CASE NO. 5986 CRB-7-15-2 : COMPENSATION REVIEW BOARD
CLAIM NO. 700156962

LEXENE CHARLES
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: NOVEMBER 30, 2016

BIMBO FOODS, INC.
EMPLOYER

and

ACE/ESIS
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant appeared without legal representation at oral argument before the board. At the trial level the claimant was represented by James T. Baldwin, Esq., Baldwin & Kaiser, LLC, 1261 Post Road, Fairfield, CT 06824.

The respondents were represented by Clayton J. Quinn, Esq., The Quinn Law Firm, 204 South Broad Street, Milford, CT 06460.

This Petition for Review[1] from the January 20, 2015 Finding and Award/Denial of Jodi M. Gregg, the Commissioner acting for the Seventh District, was heard August 26, 2016 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Ernie R. Walker and Nancy E. Salerno.

[1] We note that postponements and extensions of time were granted during the pendency of this appeal.

# OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has appealed from a January 20, 2015 Finding and Award/Denial ("Finding") issued by Commissioner Jodi Murray Gregg. He believes that the trial commissioner failed to properly credit evidence from his treating physicians which attribute a respiratory condition to a workplace mishap, and opine that he is still disabled. We find that this appeal was commenced in a jurisdictionally untimely manner pursuant to § 31-301(a) C.G.S.[2] and therefore we cannot offer relief to the claimant. We also note that had we been in a position to consider the merits of this appeal the issues herein involve the evaluation of expert medical opinion, and we are satisfied Commissioner Gregg had a sufficient quantum of probative evidence to sustain her Finding. We affirm the Finding.

Commissioner Gregg reached the following factual findings at the conclusion of a lengthy formal hearing over six sessions from July 9, 2012 to April 3, 2014. She found on July 30, 2010 the claimant was employed by the respondent at their Greenwich facility as a machine operator and had worked for the firm for eight years. The claimant testified on that date a 275 gallon drum of industrial strength vinegar fell off a pallet and spilled. This occurred close to the claimant's work station and he smelled a strong odor from the

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[2] This statute reads as follows;

**"Sec. 31-301. Appeals to the Compensation Review Board. Payment of award during pendency of appeal.** (a) At any time within twenty days after entry of an award by the commissioner, after a decision of the commissioner upon a motion or after an order by the commissioner according to the provisions of section 31-299b, either party may appeal therefrom to the Compensation Review Board by filing in the office of the commissioner from which the award or the decision on a motion originated an appeal petition and five copies thereof. The commissioner within three days thereafter shall mail the petition and three copies thereof to the chief of the Compensation Review Board and a copy thereof to the adverse party or parties. If a party files a motion subsequent to the finding and award, order or decision, the twenty-day period for filing an appeal of an award or an order by the commissioner shall commence on the date of the decision on such motion."

spill. The claimant's supervisor instructed the claimant and ten co-workers to clean up the spill by neutralizing it with ammonium sulfate powder, which took 30 to 40 minutes. The claimant said he was not provided with a mask during this process and he became very ill immediately after the clean up. He said he informed his supervisor Miriam Cohen that he was having difficulty breathing. He also said he was then asked to work overtime, and agreed to this request despite his respiratory distress because he had just returned from a long time away from work as a result of a motor vehicle accident. He worked an additional five hours that day. He testified that his difficulty in breathing continued for the next few days. On August 1, 2010, he presented to Stamford Hospital Emergency Room. The emergency room report notes that although the x-ray appeared to be normal, the claimant's symptoms were consistent with chemical inhalation, however, they had completely resolved.

Following that visit the claimant presented to the Stamford Hospital ER on a number of occasions over the next few weeks. The emergency room reports all note the chemical spill at work and diagnosed the claimant with chronic maxillary sinusitis, chronic ethnoidal sinusitis, chronic rhinitis and hypertrophied nasal turbinate. The claimant was instructed to follow up in two weeks after each visit. The claimant's treating physicians totally disabled the claimant from returning to work from the date of injury through August 13, 2010. The claimant also was examined by Dr. Steven Bramwit, an ear, nose and throat doctor, on August 17, 2010. The doctor performed an endoscopic/fibertopic examination which led to the diagnosis of maxillary and ethmoid sinusitis, chronic rhinitis and hypertrophied nasal tuinates. On October 6, 2010, the claimant was evaluated by Dr. Dominic Roca, a pulmonary physician. The doctor

reported that the claimant had a significant exposure to Acetic Acid and Ammonia Sulfate both in quantity and length of time.

> It is possible that such an exposure could cause irritation of the upper and lower airways which could cause cough and chronic rhinitis. I believe he could also have secondary insomnia and decreased appetite from the constant cough and drainage. It is difficult to determine if the exposure caused his present symptoms.

Findings, ¶ 11.

The doctor recommended further diagnostic testing. On October 6, 2010 and October 13, 2010 Dr. Roca took the claimant out of work indefinitely. However, the trial commissioner noted between July 10, 2010 and October 12, 2010, none of the claimant's diagnostic testing revealed any abnormalities.

In late 2010 the claimant was examined by an expert for the respondents, Dr. A.V. Navam Chinniah, and by Dr. Carrie A. Redlich, Director of the Yale Occupational and Environmental Program. Dr. Chinniah's November 16, 2010 examination reported that the claimant has at most a mild chemical bronchitis which has resolved completely and does not have any significant lung disease. Dr. Redlich reported,

> [I]t was unclear whether his persistent intermittent symptoms of cough, nasal drainage and chest tightness are now related to new-onset work related asthma, upper airway irritation, rhino-sinusitis or other process that temporarily has developed following the spill at work. It is possible that his on-going symptoms are related to his work expose (sic) at the bakery but it is premature to draw such conclusions.

Findings, ¶ 15.

On February 24, 2011, the claimant was evaluated by Dr. Kim Jaya of -Yale Occupational and Environmental Medicine. The doctor reported that the claimant was

unable to return to his previous place of work and recommended the claimant undergo job retraining.

Dr. Chinniah and Dr. Redlich offered differing opinions as to causation and character of the claimant's ailment. On September 8, 2011, claimant's counsel wrote to Dr. Redlich asking her to comment on whether the chemical spill was a substantial factor in the development of the claimant's current illness. The doctor reported that in her opinion "and to a reasonable degree of medical certainty that these exposures were a substantial factor in the development of Mr. Charles' subsequent illnesses and symptoms including rhinitis, sinusitis, away [sic] irritation, marked episodic coughing and fatigue." Findings, ¶ 18. On January 13, 2012, Dr. Chinniah issued an updated report based upon the review of the claimant's medical records. The doctor opined that the claimant "had no injuries to his tracheobronchial tree or lung parenchyma as a result of the exposure to the fumes caused by the spillage of vinegar and subsequent placent [sic] of granules of ammonium sulfate over the spilled vinegar." Findings, ¶ 19. He further opined that the the claimant had at most a chemical bronchitis and perhaps a bronchiolitis which always responded to the inhaled bronchodilator and that the claimant has exaggerated his symptoms. Dr. Chinniah testified at the formal hearing that the claimant's treating physicians have reported that the claimant was in no respiratory distress during their evaluation, and that between episodes of coughing, the claimant was able to speak clearly and distinctly. Dr. Chinniah also testified there is no causal connection between the claimant's alleged vocal cord dysfunction and the July 30, 2010 event because the claimant's upper airway proximal to his vocal cords, including the claimant's larynx and

pharynx, was described as normal, which would not be the case if the claimant's vocal cords were damaged by the inhalation of noxious fumes.

The trial commissioner also noted that video surveillance of the claimant was entered into evidence, which showed the claimant on August 29, 2013 walking around a track, jogging, sprinting, performing push ups and sit ups. The claimant testified at the hearing that he had been actively seeking employment since 2011 and had been taking classes to improve his English. The commissioner noted the respondents had paid total disability benefits from August 3, 2010 to August 23, 2010. She also noted the claimant was diagnosed with asthma in 2007.

Based on these subordinate facts the trial commissioner concluded the claimant sustained an upper respiratory injury (mild chemical bronchitis) as a result of the chemical spill that occurred on July 30, 2010 while working for the respondent. However, she concluded it was temporary and self limiting and had completely resolved, and therefore, there was no ongoing disability as a result of said spill. She found Dr. Chinniah to be very credible and persuasive in support of that conclusion. She did not find the claimant's medical witnesses persuasive as to compensability of the claim and she did not find the claimant's testimony credible regarding the extent of his injuries and his ongoing disability. Commissioner Gregg also found the surveillance video to be credible and persuasive. She found the medical treatment provided to the claimant reasonable and necessary and found the claimant entitled to various periods of temporary total disability. However, she found that beyond the initial mild chemical bronchitis that the claimant's bid for benefits for additional respiratory distress and sinusitis to be

dismissed. The commissioner also denied the claimant's bid for additional temporary total and temporary partial disability benefits.

The respondents filed a timely Motion to Correct dated February 3, 2015 seeking clarifications to the January 20, 2015 Finding. The trial commissioner granted some of the requested corrections which did not materially impact the terms of the original Finding. The claimant did not commence this appeal until he filed a Petition for Review which was received by the Commission on February 17, 2015.[3]

We note that the respondents have filed a Motion to Dismiss this appeal as untimely, challenging the jurisdiction of this tribunal to act on the appeal pursuant to § 31-301 C.G.S. We note that when the jurisdiction of this tribunal to hear an appeal is challenged, we must resolve this question prior to taking any action of the merits of an appeal. We have had opportunities in recent years to deal with the argument that an appeal has been filed in an untimely manner. In Brown v. Lawrence & Memorial Hospital, 5853 CRB-2-13-5 (April 21, 2014) the claimant offered an explanation for her late filing of an appeal but we concluded that we were not in a position to consider her appeal, as "[o]ur courts have determined that the failure of a party to file a timely appeal deprives the board of jurisdiction over the appeal. See Stec v. Raymark Industries, Inc., 299 Conn. 346 (2010)." Id. The claimant was obligated if he was dissatisfied or confused with this ruling to either appeal to this tribunal within twenty days, or file an appropriate motion to the trial commissioner seeking a correction or clarification within that period (see Garvey v. Atlas Scenic Studios, Inc., 5493 CRB-4-09-9 (February 14, 2012)), or his appellate rights would be extinguished pursuant to § 31-301(a) C.G.S. The

[3] The respondents also filed a Petition for Review but it was subsequently withdrawn.

claimant took neither action within that twenty day window. As the claimant herein was aggrieved by the January 20, 2015 decision of the trial commissioner and took no responsive action within twenty days, we lack subject matter jurisdiction to consider the appeal.[4] [5]

Were we able to rule on the merits of the claimant's appeal we believe, after reviewing the record and the claimant's argument, that we would be compelled to affirm the Finding. It is black letter law that the burden of persuasion in contested claims before this Commission rests on the claimant. See Dengler v. Special Attention Health Services, 62 Conn. App. 440 (2001) and Lentini v. Connecticut College, 4933 CRB-2-05-4 (May 15, 2006). The claimant's appellate arguments are essentially an effort to retry the factual findings of Commissioner Gregg on appeal, in particular her decision to find the medical opinions of Dr. Chinniah more persuasive than those of Dr. Redlich, whom the claimant believes were the opinions the commissioner should have credited.[6] We note that it is the trial commissioner's responsibility "to assess the weight and credibility of medical reports and testimony. . . ." O'Reilly v. General Dynamics Corp., 52 Conn. App. 813 (1999). Our tribunal has deferred to the discretion of a trial commissioner in what

[4] As we explained in Byczajka v. Stamford, 5023 CRB-7-05-11 (March 26, 2008) a party must present persuasive evidence that they did not receive notice within the appeal period that prevented the filing of a timely appeal, citing Kudlacz v. Lindberg Heat Treating Co., 250 Conn. 581 (1999) and Schreck v. Stamford, 250 Conn. 592, 595 (1999). In the absence of evidence claimant's counsel at the formal hearing had not received timely notice of the January 20, 2015 Finding, we cannot grant relief.

[5] We do note that the claimant's appeal was filed before the trial commissioner ruled on the respondents' Motion to Correct, but as we pointed out in Gonzalez v. Premier Limousine of Hartford, 5635 CRB-4-11-3 (April 17, 2012), a party seeking relief from the decision of a trial commissioner must appeal from the initial decision where he or she was aggrieved.

[6] The claimant argues that Commissioner Gregg did not accurately state the facts in the Finding. He did not file a Motion to Correct to challenge the factual findings of the trial commissioner. As a result on appeal we must give the commissioner's factual findings conclusive effect, Bond v. Lee Manufacturing, Inc., 5868 CRB-8-13-8 (April 21, 2016) and this tribunal is limited to reviewing as to how the trial commissioner applied the law.

can be described as "dueling expert" cases Dellacamera v. Waterbury, 4966 CRB-5-05-6 (June 29, 2006) and the commissioner is under no obligation to find the claimant's expert witnesses persuasive and reliable Zezima v. Stamford, 5918 CRB-7-14-3 (May 12, 2015).

"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). We are satisfied Commissioner Gregg reached a reasonable decision based on the evidence presented on the record.

However, since the untimely appeal deprives us of jurisdiction in this case, we dismiss the appeal.

Commissioners Ernie R. Walker and Nancy E. Salerno concur in this opinion.