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ANTONIO JOHNSON *v.* STATE OF CONNECTICUT (AC 21623)

Foti, Mihalakos and Flynn, Js.

Argued September 24—officially released December 18, 2001

Counsel

Mark E. Blakeman, for the appellant (plaintiff).

Michelle D. Truglia, assistant attorney general, with whom, on the brief, were *Richard Blumenthal*, attorney general, and *William J. McCullough*, assistant attorney general for the appellee (defendant).

Opinion

MIHALAKOS, J. In this action, the plaintiff, Antonio Johnson, appeals from the judgment of the workers' compensation review board (board) reversing the decision of the workers' compensation commissioner (commissioner) to grant the plaintiff full salary benefits under General Statutes § 5-142 (a).[1] On appeal, the plaintiff contends that the board improperly (1) reversed the commissioner's findings that (a) the plaintiff was restraining an inmate and (b) his injuries were a direct result of the special hazards inherent in his guard duties, and (2) abused its discretion in finding facts and draw-

ing unreasonable inferences contrary to those found by the commissioner. We disagree and affirm the board's decision.

The following facts and procedural history are relevant to the disposition of the plaintiff's appeal. Since April, 1989, the plaintiff has been employed by the defendant state of Connecticut in the department of correction as a correction officer at the Osborn Correctional Institution (institution) in Somers. On August 11, 1996, the plaintiff was assigned to C block shower duty at the institution. That morning an inmate stepped out from the shower onto a tier, slipped on the floor, and, in an attempt to avoid falling, grabbed onto the plaintiff, who was passing by at the same moment. The plaintiff in turn grabbed onto the inmate and they fell awkwardly to the floor of the tier. As a result, the plaintiff suffered bilateral inguinal hernias, which have left him totally incapacitated at various times and unable to work. The plaintiff filed an incident report on August 12, 1996, but he did not file a disciplinary report on the inmate.[2] Subsequently, the plaintiff filed a workers' compensation claim under General Statutes § 31-307[3] that was accepted by the defendant. Accordingly, the plaintiff has received 75 percent of his full salary during periods of total disability from work.

The plaintiff then filed a claim for full salary benefits under § 5-142 (a). The commissioner conducted formal hearings on that claim on May 18, 1999, and August 12, 1999. On the basis of the plaintiff's testimony, the commissioner found, inter alia, that the plaintiff was ''surprised by the inmate'' and that he sustained compensable injuries ''while in the actual performance of his duties, and while grabbing and restraining an inmate.'' Accordingly, the commissioner found that the plaintiff was entitled to the benefit of his full salary while incapacitated because his injuries were ''a direct result of the special hazards inherent in [his] guard duties as defined in [§ 5-142 (a).]''

The defendant petitioned the board for review on December 7, 1999. Meanwhile, on December 15, 1999, the defendant filed a motion to correct the commissioner's findings of fact and award. In that motion, the defendant asked that the commissioner remove all reference to the word ''restrained'' or other variations of the word. The defendant also requested that the commissioner eliminate the word ''surprised'' and expressly delineate the special hazards the plaintiff faced during the incident. Further, the defendant sought to eliminate the findings that the plaintiff's injuries were a direct result of any such hazards and the conclusion that the plaintiff was entitled to full salary benefits under § 5-142 (a). The commissioner denied the motion on December 23, 1999.

In its petition to the board, the defendant claimed that the commissioner improperly (1) denied its motion

to correct, (2) found that the plaintiff was restraining the inmate at the time of injury, (3) failed to delineate what special hazards inherent in the plaintiff's duties were encountered at the time of injury, (4) assumed facts not in evidence, (5) failed to include material and undisputed facts in his findings, (6) applied the law to the facts through unreasonable inferences and (7) found that the plaintiff was entitled to his full salary as compensation under § 5-142 (a).

On January 25, 2001, the board rendered a decision agreeing with the defendant, and reversing the commissioner's findings and award. The board concluded that the record contained no proof that supported the commissioner's conclusions that the plaintiff was injured as a direct result of a special hazard involved with his duties or that he had restrained the inmate within the meaning of § 5-142 (a). Instead, because the event was an accident and not an attack, the board concluded that having to break someone's fall unexpectedly could be deemed reasonably to be within the plaintiff's routine duties, as with any job, but that it cannot be categorized as a special hazard concomitant with those duties. Consequently, the board reversed the commissioner's decision, leaving the plaintiff with 75 percent of his full salary for periods of incapacity under § 31-307. The plaintiff subsequently appealed on February 13, 2001.

Our standard of review in workers' compensation appeals is well established. ''The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . Neither the review board nor this court has the power to retry facts. . . . [A]lthough not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and review board.'' (Internal quotation marks omitted.) *Dengler* v. *Special Attention Health Services, Inc.*, 62 Conn. App. 440, 445, 774 A.2d 992 (2001). ''Although it is clear . . . that the board is prohibited from retrying the case or substituting its inferences for those drawn by the commissioner, the board certainly [is] free to examine the record to determine whether competent evidence supported the commissioner's findings, inferences drawn from such findings and conclusions. The [commissioner] alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court. . . . Inferences may only be drawn from competent evidence. Competent evidence does not mean any evidence at all. It means evidence on which the trier properly can rely and from which it may draw reasonable inferences.'' (Citation omitted; internal quotation marks omitted.) Id., 450–51.

The plaintiff's first claim centers on two findings made by the commissioner that culminated in an award to the plaintiff of full salary benefits. In the absence of either of those findings, the requirements of § 5-142 (a)[4] cannot be met, and the plaintiff cannot obtain the desired benefits. On appeal to the board, the defendant argued that both findings were incorrectly arrived at on the bases of incompetent evidence and misapplication of the law to the facts. The board agreed with the defendant and reversed the commissioner's award. We agree with the board.

A

The plaintiff first argues that the board improperly reversed the commissioner's finding that the plaintiff was restraining the inmate at the time of the plaintiff's injuries. We disagree. Although the defendant conceded in its brief that the plaintiff met the first prong of the test under § 5-142 (a),[5] it did not concede that the commissioner correctly found that the plaintiff had been restraining the inmate rather than merely holding on to him as they fell to the floor. As the trier of fact, the commissioner is entitled to make only *reasonable* findings upon *competent* evidence. See id., 451. "On appeal, the board must determine whether there is any evidence in the record to support the commissioner's findings and award." *Bryan* v. *Sheraton-Hartford Hotel*, 62 Conn. App. 733, 739, 774 A.2d 1009 (2001). The board could not retry the case to determine that no such proof existed on the record, but it was within the board's power to reverse a finding for lack of competent evidence. See *Dengler* v. *Special Attention Health Services, Inc.*, supra, 450–51. The board's determination that there was a lack of evidence was not tantamount to retrying the facts of this case.

The board reviewed the record and determined, consistent with the legislative history of § 5-142 (a),[6] that the commissioner could not have found reasonably or fairly from the evidence that the plaintiff had restrained the inmate. The board further determined that "[t]here is no testimony in the record to support the conclusion that the [plaintiff] was 'restraining' the inmate . . . ." The board, however, did not make its own finding of fact. While we must give great weight to the construction given to the workers' compensation statutes by the commissioner and the board, we conclude that the board's determination was reasonable in light of the record and that the commissioner's findings were not sustainable on the same evidence. Therefore, we conclude that the board properly decided that the commissioner's finding was unreasonably drawn from the evidence before him.

B

The plaintiff next argues that the board improperly reversed the commissioner's finding that the plaintiff

was injured by a special hazard inherent in his guard duties. We do not agree. As noted in part I A, the board was empowered to determine whether the record supports the commissioner's finding with competent evidence. The board determined that "the record contains no proof that catching hold of people who slip is an especially hazardous aspect of a state prison guard's job." The board further observed that "almost any employee in any business might be placed in the unexpected situation of having to break someone's fall . . . ." As a result, the board concluded that the commissioner's finding in this regard "lack[ed] a vital subordinate factual element." Those determinations are not findings of fact by the board; rather, they are summations of the competency of the evidence before the commissioner. Again, we allot the decisions of the commissioner and the board their proper weight in light of the record. We conclude, therefore, that the board properly determined that the commissioner could not have found reasonably from the evidence that the plaintiff was injured by a special hazard inherent in his guard duties.

II

The plaintiff's last claim is that the board abused its discretion in finding facts and drawing unreasonable inferences contrary to those found by the commissioner. We disagree. Our discussion in part I controls the determination of the plaintiff's claim. The plaintiff is under the misconception that the board's reversal of the commissioner's decision means that it made its own findings of fact. That is incorrect. The board's decision to reverse the commissioner's decision was not based on its own findings of fact or inferences, but rather on a lack of competent evidence with which it could find support for the commissioner's findings and award. As a result, the board's decision fell squarely within the ambit of its authority and, accordingly, we conclude that it did not abuse its discretion.

The decision of the workers' compensation review board is affirmed.

In this opinion FOTI, J., concurred.

[1] General Statutes § 5-142 (a) provides in relevant part: "Disability compensation. (a) If any member . . . of any correctional institution . . . sustains any injury (1) while . . . in the actual performance of . . . guard duties . . . or while attending or restraining an inmate of any such institution or as a result of being assaulted in the performance of his duty and (2) that is a direct result of the special hazards inherent in such duties, the state shall pay all necessary medical and hospital expenses resulting from such injury. If total incapacity results from such injury, such person shall be removed from the active payroll the first day of incapacity, exclusive of the day of injury, and placed on an inactive payroll. He shall continue to receive the full salary which he was receiving at the time of injury subject to all salary benefits of active employees, including annual increments, and all salary adjustments, including salary deductions, required in the case of active employees, for a period of two hundred sixty weeks from the date of the beginning of such incapacity. Thereafter, such person shall be removed from the payroll and shall receive compensation at the rate of fifty per cent of the salary which he was receiving at the expiration of said two hundred

sixty weeks so long as he remains so disabled . . . .''

[2] The defendant requires a correction officer to file a disciplinary report on an inmate who has taken any hostile action against the officer. The plaintiff did not file such a report because, according to his testimony, the incident was an accident and not an assault.

[3] General Statutes § 31-307 provides in relevant part: ''Compensation for total incapacity. (a) If any injury for which compensation is provided under the provisions of this chapter results in total incapacity to work, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of his average weekly earnings as of the date of the injury . . . and the compensation shall not continue longer than the period of total incapacity.''

[4] See footnote 1. The plaintiff in this case had to show that he sustained injury while (1) either attending or restraining an inmate *and* (2) that the injury was a direct result of a special hazard inherent in his guard duties. See General Statutes § 5-142 (a).

[5] The defendant conceded that the plaintiff was attending to the inmate while in the performance of his guard duties. Such a finding by the commissioner, upon competent evidence, would have met the first prong of the test under General Statutes § 5-142 (a).

[6] The legislature amended General Statutes § 5-142 (a) by enacting Public Acts 1991, No. 91-339, to close a loophole that was made obvious in *Lucarelli* v. *State*, 16 Conn. App. 65, 546 A.2d 940 (1988), in which a correction officer was allowed to collect full salary benefits for an injury that was not related to a special hazard inherent in his job. The amendment added the second prong of the test now used in § 5-142 (a), which requires an injury to be the direct result of such a special hazard.