CASE NO. 5884 CRB-4-13-10 : COMPENSATION REVIEW BOARD
CLAIM NO. 400083538

ROBERT STAUROVSKY
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

: NOVEMBER 25, 2014

CITY OF MILFORD
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLANT

and

PMA MANAGEMENT CORP.
ADMINISTRATOR

APPEARANCES:

The claimant was represented by Dennis W. Gillooly, Esq., D'Elia Gillooly Depalma, LLC, Granite Square, 700 State Street, New Haven, CT 06511.

The respondent was represented by Neil J. Ambrose, Esq., Letizia, Ambrose & Falls, PC, 667-669 State Street, Second floor, New Haven, CT 06511.

This Petition for Review[1] from the September 23, 2013 Finding and Award of the Commissioner acting for the Fourth District was heard May 30, 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 an extension of time were granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondent appeals from a Finding and Award favorable to the claimant for a workplace back injury. The claimant originally sought benefits for an injury he said occurred on February 15, 2011. He later testified that this injury occurred on February 9, 2011. The trial commissioner accepted the claimant's explanation for the discrepancy in dates and found the claimant to be a credible witness. The commissioner found the claimant had sustained a workplace injury and directed the respondent to accept the claim. The respondent has appealed, arguing that the claim was not jurisdictionally valid as it did not comport with the terms of § 31-294c C.G.S.[2] Upon review we believe this amounts to an argument that the inaccurate

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[2] This relevant portions of this statute read as follows:

Sec. 31-294c. Notice of claim for compensation. Notice contesting liability. Exception for dependents of certain deceased employees. (a) No proceedings for compensation under the provisions of this chapter shall be maintained unless a written notice of claim for compensation is given within one year from the date of the accident or within three years from the first manifestation of a symptom of the occupational disease, as the case may be, which caused the personal injury, provided, if death has resulted within two years from the date of the accident or first manifestation of a symptom of the occupational disease, a dependent or dependents, or the legal representative of the deceased employee, may make claim for compensation within the two-year period or within one year from the date of death, whichever is later. Notice of a claim for compensation may be given to the employer or any commissioner and shall state, in simple language, the date and place of the accident and the nature of the injury resulting from the accident, or the date of the first manifestation of a symptom of the occupational disease and the nature of the disease, as the case may be, and the name and address of the employee and of the person in whose interest compensation is claimed. An employee of the state shall send a copy of the notice to the Commissioner of Administrative Services. As used in this section, "manifestation of a symptom" means manifestation to an employee claiming compensation, or to some other person standing in such relation to him that the knowledge of the person would be imputed to him, in a manner that is or should be recognized by him as symptomatic of the occupational disease for which compensation is claimed.

(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.

date prejudiced the respondent in their defense of the claim. Precedent has established that an inaccuracy as to the date of injury in a claim does not necessarily divest this Commission of jurisdiction. In addition, the respondent in the present matter did not assert they were prejudiced when the issue arose in the formal hearing nor did they seek a continuance to obtain additional witnesses or evidence; instead resting on the record presented. As the claimant persuaded the trial commissioner that he was in fact injured while employed on the date in question, we affirm the Finding and Award.

The trial commissioner found the following facts at the conclusion of a formal hearing that commenced on June 13, 2012 and continued to additional sessions on November 15, 2012, February 26, 2013 and March 28, 2013, with the record closing July 24, 2013. The claimant testified he was an employee of the City of Milford since 1996, working as a building maintenance mechanic at the city's six fire stations. The claimant filed a Form 30C on March 21, 2011 claiming a February 15, 2011 right hip injury from lifting a 45-gallon barrel filled with dirt and rock salt. He signed a document entitled "Supervisor's Accident Investigation Report" that indicated he was injured on February 15, 2011 while lifting a barrel filled with sand and rock salt, injuring his hip. The claimant testified he was injured when placing a barrel with no wheels at the base of the bed of the pickup truck. A firefighter got onto the truck bed and filled the barrel with a salt/sand mixture, after which he and the firefighter manually pushed and dragged the barrel to the proper location. The barrel weighed about 450 pounds and it took the two of them about five minutes to move it to the location. The claimant said that he began to feel sore in his right hip and he verbally reported the incident to Battalion Chief William Healey the next day, although he did not fill out any paperwork.

The claimant testified he sought medical treatment on February 18, 2011 at Milford Hospital, complaining about pain around the right hip. He continued working and returned to Milford Hospital on March 14, 2011, complaining of excruciating right hip pain. The claimant testified he was not aware the actual injury was to his back and not to his right hip. He testified at the March 28, 2013 formal hearing that the actual date of injury was February 9, 2011 and not February 15, 2011. The claimant testified he reconsidered the correct date of injury after reviewing his payroll and attendance records and the hospital treating report after the previous formal hearing, and said he was mistaken in reporting the February 15, 2011 injury date. He now believes the injury was sustained on February 9, 2011. He said that he took February 15 and 16 off because of the pain. The claimant testified he filled out a Form 30C on March 21, 2011 that was faxed to him at home by a supervisor. It listed the right hip as being injured because he was under the impression he was suffering from a hip and not a back injury.

Subsequent to his injury the claimant treated with Dr. Amit Lahav, an orthopedic doctor, on February 23, 2011 regarding a previous unrelated knee injury, and discussed the February 18, 2011 emergency room visit for what he thought was his hip injury. He saw Dr. Lahav on March 15, 2011 and was diagnosed with a lumbar strain that was likely related to lifting heavy objects. Dr. Lahav recommended conservative management of the injury, light duty work, and a lifting restriction of 30 pounds for three to four weeks. This treater later recommended a lumbar MRI and diagnosed the claimant with lumbar strain, lumbar back pain syndrome, and lumbar disc herniation. He took the claimant out of work that day pending the MRI. The claimant was referred to Dr. Rahul Anand, a pain management doctor, who advised him the symptoms were part of a back injury, not a hip

injury. He received medical treatment from Dr. Anand for a lower back condition, including epidural and facet block injections, between April and December 2011. The claimant also treated with Dr. Thomas Arkins, a neurosurgeon, and was out of work until October 31, 2011 because of his back condition. He returned to work and continues to have lower back and right hip symptoms.

Chief Healey testified that when he was employed by the City of Milford there was not a written policy for filing workers' compensation claims, but there was a general understanding on how it was to be done. He further testified that he did not remember the claimant reporting a hip or back injury to him in February or March of 2011.

Based on this factual record the trial commissioner concluded that the claimant was "hazy and inaccurate with the dates of events but overall to be credible, including about the fact that he initially thought his back injury was a hip injury and that it occurred on February 9, 2011, rather than February 15, 2011 as he initially reported." Conclusion, ¶ c. The commissioner further found that the opinions of the claimant's treating physicians were persuasive that he sustained a back injury and the injury occurred during a work related event. Therefore the commissioner found the claimant was injured on February 9, 2011 while employed by the City of Milford and performing duties arising out of and in the course of his employment.

The respondent filed a Motion to Correct seeking 51 separate corrections; including the addition of findings as to the weather conditions on February 9, 2011, the failure of the claimant to notify his superiors in a timely manner as to the alleged incident, and that the emergency room report subsequent to the alleged injury did not

reference any nexus to the lifting of a barrel at work. The trial commissioner denied this motion in its entirety. The respondent has pursued this appeal.

The respondent argues that the inaccuracies in the date of the injury and the body part which was injured cited in the claimant's Form 30C either left the Commission without jurisdiction to grant relief to the claimant or prejudiced the respondent. They also draw attention to a number of discrepancies between the claimant's account of the incident and his subsequent treatment and the documentation on the record. As the respondent views the case, the finding that the claimant sustained a compensable injury was based on unreasonable and impermissible inferences drawn by the trial commissioner from the evidence provided.

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 and Home Care, Inc., 248 Conn. 379 (1999) and Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). 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 respondent first argues that the failure of the claimant to identify the correct date of injury or the correct injured body part deprives this commission of jurisdiction. They argue since the claimant is seeking benefits for a February 9, 2011 back injury and failed to file a Form 30C or seek a hearing within one year of that date specifically identifying that date of injury and body part that he failed to comply with the notice statute and this Commission lacks jurisdiction. They cite Drivas v. Fair Auto Park, 15 Conn. Workers' Comp. Rev. Op. 366, 2279 CRB-7-95-1 (June 28, 1996) and Bell v. Dow Corning STI, Inc., 13 Workers' Comp. Rev. Op. 109, 1777 CRB-4-93-7 (January 31, 1995) for this proposition. We acknowledge that when a question of jurisdiction is raised we must resolve this prior to considering any other issue. Del Toro v. Stamford, 270 Conn. 532, 543 (2004). Nonetheless, we are not persuaded by the respondent's authorities that we lack jurisdiction over this claim. Both cases involve circumstances where due to a question as to the accuracy of an injury date in a claim form, a subsequent Motion to Preclude was denied. In the present case there was no preclusion and the respondent was able to fully investigate and defend the claim. We do not find that Drivas or Bell compel us to dismiss the claim for want of jurisdiction.

On the other hand, we find our precedent in Kingston v. Seymour, 5789 CRB-5-12-10 (September 10, 2013) more on point in regards to the issue of jurisdiction. In Kingston, the claimant put an inaccurate date of injury on his Form 30C and on appeal the respondents claimed that the Form 30C filed by the claimant was too seriously flawed by virtue of the inaccurate date of injury to confer jurisdiction on the Commission.[3] We rejected that argument as the respondent had the burden under

[3] In Kingston v. Seymour, 5789 CRB-5-12-10 (September 10, 2013); the claimant testified that he accidentally wrote down the date in which he filled out the Form 30C as the date of injury. We noted in

§ 31-294c(c) C.G.S. of establishing it was prejudiced by the inaccurate date in the claimant's Form 30C and/or any other efforts to initiate the claim within one year of the injury. The trial commissioner concluded that it was not prejudiced and we affirmed that conclusion. In Kingston, we cited Berry v. State/Dept. of Public Safety, 5162 CRB-3-06-11 (December 20, 2007) for the proposition that ". . . there must be either a complete absence of notice to warrant dismissal of a claim . . . or notice which was so fundamentally deficient as to prejudice the other party." Id. The trial commissioner did not find the flawed date of injury as an irredeemable jurisdictional defect and based on our precedent, we concur in that opinion.

This discussion is relevant to the second claim of error by the respondent. The respondent argues that they were prejudiced by the inaccurate date in the Form 30C and if it were sufficient to confer jurisdiction, this matter still must be remanded to the trial commissioner for further proceedings to address the prejudicial impact of the inaccurate date. At oral argument before our tribunal the respondent cited Austin v. State/Department of Correction, 4852 CRB-5-04-9 (August 19, 2005) and Surowiecki v. UTC/Pratt & Whitney, 4233 CRB-8-00-5 (May 24, 2001) as precedent which supports remanding a case where notice was questionable back to the trial commissioner for further proceedings. We find both cases as factually distinguishable and therefore unpersuasive. In Surowiecki, the trial commissioner dismissed a claim for an inaccurate date of injury. The claimant appealed the dismissal and we ordered the matter remanded to ascertain if the respondents were actually prejudiced by the inaccurate date. Id. In

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our opinion that the respondents' Form 43 also cited the inaccurate date of injury, leading us to conclude "[a] reasonable conclusion herein is both the claimant and the respondent had some mutual confusion as to the date of the injury, but agreed as to its occurrence." Id.

Austin, supra, we concluded the trial commissioner had ruled on a Motion to Preclude prior to reaching a determination on whether a claim with a vague date of injury conferred subject matter jurisdiction on the Commission. Therefore, we remanded the matter to the trier of fact to determine if subject matter jurisdiction was present. Neither circumstance is present herein.

We have reviewed our precedent and note that we have remanded cases back to the trial commissioner when events late in the proceedings acted to prejudice the respondents. In Ghazal v. Cumberland Farms, 5397 CRB-8-08-11 (November 17, 2009), the respondents argued that the admission of a late arriving medical report prejudiced them when they could not depose the physician prior to the conclusion of the formal hearing.

> At the hearing, counsel for the respondents pointed out that they had just received a copy of Dr. Selig's report. July 11, 2008, Transcript, pp. 2-3. Counsel for the respondents specifically told the Commissioner they were not prepared to proceed on the matter of foreign medical treatment at the July 11, 2008 hearing. The trial commissioner agreed on the record not to consider this issue. July 11, 2008 Transcript, p. 7. The commissioner then changed his position later in the hearing. July 11, 2008 Transcript, p. 13. There were no witnesses presented in the interim to add to the record before the commissioner.

Id.

We agreed with that reasoning. "The respondents argue that the consideration of Dr. Selig's report without permitting them an opportunity to depose Dr. Selig was prejudicial; noting that the claimant was the moving party seeking to gain approval of foreign medical treatment. We are persuaded by this argument." Id. We further pointed out "[i]n the event a trial commissioner decides to accept and consider recently received

evidence, the trial commissioner then must allow both parties an opportunity to elicit testimony from the witness prior to reaching a ruling that relies on such evidence." Id.

In the present case, after the hearing had commenced, the claimant suddenly realized that the date of injury on the Form 30C was inaccurate and testified he had been injured on a prior day when he was working for the respondent. Clearly, in accordance with Ghazal, supra, a colorable claim of prejudice exists when a material issue such as a different date of injury is raised late in the proceeding. Our inquiry, however, must focus on whether the respondent argued that they were prejudiced at the formal hearing and whether the respondent was given a full opportunity to address this late arriving issue.

At the June 13, 2012 formal hearing the claimant testified at length as to the circumstances of his injury and unequivocally claimed the event occurred on February 15, 2011 and that he informed Battalion Chief Healey of the incident on February 17, 2011. June 13, 2012 Transcript, pp. 8-23. Battalion Chief Healey testified at a November 14, 2012 hearing that the claimant was not at work on February 15, 2011 and produced logs to support this testimony. November 15, 2012 Transcript, pp. 16-18. He also denied that the claimant had informed him of a work injury in February 2011. Id., pp. 13-14. Following this witness's testimony counsel for the parties discussed additional evidence that they would add to the record. Id., pp. 34-37. On February 26, 2013 counsel appeared at a hearing before the trial commissioner to discuss discovery issues. Counsel for the respondent asserted the claimant was . . . "if he's going to try and change a date now, I think [the claimant] he's time barred from doing that", February 26, 2013 Transcript, p. 6; but agreed to cross-examine the claimant at a later hearing so that he would have time to prepare for the hearing. Id., pp. 7-9.

The claimant appeared for the hearing on March 28, 2013 and testified as to the actual date he believed he had been hurt. March 28, 2013 Transcript, pp. 5-8. At the conclusion of this hearing counsel for the respondent told the commissioner he had no further evidence and agreed to submit proposed findings of fact and law within 30 days. Id., pp. 27-28. Counsel did not seek additional time to obtain additional evidence to refute the claimant's testimony or seek to call any additional witnesses. Id. As a result, we find that the respondent is not in the same position as the respondents were in Ghazel, supra. To the extent the respondent could have been prejudiced by the change in the claimant's narrative, this was addressed by their ability to cross-examine the claimant and the availability of time to locate and produce whatever evidence they believed was necessary to challenge the claimant. The respondent also did not argue to the trial commissioner that this discrepancy impeded their ability to investigate the claim. Instead, counsel for the respondent represented that at the conclusion of the March 28, 2013 hearing that he had no additional evidence. Id.

It is black letter law that we cannot consider issues on appeal that the parties did not properly preserve for appeal at the trial level. As we cannot identify a ruling by the trial commissioner that prejudiced the respondent in their defense of the claim, and the respondent presented a thorough defense to the claim; we cannot now determine that the respondent was prejudiced by the inaccurate date in the claimant's Form 30C.

We then turn to two closely related issues. The respondent has argued that the trial commissioner drew improper inferences from the evidence provided and the claimant's narrative was simply too inconsistent with the documentary evidence presented to support a claim for benefits. They also argue that their Motion to Correct

should have been granted. We acknowledge that the respondent points to a number of discrepancies on the record which could have led a reasonable fact finder to rule against the claimant. On the other hand, however, we must respect the fact finding role of a trial commissioner. As we held in Goldberg v. Ames Department Stores, 4160 CRB-1-99-2 (December 19, 2000), "[t]he commissioner's plenary factfinding authority provides him with a great deal of latitude in evaluating the evidence. He is not required to regard any particular statement as probative, even if it is apparently uncontradicted, nor is he required to deem any particular witness unpersuasive just because her remarks contain inconsistencies or uncorroborated assertions that tend to further her own interest." Id.

The trial commissioner found the claimant's testimony that he put an erroneous date on the Form 30C and was not aware of the mistake until after Battalion Chief Healey pointed out the error at the formal hearing credible. The trial commissioner is the sole judge of credibility when he evaluates the live testimony of a witness, Burton v. Mottolese, 267 Conn. 1, 40 (2003). We may not revisit the determination by the trial commissioner that notwithstanding the respondent's contentions, that the claimant was credible.

We also find the other alleged discrepancies as to the initial description of the injury as a hip injury and not a back injury; as well as the vague narrative of the mechanism of the injury, not to warrant appellate intervention. See Goldberg, supra, as well as Buonafede v. UTC/Pratt & Whitney, 5499 CRB-8-09-9 (September 1, 2010) and Ramirez-Ortiz v. Wal-Mart Stores, 5492 CRB-8-09-8 (August 25, 2010). We must defer to the trial commissioner when it relates to whether he or she believes a witnesses' narrative is consistent with the mechanism of injury. Berube v. Tim's Painting, 5068

CRB-3-06-3 (March 13, 2007). We also must defer to the trial commissioner's determination that the Motion to Correct should have been denied. Since those corrections sought to interpose the respondent's conclusions as to the law and the facts presented, the trial commissioner was legally empowered to deny this motion. See Brockenberry v. Thomas Deegan d/b/a Tom's Scrap Metal, Inc., 5429 CRB-5-09-2 (January 22, 2010), *aff'd*, 126 Conn. App. 902 (2011) (Per Curiam); D'Amico v. State/Department of Correction, 4287 CRB-5-00-9 (August 3, 2001), *aff'd*, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003); and Liano v. Bridgeport, 4934 CRB-4-05-4 (April 13, 2006).

The trial commissioner determined that based on the facts herein that this case was close enough to Kingston, supra, to support the same result as that precedent; i.e. that the inaccurate date of injury on the Form 30C did not divest this Commission of jurisdiction. The commissioner also determined that despite the acknowledged discrepancies on the record that the claimant was a credible witness. We are satisfied that the trial commissioner's determination of those questions was not "clearly erroneous" Berube, supra. We may not retry the facts of the case, Fair, supra, and pursuant to Torres v. New England Masonry Company, 5289 CRB-5-07-10 (January 6, 2009), this panel must provide "every reasonable presumption" supportive of the Finding and Award.

Therefore, we affirm the Finding and Award.

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