CASE NO. 5789 CRB-5-12-10 : COMPENSATION REVIEW BOARD
CLAIM NO. 500151292

JAMES M. KINGSTON
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

: SEPTEMBER 10, 2013

TOWN OF SEYMOUR
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLANT

and

PMA MANAGEMENT CORPORATION
ADMINISTRATOR

APPEARANCES:

The claimant was represented by John F.X. Androski, Esq., Androski Law Offices, PO Box 656, Ansonia, CT 06401.

The respondent was represented by Ryan P. Driscoll, Esq., Berchem, Moses & Devlin, PC, 75 Broad Street, Milford, CT 06460.

This Petition for Review from the September 14, 2012 Finding and Decision of the Commissioner acting for the Fifth District was heard March 22, 2013 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Peter C. Mlynarczyk and Stephen B. Delaney.

# OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondent has appealed from a Finding and Decision which awarded benefits to the claimant for a compensable back injury. The respondent argues that the Commission lacked jurisdiction over this injury because the Form 30C filed by the claimant had an inaccurate date of injury. We have reviewed the facts herein and the applicable precedent governing our claim statute, § 31-294c C.G.S. We find the trial commissioner appropriately applied the law herein and the Notice of Claim was sufficient to confer jurisdiction on the Commission. We affirm the Finding and Decision as amended by the trial commissioner.

The facts found by the trial commissioner in his September 14, 2012 Finding and Decision may be summarized as follows. As there was no Motion to Correct filed in this case we may give these facts conclusive effect. Stevens v. Raymark Industries, Inc., 5215 CRB-4-07-4 (March 26, 2008), *appeal dismissed*, A.C. 29795 (June 26, 2008). The claimant testified he had been working for the Town of Seymour as a school custodian since 2003 and had been previously injured while on the job in 2008. On May 7, 2010 the claimant said that he injured his back while working for the respondent when he lifted a lawnmower into his truck. The claimant testified that later in the day he told the night custodian "I really think I screwed my back up today." Findings, ¶ K. The claimant said that he attempted to obtain assistance in filing an incident report, but finally did it himself. An informal hearing regarding the claim was held on August 10, 2010. Subsequent to the May 7, 2010 incident, the claimant treated with Dr. John Signoriello and Dr. Michael Opalak for his back injury. On September 13, 2010, the claimant underwent back surgery at Griffin Hospital by Dr. Opalak. The claimant then started

treating with Dr. Gerald Girasole for his back problems. On January 17, 2011, the claimant underwent a second back surgery at St. Vincent's Hospital by Dr. Girasole. The claimant's treating physicians opined that the work injury was responsible for the claimant's back condition, while the respondent's examiner, Dr. Patrick Carolan, opined the claimant's back surgeries were not necessitated by his work injuries. The trial commissioner also noted the claimant's wife, Fran Kingston, corroborated his testimony of having sustained a serious back injury on May 7, 2010.

The trial commissioner found the testimony of the claimant, his wife, and his treating physicians to be entirely credible and persuasive. The commissioner did not find Dr. Carolan to be persuasive. He determined the claimant sustained a back injury in the course of his employment on May 7, 2010 and that the two subsequent surgeries were reasonable and necessary medical treatment for this injury.

The respondent moved for reconsideration or articulation of the Finding on October 4, 2012, noting that this Finding did not address the issue of the claimant having filed a Form 30C citing a date of injury as May 14, 2010, and seeking a finding as to whether this constituted proper notice of the claim. The trial commissioner issued an Amended Finding and Decision on October 12, 2012. This decision recited the facts found previously, but added the following conclusions.

> 9. In regard to the Form 30C's filed in regard to this matter, with the incorrect date of injury of May 14, 2010, I do not find that the respondent was ignorant of the facts concerning this injury or that the respondent was prejudiced by the defect or the inaccuracy of the notice.
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> 10. Further, pursuant to C.G.S. § 31-294c, this claim shall not be barred, given that an informal hearing was held in regard to this matter within one year from the date of injury.

11. I find that an informal hearing was held in regard to this matter on August 10, 2010.

12. I also find that a hearing request was filed in regard to this matter on May 4, 2011.

The respondent filed a timely appeal from this decision. The gravamen of the appeal is that the Form 30C filed by the claimant was too seriously flawed by virtue of the inaccurate date of injury to confer jurisdiction on the Commission. The respondent *cite* Kuehl v. Z-Loda Systems Engineering, 265 Conn. 525 (2003) as supporting its position that the notice was irredeemably defective. We find Kuehl distinguishable on the facts, and therefore, unpersuasive.

While this is a case where the facts are not in dispute, and the general deference to fact finding promulgated in Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988) does not apply, we still extend great latitude to the findings of a trial commissioner. "As 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." Daniels v. Alander, 268 Conn. 320, 330 (2004). We must determine if the trial commissioner's application of the law pertaining to § 31-294c C.G.S.[1] was reasonable given the facts herein, which are distinguishable from Kuehl.

[1] The text of the applicable portions of this statute read as follows.

**Sec. 31-294c. Notice of claim for compensation. Notice contesting liability. Exception for dependents of certain deceased employees.** (a) No proceedings for compensation under the provisions of this chapter shall be maintained unless a written notice of claim for compensation is given within one year from the date of the accident or within three years from the first manifestation of a symptom of the occupational disease, as the case may be, which caused the personal injury, provided, if death has resulted within two years from the date of the accident or first manifestation of a symptom of the occupational disease, a dependent or dependents, or the legal representative of the deceased employee, may make claim for compensation within the two-year period or within one year from the date of death, whichever is later.

We reviewed the facts of the Kuehl case in great detail in our opinion in Berry v. State/Dept. of Public Safety, 5162 CRB-3-06-11 (December 20, 2007). We believe our analysis in Berry explains why the absence of notice that a claim will be filed under Chapter 568 is quite different than the circumstances in the present case, where the issue is whether the claim that was filed was too inaccurate to confer jurisdiction on the Commission.

> In Kuehl, the husband and wife were principals of a family business and the husband suffered a compensable injury in a motor vehicle accident on June 26, 1991, to which a notice of claim was filed with the Commission and the employer. The husband and wife filed a tort action pertaining to the motor vehicle accident, to which the employer intervened to recover against its compensation obligations. The husband died in November 1992 and his spouse did not file a new notice for § 31-306 C.G.S. benefits or request a hearing for survivor's benefits until 1998. She argued that the employer had actual notice of the claim for survivor's benefits by virtue of intervening in the lawsuit because she was manager of the respondent employer. The Supreme Court disagreed with these arguments, finding instead that written notice under § 31-294c C.G.S. was "a prerequisite that conditions whether the commission has subject matter jurisdiction." Id., 534.

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Notice of a claim for compensation may be given to the employer or any commissioner and shall state, in simple language, the date and place of the accident and the nature of the injury resulting from the accident, or the date of the first manifestation of a symptom of the occupational disease and the nature of the disease, as the case may be, and the name and address of the employee and of the person in whose interest compensation is claimed. An employee of the state shall send a copy of the notice to the Commissioner of Administrative Services. As used in this section, "manifestation of a symptom" means manifestation to an employee claiming compensation, or to some other person standing in such relation to him that the knowledge of the person would be imputed to him, in a manner that is or should be recognized by him as symptomatic of the occupational disease for which compensation is claimed.
(c) Failure to provide a notice of claim under subsection (a) of this section shall not bar maintenance of the proceedings if there has been a hearing or a written request for a hearing or an assignment for a hearing within a one-year period from the date of the accident or within a three-year period from the first manifestation of a symptom of the occupational disease, as the case may be, or if a voluntary agreement has been submitted within the applicable period, or if within the applicable period an employee has been furnished, for the injury with respect to which compensation is claimed, with medical or surgical care as provided in section 31-294d. No defect or inaccuracy of notice of claim shall bar maintenance of proceedings unless the employer shows that he was ignorant of the facts concerning the personal injury and was prejudiced by the defect or inaccuracy of the notice. Upon satisfactory showing of ignorance and prejudice, the employer shall receive allowance to the extent of the prejudice.

> The Supreme Court further concluded that while the respondent had actual notice of the decedent's death, the form of the notice ". . . contained no indication that the plaintiff was seeking or intended to seek survivor's benefits. . . ." Id., 535. The Supreme Court refused to permit process in civil litigation to serve as the functional equivalent of official notice under Chapter 568. In construing the savings provision of § 31-294c C.G.S., the Supreme Court held "it does not excuse, however, the *failure to file* a notice of claim." Id., 537. (Emphasis in original.) As official notice under § 31-294c(a) C.G.S. was ". . . an integral provision of our workers' compensation scheme. . . ." Id., 539. The Supreme Court upheld the decision of the trial commissioner and this board that Mrs. Kuehl failed to engage the jurisdiction of our Commission.
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> In the present case, however, it is undisputed that official notice *was* filed with the Commission. The Kuehl case does not address the circumstances herein; where notice was filed with the Commission but may not have sufficiently informed the respondents as to the nature of the relief sought or the correct identity of the claimant.

Id.

In the present case, the claimant properly and timely filed notice with the Commission that he was seeking benefits for a compensable injury. The issue was whether the inaccurate date of injury prejudiced the respondent. The trial commissioner determined that this error did not prejudice the respondent. We do not find this conclusion was arbitrary or capricious pursuant to the standards delineated in In re Shaquanna M., 61 Conn. App. 592 (2001). We have examined the record and the claimant testified at the hearing that he essentially made an honest mistake in putting the wrong date on the claim form, November 15, 2011 Transcript, p. 30 and pp. 39-40, in which the claimant testified that the date when he filled out the claim form was May 14, 2010. We also note that the claimant testified that on the date of the injury he informed a co-worker, Glenn Facino, of his injury, id., pp. 26 and 36, and attempted to have Mr.

Facino assist in preparing his claim form. We note that the record contains no evidence, either in the form of hearing testimony, a deposition transcript or a written statement from Mr. Facino.[2] While the commissioner was not required to draw an adverse inference from the absence of this testimony, Evans v. Shelton, 16 Conn. Workers' Comp. Rev. Op. 155, 3108 CRB-4-95-6 (May 2, 1997), *dismissed for lack of final judgment*, A.C. 17196 (January 14, 1998), from a practical standpoint the only evidence proffered on the circumstances of the claim and the date of injury was that of the claimant and his wife. The trial commissioner found these witnesses credible and this is his prerogative. See 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), *citing,* Burton v. Mottolese, 267 Conn. 1, 40 (2003). We also note that the respondent offered no witness or documentary evidence demonstrating any alleged prejudice to its ability to investigate the claim as a result of the inaccurate date on the Form 30C. The trial commissioner may only reach their conclusions based on the record "as-is," Berube v. Tim's Painting, 5068 CRB-3-06-3 (March 13, 2007), when a party does not challenge the record with their own evidence.

The commissioner also noted that the claimant initiated a hearing request within one year of the date of the accident, and that an informal hearing occurred during this time period. This is a statutorily appropriate substitute for a Form 30C. The respondent argues the hearing request also referenced the inaccurate date, and therefore prejudiced

[2] The claimant also testified that on the date of the injury he spoke to Tommy, the owner of Little River Equipment, who assisted him in removing the lawnmower from his truck. November 15, 2011 Transcript, pp. 14-16. No witness from that firm appeared at the hearing to either corroborate or dispute the claimant's narrative of events.

their ability to defend the claim. We disagree. Clearly this activity shows the claimant was actively advancing his claim, and not seeking to allow matters to linger until after a point in which investigation would have been rendered impractical by the lapse of time. This goes to the "totality of the circumstances" test as promulgated in Hayden-LeBlanc v. New London Broadcasting, 12 Conn. Workers' Comp. Rev. Op. 3, 1373 CRD 2-92-1 (January 5, 1994) for determining compliance with § 31-294c C.G.S. We also note that the initial Form 43 filed by the respondent on July 22, 2010 specifically states "Respondents acknowledge incident of 05/14/10 occurred," but questioned the medical evidence supportive of linking the incident to employment. A reasonable conclusion herein is both the claimant and the respondent had some mutual confusion as to the date of the injury, but agreed as to its occurrence.[3]

In recent years we have generally found notices which may have been vague or incomplete, but were filed in a timely manner, preserved this Commission's jurisdiction over the injury. We find the factual circumstances herein akin to Nalband v. Davidson Company, Inc., 4944 CRB-8-05-5 (May 19, 2006) (claim stated injury occurred in "Belchertown, MA," record indicated claimant advised co-worker as to specific location) and Mehan v. Stamford, 5389 CRB-7-08-10 (October 14, 2009), *aff'd*, 127 Conn. App. 619 (2011), *cert. denied*, 301 Conn. 911 (2011) (claimant submitted incomplete Form 30C to supervisor who completed the form). In the present case the claimant advised a co-worker on the date of the injury what had occurred. We also note that an inaccurate or

[3] The acknowledgment that the claimant had been involved in an injury while working for the respondent on May 14, 2010 could be deemed an evidentiary admission by the respondent, see Nationwide Mutual Ins. Co. v. Allen, 83 Conn. App. 526, 542 (2004). There is no evidence in the record suggesting the claimant sustained two separate injuries in early May, 2010.

vague date of injury did not render a Form 30C ineffective in Surowiecki v. UTC/Pratt & Whitney, 4233 CRB-8-00-5 (May 24, 2001). In Surowiecki we *cited* Roche v. Danbury Hospital, 3592 CRB-7-97-5 (July 13, 1998) and Troske v. Wolcott View Manor, 13 Conn. Workers' Comp. Rev. Op. 323, 325, 1687 CRB-5-93-4 (April 26, 1995) for the proposition that ". . . the failure to prove the exact date upon which an accidental injury occurred does not preclude this Commission from exercising jurisdiction over a claim for compensation." Id.[4]

The respondent had the burden under § 31-294c(c) C.G.S. of establishing it was prejudiced by the inaccurate date in the claimant's Form 30C and/or any other efforts to initiate the claim within one year of the injury. The trial commissioner concluded that it was not. We find that the record herein supports that conclusion.

In Berry, supra, we held ". . . there must be either a complete absence of notice to warrant dismissal of a claim . . . or notice which was so fundamentally deficient as to prejudice the other party." Id. We do not find that occurred in this case.

We affirm the Finding and Decision as amended by the trial commissioner.

Commissioners Peter C. Mlynarczyk and Stephen B. Delaney concur in this opinion.

[4] See also Sweet v. Coca Cola Bottling Company, 5262 CRB-1-07-8 (August 27, 2008) and Austin v. State/Dept. of Correction, 5014 CRB-8-05-11 (November 8, 2006).