CASE NO. 6046 CRB-7-15-11 : COMPENSATION REVIEW BOARD
CLAIM NO. 700169094

NICHOLAS TIFFANY
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

: AUGUST 23, 2016

CHEER VIRTUE EVOLUTION &
ATHLETIC TRAINING CENTER, LLC
EMPLOYER
NO RECORD OF INSURANCE
RESPONDENT-APPELLANT

and

SECOND INJURY FUND
RESPONDENT-APPELLEE

APPEARANCES:

The claimant was represented by Eric H. Evans, Esq., Evans & Lewis, LLC, 93 Greenwood Avenue, Bethel, CT 06801.

The employer, Cheer Virtue Evolution & Athletic Training Center, LLC, failed to appear at all trial level hearings. On behalf of the employer Erica Rendino filed a timely petition for review, appellant brief, and attended oral argument.

The Second Injury Fund was represented by Kenneth Kennedy, Esq., AAG, Office of the Attorney General, 55 Elm Street, Hartford, CT 06141-0120 who did not appear at oral argument.

This Petition for Review from the October 26, 2015 Finding and Award of Jodi M. Gregg, the Commissioner acting for the Seventh District, was heard April 29, 2016 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Ernie R. Walker and Nancy E. Salerno.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondent, Cheer Virtue Evolution & Athletic Training Center ("Cheer Virtue"), an LLC acting through its principal, Erica Rendino, has appealed from an October 16, 2015 Finding and Award to the claimant, Nicholas Tiffany. The Finding and Award determined that the claimant sustained an Achilles tendon injury in the course of his employment with the respondent on July 15, 2013, and awarded the claimant benefits resulting from that injury. Ms. Rendino has appealed from this Finding and Award arguing that although she did not attend the formal hearing for this claim on May 26, 2015 that her firm had a valid jurisdictional defense to the claim; arguing the absence of an employer-employee relationship. She also argues that due to alleged negligence by the Postal Service she was not aware of the formal hearing and was denied due process. We find that Ms. Rendino had actual knowledge of the claim for benefits and neglected to file a disclaimer. We are also not persuaded that the Postal Service failed to deliver mail to her address advising her of the pending formal hearing. Therefore, we affirm the Finding and Award.

Commissioner Jodi Murray Gregg reached the following factual findings in the Finding and Award. She noted the claimant had filed a Form 30C on January 31, 2014 asserting he was injured at work on July 15, 2014 [July 15, 2013], and that the employer had received this form on April 23, 2014.[1] The commissioner found the respondent never filed a Form 43 contesting the claim. Commissioner Gregg further noted the claimant's medical bills, medical opinions as to his level of impairment and his period of

[1] It appears the date of injury in the Finding and Award is a scriveners' error. We note that a Motion to Correct was not filed, and we will accord this no weight. Hernandez v. American Truck Rental, 5083 CRB-7-06-4 (April 19, 2007).

total disability. An investigator for the Second Injury Fund, (the "Fund") Sandra Aviles, testified that the respondent-employer did not have workers' compensation insurance on the day of injury. After reviewing the evidence the trial commissioner found the claimant was persuasive and credible and that he was injured while working for Cheer Virtue. Commissioner Gregg ordered Cheer Virtue to pay the claimant temporary total disability benefits and permanent partial disability benefits. She also noted that if the award was not paid within twenty days the claimant could seek an order pursuant to § 31-355 C.G.S. directing the Fund to pay the award.

The respondent did not file a Motion to Correct, but did file a Petition for Review within the statutory time period to appeal under § 31-301(a) C.G.S. Cheer Virtue's principal did not file Reasons of Appeal but as a self-represented party did file a brief in support of her appeal. Her brief maintains that on the day of the injury she did not employ the claimant and that he was a self-employed individual merely renting space from her firm. She further argues that she did not receive notice of the formal hearing and therefore did not present this defense to the trial commissioner. She also argues the claimant was not totally disabled during the period for which he is claiming benefits.[2]

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

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[2] The claimant has filed a Motion to Dismiss this appeal, citing numerous procedural irregularities and claiming that the appeal is frivolous. The claimant also seeks an award of costs in defending this appeal. We decline to grant this relief. We deny the claimant's Motion to Dismiss, because as we stated in Vitoria v. Professional Employment & Temps, 5217 CRB-2-07-4 (April 4, 2008), we are loathe to dismiss appeals filed by self-represented parties for what are essentially averments challenging the manner under which the appellant prosecuted their appeal. See also Roussel v. Village Gate of Farmington, 4918 CRB-6-05-2 (February 28, 2006). We find the appellant provided this tribunal and opposing party a sufficiently cogent argument in advance of the hearing to proceed, unlike Marino v. Cenveo/Craftman Litho, Inc., 5448 CRB-5-09-3 (March 16, 2010) or Claros v. Keystone Pipeline Services, 5399 CRB-1-08-11 (October 28, 2009).

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 further note that when a party does not file a Motion to Correct, we must give the facts found by the trial commissioner conclusive effect. Crochiere v. Board of Education, 227 Conn. 333, 347 (1993); Claros v. Keystone Pipeline Services, 5399 CRB-1-08-11 (October 28, 2009) and Stevens v. Raymark Industries, Inc., 5215 CRB-4-07-4 (March 26, 2008), *appeal dismissed*, A.C. 29795 (2008). While ordinarily this would be dispositive of the issues herein we note that the respondent has raised a jurisdictional issue as to whether the Commission had the legal authority to award the claimant benefits, and such an issue must be addressed by this tribunal even if raised subsequent to the granting of an award to a claimant. Mankus v. Mankus, 4958 CRB-1-05-6 (August 22, 2006), *aff'd*, 107 Conn. App. 585 (2008), *cert. denied*, 288 Conn. 904 (2008). As noted in Castro v. Viera, 207 Conn. 420 (1988) the Supreme Court held "once the question of lack of jurisdiction . . . is raised, '[it] must be disposed of no matter in what form it is presented."' Id., 429. We also note that we must ascertain if the hearing process provided the respondent due process, which would include proper notice and an opportunity to be heard. See Balkus v. Terry Steam Turbine Co., 167 Conn. 170, 177 (1974). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

We note that the claimant appeared at the formal hearing and the trial commissioner found him to be a credible and persuasive witness. We may not intercede findings of credibility found by the trier. Burton v. Mottolese, 267 Conn. 1, 40 (2003). The respondent had numerous opportunities to rebut the claimant's allegations. Our review of the file indicates she availed herself of none of her opportunities.

When the claimant filed his initial notice of claim that notice informed the respondent that if the employer did not file a notice contesting liability within 28 days from the date the notice was received that **COMPENSABILITY SHALL BE PRESUMED** (Emphasis in original). The trial commissioner found that the respondent received this notice. We further note that a hearing request was mailed on March 14, 2014 to the respondent both at the business address on Federal Road in Brookfield and the address of the firm's agent for service, Anthony Joseph Rendino, at the address of Ms. Rendino, 11 Baldwin Hill Road, Brookfield. Notice of an informal hearing scheduled for May 8, 2014 was sent to Cheer Virtue on April 15, 2014 via certified mail and was not returned as undeliverable. Presumably the respondent was aware of the employment status of the claimant at that point in time, but did not file any disclaimer of liability with the Commission. It appears that at some point the Commission was advised the respondent was located at the Baldwin Hill Road address, and U.S. Postal Service tracking indicates that a notice of an informal hearing sent on December 1, 2014 was delivered to the respondent on December 3, 2014 at 1:45 p.m. The notice sent by the Commission on April 10, 2015 for the May 26, 2015 formal hearing was sent to the respondent's 11 Baldwin Hill Road address and not returned as nondeliverable. The file thus reflects that the respondent had received numerous notices as to the pending claim

and did not respond in any written fashion to the pending claim. We do note that the notice sent on May 26, 2015 to the respondent's 11 Baldwin Hill Road address for the June 26, 2015 pro forma formal hearing was returned by the Postal Service as "Unclaimed Unable to Forward", but the exterior of the envelope indicates the Postal Service made numerous efforts to deliver the notice.

The respondent argued before our tribunal that there had been significant and long standard delivery problems with the Postal Service in the town of Brookfield, and a mail carrier had been fired for malfeasance. She also argued that that was not her signature on the certified mail receipt on the Form 30C returned to the Commission. She said she had not received notice of the formal hearing and would have advanced a defense to this claim at the hearing had she been properly informed. However, she offered no corroboration for her arguments, either in the form of documentary evidence such as a notice from the Postal Service or local public officials in Brookfield outlining the lapses; contemporaneous news media accounts of alleged postal neglect, or any witnesses or affidavits confirming her allegations. We note that in Yelunin v. Royal Ride Transportation, 5274 CRB-1-07-9 (September 5, 2008), *aff'd,* 121 Conn. App. 144 (2010), we cited the Supreme Court in Reiner, Reiner & Bendett, P.C. v. Cadle Co., 278 Conn. 92 (2006) for the proposition that one who disputes receipt of correspondence which was mailed to them has the burden of proving that it was not delivered. Id., 113.

After hearing the respondent's argument we are not persuaded that she met this burden. We may easily distinguish this case from Mankus, supra, where we upheld opening an award to permit a contest on jurisdiction when the claimant told the respondent not to appear at the formal hearing. We can also distinguish this case from

Rinaldi v. Tilcon Connecticut, Incorporated, 4981 CRB-3-05-7 (August 30, 2006) where a claimant persuaded the tribunal that lack of notice due to unfortunate circumstances warranted setting aside dismissal of his claim for his nonattendance at a hearing.[3] We find instead this case indistinguishable from cases such as Mehan v. Stamford, 127 Conn. App. 619 (2011), *cert. denied*, 301 Conn. 911 (2011); Bedard v. Southbury, 5923 CRB-5-14-3 (April 24, 2015) and Morgan v. Hot Tomato's, Inc. DIP, 4377 CRB-3-01-3 (January 30, 2002). In all those cases the respondent was properly served a notice of claim and neglected to respond in a proper fashion.[4] In each case we rejected their argument that the claimant should not be granted the relief they sought at the formal hearing. We find the respondent had sufficient notice of the claim to interpose a timely jurisdictional defense and the requirements of due process in this matter were complied with. We will not speculate on why the respondent herein did not avail herself of the opportunity.

The Finding and Award is affirmed.

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

[3] Our decision in Rinaldi v. Tilcon Connecticut, Incorporated, 4981 CRB-3-05-7 (August 30, 2006) was governed heavily by a belief the humanitarian purposes of Chapter 568 were not advanced by denying a claimant his "day in court" due to procedural lapses to pursue a claim for benefits.

[4] We note in Morgan v. Hot Tomato's, Inc. DIP, 4377 CRB-3-01-3 (January 30, 2002) the respondent argued that when their employees failed to sign for a certified letter that service pursuant to § 31-321 C.G.S. had not been perfected and preclusion could not be granted pursuant to § 31-294c(b) C.G.S. We rejected this argument citing Jimenez v. Montero, 14 Conn. Workers' Comp. Rev. Op. 40, 43, 1826 CRB-4-93-8 (May 4, 1995) for the proposition that the failure to accept a certified letter did not thwart effective notice on the respondent.