CASE NO. 5794 CRB-8-12-10 : COMPENSATION REVIEW BOARD
CLAIM NO. 800173059

ADRIAN BARBIERI
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

: SEPTEMBER 26, 2013

COMFORT AND CARE
OF WALLINGFORD, LLC
RESPONDENT-EMPLOYER
NO RECORD OF INSURANCE

and

SECOND INJURY FUND
RESPONDENT-APPELLANT

APPEARANCES:

The claimant was represented by Christopher DePalma, Esq., Kennedy, Johnson, D'Elia & Gillooly, 555 Long Wharf Drive, 13th Floor, New Haven, CT 06511.

The respondent-employer, Comfort and Care of Wallingford, LLC, did not appear.

The respondent-appellant, Second Injury Fund, was represented by Lawrence Widem, Esq., Assistant Attorney General, Office of the Attorney General, 55 Elm Street, Hartford, CT 06141-0120.

This Petition for Review from the July 9, 2012 Finding and Award of the Commissioner acting for the Eighth District was heard April 26, 2013 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Charles F. Senich and Peter C. Mlynarczyk.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The Second Injury Fund ("Fund") has appealed from an order issued pursuant to § 31-355 C.G.S. ordering it to pay the benefits due the claimant in this matter, as the claimant's employer was uninsured. The Fund argues that the trial commissioner failed to address whether the corporate veil should be pierced so it may seek satisfaction of the award from the respondent's principal or a successor firm. We concur with the Fund's argument. We remand this matter for further proceedings to ascertain if an award should be imposed against the principal of the respondent or the successor firm of the respondent.

The facts in this matter are as follows. The claimant, Adrian Barbieri, was employed by Comfort and Care of Wallingford, LLC (hereinafter "Respondent") on March 11, 2011 and had worked for them for four years prior to that date as a homemaker companion. On that date the claimant was with a client at the Family Dollar store in Portland when the client fell in the parking lot. The client was elderly and fell backwards into the claimant who injured her right shoulder in an attempt to prevent them both from hitting the car next to them. The claimant treated for her injuries and was restricted from work. When the claimant was released to light duty work she was first advised no such work was available, but later, as her restrictions were lessened, she returned to light duty work for two weeks. On June 6, 2011, the claimant's treating physician released her to full duty work. However, prior to being released to full duty the claimant was laid off by the respondent on April 14, 2011.

The claimant reported the incident to Linda Durning, owner of the respondent company. Ms. Durning at one point advised the claimant that she would take care of everything and not to worry. The claimant understood this to mean that the medical bills and wage replacement for lost time would be paid by the respondent. Ms. Durning never paid any of the bills but, according to the claimant, Ms. Durning advised the medical providers that the treatment was authorized and would be paid. The medical bills, however, all remain unpaid for this injury. An investigator for the Fund offered into evidence reports that the respondent did not carry workers' compensation insurance on the date of the injury. The trial commissioner noted the respondent in this matter has not cooperated in that it has not attended multiple hearings and did not engage counsel to represent its interests, nor had it filed a brief in response to the claim.

The trial commissioner concluded the claimant suffered a compensable injury and was entitled to temporary total disability benefits and temporary partial disability benefits for her periods of incapacity. He also found she was entitled to reimbursement of outstanding medical bills for her treatment. Only Comfort and Care of Wallingford, L.L.C., was named as a respondent in the Finding and Award, but a copy of the Finding was sent via certified mail to Helping Hearts and Hands, Linda Durning, Thomas Durning, Gerald Hampton and Hearts & Hands Homecare, LLC.

The Fund filed a number of post-judgment motions, specifically a Motion for Reconsideration, a Motion to Correct and a Motion for Articulation. Among the issues raised in these motions was the trial commissioner's enumeration of only Comfort and Care of Wallingford, LLC, as the party responsible for the award, as the Fund argued that Helping Hearts and Hands was a successor firm to the respondent, and that Ms. Durning

should be deemed personally responsible as the alter ego of the respondent at the time of the claimant's injury. The trial commissioner denied all of these motions in their entirety. The trial commissioner also determined that as Comfort and Care of Wallingford, LLC, had not honored the award to the claimant that the Fund was obligated to pay the award as the claimant's employer was uninsured. The Fund has thus pursued this appeal.[1]

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

The Fund argues that it placed the issue of piercing the corporate veil before the commissioner and that he did not reach a decision on the issue. In reviewing the record, we find the Fund did advance the argument at the formal hearing that they were seeking

[1] While the Fund originally contested the claimant's eligibility for certain benefits, it has abandoned that issue on appeal.

to make Ms. Durning and the successor firm to Comfort and Care of Wallingford, LLC, responsible parties for the award due to the claimant. At the March 30, 2012 formal hearing the Fund presented testimony from James Pepe, an investigator for the Treasurer's Office, who testified as to the nature of Ms. Durning's business relationship with both entities and the level of control she had over their activities. March 30, 2012 Transcript, pp. 22-31. The proposed Findings and Conclusions submitted by the Fund on June 21, 2012 specifically sought to make Ms. Durning and Helping Hearts & Hands Homecare, LLC, responsible parties to pay the award. See June 21, 2012 Proposed Conclusions C & E. The Finding and Award of July 9, 2012 contains no reference as to having addressed these issues raised by the Fund.

We find the situation herein, where a material issue was raised by a litigant but not addressed by the trial commissioner in the Finding, akin to the situation in Aylward v. Bristol/Board of Education, 5756 CRB-6-12-5 (May 15, 2013). In Aylward, the Fund appealed on the basis that they had sought a ruling from the trial commissioner on an unresolved issue, but the commissioner did not render a decision. We remanded the matter back to the trial commissioner for the following reasons.

> The Fund argues in their brief that the issue of concurrent employment was placed on the record for adjudication, and that no finding was reached by the trial commissioner. The claimant's post-trial brief dated January 12, 2012 clearly sought a finding that the claimant had been concurrently employed at the time of her 2003 injury. The respondent CIRMA acknowledged concurrent employment in their post-hearing brief dated January 19, 2012. The Fund's post-hearing brief dealt with this issue at length. The record contains numerous hearing notices referencing § 31-310 C.G.S.; and counsel for the Fund discussed the issue at length at the November 3, 2009 formal hearing. Based on this record, we agree with the Fund that our opinion in Distassio v. HP Hood, Inc., 4592 CRB-4-02-11 (May 5, 2004) is on point. As this issue was

> presented to the fact finder, and not addressed, we remand the issue of concurrent employment under § 31-310 C.G.S. to the trial commissioner for factual findings.

Id.

We believe the trial commissioner must resolve the issue of whether Ms. Durning or the successor firm to the respondent is legally responsible for the award. We believe that after reviewing the record the Fund offered a colorable argument that these parties could potentially be found responsible pursuant to the "identity rule" or the "instrumentality rule" as promulgated in Naples v. Keystone Building & Development Corp., 295 Conn. 214, 232-234 (2010). Naples indicates that "[w]hether the circumstances of a particular case justify the piercing of the corporate veil 'presents a question of fact.'" Id., 234. As an appellate body cannot find facts, we must remand this matter so that the trial commissioner can consider these issues.[2]

We have frequently determined that the principals of firms may be found liable for payment of workers' compensation awards if their corporations or limited liability companies acted as their alter ego. See Diaz v. Capital Improvement & Management, LLC, 5616 CRB-1-11-1 (January 12, 2012) and Caus v. Paul Hug d/b/a Hug Construction Company, Hug Contracting Company, Crown Asphalt Paving, LLC, P. Hug Contracting, LLC, 5392 CRB-4-08-11 (January 22, 2010). The arguments and evidence presented by

[2] In a similar case, Jacobs v. James Dwy d/b/a New Home Exteriors, 5327 CRB-5-08-3 (May 28, 2009), there was a dispute as to the claimant's principal employer under § 31-291 C.G.S. and the Fund sought to hold a new hearing to summon a non-appearing party to address the issue. We granted that relief as "[t]he rather clear implication herein is that the party who responded to the notice will now be the party obligated for the award, wherein Mr. Tucker is to be rewarded for his absence." At oral argument, before this tribunal for this case, counsel for the Fund represented that they only sought findings based on the existing record, and additional hearings were not essential. We therefore decline to order additional hearings unless the trial commissioner deems them necessary.

the Fund would, if credited by the trial commissioner, establish such liability against Ms. Durning consistent with this precedent.[3] Since there has not been a ruling from the trial commissioner on whether he credited this evidence or found this argument persuasive, this matter must be remanded to him to make such a decision.[4]

Commissioners Charles F. Senich and Peter C. Mlynarczyk concur in this opinion.

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[3] Our holding in Diaz v. Capital Improvement & Management, LLC, 5616 CRB-1-11-1 (January 12, 2012) speaks to the type of inquiry a trial commissioner should perform when the issue of personal liability of a business owner is raised regarding an uninsured employer.

> We find that Caus, supra, is also directly on point as to the issue of whether the trial commissioner could appropriately act to pierce the corporate veil and find Mr. Klavins personally liable. In Caus the principal of the respondent failed to provide documentary evidence for his defenses at the hearing, and appeared to have commingled the activities of his various businesses in such a haphazard fashion "that the trial commissioner could have reasonably concluded that Mr. Hug commingled the activities of his various businesses and that each firm acted as an alter ego of Mr. Hug personally." Id. We found the principal of the respondent personally liable in Caus when he failed to maintain corporate formalities and the firm was an alter ego of the principal. We find the present case indistinguishable from Caus either on the facts or the law and are compelled to uphold a similar result. Findings, ¶¶ 25 & 26 establish that the respondent's principal, Mr. Klavins, commingled firm assets for personal use and failed to maintain corporate formalities. Under these circumstances, the factual predicate to pierce the corporate veil has been established.

[4] We cannot identify similar Compensation Review Board precedent on the issue of successor liability for firms that purchase employers who fail to maintain workers' compensation insurance and fail to pay awards due claimants. Nonetheless, we believe the trial commissioner is obligated to rule on whether the Fund proved its argument on that issue.