CASE NO. 6406 CRB-1-20-12 CLAIM NO. 100213542	:	COMPENSATION REVIEW BOARD
JOANN C. SMITH CLAIMANT-APPELLANT	:	WORKERS' COMPENSATION COMMISSION
v.	:	AUGUST 19, 2021

SEDGEWICK CLAIMS MANGEMENT SERVICES
EMPLOYER

and

SEDGEWICK CMS, INCORPORATED
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant appeared at oral argument before the board as a self-represented party. In the proceedings before the trial commissioner, the claimant was represented by Richard Lynch, Esq., Lynch, Traub, Keefe & Errante, 32 Trumbull Street, New Haven, CT 06506.

The respondents were represented by Lynn M. Raccio, Esq., 510 Rutherford Avenue, Hood Business Park, Boston, MA 02129.

This Petition for Review from the September 25, 2019 Finding and Dismissal and the December 3, 2020 Order Re: Claimant's Motion to have the trial Commissioner Amend and Correct the Finding and Order dated November 10, 2020, received November 23, 2020 by Daniel E. Dilzer, the Commissioner acting for the First District, was heard May 28, 2021 before a Compensation Review Board panel consisting of Commission Chairman Stephen M. Morelli and Commissioners Brenda D. Jannotta and Maureen E. Driscoll.

OPINION

STEPHEN M. MORELLI, CHAIRMAN. The claimant has appealed from the dismissal of her claim for benefits resulting from an injury she alleged occurred in the course of her employment on June 29, 2018. After a formal hearing, the commissioner hearing this case, Daniel E. Dilzer (commissioner), dismissed her claim and the claimant appealed to this tribunal. In our decision in Smith v. Sedgewick Claims Management Services, 6351 CRB-1-19-10 (November 5, 2020), (Smith I), we remanded this matter to the commissioner for a detailed articulation as to his reasoning for the dismissal of the claim. In his Amended Finding and Dismissal pursuant to the Compensation Review Board Remand dated November 10, 2020, (Amended Finding), the commissioner provided in our estimation a cogent and detailed rationale for his determination that the claimant's injury was not within the scope of General Statutes § 31-275 (1).[1] The claimant appeals this decision, but we conclude her appeal is essentially an effort to retry the facts of the case. Since such factual determinations are left to the finder of fact to resolve, and as his decision comports with the law, we must affirm the Amended Finding.

We will briefly recite the facts of the case as discussed in Smith I.

> The claimant has worked as a claims adjuster for the respondent since 2015 and maintains a home office. She testified that she only goes into the respondent's office twice a month. The claimant's workday generally consisted of signing into the company computer network using her company password, typically at 8:30 a.m. on workdays, and she would process payments, answer e-mails and interact with coworkers through the company computer network from her home until she logged off the computer usually at 5:15

[1] General Statutes § 31-275 (1) states: "'Arising out of and in the course of his employment' means an accidental injury happening to an employee or an occupational disease of an employee originating while the employee has been engaged in the line of the employee's duty in the business or affairs of the employer upon the employer's premises, or while engaged elsewhere upon the employer's business or affairs by the direction, express or implied, of the employer...."

p.m. The claimant's office was on the second floor of her home and she testified that when she went downstairs to obtain a snack or to eat lunch she would not log off. The claimant further testified that on June 29, 2018, she was going up the stairs after getting something to drink in the kitchen at approximately 10:30 or 10:45 a.m. when she tripped on the stairs. She fell down the stairs and landed on her left shoulder. She testified that the fall was very painful and she thought she had broken her arm.

The claimant testified she laid on the floor awhile, gathered herself, and then went back up the stairs to log off the computer. The day of her fall was the day of the company picnic and she had the option to go to the picnic, take personal time, or continue to work. The claimant further testified if she had her cell phone on her she would have called an ambulance, but she did not, nor did she notify her supervisor as to the incident prior to logging out of her computer. She said she took some Advil tablets and decided to attend the picnic. She arrived at noon and interacted with other guests, but she did not tell anyone at the picnic she had injured herself at home that day. Because she was still in pain, she left the picnic at 2 p.m. A witness for the respondents, Carolyn Thomas, testified that she had lunch with the claimant at the June 29, 2018 picnic, and the claimant did not tell her she had been injured, nor did she see any behavior or signs from the claimant that would indicate the claimant was injured.

The claimant stated that after she left the picnic she went home and rested over the weekend. She did not seek medical attention. On Monday, she stated she felt like she had to report the injury. She testified that she reported this at 8 a.m. to her supervisor, Catherine Morneault. After reporting the incident to her supervisor, it took 15 or 20 minutes for the claims department to contact her to get the details of the injury. The claimant testified that her employer directed her to go to Concentra. The respondents produced evidence that the call occurred at 7:27 a.m. and did not reference a work injury. The commissioner found at 9:24 a.m. on July 2, 2018, the claimant asked her supervisor, via instant message, "[i]s there workers comp for telecommuters? I fell Friday about 11:30 at home, going up the stairs. Possible rotatos (sic) cuff or tendon injury. Let me know. Trying to work through it, but thought I should report it." Findings, ¶ 18. The respondents filed a first report of injury that same day. That report states the claimant reported the injury via e-mail and that the injury occurred at approximately 11:30 a.m. on June 29, 2018. The respondents produced computer records indicating the claimant had logged off their system at 11:03 a.m.

Id.

Based on these facts in Smith I, the trial commissioner issued a determination that "[t]he claimant's injury did not occur in the course of her employment with the Respondent." Conclusion, ¶ B. The claimant appealed and we concluded a remand was necessary as a determination as to whether an injury occurred in the course of the employment is a fact driven exercise and "[w]hile we may infer the commissioner was not persuaded of this fact we cannot, as an appellate panel, speculate from this record as to why he was not persuaded." Smith I. We remanded this decision for the commissioner to clarify his reasoning consistent with precedent in Bazelais v. Honey Hill Care Center, 5011 CRB-7-05-10 (October 25, 2006), *appeal withdrawn*, A.C. 30307 (July 17, 2009).

In the Amended Finding, the commissioner elucidated on his rationale for finding the claimant's injury outside the ambit of Chapter 568. He added a new finding as to why he did not find the claimant's testimony in this matter credible.

> 26. I do not find the Claimant credible in that:
>
> a) She is an experienced workers' compensation claims adjuster who did not report the alleged injury on the day it occurred to her supervisor;
>
> b) She did not share with any of her coworkers the fact that she purportedly sustained an extremely painful fall at home where she contemplated calling an ambulance, though she was with her coworkers at a company-sponsored event, and that no coworker was aware of her purported injury;
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> c) The Claimant's First Report of Injury notes the [injury] occurred at 11:30 a.m., which was after she logged out of work for the day;

d) The Claimant did not fall at home during her scheduled work hours for the Respondent.

Amended Finding, ¶ 26.

Since the commissioner did not find the claimant's testimony credible and determined that she had not been injured during working hours, the commissioner found that her injury did not occur in the course of her employment, and therefore was not a compensable injury. The claimant filed a motion to correct seeking to replace the factual findings herein with factual findings supportive of finding her injury compensable. The commissioner denied this motion in its entirety and the claimant has appealed, arguing that her narrative of the circumstances of her injury should have been credited by the commissioner. The respondents argue that in cases when the decision turns on a commissioner's evaluation of facts that such decisions are essentially impervious to appellate review as long as facts on the record support the decision, *citing* O'Reilly v. General Dynamics Corp., 52 Conn. App. 813, 816 (1999). We believe the respondents accurately described the governing law and we affirm the Amended Finding.

The standard of deference we are obliged to apply to a commissioner's findings and legal conclusions on appeal 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).

In regard to the law, it is the claimant's burden to establish that he or she has sustained a compensable injury. See Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 447 (2001). As we pointed out in Tutunjian v. Burns, Brooks & McNeil, 5618 CRB-6-11-1 (March 21, 2012), in order to obtain an award a claimant must sustain an injury while the employee was engaged in the line of the employee's duty in the business consistent with the provisions of § 31-275 (1), id., as cited in Biggs v. Combined Insurance Company of America, 6247 CRB-7-18-2 (April 12, 2019). If the commissioner was persuaded that the credible evidence presented supported a finding the claimant ceased work for the respondent at 11:03 a.m., and was hurt on or about 11:30 a.m., consistent with the claimant's first report of injury, he was obligated to conclude this injury was not in the course of the employment and was noncompensable.

The claimant did testify that she was injured during working hours, but the commissioner did not find her credible. In the present matter, the claimant offered live testimony before the trial commissioner. When a witness offers live testimony, the fact-finder's assessment of the credibility of the witness is generally impervious to appellate review. See Baron v. Genlyte Thomas Group, LLC, 132 Conn. App. 794, 804 (2012), *cert. denied*, 303 Conn. 939 (2012), *citing* Samaoya v. Gallagher, 102 Conn. App. 670, 673-74 (2007). The rationale herein is long standing precedent.

> Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor

> and attitude. . . . An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom. . . . As a practical matter, it is inappropriate to assess credibility without having watched a witness testify, because demeanor, conduct and other factors are not fully reflected in the cold, printed record.[2]

([Citations omitted;] internal quotation marks omitted.) Liano v. Bridgeport, 4934 CRB-4-05-4 (April 13, 2006) *quoting* Lewis v. Statewide Grievance Committee, 235 Conn. 693, 709-10 (1996).

The commissioner observed the claimant testify and was not persuaded by her narrative. While he failed to explain his basis for denying the claim in his original decision, the Amended Finding comports with our remand and provided a clear rationale for denial of the claim, as the commissioner identifies his reason not to accept her testimony at face value. The Amended Finding also explains why the commissioner found the claim did not fall within the ambit of Chapter 568. If the trial commissioner was not persuaded by the claimant's evidence we, as an appellate tribunal, may not intercede on appeal. See Wierzbicki v. Federal Reserve Bank of Boston, 4147 CRB-1-99-11 (December 19, 2000), *appeal dismissed*, A.C. 21533 (June 14, 2001).

As the Amended Finding comports with the terms of our remand in Smith I and is both consistent with the law and supported by facts in the record the commissioner chose to credit, there is no error. We affirm the Amended Finding.

Commissioners Maureen E. Driscoll and Brenda D. Jannotta concur in this Opinion.

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[2] In her written submissions before this tribunal and in her oral presentation, the claimant has stressed that she should have been found to be a credible witness by the commissioner and it was error for him to determine this to the contrary. However, in the absence of identifying any inconsistency between this conclusion as to her credibility and other documentary evidence or other testimony the commissioner did find credible, we simply cannot identify any basis in which we may intercede on appeal.