CASE NO. 5905 CRB-3-13-12 : COMPENSATION REVIEW BOARD
CLAIM NO. 300101965

KEVIN BURCH : WORKERS' COMPENSATION
CLAIMANT-APPELLEE COMMISSION

v. : DECEMBER 18, 2014

A-1 HOME SERVICES
EMPLOYER
NO RECORD OF INSURANCE
RESPONDENT-APPELLEE

and

SECOND INJURY FUND
RESPONDENT-APPELLANT

APPEARANCES:

The claimant was represented by Christopher Petter, Esq., McHugh, Chapman & Vargas, 160 Washington Street, Middletown, CT 06457.

At the trial level respondent A-1 Home Services was represented by Jennifer Safford, pro se, of 121 Birdsey Avenue, Middletown, CT 06457.

Respondent Second Injury Fund was represented by Lawrence G. Widem, Esq., Assistant Attorney General, Office of the Attorney General, 55 Elm Street, P.O. Box 120, Hartford, CT 06141-0120.

This Petition for Review from the December 17, 2013 Finding and Award by the Commissioner acting for the Eighth District was heard on June 20, 2014 before a Compensation Review Board panel consisting of Commission Chairman John A. Mastropietro and Commissioners Stephen B. Delaney and Michelle D. Truglia.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondent Second Injury Fund has petitioned for review from the December 17, 2013 Finding and Award by the Commissioner acting for the Eighth District. We find no error and accordingly affirm the decision of the trial commissioner.

The trial commissioner made the following findings which are pertinent to our review of this matter. The claimant testified that he was offered employment with A-1 Home Services while walking down a street in Middletown, Connecticut on April 27, 2013. The claimant explained that he usually wore a tool belt when he went to the soup kitchen in the morning in case any contractors came by looking for day laborers. The claimant indicated that he was approached by an individual named "Don" who asked if he was interested in working; the individual, whose full name is Don Tamaro, was at that time the boyfriend of Jennifer Safford, the sole proprietor of A-1 Home Services. The A-1 Home Services logo was on the side of the truck being driven by Tamaro.

The claimant immediately began working for A-1 Home Services on a roofing job in Branford. The claimant testified that Tamaro directed the claimant's activities at the job site; Tamaro decided when the lunch break would occur, instructed the claimant in how to perform the work, and provided the necessary tools. On April 27, 2013, the claimant worked from 8:00 a.m. until 8:00 p.m. and was paid $125.00 for the day; at trial, the claimant testified that it was his understanding he would be paid "under the table." On April 28, 2013, the claimant was again driven back and forth to the work site by Tamaro and paid $125.00 for the day. On April 29, 2013, the claimant was driven to the

Branford site by Tamaro, who then directed the claimant to begin placing plywood on the roof. The claimant was using the respondent's circular saw when the saw "jigged," causing the claimant to fall back onto the rafters and cut his leg with the saw. Medical records from the Yale New Haven Emergency Department indicate that the claimant was transported to the hospital by ambulance and was treated on April 29, 2013 at 2:28 p.m. for a laceration to the right thigh caused by the kick-back of a saw. The Yale New Haven diagnosis excluded nerve, vascular or tendon involvement. The claimant was instructed to follow up with his primary care physician in two days and to return to Yale in seven to ten days. The Yale emergency room released the claimant to work without restrictions on May 1, 2013.

On April 30, 2013, the claimant treated with Matthew Huddleston, M.D., his primary care physician; Huddleston removed the sutures for the leg laceration on May 9, 2013. The claimant returned to Huddleston on May 24, 2013 complaining that he had sustained an injury to his lower ribs when a steel pole struck him while working in construction. The claimant subsequently returned to Huddleston on June 4, 2013, July 8, 2013 and July 15, 2013, each time complaining of pain in the area of the leg laceration. Huddleston's note of July 15, 2013 indicates that the claimant was again lifting weights and intended to return to roofing that day. Huddleston's note of August 13, 2013 indicates that the claimant had a temporary partial work capacity with a twenty-pound lifting restriction; the September 24, 2013 note does not disable the claimant from work but indicates that the claimant was claiming he could not work. Huddleston's notes in general suggest that the doctor suspected the claimant had sustained nerve damage to his

right thigh. The claimant testified that he had not returned to work since the injury of April 29, 2013.

Jennifer Safford, the sole proprietor of A-1 Home Services, also testified at trial, stating that Tamaro, her former "significant other," was supervising a roof replacement project in Branford for A-1 Home Services and had hired the claimant even though she had not given Tamaro the authority to hire anyone. Safford testified that A-1 Home Services had procured the building permit for the Branford premises where the claimant sustained the injury to his right thigh. Safford conceded that as the permit holder, she ultimately controlled the job site and the claimant was not authorized to perform any work at the site except under her direction. Safford did not have a workers' compensation insurance policy in place on the date the claimant was injured. Safford disputes that the claimant was cut by a saw on April 29, 2013.

The trial commissioner concluded that the claimant was employed by Jennifer Safford d/b/a A-1 Home Services on April 29, 2013 and sustained a laceration to his right thigh while in the course and scope of his employment. The trier found the medical care provided by Yale New Haven and Matthew Huddleston, M.D., was reasonable and necessary and, because the employer did not have a workers' compensation policy in place on the claimant's date of injury, ordered the respondent employer to pay the medical bills associated with this treatment. The trial commissioner found credible Huddleston's opinion of August 13, 2013 that the claimant had a temporary partial work capacity with a lifting restriction of twenty pounds. He also found credible Huddleston's opinion that the claimant may have sustained nerve damage

as a result of the April 29, 2013 injury such that referral to a specialist was reasonable and necessary. The trial commissioner also ordered the respondent employer to pay the medical expenses associated with this referral. The trier determined that based on a weekly wage rate of $625.00 for a single filer with one exemption, the claimant's compensation rate is $365.69, and ordered the respondent employer to pay the claimant temporary partial disability benefits at that weekly rate commencing August 13, 2013 contingent upon the claimant's submission of five job searches per week.

Respondent Second Injury Fund [hereinafter "appellant"] filed a Motion to Correct which was denied in its entirety, and this appeal followed. The gravamen of this matter appears to be the Fund's contention that because the claimant filed his Form 30C against A-1 Home Services, which is a trade name, rather than against Jennifer Safford personally, the Workers' Compensation Commission was deprived of subject matter jurisdiction. The Appellant also contends that the claimant's failure to properly amend the Form 30C "has impaired the Second Injury Fund's recoupment rights against the sole proprietor under Conn. Gen. Stat. §§ 31-355(c) and 31-355a."[1] Appellant's Brief, p. 7.

[1] Section 31-355(c) C.G.S. (Rev. to 2013) states: "The employer and the insurer, if any, shall be liable to the state for any payments made out of the fund in accordance with this section or which the Treasurer has by award become obligated to make from the fund, together with cost of attorneys' fees as fixed by the court. If reimbursement is not made, or a plan for payment to the fund has not been agreed to by the Treasurer and employer, not later than ninety days after any payment from the fund, the Attorney General shall bring a civil action, in the superior court for the judicial district where the award was made, to recover all amounts paid by the fund pursuant to the award, plus double damages together with reasonable attorney's fees and costs as taxed by the court. Any amount paid to the Treasurer by the employer or insurer after the filing of an action, but prior to its completion, shall be subject to an interest charge of eighteen per cent per annum, calculated from the date of original payment from the fund."

Section 31-355a C.G.S. (Rev. to 2013) states, in pertinent part: "(a) Whenever the Second Injury Fund is required, pursuant to section 31-355 or subsection (c) of section 31-349, to pay benefits or compensation mandated by the provisions of this chapter for any employer or insurer who fails or is unable to make such payments, the amount so paid by the fund shall be collectible by any means provided by law for the

We begin our analysis with a recitation of the well-settled standard of review we are obliged to apply to a trial commissioner's findings and legal conclusions. "The trial commissioner's factual findings and conclusions must stand unless they are without evidence, contrary to law or based on unreasonable or impermissible factual inferences." Russo v. Hartford, 4769 CRB-1-04-1 (December 15, 2004), citing Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Moreover, "[a]s 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." Burton v. Mottolese, 267 Conn. 1, 54 (2003). Thus, "it is … immaterial that the facts permit the drawing of diverse inferences. The [commissioner] alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court." Fair, supra, 540 (1988), quoting Del Vecchio v. Bowers, 296 U.S. 280, 287 (1935).

It is of course well-settled that a trial commissioner must address any challenge to the subject matter jurisdiction of the Workers' Compensation Commission prior to

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collection of any tax due the state of Connecticut or any subdivision thereof, including any means provided by section 12-35. Tax warrants referred to in said section 12-35 may be signed by the State Treasurer.

(b) Any such amount due shall be a lien from the due date until discharged by payment against all the property of the employer or insurer within the state, whether real or personal, except such as is exempt from execution, including debts to the employer or insurer, and a certificate of such lien without specifically describing such real or personal property, signed by the State Treasurer, may be filed in the office of the clerk of any town in which such real property is situated, or, in the case of personal property, in the office of the Secretary of the State, which lien shall be effective from the date on which it is recorded. When any such amount with respect to which a lien has been recorded under the provisions of this section has been satisfied, the State Treasurer, upon request of any interested party, shall issue a certificate discharging such lien…."

evaluating the underlying merits of a claim. "Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it." Burton v. Dominion Nuclear Connecticut, Inc., 300 Conn. 542, 550 (2011). The Workers' Compensation Commission is a creature of statute, and it is axiomatic that "a court which exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation." Castro v. Viera, 207 Conn. 420, 427-428 (1988), *quoting* Heiser v. Morgan Guaranty Trust Co., 150 Conn. 563, 565 (1963). As such, "once the question of lack of jurisdiction of a court is raised, '[it] must be disposed of no matter in what form it is presented;' and the court must 'fully resolve it before proceeding further with the case.' Subject matter jurisdiction, unlike jurisdiction of the person, cannot be created through consent or waiver." (Internal citations omitted.) Castro, supra, at 429-430. Generally, "the compensability of a type of injury, the existence of the employer-employee relationship and the proper initiation of a claim, are all issues that implicate the threshold question of whether an entire category of claims falls under the scope of the act." Del Toro v. Stamford, 270 Conn. 532, 544-545 (2004).

Turning to the matter at bar, as mentioned previously herein, the appellant's claim of error rests upon its contention that the notice of claim ("Form 30C") citing the respondent employer's trade name was so fatally defective that the notice failed to "properly initiate" the claim, thus depriving this tribunal of subject matter jurisdiction.

The appellant asserts:

> [Our] Appellate Court has held that a plaintiff/claimant who brings suit in his/her trade name lacks standing because a trade name is a legal fiction and it is not either a real or an artificial person who has the capacity to bring suit. The lack of standing deprives the Court of subject matter jurisdiction over the claim.

Appellant's Brief, p. 4-5.

The appellant further avers that "[b]ecause the defect in the Form 30C is jurisdictional, it is not a mere misnomer that can be corrected upon a finding of no prejudice, under Conn. Gen. Stat. § 52-123 (or Conn. Gen. Stat. § 31-294c for that matter).[2] Id., 5.

The appellant's argument appears to rely *inter alia* on the Appellate Court's holding in Coldwell Banker Manning Realty, Inc. v. Cushman & Wakefield of Connecticut, Inc., 136 Conn. App. 683 (2012), which in turn relied upon America's Wholesale Lender v. Pagano, 87 Conn. App. 474 (2005), for the proposition that "[b]ecause the trade name of a legal entity does not have a separate legal existence, a plaintiff bringing an action solely in a trade name cannot confer jurisdiction on the

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[2] Section 52-123 C.G.S. (Rev. to 2013) states: "No writ, pleading, judgment or any kind of proceeding in court or course of justice shall be abated, suspended, set aside or reversed for any kind of circumstantial errors, mistakes or defects, if the person and the cause may be rightly understood and intended by the court."

Section 31-294c(c) C.G.S. (Rev. to 2013) states: "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."

court."[3] America's, supra, 477. "It is elemental that in order to confer jurisdiction on the court the plaintiff must have an actual legal existence, that is he or it must be a person in law or a legal entity with legal capacity to sue…." Id. However, while it is of course axiomatic that we must be guided by the decisions propounded by the higher courts, we hasten to point out that in the matter at bar, the party for which the trade name was utilized was the respondent employer, not the claimant. As such, we find more instructive to the matter at hand the court's observation in America's that the Appellate Court, "as well as our Supreme Court, has held in numerous circumstances that the mislabeling or misnaming of a *defendant* constituted a circumstantial error that is curable under § 52-123 when it did not result in prejudice to either party…. This is true even when the plaintiff used only the defendant's trade name and not the defendant's legal name." [4] Id., 478.

In World Fire & Marine Ins. Co. v. Alliance Sandblasting Co., 105 Conn. 640 (1927), the plaintiff initially directed its writ against "The Alliance Sandblasting Company" and subsequently sought "to amend its writ by striking out the name of the defendant as it originally appeared and substituting therefor Julius Goodman doing business under the trade name of the Alliance Sandblasting Company." Id., 642. In assessing whether the granting of the amendment constituted error, the Supreme Court

[3] The appellant also relies in part upon two unreported Superior Court decisions which are neither binding nor persuasive. We find particularly unpersuasive the appellant's reliance on the lower court's analysis of the doctrine of justiciability vis-à-vis the instant matter as it appears to fly in the face of the appellate court precedent discussed herein.

[4] While the appellant has characterized this statement as "dicta," we are more inclined to view the remark as a summation of precedent which is not only binding on this board but perfectly applicable to the matter at bar.

stated that "[t]he change made by the amendment did not affect the identity of the party sought [sic] to be described, but merely made correct the description of the real party sued; it did not substitute or bring in a new party…. 'The effect given to such a misdescription usually depends upon the question whether it is interpreted as merely a misnomer or defect in description, or whether it is deemed a substitution or entire change of party; in the former case an amendment will be allowed, in the latter it will not be allowed.'" Id., 643-655, *quoting* "Annotator's note to Goldstein v. Peter Fox Sons Co., 40 L.R.A. (N.S.) 567.

In Lussier v. Department of Transportation, 228 Conn. 343 (1994), a case of more recent vintage, the Supreme Court further elaborated upon the factors to be considered in assessing whether an error as to a defendant's name constitutes a curable, circumstantial defect or is fatal to the claim. The court stated:

> These two different categories of defects, though easily confused, are readily distinguished. The first, involving a defendant designated by an incorrect name, is referred to as a "misnomer." It is a circumstantial defect anticipated by General Statutes 52-123 that can be cured by amendment. A misnomer must be distinguished from a case in which the plaintiff has misconstrued the identity of the defendant, rather than the legal nature of his existence.
> When the correct party is designated in a way that may be inaccurate but which is still sufficient for identification purposes, the misdesignation is a misnomer. Such a misnomer does not prevent the exercise of subject matter jurisdiction if the defendant was actually served and knew he or she was the intended defendant. This is in contradistinction to the case in which the plaintiff has misconstrued the identity of the defendant and has therefore named and served the wrong party.

Id., 350.

Finally, in Pack v. Burns, 212 Conn. 381 (1989), our Supreme Court set out a three-part test to determine whether the misidentification of a party constituted a misnomer, curable by the application of § 52-123, or required the substitution of a new party. The court indicated that the factors to be considered were "that the proper party defendant (1) have actual notice of the institution of the action; (2) knew that it was the proper defendant in the action, and (3) was not in any way misled to its prejudice." Id., 385, *quoting* Servatius v. United Resorts Hotels, 85 Nev. 371, 373 (1969).

Turning to the matter at bar, we note that at the outset that the respondent employer in question appeared at the formal hearing in this matter and identified herself a sole proprietor of A-1 Home Services. November 14, 2013 Transcript, pp. 3, 37. She also testified that she had attended prior hearings on a *pro se* basis, id., 7, including an informal hearing held on September 12, 2013.[5] Id., 38. At the formal hearing, in addition to being examined by counsel for the Second Injury Fund, Safford was given the opportunity to review exhibits, id., 4-5, to which she had no objection, and to cross-examine the claimant. Id., 33-35.

In light of the relevant precedent discussed previously herein and its application to the facts of this matter, we are unable to discern any basis on which the trier could have reasonably inferred that Safford was so prejudiced by the claimant's failure to cite her personally on his original notice of claim that the notice was fatally defective to the

[5] We note that Jennifer Safford testified that she never received notice of the claimant's injury. November 14, 2013 Transcript, p. 42. However, she also testified that shortly after the accident occurred, she received a call from Don Tamaro and traveled to the work site where she discovered representatives from the Occupational Safety and Health Administration had already arrived for an investigation. Id., 43. More important, her attendance at the hearing of September 12, 2013 occurred within one year of the date of accident and would therefore constitute constructive notice of the claim pursuant to § 31-294c(c) C.G.S.

claim. In addition, we are not persuaded by the appellant's contention that "[t]he fact that the sole proprietor was aware of the plaintiff's/claimant's error, was present at trial and was not prejudiced by the error, does not permit a correction under Conn. Gen. Stat. § 52-123, because the error was not merely a misnomer." Appellant's Brief, pp. 5-6. Rather, we find the facts of this matter are evocative of the following observation by our Supreme Court in Motiejaitis v. Johnson, 117 Conn. 631 (1933): "Under the circumstances, the situation is one where the parties who should have been sued really appeared and defended, although ostensibly another party was named, and the trial court committed no error in permitting an amendment naming the real parties." Id., 638.

We note that the appellant has not provided any indication of the remedy being sought in this appeal. For his part, the claimant has suggested that the matter be remanded to the trial commissioner so that the Finding and Award may be amended to reflect that the full name of the respondent is "Jennifer Safford d/b/a A-1 Home Services." However, the appellant, in its reply brief, argues that "[t]he fatal flaw in that curative proposal is that Jennifer Safford has not consented to be retroactively substituted as the respondent and entered into a repayment plan with the Second Injury Fund." Appellant's Reply Brief, p. 3. The appellant further avers that the Second Injury Fund has already paid benefits pursuant to § 31-301(f) C.G.S., and "[a]mending the Finding and Award at this late date, to name Jennifer Safford, individually, as the respondent-employer will not remove the obstacles impairing the Second Injury Fund's recoupment rights under Conn. Gen. Stat. §§ 31-355(c) and 31-355a." Id., 4. The Fund has provided no case law or statutory provisions in support of its somewhat bald

assertions and we are unequal to the task of divining what these prohibitions may be. Moreover, given that Conclusion, ¶ A of the December 17, 2013 Finding and Award already states, in part, that the trial commissioner found "the Claimant was an employee by Jennifer Safford d/b/a A-1 Home Services on April 29, 2013," any alleged defects in the original notice of claim would appear to have been rendered null and void consistent with the provisions of § 52-123 C.G.S. As such, we see no useful purpose in remanding the matter for alterations to the Finding and Award. [6]

There is no error; the December 17, 2013 Finding and Award by the Commissioner acting for the Eighth District is accordingly affirmed.

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

[6] In light of the record before us, despite the appellant's protestations, we are not convinced that Jennifer Safford's permission is required for the matter to proceed in the manner envisioned by the trial commissioner.