CASE NO. 5550 CRB-8-10-5 CLAIM NO. 800158941	: COMPENSATION REVIEW BOARD
SANDRA LAMOTHE CLAIMANT-APPELLANT	: WORKERS' COMPENSATION COMMISSION
v.	: OCTOBER 12, 2011

CITIBANK, N.A.
EMPLOYER

and

TRAVELERS PROPERTY & CASUALTY
INSURER
RESPONDENTS-APPELLEES

APPEARANCES

The claimant was represented by Enrico Vaccaro, Esq., Law Offices of Enrico Vaccaro, 1057 Broad Street, Bridgeport, CT 06604.

The respondents were represented by Lisa A. Bunnell, Esq., Montstream & May, L.L.P., 655 Winding Brook Drive, P.O. Box 1087, Glastonbury, CT 06033.

This Petition for Review from the April 28, 2010 Finding and Award of the Commissioner acting for the Eighth District was heard on February 25, 2011 before a Compensation Review Board panel consisting of Commissioners Scott A. Barton, Christine L. Engel and Peter C. Mlynarczyk.

OPINION

SCOTT A. BARTON, COMMISSIONER. The claimant has petitioned for review from the April 28, 2010 Finding and Award of the Commissioner acting for the Eighth District. We find no error and accordingly affirm the decision of the trial commissioner.[1]

The following factual background is pertinent to our review. Noting that the respondents had contested the compensability of the claim "[f]rom the outset," Findings, ¶ 3, the trial commissioner concluded that the claimant was "undisputedly" employed by the respondent on August 31, 2007. Findings, ¶ 1. The claimant testified at trial that she sustained her injuries while working at a bank branch that had been recently constructed in Glastonbury, Connecticut. Margaret Roth, a co-worker of the claimant, also testified at trial that the claimant was working inside the Glastonbury branch for the respondent employer on the date in question.

However, the respondents called as a witness Reeta Gulati, the claimant's supervisor and the manager of the Glastonbury branch, who testified that the claimant could not have been injured as claimed because the branch in question was not yet open to the public or to employees on August 31, 2007. Rather, Gulati testified, she had instructed the claimant and several other bank employees to hand out fliers in the neighborhoods near the branch office on that date. Gulati also testified that the claimant never informed her that she had sustained a work-related injury on August 31, 2007 and that Gulati did not learn of the claimant's alleged injury until November 2007.[2] Gulati

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[1] We note that oral argument in this matter was postponed during the pendency of the proceedings.
[2] The trier took administrative notice of the claimant's notice of claim ("Form 30C") filed on December 6, 2007 and the respondents' denial of claim ("Form 43") filed on December 17, 2007.

indicated that a user maintenance report entered into evidence purporting to show that several employees had logged onto the employer's network on August 31, 2007 using the identification number of the Glastonbury branch did not demonstrate that the branch was open on that date because employees could have used the Glastonbury branch identification number to log onto the report from remote locations. See Claimant's Exhibit E.

On March 31, 2010, respondents filed proposed findings with the Workers' Compensation Commission wherein they accepted compensability of the claimant's injury of August 31, 2007 and indicated they would issue a voluntary agreement accordingly. The trier concluded that the central issue of whether the claimant sustained a work-related injury on the date and at the location alleged by the claimant, which would have essentially required a determination of the credibility of the witnesses, had been resolved by the tendering of a voluntary agreement. The trier also determined that the claimant had failed to establish that the respondents had unreasonably contested the claim and declined to award the interest and attorneys' fees sought by the claimant.

The claimant has instituted this appeal based on two claims of error. First, the claimant argues that the trier's failure to enter a written award of compensability despite the respondents' proffer of a voluntary agreement constituted error. Second, the claimant avers that the trier erred in concluding that the claimant failed to establish that the respondents unreasonably contested her claim.

We note at the outset that the respondents have filed a Motion to Dismiss this appeal based on the claimant's failure to file a timely Reasons of Appeal, or a motion for

an extension of time for same, pursuant to § 31-301-2 C.G.S.[3] Our review of the record indicates that although the claimant filed a timely Petition for Review on May 3, 2010, the claimant's Reasons of Appeal were not filed until August 10, 2010, nearly three months after the statutory deadline of May 13, 2010. The respondents concede that § 31-301-2 C.G.S. "does not specifically provide for the dismissal of an appeal as a result of the late filing of Reasons of Appeal…." Appellees' Motion to Dismiss Appeal, p. 2. However, they also maintain that "a dismissal is authorized by the provisions in C.G.S. § 31-301(a), which states that the procedure in appealing from an award of the compensation commissioner shall be the same as the procedure employed in an appeal from the superior court to the supreme court." Id., *citing* Sager v. GAB Business Services, Inc., 11 Conn. App. 693, 696 (1987).[4]

There is no question that "this board has discretion to dismiss an appeal for failure to prosecute with due diligence, which includes the failure of a party to file a brief on time." Walter v. Bridgeport, 5092 CRB-4-06-5 (May 16, 2007), *citing* Reaves v. Brownstone Construction, 3930 CRB-4-98-11 (November 30, 1999). Such powers comport with this forum's adherence to the fundamental tenets of due process espoused by the Fourteenth Amendment of our Federal Constitution.[5] However, in Sager, supra,

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[3] Sec. 31-301-2 C.G.S. (Rev. to 2007) states: "Within ten days after the filing of the appeal petition, the appellant shall file with the compensation review division his reasons of appeal. Where the reasons of appeal present an issue of fact for determination by the division, issue must be joined by a pleading filed in accordance with the rules applicable in ordinary civil actions; but where the issue is to be determined upon the basis of the finding of the commissioner and the evidence before him, no pleadings by the appellee are necessary."

[4] The respondents also point out that "[t]he claimant-appellant is not appearing pro se, and is represented by competent counsel. Consequently, the failure to comply with the statutory requirements of C.G.S. § 31-301-2 should result in a dismissal of the appeal filed by the claimant-appellant." Appellees' Motion to Dismiss Appeal, p. 3. While this board obviously does not countenance non-compliance with procedural regulations, respondents do not provide, and we are not aware of, any authority which would support their claim that this appeal should be dismissed because the claimant was represented by competent counsel.

[5] U.S. Const., amend. XIV, § 1 states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof; are citizens of the United States and of the state wherein they reside. No state shall

our Appellate Court determined that this board's dismissal of an appeal on procedural grounds is essentially governed by the Supreme Court rules of procedure, and "the reasons for appeal required by § 31-301-2 … serve an identical function as a preliminary statement of issues." Id., at 697. As such, "[w]here an appellant fails to file timely a preliminary statement of issues as required by Practice Book § 4013(a)(1) [now Practice Book § 63-4], the appeal is voidable." Id. "The appellee may then move to dismiss the appeal in accordance with Practice Book § 4056 [now Practice Book § 66-8]," id., but such a motion must be filed within the ten-day period following the expiration of the appellant's filing deadline. "Where an appellee fails to move for dismissal within the ten day period, the motion to dismiss comes too late and the defect is deemed waived." Id.

In the instant matter, our review of the file indicates that the respondents' Motion to Dismiss was filed on August 17, 2010, well after the expiration of the ten-day deadline which began when the claimant failed to file her Reasons for Appeal by May 13, 2010. As a result, consistent with the court's reasoning in Sager, we find the respondents' waived any alleged defect arising from the claimant's late filing of her Reasons for Appeal. Moreover, the claimant ultimately did file a comprehensive brief from which the respondents were able to fashion their own responsive brief which was also timely filed. The respondents have failed to explain, and we are unable to discern, how the late filing of the Reasons of Appeal may have prejudiced their ability to defend this claim. As such, we decline to dismiss the claim on the basis of a procedural deficiency. As this board has previously remarked, "[w]e believe some indicia of prejudice to the respondents should generally exist before we dismiss a claim initiated in a timely manner, as the sole dispute

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make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

herein is over the adequacy of the pleadings." Vitoria v. Professional Employment & Temps, 5217 CRB-2-07-4 (April 4, 2008).

We turn now to an examination of the underlying merits of the appeal, beginning with a recitation of the well-settled standard of deference 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). "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).

As mentioned previously herein, the claimant has claimed as error the trier's failure to enter a written award of compensability. Specifically, the claimant argues that the trier "erred in failing to enter a written award of compensability in favor of the claimant where this fact was judicially and conclusively admitted by the respondents and supported by the uncontroverted evidence." Appellant's Brief, p. 7. The claimant asserts that this failure resulted in a Finding and Award that is non-compliant with the provisions

of both § 31-278 C.G.S.[6] and § 31-300 C.G.S.[7] The claimant therefore contends:

> the trial commissioner abdicated his duty to ***determine*** the issue of compensability and render a written award on this issue in the Claimant's favor. It is apparent from even a cursory review of his writing that he clearly but mistakenly believed that the tendering of a voluntary agreement discharged him from his absolute duty to not only hear, but determine this claim." (Emphasis in the original.)

Appellant's Brief, p. 7.

We do not find that any such abdication occurred.

In Schroeder v. Triangulum Associates, 259 Conn. 325 (2002), our Supreme Court "[observed] that General Statutes § 31-296 specifically authorizes a voluntary agreement with regard to compensation, and provides that such an agreement is to be binding upon the parties as an award if it is approved by a workers' compensation

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[6] Section 31-278 C.G.S. (rev. to 2007) states, in pertinent part: "Each commissioner shall, for the purposes of this chapter, have power to summon and examine under oath such witnesses, and may direct the production of, and examine or cause to be produced or examined, such books, records, vouchers, memoranda, documents, letters, contracts or other papers in relation to any matter at issue as he may find proper, and shall have the same powers in reference thereto as are vested in magistrates taking depositions and shall have the power to order depositions pursuant to section 52-148…. Each commissioner shall hear all claims and questions arising under this chapter in the district to which the commissioner is assigned and all such claims shall be filed in the district in which the claim arises, provided, if it is uncertain in which district a claim arises, or if a claim arises out of several injuries or occupational diseases which occurred in one or more districts, the commissioner to whom the first request for hearing is made shall hear and determine such claim to the same extent as if it arose solely within his own district...."

[7] Section 31-300 C.G.S. (Rev. to 2007) states, in pertinent part: "As soon as may be after the conclusion of any hearing, but no later than one hundred twenty days after such conclusion, the commissioner shall send to each party a written copy of the commissioner's findings and award…. If no appeal from the decision is taken by either party within twenty days thereafter, such award shall be final and may be enforced in the same manner as a judgment of the Superior Court…. In cases where, through the fault or neglect of the employer or insurer, adjustments of compensation have been unduly delayed, or where through such fault or neglect, payments have been unduly delayed, the commissioner may include in the award interest at the rate prescribed in section 37-3a and a reasonable attorney's fee in the case of undue delay in adjustments of compensation and may include in the award in the case of undue delay in payments of compensation, interest at twelve per cent per annum and a reasonable attorney's fee…. In cases where there has been delay in either adjustment or payment, which delay has not been due to the fault or neglect of the employer or insurer, whether such delay was caused by appeals or otherwise, the commissioner may allow interest at such rate, not to exceed the rate prescribed in section 37-3a, as may be fair and reasonable, taking into account whatever advantage the employer or insurer, as the case may be, may have had from the use of the money, the burden of showing that the rate in such case should be less than the rate prescribed in section 37-3a to be upon the employer or insurer. In cases where the claimant prevails and the commissioner finds that the employer or insurer has unreasonably contested liability, the commissioner may allow to the claimant a reasonable attorney's fee…."

commissioner."[8] Id., at 338. A review of the exact language of the statute indicates that the contemplated agreement between the parties is "in regard to compensation," and the form itself merely sets out the specifics of the claimed injury and the parameters under which the claimant will be paid workers' compensation benefits. While there is no question that a voluntary agreement generally signals an employer's acceptance of liability for a claimed injury, it is significant for our purposes that this agreement between the parties can and often does occur separate and apart from the litigation process. As our Appellate Court remarked in Mora v. Aetna Life & Casualty Ins. Co., 13 Conn. App. 208, 212-213 (1988):

> There are only three ways to fix an employer's liability: first, by the employer's failure to contest liability within twenty days of receiving notice of the injury as required by General Statutes 31-297(b)…; second, by the commissioner's approval of a written voluntary agreement entered into by the employer and employee pursuant to General Statutes 31-296; and third, where the employer contests liability and the parties fail to reach an agreement, by the adjudication of the claim by the workers' compensation commissioner and the granting of an award to the employee.[9] (Internal citations omitted.)

Id., at 212-213.

Furthermore,

> [t]he provisions of General Statutes, § 5247 [the precursor to §31-296], are sufficiently broad to include not only agreements as to the amount and terms of compensation where a compensable injury is admitted, but also where there is a dispute as to the

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[8] Section 31-296 C.G.S. (Rev. to 2007) states, in pertinent part: "If an employer and an injured employee, or in case of fatal injury his legal representative or dependent, at a date not earlier than the expiration of the waiting period, reach an agreement in regard to compensation, such agreement shall be submitted in writing to the commissioner by the employer with a statement of the time, place and nature of the injury upon which it is based; and, if such commissioner finds such agreement to conform to the provisions of this chapter in every regard, the commissioner shall so approve it…."

[9] It should be noted that Public Act 91-32 was enacted for the purpose of making technical revisions to the Workers' Compensation Act and was not intended to effect substantive changes. Although the Public Act technically deleted § 31-297(b), the substance of § 31-297(b) was codified at § 31-294(c) C.G.S. See Graham v. State/Univ. of Conn. Health Center, 4418 CRB-6-01-7 (July 23, 2002).

> existence of such a claim. An agreement such as the latter is as much within the beneficent purpose of the act as the former.

Wallace v. Lux Clock Co., 120 Conn. 280, 284 (1935).

Given, then, that a voluntary agreement can be proffered in lieu of litigation, we are somewhat perplexed at the claimant's insistence that the trial commissioner should have proceeded regardless to rule on the issue of compensability. The claimant seems to be laboring under the assumption that the respondents' proffer of a voluntary agreement conclusively establishes that the trial commissioner would have found the claimant's injury compensable based on his own independent review of the record. We are not so persuaded; nor are we inclined to accept the claimant's theory that the voluntary agreement constitutes a judicial admission. Such a finding would not only undercut the discretion of the trial commissioner to determine the appropriate weight to be accorded evidentiary submissions but could also potentially exercise a chilling effect on respondents' willingness to proffer voluntary agreements. In Jones v. Connecticut Children's Medical Center Faculty Practice Plan, 5420 CRB-1-09-1 (July 1, 2010), *aff'd*, 131 Conn. App. 415 (2011), this board remarked that "while the respondents' proffer of the permanency voluntary agreements could be construed in light of a 'judicial admission,' we are reluctant, given the overall tenor of the trial commissioner's findings in this matter, to set a precedent that would 'hold the respondents' feet to the fire' in such a fashion." Id. Moreover, in Peiter v. Degenring, 136 Conn. 331 (1949), our Supreme Court stated:

> … such an admission should ordinarily be adopted by a trial court in the decision of a case. It is not, however, necessarily binding upon the court, and under the circumstances of a particular case the court may be justified in disregarding it. This follows from the fact, which we have frequently stated, that a judge is not a mere

> umpire in a forensic encounter but a minister of justice. (Internal citations omitted.)

Id., at 337-338.

Obviously, when a dispute arises regarding the terms of a voluntary agreement which the parties are unable to resolve, or if the terms of the agreement fail to pass muster with the trial commissioner, intervention by the trial commissioner and/or litigation is required. In the instant matter, we do note that as of the dates of submission of the parties' briefs in this matter, August 16, 2010 and September 7, 2010 respectively, the voluntary agreement had been neither signed by the claimant nor submitted to the trial commissioner for his approval. Appellant's Brief, p. 8; Appellees' Brief, p. 5. Given, then, that the claimant did not sign the voluntary agreement proferred by the respondent, we can reasonably infer that the claimant did not accept its terms. However, the claimant seems to be suggesting that the trial commissioner is imposing the terms of the voluntary agreement on her despite the claimant's failure to agree to those terms. In light of the fact that there were formal proceedings before the trial commissioner pertaining to issues arguably incorporated in the voluntary agreement, the claimant's basis for challenging the voluntary agreement could have been considered by the trial commissioner. Such a challenge did not occur and, in essence, the trial commissioner was permitted to accord whatever weight he deemed appropriate to the unsigned voluntary agreement. In light of the foregoing analysis, we therefore decline to accompany the claimant in her quest to potentially "snatch defeat from the jaws of victory." The trial commissioner's findings

relative to the adequacy of the voluntary agreements in resolving the issue of compensability in this matter are affirmed.[10]

We turn next to the claimant's second claim of error. The claimant avers that the trier's determination "that the claimant had failed to meet her burden of proof that the respondents unreasonably contested her claim, when this conclusion is unsupported by any findings of fact, is arbitrary, capricious, patently unreasonable, and directly contraverted by the evidence." Appellant's Brief, p. 8. The claimant contends that "[a] perusal of the Respondents' actions in the defense of this claim reveals a shocking pattern of malfeasance, obstruction and delay which, if not sanctioned, will encourage such conduct to continue not only in this case, but in matters which other respondents have or will have before the commission." Id., at 9. The claimant also argues that the causation report of Andrew Wakefield, M.D.,

> coupled with the facts that the Claimant was asymptomatic prior to this fall, had been working full time with no physical restrictions for approximately 6 years, had not had any medical treatment for her low back for almost a year and a half, and is a highly credible witness conclusively proved that her injuries arose out and in the course of her employment with the Respondent CitiBank N.A. on August 31, 2007.[11]

Id., at 10.

The claimant essentially excoriates the respondents' defense of the claim, stating,

> not only did the Respondents delay accepting responsibility for this claim for three years through the completion of a formal hearing,

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[10] We note that on August 16, 2010, the claimant filed a Motion for Judgment Pursuant to § 31-301 C.G.S. seeking unpaid medical and indemnity benefits. In light of our discussion herein regarding the respondents' proffer of a voluntary agreement, the Motion for Judgment is denied.

[11] In his report of March 13, 2008, Dr. Wakefield states, "[i]t is my opinion that the episode on August 31st was a significant contributor to her back pain and I believe within reasonable medical probability was the causal factor for the onset of her new symptoms, worsening back pain, and requirement for surgery on 12/03/07." Claimant's Exhibit C.

> but their contest of this claim is clearly in bad faith and without reason, as exemplified by their obviously intentional failure to produce relevant documents in discovery as ordered by the commissioner, their willful violation of the commission's Section 31-278 order, and their presentation at the formal hearing of testimony which they clearly knew before presenting it was patently false, since it was contradicted by their own business and computer records as well as by the testimony of another employee.

Id., at 11.

In Cirrito v. Resource Group Ltd. of Conn., 4248 CRB-1-00-6 (June 19, 2001), this board had opportunity to review the procedures for properly invoking § 31-300 C.G.S. and stated the following:

> … there are four separate circumstances in which the trial commissioner is empowered to penalize an employer or insurer. Where adjustments or payments of compensation have been unduly delayed due to the fault or neglect of the employer or insurer, the commissioner may award interest and a reasonable attorney's fee. Where adjustments or payments of compensation have been delayed in the absence of fault by the employer or insurer, the commissioner may allow interest "as may be fair and reasonable." Where the claimant prevails in an action and the trier finds that the employer or insurer has unreasonably contested liability, the commissioner may allow to the claimant a reasonable attorney's fee. Finally, where total or partial incapacity payments are discontinued without (1) the issuance of proper notice as required by § 31-296 and (2) a written approval of such cessation by the commissioner, the trier is *required* to award the claimant a reasonable attorney's fee and interest on the prematurely halted or reduced payments. (Emphasis in the original.)

Id.

"An attorney's fee award for unreasonable contest is made when, after hearing the parties' arguments and reviewing the evidence, the trier decides that the employer or insurer lacked a reasonable basis upon which to contest the claimant's request for benefits." Duffy v. Greenwich Board of Education, 4930 CRB-7-05-3 (May 15, 2006), *citing* Bailey v. State/Greater Hartford Community College, 3922 CRB-2-98-10

(November 30, 1999), *aff'd in part, rev'd in part*, 65 Conn. App. 592 (2001). This board has also "repeatedly held that whether to award attorney's fees and interest for unreasonable delay and/or unreasonable contest pursuant to § 31-300 is a discretionary decision to be made by the trial commissioner." McMullen v. Haynes Construction Co., 3657 CRB-5-97-7 (November 12, 1998). Our scope of review of such determinations is therefore sharply constrained, limited as it is to whether the trial commissioner's decision constituted an abuse of discretion, which "exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided based on improper or irrelevant factors." In re Shaquanna M., 61 Conn. App. 592, 603 (2001).

Turning our analysis to the matter at bar, we note at the outset that the claimant did not file a Motion to Correct; as a result, "we must accept the validity of the facts found by the trial commissioner and this board is limited to reviewing how the commissioner applied the law." Corcoran v. Amgraph Packaging, Inc., 4819 CRB-2-04-6, 4948 CRB-2-05-5 (July 26, 2006). That being said, we concede that the trial commissioner did not provide a bounty of factual findings in support of his dismissal of the claim for undue delay. Rather, the trier found the claimant was an employee at the time of the alleged injury, summarized the testimony offered by both the claimant and the respondents' witness, Reeta Gulati, and noted that the respondents, in their proposed findings, had accepted compensability of the claimant's injuries and tendered a voluntary agreement. The trier therefore concluded the issue of compensability was moot and the claimant had not met her burden in establishing that the respondents had unduly contested her claim.

However, having thoroughly examined the underlying record, we find it may be reasonably inferred that the trier recognized that the respondents did in fact have the requisite "reasonable basis upon which to contest the claimant's request for benefits." Duffy, supra. For instance, relative to her medical history, the claimant testified that in 1997, while working for another employer, she sustained an injury to her back that ultimately required three surgeries. November 18, 2009 Transcript, pp. 24-25. The claimant returned to full duty without restrictions in 2001 but remained under the care of Dr. Wakefield, whom she last saw in April 2006, approximately sixteen months prior to the claimed date of injury. Id., at 27-28. On April 4, 2006, Dr. Wakefield discharged the claimant from his care and assigned a permanent partial disability rating of twenty-three percent (23%). Id., at 42-43. See also Respondents' Exhibit 2. The claimant testified that Dr. Wakefield also told her she might have chronic pain which would require intermittent pain medication for the rest of her life. Id., at 45; Respondents' Exhibit 2. See also Claimant's Exhibit C. Prior to her release from Dr. Wakefield's care, the claimant was also involved in a motor vehicle accident in 2005 which resulted in physical therapy for her knees and neck.[12] Id., at 65-66. In addition, in February or March 2007, the claimant reported to her primary care physician a "flare-up" of back pain after shoveling snow which resolved with use of a heating pad. Id., at 48.

The record before us is similarly complex relative to the circumstances surrounding the injury which is the subject of the instant appeal. The claimant testified that on the morning of August 31, 2007, she tripped and fell while attempting to put a box on a shelf in the storage room at the Glastonbury branch, but there were no witnesses

[12] Andrew Wakefield's report of January 24, 2006 references the claimant's motor vehicle accident but states that the claimant's lower back and neck pain since the accident is muscular in origin and the lumbar spine at L4-5 seemed to be stable with intact instrumentation. Respondents' Exhibit 1.

to her fall. Id., at 29-30. The claimant stated that although she was in pain, she thought she had bruised her back and did not tell anyone what had happened. Id., at 30-31. The claimant's time sheet indicates that she worked the entire day on August 31, 2007, id., at 36, and she testified that although she went to lunch with her co-workers on that date, she did not tell anybody she was injured. Id., at 54. The claimant testified that she did not go to the emergency room, id., at 52, waited "a couple weeks" to call the doctor, id., at 53-54, and didn't get in to see Sean Brennan (Dr. Wakefield's Physician's Assistant) until October 18, 2007, at which time Brennan took her out of work and referred her for additional diagnostic studies. Id., at 54. See also Respondents' Exhibit 3. The claimant never directly notified her supervisors that she had sustained a work-related injury, id., at 52, 54, and indicated that even though she told Margaret Roth that she was having back surgery, she did not tell her that she had fallen at work.[13] Id., at 62. The claimant charged her doctors' visits to her group insurance, id., at 63; began collecting short-term disability as of October 16, 2007, id., at 52, Claimant's Exhibit A; and did not alert her employer regarding a workers' compensation claim until she filed her Form 30C on November 28, 2007, five days before the surgery scheduled on December 3, 2007. Id., at 63.

With regard to the medical reports in evidence, we note that Sean Brennan's report of October 18, 2007 is silent as to a workers' compensation injury and merely notes that the claimant "reports for the last 2 months having a slow steady increasing pain in the right buttock, hamstring, gastrocnemius to the soles of both feet. The patient states on Monday she had an acute flare up necessitating her to see her primary care provider."

[13] Reeta Gulati also testified that the claimant told her she was having back surgery but did not say it was work-related. November 8, 2009 Transcript, p. 90.

Respondents' Exhibit 3. The report from a radiological study performed by Jefferson Radiology on October 18, 2007 indicates that the claimant's "[a]lignment remains anatomic and the hardware is intact. No interval change is noted as compared with 4-4-06." Claimant's Exhibit C. In fact, the first reference to a fall does not occur until Dr. Wakefield's report of November 1, 2007 which also recites the claimant's report of increasing pain over the prior two months. Id. However, even in this report Dr. Wakefield does not indicate that the claimant reported the fall was work-related.

Having conducted the foregoing analysis of the record in this matter, we would respectfully submit that, claimant's forceful arguments to the contrary notwithstanding, the factual underpinnings of this claim were something less than straightforward. We note that in support of her claim for interest and attorneys' fees, the claimant points to Colon v. CEI Bottling & Distribution Co., 4470 CRB-3-01-12 (November 12, 2002). However, as the claimant herself admits, this case can be sharply distinguished from the instant matter, in that two co-workers witnessed the Colon claimant's injury and heard her scream when injured, supervisors on the assembly line knew that she had been injured, and the claimant's employer transported her to the emergency room on the following day when she reported to work and could not finish her shift. The Colon respondents attempted to impeach the claimant's credibility because of confusion regarding the actual date of injury, a defense which ultimately proved unavailing. Upon review, we upheld the trier's findings of undue delay, stating that

> [a] reasonable person could readily conclude that the respondents were informed of the injury on August 6, 1998, at which point they provided the claimant with medical care. Witnesses were present to corroborate this incident, and a contemporaneous medical record from Yale-New Haven Hospital was created. Thereafter, one could reasonably infer that any steps taken to disclaim the

> occurrence of this injury were nothing more than attempts by the employer to evade responsibility by trying to take advantage of the claimant's error in listing her date of injury as August 12, 1998 on her original Form 30C.

Id.

The instant claimant also points to Anglero v. State/Dept. of Administrative Services, 3457 CRB-8-96-11 (March 5, 1998) in support of her allegations of error relative to the trier's failure to find unreasonable contest. In Anglero, we upheld the trial commissioner's award of interest and attorneys' fees in a matter in which the parties reached an agreement as to benefits due the claimant for certain time periods but left other time periods left unresolved pending the introduction of additional evidence. The trial commissioner, having found "that the respondent's failure to pay benefits (which they ultimately agreed were payable) in a timely manner had caused the claimant significant financial hardship," id., awarded interest and attorneys' fees which this board upheld because "the facts found by the commissioner do not suggest that there was a strong basis for denying the claimant benefits since February 1995." Id.

The instant claimant draws our attention to our observation in Anglero that:

> [e]mployers should not delay serious attempts to resolve claims until the formal hearing stage of the process is reached…. It is very likely that the commissioner realized that in this case, and accordingly penalized the respondent by awarding the claimant additional sums on account of the undue delay this 'wait until the last minute policy' caused him. We cannot say that this penalty was unwarranted.

Id.

We stand by this remark, as it is consistent with the well-settled axiom that "the Workers' Compensation Act encourages the settlement of claims as early as possible." Id. However, it should be noted that we were prompted to make this observation by the

Anglero respondent's admission "that counsel for the state does not become involved in the claim resolution process until 'matters are scheduled for preformal hearings.'" Id. In response, we reminded the respondent that "informal hearings are not simply held as warm-up exercises," id., and then stated the language quoted by the instant claimant, but with the following additional remark inserted where the instant claimant placed her ellipsis: "Yet, it appears that the respondent here has chosen to downplay the importance of the informal stages of administering its workers' compensation claims." Id. Given that the record before us provides no support for the inference that the instant respondents have adopted such a cavalier approach to the procedural requirements of the workers' compensation forum, we are disinclined to find our own remarks in Anglero persuasive authority for reversing the trial commissioner's dismissal of the instant claim of unreasonable contest. In light of the claimant's medical history, the lack of clarity in the medical evidence, and the circumstances surrounding the claimant's delay in reporting the injury, including her failure to inform her supervisors directly, we find it may be reasonably inferred that the respondents had a reasonable basis to contest this claim.

Finally, we examine the circumstances surrounding the respondents' failure to produce Reeta Gulati for a deposition despite an order from Commissioner Walker pursuant to § 31-278 C.G.S. The claimant contends that the respondent's "willful disobedience" of the trial commissioner's order constitutes yet another manifestation of the respondents' unreasonable contest of the claim. Our review of the file indicates that the trial commissioner's order to depose Gulati within sixty days entered on April 9, 2009. The deposition never occurred and claimant's counsel was not given the opportunity to cross-examine Gulati until the formal hearing of November 8, 2009.

Claimant's counsel stated at trial that he noticed the deposition three times prior to Commissioner Walker's order and once again afterwards. November 8, 2009 Transcript, pp. 10-11. Counsel for the respondents indicated at trial that the first deposition was cancelled following the respondents' request for a protective order. Id., at 13. The parties then had an informal hearing before the instant trier on November 24, 2008, who recommended the deposition be conducted before the end of the year. Id. Respondents' counsel stated that following that hearing, she sent correspondence to claimant's counsel advising him of dates the witness would not be available but never heard back from claimant's counsel until she received a deposition notice for January 20, 2009, on which date respondents' counsel was already scheduled for a formal hearing. Id., at 13-14. The deposition was ultimately re-scheduled for May 27, 2009, on which date the witness cancelled due to illness. Id., at 14, 91. Respondents' counsel indicated that following the cancellation, her office contacted claimant's counsel three times to set up another date but he never responded to those requests. Id., at 14.

We are naturally troubled by the foregoing history of the "deposition that never was," particularly as the failure of the respondents' to produce Gulati constituted a direct violation of a trial commissioner's order. It should come as no surprise that this tribunal is inclined to view with an extremely jaundiced eye any litigation strategy which appears to flout its authority. However, we also note that in the instant matter, the initial deposition was cancelled because the respondents felt compelled to seek a protective order "based upon an overbroad discovery request which would have included documents that were privileged and/or work product." Id., at 19; Appellees' Brief, p. 13. In addition, on at least one occasion, claimant's counsel apparently went ahead and

scheduled a deposition without checking beforehand with the respondents' office to ascertain availability. While there is no per se requirement that parties who are attempting to schedule depositions coordinate their efforts beforehand, common sense would seem to dictate that a simple "courtesy call" prior to noticing the deposition might have served to avoid at least some of the delays which occurred in this matter. As we observed in Millette v. Wal-Mart Stores, Inc., 4429 CRB-5-01-8 (July 19, 2002), "[t]his tribunal has repeatedly explained that the workers' compensation system encourages full disclosure and cooperation among the parties during the adjudication process. We believe both sides would have benefited from greater cooperation and adherence to the Workers' Compensation Commission's policy regarding discovery." (Internal citations omitted.) Id. As such, while we would strongly caution both the claimant and the respondents that it is the expectation of this tribunal that parties will make every reasonable effort to fully comply with the orders of the trial commissioners, we also find that a review of the totality of the circumstances surrounding this issue provides support for the reasonable inference that the trial commissioner simply did not find meritorious the claimant's allegations of "willful disobedience" or unreasonable delay on the part of the respondents relative to the scheduling of Gulati's deposition.

In a similar vein, the claimant also alleges that because the respondents failed to "produce the Glastonbury branch audit log for August 31, 2007 which would unequivocally establish whether the Claimant was working there on that date, an adverse inference must be drawn against them for this failure to produce evidence in their possession which, if produced, would be expected to be favorable to them." Appellant's

Brief, p. 4, *citing* Grabowski v. Fruehauf Trailer Corp., 2 Conn. App. 167 (1984).[14] The respondents have offered no explanation as to why this document was not provided to the claimant.[15] However, as this board noted in Evans v. Shelton, 3108 CRB-4-95-6 (May 2, 1997), *dismissed for lack of final judgment*, A.C. 17196 (1998), relative to the Secondino rule, the issue of an adverse inference:

> generally arises in cases where jury instructions are at issue… When a trial commissioner is acting as the fact-finder, the situation is different because no jury instructions are available for an appellate body to review. Nowhere in our law does it say an adverse inference is ever *required* in a given situation; thus, if the trier declines to draw an adverse inference from the absence of a particular witness, it would likely not be discussed in the written decision. (Emphasis in the original.)

Evans, supra.

Given that our analysis in Evans relative to the Secondino rule can logically be extended to Grabowski, we conclude that even if the respondents' defense had rested as the claimant alleges, solely on the issue of whether the claimant was actually working at the Glastonbury branch on the date in question, the trial commissioner still was under no obligation to draw the adverse inference sought by the claimant. Moreover, as the

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[14] In Secondino v. New Haven Gas Co., 147 Conn. 672 (1960), our Supreme Court, quoting Ezzo v. Geremiah, 107 Conn. 670 (1928), stated, "[t]he failure of a party to produce a witness who is within his power to produce and who would naturally have been produced by him, permits the inference that the evidence of the witness would be unfavorable to the party's cause." Secondino, supra, at 675, *quoting* Ezzo, supra, at 677. The Secondino court went on to explain that "[t]here are two requirements for the operation of the rule: The witness must be available, and he must be a witness whom the party would naturally produce…. A witness who would naturally be produced by a party is one who is known to that party and who, by reason of his relationship to that party or to the issues, or both, could reasonably be expected to have peculiar or superior information material to the case which, if favorable, the party would produce." (Internal citations omitted.) Secondino, supra. Thereafter, in Grabowski v. Fruehauf Trailer Corporation, 2 Conn. App. 167 (1984), our Appellate Court stated, "[t]he Secondino rule applies with equal vigor to a failure to produce a material document into evidence. The failure to produce a material document may permit the jury to draw an unfavorable inference if the required conditions set forth under the Secondino rule are met." Grabowski, supra, at 173, *citing* Maciejewska v. Lombard Bros., Inc., 171 Conn. 35, 43, (1976); Wilson v. Griswold, 79 Conn. 18, 22 (1906).

[15] We note that the claimant was provided with the August 31, 2007 user maintenance report for the Glastonbury branch which, according to the claimant, "established that there were employees working in the Glastonbury branch on that date." Appellant's Brief, p. 2. See also Claimant's Exhibit E.

analysis herein indicates, it may be reasonably inferred that the trier found the respondents' defense was predicated on a number of factors apart from the issue of the claimant's whereabouts on the claimed date of injury and these factors afforded the respondents the right to contest the claim. Nevertheless, we would strongly caution the respondents that the prompt delivery of discovery documents which are not the subject of a protective order is not optional.

Having found no error, the April 28, 2010 Finding and Award of the Commissioner acting for the Eighth District is accordingly affirmed.

Commissioners Christine L. Engel and Peter C. Mlynarczyk concur in this opinion.