CASE NO. 6361 CRB-1-19-12 CLAIM NO. 100211445	:	COMPENSATION REVIEW BOARD
JOSHUA GALINSKI CLAIMANT-APPELLANT	:	WORKERS' COMPENSATION COMMISSION
v.	:	DECEMBER 9, 2020

BEAVER TREE SERVICE, L.L.C.
EMPLOYER

and

CALIFORNIA INSURANCE COMPANY
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Mark E. Blakeman, Esq., and Carolyn A. Young, Esq., Michelson, Kane, Royster & Barger, P.C., 10 Columbus Boulevard, Hartford, CT 06106.

The respondents were represented by Matthew S. Necci, Esq., Halloran Sage, 225 Asylum Street, Hartford, CT 06103.

This Petition for Review from the December 2, 2019 Finding and Dismissal by Scott A. Barton, the Commissioner acting for the First District, was heard June 26, 2020 before a Compensation Review Board panel consisting of Commission Chairman Stephen M. Morelli and Commissioners Randy L. Cohen and William J. Watson III.[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 petitioned for review from the December 2, 2019 Finding and Dismissal (finding) of Scott A. Barton, Commissioner acting for the First District (commissioner). We find error and accordingly reverse the decision of the commissioner and remand this matter for additional proceedings consistent with this Opinion.

The commissioner identified as the issue for determination the compensability of injuries to the claimant's cervical spine and brain sustained on December 27, 2017. The following factual findings are pertinent to our review. On the date of injury, the claimant was employed by the respondent employer, a tree removal company owned by his father, John Galinski. The claimant, who began working for the company in July 2015, was at a worksite in Wales, Massachusetts, when he was struck in the head by a falling tree limb. The accident resulted in a traumatic brain injury and multiple fractures to the claimant's cervical spine, rendering him a quadriplegic.

The work crew on the date of injury consisted of the claimant, the foreman, Dustin O'Dell, and a grapple truck driver, Dan Karnolt. O'Dell was responsible for operating the bucket truck and trimming the tree with a chainsaw. The claimant was responsible for hauling brush. On the morning of the accident, the crew met at John Galinski's home and traveled to the worksite after stopping for gas and snacks. The job involved the removal of one large tree; O'Dell was operating the lift and cutting branches while the claimant and Karnolt remained on the ground.

The crew utilized a communications system consisting of headphones and microphones which allowed O'Dell to instruct the ground crew as to when the cuts would be made. The claimant and Karnolt were advised to stand outside the drop zone while O'Dell trimmed the tree branches. After a portion of the trimming was completed, O'Dell would lower himself to the ground and help the crew clean up the downed branches and carry them to the woodchipper. This process continued until only the larger limbs and the trunk of the tree remained.

After picking up the branches, O'Dell returned to the lift to cut down the remaining four large limbs. O'Dell communicated his intentions to the ground crew. The first cut was performed without incident and, ten seconds after removing the first limb, O'Dell cut the second top of the tree. It was at this time that the claimant entered the drop zone and was struck on the head by the second limb.

Immediately after the accident, Karnolt called 911. Members of the Wales police department and emergency medical personnel responded to the scene, where the claimant was found unresponsive and was intubated. The claimant was transported to Baystate Medical Center by LifeStar where he underwent emergency surgery to treat complex fractures at C1, C3, C4, C5 and C6. As part of the emergency surgical procedure, the Baystate medical staff obtained a urine drug screening, the results of which demonstrated high levels of an inactive metabolite of marijuana.

On January 16, 2018, the claimant was transported to Craig Hospital in Englewood, Colorado, for specialized treatment for his spinal cord injury. The claimant remained in Colorado until October 10, 2018, undergoing numerous surgeries at Craig Hospital and the Swedish Medical Center to further stabilize his cervical spine. The

claimant returned to Connecticut on October 10, 2018, where he was admitted to Gaylord Specialty Healthcare in Wallingford. He was discharged from Gaylord on October 19, 2018, and has been living at his parents' home since that date. He continues to receive appropriate medical care for individuals with severe spinal cord injuries.

On August 9, 2018, Karnolt testified at deposition that December 27, 2017, was his first day of employment with Beaver Tree Service and he had not had any prior dealings with the Galinski family. He specifically recalled O'Dell telling the claimant and him to stand clear prior to the accident; the communication was through the headsets they were wearing. He testified that the headsets and microphones were tested as soon as he and the others had arrived at the worksite and were functioning properly that day. The headsets were designed so that co-workers could be heard even when the chainsaw was being operated. Karnolt was not aware of any hand signals that could be used if the headsets failed.

Karnolt testified that the accident occurred within two hours of starting the job and approximately thirty minutes after O'Dell began using the chainsaw to remove the tree limbs. Karnolt recalled the claimant telling O'Dell he understood the directions to stand clear of the drop zone prior to the accident. He believed the claimant was aware of the location of the drop zone and, before the claimant walked into the drop zone and was struck on the head, he had told Karnolt he understood O'Dell was making cuts to the tree. The claimant was aware that cutting down the large part of the tree would take some time and they were to stand back until O'Dell was finished cutting. Karnolt witnessed the claimant entering the drop zone prior to the second cut of the tree; the claimant was dragging a tree branch when he was struck by the falling limb. Karnolt testified that he

was "screaming" at the claimant trying to warn him about the falling limb. Id., p. 24. Karnolt indicated that the claimant appeared to be "a completely normal kid" on the morning of the accident, Findings, ¶ 12.d., *quoting* Claimant's Exhibit I, p. 14, and he did not witness the claimant using drugs or alcohol that day.

On August 15, 2018, O'Dell testified by way of deposition. He indicated that as of the date of the accident, he had been employed by the respondent employer for approximately eight years. He is an experienced tree removal specialist and, in his role as foreman, was responsible for operating the chain saw from the lift and instructing the ground laborers where to stand and when to begin dragging the branches to the woodchipper.

O'Dell testified that in addition to the headsets, he generally uses hand signals and head nods to communicate with the ground crew. He stated that the headsets were fully charged and operational on the day of the accident. He indicated that he was in regular communication with the claimant throughout the tree-trimming process and had no explanation for why the claimant entered the drop zone before being told that it was safe to do so. O'Dell testified that the crew understood where the drop zone was located and the instructions they would receive before it was safe to enter the zone. O'Dell stated that as of the date the accident occurred, he had known the claimant for five years, and described him as "a great worker." Claimant's Exhibit J, p. 16. He further indicated that the claimant seemed fine that day and he did not believe the claimant was under the influence of alcohol or drugs, including marijuana.

The claimant testified by deposition on December 18, 2018. He indicated that he believed he had taken a mandatory OSHA safety training class for his work with Beaver

Tree Service. He testified that the headset system was working properly that day and the drop zone had been clearly established prior to O'Dell going up in the lift to begin the tree trimming. He had no memory of what happened just before he walked into the drop zone and was struck by the limb. He does not remember being told by O'Dell or Karnolt that it was safe to enter the drop zone before he was struck. The claimant admitted that he would occasionally use marijuana recreationally "maybe once or twice a week during the weekends." Claimant's Exhibit K, p. 26. He also occasionally drank alcohol but this occurred less frequently than his marijuana use. He was "adamant" that he did not use marijuana or alcohol on the day of or the day before the accident. Findings, ¶ 14.c.

John Galinski, the claimant's father, testified at a formal hearing. He indicated that he has operated Beaver Tree Service for more than fifteen years and described the job scheduled for December 27, 2017, in Wales, Massachusetts, as a "normal" tree removal. January 24, 2019 Transcript, p. 42. It was his intention that the claimant take over the company one day, and Galinski would take the claimant with him when providing estimates in order to teach him the business side of the profession. He trained the claimant on the proper use of chainsaws and other pieces of equipment and sent the claimant to training classes.

Galinski purchased the helmet communication system. Prior to purchasing this system, the workers would use hand signals for instructions and safety. Galinski testified that it was the foreman's responsibility to establish the drop zone prior to going up in the lift to begin tree trimming. The foreman would instruct the ground laborers to remain out of the drop zone until all the cuts were completed. Galinski indicated that he was not

aware his son used marijuana; however, he did recall possibly smelling the drug on him in the past.

It is the respondents' position that the injuries sustained in this incident were "the direct result of the Claimant's intoxication, and therefore not compensable pursuant to C.G.S. §31-284(a)."[2] Findings, ¶ 19. The respondents argue that the claimant's "history demonstrates long-term marijuana use and that this impaired his cognitive abilities to such an extreme degree that he was rendered intoxicated on December 27, 2017." Id. Given that this impairment was a substantial contributing factor to the claimant's injuries, it is the respondents' contention that the workers' compensation claim is not compensable.

In support of their position, the respondents submitted into evidence the report and deposition testimony of Charles A. McKay, Jr., M.D., a medical toxicologist and Associate Medical Director at the Connecticut Poison Control Center. McKay is a member of the executive board and president of the American College of Medical Toxicology, the national professional organization of physician toxicologists. McKay, whose curriculum vitae reflects "a long and decorated career in the field of toxicology," Findings, ¶ 21, is an Associate Clinical Professor at the University of Connecticut School of Medicine. McKay served as an attending physician and Chief of the Division of Medical Toxicology at Hartford Hospital for more than thirty years, and "[t]hroughout

[2] General Statutes § 31-284 (a) states in relevant part: "An employer who complies with the requirements of subsection (b) of this section [setting forth the various methods by which employers may establish satisfactory proof of solvency and financial ability to pay workers' compensation benefits] shall not be liable for any action for damages on account of personal injury sustained by an employee arising out of and in the course of his employment or on account of death resulting from personal injury so sustained, but an employer shall secure compensation for his employees as provided under this chapter, except that compensation shall not be paid when the personal injury has been caused by the wilful [sic] and serious misconduct of the injured employee or by his intoxication."

his career … has treated patients under the influence of acute and chronic marijuana use and their related side effects." Findings, ¶ 22.

After reviewing the relevant medical records, the testimony of the claimant's co-workers, the claimant's urine screen results and the test calibration data used at Baystate Medical Center, "McKay concluded that the Claimant's chronic, heavy-use of marijuana created cognitive deficits and impairment akin to intoxication." Findings, ¶ 24. McKay opined "this intoxication prevented [the claimant] from sustaining attention, following directions, and affected his decision-making ability." Id; see also Respondents' Exhibit 8, pp. 18, 20. McKay believed that these deficits "were substantial contributing factors that caused the accident of December 27, 2017," Findings, ¶ 25 and, as such, "the Claimant's actions at the time of the accident, combined with his contemporaneous urine screen results, clearly demonstrate that his use of marijuana was a substantial factor in the accident of December 27, 2017." Id.; see also Respondents' Exhibit 8, p. 22.

At his deposition, McKay testified that "[t]he level of cannabinoids in the Claimant's urine screen was so elevated that it '**overwhelmingly**' indicated the recent use of cannabis." (Emphasis in the original). Findings, ¶ 25.a., *quoting* Respondents' Exhibit 8, p. 13. McKay also opined that "[t]he level of cannabinoids found in the Claimant's urine is direct proof that [the claimant] was more likely than not intoxicated from the 'residual effects from chronic, heavy use of marijuana' at the time of the injury." Findings, ¶ 25.b., *quoting* Respondents' Exhibit 8 [Respondents' Deposition Exhibit 2, p. 3].

McKay further testified that regardless of whether the claimant had used marijuana in the hours before the accident, "his chronic use of marijuana impaired his decision-making ability, caused him to be unable to sustain attention, and incorporate new information, including receiving directions like those given by Mr. O'Dell prior to the accident." Findings, ¶ 25.d., *citing* Respondents' Exhibit 8, pp. 39, 43. In addition, McKay indicated that individuals who begin to use marijuana "extensively" before their mid-teens tend to be more susceptible to an inability to learn and follow directions. Respondents' Exhibit 8, p. 18. As such, "the Claimant's intoxication . . . impaired his ability to know . . . at the time of the accident, he should not have walked into the drop zone." Findings, ¶ 25.f.

McKay also testified that although the urine screening taken on December 27, 2017, demonstrated a high concentration of the metabolite of active THC in the claimant's system, "this test cannot confirm the last time a person used marijuana."[3] Findings, ¶ 27, *citing* Respondents' Exhibit 8, p. 39. McKay stated that the claimant's testimony to the effect that he only smoked marijuana once or twice a week was not supported by the medical evidence, which "confirms him to be a chronic heavy-user who smokes almost daily on a frequent basis." Findings, ¶ 27.

In support of this theory, McKay referenced a January 16, 2018 Craig Hospital Consultation report prepared by Ellen R. Mackinnon, C.N.S., in which Mackinnon

[3]At his deposition, McKay initially stated that the urine screen performed on the claimant was "based on the structure of a metabolite of the active THC . . . [which] was present in [the claimant's] system in his urine at a high concentration." Respondents' Exhibit 8, p. 12. However, McKay subsequently explained that the screening was "for an inactive metabolite in the urine," id., 13, which was "inactive in terms of its psychoactive effects." Id., 35. The claimant's expert, Richard A. Parent, Ph.D., likewise testified that the metabolite in the urine screen was "inert" and "not psychoactive." Claimant's Exhibit Q, pp. 10, 11.

indicated that the claimant had reported he smoked marijuana "almost daily."[4] Respondents' Exhibit 6, p. 3. McKay further testified that a THC metabolite score of 695 proved that the claimant was a heavy user of marijuana because an occasional user of the drug would never demonstrate such a high level unless he had used the drug "closer to when the test had actually been done." Respondents' Exhibit 8, p. 43.

Under cross-examination, McKay admitted that because the urine test did not indicate the claimant's most recent use of the drug, "he could not state that the claimant was 'acutely under the effects or influence of marijuana' at the time of the injury." Findings, ¶ 31, *quoting* Respondents' Exhibit 8, p. 39. However, McKay maintained his opinion that the claimant's inattention and cognitive issues on the day of the accident were the result of his chronic, long-term use of marijuana.

The claimant is challenging the respondents' argument that his use of marijuana was a substantial contributing factor to the accident of December 27, 2017. In support of his position, the claimant introduced the report and deposition testimony of Richard A. Parent, Ph.D., who concluded there was no factual basis or scientific foundation to support the contention that the claimant was in any way impaired when he sustained his injuries on December 27, 2017. Parent opined that because the urine screening revealed an inactive metabolite of THC, the claimant had not smoked marijuana on the day of the accident. See Claimant's Exhibit Q, pp. 10, 11. Parent further opined that the claimant's long-term use of marijuana may have caused him to develop a "tolerance" for the psychoactive effects of the drug. See id., 12, 14, 31.

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[4] We note that the commissioner indicated that the January 16, 2018 report by Ellen R. Mackinnon, C.N.S., was authored by the claimant's attending physician, Mark R. Johansen, M.D. We deem this harmless scrivener's error. See D'Amico v. Dept. of Correction, 73 Conn. App. 718, 729 (2002), *cert. denied*, 262 Conn. 933 (2003).

In a written report dated March 26, 2019, Parent stated that "[t]he metabolite detected, 11-nor-9-carboxy-delta-9-tetrahydrocannibinol (THC-COOH), is not psychoactive and did not result in any behavioral or performance deficits in Mr. Galinski." Id. [Claimant's Deposition Exhibit B, p. 3.] Parent explained that "[b]ecause the analysis was not confirmed by gas chromatography/mass spectroscopy (GC/MS), it is not considered adequate for drawing any conclusions other than for medical purpose, according to the hospital records." Id. Parent also stated that "[s]cientific studies make it clear that you cannot predict deficits in psychomotor performance based on the finding of urinary THC-COOH." Id. [Claimant's Deposition Exhibit B, p. 4.] Parent opined that the claimant's "regular use of marijuana was not a substantial contributing factor to the December 27, 2017 accident, and [the claimant] was not in any way impaired at the time of the accident." Id. [Claimant's Deposition Exhibit B, p. 5.]

At his deposition, Parent noted that the claimant had testified that he was a "regular" user of marijuana in that he used the drug "at least a couple times a week on a fairly regular basis" prior to the accident. Claimant's Exhibit Q, p. 9. Parent reiterated that the gas chromatography/mass spectroscopy test was not conducted, which test he described as "the gold standard" for assessing the actual impact of THC. Id., 10.

Under cross-examination, Parent testified that the urine screening had revealed an elevated finding of 695 nanograms of THC metabolites which "confirmed the respondents' position . . . that the Claimant [was] a "'regular user of marijuana.'"[5]

[5] The commissioner found that Parent's opinion at deposition was "inapposite" to his report of March 26, 2019, in which Parent noted that the claimant had indicated he was an "occasional" user of marijuana. Findings, ¶ 39; see also Claimant's Exhibit Q, p. 32; id. [Respondents' Deposition Exhibit, p. 2].

Findings, ¶ 39. Parent further indicated that a high level of THC metabolites is typically found in the fatty tissue of regular users because the metabolites accumulate there over time with regular use of the drug. Parent testified that he did not believe the claimant had smoked marijuana on the day of the accident; however, he admitted there was no way to tell based on the medical evidence provided. Claimant's Exhibit Q, p. 13.

Under cross-examination, Parent testified regarding his credentials, stating that his degree is in chemistry and he has no formal education in the field of toxicology. Parent explained that although he is a board-certified toxicologist, this certification is predicated on his doctorate degree because he is not a medical doctor and does not treat patients. Parent indicated that he has never taken any classes or received any certification relative to the study of the effects of marijuana on humans and has performed limited screenings for THC metabolites over the course of his career. Rather, he has worked as a chemist for a number of corporations whose businesses involved air travel, pharmaceuticals, beauty products, and environmental pollutants.

Based on the foregoing, the commissioner concluded, inter alia, that McKay's opinion was more persuasive than the opinion advanced by Parent. The commissioner noted that McKay was a medical doctor who had spent much of his career studying patients who were long-term and acute users of marijuana. The commissioner also noted that in rendering his opinion, McKay had relied upon published medical studies which examined the effects of long-term marijuana used on young adults who began using at an early age; McKay had also relied on "uncontroverted lab test results establishing that the Claimant is a long-term chronic user of marijuana, as opposed to an occasional user." Conclusion, ¶ P.3.

The commissioner found Parent's opinion less persuasive given his lack of experience treating or studying the long-term effects of chronic, regular marijuana use and the fact that Parent is not a medical doctor but, rather, a chemist who has spent much of his career advising corporations about the effects of environmental pollutants. The commissioner further noted that Parent had relied on a "purely speculative" theory relative to an information technology contractor with whom he was acquainted who was ostensibly able to successfully perform his duties despite his long-term use of marijuana. Conclusion, ¶ P.6.

The commissioner concluded that the claimant's injuries were sustained "as a direct result of his intoxication," and the claimant "was knowingly intoxicated due to longstanding and chronic use of marijuana." Conclusion, ¶ Q. This state of intoxication rendered the claimant "functionally impaired" such that he was unable to understand directions or process information and, as a result, entered the drop zone just prior to being struck by the felled limb. Id. The commissioner further concluded that "the Claimant's history of using marijuana on a regular basis was a substantial contributing factor in causing the accident that occurred on December 27, 2017." Conclusion, ¶ R. As such, the commissioner determined that the respondents had met their burden of proof relative to the affirmative defense pursuant to the provisions of § 31-284 (a) and denied and dismissed the claim for benefits.

In support of his conclusions, the commissioner explained that he had found credible Karnolt's testimony indicating that the claimant had no reason to enter the drop zone prior to the accident; the testimony by O'Dell and John Galinski indicating that the headsets were fully charged and operational prior to the accident; testimony from

Karnolt, O'Dell and the claimant indicating that the drop zone had been clearly established and its location communicated to the crew before the accident; and testimony reflecting that the claimant was aware of O'Dell's instructions to stand back and not enter the drop zone just prior to the accident.

The commissioner also noted the claimant's failure to explain why he entered the drop zone despite "overwhelming evidence" that the drop zone had been clearly identified. Conclusion, ¶ T.5. In addition, the commissioner relied on McKay's opinion that the level of THC metabolites in the claimant's urine established that he was a long-term heavy user of marijuana on an almost daily basis. Finally, the commissioner referenced the scientific studies introduced by McKay suggesting that individuals of the claimant's age who are heavy users of marijuana "can have a highly compromised ability to sustain attention and process information." Conclusion, ¶ T.7.

The claimant filed a motion to correct, to which the respondents' objected and which was denied in its entirety, and this appeal followed. On appeal, the claimant contends that the commissioner erred in concluding that the claimant was intoxicated when he sustained his injuries and that this state of intoxication was a substantial contributing factor to those injuries. The claimant asserts that the commissioner's conclusions are legally inconsistent with the subordinate factual findings and resulted from inferences illegally or unreasonably drawn from the factual findings. The claimant therefore argues that the commissioner erroneously concluded that the respondents had satisfied their burden of proof relative to the affirmative defense afforded by the provisions of § 31-284 (a). Finally, the claimant asserts that the commissioner erred in denying his motion to correct.

We begin our analysis of this matter with a recitation of the well-settled standard of review we are obliged to apply to a trial commissioner's findings and legal conclusions. 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-established in our workers' compensation jurisprudence that in order for a respondent to successfully invoke the affirmative defense contemplated by the provisions of § 31-284 (a), "it is the respondent's burden to prove that the worker was intoxicated *at the time of the injury* and the intoxication was a substantial factor in the claimant's injury." (Emphasis added.) Gamez-Reyes v. Donald F. Biagi, Jr., 5552-CRB-7-10-5 (May 3, 2011), *aff'd, remanded in part for articulation on issue of interpreter's fees,* 136 Conn. App. 258 (2012), *cert. denied*, 306 Conn. 905 (2012). See also Carter, Civitello, et al, Connecticut Practice Series Volume 19, Workers' Compensation Law § 7:3 (2008).

Moreover, "[i]n order for the intoxication exclusion to apply, the respondents need not prove that intoxication was the sole proximate cause of the injury, but only that the intoxication was a substantial factor in causing the accident." St. Germaine v. Buckingham Restaurant & Pizza, Inc., 4343 CRB-8-01-1 (January 10, 2002), *citing* 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). This board has also previously observed that the "legally correct" burden of proof in inquiries implicating the applicability of the affirmative defense of intoxication is whether "it was more likely than not" that the claimant's injuries were due to intoxication or drug use. Claudio v. Better Bedding, 4786 CRB-1-04-2 (October 19, 2005), *appeal dismissed for lack of a final judgment*, 104 Conn. App. 1 (2007); see also Liptak v. State, 176 Conn. 320 (1978).

In the matter at bar, we note at the outset that McKay, in offering the expert opinion ultimately relied upon by the commissioner, testified at deposition that he was unable to confirm that the claimant had used marijuana contemporaneously on the date of injury. Rather, he agreed with claimant's counsel that "the inactive metabolite of marijuana . . . does not equate to evidence of impairment caused by the use of marijuana on the day of injury . . . ." Respondents' Exhibit 8, p. 35. McKay stated that the presence of the metabolite in the claimant's urine "would not mean intoxication by the drug marijuana at that time necessarily," id., 40-41, and "[f]rom the metabolite alone that does not indicate impairment at that time. You cannot make that assessment from the presence of an inactive metabolite in the urine alone." Id., 41.

At McKay's deposition, claimant's counsel also pointed out that the report for the Baystate Medical Center blood chemistry screen collected on the date of injury stated the

following: "This is an unconfirmed screening result. Unconfirmed results are to be used for medical purposes only. Interpretation should be confirmed with clinical symptoms or by an alternative method." Id., 36, *quoting* Claimant's Deposition Exhibit A, p. 2. When queried regarding this disclaimer, McKay replied that "[t]he laboratory did not confirm [the urine screen] with gas chromatography, which is the alternative method most commonly used."[6] Id.

McKay further testified that the metabolite found in the claimant's bloodstream could be excreted in detectable amounts for weeks by heavy users and "for days after [for] somebody who is using it infrequently." Id. He indicated that for regular users of marijuana, "[i]t can take a long time to clear entirely. To be in this range, this is about at least five days away from clearing." Id., 45. McKay also stated that "[b]ased on the witness statements from the deposition testimony . . . and the urine result itself I'm not able to tell when his last use of marijuana [was], that's correct." Id., 38. When claimant's counsel asked McKay whether he could "say that Josh was intoxicated on marijuana on the day of injury," McKay replied, "[n]o," id., 38-39, adding, "[t]here is not any information here that says he [was] acutely under the effects or influence of marijuana at the time of this injury." Id., 39. McKay also stated that "[f]rom the metabolite alone that does not indicate impairment at that time. You cannot make that assessment from the presence of an inactive metabolite in the urine alone." Id., 41.

[6] At his deposition, Parent reiterated the same point, stating: "If they really wanted to find out whether [the claimant] had used marijuana recently, then it would have been more appropriate to do a test for THC which is the psychoactive component of marijuana. The most appropriate way of doing this would be to analyze the blood using gas chromatography and mass spectroscopy. That's the gold standard for the analysis." Claimant's Exhibit Q, pp. 10-11.

Nevertheless, despite having opined that the urine screening performed on the claimant did not demonstrate that the claimant was intoxicated when the accident occurred, McKay attributed the accident to what he essentially described as the claimant's "perpetual" state of intoxication due to his chronic heavy use of marijuana. In his report of January 8, 2019, the doctor stated, and the commissioner so found, that "[c]hronic, heavy marijuana use causes impairment in sustained attention and decision making. The cognitive impairment demonstrated by the actions Mr. Galinski took, resulting in his injuries, are consistent with the residual effect of daily marijuana use. These include effects on attentiveness and information processing . . . ." Respondents' Exhibit 8 [Respondents' Deposition Exhibit 3, p. 4].

Although, upon review, we concede that McKay's theory is certainly plausible, we also note that a plain reading of the provisions of § 31-284 (a) indicates that the successful invocation of this affirmative defense specifically requires that the injuries in question be caused by a claimant's "intoxication." This statutory requirement has generally been satisfied through the submission into evidence of toxicology screenings reflecting that a claimant was actively under the influence of drugs or alcohol when the accident occurred. See, e.g., Paternostro, supra; St. Germaine v. Buckingham Restaurant & Pizza, Inc., 4343 CRB-8-01-1 (January 10, 2002).[7] In light of the entirety of McKay's testimony on this issue, we are therefore unable to affirm the commissioner's decision in the present matter because we are not persuaded that McKay's opinion provided a

[7] It should be noted that in Paternostro v. Arborio Corp., 56 Conn. App. 215 (1999), *cert. denied*, 252 Conn. 928 (2000), our Appellate Court affirmed the commissioner's decision "that the decedent's intoxicated state, combined with the proscribed acts of consuming alcohol while on duty and crossing the highway, constituted wilful [sic] and serious misconduct that caused the injuries that resulted in the decedent's death." Id., 223.

sufficient basis for the reasonable inference that the claimant was under the influence of marijuana at the time he sustained his injuries.

We would also note that in cases that have previously come before this board involving allegations of intoxication, evidence of alcohol consumption prior to the workplace accident, in and of itself, was not always deemed dispositive. For instance, in Gamez-Reyes, supra, we stated that "intoxication is an affirmative defense and may not be presumed solely by asserting the presence of some level of a controlled substance or alcohol in the claimant's bloodstream subsequent to an injury." Id. Similarly, in Ogdon v. Treemasters, Inc., 3071 CRB-4-95-6 (December 20, 1996), this board affirmed a finding of compensability and the denial of an affirmative defense in a matter involving a claimant who had testified to consuming "a couple cans of beer" on the morning of the accident. We observed:

> Although the evidence does show that the claimant had consumed some alcohol that morning, there is simply nowhere near enough evidence in the record to establish either prong of the intoxication defense (i.e. the intoxication itself, and its causal relationship to the accident) as a matter of law. There was no evidence that the claimant was actually affected by the moderate amount of liquor in his system, and there was testimony that the noise of the woodchipper, not the claimant's alleged intoxication, prevented him from hearing the warning cries of his co-workers when the tree fell.

Id.

Finally, in Jacobs v. James Dwy d/b/a New Home Exteriors, 5327 CRB-5-08-3 (May 28, 2009), this board affirmed in part the decision by the commissioner to deny the § 31-284 (a) affirmative defense on both procedural and substantive grounds in a case

involving a claimant who sustained injuries after falling off a roof.[8] The claimant subsequently testified that he had been "up late the night before using cocaine." Id. In affirming the commissioner's decision, we stated:

> The record consists solely of the claimant's testimony that he did use cocaine at a party two nights prior to the accident and hospital records documenting the presence of the drug when he was admitted. We cannot conclude that these admissions, in and of themselves, as a matter of law, demonstrate the claimant is statutorily barred from recovery.

Id.

We would further note that in Jacobs, this board stated that "[t]he record also lacks eyewitness testimony that would support the conclusion the claimant had used alcohol or drugs at the workplace . . . or was impaired at the time of the accident." Id. Our review of the evidentiary record in the instant matter reveals a similar lack of eyewitness testimony suggesting that the claimant was under the influence of marijuana when the accident occurred.[9]

For instance, O'Dell testified that nothing seemed "irregular" that morning, Claimant's Exhibit J, p. 27; he did not detect the odor of marijuana or alcohol on the claimant; and he had never witnessed the claimant doing drugs or drinking alcohol. Karnolt also testified that the claimant "[s]eemed like a completely normal kid" on the morning of the accident, Claimant's Exhibit I, p. 14, that he "hustled . . . [and] seemed like a good worker," id., 26, and he did not see the claimant drinking alcohol or taking any drugs on the day of the accident. Id. Thus, in light of this testimony by the

[8] This board remanded Jacobs v. James Dwy d/b/a New Home Exteriors, 5327 CRB-5-08-3 (May 28, 2009), for additional findings on the issue of the identity of the principal employer.
[9] It should be noted that the claimant testified under oath that he had "absolutely not" used marijuana or alcohol either the day of or the day before the accident. Claimant's Exhibit K, p. 30.

claimant's co-workers, there is simply no reasonable basis for the inference that the claimant's actions on the morning of the accident differed from his usual behavior on any other workday.

We also note that the commissioner's inferences relative to McKay's opinion relied in part on the doctor's impression that the claimant's medical records demonstrated that the claimant was a chronic, heavy user of marijuana. At his deposition, McKay specifically referenced two Craig Hospital reports: a January 16, 2018 Consultation report by Ellen R. Mackinnon, C.N.S., wherein the claimant reported that he smoked marijuana "almost daily," Respondents' Exhibit 6, p. 3, and a January 10, 2018 Referral Assessment report by Thomas Horan, Clinical Liaison, wherein the claimant reported that the used marijuana "frequently."[10] Id., p. 6.

However, the evidentiary record also contains a January 23, 2018 Consultation report for Craig Hospital, wherein Charles K. Holt, P.A., indicated that the claimant "admits to weekly use of marijuana products . . . [but] denies any illicit drug use." Claimant's Exhibit F, p. 2. In addition, the record contains a January 26, 2018 Consultation report from the Swedish Medical Center in which Theodore J. McMenomy, M.D., reported that the claimant has "used alcohol and marijuana products, none in recent weeks." Claimant's Exhibit G, p. 2. In a Gaylord Hospital History and Physical Examination report dated October 10, 2018, Sheila Turner, A.P.R.N., indicated that the claimant had "[n]o history of illicit drug use," Claimant's Exhibit H, p. 4, and a Gaylord Hospital Progress Note dated October 19, 2018, prepared by David S. Rosenblum, M.D.,

[10] Horan did not define the term "frequently."

stated that "[i]t was not clear to this writer the claimant met criteria for a prior cannabis use disorder . . . ." Id., 3.

The evidentiary record also contains a November 23, 2016 Adult Intake form for Adult & Adolescent Counseling Services completed by Benjamin Wertheim, L.P.C., in which Wertheim noted that the claimant described himself as "a recreational drug user," Respondents' Exhibit 3, p.2. On July 24, 2017, Dale Smith, M.S., a licensed professional counselor, administered an Adult SASSI-3 to the claimant and reported that the "screening showed a very low probability of an ongoing alcohol/substance use disorder."[11] Respondents' Exhibit 4. On October 17, 2018, the claimant reported to Amanda Scholl, L.C.S.W., that he did "smoke cannabis, but did not wish to discuss his use at this time." Respondents' Exhibit 7, p. 1. Finally, on an Initial Evaluation form for ProHealth Physicians completed on November 12, 2018, the claimant checked the "yes" box regarding the use of recreational drugs and circled marijuana but did not indicate the frequency of use. Claimant's Exhibit O, p. 2.

It is of course axiomatic that assessing the credibility of witnesses is "uniquely and exclusively the province of the trial commissioner" and such assessments are not generally subject to reversal on review. Smith v. Salamander Designs, Ltd., 5205 CRB-1-07-3 (March 13, 2008), *citing* Berube v. Tim's Painting, 5068 CRB-3-06-3 (March 13, 2007). However, having reviewed the numerous medical reports in the instant matter purporting to address the claimant's marijuana use, it strikes us as

[11] In July 24, 2017 correspondence to Attorney Robert J.T. Britt, Smith described the Adult SASSI-3 as "an industry wide accepted valid and reliable substance abuse screening tool." Respondents' Exhibit 4.

exceedingly difficult to draw a reasonable inference regarding the frequency of that use.[12] As such, we are unable to sustain the commissioner's legal conclusions in this regard, given that they appear to "result from an incorrect application of the law to the subordinate facts, or . . . are the product of an inference illegally or unreasonably drawn from the facts." McMahon v. Emsar, Inc., 5049 CRB-4-06-1 (January 16, 2007), *citing* Burse v. American International Airways, Inc., 262 Conn. 31, 37 (2002); Pallotto v. Blakeslee Prestress, Inc., 3651 CRB-3-97-7 (July 17, 1998).

Unfortunately, it does not seem likely that there will ever be a satisfactory explanation for why the claimant entered the drop zone when he did on the day the accident occurred. We do note that the claimant testified that it was normal procedure to go into the drop zone to pick up the debris in between cuts, see id., 39; O'Dell testified that there was a ten-second gap with no communication in between the first and second cuts, see Claimant's Exhibit J, p. 24; and Karnolt testified that there was a time lapse of a few minutes between the accident and when O'Dell started making the first cut. See Claimant's Exhibit I. We also note that John Galinski reiterated that it is customary for the individual cutting the branches to periodically stop so the ground workers can enter the drop zone to remove the brush, and Galinski speculated that the claimant may have "misunderstood what was going to happen." January 24, 2019 Transcript, p. 49. Parent likewise attributed the accident to "a miscommunication or lack thereof," Claimant's Exhibit Q, p. 14, remarking that "they may have had a communication system

[12] It should also be noted that the claimant attested under oath that he used marijuana "maybe once or twice during the weekends," Claimant's Exhibit K, p. 26, and that "it definitely – like it wasn't every weekend the same." Id.

electronically, but nothing was communicated about the dropping of the second limb of the tree." Id.

Nevertheless, this board has not been tasked with providing an explanation for why the accident occurred; rather, our analysis is confined to an assessment of the soundness of the commissioner's decision to grant to the respondents the affirmative defense afforded by the provisions of § 31-284 (a). We would hasten to add that in reversing the commissioner's decision in this matter, we do not mean to imply that it was not within his discretion to favor one expert opinion over another. "It is the quintessential function of the finder of fact to reject or accept evidence and to believe or disbelieve any expert testimony. . . . The trier may accept or reject, in whole or in part, the testimony of an expert." (Internal citations omitted.) Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999).

However, this board has previously observed that "[i]n order to sustain a legal conclusion of liability, a medical opinion must be definite and positive and not merely speculative or likely." Moran v. Southern Connecticut State University, 4735 CRB-5-03-10 (September 9, 2004), *quoting* Aurora v. Miami Plumbing & Heating, Inc., 2 Conn. Workers' Comp. Rev. Op. 113, 238 CRD-7-83 (December 10, 1984), *no error*, 6 Conn. App. 45 (1986). Having reviewed the evidentiary record in its entirety, we are not persuaded that McKay's opinion provided a sufficient basis for the commissioner's conclusion that the respondents had satisfied their burden of proof pursuant to § 31-284 (a). Particularly in light of McKay's statements regarding the limitations of the urine screening performed on the claimant, we do not believe it can be reasonably

inferred that the claimant's injuries were due to his intoxication at the time he sustained his injuries.[13] See Gamez-Reyes, supra.

Finally, we note that the claimant has also claimed as error the commissioner's denial of his motion to correct. Insofar as the commissioner's denial of the proposed corrections was inconsistent with the board's analysis as presented herein, the denial also constituted error.

There is error; the December 2, 2019 Finding and Dismissal by Scott A. Barton, the Commissioner acting for the First District, is accordingly reversed and remanded for additional proceeding consistent with this Opinion.

Commissioners Randy L. Cohen and William J. Watson III concur.

[13] We note that both parties have challenged the credentials of the opposing party's medical expert. We decline to address these arguments, and would simply remind the parties that it is the commissioner's responsibility "to assess the weight and credibility of medical reports and testimony." O'Reilly v. General Dynamics Corp., 52 Conn. App. 813, 818 (1999).