CASE NO. 5770 CRB-4-12-7 : COMPENSATION REVIEW BOARD
CLAIM NO. 400080125

BONNIE COVEY, Surviving spouse of Dr. William Covey : WORKERS' COMPENSATION COMMISSION
CLAIMANT-APPELLEE

v. : JULY 25, 2013

HOME MEDICAL ASSOCIATES, LLC
EMPLOYER-APPELLEE

and

JEWISH HOME FOR THE ELDERLY
EMPLOYER

and

LIBERTY MUTUAL INSURANCE COMPANY
INSURER
RESPONDENTS-APPELLANTS

and

SECOND INJURY FUND
RESPONDENT-APPELLEE

APPEARANCES:

The claimant was represented by Robert F. Carter, Esq., Carter & Civitello, Woodbridge Office Park, One Bradley Road, Suite 301, Woodbridge, CT 06525.

The respondent Home Medical Associates, LLC, was represented by Andrew J. Hern, Esq., Law Offices of Andrew J. Hern, 221 Main Street, 5th Floor, Hartford, CT 06106.

Respondents Jewish Home for the Elderly and Liberty Mutual Insurance Company were represented by Vincent DiPalma, Esq., Loccisano, Turret & Rosenbaum, 101 Barnes Road, 3rd Floor, Wallingford, CT 06492.

At oral argument, respondent Second Injury Fund was represented by Joy L. Avallone, Esq., Assistant Attorney General, Office of the Attorney General, P.O. Box 120, Hartford, CT 06141-0120. In the proceedings below, the Second Injury Fund was represented by Lawrence G. Widem, Esq., Assistant Attorney General, Office of the Attorney General, P.O. Box 120, Hartford, CT 06141-0120.

This Petition for Review from the July 18, 2012 Findings and Orders and the October 11, 2012 Supplemental Findings and Order of the Commissioner acting for the Fourth District was heard on February 18, 2013 before a Compensation Review Board panel consisting of Commissioners Charles F. Senich, Peter C. Mlynarczyk and Scott A. Barton.

OPINION

CHARLES F. SENICH, COMMISSIONER. The respondents Jewish Home for the Elderly and Liberty Mutual Insurance Company [hereinafter "respondents"] have petitioned for review from the July 18, 2012 Findings and Orders and the October 11, 2012 Supplemental Findings and Order of the Commissioner acting for the Fourth District. We find no error and accordingly affirm the decisions of the trial commissioner.

In her Findings and Orders of July 18, 2012, the trial commissioner made the following factual findings which are pertinent to our review. The claimant, Bonnie Covey, who was at all relevant times married to William Covey, M.D., [hereinafter "Covey"] filed a timely claim for survivor's benefits pursuant to § 31-306 C.G.S. following the death of her husband on May 28, 2009.[1] At the time of his death, Covey

[1] Section 31-306 C.G.S. (Rev. to 2009) states, in pertinent part: (a) Compensation shall be paid to dependents on account of death resulting from an accident arising out of and in the course of employment or from an occupational disease as follows:
(1) Four thousand dollars shall be paid for burial expenses in any case in which the employee died on or after October 1, 1988. If there is no one wholly or partially dependent upon the deceased employee, the burial expenses of four thousand dollars shall be paid to the person who assumes the responsibility of paying the funeral expenses.

was, *inter alia*, the medical director of the Jewish Home for the Elderly [hereinafter "JHE"]. Pursuant to the Medical Director Agreement with the JHE, "Covey was required to be physically present at the JHE for forty hours per week," Findings, ¶ 4, during which time he was to be on call for medical and administrative emergencies. He was also required to perform administrative duties as medical director for six hours per week and "was prohibited from engaging in any outside activities without the written approval of the CEO of the JHE." Id.

As medical director for the JHE, Covey had specific administrative duties which were under the direction and control of the CEO for the JHE, including the duty to: 1) attend regularly scheduled meetings at specified times and to attend other administrative meetings on an as-needed basis; 2) maintain the medical charts for the residents of the JHE; 3) oversee the medical care of the residents and the administration of the panel of physicians permitted to care for the residents of the JHE; and, 4) perform other administrative duties such as chart review, correspondence and complaint follow-up.

In exchange for his administrative services, Covey was paid an annual salary of $30,000.00 and was provided additional benefits such as health insurance, an employee health savings account, and dental insurance.[2] He was also given an educational stipend and received reimbursement for the costs associated with his application fees and dues at

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(2) To those wholly dependent upon the deceased employee at the date of the deceased employee's injury, a weekly compensation equal to seventy-five per cent of the average weekly earnings of the deceased calculated pursuant to section 31-310, after such earnings have been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act made from such employee's total wages received during the period of calculation of the employee's average weekly wage pursuant to said section 31-310, as of the date of the injury but not more than the maximum weekly compensation rate set forth in section 31-309 for the year in which the injury occurred or less than twenty dollars weekly….

[2] The payroll deductions for Dr. Covey's employee contributions to the group health insurance were made in the same amount and manner as those for the JHE employees.

St. Vincent's Medical Center as well as partial reimbursement (fifteen percent) of his malpractice insurance premiums. The JHE provided at cost both office space for Covey's private medical practice and several JHE employees who staffed Covey's medical practice within the JHE facility. In addition, Covey received malpractice coverage for his administrative services from the JHE, and the JHE furnished office equipment such as a computer, a telephone, and office supplies. Under the terms of the Medical Director Agreement, Covey agreed to reimburse the JHE for the expenses associated with the operation of Home Medical Associates [hereinafter "HMA"], the private practice Covey ran with Kenneth Fine, M.D., based on a percentage allocation. The Agreement also stated that Covey was an independent contractor and not an employee of the JHE, and the Medical Director Agreement "should not be construed to allow JHE to exercise control or direction over the manner or method by which the physician services were provided and performed, except for Dr. Covey's obligations and responsibilities with respect to administrative services and other items set forth in Part III of the agreement." Findings, ¶ 8.

Andrew Banoff, the CEO of the JHE, testified that Covey, in his role as medical director, reported to Banoff and Banoff had the right to terminate this employment. Banoff also had the right to control the administrative services aspect of Covey's work as medical director. Covey's private practice consisted of two elements: one involving the treatment of patients who lived either permanently or on a short-term basis at the JHE and the other involving the treatment of patients who came to the JHE for office visits. Covey also had three separate business relationships with the JHE: the role of medical director as set forth previously herein; his activities as a private practitioner who, under

the terms of the Medical Director Agreement, had the ability to run a private practice and the responsibility to house that practice at the JHE; and his role as a member of the medical staff at the JHE, which was governed by a separate contractual relationship.[3] Banoff indicated that several years ago, the JHE established a billing service known as GPG (Geriatric Professional Group) for the purpose of handling the billing for physicians on the active medical staff at the JHE, and checks received by HMA from patients were made out to this entity. Banoff testified that the bulk of Covey's relationship with the JHE was "as a private practitioner who was in control of his own schedule, went on vacation when he wanted to and ultimately billed and collected what he wanted to make." Findings, ¶ 9.h.

Based on the foregoing, the trial commissioner concluded that with regard to Covey's position as medical director for the JHE, Covey was an employee of the respondent JHE at the time of his death. The trial commissioner also found that Covey, as a member of the multi-member limited liability company HMA who had not elected to opt out of workers' compensation coverage, was covered by the Workers' Compensation Act at the time of his death.[4] In reaching this determination, the trial commissioner took administrative notice of the Workers' Compensation Commission Chairman's Memorandum No. 2003-02 dated April 17, 2003 which states:

> It has recently come to the attention of this Commission that uncertainty exists in the business community of this state regarding the obligations of members of limited liability companies (LLCs) to request inclusion or exclusion under the Workers' Compensation Act. After carefully considering this matter, we have determined that members of LLCs that contain only one member (single-member LLCs) should be presumed to be **excluded** from the Act

[3] Banoff estimated that Covey derived eighty-five or ninety percent of his income from his private practice.
[4] The trier found that HMA did not have a workers' compensation policy in place as of the date of Covey's death.

> unless they have elected to be covered, while members of multiple-member LLCs should be presumed to be **covered** under the Act unless they have elected to be excluded. In order to clarify this policy, we have amended our Form 6B and our Form 75 accordingly, and direct all members of LLCs to use such forms in the future.[5] (Emphasis in the original.)

The trial commissioner declined to reach the issue of whether, at the time of Covey's death, the JHE was liable as a principal employer pursuant to § 31-291 C.G.S. relative to Covey's work with HMA, remarking that the resolution of that aspect of the claim should be deferred until compensability was adjudicated.[6] However, on October 11, 2012, the trier granted a Motion for Reconsideration filed by the Second Injury Fund requesting that the trier render a decision on the issue of principal employer liability so it could be joined with the other issues on appeal.[7] The trier then issued a Supplemental Findings and Order of the same date in which she deleted Section C of the July 18, 2012 Findings and Orders relative to the deferral of the principal employer issue and concluded, on the basis of additional factual findings which will be addressed in more detail below, that based on the "totality of the circumstances regarding Dr. Covey's unique relationship with the respondent JHE," Conclusion, ¶ E, the JHE was liable as a principal employer of Covey relative to Covey's professional activities as a physician at the uninsured HMA.

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[5] On August 7, 2012, the trier granted in part the claimant's Motion to Correct dated July 24, 2012, and corrected Findings, ¶ 12 of the July 18, 2012 Findings and Orders to reflect that she also took administrative notice of the Workers' Compensation Commission Form 6B entitled "Coverage Election by Employee who is an Officer of a Corporation, Manager of an LLC, or Member of a Multiple-Member LLC."

[6] Sec. 31-291 C.G.S. (Rev. to 2009) states, in pertinent part: "When any principal employer procures any work to be done wholly or in part for him by a contractor, or through him by a subcontractor, and the work so procured to be done is a part or process in the trade or business of such principal employer, and is performed in, on or about premises under his control, such principal employer shall be liable to pay all compensation under this chapter to the same extent as if the work were done without the intervention of such contractor or subcontractor…."

[7] The Motion for Reconsideration dated August 14, 2012 was actually the second Motion for Reconsideration filed by the Second Injury Fund. The first, filed on different grounds and dated July 26, 2012, was denied in its entirety on August 7, 2012.

A flurry of pleadings ensued following the issuance of both the Findings and Orders of July 18, 2012 and the Supplemental Findings and Order of October 11, 2012, culminating in an appeal of both decisions by the respondents. On appeal, the respondents assert that the trial commissioner erroneously concluded that an employer-employee relationship existed between the JHE and Covey and that the JHE was Covey's principal employer pursuant to § 31-291 C.G.S.

The standard of deference we are obliged to apply to a trial commissioner's findings and legal conclusions is well-settled.

> … the role of this board on appeal is not to substitute its own findings for those of the trier of fact. Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 451 (2001). The trial commissioner's role as factfinder encompasses the authority to determine the credibility of the evidence, including the testimony of witnesses and the documents introduced into the record as exhibits. Burse v. American International Airways, Inc., 262 Conn. 31, 37 (2002); Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999). If there is evidence in the record to support the factual findings of the trial commissioner, the findings will be upheld on appeal. Duddy v. Filene's (May Department Stores Co.), 4484 CRB-7-02-1 (October 23, 2002); Phaiah v. Danielson Curtain (C.C. Industries), 4409 CRB-2-01-6 (June 7, 2002). This board may disturb only those findings that are found without evidence, and may also intervene where material facts that are admitted and undisputed have been omitted from the findings. Burse, supra; Duddy, supra. We will also overturn a trier's legal conclusions when they result from an incorrect application of the law to the subordinate facts, or where they are the product of an inference illegally or unreasonably drawn from the facts. Burse, supra; Pallotto v. Blakeslee Prestress, Inc., 3651 CRB-3-97-7 (July 17, 1998).

McMahon v. Emsar, Inc., 5049 CRB-4-06-1 (January 16, 2007).

We begin with the respondents' claim of error relative to the trier's conclusion that an employer-employee relationship existed between Covey and the JHE. The respondents assert that "[i]n the present matter, the totality of factors clearly indicate that

Dr. Covey was an independent contractor/sole proprietor and, as a result, no employer-employee relationship can be established as to the Jewish Home." Appellants' Brief, p. 14. We are not so persuaded.

In articulating the distinction between an employee and an independent contractor, our Supreme Court stated that the "ultimate test" for determining whether a worker is an employee as defined by the Workers' Compensation Act "is the right of general control of the means and methods used by the person whose status is involved." Hanson v. Transportation General, Inc., 245 Conn. 613, 617 (1998), *quoting* Ross v. Post Publishing Co., 129 Conn. 564, 567 (1943). Hanson established a "totality of the evidence test," such that "[i]t is the totality of the evidence that determines whether a worker is an employee under the act, not 'subordinate factual findings that, if viewed in isolation, might have supported a different determination.'" Rodriguez v. E.D. Construction, Inc., 126 Conn. App. 717, 728 (2011), *cert. denied*, 301 Conn. 904 (2011), *quoting* Hanson, supra, at 624-625.

Moreover, "[i]t is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent." (Internal quotation marks omitted.) Tianti v. William Raveis Real Estate, Inc., 231 Conn. 690, 697 (1995), *quoting* Latimer v. Administrator, 216 Conn. 237, 248 (1990). "As a general principle, a hiring entity retains control over only the results of an independent contractor's work, while an employer's will governs the employee 'regarding both the fruits of [their] labor and the mode and manner in which [their] services are performed.'" Lema v. Eoanou, 5056 CRB-4-06-2 (January 29, 2007),

quoting Morrissey v. Lannon-Norton Associates, 3085 CRB-4-95-6 (December 23, 1996).

Turning to the matter at bar, we note that in support of their claim of error relative to the trier's determination that an employer-employee relationship existed between the JHE and Covey, the respondents rely in part on the provisions of the Medical Director Agreement between the JHE and Covey, which state, *inter alia*, that Covey was an independent contractor and no provision of the contract was to be construed as establishing an employer-employee relationship. Respondents' Exhibits JH-1, JH-2. The contract also "states that neither the Jewish Home nor Dr. Covey have the authority to create any obligations as to the other," Appellants' Brief, p. 14, and "Dr. Covey was to perform his duties as the medical director by his own means and methods." Id. The respondents contend that the contract indicates that Covey was not entitled to any employee benefits over and above those for which he negotiated, and Covey was responsible for the payment of his own taxes and other withholdings and for providing his own workers' compensation coverage. In light of the provisions of the Medical Director Agreement, the respondents also aver that Covey, in his role as medical director for JHA, was acting as a sole proprietor who had not opted into the Workers' Compensation Act pursuant to § 31-275(10) C.G.S.[8]

We have examined the subject contract, and we have no dispute with the respondents' interpretation of the language contained therein. Moreover, we note that Andrew Banoff, the Chief Executive Officer of the JHE, testified that the JHE had no

[8] Sec. 31-275(10) C.G.S. states, in pertinent part: "A person who is the sole proprietor of a business may accept the provisions of this chapter by notifying the commissioner, in writing, of his intent to do so. If such person accepts the provisions of this chapter he shall be considered to be an employer and shall insure his full liability in accordance with subdivision (2) of subsection (b) of section 31-284. Such person may withdraw his acceptance by giving notice of his withdrawal, in writing, to the commissioner."

control over the manner in which Covey performed his duties as medical director, and Covey was free to accept or reject any new opportunities at the JHE and to take time off at his own discretion. We also realize that the method by which Covey filed his tax returns could ostensibly support the inference that Covey was an independent contractor, particularly in light of the fact that the JHE issued Covey a Form 1099, generally given to independent contractors, rather than the Form W-2 customarily given to employees. Finally, it is undisputed that Covey owned HMA, and Banoff testified that no business relationship existed between the JHE and HMA apart from the space rental arrangements.

There is no question that the above-mentioned factors could have supported a finding by the trial commissioner that no employer-employee relationship existed between Covey and the JHE. However, a closer examination at the instant record and, in particular Banoff's testimony, reveals a number of factors that support the trier's conclusions to the contrary.

At trial, Banoff described the responsibilities of the JHE medical director as having three main areas of focus: 1) organization of the activities of the medical staff consisting of approximately 100 physicians, which duties "included credentialing, medical records, documentation, charting, oversight of the work of the physicians of the medical staff," September 15, 2011 Transcript, p. 8; 2) development and implementation of the JHE policies and procedures; and, 3) cooperation with the administrative team on issues such as board governance, corporate structure, and various other administrative committee matters.[9] Banoff explained that pursuant to the Medical Director Agreement, Covey was required to be on the premises for at least forty hours a week and of those

[9] Banoff explained that physicians are required to complete their chart notes within seventy-two hours, and the role of the medical director was "to work with the individual physicians to get their notes and the medical records up to speed." September 15, 2011 Transcript, p. 11.

forty hours, six hours per week were to be devoted to administrative duties. Moreover, if for some reason Covey was unavailable to perform any of the services under the contract, he was responsible for finding (and paying) a substitute physician who "shall be acceptable to the Home and shall meet all of the qualifications and representation under this agreement." Id., at 61, *quoting* Respondents' Exhibits JH-1, JH-2, § 3.1.

Banoff also testified that Covey was required to attend quarterly board and Professional Services Committee meetings, monthly leadership management meetings, weekly or bi-weekly meetings with Banoff, and as-needed impromptu meetings with clinical staff, along with the "desk time of doing administrative work, reviewing charts, writing letters, following up to complaints, you know, administrative duties that weren't meetings."[10] Id., at 14. Banoff indicated that Covey chaired a monthly physician meeting and reported developments to the Professional Services Committee. Covey was also involved with the Pharmaceutical Committee, performed assessments for the in-house Institute for Aging, and was required to serve as the primary private physician for patients admitted to the post-acute rehabilitation unit.[11]

Banoff also testified that in addition to Covey being on-call for his private practice, under the terms of the Medical Director Agreement, Covey also had a "duty to

[10] Covey's wife testified that on at least one occasion, Covey was not given notice of a meeting with a "disgruntled" family member of a resident until either the morning of or the night before the meeting and as a result was forced to cancel and reschedule his office hours. August 2, 2011 Transcript, p. 32-33.
[11] Both Fine and Covey's wife testified that Covey was also required to attend an annual Dale Carnegie seminar. See Claimant's Exhibit S, pp. 47-48; August 2, 2011 Transcript, p. 40. When queried as to how he discovered he was expected to take the class, Fine replied, "I think it comes through Employee Relations, if I'm not mistaken." Claimant's Exhibit S, p. 8. Covey's wife also testified that Covey had told her he "had to attend" the Dale Carnegie course and "had to go" to various JHE functions such as the holiday party and the annual picnic. August 2, 2011 Transcript, pp. 40, 59.

provide on-call availability and respond to medical or regulatory or other emergencies."[12] December 19, 2011 Transcript, p. 29. Banoff agreed that the Medical Director Agreement states that "[t]he physician will not engage in any outside activities [such as working as a medical director at another nursing home] without the written approval of the CEO," September 15, 2011 Transcript, p. 19, testifying that he "just wanted to have the opportunity to have that conversation before it happened." Id. Banoff indicated that the medical director reported directly to him and that Banoff was responsible for making any changes in the duties of the medical director and, if necessary, firing, the medical director. Banoff described his professional relationship with Covey as follows:

> I don't know if it would be helpful to describe the relationship, but the, the employment part of this, *the control part of this*, was for administrative services as the medical director. I could ask him to go to a meeting, I could ask him to be on a committee, I could ask him to review charts. Everything else that he did was based on a mutual respect and a goal of what we were trying to accomplish. But I couldn't tell him to do anything. (Emphasis added.)

Id., at 48.

Banoff indicated that Covey was responsible for conducting the performance evaluations for the physicians and Banoff would also solicit Covey's informal opinion regarding the assessments of the nursing staff. Banoff stated that Covey was "bound to follow the policies and procedures of the Jewish Home with treating patients on the premises of the Jewish Home." Id., at 50. Banoff testified that the formula used for Covey's health insurance benefits was the same as that used for other employees, Covey was given a guide to employee benefits, and the benefits for which Covey had negotiated

[12] Banoff also stated, "we always knew that if we needed to reach him in an emergency, we would reach him through his pager, as we would with any of the other physicians because that was his schedule." September 15, 2011 Transcript, pp.16-17.

were administered in the same manner as those for regular employees. Banoff testified that he did not know whether the JHE reported Covey as an employee for purposes of obtaining health insurance; however, the JHE Certificate of Group Health Plan Coverage dated July 5, 2009 indicates that Covey was an employee. Claimant's Exhibit L. Covey was covered under the general malpractice policy for administrative staff and was allotted thirty days of vacation time which was "within the reasonable standards of all of us who had a full-time presence at the Home." September 15, 2011 Transcript, p. 30.

Banoff indicated that the JHE provided Covey space for an office (as part of his administrative duties) along with an exam room, computers, office equipment, staff and supplies. The costs attributed to the private practice were billed back to HMA; Covey and Fine elected to have their patient billings handled by the in-house billing entity Geriatric Professional Group (GPG), which paid eighty-five percent of its collections to the JHE physicians and retained fifteen percent to cover administrative costs.[13] Two JHE employees were assigned to perform administrative functions for HMA; Banoff indicated that the JHE handled the hiring process "but ultimately the staff that worked in the office had to be approved by [Covey] because that's who he was working with." Id., at 81. However, any staff that was "shared" between the JHE and HMA required:

> a mutual agreement … because we clearly had to have acceptance of the person as well. So, in the collaborative spirit of how this all really worked, if an individual was perfect for him and horrible for us, we weren't going to hire them either. It took both parties to agree.

Id., at 81-82.

[13] Dr. Fine testified that he and Covey would meet on an informal basis to discuss expenses and "would also meet on a regular basis with the – The Jewish Home administrative person who was responsible for coordinating some of these practice activities, and it was at those meetings that the expenses related to or the expenses coming from The Jewish Home were viewed and discussed in that … forum…." Claimant's Exhibit S, p. 33.

Banoff testified that while Covey and HMA had primary responsibility for day-to-day decision-making regarding the duties of the shared staff, if other issues arose, "[w]e would not let our employee be treated outside the law, for example. So there was a relationship as the leased employer, as, I'm not sure what the right terminology is, but as the employer leasing that staff member, we would not let anything happen to our employees." December 19, 2011 Transcript, p. 32.

Having reviewed the foregoing, we find that the instant evidentiary record and, in particular, Banoff's testimony, provided a satisfactory basis for the trier's conclusion that the JHE retained a sufficient measure of control over Covey's duties as a medical director such that the existence of an employer-employee relationship could reasonably be inferred. There is no question that the contract between the JHE and Covey purported to contemplate that the medical director would function as an independent contractor, and Banoff in his testimony went to considerable length to disavow the existence of an employer-employee relationship. Nevertheless, "the key factor in establishing employee status is not the label applied by the parties in a memorialized agreement; it is the putative employer's right to control the means and methods used by the person whose status is implicated." Johnson v. Braun Moving, Inc., 3861 CRB-7-98-7 (November 2, 1999).

Our review of the instant record indicates that the "totality of the evidence" supports the trier's inference that the JHE retained a substantial "right to interfere" in the manner in which Covey carried out his daily responsibilities as medical director. Tianti, supra. As such, regardless of the language of the contract between the JHE and Covey, "there was also evidence presented to the commissioner that supported a finding that [the

JHE] was the claimant's employer. Where there is conflicting evidence, the trier is entitled to accept that which he finds most credible." Johnson, supra. We therefore find no merit in the respondents' claim of error on this issue.[14] "It is … immaterial that the facts permit the drawing of diverse inferences. 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." Fair v. People's Savings Bank, 207 Conn. 535, 540 (1988), *quoting* Del Vecchio v. Bowers, 296 U.S. 280, 287 (1935).

The respondents have also claimed as error the trier's determination, issued in her Supplemental Findings and Order dated October 11, 2012, that the JHE was liable as a principal employer of Covey relative to Covey's professional activities as a physician at HMA. In association with that Order, the trier made the following factual findings. The JHE, a 360-bed skilled nursing facility, employed a number of medical professionals to care for the residents of the JHE, including approximately ten primary care physicians who were primarily responsible for the residents. Physicians, dentists and podiatrists were covered under a separate agreement known as the Medical Staff Bylaws/Rules and Regulations which each practitioner was required to sign. According to these bylaws, Covey, in his role as medical director, was also a member of the standing committee of the active medical staff of the JHE.

The trier found that "Banoff testified that he asked Dr. Covey to move his private practice into JHE … in order to have more of a medical presence in the building" and that Covey's private practice was "absolutely a positive improvement for JHE" and its

[14] In light of our affirmance of the trier's determination that an employer-employee relationship existed between Covey and the JHE relative to his duties as medical director, we likewise find no merit in the respondents' assertion that Covey was acting as a sole proprietor in that role.

patients. Findings, ¶ 7. Moreover, in addition to providing Covey with office space and medical examination rooms, the JHE advertised that Covey's services were available, and by operation of a rotating assignment process, approximately two-thirds of the residents had either Covey or Fine as their primary care physician after 2006. Banoff also testified that although the day-to-day decisions regarding the JHE staff members working at HMA were the responsibility of the physicians, if any of these employees "were treated in a manner that violated labor law or policy, JHE would intervene." Findings, ¶ 11.

In light of the foregoing, the trial commissioner concluded that the JHE had caused HMA "to be operated in whole or in part as a part or process of the JHE's business as a skilled nursing facility," Conclusion, ¶ B, and the activities of HMA were "performed on or about premises that were under the control of the respondent JHE." Conclusion, ¶ C. The trial commissioner determined that Covey had a "unique relationship" with the JHE by virtue of: 1) his status as an employee relative to his duties as Medical Director; 2) his role as a private practitioner who conducted a private practice within the JHE and was required to maintain a presence at the JHE for forty hours per week; and, 3) his membership of the medical staff of the JHE, which was governed by a separate contractual relationship. Conclusion, ¶ D. As such, "[g]iven the totality of the circumstances regarding Dr. Covey's unique relationship with the respondent JHE," Conclusion, ¶ E, the trier concluded that the JHE was liable as a principal employer of Covey relative to Covey's professional activities as a physician at the uninsured HMA. The respondents have claimed this determination as error.[15]

[15] On November 6, 2012, the trier granted the claimant's Motion to Correct dated October 17, 2012 and added the following language to Conclusion, ¶ B of the October 11, 2012 Supplemental Findings and Order: "I find that in the special circumstances of this case, the respondent JHE undertook as a part of its business to provide primary care physician services by in-house primary care physicians to the residents of

As mentioned previously herein, § 31-291 C.G.S. defines principal employer liability as follows:

> When any principal employer procures any work to be done wholly or in part for him by a contractor, or through him by a subcontractor, and the work so procured to be done is a part or process in the trade or business of such principal employer, and is performed in, on or about premises under his control, such principal employer shall be liable to pay all compensation under this chapter to the same extent as if the work were done without the intervention of such contractor or subcontractor….

The purpose of § 31-291 C.G.S. was "to protect employees of minor contractors against the possible irresponsibility of their immediate employers, by making the principal employer who has general control of the business in hand liable as if he had directly employed all who work upon any part of the business which he has undertaken to carry on." Bello v. Notkins, 101 Conn. 34, 38 (1924). In addition, "principal employer responsibility under the Workers' Compensation Act is to allow recovery for accidents occurring in the work area which could be prevented or minimized by sufficient oversight or control." Alpha Crane Service, Inc. v. Capitol Crane Co., 6 Conn. App. 60, 74 (1986), *citing* Crisanti v. Cremo Brewing Co., 136 Conn. 529, 535 (1950).

It should be noted that:

> [t]he term "control" in this context has a specific meaning. It is merely descriptive of the work area and "is used instead of such words as 'owned by him' or 'in his possession' in order to describe the area in a more inclusive fashion. The emphasis is upon limitation of the area within which the accident must happen rather than upon actual control of the implements which caused the accident.

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the JHE, on premises under the control of the JHE, in order to attract residents to the JHE, to the financial benefit of the JHE. The JHE also profited by providing a billing service for securing payment of the bills for all the services provided by Dr. Covey in his medical practice through Home Medical Associates, from which the JHE also profited financially." In addition to the October 17, 2012 Motion to Correct, the claimant also filed a Motion to Correct dated July 24, 2012 which was granted in part and denied in part on August 7, 2012. No claim of error has been made in association with this Motion to Correct.

Alpha Crane, supra, at 73-74, *quoting* Crisanti, supra.

In King v. Palmer, 129 Conn. 636 (1943), our Supreme Court, after noting the difficulty attendant in defining the legislative intent of the phrase "part or process in the trade or business," described it as follows: "If the work is of such a character that it ordinarily or appropriately would be performed by the principal employer's own employees in the prosecution of its business, or as an essential part of the maintenance thereof, it is a part or process of his work." Id., at 641. In addition, "[i]t has long been held that this condition is not limited to the main tasks performed in the principal employer's trade or business. Rather, those tasks which are necessary to the routine functioning of a business are also included within the scope of this element of the defense." Alpha Crane, supra, at 75.

Turning to the matter at bar, as mentioned previously herein, we note at the outset that the trier's finding of principal employer liability against the JHE rests in part on her threshold finding of the existence of an employer-employee relationship between Covey and the JHE, which we have affirmed herein. In addition to the evidentiary submissions adduced on that issue, a number of which lend themselves to the reasonable inference that the JHE exercised sufficient control over HMA such that the JHE was liable as a principal employer of Covey relative to Covey's professional activities as a physician at HMA, the instant record contains the following evidentiary items which also serve to buttress the trier's conclusions relative to the issue of principal employer liability.

For instance, relative to the statutory requirement that the work be "procured," we note that Banoff readily admitted that he had been instrumental in Covey choosing to operate his medical practice on the JHE premises. Banoff explained that beginning in

2004, Covey "transitioned" from a community-based practice in which he saw JHE patients on a part-time basis to a full-time in-house treating physician at the JHE. September 15, 2011 Transcript, p. 7. Banoff stated:

> historically, all of the primary care physician at the … Jewish Home were doctors who practiced in the community and came to the Home on a fairly limited but regular schedule. The reason I changed that structure and asked Dr. Covey to move his private practice into the Home … is to have more of a medical presence in the building so that when there were questions with family members, with nursing staff, with the residents themselves, there was more of a physician presence on site….[16]

September 15, 2011 Transcript, pp. 12-13.

Banoff testified that the "practice has been absolutely a positive improvement for the home and I think for our clients," id., at 13, and "[i]t was absolutely an advantage to have on-site physician coverage rather than community-based coverage." December 19, 2011 Transcript, p. 28. Banoff also indicated that the JHE advertised Covey's on-site services "because it enhanced the overall services to the Jewish Home community," September 15, 2011 Transcript, p. 56, and "[i]t's certainly not inconceivable that as Dr. Covey's private practice patients aged, that they could become residents."[17] Id., at 57. In light of the foregoing testimony relative to the circumstances surrounding the establishment of Covey's in-house practice at the JHE, we find that the trier could have

[16] Covey's wife testified that she thought it was Banoff's decision to hire Fine to work with Covey because the JHE was expanding. August 2, 2011 Transcript, p. 57. She also stated that Covey was "not necessarily" in charge of HMA "[b]ecause the offices were within the Jewish Home and it functioned with the approval of the Jewish Home." Id., at 58.

[17] Covey's wife testified that she believed the JHE benefited from the fact that Covey's private practice was located within the JHE facility"[b]ecause Dr. Covey had a wonderful reputation and he was well loved among his patients, and he was providing care for people in the community." August 2, 2011 Transcript, p. 43. She also indicated that she believed that patients who normally might not have gone to the Jewish Home did go in order to see Covey. Id.

reasonably inferred that the JHE, through Banoff, "procured" Covey's services in this regard and reaped a benefit therefrom.[18]

Moreover, relative to the statutory requirement of § 31-291 C.G.S. that "the work be part or process in the trade or business of such principal employer," Banoff testified that the JHE is a "skilled nursing facility and senior living provider of services for the elderly," Id., at 5, on whose premises was housed, *inter alia*, an on-site medical practice made up of physicians who treated the JHE residents as well as patients from the community. Banoff testified that the JHE medical staff was organized in the same manner as a hospital and consisted of approximately ten primary care physicians along with a number of specialists who would be consulted on specific issues. Banoff stated that every resident of the JHE had to have a primary care physician, who was designated on a rotating basis, and that two-thirds of the residents were split between Covey and Fine.[19] Banoff stated that the JHE was "responsible for all of the care for the residents that live there," December 19, 2011 Transcript, p. 9, and while the choice of physician was left to the resident or the conservator, "[t]he physician then in consultation with the decision maker is going to use their best judgment about the medical care that's needed … and the Home's responsibility is to carry out those physician orders. The oversight to that is through the medical staff in all nursing homes." Id., at 10-11.

We find it may be readily inferred from the foregoing description of the JHE's mission that the JHE's "trade or business" was the provision of medical care, and the record at hand clearly indicates that all Covey's duties in his various guises at the JHE

[18] See footnote 15, supra.
[19] Fine testified the JHE admissions office was responsible for determining which doctors were assigned to which patients, stating, "I can't tell you exactly what the formula was, but there was an agreement, in a sense, that as time went on, the proportion of patients assigned to me would grow." Claimant's Exhibit S, p. 66.

were primarily directed to that end. Furthermore, of particular significance to our inquiry in this regard is the fact that when Fine initially began working for the JHE, he was considered a full-time employee and was paid and given benefits accordingly. When Fine entered into the partnership with Covey in October 2008, "the structure was amended so that both Dr. Covey and Dr. Fine had a similar relationship with the Home, where they were paid a modest stipend for their administrative duties, and the bulk of their time and energy were carried out through the private practice."[20] September 15, 2011 Transcript, p. 74. However, we note that the record contains no indication that any significant change in Fine's duties accompanied this change in employment status. Given, then, that Fine was initially treated as an employee by the JHE while performing a number of the same duties as Covey, and Fine's duties did not substantially change following his change in status from employee to independent contractor, we find the trier could have reasonably inferred that both Fine's and Covey's duties associated with the provision of health care were indeed "part or process in the trade or business" of the JHE.[21]

Finally, relative to the statutory requirement that the work be "performed in, on or about premises under [the principal employer's] control, we would reiterate that many of the evidentiary submissions reviewed in the preceding analysis regarding the existence of

[20] Likewise, Dr. Fine testified that "[a]s of October 2008, I transitioned from a salaried employee of the Jewish Home to an independent practitioner practicing in – in a space within the Jewish Home." Claimant's Exhibit S, p. 10.

[21] It would seem that the trier did not find particularly persuasive Banoff's attempt to describe the rather arcane method by which the JHE classified Covey's various roles: "It depends on whether he was seeing a patient in his private office or whether he was seeing a resident up in one of the Jewish Home neighborhoods, and I'll delineate the answer as follows. When he saw a private patient in his private office, he was purely a private practitioner, governed by this relationship. When he saw a patient up on the floor, one of the units, one of the neighbors, he was wearing two hats, a private practitioner and a member of the medical staff. In neither case is he a member, is he doing that in his capacity as medical director." September 15, 2011 Transcript, p. 53.

an employer-employee relationship also lend themselves to the reasonable inference that the premises occupied by HMA were subject to the control of the JHE. The record also indicates that Covey, in addition to signing the Medical Director Agreement, would also have been required to sign a second agreement confirming his compliance with the rules and regulations of the by-laws of the medical staff.[22] As such, we find no error in the trier's determination that the statutory requirements for a finding of principal employer liability against the JHE were satisfied under the facts of this matter.

There is no error; the July 18, 2012 Findings and Orders and the October 11, 2012 Supplemental Findings and Order of the Commissioner acting for the Fourth District are hereby affirmed.

Commissioners Peter C. Mlynarczyk and Scott A. Barton concur in this opinion.

[22] Banoff explained that the "[m]edical staff by-laws dictate a whole host of rules and responsibilities, including things like I will remain compliant with all of the Medicare and Medicaid rules, I will document what I do in a chart, I will follow the Jewish Home policy and procedures, things along those lines. I will maintain an active license. I will be a good doctor. Medical staff as an organized body has to approve those privileges, and ultimately has the authority to remove those privileges if they have cause to do so." September 15, 2011 Transcript, p. 67.