CASE NO. 5832 CRB-4-13-4 : COMPENSATION REVIEW BOARD
CLAIM NO. 400062572

EDWARD HENRY
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: AUGUST 6, 2014

CITY OF ANSONIA
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLEE

and

PMA CORP. OF NEW ENGLAND
THIRD PARTY ADMINISTRATOR

APPEARANCES:

The claimant was represented by David J. Morrissey, Esq., Morrissey, Morrissey & Mooney, LLC, 203 Church Street, PO Box 31, Naugatuck, CT 06770.

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

This Petition for Review[1] from the March 25, 2013 Remanded Finding and Dismissal of the Commissioner acting for the Fourth District was heard January 24, 2014 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Stephen B. Delaney and Michelle D. Truglia.

[1] We note that a postponement and motions for extensions of time were granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has appealed from a Remanded Finding and Dismissal which determined that he had not complied with the notice requirements under Chapter 568 to pursue a claim for benefits. He argues that the facts of this case demonstrate that he met the exception to formal written notice under § 31-294c C.G.S.[2] at the time his claim for § 7-433c C.G.S. benefits accrued in 2005. We have reviewed the case and we are not persuaded that the trial commissioner reached

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[2] This statute reads 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

an unreasonable decision based on the facts herein. Accordingly, we affirm the Remanded Finding and Dismissal.

The trial commissioner reached the following facts which are pertinent to our consideration of the appeal. He noted that a Finding and Award/Finding and Dismissal was issued on July 29, 2011 and the matter was appealed. This tribunal ordered the matter remanded, Henry v. Ansonia, 5674 CRB-4-11-8 (August 8, 2012), and the trial commissioner held a new hearing on the sole issue of subject matter jurisdiction. The claimant testified as to the circumstances that precipitated the claim. He said he was a full time member of the Ansonia police department in 2005 and he was in charge of the Memorial Day parade route on May 29, 2005. At that event he sustained a rapid heart

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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 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.

(d) Notwithstanding the provisions of subsection (a) of this section, a dependent or dependents of a deceased employee seeking compensation under section 31-306 who was barred by a final judgment in a court of law from filing a claim arising out of the death of the deceased employee, whose date of injury was between June 1, 1991, and June 30, 1991, and whose date of death was between November 1, 1992, and November 30, 1992, because of the failure of the dependent to timely file a separate death benefits claim, shall be allowed to file a written notice of claim for compensation not later than one year after July 8, 2005, and the commissioner shall have jurisdiction to determine such dependent's claim.

beat when walking into the police station. He was taken to Griffin Hospital for tests, and then referred to his treating physician, Dr. Sudipta Dey, who then referred him to a cardiologist, Dr. Kenneth Spector. After performing tests, Dr. Spector diagnosed the claimant with heart disease, hypertension and sinus tachycardia in 2005, and placed the claimant on medication for heart disease.

The respondent filed a Form 43 with the Commission on October 21, 2005 specifying the claimant had an injury consisting of hypertension, arrhythmia and chest pain, and stating that no injury or occupational disease arose out of the employment. The Form 43 also stated the notice of claim was untimely, although no Form 30C had been filed at that time. The employer had prepared a First Report of Injury and an incident report pertaining to the May 29, 2005 incident. The claimant filed two separate Forms 30C which were received by the Commission on August 6, 2008; one alleging hypertension and the other alleging heart disease and sinus tachycardia. Both alleged repetitive trauma. No Form 43 was filed by the respondent responsive to these claims.

Two co-workers of the claimant at the time of the incident testified at the hearing. Jeffrey Dempsey said that he was the supervisor at the time and the claimant reported feeling ill on May 29, 2005, so an incident report was filled out. Mr. Dempsey did not know how the claimant was transported to Griffin Hospital but another witness, John Fitzgerald, said because the claimant was looking pale, sweating and complaining of chest pain he transported the claimant to the hospital in a police car.

The commissioner then noted the 2010 deposition testimony of Dr. Dey and the respondent's expert witness, Dr. Martin Krauthamer. Dr. Dey testified he prescribed Diovan to the claimant on September 19, 2005 and then changed the prescription to

Toprol XL. He prescribed the Diovan because an echocardiogram showed a thickening of the heart muscle and he needed to put the claimant on anti-hypertension medication. He said he usually explained to his patients why they were being prescribed medication. The claimant had high blood pressure and hypertension on September 19, 2005. While the claimant has hypertensive heart disease he does not have coronary artery disease. Dr. Krauthamer opined that the claimant did not have heart disease, noting prior episodes of dizziness and shortness of breath prior to the 2005 incident. Noting the claimant had not been found to have an arrhythmia and had a "clean bill of health" from a 2005 catheterization, Dr. Krauthamer attributed the claimant's raised blood pressure to anxiety disorder and panic attacks. Findings, ¶ 8. He further opined the only reason to prescribe Diovan is to treat hypertension.

Based on this record the trial commissioner concluded that the claimant's testimony was credible and persuasive except as to the issue of whether he was on heart medication in 2005. The trial commissioner found Dr. Dey's testimony credible and persuasive and found that he prescribed hypertension medication to the claimant on September 19, 2005 and explained its purpose to the claimant. Based on the precedent in Ciarelli v. Town of Hamden, 299 Conn. 265 (2010) this establishes the claimant's date of injury as September 19, 2005. As the claimant failed to make a formal claim for hypertension benefits within one year from that date as required by statute and case law, the Commission lacked subject matter jurisdiction to consider the claim.

Neither party filed a Motion to Correct. Therefore, for the purposes of this appeal we may give the facts found by the trial commissioner 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 has appealed on the basis that the trial commissioner did not properly apply the law governing subject matter jurisdiction for claims brought under Chapter 568.

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). 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).

The claimant offers three arguments as to why the trial commissioner's decision was erroneous as a matter of law. First, he argues that pursuant to the remedial purpose of the Act that the respondent's Form 43 served as the functional equivalent of written notice from the claimant for the purpose of establishing jurisdiction over the claimant's hypertension. The claimant also argues that the respondent is equitably estopped from contesting jurisdiction based on the fact that they had sufficient knowledge as to the claimant's injury to file a Form 43 contesting the elements of the injury. Finally, the claimant argues that the circumstances herein, where the claimant was transported to a hospital by a co-worker for examination, placed the respondent on notice as to a compensable injury pursuant to the precedent in Pernacchio v. New Haven, 3911 CRB-3-

98-10 (September 27, 1999), *aff'd*, 63 Conn. App. 570 (2001). We are not persuaded by these arguments that the trial commissioner's decision was erroneous as a matter of law.

The claimant cites Hodges v. Federal Express Corporation, 5717 CRB-7-12-1 (January 4, 2013) as being on point, and we do note many similarities with that case. However, there are enough factual distinctions that we are not obligated to give *stare decisis* to the holding of Hodges (where we affirmed jurisdiction in the absence of a timely Form 30C being filed) to the facts of this case. In Hodges, the claimant suffered an injury at work and was driven to the hospital by a co-worker. The claimant spent five days thereafter at the hospital and a few weeks later underwent surgery on a herniated disc. The respondents filed a pre-emptive Form 43, and counsel for the claimant then sent correspondence regarding the injury to the respondent's claims manager and the Commission. The trial commissioner concluded that the respondents had been placed on notice that the claimant would seek benefits and we affirmed that decision. We cited Hayden-LeBlanc v. New London Broadcasting, 12 Conn. Workers' Comp. Rev. Op. 3, 1373 CRD-2-92-1 (January 5, 1994), as outlining the "totality of the circumstances" test for determining the adequacy of a written notice of claim. We further noted,

> [h]owever, § 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.

Hodges, supra.

In the present case, there was no finding that the claimant or his legal representative made any written statement to his employer within one year of his injury evincing he would seek benefits under Chapter 568 or § 7-433c C.G.S. Therefore, the "totality of the circumstances" supportive of finding the Commission had jurisdiction was considerably stronger in Hodges than the present case. We find this factual distinction substantial enough to justify the trial commissioner reaching a differing result in this case, especially as it is the claimant's burden to prove to the trial commissioner that he or she has satisfied the notice statute in order to preserve jurisdiction. Miller v. State/Judicial Branch, 5584 CRB-7-10-8 (November 28, 2011).[3]

We now turn to the specific arguments raised by the claimant. He argues that the Form 43 filed by the respondent served as a functional equivalent of the Form 30C which the claimant did not file within the statutory notice period. Therefore, when the respondent filed a Form 43 this filing automatically conferred jurisdiction to the Commission over the claimant's injury. We considered this argument in Izikson v. Protein Science Corporation, 5814 CRB-8-12-12 (November 15, 2013) and rejected it. In Izikson we pointed out that in Gaffney v. Stamford, 15 Conn. Workers' Comp. Rev. Op. 257, 2219 CRB-7-94-11 (May 24, 1996) the compensation review board had ruled whether the respondents' filing of a Form 43 establishes jurisdiction for the claimant. In Gaffney, the compensation review board had ruled that it did not as the express language of the statute did not make such a filing an exception to notice, and "[t]his board is not in

[3] The claimant notes that in Hodges v. Federal Express Corporation, 5717 CRB-7-12-1 (January 4, 2013) we questioned the equity of allowing a respondent who filed a pre-emptive Form 43 to then argue a nonclaim defense after the one year notice period had expired. We further note however that in Izikson v. Protein Science Corporation, 5814 CRB-8-12-12 (November 15, 2013), we held that 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 creates a factual issue for the trial commissioner to consider as to whether the "totality of the circumstances" test under Hayden-LeBlanc v. New London Broadcasting, 12 Conn. Workers' Comp. Rev. Op. 3, 1373 CRD-2-92-1 (January 5, 1994), has been met.

a position to broaden the express language of the statute, particularly where subject matter jurisdiction over a claim is implicated." Id. We determined that we must extend *stare decisis* to our precedent in Gaffney, supra, and ruled against the claimant in Izikson, supra. We must apply *stare decisis* to this case as well.

The claimant then argues that the respondent should be equitably estopped from contesting timely jurisdiction over the claim. We also considered this issue in Izikson, supra, and concluded that it is a factual question committed to the determination of the trial commissioner. 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.

This question essentially hinges on whether the "totality of the circumstances" test in Hayden-LeBlanc was met by the claimant. The trial commissioner concluded to the contrary. As we noted, unlike Hodges, supra, there was no communication from the claimant during the initial one year period from the date of injury which indicated he would seek benefits. Therefore, we do not find the commissioner's conclusion unreasonable.

We finally turn to the claimant's argument that he was furnished medical care by the respondent and this served to satisfy the notice statute. In Valenti v. Norwalk Hospital, 5871 CRB-3-13-8 (July 16, 2014) we noted "[p]roving that a claimant was furnished medical care sufficient to overcome the need to file a written notice of claim is

a difficult burden." In the present case the claimant was transported to a health care facility on May 29, 2005 by a co-worker and the record does not reflect that his treatment that day went beyond tests. We can distinguish this situation on the facts from Hodges, supra, where the claimant was hospitalized for five days after being transported to a hospital, and from Pernacchio, supra, where the claimant was transported to the hospital in an ambulance while in cardiac distress. The respondent cites Kulis v. Moll, 172 Conn. 104 (1976) for the proposition that transportation of an employee to a health care facility, standing on its own, is insufficient to constitute "furnishing medical care." We conclude that based on this record the trial commissioner was not satisfied that the actions of Mr. Fitzgerald in driving the claimant to the hospital rose to the level of "furnishing medical care."

Since the parties herein did not contest the commissioner's factual findings by way of a Motion to Correct, we must ascertain if, as a matter of law, Mr. Fitzgerald's conduct rose to a level that conferred jurisdiction over the claim. We conclude that based on the specific facts herein, the trial commissioner was not obligated to find medical care had been furnished for a compensable injury. While the transportation of the claimant to a medical facility could have caused a reasonable fact-finder to find that medical care was furnished, given the totality of the circumstances, it was also reasonable to find it had not been furnished. While a different fact finder might have reached a conclusion supportive of the claimant after considering the evidence, we do not believe that this is the type of factual finding we can revisit on appeal, Fair v. People's Savings Bank, 207 Conn. 535 (1988).

The claimant had the burden of proving that in the absence of a written claim within one year of being diagnosed with a compensable injury he met one of the statutory exceptions to written notice. The trial commissioner concluded that he had not. This determination was not contrary to law and was not clearly erroneous.

Accordingly, we affirm the Remanded Finding and Dismissal.

Commissioners Stephen B. Delaney and Michelle D. Truglia concur in this opinion.