

CASE NO. 6158 CRB-3-16-12
CLAIM NO. 300102649

: COMPENSATION REVIEW BOARD

ANGELA WATLEY
CLAIMANT-APPELLEE

: WORKERS' COMPENSATION
COMMISSION

v.

: NOVEMBER 15, 2017

CITY OF NEW HAVEN/
POLICE DEPARTMENT
EMPLOYER
SELF-INSURED

and

CONNECTICUT INTERLOCAL
RISK MANAGEMENT AGENCY (CIRMA)
ADMINISTRATOR
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by George H. Romania, Esq., and Christopher Kenworthy, Esq., Law Office of George H. Romania, 2653 Whitney Avenue, Hamden, CT 06518.

The respondents were represented by Anne Kelly Zovas, Esq., and Philip T. Markuszka, Esq., Strunk, Dodge, Aiken & Zovas, L.L.C., 200 Corporate Place, Suite 100, Rocky Hill, CT 06067.

This Petition for Review from the November 14, 2016, Finding of Nancy E. Salerno, the Commissioner acting for the Third District, was heard May 19, 2017 before a Compensation Review Board panel consisting of the Commissioners Christine L. Engel, Daniel E. Dilzer and Peter C. Mlynarczyk.

OPINION

CHRISTINE L. ENGEL, COMMISSIONER. The respondents have appealed from a Finding issued on November 14, 2016, by Commissioner Nancy E. Salerno, who determined that the claimant sustained a compensable cervical injury at work. The respondents' appeal asserts that they were prejudiced by an inaccurate date of injury in the claimant's Form 30C, and this error deprived the Workers' Compensation Commission ["Commission"] of jurisdiction to award benefits. Upon review, we find the respondents' position inconsistent with our precedent in Staurovsky v. Milford, 5884 CRB-4-13-10 (November 25, 2014) and Kingston v. Seymour, 5789 CRB-5-12-10 (September 10, 2013). In both those cases, minor discrepancies between the date of injury and the date listed in the claimant's timely notice of claim were not held to be fatal jurisdictional defects under General Statutes § 31-294c. Since we cannot distinguish this case on either the facts or the law from Staurovsky or Kingston, stare decisis compels this panel to affirm the Finding.

Commissioner Salerno reached the following factual findings at the conclusion of the formal hearing which are pertinent to our inquiry herein. She found that a First Report of Injury was filed on April 22, 2013, indicating that on April 17, 2013, the claimant experienced pain in her neck causing left-hand numbness. On April 26, 2013, the respondents filed a Form 43 disclaiming the compensability of the claim and noting that the injury was of unknown etiology. The claimant filed a Form 30C on July 10, 2013, seeking compensation for an injury alleged to have occurred on April 17, 2013, when the claimant fell back in her chair. The respondents filed a second Form 43 on

July 16, 2013, contesting causation and the extent of the injury, and asserting the Form 30C was “barred by statute.” Findings, ¶ 5.

On October 29, 2013, the claimant testified by deposition that she initially experienced neck pain on April 15, 2013, when her chair flipped back at work. She further testified that her neck pain became less severe on April 15, 2013, and she worked her shifts on April 16, 2013 and April 17, 2013. However, on April 17, 2013, she needed to be transported by emergency vehicle to Yale-New Haven Hospital Occupational Health Plus [“Occupational Health”].

At the initial formal hearing held on April 4, 2015, the claimant sought to amend her date of loss to April 15, 2013. The commissioner requested briefs on the issue and the respondents filed a motion to dismiss the claim on April 14, 2015, asserting that timely notice of claim had never been filed. The claimant filed a brief in response to this motion. At the formal hearing, the claimant testified that on April 15, 2013, she injured her neck at work when her chair flipped back but she did not feel any immediate pain or numbness. She woke up the next morning with a stiff neck and tingling in her hands. She initially thought that this was due to the way she had slept and also because she was diabetic. She worked on April 16, 2013 and April 17, 2013, and provided the history of the injury as reported in the First Report of Injury. On April 18, 2013, she had significant arm numbness at work and felt dizzy; as a result, an emergency vehicle was called to transport her to Occupational Health.

Based on the evidence in the record, the trial commissioner reached the following conclusions regarding the issues on appeal:

B. On April 22, 2013, a *First Report of Injury* (FRI) was prepared for an April 17, 2013 neck injury. On April 26, 2013 the

respondents filed a Form 43. On July 10, 2013 the claimant filed a Form 30C for an April 17, 2013 neck injury. On July 16, 2013 the respondents filed a second Form 43.

C. October 29, 2013 the respondent took the claimant's deposition and the claimant testified in detail regarding the events that transpired at work on April 15th, 16th, and 17th of 2013. The claimant specifically testified that she started having neck pain on April 15, 2013 when her chair at work flipped back.

D. At the first Formal Hearing on February 4, 2015 the claimant, through counsel, requested to amend her Form 30C to change the date of loss from April 17, 2013 to April 15, 2013. Thereafter, respondents filed a motion to dismiss based on claimant's failure to file a timely claim for an April 15, 2015 date of injury.¹

E. I find that the claimant's Form 30C *Notice of Claim* substantially complied with proper notice and permitted the employer to investigate this claim in a timely manner. The employer was not ignorant of the facts concerning the claimant's injury, nor were they prejudiced by the two day discrepancy in the Form 30C. Therefore the respondent's motion to dismiss is denied.

The commissioner also concluded that the claimant was a credible witness and had presented corroborating witnesses to her injury. In addition, the trier concluded that medical evidence established that the fall at work was a substantial contributing factor to the claimant's injury. As such, the commissioner determined the claimant's injury of April 15, 2013, arose out of and in the course of her employment and was a substantial factor behind the claimant's subsequent cervical surgery and absence from work until November 1, 2014. She ordered the respondents to take responsibility for the injury.

The respondents filed a Motion to Correct seeking twenty-one separate corrections. The trial commissioner granted only one correction which did not materially change the relief granted to the claimant. The respondents then filed an appeal arguing:

¹ The "April 15, 2015" date of injury in Conclusion, ¶ D of the finding is an obvious scrivener's error which will have no weight herein. Hernandez v. American Truck Rental, 5083 CRB 7-06-4 (April 19, 2007).

(1) their Motion to Dismiss the claim for lack of jurisdiction should have been granted; (2) they were prejudiced by the inaccuracy in the date of injury; and, (3) the claimant had failed to prove her claim. The respondents did not brief an argument critiquing the merits of the claimant's substantive case, and we therefore deem this element of alleged error abandoned on appeal. See Christy v. Ken's Beverage, Incorporated, 5157 CRB-8-06-11 (December 7, 2007) and St. John v. Gradall Rental, 4846 CRB-3-04-8 (August 10, 2005). Relative to the issue of whether the discrepancy in the initial claim for benefits constitutes a jurisdictional defect, we find precedent clearly supports the trial commissioner's decision.

The standard of deference we are obliged to apply to a trial commissioner's findings and legal conclusions is well-settled. "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. Mottolose, 267 Conn. 1, 54 (2003). "This presumption, however, can be challenged by the argument that the trial commissioner did not properly apply the law or has reached a finding of fact inconsistent with the evidence presented at the formal hearing." Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

The circumstances of this case are that the claimant submitted a Form 30C seeking benefits well within the statutory time period required under General Statutes

§ 31-294c and the notice had a minor discrepancy as to the date of injury. We have in recent years ruled on precisely the same issue twice and in both cases ruled that the trial commissioner could find jurisdiction existed to award the claimant benefits. In Kingston, supra, the claimant recited an inaccurate date of injury on his Form 30C and, on appeal, the respondents claimed that the Form 30C filed by the claimant was too seriously flawed by virtue of the inaccurate date of injury to confer jurisdiction on the Commission. We rejected that argument given that the respondents had the burden under General Statutes § 31-294c (c) of establishing they had been prejudiced by the inaccurate date in the claimant's Form 30C and/or any other efforts to initiate the claim within one year of the injury. The trial commissioner concluded that the respondents were not prejudiced, and we affirmed that conclusion.

In the present case, the respondents were put on notice regarding the actual date of injury on the day they took the claimant's deposition, which was within one year of the date of injury and well in advance of the commencement of the formal hearing. We believe the trial commissioner in this case could reasonably find that the actual notice cured any possible prejudice to the respondents resulting from the inaccurate Form 30C.

In Staurovsky, supra, the respondents presented what could be perceived as an even more compelling argument that they were prejudiced by an inaccurate date of injury. The claimant, in Staurovsky, did not realize he had put the wrong date on his Form 30C until evidence was presented, on the first day of the formal hearing, that he was not at work on that date. He then ascertained that he had been injured on a prior day when he was working for the respondent. While we noted that in Ghazal v. Cumberland

Farms, 5397 CRB-8-08-11 (November 17, 2009), we had held that a respondent could be prejudiced by a commissioner relying on late-arriving evidence, in Staurovsky, we stated:

To the extent the respondent could have been prejudiced by the change in the claimant's narrative, this was addressed by their ability to cross-examine the claimant and the availability of time to locate and produce whatever evidence they believed was necessary to challenge the claimant. The respondent also did not argue to the trial commissioner that this discrepancy impeded their ability to investigate the claim.

Staurovsky, supra.

In the present case, the actual date of injury was known to the respondents within the one-year period for commencing a claim under General Statutes § 31-294c. The respondents clearly could have properly investigated the claim. To argue that the claimant lost her right to prosecute a claim for benefits by not amending her Form 30C prior to the start of the formal hearing is essentially advocating that we elevate form over substance. As we held in Berry v. State/Dept. of Public Safety, 5162 CRB-3-06-11 (December 20, 2007), we will bar relief to claimants for technical notice deficiencies only when their notice is so fundamentally deficient that it clearly prejudiced the respondents. Such is not the case in the present matter.

The respondents' argument focuses primarily on precedent set forth in Simmons v. Philip Bonhotel, d/b/a Bonhotel's Lawn Maintenance, 13 Conn. Workers' Comp. Rev. Op. 234, 1778 CRB-5-93-7 (April 13, 1995), *aff'd*, 40 Conn. App. 278 (1996). We do not find Simmons stands for the proposition that the instant trial commissioner's decision should be reversed, because the case is distinguishable both on the facts and on the law. In Simmons, the date of injury on the claimant's notice proved to be over a month later than the date the respondent argued the claimant had been injured. Nonetheless, the claimant was not deprived of jurisdiction to seek benefits. The trial commissioner

determined that the material difference between the notice and the evidence presented was sufficient such that the harsh remedy of preclusion was not viable, given that the respondent's ability to promptly investigate the claim was clearly impeded. The trial commissioner denied the claimant's Motion to Preclude, but allowed the claim to proceed on the merits and the respondent to present a defense that the claimant had been injured as a result of horseplay with coworkers. The respondent prevailed in Simmons, not on jurisdictional grounds, but because the commissioner's decision was dependent upon the weight and credibility afforded the evidence. Since the trial commissioner found the claimant credible on the central issues presented herein, and since preclusion is not at issue, we do not find Simmons on point.

We note that in this case, the respondents filed a "pre-emptive Form 43" similar to the fact pattern in Izikson v. Protein Science Corporation, 5814 CRB-8-12-12 (November 15, 2013), *aff'd*, 156 Conn. App. 700 (2015). In Izikson, notwithstanding the respondents' apparent knowledge of a potential claim, the trial commissioner found the claimant never perfected his claim for benefits within the statutory claim period and, as a result, jurisdiction was lacking. Unlike Izikson, however, the claimant herein subsequently presented a notice of claim within the statutory one-year claim period setting forth her demand for benefits. Under these circumstances, we do not believe the trial commissioner was unreasonable in determining that the respondents failed to prove prejudice and jurisdiction therefore existed to award the claimant benefits. See Hodges v. Federal Express Corporation, 5717 CRB-7-12-1 (January 4, 2013), *appeal withdrawn*, A.C. 35342 (2013). Both Staurovsky and Kingston stand for the principle that de minimus notice inaccuracies do not deprive this Commission of jurisdiction.

We affirm the Finding.

Commissioners Daniel E. Dilzer and Peter C. Mlynarczyk concur in this opinion.

CERTIFICATION

THIS IS TO CERTIFY THAT a copy of the foregoing was mailed this 15th day of November 2017 to the following parties:

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