CASE NO. 5818 CRB-2-13-1 : COMPENSATION REVIEW BOARD
CLAIM NO. 200170290

JEREMY M. REID
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

: JANUARY 28, 2014

SHERI A. SPEER
d/b/a SPEER ENTERPRISES, LLC
EMPLOYER
NO RECORD OF INSURANCE
RESPONDENT-APPELLANT

and

SECOND INJURY FUND
RESPONDENT-APPELLEE

APPEARANCES: The claimant was represented by Lance G. Proctor, Esq., 43 Broad Street, 2nd Floor, PO Box 714, Westerly, RI 02891.

The respondent-appellant Sheri A. Speer d/b/a Speer Enterprises, LLC, was represented by Edward Bona, Esq., 30 Broadway, PO Box 146, Norwich, CT 06360.

The respondent-appellee Second Injury Fund was represented by Richard Hine, Esq., Assistant Attorney General, Office of the Attorney General, 55 Elm Street, PO Box 120, Hartford, CT 06141-0120.

This Petition for Review[1] from the January 15, 2013 Finding and Award of Preclusion of the Commissioner acting for the Second District was heard August 30, 2013 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Charles F. Senich and Peter C. Mlynarczyk.

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[1] We note that an extension of time was granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondent has appealed from a Finding and Award of Preclusion in this matter which determined that the claimant was her employee and that she had not filed a Form 43 responsive to his notice of claim. Upon review of the Finding and supportive Memorandum we conclude the trial commissioner reached a reasonable decision based on his evaluation of the evidence on the record. We identify no errors of law and affirm the Finding and Award of Preclusion.

The trial commissioner reached the following findings which are pertinent to our consideration. The trial commissioner found the respondent, Sheri Speer, engages in a real estate business in the Norwich area via a number of limited liability companies in which she is the sole owner. Her businesses are run out of her home and she does not carry workers' compensation insurance. She has one part time administrative worker, Jane Prokop, who is paid with taxes withheld and receives a W-2 at the end of the year. The trial commissioner identified two other women who perform part-time administrative duties for the respondent, whom she regarded as independent contractors. One of these women was Jennifer Prokop, daughter-in-law of Jane Prokop. The respondent also said that in 2009 and 2010 she had 15 other people who performed various maintenance tasks on her properties whom she regarded as independent contractors. Among those individuals were the claimant, Jeremy Reid, the claimant's father, Patrick Reid, Steven Tortora, Jeffrey Davis, Peter Contino, Toby Higgins and Chris Hettrick.

The claimant began working for Ms. Speer in October of 2008. From the start, the claimant was aware that taxes would not be withheld from his checks. He was told that he would be given a Form 1099 at the end of the year and he would be responsible

for paying his own taxes. He was paid by the hour, initially at a rate of $10.00. Initially the claimant worked at the direction of Mr. Hettrick, but after a falling out between the respondent and Mr. Hettrick, the claimant reported directly to the respondent and received a raise to $12.00 per hour. The claimant began exercising increasing responsibility over retaining vendors to do work for the respondent, as well as doing minor work himself. In February 2009 the claimant began renting a unit from Ms. Speer and by March 2009 the claimant's hourly pay increased to $15.00 per hour.

In 2009 the respondent added more workers to deal with various projects and these workers considered the claimant the go-between or supervisor for the respondent. These workers received instructions from the claimant on what Ms. Speer wanted done. The claimant and the other workers all had their own tools, but also used vacuum cleaners, carpet cleaners, rakes and shovels owned by the respondent. The claimant also said that he began working more hours and was responsible for distributing a punch list of needed emergency repairs to other people working for the respondent. At some point, a notice was sent by Ms. Speer's office to her tenants telling them they could contact Jeremy Reid directly with maintenance requests.

The claimant and the respondent disagreed on whether she could dictate the claimant's work hours. The claimant testified that he and some other workers had to fill out time cards for the respondent and she had a strict policy against them working for others. The respondent denied she had a policy against outside employment but admitted that the claimant and a few others did have to submit time cards to her.

In the late summer of 2009 the claimant and the respondent had a brief dating relationship wherein he moved into her house. Around September 2009, while they were

dating, Ms. Speer began to find that she was sometimes unable to get hold of Mr. Reid during business hours. Upon checking with other workers she was told that there had lately been significant blocks of time during which the claimant could not be accounted for. Ms. Speer began to suspect that the claimant was not working all the hours he claimed to be, and that he was performing work for others during hours he ought to have been working for her. On September 25, 2009, the respondent Speer issued a memorandum, addressed to "all workers," regarding time records. She ordered that "all time cards" must show when the worker punched in and when he punched out. It also stated that "[n]ormal work hours per day begin 7:00 am till 3:00 pm." Findings, ¶ 52. The September 25, 2009 memo also stated that lunch was to be one-half hour long. Workers were free to leave the site for lunch, but if they stayed on site they would be paid for the half-hour break. Ms. Speer denied authoring this memo and said that if it had been issued it would have been issued by Jennifer Prokop. One worker for the respondent, Joshua Mason, received a memo with handwritten notes from Ms. Speer directing him to perform certain duties because he had sustained an injury to his foot.

In an October 7, 2009 memorandum, signed by Ms. Speer and addressed to "all workers," the workers were told they must report to her "every morning when [they] arrive on the job." Findings, ¶ 59. It also required a weekly update on work done when time cards were submitted. For the week ending Saturday, October 10, 2009, the claimant submitted a written account of what he had done for that week. For Monday the claimant accounted for only one hour of his time. For Tuesday, he indicated that he worked from 7:00 a.m. until 6:00 p.m., at various locations, and described what he did in detail. The record showed nothing else for the remainder of the week, however. The

claimant sought $753.75 in pay for the work week ending October 10, 2009, which represented 50.25 hours at his rate of $15.00. At payday the following Friday the claimant was paid only $502.75 (actually, $334.00 to the claimant and $168.75 for his rent). A few days later he was paid another $211.00 and ten days after that he was paid the final $40.00. Findings, ¶ 61.

The romantic relationship between Mr. Reid and Ms. Speer appears to have broken off about the middle of October 2009. On or about October 15, 2009, the respondent installed time clocks at three of her properties. She testified that she specifically did this because she believed the claimant was cheating her on time and avoiding her calls, making it hard to keep track of his goings and comings. About that time Patrick Reid received a memo from Ms. Speer directing him to report to his job site by 7:00 am, not leave until 3:30 pm, clock out for lunch if necessary, and report any tardiness to Ms. Speer. Ms. Speer also issued a memo to "all workers" on October 23, 2009 stating: *"I can not stress enough that you must call me when you arrive in the morning and when you leave for the day. The weekly log must be filled out and attached to your time card or you will not receive your pay check."* Ms. Speer wrote in ink at the bottom of at least one copy of this memorandum: *"Also, you must punch in where there is a time clock on the job. No exceptions."* Findings, ¶ 65. Ms. Speer testified that memo was sent only to the crew at a single job site where she needed to know who was working there.

The claimant continued to work for the respondent after their dating relationship ended, but communicated through Jennifer Prokop. On December 15, 2009 Ms. Prokop sent the claimant an e-mail directing him to provide daily updates as to his work, a

weekly schedule for his work, and to turn in time cards no later than Tuesday before noon. The e-mail further required the claimant to obtain Ms. Speer's approval to schedule a helper on the job and that until someone was up to date on company work that it was a conflict of interest to schedule side jobs.

On December 18, 2009 the claimant sent an e-mail as to the snow removal policies for the respondent's properties, as a storm was expected. Ms. Speer wanted snow removed within three hours of the end of a storm. The claimant alleges that his maintenance duties included, when necessary, shoveling snow. Ms. Speer testified that Mr. Higgins would be required to shovel snow, but this was never one of Jeremy Reid's duties. Indeed, Ms. Speer testified that she specifically told the claimant not to shovel snow because he had injured his shoulder while lifting weights earlier that year. The claimant denies any such prior injury, and denies ever being told by Ms. Speer that he should not shovel snow. A responsive e-mail from the respondent to the claimant on December 18, 2009 directed him to check an oil gauge when he was doing shoveling or maintenance. On December 29, 2009 the respondent sent the claimant an e-mail scheduling him to work on a certain property on the 30th from 8 a.m. to 2 p.m., to go to another property at 2 p.m., and to be on call on the 31st and the 1st. The claimant said that while removing snow on the 31st with Toby Higgins, he injured his right shoulder. On January 8, 2010 the claimant went to the emergency department at the Lawrence & Memorial Hospital in New London with complaints of shoulder pain. The hospital registration record of that visit identifies his employer as: "self-employed." Findings,

¶ 80. The claimant continued to work for Ms. Speer in a limited fashion until approximately February 1, 2010, when he went to another emergency room for shoulder complaints.

The claimant filed a Form 30C with the Commission on May 5, 2010 asserting he sustained a compensable shoulder injury while employed by the respondent. The same day he requested a hearing before the Commission. Notice of these filings was sent to the respondent at her address via certified mail. The claimant also unsuccessfully filed for unemployment compensation during this time frame. The respondent received notice of the Form 30C but did not file any responsive pleading, nor did the respondent or a representative attend an informal hearing held on June 2, 2010. The 28 day period to respond to the claimant's Form 30C expired on June 7, 2010. On June 23, 2010 a second informal hearing was held where counsel for the respondent attended and argued the claimant had been an independent contractor. On August 20, 2010, the claimant's attorney filed a "Motion to Preclude" which included a postal receipt card signed by Ms. Speer. The respondent has not filed a Form 43 despite requests from claimant's counsel, who seeks this filing to assist in obtaining health insurance from the state for his client.

The trial commissioner noted that the formal hearing commenced on March 2, 2011 and involved a number of sessions and that due to a disruptive incident; the hearings had to be moved for security reasons from the Commission offices in Norwich to the local courthouse. The final session of testimony took place at the courthouse on December 28, 2011. The respondent completed an examination of the witnesses present, and sought a continuance to call additional witnesses not present, which was denied.

Based on this record the trial commissioner concluded that the claimant alleged he sustained an accidental injury within the scope of § 31-275 C.G.S. and § 31-284 C.G.S., if an employer-employee relationship existed. While he found the claimant was advised upon being hired he was an independent contractor, he did not find this representation binding. The trial commissioner engaged in a lengthy discussion of the business relationship, noting the claimant was paid on an hourly basis, and at least from September 2009 onward the claimant's time, breaks and hours were set by the respondent. The claimant's job duties evolved and he became a de facto foreman for the respondent. The trial commissioner accepted as credible the respondent's reasoning for installing time clocks, but noted that eliminated flexibility and created a great deal of control over the claimant's work. By December of 2009 the relationship between Ms. Speer and Jeremy Reid was that of employer and employee and therefore the alleged injury fell within the jurisdiction of Chapter 568. The trial commissioner found that the claimant was not a casual employee, and that the requisite elements existed to grant a Motion to Preclude. Accordingly, the trial commissioner granted the Motion to Preclude. He further directed that if the parties did not reach a stipulation, an additional hearing be held to determine if the claimant could present a prima facia case of compensability to the trial commissioner.

The respondent filed a Motion to Correct seeking 25 corrections to the Finding. The trial commissioner granted three of the corrections sought, which did not materially change the Finding. The respondent has pursued this appeal. She argues that the trial commissioner erred by finding that an employer-employee relationship existed. She also argues that her failure to file a Form 43 was proper in this matter, as she thought that had she filed one it would abet a fraud in the claimant's unemployment compensation claim.

She also argues that the claimant's Form 30C was insufficient as it did not state a place of injury. She also argues the trial commissioner erred by deeming the respondent's case rested when she had no further witnesses on December 28, 2011. As a corollary to that point, she argues that the trial commissioner was biased against her and he should not have found the claimant credible. We are not persuaded by any of these arguments.

On appeal, we generally extend deference to the decisions made by the 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). The Compensation Review Board cannot retry the facts of the case and may only overturn the findings of the trial commissioner if they are without evidentiary support, contrary to the law, or based on unreasonable or impermissible factual inferences. Kish v. Nursing & Home Care, Inc., 248 Conn. 379 (1999) and Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Nonetheless, while we must provide deference to the decision of a trial commissioner, we may reverse such a decision if the commissioner did not properly apply the law or reached a decision unsupported by the evidence on the record. Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

In the present case, the claimant filed a Motion to Preclude. In the wake of the precedent established by the Connecticut Supreme Court in Donahue v. Veridiem, Inc., 291 Conn. 537 (2009) and Harpaz v. Laidlaw Transit, Inc., 286 Conn. 102 (2008) we believe trial commissioners have a very limited scope of inquiry once a claimant files a Motion to Preclude.

> Turning first to that text, § 31-294c(b) provides in relevant part that ''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.'' We have referred to this statute, or its predecessor, as setting forth a ''conclusive presumption.''

Donahue, supra, 548.

The claimant in this case filed a Form 30C. Within 28 days the statute required the respondent to respond in some fashion to the claim or face preclusion. None of the affirmative actions that would avoid preclusion were taken. We note that unlike Dubrosky v. Boehringer Ingleheim Corporation, 145 Conn. App. 261 (2013), the respondent does not argue that she was seeking "safe harbor" from preclusion and the circumstances herein made compliance impossible. Rather, she argues that the very act of filing a Form 43 denying the claim would constitute some form of admission on her part conceding jurisdiction.

The respondent advances no precedent supportive of this argument, instead offering a novel statutory interpretation of § 31-294c(b) C.G.S. Respondent's Brief, pp. 41-45.[2] We note that in civil litigation, a default judgment will enter if a party properly

[2] The relevant statute reads as follows:

(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

served with a writ, summons and complaint does not file an appearance and a responsive pleading. See § 52-84 C.G.S., § 52-119 C.G.S. and § 52-221 C.G.S, as well as Practice Book § 10-18 and § 17-32. The entry of preclusion when a respondent fails to respond to a claim for workers' compensation is similar. In both circumstances, if a party believes there is no jurisdiction over the dispute, the appropriate response is to file a timely pleading challenging jurisdiction. In Chapter 568, that pleading would be a Form 43 disclaiming liability.

We dealt with many of these issues in Zolla v. John Cheeseman Trucking, Inc., 5261 CRB-5-07-8 (August 4, 2008). In Zolla, the claimant filed a Form 30C against an Ohio employer. The Ohio employer did not respond with a timely Form 43 but argued that Connecticut lacked jurisdiction as the claimant's exclusive remedy was allegedly under Ohio law. We upheld the finding that the respondent had been precluded from challenging compensability.

> In reviewing the various defenses advanced by the respondent, we agree with the trial commissioner that such defenses were affirmative defenses which needed to be advanced prior to statutory preclusion attaching to this claim pursuant to the precedent in Harpaz, supra. The defenses of contractual preclusion

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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.

> and *res judicata* in the Ohio proceeding do not go to the subject matter of this Commission to consider this claim based on the timeline herein.

Id.

The respondent argues she is challenging subject matter jurisdiction, which may be raised at any time. See Del Toro v. Stamford, 270 Conn. 532 (2004). Nonetheless, we do not read the preclusion statute as permitting a respondent to ignore a claim altogether if they intend to subsequently advance a jurisdictional defense. We find that such an interpretation would yield "absurd or unworkable results," see § 1-2z C.G.S., and is therefore untenable.[3] The purpose of the preclusion statute is to provide a timely response to the claimant as to whether his or her claim will be accepted. An affirmative statement that the respondent denies the jurisdictional requirement of an employer-employee relationship satisfies the statute. Silence does not.

The other defense the respondent raises, as to the Motion to Preclude, is that the claimant's Form 30C was too irregular to support preclusion. She asserts that as the claim form did not state an address of injury that this notice was statutorily defective. The trial commissioner concluded to the contrary. In denying Request 25 in the Motion to Correct the trial commissioner concluded "[t]he fact that the claimant did not specify Elizabeth Street as the place of injury in his Form 30c is immaterial." February 7, 2013 Ruling to Respondent's Motion to Correct. We find this conclusion reasonable.

In Kingston v. Seymour, 5789 CRB-5-12-10 (September 10, 2013), we determined an inaccurate date of injury in a Form 30C did not prejudice the respondent.

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[3] We are puzzled at the respondent's reasoning that by filing a form in this forum, denying that she acted as an employer, she would be waiving a jurisdictional argument that she was not an employer of the claimant in regards to his unemployment compensation claim. It would seem logical to assume that an affirmative denial of jurisdiction would be a more effective response to the claim rather than no response at all.

Our reasoning, citing the "totality of the circumstances" standard promulgated in Hayden-Leblanc v. New London Broadcasting, 12 Conn. Workers' Comp. Rev. Op. 3, 1373 CRD 2-92-1 (January 5, 1994) was as follows:

> 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).

Kingston, supra.

Considering the significant level of supervision the record demonstrates the respondent maintained over the claimant's daily work activities, we do not find the absence of an address of injury on the Form 30C prejudiced the respondent. The precedent in Nalband, supra, Mehan, supra, and Berry v. State/Dept. of Public Safety, 5162 CRB-3-06-11 (December 20, 2007) supports the trial commissioner's conclusion.

Even if the claim herein was properly commenced and the circumstances warranted granting preclusion, the claimant still has the obligation of proving that the Commission has jurisdiction over the injury. "Our precedent makes clear it is the claimant's burden to establish the jurisdictional fact of an employer-employee relationship, '[t]he burden rested on the plaintiff to prove that he was an employee. Morganelli v. Derby, 105 Conn. 545, 551 (1927); Bourgeois v. Cacciapuoti, 138 Conn. 317, 321 (1951)." Reeve v. Eleven Ives Street, LLC, 5146 CRB-7-06-10 (November 5, 2007). The trial commissioner concluded that the claimant met this burden. We must ascertain if there was sufficient evidence in the record to reach this conclusion.

Our precedent on determining whether a employer-employee relationship exists is based on the "totality of the factors" test first promulgated in Hanson v. Transportation General, Inc., 245 Conn. 613 (1998). We restated this test in Maskowsky v. Fed Ex Ground, 5200 CRB-3-07-2 (July 28, 2008).

> Therefore, under the Hanson precedent a trial commissioner must weigh *all* the factors relevant to employment status prior to reaching a decision. This decision will be driven by the specific facts of each case presented. Our ability as an appellate panel to reverse such a determination on appeal is limited in scope as the inferences and conclusions reached by a trial commissioner must be accorded deference on appeal. As "[n]o reviewing court can then set aside that inference because the opposite one is thought to be more reasonable; nor can the opposite inference be substituted by the court because of a belief that the one chosen by the [commissioner] is factually questionable." Daubert v. Naugatuck, 267 Conn. 583, 590 (2004), citing Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988).

Maskowsky, supra.

The respondent asserts error as in her view the circumstances of this case are indistinguishable from our decisions in Jordan v. Reindeau & Sons Logging, LLC, 5388 CRB 2-08-10 (December 18, 2009) and Schleidt v. Eldredge Carpentry, LLC, 5373 CRB-8-08-8 (July 14, 2009). In those cases we affirmed Findings and Dismissals wherein the trial commissioner determined the claimants were independent contractors. The respondent argues that as the claimant in this case was paid without having taxes withheld, and had a Form 1099 issued, that these facts argue that the claimant was an independent contractor, as was found in Jordan and Schleidt. The respondent also argues that the claimant in this case also worked in an autonomous manner as did the claimants in those aforementioned cases. Respondents Brief, pp. 26 -29.

The trial commissioner did not find the claimant was an independent contractor and after reviewing the thorough review of the facts and the law the trial commissioner undertook in evaluating this case, we are satisfied this conclusion was reasonable. In Covey v. Home Medical Associates, LLC, 5770 CRB-4-12-7 (July 25, 2013) we cited Tianti v. William Raveis Real Estate, Inc., 231 Conn. 690, 697 (1995) for the proposition "[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."[4] We found that based on the factual record presented in Covey that the respondent exercised such pervasive control as to the business activities of Dr. Covey that an employer-employee relationship had been created.

Last month in their opinion in Compassionate Care Inc. v. Travelers Insurance Co., 147 Conn. App. 380 (2013) the Appellate Court restated the "right to control" test that we applied in Covey, supra. In that case the Appellate Court was asked to determine whether health care professionals who rendered home care to clients of the defendant could be classified as employees for the purpose of assessing premiums on a workers' compensation insurance policy. It restated this determining factor.

> The controlling consideration in the determination whether the relationship of master and servant exists or that of independent contractor exists is: Has the employer the *general authority to direct what shall be done and when and how it shall be done*—the right of general control of the work?'' (Citation omitted; emphasis

[4] In Covey v. Home Medical Associates, LLC, 5770 CRB-4-12-7 (July 25, 2013) we *cited* Tianti v. William Raveis Real Estate, Inc., 231 Conn. 690, 697 (1995) and rejected the respondent's position in that case that as Dr. Covey had not received a W-2 or had taxes withheld, that he was therefore an independent contractor. Despite the respondent's argument to the contrary citing Jordan v. Reindeau & Sons Logging, LLC, 5388 CRB 2-08-10 (December 18, 2009) and Schleidt v. Eldredge Carpentry, LLC, 5373 CRB-8-08-8 (July 14, 2009) the failure of the claimant to have taxes withheld does not automatically equate to independent contractor status. See Phelan v. Soda Construction Co., 13 Conn. Workers' Comp. Rev. Op. 53, 54-55, 1583 CRB-3-92-12 (Dec. 20, 1994).

> added.) *Kaliszewski* v. *Weathermaster. Alsco Corp.*, 148 Conn. 624, 629, 173 A.2d 497 (1961). Id., 391.

The Appellate Court further cited a case dealing with unemployment compensation, Latimer v. Administrator, 216 Conn. 237 (1990), for the proposition that when the contracting party retains the ability to direct a worker's day to day activities that level of control of a worker could reasonably lead a fact finder to conclude an employer-employee relationship was in existence.

> That right of intervention, which we believe clearly exists under the facts, evinces a right to control and direct the [workers] by the recipient of their services. The reporting of their day-to-day activities to [the plaintiff] by the [workers] and the monitoring of those activities by [the plaintiff], who possessed the right to discharge the [workers], is hardly indicative of the degree of independence that distinguishes an independent contractor from an employee. That the [workers] were permitted to perform their day-to-day duties without interference so long as those duties were performed in a satisfactory manner does not militate against a conclusion of control. Id., 251.

Compassionate Care, supra, at 393.

In the present case the trial commissioner determined that after considering the testimony of the various witnesses that an employer-employee relationship existed between the claimant and the respondent at the time of his alleged injury.[5] We find that for the purposes of the precedent on this issue the respondent's decision to install time clocks and enforce strict policies as to the time, place and manner that work on her properties was to be performed could clearly demonstrate that she asserted the right to control the claimant's work, and he was no longer acting in an autonomous manner. We

[5] We note that in Compassionate Care Inc. v. Travelers Insurance Co., 147 Conn. App. 380 (2013) the Appellate Court found the health care professionals in that case worked in an autonomous manner, and therefore were properly deemed independent contractors. We are satisfied that after review of the facts in this case the trial commissioner could reasonably find the respondent exercised more control over the claimant's activities than was present in the Compassionate Care case.

find that Findings, ¶¶ 52, 53 reflect that in September 2009 the respondent instituted a more stringent attendance policy for her workers, including daily logs of their activities. Findings, ¶ 56. The respondent also specifically directed at least one worker as to what type of work he was able to perform. Findings, ¶ 58. The respondent further increased the level of control over her workers in October 2009 by installing time clocks. Findings, ¶ 63. The respondent began requiring notification of tardiness and to call in upon arriving at a worksite. Findings, ¶¶ 64-65. The respondent also limited the ability of her workers to work outside jobs, Findings, ¶ 70, and required prior requests to schedule helpers on jobs. Findings, ¶ 71.

Given these subordinate factual findings the trial commissioner could have reasonably determined "from at least September 2009 forward the respondent clearly set the starting and ending times for the claimant's work day, and dictated both the time and length of his lunch breaks." Conclusion, ¶ O. The trial commissioner further concluded "Ms. Speer maintained the right to, and often did, direct where and when the claimant worked at any given time and which tasks were to be given priority. She retained power to direct the order of his work." Conclusion, ¶ S. The commissioner could also reasonably conclude "that the primary reason for installing time clocks was to check up on the claimant, whom [the respondent] suspected of cheating on his time cards." Conclusion, ¶ W. The trial commissioner could have concluded from the evidence that after the personal relationship ended between the claimant and the respondent that "the respondent exercised a great deal of control over the claimant's daily work. Whether this degree of control existed prior to that time or not, the respondent has provided ample documentation of extensive control over the means of claimant's work in the months

leading up to his claimed injury, and that is the period of time that matters." Conclusion, ¶ X. The trial commissioner's Conclusion, ¶ Y, that as of December 2009 the relationship between Ms. Speer and Mr. Reid was that of employer and employee is consistent with the other facts found by the trial commissioner.

In both Jordan, supra, and Schleidt, supra, the trial commissioner determined that the claimants were working in an autonomous manner at the time of their injury and as a result, the business relationship existing was that of working as an independent contractor. We may distinguish those cases as the subordinate facts herein could reasonably cause the trier of fact to reach a different conclusion as to whether the claimant acted in an autonomous manner. We also note that in Schleidt, the trial commissioner specifically discounted the claimant's testimony as not credible. The trial commissioner did not reach that conclusion in this case, although the respondent's Motion to Correct sought to add findings that the claimant was attempting to seek benefits through fraudulent testimony, and the trial commissioner denied those corrections. See February 7, 2013 Ruling on Respondent's Motion to Correct, Requests, ¶¶ 12, 21 and 22. The respondent argues vehemently that the claimant did not offer credible testimony to the trial commissioner, citing a number of alleged discrepancies, Respondent's Brief, pp. 30-35, and states "[t]he Commission is inescapably bound to rule the claimant not credible." Id., p. 35. With all due respect, we are not bound in that manner.[6] We note that on appeal we may not substitute our opinion of the credibility of a

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[6] "Where the veracity of a witness' factual representations is at issue, the trial commissioner's credibility assessment is virtually inviolable on appeal." Goldberg, supra. Thus, this board would be unable to declare on review that the testimony of the claimant in this case was unreliable as a matter of law. VanStraten v. Hartford Courant, 3999 CRB-8-99-3 (March 23, 2000). Canevari v. C.R. Gibson Co. 4231 CRB-7-00-5 (May 14, 2001).

witness for the opinion of credibility that the trier of fact reached after observing the witness testify.

> Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude . . . . An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom . . . . As a practical matter, it is inappropriate to assess credibility without having watched a witness testify, because demeanor, conduct and other factors are not fully reflected in the cold, printed record.

Burton v. Mottolese, 267 Conn. 1, 40 (2003).

We also note that it is the role of the trial commissioner to weigh the impact of any alleged inconsistencies in a witnesses' testimony. See Cruz v. 31 Catherine Avenue, LLC, 5445 CRB-5-09-3 (March 2, 2010), *aff'd*, 127 Conn. App. 903 (2011)(Per Curiam), Berube v. Tim's Painting, 5068 CRB-3-06-3 (March 13, 2007) and Goldberg v. Ames Department Stores, 4160 CRB-1-99-2 (December 19, 2000). We are satisfied that the trial commissioner could have concluded as he did in regards to the claimant's testimony.

This standard also addresses the trial commissioner's evaluation of the respondent's testimony. The trial commissioner concluded that material aspects of the respondent's testimony were not credible. See January 15, 2013 Memorandum, pp. 10-12. The trial commissioner, having observed her testimony, was entitled to make this determination. Burton, supra. The trial commissioner also determined that the respondent's demeanor as a witness was inconsistent with someone who was not exercising control over her workers. January 15, 2013 Memorandum, p. 12. A trial commissioner is permitted to consider the demeanor of a witness in weighing his or her

testimony. DiDonato v. Greenwich/Board of Education, 5431 CRB-7-09-2 (May 18, 2010). Counsel for the respondent argues that the trial commissioner penalized the respondent for conducting a vigorous defense. We find no objective basis in the record for this position. The trial commissioner is permitted to reach those conclusions which may be reached by considering the documentary evidence and witness testimony which occurs on the record. The Finding and Award of Preclusion and the Memorandum contain no reference to any impermissible inference drawn from matters outside the record.

This is also dispositive of the argument advanced by the respondent that the trial commissioner should have disqualified himself as biased against the respondent pursuant to "Cannon 3" of the Code of Judicial Conduct. Respondent's Brief, p. 47. We have recently addressed the issue of when a trial commissioner must recuse themselves in our opinion in Martinez-McCord v. State/Judicial Branch, 5647 CRB-7-11-4 (August 1, 2012). There is no claim that the trial commissioner in this matter had any prior personal opinions as to the credibility of any witness or party herein. As our Supreme Court acknowledged in State v. Rizzo, 303 Conn. 72 (2011), "In the absence of unusual circumstances, therefore, equating knowledge or opinions acquired during the course of an adjudication with an appearance of impropriety or bias requiring recusal 'finds no support in law, ethics or sound policy.' *People v. Moreno*, 70 N.Y. 2d 403, 407, 516 N.E. 2d 200, 521 N.Y.S. 2d 663 (1987)." Rizzo, supra, at 119, as cited in Martinez-McCord, supra. The source of any alleged bias was the opinion formed by the trial commissioner from reviewing the evidence herein. Pursuant to Martinez-McCord, this does not constitute grounds for recusal.

We turn to the respondent's claim that the trial commissioner denied her due process by deeming her case to have rested at the close of the December 28, 2011 hearing when she had no additional witnesses available to testify and the trial commissioner denied a continuance to obtain testimony from other witnesses not present. Our review of the record indicates that the colloquy between counsel for the respondent and the trial commissioner on this issue indicates that none of the proposed witnesses were expected to offer testimony on the business relationship between the claimant and the respondent. December 28, 2011 Transcript, pp. 122-125. Nor does the record indicate that these witnesses were expected to offer rebuttal testimony or clarifications to recently received testimony or documentary evidence, see Ghazal v. Cumberland Farms, 5397 CRB-8-08-11 (November 17, 2009). Therefore, we find no error from the commissioner determining that the additional witnesses would offer unnecessary cumulative evidence.

In Kinsey v. World Pac, 5783 CRB-7-12-10 (September 17, 2013) we pointed out that "[i]t is black letter law that 'a trial commissioner has broad discretion to determine the admissibility of evidence, and an evidentiary ruling will not be set aside absent a clear abuse of that discretion,' LaMontagne v. F & F Concrete Corporation, 5198 CRB-4-07-2 (February 25, 2008)." We find the circumstances herein are similar to those in Tutsky v. YMCA of Greenwich, 9 Conn. Workers' Comp. Rev. Op. 29, 902 CRD-7-89-8 (January 17, 1991), *aff'd*, 28 Conn. App. 536 (1992). In Tutsky, the claimant proffered additional letters addressing medical issues before the trial commissioner and the commissioner declined to admit them. This panel concluded that additional evidence was not material to the issue of causation and affirmed the trial commissioner. The Appellate Court affirmed this decision.

> The commissioner's determination that the proffered letters were cumulative and not material to the causality question, being one of fact, was committed to his discretion. *Fair v. People's Savings Bank,* supra, 541. [T]he discretion of a commissioner in a matter of this kind should not be lightly disturbed. *Furlani v. Avery,* 112 Conn. 33, 339 152A. 158 (1930).

Tutsky, id., at 545.

We find the precedent in Tutsky governs this issue. Furthermore, in Vetre v. State/Dept. of Children and Youth Services, 3443 CRB-6-96-10 (January 16, 1998) we said that "[d]ecisions regarding the relevance and remoteness of evidence in workers' compensation proceedings fall solely within the discretion of the trier of fact." We affirm the trial commissioner's discretion here not to prolong what was already an extremely elongated formal hearing to allow cumulative evidence to be added to the record.[7]

Finally we note that the respondent argues the trial commissioner erred by not granting her Motion to Correct. The trial commissioner is not obligated to adopt the legal opinions and factual conclusions of a litigant. D'Amico v. Dept. of Correction, 73 Conn. App. 718 (2002) and Liano v. Bridgeport, 4934 CRB-4-05-4 (April 13, 2006). As we previously noted, many of these issues went to determining the relative credibility of the litigants which cannot be revisited on appeal.

In Cruz, supra, we pointed out "[e]mployment status is patently a factual issue, and is subject to a significant level of deference on review." That is the central issue in this appeal and we extend such deference in the present case.

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[7] We have long held that it is the quality of evidence, not the quantity of evidence, which is decisive in resolving contested matters before this Commission. "In this sense 'weight' means the *qualitative* value of the evidence presented. The trial commissioner decided the claimant presented the superior qualitative evidence. 'As the finder of fact, the trier has the sole authority to decide what evidence is reliable and what is not . . . .' Byrd v. Bechtel/Fusco, 4765 CRB-2-03-12 (December 17, 2004)." Arnott v. Taft Restaurant Ventures, LLC, 4932 CRB-7-05-3 (March 1, 2006).

Therefore, we affirm the Finding and Award of Preclusion.

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