166820

RICHARD McGRATH : WORKERS' COMPENSATION
CLAIMANT-APPELLANT COMMISSION

v. : NOVEMBER 28, 2018

STATE OF CONNECTICUT/WESTERN
CONNECTICUT STATE UNIVERSITY
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLEE

and

GALLAGHER BASSETT SERVICES, INC.
ADMINISTRATOR

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 respondent was represented by Francis C. Vignati, Jr., Esq., Assistant Attorney General, Office of the Attorney General, 55 Elm Street, P.O. Box 120, Hartford, CT 06141-0120.

This Petition for Review from the October 26, 2017 Finding of Michelle D. Truglia, the Commissioner acting for the Seventh District, was heard May 25, 2018 before a Compensation Review Board panel consisting of Commission Chairman Stephen M. Morelli and Commissioners Scott A. Barton and David W. Schoolcraft.[1]

[1] We note that a motion for extension of time was granted during the pendency of this appeal.

OPINION

STEPHEN M. MORELLI, CHAIRMAN. The claimant has appealed from a Finding reached by Commissioner Michelle D. Truglia concluding that the claimant failed to establish his eligibility for benefits pursuant to General Statutes § 5-145a.[2] It is of course well-settled that in the absence of jurisdiction, the Workers' Compensation Commission [hereinafter "Commission"] cannot award benefits. See Del Toro v. Stamford, 270 Conn. 532 (2004). In addition, any award of workers' compensation benefits must be consistent with legislation passed by the General Assembly. See Cantoni v. Xerox Corp., 251 Conn. 153 (1999), and Discuillo v. Stone & Webster, 242 Conn. 570 (1997). Prior to the commencement of oral argument in this appeal, counsel for the respondent presented documentation to this tribunal which both parties contend established that the claimant was a member of the class of individuals that falls within the ambit of § 5-145a and, consequently, that the respondent's jurisdictional defense was invalid. Having reviewed the totality of the evidence submitted in this

[2] General Statutes § 5-145a states: "Any condition of impairment of health caused by hypertension or heart disease resulting in total or partial disability or death to a member of the security force or fire department of The University of Connecticut or the aeronautics operations of the Department of Transportation, or to a member of the Office of State Capitol Police or any person appointed under section 29-18 as a special policeman for the State Capitol building and grounds, the Legislative Office Building and parking garage and related structures and facilities, and other areas under the supervision and control of the Joint Committee on Legislative Management, or to state personnel engaged in guard or instructional duties in the Connecticut Correctional Institution, Somers, Connecticut Correctional Institution, Enfield-Medium, the Carl Robinson Correctional Institution, Enfield, John R. Manson Youth Institution, Cheshire, the York Correctional Institution, the Connecticut Correctional Center, Cheshire, or the community correctional centers, or to any employee of the Whiting Forensic Division with direct and substantial patient contact, or to any detective, chief inspector or inspector in the Division of Criminal Justice or chief detective, or to any state employee designated as a hazardous duty employee pursuant to an applicable collective bargaining agreement who successfully passed a physical examination on entry into such service, which examination failed to reveal any evidence of such condition, shall be presumed to have been suffered in the performance of his duty and shall be compensable in accordance with the provisions of chapter 568, except that for the first three months of compensability the employee shall continue to receive the full salary which he was receiving at the time of injury in the manner provided by the provisions of section 5-142. Any such employee who began such service prior to June 28, 1985, and was not covered by the provisions of this section prior to said date shall not be required, for purposes of this section, to show proof that he successfully passed a physical examination on entry into such service."

appeal, we remand the claim for a new hearing to determine whether the claim is jurisdictionally valid.

The following facts are pertinent to our inquiry in this matter. In 2004, the claimant was hired by Western Connecticut State University [hereinafter "WCSU"] as a police officer. He passed a pre-employment physical and was employed for forty hours per week with a provision for mandatory overtime. On June 17, 2013, the claimant filed a form 30C stating that he was pursuing an "occupational disease or a repetitive trauma" claim. However, at the first formal hearing held on January 19, 2017, the claimant indicated he was pursuing a claim for benefits pursuant to § 5-145a and the respondent did not object, although the claimant did not present any evidence relative to his eligibility for these benefits. After closing the record on July 31, 2017, the trial commissioner reopened the record so the claimant could introduce evidence showing that he satisfied the preliminary qualifications for pursuing a claim pursuant to § 5-145a. The trial commissioner closed the record on October 12, 2017, and issued her Finding on October 26, 2017.

In dismissing the claim**,** the trial commissioner cited the "plain language" of § 5-145a:

> The title of C.G.S. Sec. 5-145a is: "**Hypertension or heart disease in *certain university*, aeronautics, State Capitol police, correction, mental health, criminal justice or hazardous duty personnel."** [Emphasis added]. Administrative notice is taken of the fact that Western Connecticut State University is not part of The University of Connecticut school system; it is part of the Connecticut State College and University ("CSCU") system which membership includes Central Connecticut State University, Southern Connecticut State University, Eastern Connecticut State University and Western Connecticut State University and a host of community colleges around the State. No evidence, by way of legislative history, was entered at the time of trial to demonstrate

> that the legislature intended to include any university school system other than The University of Connecticut's system when it used the words "certain university."

Findings, ¶ 7.

The commissioner also addressed the various documents the claimant had submitted in support of his position that he was a member of the statutory class deemed eligible for § 5-145a benefits. Included in this evidence was a collective bargaining agreement which was summarized by the trial commissioner as follows:

> a. **Article 20, Sec. 5(c) (Worker's Compensation)** which states in relevant part: "Police Officers as defined by POST (Police Officer Standards and Training Counsel) shall be afforded portal to portal Workers' Compensation Coverage in accordance with 31-275 (A)(i) of the Workers' Compensation Act."
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> b. **Article 41 (Hypertension)** which states in relevant part that 5-145a C.G.S. is amended to include peace officers covered under 29-18 [special policeman for state property]; 29-18a [special policeman for investigating public assistance fraud]; 29-18b [special policeman for Department of revenue services]; C.G.S. or Section 26-5 C.G.S. [conservation officers, special conservation officers and patrolmen] and full-time firefighting personnel.
>
> c. The claimant offered no evidence at the time of trial that he qualified for Sec. 5-145a benefits pursuant to any statute enumerated in **Article 41.**

(Emphasis in the original.) Findings, ¶ 9.

In addition, the claimant presented a beneficiary election form issued by the Retirement & Benefit Services Division for the State of Connecticut. See Claimant's Exhibit J. This form appears to have been filled out by the claimant, and the box marked "hazardous duty" was checked off. The claimant also presented his WCSU police

department badge, which certified that he had received training from the Police Officer Standards and Training Council. See Claimant's Exhibit I.

Based on this evidence, the trial commissioner concluded that the claimant had not established statutory eligibility for benefits pursuant to § 5-145a. The commissioner provided the following explanation for the denial of these benefits:

> The claimant does not meet the statutory criteria of C.G.S. Sec. 5-145a for "hazardous duty" employee status for the following reasons:
>
> (1) He is not "a member of the security force … of The University of Connecticut" and no legislative history was entered into evidence to show that the legislature intended to incorporate any other university system other than The University of Connecticut's system.
>
> (2) The claimant's collective bargaining agreement with the Protective Services IUPA/IAFF, AFL-CIO does not confer "hazardous duty" status upon the claimant either under Article 20, Sec. 5(a) or 5(c) as argued by the claimant. Article 20, Sec. 5(a) discusses Sec. *5-142(a),* not 5-145a and, therefore is not applicable to the claimant's argument. In Article 20, Sec. 5(c) the discussion refers to portal to portal coverage for POST designates; this only expands the workplace territory for purposes of compensability, however, it does not work to confer a "hazardous duty" designation upon POST officers.
>
> (3) Similarly, and contrary to the claimant's arguments at trial, the claimant does not appear to meet the criteria set forth under Article 41 and the subsections that it lists: Sec. 29-18; 29-18a; 29-18b or Sec. 26-5 as state jobs subject to the provisions of Sec. 5-145a. It would appear that C.G.S. Sec. 29-18 (Special policeman for state property), including the annotations for same, is the section with the closest relationship to the claimant's occupation. While Claimant's Exhibit "I" demonstrates that the claimant holds a WestConn I.D. badge, the back side of the badge merely substantiates that the claimant passed certification standards maintained by the State of Connecticut, Police Officer Standards and Training Council. It is not evidence that the claimant was *appointed* by either the Commissioner of Emergency Services or the Commissioner of Public Protection, after *nomination* by an administrative

> authority of any state buildings or lands as required under the provisions of Sec. 29-18. The Police Officer Standards and Training Council is not synonymous with either of the latter agencies.
>
> (4) Further, an examination of the annotations listed under C.G.S. Sec. 29-18 does not extend coverage to anything other than the police force at the University of Connecticut. (See reference to State v. Sober, 166 Conn. 81 [1974]).

(Emphasis in the original.) Conclusion, ¶ C.

The commissioner also discounted the relevance of the claimant's election of "hazardous duty" on his retirement form given that his position had not been designated as such in the collective bargaining agreement. She therefore determined that the claimant would need to pursue his remedies under Chapter 568 because he had not established that he was entitled to relief as a "hazardous duty" employee. She directed the parties to submit new briefs and proposed findings regarding the claimant's statutory eligibility for hypertension benefits in accordance with the relevant statutes.

The claimant filed a timely petition for review and sought an extension of time to file a motion to correct. He subsequently filed a motion to submit additional evidence along with his motion to correct. The motion to submit additional evidence sought to introduce evidence demonstrating that the employer had withheld funds from the claimant's paycheck because his job was listed as "hazardous duty" by the comptroller's office and his job title appeared on a list of occupations deemed "hazardous duty" by the comptroller's office. This motion also included a representation by counsel for the respondent indicating that the employer "stipulated to the applicability of Sec. 5-145a" and "recognizes Police Officer Richard McGrath as a hazardous duty employee." November 16, 2017 Claimant's Motion to Allow Additional Evidence.

The motion to correct sought to incorporate this evidence along with substituted findings indicating that the claimant was a "hazardous duty" employee entitled to § 5-145a benefits. The trial commissioner denied the motion to submit additional evidence on the basis that the motion constituted an improper effort to create jurisdiction by "agreement, waiver or conduct." November 28, 2017 Ruling on Claimant's Motion to Allow Additional Evidence of November 17, 2017. The trial commissioner denied the motion to correct as "late on its face." November 20, 2017 Motion to Correct the Finding Dated October 26, 2017; November 21, 2017 Order.

The claimant chose to appeal the trial commissioner's denial of his motions to this tribunal. Prior to oral argument before this board on May 25, 2018, counsel for the respondent indicated that he had located an arbitration award which was directly on point in that it designated WCSU police officers as "hazardous duty" employees. Although he requested that the matter be remanded without a hearing, we allowed oral argument to proceed as scheduled in order to consider arguments from both parties. At oral argument, the claimant and the respondent presented additional evidence, including a copy of a September 25, 1989 arbitration award [hereinafter "1989 award"] in which an arbitrator had determined that the job title of "University Police Officer" was a "hazardous duty" position as contemplated by § 5-145a. May 25, 2018 Respondent's Exhibit 1.

The respondent's evidentiary submission also included a November 29, 1989 letter from the State Employee's Retirement Commission stating that the 1989 arbitration award had been ratified by the General Assembly on October 12, 1989. Attached to this correspondence was a copy of the November 17, 2014 "Hazardous Duty Appendix" identifying the claimant's job title as a hazardous duty position.

This evidence was not presented to the trial commissioner for review at the formal hearing; nor was it part of the motion to allow additional evidence which was submitted following the formal hearing. It would obviously be of benefit to litigants to establish all necessary jurisdictional facts at the inception of a hearing, not after the record has closed. We confess to being somewhat perplexed as to why counsel for neither party was able to locate a copy of the actual 1989 award before the trial commissioner closed the record. However, in previous instances when this board has discovered, after the completion of a formal hearing, that an error was made regarding jurisdiction, we have allowed this issue to be revisited. See, e.g., Mankus v. Mankus, 4958 CRB-1-05-6 (August 22, 2006), *aff'd,* 107 Conn. App. 585 (2008), *cert. denied*, 288 Conn. 904 (2008).[3] As we pointed out in Mankus, issues as to subject matter jurisdiction may be raised at any time. Id., *citing* Del Toro, supra, 543.

In her Finding, the trial commissioner cited statutory language which could reasonably be interpreted as excluding WCSU police officers from coverage under § 5-145a. The provisions of the statute reflect that only "a member of the security force or fire department of The University of Connecticut" was included in the enumerated university security personnel who were deemed eligible for the hazardous duty benefits. The trial commissioner inferred that the eligibility of the WCSU police force for hazardous duty benefits fell outside the scope of the statute. In addition, the commissioner was not persuaded by the other evidence submitted by the claimant purporting to demonstrate jurisdiction.

[3] In Mankus v. Mankus, 4958 CRB-1-05-6 (August 22, 2006), *aff'd,* 107 Conn. App. 585 (2008), *cert. denied*, 288 Conn. 904 (2008), the respondent Second Injury Fund moved to open an award when they produced a previously unavailable witness (the putative employer) who testified that there was no employee-employer relationship at the time of the claimant's injury and, hence, no jurisdiction.

However, the trial commissioner did not have the benefit of the 1989 award when she found this Commission lacked jurisdiction to award the claimant benefits pursuant to § 5-145a. Given that this document has now been added to the record, we believe she should rule on this issue in light of this additional evidence. It is therefore necessary to vacate the Finding and remand this matter for further proceedings in order to give the trial commissioner the opportunity to consider the legal effect of the evidence submitted at oral argument. "No case under this Act should be finally determined when the trial court, or this court, is of the opinion that, through inadvertence, or otherwise, the facts have not been sufficiently found to render a just judgment." Cormican v. McMahon, 102 Conn. 234, 238 (1925).

Commissioners Scott A. Barton and David W. Schoolcraft concur in this opinion.