CASE NO. 6004 CRB-1-15-4 CLAIM NO. 100189764	: COMPENSATION REVIEW BOARD
FRANK OJEDA CLAIMANT-APPELLANT	: WORKERS' COMPENSATION COMMISSION
v.	: MARCH 16, 2016
FRESHPOINT CONNECTICUT, LLC EMPLOYER	
and	
GALLAGHER BASSETT SERVICES INCORPORATED INSURER RESPONDENTS-APPELLEES	

APPEARANCES:

The claimant did not attend oral argument. The appeal was heard on the basis of the papers. At the trial level the claimant was represented at the third session of the formal hearing by John R. Williams, Esq., John R. Williams and Associates, 51 Elm Street, New Haven, CT 06510 and at the first two sessions of the formal hearing by Jeffrey Armas, Esq., Gillis & Gillis, PC, One Century Tower, 265 Church Street, Suite 203, New Haven, CT 06510.

The respondents were represented by James L. Pomeranz, Esq., Pomeranz, Drayton & Stabnick, LLC, 95 Glastonbury Boulevard, Glastonbury, CT 06033-4412.

This Petition for Review[1] from the January 21, 2015 Finding and Dismissal of Christine L. Engel the Commissioner acting for the First District was heard October 30, 2015 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Randy L. Cohen and Stephen M. Morelli.

[1] We note an extension of time was granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant, Frank Ojeda, has appealed from a January 21, 2015 Finding and Dismissal which determined that he did not sustain a compensable injury on December 3, 2012. The claimant argues that the trial commissioner, Christine L. Engel, erred in reaching this decision. He argues that she misstated the testimony of certain witnesses in reaching her opinion, and that the failure of a recording machine during one of the hearings mandates a remand for a new hearing. The respondents have moved to dismiss this appeal as jurisdictionally barred due to an untimely filing. They also argue that the claimant is merely trying to retry the facts of the case. We find that the appeal was untimely and therefore it must be dismissed due to lack of jurisdiction. Had we considered this case on the merits, we would not find reversible error.

The commissioner found the following facts at the conclusion of the formal hearing. The claimant was employed by Freshpoint Connecticut, LLC (hereinafter, Freshpoint) as a commercial driver and delivery person. He testified that on the last stop of his route on December 3, 2012 he was injured when he leaned over to lift a case of bananas. He described this as causing pain like a jolt of electricity to shoot down his right leg, and he felt a numbing sensation in his hand immediately thereafter. He testified he did not use his cell phone to call Freshpoint to report the injury as the drivers are expressly forbidden to use their phones while in the cab of their trucks. Instead he drove back to Freshpoint and reported his injury to Paul Riordan, the second shift router. The claimant testified he told Mr. Riordan of the injury and said he wanted to file an incident

report but Mr. Riordan brushed him off and told him to go home and see how he felt the next day.

The claimant testified that he returned to Freshpoint the following morning, December 4, 2012, and talked to John, the first shift router. (The trial commissioner noted the claimant gave no last name for John.) The claimant said he told John he had hurt himself in the truck while doing deliveries the previous day. The claimant testified John told him to remain in the warehouse for that day and do lighter duty work. The claimant said he did work in the warehouse for the rest of the week.

On December 5, 2012, the claimant scheduled an emergency appointment for December 10, 2012, with Dr. Michael Posner, a physician whom he had seen previously for removal of a lipoma from his back. The claimant testified he talked about his injury with Jaime Flores, the transportation manager for Freshpoint, on Friday, December 7, 2012. He testified he told Mr. Flores he could not lift his hand truck and he had an appointment with a doctor on Monday, the 10th, and would not be in to work. The claimant said he had not discussed whether his neck injury had happened while he was delivering any produce. When he was examined by Dr. Posner the claimant discussed lifting the case of bananas and the pain he felt in his arm. The claimant testified Dr. Posner thought this was an orthopedic problem and immediately referred the claimant to Dr. Richard F. Scarlett, an orthopedic surgeon with an office in the same building. Dr. Scarlett's initial report described the claimant's condition as follows:

> Present Illness: Mr. Ojeda is a very pleasant 34-year-old right-hand-dominant male with right upper extremity radicular pain for the past 2 weeks. He denies any trauma to the neck or right upper extremity….it was determined that his new onset symptoms are likely more orthopedic in nature and not a result of his lipoma excision. He states the pain is severe and sharp and shooting

> tracking down the left posterior aspect of the arm traveling to his small fingers. He denies any trauma to the neck or shoulder. He feels that his right hand also goes numb at times.

Claimant's Exhibit A; Findings, ¶ 12.

Dr. Scarlett ordered a cervical spine MRI which revealed a large C6-7 right sided disk herniation with canal impingement. He referred the claimant to Dr. Stephan Lange, a neurosurgeon. Dr. Lange's report of December 18, 2012, contained the following history as to the claimant: "He reports injuring his neck 3 weeks ago after lifting a case of bananas. There was mild pain initially but the following day the pain became more severe." Findings, ¶ 14. To address these issues Dr. Lange performed a cervical discectomy and fusion on January 10, 2013. Subsequent to the procedure Dr. Lange issued a letter to claimant's counsel which linked the causation of the injury that required the discectomy with the claimant's lifting injury at work. Dr. Lange then referred the claimant to Dr. Gerald Becker, an orthopedic surgeon, for an examination. Dr. Becker's report included the following statement: "He indicates that the injury occurred when he was picking up cases of bananas and produce in the course of work duties as a commercial driver." Findings, ¶ 17.

The respondents had Dr. Alan S. Waitze, a neurosurgeon, perform a respondents' medical examination of the claimant. Dr. Waitze pointed out the discrepancy between Dr. Scarlett's history of no known trauma to the neck and the history repeated by Drs. Lange and Becker of the claimant having lifted a case of bananas and feeling pain down his entire right arm. Dr. Waitze concluded that while the treatment had been reasonable and necessary he ". . . could not say that it is related to the current injury." Findings, ¶ 19. Dr. Gary Bloomgarden, a neurosurgeon, performed a commissioner's examination of

the claimant. He concluded the claimant's cervical spine injury was due to his having lifted "…50–pound cases of bananas." Findings, ¶ 20.

A number of the claimant's co-workers testified at the hearing. Jaime Flores, the transportation manager for Freshpoint, testified as to the procedure when a worker reports an injury while on the job. He stated he would report with the injured worker to Todd, the Safety Manager. (The witness gave no last name for Todd.) The Safety Manager, he testified, would "…ask them a series of questions and enter it in the computer." Findings, ¶ 21. Mr. Flores further testified he did not do this with the claimant as the claimant did not report an injury had occurred while he was working. Mr. Flores also said the claimant had not informed him of a work injury in numerous subsequent phone conversations. This witness also testified he had worked for Freshpoint for twenty years and would have known if a decision was made to keep the claimant working only in the warehouse, as the routers would have told him. He said he did not recall being told the claimant was kept in the warehouse for four days.

The afternoon router for Freshpoint, Paul Riordan, also testified. Mr. Riordan had voluntarily left Freshpoint's employment before the formal hearing. He testified the claimant never told him he had suffered an injury while working. He testified he recalled a brief conversation in which the claimant told him "…something was bothering him, an arm, or a shoulder, or something of that nature, I don't remember what it was, and that he was going home, and he punched out and left." Findings, ¶ 25. Another former Freshpoint employee, JoAnne Cortese, also testified at the hearing. She testified the claimant had contacted her and asked her to testify. Ms. Cortese said she overheard the conversation between the claimant and Paul Riordan when he reported his work injury.

“I overheard that Frank had came back from his – he was telling Paul how he got hurt, he was in the back of the truck, and he lifted something up, and he heard a pop, and he had numbness going down his arm, and he was in pain…” Findings, ¶ 28. Ms. Cortese said she was no longer working for Freshpoint and said there was a pending legal matter between her and her prior employer. The respondents subsequently presented evidence in the form of time cards that indicated Ms. Cortese was not working at Freshpoint during the week of December 3, 2012, to December 7, 2012.

Based on these facts the trial commissioner concluded the claimant did not suffer a compensable injury to his cervical spine on December 3, 2012. She noted the initial report of Dr. Scarlett did not support a work injury of December 3, 2012, or any other day. She also found Mr. Flores and Mr. Riordan credible and persuasive witnesses. She found Ms. Cortese, on the other hand, not credible or persuasive. The commissioner noted the medical reports of Drs. Lange, Becker and Bloomgarden supported the claimant, but that those reports were based upon a flawed history. Therefore, the claimant’s claim for benefits due to a work related injury on December 3, 2012 was denied.

The trial commissioner issued her Finding and Dismissal on January 21, 2015. The claimant did not file a Motion to Correct or any other responsive pleading within twenty days from the issuance of this decision. The Commission received a Petition for Review from the claimant on April 20, 2015 and received Reasons for Appeal on April 23, 2015. Since these appeal documents were filed more than twenty days from the issuance of the Finding and Dismissal the respondents filed a Motion to Dismiss. We find this motion meritorious and dismiss this appeal.

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 claimant took neither action within that twenty day window. As the claimant herein was aggrieved by the January 21, 2015 decision of the trial commission and took no responsive action within twenty days, we lack subject matter jurisdiction to consider the appeal.

While we believe the procedural deficiencies in the claimant's appeal were sufficiently material as to warrant a dismissal, were we to have considered the merits of the claimant's appeal we would have affirmed the trial commissioner's decision. The claimant raises a number of alleged errors by the trial commissioner in his pleadings. He alleges that a recording machine failed during the hearing session where Mr. Flores testified, and this renders the record unreliable. He also argues that the trial

commissioner misstated the testimony of Ms. Cortese and the report presented by Dr. Scarlett. We do not believe either issue rises to the level of reversible error.

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 trial commissioner concluded the claimant did not meet this burden and we must defer to this assessment on appeal. As to the recording machine issue, we note that the trial commissioner raised this issue at the formal hearing, and counsel for both parties waived any objections to proceeding. April 10, 2014 Transcript, pp. 43-44. In any event, even had the trial commissioner accorded the testimony of Mr. Flores no weight, the testimony of Mr. Riordan was also generally unsupportive of the claimant's narrative and could be relied upon. As for Ms. Cortese's testimony, the documentary evidence presented that she was not on the respondent's premises on or about the alleged date of injury provided reasonable grounds to disregard her narrative. In regards to Dr. Scarlett's report, 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). We will not revisit the commissioner's evaluation of this evidence. We cannot retry the case on appeal and we find the trial commissioner had a reasonable basis in the record supporting her decision.

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

Commissioners Randy L. Cohen and Stephen M. Morelli concur in this opinion.