CASE NO. 5765 CRB-7-12-7 : COMPENSATION REVIEW BOARD
CLAIM NO. 700143741

STANLEY F. ANTONOWICZ
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

: JUNE 19, 2013

BARDEN CORPORATION
EMPLOYER

and

TRAVELERS INDEMNITY COMPANY
INSURER
RESPONDENTS-APPELLANTS

and

DF&B PRECISION MANUFACTURING, INC.
ALTERNATE STAFFING SOLUTIONS
COMMERCE AND INDUSTRY COMPANY
EMPLOYERS

and

PEERLESS INSURANCE COMPANY
THE HARTFORD INSURANCE GROUP
CHARTIS CORPORATION
INSURERS
RESPONDENTS-APPELLEES

APPEARANCES:

The pro se claimant did not appear at oral argument.

The respondents Barden Corporation and Travelers Indemnity Company were represented by Timothy G. Zych, Esq., Law Offices of Cynthia M. Garraty, One Hamden Center, 2319 Whitney Avenue, Suite 4C, Hamden, CT 06518.

The respondents Alternate Staffing Solutions, Commerce and Industry Company and Chartis Corporation were represented by Lynn M. Raccio, Esq., Law Offices of Jack

Genovese, II, 200 Glastonbury Boulevard, Suite 301, Glastonbury, CT 06033.

The respondents DF&B and The Hartford Insurance Group were represented by Laurence P. McLoughlin, Esq., The Law Offices of David J. Mathis, 55 Farmington Avenue, Suite 500, Hartford, CT 06105.

The respondents DF&B and Peerless Insurance Company were represented by Marie E. Gallo-Hall, Esq., Montstream & May, LLP, PO Box 1087, Glastonbury, CT 06033-6087.

This Petition for Review from the June 25, 2012 Finding and Dismissal of the Commissioner acting for the Seventh District was heard February 15, 2013 before a Compensation Review Board panel consisting of Commissioners Charles F. Senich, Peter C. Mlynarczyk and Nancy E. Salerno.

OPINION

CHARLES F. SENICH, COMMISSIONER. The present case deals with the question of whether a respondent responsible for a compensable injury can seek "reverse apportionment" against a claimant's more recent employers. The respondents Barden Corporation ("Barden") and Travelers Indemnity Company ("Travelers") have appealed from a Finding and Dismissal dated June 25, 2012. In that decision, the trial commissioner concluded the statute lacked a mechanism to seek apportionment from a subsequent employer and that in the absence of a claim against those employers, the Commission lacked jurisdiction to enter such an award. After considering the facts of this case, and reviewing the applicable law, we do not find legal error by the trial commissioner. We affirm the Finding and Dismissal.

The commissioner reached the following findings of fact at the conclusion of the formal hearing. On December 28, 2003 and April 4, 2004, the claimant sustained

compensable injuries to his left elbow while working for Barden. Findings, ¶ 1. On May 2, 2006, the claimant sustained a compensable injury to his right shoulder while working for Alternative Staffing Solutions/Commerce and Industry Company, ("Alternative") which was insured by AIG/Chartis. Findings, ¶ 2. A July 7, 2006 MRI revealed a rotator cuff tear. The claimant had surgery to repair the tear on October 4, 2006. Findings, ¶ 3.[1] The claimant commenced full time employment with DF&B on May 14, 2007. On May 12, 2008, the claimant's treating physician, Dr. James W. Depuy, an orthopedic surgeon, reported that the claimant was in need of left elbow surgery and related the need for surgery to the 2004 date of injury.

Expert opinions were presented to the trial commissioner from Dr. William F. Flynn, Jr., who examined the claimant on behalf of Barden and Travelers, and from Dr. Daniel J. Mastella, who examined the claimant on behalf of DF&B and their carrier, Peerless Company ("Peerless"). Dr. Flynn attributed the need for the claimant's elbow surgery to repetitive trauma which was a result of overuse stemming from the previous right rotator cuff surgery. Dr. Flynn attributed 80% of the need for elbow surgery to the 2003 injury and the remainder to the claimant's subsequent repetitive work activities as a machinist post-right shoulder surgery. Dr. Mastella attributed the claimant's present symptoms to the 2003 injury and opined that the 2006 surgery and/or the alleged continuing repetitive trauma at work were not significant contributing factors to the underlying condition or need for treatment.

The trial commissioner noted that the claimant was not present for the formal hearing and had not filed a claim against either Alternative or DF&B for his elbow

[1] It appears that there may be scriveners' errors as to various dates cited in the Finding and Dismissal. As they are immaterial to resolving the issue at hand, we will deem these errors harmless, Risola v. Hoffman Fuel Company of Danbury, 5120 CRB-7-06-8 (July 20, 2007).

injuries. The commissioner also noted that Barden had not denied the elbow injury claim and had paid all benefits due from that injury.

Based on these factual findings the trial commissioner concluded that the claimant had not perfected a claim against Alternative or DF&B nor their insurance carriers pursuant to § 31-294c C.G.S. She reached this conclusion based on the fact the claimant had not filed a claim against these parties for his elbow injuries, nor had they provided medical treatment for the claimant's elbow; nor had the claimant requested a hearing regarding a claim against these parties. The trial commissioner also reached this conclusion of law (Conclusion, ¶ F) on the issue of apportionment.

> I find that pursuant to C.G.S. 31-299b, an employer can bring prior employer's into a pending action where the claimant has not filed a claim; however, this only applies retroactively. Although the last employer on the risk can bring in prior employers and/or insurers under the Workers' Compensation Act, there is no provision in the statute where a respondent can reach prospectively to seek apportionment from subsequent employers. Stevens v. Raymark Industries, Inc., 5215 CRB-4-07-4 (3/26/08).

As a result, the trial commissioner dismissed all claims against Alternative or DF&B. Barden and Travelers subsequently filed a Motion to Correct. This Motion to Correct sought to have the trial commissioner rule that the claimant's alleged repetitive trauma under subsequent employers terminated Barden's responsibility for the claimant's elbow injury. The Motion also added findings that Dr. Flynn's opinion on causation was credible and persuasive, and that this opinion supported finding subsequent employers liable for the claimant's injury. The trial commissioner denied this motion in its entirety and the present appeal ensued.

The respondents-appellants Barden and Travelers frame their appellate argument as follows. They argue that two issues were presented to the trial commissioner and the

commissioner failed to rule on the issue they presented. They argue that the commissioner should have determined whether Dr. Flynn established that the claimant had sustained a subsequent injury to his elbow. As the appellants view the record, this would absolve them of further liability for the claimant's elbow condition pursuant to the precedent in Hatt v. Burlington Coat Factory, 263 Conn. 279 (2003), which construed the terms of § 31-299b C.G.S. and § 31-349 C.G.S.[2] [3]

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[2] Section 31-299b C.G.S reads as follows:

Sec. 31-299b. Initial liability of last employer. Reimbursement. If an employee suffers an injury or disease for which compensation is found by the commissioner to be payable according to the provisions of this chapter, the employer who last employed the claimant prior to the filing of the claim, or the employer's insurer, shall be initially liable for the payment of such compensation. The commissioner shall, within a reasonable period of time after issuing an award, on the basis of the record of the hearing, determine whether prior employers, or their insurers, are liable for a portion of such compensation and the extent of their liability. If prior employers are found to be so liable, the commissioner shall order such employers or their insurers to reimburse the initially liable employer or insurer according to the proportion of their liability. Reimbursement shall be made within ten days of the commissioner's order with interest, from the date of the initial payment, at twelve per cent per annum. If no appeal from the commissioner's order is taken by any employer or insurer within twenty days, the order shall be final and may be enforced in the same manner as a judgment of the Superior Court. For purposes of this section, the Second Injury Fund shall not be deemed an employer or an insurer and shall be exempt from any liability. The amount of any compensation for which the Second Injury Fund would be liable except for the exemption provided under this section shall be reallocated among any other employers, or their insurers, who are liable for such compensation according to a ratio, the numerator of which is the percentage of the total compensation for which an employer, or its insurer, is liable and the denominator of which is the total percentage of liability of all employers, or their insurers, excluding the percentage that would have been attributable to the Second Injury Fund, for such compensation.

[3] The relevant section of § 31-349 C.G.S. reads as follows:

Sec. 31-349. Compensation for second disability. Payment of insurance coverage. Second Injury Fund closed July 1, 1995, to new claims. Procedure. (a) The fact that an employee has suffered a previous disability, shall not preclude him from compensation for a second injury, nor preclude compensation for death resulting from the second injury. If an employee having a previous disability incurs a second disability from a second injury resulting in a permanent disability caused by both the previous disability and the second injury which is materially and substantially greater than the disability that would have resulted from the second injury alone, he shall receive compensation for (1) the entire amount of disability, including total disability, less any compensation payable or paid with respect to the previous disability, and (2) necessary medical care, as provided in this chapter, notwithstanding the fact that part of the disability was due to a previous disability. For purposes of this subsection, "compensation payable or paid with respect to the previous disability" includes compensation payable or paid pursuant to the provisions of this chapter, as well as any other compensation payable or paid in connection with the previous disability, regardless of the source of such compensation.

We start our analysis of this case with a simple observation. The purpose of the Workers' Compensation Act is to provide compensation to **claimants** for work related injuries. In viewing the record of this case we notice the one party who is conspicuous by his absence is the claimant himself. This shortcoming creates jurisdictional and evidentiary challenges for the appellant and we are not satisfied they were overcome.

The hearing in question was prompted by a Form 43 filed by Travelers on November 5, 2008 alleging that the repetitive trauma injuries outlined in Dr. Flynn's report divested them of further obligations for the claimant's injuries. There is no evidence that the claimant filed a claim against any of his subsequent employers for his injuries, nor is there evidence in the record that the claimant had been furnished medical care for such an injury by his subsequent employers, nor had he placed a hearing request before these subsequent employers. Therefore, the claimant took no action consistent with § 31-294c C.G.S. to place his subsequent employers on notice that they might be responsible for a compensable injury.[4]

It is black letter law pursuant to Castro v. Viera, 207 Conn. 420, 426-427 (1988), that the burden is on the claimant to prove that their claim is within the jurisdiction of this Commission. We note that in Castro, the Supreme Court made clear that an injury must "arise out of and in the course of *that employment"* to fall within this Commission's jurisdiction. Id., 426. (Emphasis in original.) The claimant took no action to place his subsequent employers within the jurisdiction of this Commission. Since this Commission may only act according to its statutory limitations, see Discuillo v. Stone & Webster, 242

[4] The Appellate Court has recently examined the need for a party asserting a new claim of injury to file a new Form 30C, see Callender v. Reflexite Corp., 137 Conn. App. 324, 335-338 (2012), *cert. granted*, 307 Conn. 915 (2012).

Conn. 570, 576 (1997), and since the claimant did not initiate a claim against those employers subsequent to Barden, we must ascertain if there is any statutory mechanism to confer jurisdiction.

The appellants argue that they did not seek "reverse apportionment" but only sought to utilize the precedent in Hatt, supra, to place the burden on a party responsible for a subsequent injury. We will proceed to examine whether Hatt provides a mechanism to obtain jurisdiction. In Hatt, the Supreme Court determined that this tribunal correctly concluded that § 31-349 C.G.S. abrogated common-law apportionment in cases involving a separate and distinct second injury. Id., 305-312. Needless to say, in order to apply Hatt, a condition precedent is that the trier of fact must determine a subsequent injury had occurred.[5] Based on the facts in this case, the appellants seek to reach this finding although there was an absence of notice to the subsequent employer from the claimant that a subsequent injury had occurred. We conclude the appellants failed in this burden for three reasons. First, the trial commissioner rejected the Motion to Correct seeking to establish a subsequent injury was responsible for the claimant's condition. In addition, we find that, standing on its own, the medical report was inadequate evidence to establish this fact. Finally, we note that the hearing notices for this case never cited § 31-349 C.G.S. as grounds for relief and therefore we question whether the issue was properly presented for adjudication.

[5] In addition, the subsequent injury must be materially related to the initial injury in order to apply Hatt v. Burlington Coat Factory, 263 Conn. 279 (2003), see Gill v. Become Barton, Inc., 5659 CRB-8-11-6 (June 1, 2012), *aff'd*, 142 Conn. App. 279 (2013). For a thorough discussion of the concept of causation and intervening cause, see Sapko v. State, 305 Conn. 360 (2012).

The appellants filed a Motion to Correct which sought to add findings that Dr. Flynn's medical opinion was credible and persuasive, and that opinion conclusively established that injuries subsequent to the claimant's employment at Barden were a substantial factor in his elbow ailments. The trial commissioner denied this Motion in its entirety. As we pointed out in Brockenberry v. Thomas Deegan d/b/a Tom's Scrap Metal, Inc., 5429 CRB-5-09-2 (January 22, 2010), *aff'd,* 126 Conn. App. 902 (2011) (Per Curiam), we must presume the trial commissioner did not find this evidence probative.

> When a party files a Motion to Correct this is an effort to bring factual evidence to the trial commissioner's attention in an effort to obtain a Finding that is consistent with such facts. When a trial commissioner denies such a motion, we may properly infer that the commissioner did not find the evidence submitted probative or credible. Vitti v. Richards Conditioning Corp., 5247 CRB-7-07-7 (August 21, 2008). On appeal, our inquiry is limited to ascertaining if this decision was arbitrary or capricious.

Id.

We do not find the denial of the appellant's Motion to Correct was arbitrary or capricious. In addition, even were we inclined to revisit the substance of Dr. Flynn's opinion, we would find that given the circumstances herein that standing on its own it would not be sufficient to sustain a Finding and Award. In reaching this conclusion, we look to the holding in DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132 (2009). The Supreme Court in DiNuzzo pointed out that "it is the plaintiff who bears the burden to prove an unbroken sequence of events that tied his injuries to the [defendant's conduct]." Id., 142. This argues against permitting another respondent to advance a claim on behalf of the claimant. In addition, in DiNuzzo, the Supreme Court pointed out that a medical opinion cannot be relied upon if it is not supported by the subordinate facts in the case, as " . . . there must be subordinate facts from which the conclusion that there

is a causal connection between the employment and the injury can be drawn. . . ." Id., 143.

In the present case, due to the absence of the claimant's testimony in any form from the proceeding, the record contains no subordinate facts concerning the claimant's work history subsequent to working for Barden. Under these circumstances we do not believe the trial commissioner would have been presented with a sufficient quantum of evidence to corroborate Dr. Flynn's opinion and support the appellant's position.[6] [7] For those reasons the appellants reliance on Kelly v. Dunkin' Donuts, 4621 CRB-4-03-2 (April 5, 2004), as grounds to reverse the Finding and Dismissal, is unpersuasive. The record in Kelly included testimony from the claimant as to the circumstances of her second injury. See Kelly v. Dunkin' Donuts, 4278 CRB-4-00-8 (November 1, 2001). The expert testimony in this case, unlike the expert testimony in Kelly, is uncorroborated by any testimony from the claimant.

Finally, we note that the various hearing notices in question, as well as the Form 43 dated October 29, 2009, do not cite the statute which it appears the appellants now rely on for relief. Appropriate notice as to issues before the tribunal is an essential element of a jurisdictionally sound finding. See Palm v. Yale University, 3923 CRB-3-98-10 (January 7, 2000). While such deficiencies may be cured as a result of arguments and evidence adduced at the hearing, DiDonato v. Greenwich/Board of Education, 5431

[6] Presumably the claimant could have been subpoenaed by one of the litigants to the formal hearing or to a deposition to provide factual testimony bearing on the issues in dispute. The appellants did not subpoena the claimant and we may only rule on the record as it stands.

[7] At oral argument counsel for the appellees pointed out there was no prior finding of the claimant sustaining a repetitive trauma injury in this case, therefore, there was no means to apply res judicata or collateral estoppel to this question. We concur with this analysis.

CRB-7-09-2 (May 18, 2010), or when a trial commissioner places an issue clearly before the litigants, Valiante v. Burns Construction Company, 5393 CRB-4-08-11 (October 15, 2009), we do not find this occurred in this case. Indeed, the formal hearing notices issued in 2010 and 2012 cited only § 31-299b C.G.S. as an issue under dispute.

Having concluded that § 31-349 C.G.S. does not offer a viable avenue to reverse the trial commissioner's decision we must examine whether her analysis of § 31-299b C.G.S. was correct. We agree with the trial commissioner's analysis. She concluded that this statute does not permit "reverse apportionment" against parties not originally part of the prior finding and award or voluntary agreement. She cited the analysis of that statute this tribunal performed in Stevens v. Raymark Industries, Inc. et al., 5215 CRB-4-07-4 (March 26, 2008), *appeal dismissed*, A.C. 29795 (June 26, 2008). We find our discussion of § 31-299b C.G.S. in Stevens on point.

> We also reject the appellant's argument that the trial commissioner erred by deciding not to find Mohegan Auto Parts a responsible party. From a jurisdictional point of view, we note that a Form 30C was never filed against Mohegan. The lack of a claim for benefits can deprive the Commission of subject matter jurisdiction. See Chambers v. General Dynamics Corp./Electric Boat Corporation, 4952 CRB-8-05-6 (June 7, 2006), *aff'd*, 283 Conn. 840 (2007). We also reject the argument that pursuant to statute, a hearing on apportionment was required. The statute in question is § 31-299b C.G.S. which states in part, "[i]f an employee suffers an injury or disease for which compensation is found by the commissioner to be payable according to the provisions of this chapter, the employer who last employed the claimant prior to the filing of the claim, or the employer's insurer, shall be initially liable for the payment of such compensation."
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> The situation herein is that the last employer who employed the claimant prior to the filing of his original claim was Raymark. The statute also is limited in application to "determine whether prior employers, or their insurers, are liable for a portion of such compensation and the extent of their liability." There is no provision in this statute where a respondent can reach

> prospectively to seek apportionment from *subsequent* employers; rather than *prior* employers. We must presume the General Assembly intended this difference to exist. See § 1-2z C.G.S. and Verrinder v. Matthew's Tru Colors Painting & Restoration, 4936 CRB-4-05-4 (December 6, 2006), *appeal dismissed*, A.C. 28367 (July 25, 2007), "[t]he absence of a term from the language of a statute can be telling. . . ."

Id.

The claimant took no action to advise his subsequent employers that they, and not Barden, might be the responsible parties for his elbow's medical condition. Barden and its insurance carrier took no action to obtain any testimony from the claimant that would establish the facts necessary to prove this position. Given those facts, and the plain language of § 31-299b C.G.S., we believe the trial commissioner correctly determined that the appellants had failed to prove there was jurisdiction over the claimant's subsequent employers as related to the claimant's left elbow condition. The plain language of this statute does not allow for prospective employers to be subject to apportionment. As a result of § 1-2z C.G.S., we must find the trial commissioner properly applied the statute, as we do not find the result herein either irrational or bizarre.

We do not find that the trial commissioner erred in her Finding and Dismissal. The Finding and Dismissal is affirmed.

Commissioners Peter C. Mlynarczyk and Nancy E. Salerno concur in this opinion.