CASE NO. 5814 CRB-8-12-12 : COMPENSATION REVIEW BOARD
CLAIM NO. 800170342

RUVIM IZIKSON
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: NOVEMBER 15, 2013

PROTEIN SCIENCE CORPORATION
EMPLOYER

and

CHUBB GROUP INSURANCE COMPANIES
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Brian J. Mongelluzzo, Esq., and Nicholas Mancini, Esq., Law Office of Brian Mongelluzzo, LLC, 1336 West Main Street, Suite 1B, Waterbury, CT 06708.

The respondents were represented by Karen Acquarulo, Esq., and Elycia D. Solimene, Esq., Behman Hambelton, LLP, 10 Alexander Drive, Wallingford, CT 06492.

This Petition for Review from the December 10, 2012 Finding and Dismissal of the Commissioner acting for the Eighth District was heard June 28, 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. MASTOPIETRO, CHAIRMAN. The claimant has appealed from a Finding and Dismissal that determined that he had failed to comply with the statutory requirements under § 31-294c C.G.S. to engage the jurisdiction of the Commission over his claim for benefits. The claimant argues that while he had not filed a Form 30C, within the statutory one year period to commence a claim, that the totality of the circumstances placed the respondent on notice that he was seeking benefits. We conclude that this is essentially a factual question for the trial commissioner to resolve. The claimant failed to persuade the trial commissioner on this issue and after reviewing the evidence, we believe the commissioner's decision was a reasonable exercise of his discretion. We affirm the Finding and Dismissal.

The parties stipulated to the following facts at the formal hearing.

1. Ruvim Izikson, (hereinafter "Claimant") was employed by the Protein Science Corporation (hereinafter "Respondent") on July 12, 2010.
2. The Claimant asserts he injured his back and leg in the course of his employment with the Respondent while lifting a box at work on July 12, 2010.
3. The Claimant notified his employer, through David Turrill, Respondent's Controller, on or about July 14, 2010 of the injury, and a First Report of Injury form was prepared. (Exhibit C)
4. The First Report of Injury completed on July 14, 2010 (Exhibit C) names the Claimant as the injured employee, Respondent as employer, the Insurance Carrier, physician, and the nature date and time of the injury.
5. The First Report of Injury was transmitted to Chubb Insurance on July 14, 2010, and from that date forward Mr. Turrill and the Claimant corresponded by email concerning the Claimant's purported July 12, 2010 work injury.
6. In addition, on July 14, 2010, Mr. Turrill wrote that the insurance adjuster wanted to speak with the Claimant and Mr. Turrill. (Exhibit A, 7/14/2010 email.)
7. Again on July 22, 2010, Mr. Turrill corresponded with the Claimant to advise the Claimant of the progress of the Claimant's claim and to see how to handle the Claimant being out of work for a workers' compensation claim as opposed to a short-term disability claim. (Exhibit A 7/22/2010 email)

8. By July 23, 2010, Mr. Turrill advised the Claimant to directly contact the Respondent Chubb to move forward with his compensation claim. (Exhibit A email 7/23/2010).
9. On or before July 21, 2010, the Respondent Chubb sent a prescription card to the Claimant by mail. (Exhibit B) It contained a disclaimer indicating that any payment that may be made for prescriptions does not mean the claim was accepted. (Id.) It was never used.
10. The emails indicate that the Claimant believed the Respondent, Chubb, was investigating the claim. (Exhibit A email 8/24/2010)
11. On August 25, 2010, the Respondent Chubb issued a Form 43 contesting the Claimant's assertion that an injury occurred to the claimant's back while in the course of his employment with the Respondent. (Exhibit D) The Form 43 does not list an injury date. (Id.)
12. The Claimant did not file a Form 30C within one year of the date of the purported July 12, 2010 injury.
13. The Claimant did not file a hearing request within one year of the date of the purported July 12, 2010 injury.
14. The Respondent-Employer and/or Respondent-Insurer did not furnish any medical treatment, surgical care or indemnity payments to the Claimant in connection with this claim.

Based on these stipulated facts the trial commissioner concluded that the claimant had not filed a Form 30C with the Commission within the statutory one year period subsequent to the date of injury, nor had the respondent provided any medical care or indemnity benefits within that one year period. As a result, the trial commissioner dismissed the claim. The claimant filed a Motion to Correct seeking to add findings consistent with the Commission retaining jurisdiction over the injury. Only one correction was granted, correcting Finding, ¶ 11, finding that the Form 43 listed an injury date. The claimant has now pursued this appeal. In his opinion, the "totality of the circumstances" placed the respondent on notice the claimant was seeking benefits for a work-related injury and therefore the notice provision of § 31-294c C.G.S. had been met.[1]

[1] The relevant terms of the 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. 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.

(b) Whenever liability to pay compensation is contested by the employer, he shall file with the commissioner, on or before the twenty-eighth day after he has received a written notice of claim, a notice in accord with a form prescribed by the chairman of the Workers' Compensation Commission stating that the right to compensation is contested, the name of the claimant, the name of the employer, the date of the alleged injury or death and the specific grounds on which the right to compensation is contested. The employer shall send a copy of the notice to the employee in accordance with section 31-321. If the employer or his legal representative fails to file the notice contesting liability on or before the twenty-eighth day after he has received the written notice of claim, the employer shall commence payment of compensation for such injury or death on or before the twenty-eighth day after he has received the written notice of claim, but the employer may contest the employee's right to receive compensation on any grounds or the extent of his disability within one year from the receipt of the written notice of claim, provided the employer shall not be required to commence payment of compensation when the written notice of claim has not been properly served in accordance with section 31-321 or when the written notice of claim fails to include a warning that (1) the employer, if he has commenced payment for the alleged injury or death on or before the twenty-eighth day after receiving a written notice of claim, shall be precluded from contesting liability unless a notice contesting liability is filed within one year from the receipt of the written notice of claim, and (2) the employer shall be conclusively presumed to have accepted the compensability of the alleged injury or death unless the employer either files a notice contesting liability on or before the twenty-eighth day after receiving a written notice of claim or commences payment for the alleged injury or death on or before such twenty-eighth day. An employer shall be entitled, if he prevails, to reimbursement from the claimant of any compensation paid by the employer on and after the date the commissioner receives written notice from the employer or his legal representative, in accordance with the form prescribed by the chairman of the Workers' Compensation Commission, stating that the right to compensation is contested. Notwithstanding the provisions of this subsection, an employer who fails to contest liability for an alleged injury or death on or before the twenty-eighth day after receiving a written notice of claim and who fails to commence payment for the alleged injury or death on or before such twenty-eighth day, shall be conclusively presumed to have accepted the compensability of the alleged injury or death.

(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

We note that as an appellate panel we generally extend significant deference 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). When the findings of a trial commissioner has been reversed on appeal by this panel or by an appellate court it has been due to a determination there was an inadequate basis in the evidentiary record to sustain the finding, McFarland v. State/Dept. of Developmental Services, 115 Conn. App. 306, 323 (2009); or after a determination that the finding was contrary to law, Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007); or upon our conclusion after reviewing the record that "a mistake has been committed." Berry v. State/Dept. of Public Safety, 5162 CRB-3-06-11 (December 20, 2007).

The claimant cites Hayden-LeBlanc v. New London Broadcasting, 12 Conn. Workers' Comp. Rev. Op. 3, 1373 CRD-2-92-1 (January 5, 1994) and Pernacchio v. New Haven, 63 Conn. App. 570 (2001) as supporting a finding that the Commission has jurisdiction over the injury despite the absence of a Form 30C filed with the Commission. The claimant argues that since the respondents had sufficient information to file a Form 43 disclaiming liability for the alleged injury that they had sufficient notice of his interest in pursuing a claim for benefits to confer jurisdiction on the Commission. We must review the relevant precedent to ascertain if the trial commissioner's conclusion to the contrary was reasonable.

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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.

In Pernacchio, the claimant got ill during the course of his work day and was transported by an ambulance at the direction of his employer to the emergency room. The trial commissioner concluded that filing a First Report of Injury, coupled with the respondent's employees having witnessed the event and summoning medical treatment, was sufficient to meet the 'totality of the circumstances" test promulgated in Hayden-LeBlanc, supra. In addition, the trial commissioner concluded that by sending the claimant to the hospital in an ambulance the respondents "furnished medical care" within the meaning of the statute. The Appellate Court relied on the medical care exception to the statute in affirming the trial commissioner's decision.

> We agree with the conclusion of the majority of the board that the exception to the requirement of § 31-294c(a) that a written notice of claim for compensation be given within one year from the date of the accident that caused the personal injury created by § 31-294c(c) is applicable because the defendant, immediately after the accident, furnished the plaintiff with medical and hospital care, as provided in § 31-294d.

Id., 577-578.

In the present case we note that the record indicates that the respondent did not have contemporaneous knowledge of the claimant's injury, nor did they take any immediate action to render medical care to the claimant. The record indicates the respondent was made aware of the incident some days after its alleged occurrence, and to the extent any "medical care" was proffered, it was done over a week later in the form of an insurance card the claimant did not use. As a result, the claimant's arguments as to "substantial compliance" in this case are far weaker than the claimant's arguments in Pernacchio.

The respondents argue that the facts in this case more closely resemble a case where the claimant was found to have not engaged the jurisdiction of this Commission, Miller v. State/Judicial Branch, 5584 CRB-7-10-8 (November 28, 2011). In Miller, the claimant filed a First Report of Injury, but filed no further documentation within the one year period and the trial commissioner concluded the claimant's documentary filings did not put the respondent on notice a claim was being sought for the injury. We affirmed the trial commissioner's conclusion that the claimant had not complied with § 31-294c(a) C.G.S. We note the similarity between the facts in Miller and the present case. "From reviewing the various exhibits presented by the claimant in this matter, it does appear that the employer was advised as to the date and the place of the alleged accident and the nature of the injury. None of these documents, however, constitute an affirmative 'claim' for compensation under Chapter 568." Id. In the present case, similar to Miller, we note that neither a Form 30C, nor any other functional equivalent was sent to this Commission within a year of the alleged incident advising the Commission the claimant was seeking benefits under Chapter 568.[2] [3]

One official form was sent in this matter. The respondent sent a Form 43 to the claimant disclaiming responsibility for the claimant's injury. The claimant has argued that since the respondents had sufficient knowledge of the potential claim to issue a

[2] As a result, our inquiry herein is different than our analysis was in cases involving whether a Form 30C was incomplete or inaccurate, such as Mehan v. Stamford, 5389 CRB-7-08-10 (October 14, 2009), *aff'd*, 127 Conn. App. 619 (2011), *cert. denied*, 301 Conn. 911 (2011) and Berry v. State/Dept. of Public Safety, 5162 CRB-3-06-11 (December 20, 2007).

[3] It is black letter law that effective notice is a prerequisite to this Commission having subject matter jurisdiction over a claimant's injuries. Kuehl v. Z-Loda Systems Engineeering, 4172 CRB-7-00-1 (July 12, 2001), *aff'd*, 265 Conn. 525, 534 (2003).

timely disclaimer, that clearly the respondents had constructive notice that the claimant was intending to seek workers' compensation benefits. Indeed, counsel for the claimant argues that issuing a Form 43 should be deemed an exception to the notice requirements of § 31-294c C.G.S. by operation of law. The respondents argue pursuant to Gaffney v. Stamford, 15 Conn. Workers' Comp. Rev. Op. 257, 2219 CRB-7-94-11 (May 24, 1996), the issue of whether the respondents' filing a Form 43 establishes jurisdiction for the claimant has already been addressed by the Compensation Review Board, and the claimant's argument was rejected. In Gaffney, we found the express language of the statute did not make such a filing an exception to notice, and "[t]his board is not in a position to broaden the express language of the statute, particularly where subject matter jurisdiction over a claim is implicated." Id.

One recent case is relevant to this inquiry. In Hodges v. Federal Express Corporation, 5717 CRB-7-12-1 (January 4, 2013), the claimant filed a First Report of Injury but did not file a Form 30C seeking benefits and the respondent had filed a Form 43 disclaiming liability. Counsel for the claimant sent correspondence to the respondent outlining the basis of a claim for benefits and copied the Commission. At a later date, the respondents contested jurisdiction over the claimant's injury asserting noncompliance with the notice statute. The trial commissioner concluded that based on the "totality of the circumstances" test promulgated in Hayden-LeBlanc, supra, the claimant had satisfied the notice requirements of the statute. We affirmed that decision.

> We note that the respondent correctly points out the claimant did not file a Form 30C within the one year period following the accident. However, § 31-294c(a) C.G.S., does not mandate that a claimant can only use the official Commission form to provide notice of a claim for benefits. The notice need only be in writing,

> be sent to the respondent and to the Commission, and provide the necessary information required to identify the claimant, the date and location of the injury, and the nature of the injury. The trial commissioner concluded the correspondence sent by claimant's counsel at the time in June of 2005, met this statutory requirement. In examining the verbiage of the letters and the plain meaning of the statute, we are satisfied the trial commissioner made a reasonable decision on the facts herein.

We also noted in Hodges that a co-worker had driven the claimant to the hospital immediately after his injury. We found the circumstances of that substantially similar to the situations in Pernacchio, supra, and Spencer v. Manhattan Bagel Company, 5419 CRB-8-09-1 (January 22, 2010), where we found that the medical care exception under § 31-294c(c) C.G.S. was met.

> We agree that to the extent there was a question as to the adequacy of the claimant's written notice in this matter, a trial commissioner could properly resolve this question in the claimant's favor. The commissioner believed the procurement of medical transportation alerted the respondent to the likelihood of a compensable injury, hence this would cause any written notice to meet the Hayden-LeBlanc standard.

Hodges, supra.

There are many similarities between this case and Hodges, but upon review there are sufficient factual differences that we cannot apply *stare decisis.* In the present case the employer did not render medical care to the claimant contemporaneously with the injury, nor is there any evidence in the record that the claimant took any action to notify the Commission he was seeking benefits. We believe that these factual differences could reasonably allow a trial commissioner in this case to reach a different result on the issue of whether the totality of the circumstances placed the respondent on notice the claimant was pursuing a claim under Chapter 568.

We did express concern in Hodges as to whether it is equitable to the claimant for a respondent to assert a defense of nonclaim subsequent to having filed a pre-emptive disclaimer. See Footnote, ¶ 2. Nonetheless, we also must extend *stare decisis* to our precedent in Gaffney, supra, where we previously ruled on this issue and determined that as a matter of law, the filing of a Form 43 did not create an automatic exception to the need to file a notice of claim under § 31-294c C.G.S. The filing of a disclaimer does create a factual issue for the trial commissioner to consider as to whether the "totality of the circumstances" test under Hayden-LeBlanc has been met. It is possible once a claimant is aware a potential claim will not be accepted by the employer that the claimant will then decide not to pursue the claim any further and will take no additional action. It is also possible a respondent could have actual knowledge a compensable injury occurred and by filing a pre-emptive Form 43 and engaging in other communication, could lead the claimant to reasonably believe he or she had already satisfied the requisite standard for a notice of claim. The issue of whether a party's conduct is equitable is an issue of fact. As the Appellate Court held in Deutsche Bank National Trust Co. v. DelMastro, 133 Conn. App. 669 (2012).

> "The determination of what equity requires in a particular case . . . is a matter for the discretion of the trial court. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of [the trial court's] action. . . . The manner in which [this] discretion is exercised will not be disturbed so long as the court could reasonably conclude as it did. . . .

Id., 674-675.

We conclude that by finding the claimant had not satisfied the totality of the circumstances standard the trial commissioner necessarily concluded that it was not

inequitable to expect the claimant to take further actions to advance his claim subsequent to the filing of the pre-emptive Form 43. We must respect this factual decision.

We have long held that when a claimant asserts that he or she has perfected notice of a claim by virtue of one of the statutory exceptions to filing a formal notice of claim, it is the claimant's burden to prove that exception. See Miller, supra, *citing* Horvath v. State/Department of Correction, 5008 CRB-8-05-10 (September 13, 2006), "Whether a claimant was 'furnished medical care' pursuant to § 31-294c(c) is a factual determination." Distassio v. HP Hood, Inc., 4592 CRB-4-02-11 (May 5, 2004). Our role on appeal is to ascertain if this finding is "clearly erroneous." Moutinho v. Planning & Zoning Commission, 278 Conn. 660, 665-666 (2006)." Horvath, supra.

In reviewing the stipulated facts before the trial commissioner we believe he could reasonably conclude the claimant failed to properly provide notice that he was seeking benefits for a compensable injury within one year of the injury. The trial commissioner could also reasonably conclude that none of the statutory exceptions to § 31-294c C.G.S were met. This determination was not contrary to law and was not clearly erroneous.[4]

Therefore, we affirm the Finding and Dismissal.

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

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[4] The claimant filed a Motion to Correct in which the trial commissioner denied 9 of the 10 proposed corrections. Insofar as our review of the proposed corrections indicates the claimant was primarily engaged in an attempt ". . . to have the commissioner conform his findings to the [claimant's] view of the facts," D'Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003), we find no error in the trial commissioner's refusal to grant those corrections, "The [claimant] cannot expect the commissioner to substitute the [claimant's] conclusions for his own." Id.