CASE NO. 6410 CRB-3-21-1 CLAIM NO. 300120307	:	COMPENSATION REVIEW BOARD
JAMES A. BASSETT CLAIMANT-APPELLANT	:	WORKERS' COMPENSATION COMMISSION
v.	:	OCTOBER 22, 2021

TOWN OF EAST HAVEN
EMPLOYER
SELF-INSURED

and

PMA MANAGEMENT CORPORATION
OF NEW ENGLAND
THIRD-PARTY ADMINISTRATOR
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Leonard A. Fasano, Esq., Fasano, Ippolito, Lee & Florentine, 388 Orange Street, New Haven, CT 06511. At the trial level, the claimant was represented by Christopher D. DePalma, Esq., D'Elia, Gillooly & DePalma, LLC, 700 State Street, New Haven, CT 06511.

The respondents were represented by Michael J. Finn, Esq., Montstream Law Group, LLP, 655 Winding Brook Drive, P.O. Box 1087, Glastonbury, CT 06033-6087.

This Petition for Review from the December 16, 2020 Finding and Dismissal by Maureen E. Driscoll, the Administrative Law Judge acting for the Third District, was heard June 25, 2021 before a Compensation Review Board panel consisting of Chief Administrative Law Judge Stephen M. Morelli and Administrative Law Judges Brenda D. Jannotta and Soline M. Oslena.[1]

[1] Effective October 1, 2021, the Legislature directed that the phrase "Administrative Law Judge" be substituted when referencing a workers' compensation commissioner. See Public Act 21-18.

OPINION

STEPHEN M. MORELLI, CHIEF ADMINISTRATIVE LAW JUDGE. The claimant has appealed from the December 16, 2020 dismissal of his claim for benefits resulting from an injury he alleged arose out of and in the course of his employment on July 30, 2018. After formal hearings conducted on October 17, 2019, January 9, 2020, and March 5, 2020, Maureen E. Driscoll, the administrative law judge acting for the Third District, dismissed his claim and the claimant appealed to this tribunal. We find no error and accordingly affirm the decision of the administrative law judge.[2]

The administrative law judge identified the issue for determination as the compensability of the injuries sustained by the claimant while working for the respondent, Town of East Haven, on July 30, 2018. Subsumed within the analysis of that sole issue were whether: (1) the injury arose out of and in the course of the claimant's employment;[3] (2) the claimant's actions constituted willful and serious misconduct such that the respondents had an affirmative defense to the claimed injury;[4] (3) the claimant's actions were an illegal act such that his injuries were not compensable; and (4) the employer's knowledge of the allegedly dangerous environment in which the claimant worked on July 30, 2018 and its failure to notify him of such danger and/or adequately

[2] We note that four motions for extension of time and two motions for continuance were granted during the pendency of this appeal.

[3] General Statutes § 31-275 (1) defines: "'Arising out of and in the course of his employment' as 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, expressed or implied, of the employer."

[4] General Statutes § 31-284 (a) provides that: "An employer who complies with the requirements of subsection (b) of this section 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 and serious misconduct of the injured employee or by his intoxication."

train him in the proper protocols to be followed, placed him in a precarious situation in which he needed to decide upon the appropriate course of action to allow for the safety of his crew, i.e., he acted within his job responsibilities as a supervisor.

At the outset of the formal proceedings, the respondents acknowledged that the claimant was injured in the course of his employment but denied that the injury arose out of his employment. After the close of the record, the administrative law judge made the following additional findings which were pertinent to our review of this matter. The claimant was born on June 7, 1989 (he was twenty-nine years old on the date of his injury), had graduated from North Branford High School in 2007, and had completed almost two years of studies at Gateway Community College. For the four to five years preceding the claimant's injury, he was employed by the respondent as one of three supervisors of the summer youth program. As part of his job responsibilities, the claimant would supervise and assist teenage workers in cleaning up and beautifying areas in town. The claimant was instructed regarding the areas that needed to be cleaned by Bob Parente, an employee at the Department of Public Works.

On the morning on July 30, 2018, the claimant and his crew were working with another crew that was supervised by Mike Streeto at the town beach. The crews took a lunch break at McDonald's and were subsequently instructed by Parente to spend the rest of the afternoon working at either the new high school or at the D.C. Moore Elementary School. Given the time remaining in the workday and the crews' proximity to the D.C. Moore Elementary School, they chose the latter. Streeto was not feeling well and remained in the vehicle where he was able to supervise the crew as they weeded. The claimant walked to the rear of the school to assess the work needed in that location.

While walking through the property, the claimant picked up garbage with his grabber and deposited it in his five-gallon bucket. During the course of this activity, the claimant found and picked up a small brown sphere with paper wrapped around it, foil stuck on it, and a wick attached thereto. The claimant removed his personal lighter from his pocket and lit the wick. The sphere exploded and the claimant sustained serious injuries to his left hand, including a traumatic amputation.

The claimant testified that he thought it was his job to pick up the sphere, that he believed it to be a smoke bomb, and that he did not know that it was some type of explosive device when he picked it up. The claimant further testified that he lit the wick because he did not want to bring the sphere into the van where one of the teens might light it, thereby causing a dangerous situation for his crew. Implied therein is the claimant's knowledge that the device was dangerous or at least potentially dangerous. Streeto testified that the claimant should have called him when he found the sphere so that the police or fire departments could be called. Streeto further testified that he knew the claimant to be "very adult" and "very serious" and that he believed it would be fair to say that the claimant would have known that the sphere would have blown up if he lit it. During the initial police investigation and while at the hospital, the claimant denied lighting the wick. It was not until the claimant was confronted with the evidence collected by the police at the scene of the accident that he admitted that he had lit the device. The police report found the claimant had intentionally lit the wick but the explosion and injuries were accidental. The claimant was not charged with a crime.

Based on these findings, the administrative law judge concluded that the chain of causation was broken at the moment that the claimant lit the sphere; Streeto's testimony

was credible; the state police's determination that the claimant intentionally lit the wick was credible; the claimant's testimony confirmed that he knew that the sphere could be dangerous; the claimant's testimony that he lit the wick to protect the summer youth crew was not credible; and that the lighting of the wick was not within the scope of the claimant's job duties. See Conclusions, ¶¶ q, s-t, v-w, y. The administrative law judge, therefore, held that the claimant was in the course of his employment when he picked up the sphere on July 30, 2018, but that his intentional lighting of the wick broke the chain of causation with respect to the scope of his employment and that the claimant's resultant injuries did not arise out of his employment. She, therefore, dismissed the claim. Given this conclusion, the administrative law judge deemed the other defenses set forth by the respondents to be moot and did not comment thereon.

The claimant filed a motion to correct, that was denied in its entirety. The claimant subsequently filed this appeal which contends: (1) it was error for the administrative law judge to hold that the lighting of the sphere was not in the scope of his employment; (2) the humanitarian purpose of the act dictated that a claimant not be penalized for a mistake of judgment and/or a careless action when performing his job duties; (3) the administrative law judge misapplied the law when she held that the claimant's "intentional" action took him outside of the scope of the act; (4) there was no evidence that the claimant intentionally broke any rules and/or protocols as set forth by the respondent; (5) there was no evidence that the claimant knew that the sphere was dangerous; (6) the respondents should not escape liability since they did not provide the claimant with any training or guidelines regarding the proper disposal of incendiary

devices; and (7) the respondent was aware of spent explosives on the property of the school and did not adequately warn the claimant of that potential hazard.

The standard of review we are obliged to apply to an administrative law judge'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 the 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). Thus, "it is … immaterial that the facts permit the drawing of diverse inference. The [commissioner] alone is charged with the duty of initially selecting the inference which seems most reasonable and [her] choice, if otherwise sustainable, may not be disturbed by a reviewing court." Fair v. People's Savings Bank, 207 Conn. 535, 540 (1988), *quoting* Del Vecchio v. Bowers, 296 U.S. 280, 287 (1935).

We begin our analysis with the meaning and implications of General Statues § 31-275 (1). Our Supreme Court recently reiterated the requirement that a claimant prove that his injury arose in the course of his employment and that the injury was the result of a risk involved in the employment or incidental to it or to the conditions under which it was required to be performed. See Clements v. Aramark Corporation, SC 20167 (2021). The requirement that the injury must arise out of the employment relates to the origin and cause of the accident, whereas the requirement that the injury occur in the

course of the employment relates to the time, place, and circumstances of the accident. Id., *citing* Labadie v. Norwalk Rehabilitation Services, Inc., 274 Conn. 219, 228 (2005). Furthermore, the court reiterated that whether a claimant's injuries resulted from an incident that occurred in the course of the employment is a separate and distinct question from whether those injuries *arose out of* the employment. See Clements, supra, *citing* Daubert v. Naugatuck, 267 Conn. 583, 591 (2004). Whether an injury arose out of the employment is a factual finding left to the determination of the administrative law judge. Furthermore, unless the administrative law judge's factual findings as to whether an employee so departed from his employment as to take him outside of the scope of the act are without support in the record, they should not be overturned by an appellate body. See Crochiere v. Board of Education, 227 Conn. 333, 347-348 (1993).

Our Supreme Court has addressed the requirement of proximate cause on many occasions. In Sapko v. State, 305 Conn. 360, 372 (2012) ,the court stated:

> In Connecticut traditional concepts of proximate cause constitute the rule for determining … causation [in workers' compensation cases]. . . . [T]he test of proximate cause is whether the [employer's] conduct is a substantial factor in bringing about the [employee's] injuries. . . . Further, it is the plaintiff who bears the burden to prove an unbroken sequence of events that tied [the employee's] injuries to the [employer's conduct]. . . . The existence of the proximate cause of an injury is determined by looking from the injury to the negligent act complained of for the necessary causal connection.

(Citations omitted; internal quotation marks omitted.) Sapko v. State, supra, 372 *citing* DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132, 141-42 (2009).

> The question of proximate causation . . . belongs to the trier of fact because causation is essentially a factual issue. . . . It becomes a conclusion of law only when the mind of a fair and reasonable [person] could reach only one conclusion; if there is room for a

> reasonable disagreement the question is one to be determined by the trier as a matter of fact.

(Citations omitted; internal quotation marks omitted.) Id., 373, *citing* Stewart v. Federated Dept. Stores, Inc., 234 Conn 597, 611 (1995).

In Clements, supra, our Supreme Court again cited language from Sapko, supra, 379-80, in which it expounded on the concept of proximate cause with respect to workers' compensation claims. The court stated,

> [A]lthough we often state that traditional concepts of proximate cause govern the analysis of causation in workers' compensation cases, our case law makes clear that, with respect to primary injuries, the concept of proximate cause is imbued with its own meaning. In such cases, [t]he employment may be considered as causal in the sense that it is a necessary condition out of which, necessarily or incidentally due to the employment, arise the facts creating liability, and that is the extent to which the employment must be necessarily connected in a causal sense with the injury. If we run over the cases in which compensation has been awarded, it will be found to be rarely true – although it may be true – that the employment itself was, in any hitherto recognized use of the words in law, either the cause or the proximate cause . . . . The real truth appears to be that … [t]he causative danger need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that as a rational consequence.

(Citations omitted; internal quotation marks omitted.) Id., 379-80, n.13.

Our Supreme Court has also often spoken of the injury arising from the risks of the employment, either directly, or incidental to it. See Labadie, supra, 237-39; and McNamara v. Hamden, 176 Conn. 547, 556 (1979). Incidental has been defined as something that happens as a chance or undesigned feature of something else. See Stakonis v. United Advertising Corporation, 110 Conn. 384, 390 (1930). An activity is incidental to the employment if the activity is regularly engaged in on the employer's

premises within the period of the employment, with the employer's approval or acquiescence. See McNamara, supra.

After considering the evidence in this case, the administrative law judge found that the facts did not support the requirement that the claimant's injury arose out of the employment or was incidental to it. Instead the administrative law judge concluded that the claimant's intentional act of lighting the wick broke the chain of proximate cause between the employment and the injury.

The claimant argued that the administrative law judge misapplied the law when she reached this conclusion. It was the claimant's contention that the administrative law judge afforded a misplaced reliance on the term "intentional" since an intentional act must encompass an intentional act and an intentional injury, i.e., the claimant must intend the act and know that the injury was substantially certain to occur. Since the claimant testified that he thought the sphere was harmless, he argued that, by definition, the administrative law judge's finding was erroneous. We disagree.

An intentional act is defined as "[a]n act resulting from the actor's will directed to that end; [a]n act is intentional when foreseen and desired by the doer, and this foresight and desire resulted in the act through the operation of the will." Black's Law Dictionary, Seventh Edition (1999), p. 25.

In Mingachos v. CBS, Inc., 196 Conn. 91 (1985), our Supreme Court discussed the concept of intent. The court referred to writings by Dean Prosser, who stated that "intent" is the word commonly used to describe the desire to bring about the physical consequences of an act. Intent, however, is broader than the desire to bring about physical results. "It must extend not only to those consequences which are desired, but

also to those which the actor believes are substantially certain to follow from what he does." Prosser, Torts (4th Ed., 1971) § 8. Id., 101. The court also cited the Second Restatement of Torts § 8A, wherein it was stated that intent refers to the consequences of an act rather than the act itself and that the word "intent" denotes that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to follow from it. Id., 101 (1965).

Assuming arguendo that the administrative law judge's use of the word "intentional" was akin to the common definition in tort law, we are still not persuaded by the claimant's argument. The claimant in the current case admitted that he intended to light the wick for the purpose of achieving his intended result of igniting the sphere. There was no claim that the claimant intended to cause a traumatic amputation of his left hand. Nevertheless, the detonation of an explosive device had an inherent risk of causing some form of damage. If we conceded that the necessary element was the intent of injuring one's self, the term itself would be rendered moot. The more reasonable analysis was whether the intended action was the lighting of the wick and the intended result was the detonation of the sphere with a foreseeable outcome of an explosion.

An additional analysis must also focus on the knowledge of the claimant. In Mancini v. Scovill Mfg. Co., 98 Conn. 591 (1923), the court agreed that the claimant's conduct was improper and in violation of company policy. It further held that until the claimant fully knew and appreciated that her conduct would expose her to serious injury and continued to participate in such conduct, it was not serious misconduct that would take her outside of the protections of the act. Id., 600. Similarly, in Gonier v. Chase Companies, Inc., 97 Conn. 46 (1921), the court held that the claimant's conduct must be

more than thoughtless, heedless, inadvertent, or in the moment. Furthermore, a mere violation of the rules was not enough to avoid compensability. Id., 56.

In contrast, this board affirmed the decisions of the administrative law judges in Colon v. Savin Brothers, Inc., 1574 CRB-1-92-11 (1994), *aff'd*, 37 Conn. App. 912 (1995), *cert. denied,* 234 Conn. 903 (1995); Ryker v. Town of Bethany, 4780 CRB-3-04-2 (February 16, 2005), *aff'd*, 97 Conn. App. 304 (2006), *cert. denied*, 280 Conn. 932 (2006); Williams v. State, 5359 CRB-1-08-6 (October 8, 2009), *aff'd*, 124 Conn. App. 759 (2010) and St. Germain v. Buckingham Restaurant & Pizza, Inc., 4343 CRB-8-01-1 (January 10, 2002), which dismissed claims based on the intentional actions/misconduct of the claimants. The determination of whether the claimant's intentional conduct rises to the level of disqualification is a question of fact that won't be overturned unless it is clearly erroneous. See Gronier, supra, 57.

The second issue for analysis, therefore, was whether the administrative law judge properly applied the law with respect to the claimant's knowledge and/or intent in his lighting of the wick. The claimant was a twenty-nine-year-old individual with a high school degree and some community college training at the time of his injury. He had worked for the employer as a supervisor for several summers prior to his date of injury. Furthermore, while the claimant testified that he thought that the sphere was a harmless smoke bomb, he also testified that he lit the wick because he worried that, if one of the teenagers in his charge lit the sphere, it would cause a dangerous situation. These two statements are difficult to reconcile. Either the claimant thought that the sphere was harmless or he knew that it posed a possible dangerous situation for himself and his workers and lit it regardless of that knowledge. In fact, given the serious injuries which

often result from the misuse of fireworks, it could also be inferred that the claimant participated in highly unreasonable conduct in a situation where danger was apparent. The claimant's injuries were a direct result of that conduct. Furthermore, the claimant was not truthful with the police or the emergency personnel that treated him regarding the precipitating factors to the explosion. The inference could easily have been made, therefore, that the claimant was aware of his malfeasance. Consequently, upon hearing all of the evidence, the administrative law judge, who had wide discretion in assigning credibility and making factual findings, determined that the claimant's testimony was not credible and that he intended to set off the device with sufficient awareness that it could be dangerous. Such findings were within her authority and not subject to review by this board. Furthermore, it was well within the administrative law judge's authority to find that the claimant's actions rose to a level that would disqualify him from receiving benefits pursuant to the Workers' Compensation Act.

Next, we must address the claimant's contention that the employer had knowledge of spent explosives on the school property, failed to notify the claimant of a potential hazard, and/or failed to train the claimant in the proper disposal of explosives, thereby resulting in the claimant having to use his own judgment in dealing with this type of situation. In Connecticut, the Workers' Compensation Act is a no-fault compensation system which is not subject to claims of comparative and/or contributory negligence. See Durniak v. August Winter & Sons, Inc., 222 Conn. 775, 781-82 (1992); Albuquerque v. East Hartford, 5741 CRB-1-12-3 (April 9, 2013). Thus, while we acknowledge the humanitarian purpose of the act, based on the record and the no-fault nature of the act, we find this argument to be without merit.

There is no error; the December 16, 2020 Finding and Dismissal of Maureen E. Driscoll, Administrative Law Judge acting for the Third District, is accordingly affirmed.

Administrative Law Judges Brenda D. Jannotta and Soline M. Oslena concur in this Opinion.