CASE NO. 5840 CRB-5-13-5 : COMPENSATION REVIEW BOARD
CLAIM NO. 500154775

PATRICIA GERALDINO
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

: APRIL 17, 2014

OXFORD ACADEMY OF HAIR DESIGN
EMPLOYER

and

THE HARTFORD INSURANCE GROUP
INSURER
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by Daniel D. Skuret, III, Esq., Law Offices of Daniel D. Skuret, P.C., 215 Division Street, Ansonia, CT 06401-0158.

The respondents were represented by Richard T. Stabnick, Esq., Law Offices of Pomeranz, Drayton & Stabnick, LLC, 95 Glastonbury Boulevard, Suite 216, Glastonbury, CT 06033-4412.

This Petition for Review from the May 1, 2013 Finding and Award of the Commissioner acting for the Fifth District was heard November 22, 2013 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Peter C. Mlynarczyk and Ernie R. Walker.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondents in this matter have appealed from a Finding and Award which determined the claimant had submitted a valid Motion to Preclude to the Commission. The respondents argue that they had a meritorious defense to the Motion to Preclude based on challenging subject matter jurisdiction and the commissioner's decision to grant preclusion was in error. We have reviewed the record herein and considered the respondents' argument. We find even in a light most favorable to the respondents, the arguments they advanced would not challenge the presence of subject matter jurisdiction for the Commission. We affirm the Finding and Award.

The trial commissioner reached the following factual findings in this matter. She noted that the claimant made a claim for a repetitive trauma injury asserting a date of injury of November 2, 2010. The Form 30C was served on the respondents on October 28, 2011, which was within one year of the stated last date of exposure. The respondents did not file a Form 43 within 28 days of receiving the Form 30C, and as the claimant believed that as the Form 30C was in proper order the precedent in Russell v. Mystic Seaport Museum, Inc., 252 Conn. 596 (2000) mandated that preclusion should enter. The respondents argued that cases such as Discuillo v. Stone and Webster, 242 Conn. 570, 575 (1997) required that the claimant establish a prima facia case prior to granting preclusion, which included the existence of an employer-employee relationship and an injury as defined under Chapter 568. The respondents challenged the adequacy of a prima facia case.

The trial commissioner then reviewed the material submitted in support of the Motion to Preclude and confirmed that a timely Form 30C for the alleged date of injury had been filed and a timely Form 43 contesting the claim had not been filed. The commissioner also found that at the Apri1 1, 2013 formal hearing the parties stipulated that the Workers' Compensation Commission had jurisdiction over the claim. The parties also stipulated that November 2, 2010 is the claimed repetitive trauma date on the Form 30C. The parties also stipulated that on the date listed on the Form 30C, November 2, 2010, the claimant was an employee, was at work on the company premises and was being paid to be at work on the company premises. The commissioner also found a stipulation that the claimant continued to work as an employee for the respondent-employer until February 18, 2011 and on February 21, 2011 the claimant had cervical fusion surgery. She also found the respondent neither filed a Form 43 nor commenced payments without prejudice within the statutory 28 day period from receiving notice.

The trial commissioner reviewed the statutory requirements for a valid notice of claim under § 31-294c C.G.S.[1] She also reviewed the actual verbiage of the Notice of

[1] The relevant portions of this statute are 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.

Claim, which indicated that the claimant was injured on November 2, 2010 in Seymour, Connecticut; that it was a repetitive trauma claim; and that the body parts injured were her neck, back, legs, knees, feet, arms, hands, & fingers. The notice states that the claimant was injured due to "[r]epetitive lifting, carrying, moving, climbing stairs, and standing." The employer listed was Oxford Academy of Hair Design. The respondents having taken no responsive action to the filing of the Form 30C; the claimant filed a Motion to Preclude on February 17, 2012.

(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 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.

Based on these subordinate facts the trial commissioner concluded that the claimant was employed by the respondent on the date cited in the Notice of Claim and that the notice was clearly adequate on its face and placed the respondents on notice that they should investigate and respond to the pending claim. She concluded the claimant was at the company premises on the date of the alleged injury and was paid to be at work there. The respondents took no responsive action. Therefore based on the totality of evidence presented, she granted the Motion to Preclude.

The respondents filed a Motion to Correct seeking different verbiage describing the claimant's activities on the date of the accident. The trial commissioner granted this correction in part. The respondents then brought the present appeal.

The gravamen of the respondents' argument on appeal is that in order to obtain preclusion a claimant must present a prima facia case. The elements of a prima facia case include that this Commission has subject matter jurisdiction over the claimant's injury. The respondents argue that although the claimant's Form 30C cites a date of injury in which she was at the employer's premises and being paid, she was not "working" at that time and hence, they are contesting the Commissioner's jurisdiction over the injury. We find this semantic wordsmanship unpersuasive.

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), trial commissioners have a 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. Instead, the respondents have advanced an argument that the claim lacked subject matter jurisdiction. We noted that in Reid v. Sheri A. Speer d/b/a Speer Enterprises, LLC, 5818 CRB-2-13-1 (January 28, 2014) that pursuant to Del Toro v. Stamford, 270 Conn. 532 (2004) that subject

matter jurisdiction may be raised at any time. We did not find the respondents' argument in Reid, supra, that there was no employee-employer relationship meritorious, and we reach the same result herein.

In Reid we cited Reeve v. Eleven Ives Street, LLC, 5146 CRB-7-06-10 (November 5, 2007) and Hanson v. Transportation General, Inc., 245 Conn. 613 (1998) as governing the standard for ascertaining whether an employer-employee relationship existed. We need not engage in such detailed review, however. At the formal hearing the respondents acknowledged that on the day cited in her Form 30C the claimant was an employee, continued to be employed by the respondent for months thereafter, and was being paid by the respondents on that day to be at the respondent's premises. See January 17, 2013 Transcript, p. 12, where counsel for the respondents advised the trial commissioner as follows regarding the date cited in the Form 30C; "I agreed that she was an employee on that date. My contention all along was there was no work that was done that day."

Therefore, the respondents acknowledged that on the date of injury cited by the claimant in the Form 30C that she met the jurisdictional threshold of having an employer-employee relationship with the respondent. We find this matter akin to Shepard v. Bridgeport, 5762 CRB-4-12-6 (November 22, 2013) where once respondent's counsel agreed to jurisdictional facts establishing the claimant's right to relief, the trial commissioner was obligated to grant that relief. We also find the case of Nationwide Mutual Ins. Co. v. Allen, 83 Conn. App. 526 (2004) on point. In Nationwide, a trial court granted a declaratory judgment for the plaintiff that an individual who did work for the carrier's insured was an employee and not an independent contractor, and Nationwide was not obligated to defend the suit. The Appellate Court concluded that the trial court

could rely on admissions made by the parties in the underlying workers' compensation case that an employer-employee relationship existed. Id., 541-542. In this case, the respondents conceded the claimant was an employee on the alleged date of injury. What she was specifically doing on that date is an issue related to causation, and not subject matter jurisdiction. [2]

Even, if assuming *arguendo*, the date on the claimant's Form 30C did not relate to a date in which she was physically present at the respondent's premises and being paid by the respondent we are not persuaded that this error would divest the Commission of jurisdiction. The record herein indicates that the claimant continued to work for the respondent for several months subsequent to the alleged date of injury. The claimant is also asserting a repetitive trauma injury, and not an injury on a specific date. As a result,

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[2] We compare the facts herein to a case where the trial commissioner reopened and set aside an award upon finding the requisite jurisdictional fact of employer-employee relationship did not exist. See Mankus v. Mankus, 4958 CRB-1-05-6 (August 22, 2006), *aff'd,* 107 Conn. App. 585 (2008). In Mankus, the claimant obtained an award essentially through a default judgment when the putative employer did not attend a hearing. Following an investigation the Second Injury Fund moved to reopen and set aside the award, as the employer denied that he had employed the claimant. The trial commissioner granted that relief and we affirmed that decision on appeal.

The testimony offered by Robert Mankus and credited by the trial commissioner that the claimant wasn't his employee at the time of injury implicated our jurisdiction pursuant to § 31-275(1) since we are limited to compensating employees for injuries incurred in an employer-employee relationship. As noted in Marone, a "mistake of fact" can justify reopening an award if, as noted in Meadow, supra, "it appears likely an injustice has been done and upon a rehearing a different result would be reached." Obviously, the 1997 Finding and Award was granted based on the mistaken belief that the Commission had jurisdiction over the injury, thus the operative requirements of both Marone and Meadow are present herein.

The claimant argues that since the respondent failed to appear at the 1997 formal hearing that the Finding and Award cannot be reopened. The ultimate outcome of the claimant's argument would cause what equates to a default judgment to confer permanent subject matter jurisdiction on the Commission. Such reasoning is untenable with Castro, supra, and Del Toro, supra. "In other words, the employer can *always* contest the existence of 'jurisdictional facts.'" Del Toro, supra. (Emphasis added.) Moreover, it is incompatible with black letter law wherein default judgments lack the force of collateral estoppel. "Collateral estoppel is 'that aspect of res judicata which prohibits the relitigation of an issue when that issue was *actually litigated* and necessarily determined in a prior action between the same parties upon a different claim.' Rinaldi v. Town of Enfield, 82 Conn. App. 505, 516 (2004)." Robert v. General Dynamics, 4691 CRB-2-03-7 (June 14, 2004). (Emphasis added.) Id.

In the present case the respondents appeared at the formal hearing and counsel stated on the record that the claimant was their employee. While one can raise a defense at any time as to subject matter jurisdiction, we find that the concession of employer-employee relationship is now the "law of the case" Gilbert v. Ansonia, 5342 CRB-4-08-5 (May 14, 2009).

we do not find the respondents could have been prejudiced by the Form 30C as it clearly states the claimant sustained an injury during a period when she was employed by respondent and was filed within one year of the alleged date of last exposure. See Kingston v. Seymour, 5789 CRB-5-12-10 (September 10, 2013) where we cited Surowiecki v. UTC/Pratt & Whitney, 4233 CRB-8-00-5 (May 24, 2001) for the proposition that ". . . the failure to prove the exact date upon which an accidental injury occurred does not preclude this Commission from exercising jurisdiction over a claim for compensation." We also note that in Palmieri v. Simkins Industries, Inc., 5694 CRB-3-11-11 (October 10, 2012) and Goulbourne v. State/Department of Correction, 5192 CRB-1-07-1 (January 17, 2008) we pointed out that the "last day of exposure" is the standard for determining the timeliness of a claim for repetitive trauma. In Palmieri, we also cited Russell, supra, for the position that the statute of limitations issue is separate and distinct from the time limitations regarding preclusion.

> the rule that the statute of limitations period begins to run from the date of last exposure for some repetitive trauma injuries has no relevance, and bears no logical relationship, to the rule requiring sufficient time related information in a notice of claim to allow an employer to investigate a repetitive trauma injury. Consequently, our determination of when the statute of limitations begins to run for certain types of repetitive trauma injuries is *irrelevant* to a determination of whether the plaintiff' notice of claim complied with § 31-294c (a).

Id., 616. (Emphasis in original.)

This analysis was critical to our decision in Volta v. United Parcel Service, 5612 CRB-7-10-12 (January 31, 2012). The respondents in this case argue that the present case can be distinguished from Volta. We do not agree. Both cases appear to be

examples where respondents attempted to defend against a Motion to Preclude by labeling a challenge to causation a "jurisdictional defense."

In Volta, the claimant filed a repetitive trauma claim and the respondents failed to file a timely disclaimer. The claimant filed a Motion to Preclude. After reviewing the factual evidence, the trial commissioner concluded that the claimant's injurious exposure had ended more than one year prior to his claim having been filed and "the notice of claim filed in 2008 was untimely and therefore deprived the Workers' Compensation Commission of subject matter jurisdiction. The trial commissioner denied the claimant's Motion to Preclude and dismissed the repetitive trauma claim." Id. The claimant filed a Motion to Correct asserting error in the initial decision, but the trial commissioner denied that motion. On appeal, this tribunal reversed the trial commissioner and remanded the matter for further proceedings, citing Russell, supra. We also cited Del Toro, supra, for the proposition that "[i]t is well settled that, in the context of a workers' compensation proceeding, issues of causation, such as whether an injury arose out of and in the course of employment, have not been held to be jurisdictional facts." We determined that as the claimant in Volta asserted a repetitive trauma injury had occurred during the time he was employed by the respondent, that the Notice of Claim which he submitted was sufficient on its face to establish jurisdiction. To permit the respondents to question the manner in which the claimant was injured after statutory preclusion affixed to the claim essentially would permit the respondents "to circumvent the strictures of preclusion." Id.

Our reasoning herein is consistent with the directive the Appellate Court set forth in Callender v. Reflexite Corp., 137 Conn. App. 324 (2012). In Callender, the Appellate Court made clear that for the purposes of preclusion the trial commissioner cannot look

behind the four corners of a filed claim to ascertain if it is duplicative of a claim already pending before the Commission. Instead, the commissioner is limited to a very narrow inquiry in deciding whether preclusion should enter.

> In deciding a motion to preclude, the commissioner must engage a two part inquiry. First, he must determine whether the employee's notice of claim is adequate on its face. See General Statutes § 31-294c (a). Second, he must decide whether the employer failed to comply with § 31-294c either by filing a notice to contest the claim or by commencing payment on that claim within twenty-eight days of the notice of claim. See General Statutes § 31-294c (b). If the notice of claim is adequate but the employer fails to comply with the statute, then the motion to preclude must be granted.

Id., 338.

In the present matter the trial commissioner engaged in this analysis and determined that the claimant submitted adequate notice as to her injuries.[3] She further determined that the parties had agreed that on the date of the claimant's alleged injury an employer-employee relationship existed. We find no error.

We address one additional issue. The claimant is seeking sanctions from the respondent asserting that the appeal herein was frivolous. We note that there is a highly discretionary standard set as to whether or not a respondent should be sanctioned for advancing a frivolous defense. In light of the extremely unsettled nature of the law in the wake of Harpaz, supra, and Donahue, supra, we believe we are guided by the precedent in DiBlase v. Logistec of CT., Inc., 5362 CRB-3-08-7 (April 28, 2009), *aff'd*, 123 Conn.

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[3] We note that in Dubrosky v. Boehringer Ingelheim Corp., 145 Conn. App. 261 (2013) the Appellate Court advanced an additional ground as a defense to a Motion to Preclude; the defense that the circumstances of the case made it impossible for the respondents to comply with the statute within the 28 day period following the filing of the Form 30C. The respondents have not advanced an argument that similar to the respondents in Dubrosky that they could not have filed a disclaimer or commenced payment within 28 days.

App. 753 (2010), *cert. denied*, 299 Conn. 908 (2010). In DiBlase a party sought sanctions for unreasonable contest after a party advanced a defense which was subsequently rejected by the Connecticut Supreme Court. In light of the frequent clarifications by appellate courts of the law of preclusion, see e.g. Dubrosky v. Boehringer Ingelheim Corp., 145 Conn. App. 261 (2013) and Lamar v. Boehringer Ingelheim Corp., 5588 CRB 7-10-9 (August 25, 2011), *aff'd*, 138 Conn. App. 826 (2012), *cert denied*, 307 Conn. 943 (2013), we do not believe respondents should at this juncture be penalized for arguing that specific circumstances herein did not warrant preclusion.

For the reasons stated herein, we affirm the Finding and Award.

Commissioners Peter C. Mlynarczyk and Ernie R. Walker concur in this opinion.