CASE NO. 6063 CRB-7-15-12 : COMPENSATION REVIEW BOARD
CLAIM NO. 700167282

PETER GOULD
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: NOVEMBER 14, 2016

CITY OF STAMFORD
EMPLOYER

and

SECOND INJURY FUND
RESPONDENT-APPELLEE

APPEARANCES:

The claimant was represented by John J. Morgan, Esq., Barr & Morgan, 22 Fifth Street, Stamford, CT 06905.

The respondent Second Injury Fund was represented by Kenneth H. Kennedy, Jr., Esq., Assistant Attorney General, Office of the Attorney General, 55 Elm Street, Hartford, CT 06141-0120.

The employer City of Stamford did not participate in the issue presented at the trial level or at oral argument before the board.

This Petition for Review from the December 9, 2015 Findings and Order of Randy L. Cohen, the Commissioner acting for the Seventh District, was heard June 17, 2016 before a Compensation Review Board panel consisting of Commission Commissioners Ernie R. Walker, Nancy E. Salerno and Michelle D. Truglia.

OPINION

ERNIE R. WALKER, COMMISSIONER. The claimant has appealed from Findings and Order issued on December 9, 2015 by Commissioner Randy L. Cohen. The claimant, a Stamford city employee, was injured at that job and the injury has been accepted by the employer, but he now argues that the trial commissioner erred in determining that he was not entitled to include income from his outside occupation in calculating a compensation rate under § 31-310 C.G.S. Upon review, we conclude that it is a question of fact as to whether the claimant established an employer-employee relationship between himself and the single member limited liability company that he owns. In the absence of such a relationship, such earnings are outside the jurisdiction of this Commission and cannot be used to calculate benefits under § 31-310 C.G.S. Commissioner Cohen concluded that this employer-employee relationship did not exist and cited evidence on the record supporting this conclusion. Since we find that this conclusion is consistent with precedent on this issue, we affirm the Findings and Order.

Commissioner Cohen reached the following factual findings in her decision. She noted that the respondent had proferred a voluntary agreement to the claimant as to the injury he sustained working for the City of Stamford but he was now claiming he was concurrently employed by the Intervale Group L.L.C. ("Intervale") and his earnings there should be included in his average weekly wage. The trial commissioner noted that Intervale was a single member LLC and the claimant was the sole member. The respondent Second Injury Fund ("Fund") denied the claimant for § 31-310 C.G.S. benefits on two grounds. The Fund argued that there was no employer-employee relationship between the claimant and Intervale. The Fund also argued that since

Intervale failed to file a Form 75 with the Commission electing to be covered under Chapter 568, that Chairman's Memorandum No. 2003-02 barred single member LLC's from coverage under Chapter 568. The trial commissioner found that there was no evidence that the Form 75 was ever filed by Intervale with the Commission, but did find Intervale maintained a workers' compensation insurance policy which was in effect as of the date of the claimant's injury.

The claimant testified at the formal hearing that he was "the business" for Intervale and had never hired any employees. He said he had hired independent contractors to assist on certain projects. He said he had procured workers' compensation insurance for Intervale because it was required for the firm to do a film shoot at a shopping mall in Massachusetts, and it would be prudent were an independent contractor to file a compensation claim against Intervale to have coverage. He said at the time he obtained the policy he had no employees and he stated on the policy application his payroll was $12,750 per year since he did not know what his payroll was and this enabled him to obtain coverage. He said that this amount was to be adjusted by a subsequent audit. The claimant noted that his Schedule C gross receipts on his Form 1040 from the Internal Revenue Service from Intervale for calendar year 2012 were $43,600.00 and for calendar year 2013 they were $97,496.00. These were the amounts that he reported to the federal government as income from Intervale. The numbers that he reported to the federal government on his Schedule C for Cost of Goods Sold was $11,336.00 for calendar year 2012 and $27,609.00 for calendar year 2013. The trial commissioner noted the claimant explained as to the manner to how he was paid by Intervale.

> He has no fixed salary with The Intervale Group, LLC. When a check comes in he deposits it into the Intervale Group bank

account. He withdraws money from the Intervale Group bank account when there is some available and when he needs it.

Findings, ¶ 9 a.

The trial commissioner also noted that the claimant's tax returns in 2011, 2012 and 2013 note that he filed Schedule SE and paid taxes in those years as a self-employed individual. After reviewing the totality of the circumstances the trial commissioner concluded she was not persuaded that the claimant was an employee of Intervale. She cited the following reasons in Conclusion, ¶ A.

a. The Claimant alone controlled the means and method of the services he performed on behalf of The Intervale Group. There was no one higher than him to report to-only the client.

b. The Claimant alone determined if and when to hire independent contractors to perform certain aspects of jobs for The Intervale Group.

c. The Claimant has no fixed salary with The Intervale Group, LLC. When a check comes in he deposits it into the Intervale Group bank account. He withdraws money from the Intervale Group bank account when there is some available and when he needs it. There is no Board of Directors or anyone else that he must account to.

d. For tax purposes, the claimant treated The Intervale Group LLC as a sole proprietorship, naming himself as the proprietor; itemizing his expenses for the business and paying self-employment taxes.

e. It is questionable as to whether the Claimant intended to cover himself as an employee when he procured is covered [sic], or whether the Workers' Compensation Insurance policy that was in effect for The Intervale Group on July 28, 2013 (and which was a renewal of the 2012 policy). The number that was put down for wages on the 2013 policy was $12,750. By the Claimant's testimony, that was a number that was put down if you didn't know what your payroll was and you were a small business-later to be adjusted by audit. This-despite the fact that in 2012 and

> 2013 the claimant was in control of the money that he was paid from the business's bank account and he reported income from The Intervale Group far in excess $12,750.00.

Commissioner Cohen noted that precedent required the existence of an employer-employee relationship in outside employment to qualify such earnings for a § 31-310 C.G.S. award. She found no such relationship between the claimant and his single member LLC. She also noted that Intervale did not file a Form 75 with the Commission electing to be covered under Chapter 568. She noted that pursuant to Chairman's Memorandum No. 2003-02 dated April 17, 2003, single member LLCs are excluded from the Act unless they have elected to be covered through the use of a Form 75. However, in Conclusion, ¶ E, Commissioner Cohen noted that that was not in and of itself a decisive factor.

> Notwithstanding the fact that The Intervale Group LLC did not file a Form 75 election, the Claimant was not concurrently employed by his single member LLC on July 28, 2013, and therefore is not entitled to additional indemnity benefits based upon his claimed concurrent employment with the Intervale Group LLC.

Therefore, the trial commissioner denied the claimant's bid for benefits as a result of concurrent employment. The claimant filed a Motion to Correct which sought to include findings that the claimant was an employee of Intervale and that Intervale's workers' compensation policy was intended to extend coverage over him as an employee. The trial commissioner denied this Motion in its entirety and the claimant pursued this appeal.

In his appeal the claimant has focused primarily on his argument that the Commission acted improperly when it promulgated Chairman's Memorandum No. 2003-02. We note that it has been 13 years since this policy was adopted and the General

Assembly has acquiesced to this policy by virtue of its inaction. See Hanson v. Transportation General, Inc., 245 Conn. 613, 618-619, (1998) discussing this concept as related to judicial interpretation of statutes. In any event, we conclude that based on Conclusion, ¶ E, that even had the claimant filed a Form 75, electing workers' compensation coverage; or were we to conclude that such an election was unnecessary the claimant was not covered under the terms of Chapter 568 as he was not an "employee" of Intervale. Therefore, we find arguments regarding the filing of a Form 75 are not central to the determination of this appeal.

It has long been established that the presence of an employer-employee relationship is a threshold requirement under Chapter 568 to confer subject matter jurisdiction over a matter to the Commission. The touchstone case on this point is Castro v. Viera, 207 Conn. 420 (1988). This case stands for the following proposition.

> The burden in a workers' compensation claim rests upon the claimant to prove that he is an "employee" under the act and thus is entitled to invoke the act. Bourgeois v. Cacciapuoti, 138 Conn. 317, 321, 84 A.2d 122 (1951); Morganelli v. Derby, 105 Conn. 545, 551, 135 A. 911 (1927). This relationship is threshold because it is settled law that the "commissioner's jurisdiction is 'confined by the Act and limited by its provisions.'" Gagnon v. United Aircraft Corporation, 159 Conn. 302, 305, 268 A.2d 660 (1970). Long ago, we said that the jurisdiction of the commissioners "is confined by the Act and limited by its provisions. Unless the Act gives the Commissioner the right to take jurisdiction over a claim, it cannot be conferred upon [the commissioner] by the parties either by agreement, waiver or conduct."

Castro, 426.

The trial commissioner concluded the claimant failed to meet his burden that he was an "employee" of Intervale. As this constitutes a factual finding we must provide strong deference to the commissioner unless we determine this conclusion was based on

an improper application of the law or lacked support in the record. Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007). We look to Findings, ¶ 9 a, and are satisfied the trial commissioner reached a reasonable conclusion herein.

The claimant herein testified that he was not paid by Intervale on a regular monthly or weekly basis, nor was he paid based on the number of hours he worked for this firm or the number of projects he performed for the firm. Instead, the claimant testified that "when he needed money" he would write himself a check from the firm's account. It is therefore apparent the claimant compensated himself for his activities at Intervale solely as a business owner obtaining profits from the firm, and not as an employee whose compensation was fixed in some manner independent of the profitability of the firm.[1] Essentially Intervale was the alter ego of the claimant and did not maintain the appropriate corporate formalities to establish an employer-employee relationship with its principal. We note that when business owners who commingled their personal business activities with the activities of limited liability companies they controlled subsequently asserted a "corporate veil" that situation caused the Commission to bar the use of the "corporate veil" to shield the principal from the consequences of being uninsured for workers' compensation. See Diaz v. Capital Improvements and Management, LLC, 5616 CRB-1-11-1 (January 12, 2012) and Caus v. Paul Hug d/b/a Hug Construction Company, Hug Contracting Company, Crown Asphalt Paving, LLC, P. Hug Contracting, LLC, 5392 CRB-4-08-11 (January 22, 2010). When a limited liability

[1] We look to the definitions in Black's Law Dictionary Eighth Edition for guidance herein. This treatise defines "Wage" as "[p]ayment for labor or services, usu. based on time worked or quantity produced." Conversely, "Profit" is defined as "[t]he excess of revenues over expenditures in a business transaction." A reasonable fact finder could conclude the claimant was being paid "profits" from Intervale and not "wages."

company and its principal act as alter egos a trial commissioner may reasonably conclude there is no employer-employee relationship present, and therefore this Commission lacks jurisdiction.

The commissioner further noted that the claimant did not receive a W-2 form from Intervale or have any pay withheld for taxes; rather he filed his federal taxes as a self-employed individual. This places this case directly within the precedent established in Bonner v. Liberty Home Care Agency, 4945 CRB-6-05-5 (May 12, 2006) and Dupree v. Masters, 13 Conn. Workers' Comp. Rev. Op. 316, 1791 CRB-7-93-7 (April 25, 1995), *aff'd*, 39 Conn. App. 929 (1995)(Per Curiam).

As we held in Bonner, supra, the trial commissioner denied a claimant's bid for benefits when she was paid without withholding and received a 1099 form for her earnings, "[c]ritical to the holding in all of these cases were methods of payment inconsistent with employer-employee relationships." Id. We further cited Dupree in our Bonner decision that the decisive factor in that case was the claimant's tax filings. "[T]he claimant considered himself self employed for tax purposes, paying his own income taxes and social security taxes at self employment rates." Dupree, supra. The trial commissioner in the present case could reasonably conclude that an individual who held himself out as self-employed to the Internal Revenue Service was not part of an employer-employee relationship under Chapter 568.

"Once a determination is reached that we lack subject matter jurisdiction no further inquiry is warranted." Mankus v. Robert Mankus, 4958 CRB-1-05-6 (August 22, 2006), *aff'd*, 107 Conn. App. 585 (2008), *cert. denied*, 288 Conn. 904 (2008). The trial

commissioner concluded that our Commissioner lacked jurisdiction over the claimant's relationship with Intervale.[2]

As we find that was a reasonable conclusion based on the law and the facts we affirm the Findings and Order.

Commissioners Nancy E. Salerno and Michelle D. Truglia concur in this opinion.

[2] The claimant asserts error from denial of his Motion to Correct. For the reasons cited in Beedle v. Don Oliver Home Improvement, 4491 CRB-3-02-2 (February 28, 2003), we find no error. The trial commissioner is not obligated to adopt the view of the case advanced by a litigant. Given the claimant's own testimony as to his rationale for procuring a workers' compensation policy the trial commissioner reasonably could have denied this motion.