CASE NO. 6154 CRB-5-16-11 : COMPENSATION REVIEW BOARD
CLAIM NO. 800188467

MICHAEL DUNKLING : WORKERS' COMPENSATION
CLAIMANT-APPELLEE COMMISSION

v. : APRIL 25, 2018

LAWRENCE BRUNOLI, INC.
EMPLOYER

and

LIBERTY MUTUAL INSURANCE COMPANY
INSURER
RESPONDENTS-APPELLANTS

and

MID-STATE METAL BUILDING COMPANY., L.L.C.
EMPLOYER
NO RECORD OF INSURANCE
RESPONDENT-APPELLEE

and

CONNECTICUT METAL STRUCTURES, L.L.C.
EMPLOYER
NO RECORD OF INSURANCE
RESPONDENT-APPELLEE

and

SECOND INJURY FUND
RESPONDENT-APPELLEE

APPEARANCES: At the trial level, the claimant was represented by Scott R. McCarthy, Esq., Cramer & Anderson, L.L.P., 51 Main Street, New Milford, CT 06776. Attorney McCarthy did not submit a brief or appear at oral argument as the issue on appeal did not involve the claimant.

Respondents Lawrence Brunoli, Inc., and Liberty Mutual Insurance Company were represented by Christopher J. Powderly, Esq., Law Offices of Meehan, Roberts, Turret & Rosenbaum, P.O. Box 5020, 108 Leigus Road, 1st Floor, Wallingford, CT 06492.

Respondent-employer Mid-State Metal Building Company, L.L.C., was represented by Bertrand Rompre, 325 Main Street, Farmington, CT 06032. Mr. Rompre, who appeared at the trial level as an unrepresented party, did not file a brief or appear at oral argument.

Respondent-employer Connecticut Metal Structures, L.L.C., was represented at the trial level by Marla L. Seligson, Esq., Esty & Buckmir, L.L.C., 2340 Whitney Avenue, Hamden, CT 06518. Attorney Seligson did not file a brief or appear at oral argument.

Respondent Second Injury Fund was represented by Joy L. Avallone, Esq., Assistant Attorney General, Office of the Attorney General, 55 Elm Street, P.O. Box 120, Hartford, CT 06141-0120

This Petition for Review from the October 28, 2016 Supplemental Finding and Award of Thomas J. Mullins, the Commissioner acting for the Fifth District, was heard September 29, 2017 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Christine L. Engel and Daniel E. Dilzer.[1]

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The appellant, Lawrence Brunoli, Inc., [hereinafter "Brunoli"] has appealed from a Supplemental Finding and Award [hereinafter "Supplemental Finding"] issued on October 28, 2016.[2] In this Supplemental

[1] We note that motions for extensions of time and a motion for postponement were granted during the pendency of this appeal.
[2] Commissioner Mullins initially issued a Finding and Award on June 20, 2016. The Second Injury Fund filed a motion for articulation and reconsideration and the trial commissioner subsequently amended his

Finding, the trial commissioner determined that Brunoli had served as the "principal employer" pursuant to General Statutes § 31-291 at the worksite where the claimant in this matter was injured.[3] Brunoli argues that the premises in question were substantially complete at the time of the claimant's injury, and because Brunoli did not exercise control over the worksite, the principal employer statute does not apply to the facts of this case.

The appellee, the Second Injury Fund [hereinafter "fund"] contends that the facts presented to the commissioner support his finding that Brunoli had sufficient control over the premises to apply General Statutes § 31-291. The fund also argues that this matter should be remanded because various elements of relief awarded to the claimant need to be determined and were not addressed in the Supplemental Finding. After review, we find the fund's position persuasive. We affirm the Supplemental Finding concluding that Brunoli is liable to the claimant as the principal employer in this matter but remand this case to the trial commissioner for additional proceedings.

The trial commissioner reached the following factual findings in his Supplemental Finding. He found that the claimant was an hourly employee of Connecticut Metal Structures, L.L.C., [hereinafter "CMS"] in August 2013. On or around July 19, 2012, the State of Connecticut Department of Transportation [hereinafter "DOT"] entered into a

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decision on October 28, 2016. For the purposes of this appeal, we will review the facts and conclusions reached by the trial commissioner in his Supplemental Finding and Award.

[3] General Statutes § 31-291 states: "When any principal employer procures any work to be done wholly or in part for him by a contractor, or through him by a subcontractor, and the work so procured to be done is a part or process in the trade or business of such principal employer, and is performed in, on or about premises under his control, such principal employer shall be liable to pay all compensation under this chapter to the same extent as if the work were done without the intervention of such contractor or subcontractor. The provisions of this section shall not extend immunity to any principal employer from a civil action brought by an injured employee or his dependent under the provisions of section 31-293 to recover damages resulting from personal injury or wrongful death occurring on or after May 28, 1988, unless such principal employer has paid compensation benefits under this chapter to such injured employee or his dependent for the injury or death which is the subject of the action."

contract with Brunoli to act as the general contractor for work in Colchester and permitted Brunoli to subcontract work with respondents Mid-State Metal Building Company, L.L.C., [hereinafter "Mid-State"] and CMS. Pursuant to this contract, "Brunoli warranted all materials and workmanship for all work performed under said contract for a period of one year from September 16, 2014, against failures of workmanship and materials in accordance with the aforementioned contract." Findings, ¶ 3. According to the State of Connecticut, Brunoli maintained workers' compensation insurance on the claimant's date of injury, December 4, 2014; however, neither CMS nor Mid-State maintained workers' compensation insurance on December 4, 2014.[4]

The claimant, who was employed by CMS, worked on the Colchester project until June 2014, and remained employed at CMS until November 2014. On December 3, 2014, Bert Rompre [hereinafter "Rompre"], president of Mid-State, contacted the claimant and requested that he return to the Colchester worksite to repair leaking gutters. Mid-State advised the claimant that Brunoli was withholding final payment for the company's work until the leak was repaired. Mid-State agreed to pay the claimant for gutter repair at the Colchester worksite upon completion of said repair on December 4, 2014. Mid-State paid the claimant essentially the equivalent wage that the claimant had received while the claimant was employed by CMS during the construction project at the Colchester worksite.

On December 4, 2014, the claimant arrived at Mid-State's offices and met with Rompre. Rompre transported the claimant to the Colchester worksite, directed him to the

[4] The Joint Stipulation of Facts submitted in this matter states that "Brunoli had workers' compensation insurance on 12/4/14. Neither Mid-State nor CMS had workers' compensation insurance on 12/4/14. (Adm. Notice of file and Cindi Lloyd's investigation reports dated March 20, 2015 and March 27, 2015.)" Joint Exhibit 1, ¶ 7.

locations of the subject leak(s), and provided materials, including a ladder, to access the location of the subject leak(s). The claimant had been working for approximately four (4) hours when the ladder provided by Mid-State retracted, causing the claimant to fall and sustain injuries. Following the incident, the claimant was paid by Rompre in the same amount as the wages paid to the claimant by CMS prior to the claimant's "layoff" in November 2014. The claimant testified that he had always worked as an hourly employee and never worked for himself or hired subordinates. The claimant has not worked since the December 4, 2014 incident and has incurred medical bills totalling $16,675.26.

The trial commissioner noted that the claimant was injured within the specific area identified as the worksite of the Colchester project at 80 New London Road, Colchester, Connecticut. Brunoli had contracted with the DOT and the subcontractors identified herein for the purpose of building said structure on this property. The trial commissioner also noted that Brunoli had retained Mid-State as a subcontractor, and the "[c]laimant's injury on December 4, 2014, was in response to the Brunoli communication and directive to Mid-State that it summon a representative to the worksite for gutter repair, even though no representative of Brunoli remained on the worksite premises." Findings, ¶ 19. The commissioner found that work on the Colchester project was procured by Brunoli as part of Brunoli's trade or business.

Based on these facts, the trial commissioner, in his Supplemental Finding, concluded that the claimant was credible and had sustained a compensable injury on December 4, 2014. At the time of his injury, the claimant was an employee of Mid-State, given that an employee-employer relationship had been established between the claimant

and Rompre, and the claimant's injury occurred in the course and scope of his employment with Mid-State. The trial commissioner further concluded that Brunoli was the "principal employer" of the claimant pursuant to General Statutes § 31-291.

Subsequent to the Supplemental Finding, both the fund and Brunoli filed motions to correct. The fund sought corrections clarifying the nature of the business relationship between Brunoli and its subcontractors, as well as corrections to the "Order" language in the Supplemental Finding regarding the obligations owed to the claimant by both Mid-State and Brunoli. The trial commissioner denied this motion in its entirety. He also denied in its entirety the motion to correct filed by Brunoli because that motion sought to substitute findings that Brunoli was no longer in control of the premises on the date of the claimant's injury and the party controlling the premises was the DOT. Brunoli has appealed the Supplemental Finding, arguing that the trial commissioner erred in concluding that Brunoli had met the provisions of General Statutes § 31-291 such that he could be deemed a principal employer.

We note that 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. Mottolese, 267 Conn. 1, 54 (2003) *quoting* Thalheim v. Greenwich, 256 Conn.

628, 656 (2001). "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).

As previously noted herein, Brunoli's appeal is based on its position that the trial commissioner erred in determining that it had adequate control over the worksite such that principal-employer status could be invoked. It believes that as of the date of substantial completion of the Colchester project, control of the premises was exclusively in the hands of the DOT, and it no longer possessed any indicia of control over the premises. Brunoli argues that the date of substantial completion on this project was on or about September 16, 2014. The premises were turned over to the DOT as of that date, and Brunoli's sole obligation thereafter was to perform warranty work. As Brunoli views the Supplemental Finding, any principal-employer requirement for work pursuant to a warranty under General Statutes § 31-291 creates an unreasonable "open-ended" obligation for a general contractor far beyond the intent of the statute. Appellant's Brief, p. 10. Brunoli cites Mancini v. Bureau of Public Works, 167 Conn. 189 (1974), for the proposition that the "principal employer" statute was only supposed to encompass situations "where such conditions might be assumed to be largely within the control or observation of the principal employer." Id., 198, *quoting* Wilson v. Largay Brewing Co., Inc., 125 Conn. 109, 112 (1939).

The fund contends that under the circumstances in this case, it could be assumed that Brunoli maintained control of the worksite at which the claimant sustained injury. It cites cases such as Hebert v. RWA, Inc., 48 Conn. App. 449 (1998), Pacileo v. Morganti,

Inc., 10 Conn. App. 261 (1987) and Alpha Crane Service, Inc. v. Capitol Crane Co., 6 Conn. App. 60 (1986), *cert. denied*, 199 Conn. 808 (1986), for the argument that "control" of a worksite under General Statutes § 31-291 does not require the general contractor to maintain fee ownership, leasehold ownership or exclusive physical possession of a worksite. Instead, the inquiry concerns whether the general contractor had the ability to manage the subcontractor on the site at the time the subcontractor's employee sustained injury. The fund argues that the testimony of Dan Neagle, a principal of Brunoli, establishes that Brunoli had a sufficient level of control over the Colchester premises to satisfy the requirements of General Statutes § 31-291. As the fund views the circumstances, Brunoli chose to send its subcontractor Mid-State to do the work it was contractually obligated to the DOT to perform, and any injury which occurred during the performance of that work should be imputed back to Brunoli.

In reviewing the applicable legal precedent, although we credit Brunoli's argument that a point may exist at which extending a general contractor's liability for a subcontractor could result in an untenable application of the provisions of General Statutes § 31-291, we do not believe that point was reached under the facts of this case. Neagle's testimony establishes that although Brunoli had "substantially completed" the Colchester project in September 2014, the firm returned a number of times to the worksite to respond to matters the DOT believed had to be addressed. January 5, 2016 Transcript, pp. 31-32. The departure of staff from Brunoli's field office at the site on September 24, 2014, did not conclude the firm's ongoing work at the Colchester project. Id., p. 30. Neagle cited issues raised by the DOT which required a response from Brunoli, including a water heater, a gas station island, an overhead crane, and the

previously-mentioned leaking gutters. Id., 32. With regard to the gutters, Neagle said that they had been installed before the substantial completion date and then proved to be inadequate. Id., pp. 33-34. Given these circumstances, we do not believe Brunoli's obligations pursuant to the provisions of General Statutes § 31-291 concluded as of the date of "substantial completion" of the Colchester project.

We reach this conclusion based on the similarity between the facts in this case and the facts in Hebert, supra. In Hebert, the claimant was injured repairing the roof of a restaurant and brought a claim both against his employer and the general contractor on the roof project. The general contractor argued that he did not "control" the premises as contemplated by the provisions of General Statutes § 31-291 because he did not have an ownership interest in the premises or maintain a physical presence such as a construction trailer or office. The Appellate Court, however, found that the general contractor had maintained a sufficient indicia of "control" via site visits to the job site, inspections of ongoing work, and directions "to the claimant to address certain problem areas on the roof…." Id., 454. In addition, "[the general contractor] alone dealt with the owners of the premises and he was ultimately responsible to them for the satisfactory completion of the work." Id. We believe the contractual obligations between DOT and Brunoli created an obligation for Brunoli to remedy matters subsequent to "substantial completion" and effectively created the same level of "control" as the circumstances in Hebert which led to a finding of "principal employer" status for the general contractor in that case. Joint Exhibit 1, ¶¶ 6 and 16; Findings, ¶¶ 18 and 19.

The fund has raised another issue in its appeal, arguing that consistent with Samaoya v. Gallagher, 102 Conn. App. 670 (2007), more than one firm may be deemed

to be a principal employer of a claimant, and each firm in the chain between the general contractor and the claimant's immediate employer may be found liable. The fund also sought to declare Mid-State jointly and severally liable for the claimant's injuries. Second Injury Fund's Motion to Correct, ¶¶ 11, 15. The trial commissioner denied this Motion.[5] After reviewing the record and the court's reasoning in Samaoya, we conclude that it was error for the trial commissioner to have denied these corrections. We also note that the Supplemental Finding did not establish either a wage rate for the claimant or the duration of his disability so that the amount of his compensation could be ascertained. For those reasons, we remand this matter to the trial commissioner for additional proceedings. See Cormican v. McMahon, 102 Conn. 234, 238 (1925).

We affirm the Supplemental Finding insofar as it identified that the claimant sustained a compensable injury on a project for which Brunoli was acting as principal employer pursuant to the provisions of General Statutes § 31-291. Relative to the relief due the claimant and the assessment of joint liability against Mid-State, we remand this matter for additional proceedings.

Commissioners Christine L. Engel and Daniel E. Dilzer concur in this opinion.

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[5] Relative to the balance of the fund's motion to correct and the entirety of Brunoli's motion to correct, we affirm the trial commissioner's denials. See Brockenberry v. Thomas Deegan d/b/a Tom's Scrap Metal, Inc., 5429 CRB-5-09-2 (January 22, 2010), *aff'd*, 126 Conn. App. 902 (2011) (per curiam).

CERTIFICATION

THIS IS TO CERTIFY THAT a copy of the foregoing was mailed this 25th day of April 2018 to the following parties:

MICHAEL DUNKLING
155 Park Avenue 2nd Floor
Torrington, CT 06790

SCOTT R. McCARTHY, ESQ. 7011 2970 0000 6088 7473
Cramer & Anderson, L.L.P.
51 Main Street
New Milford, CT 06776

LAWRENCE BRUNOLI, INC.
11 Eastview Drive
Farmington, CT 06034

CHRISTOPHER J. POWDERLY, ESQ. 7011 2970 0000 6088 7480
Law Offices of Meehan, Roberts, Turret & Rosenbaum
P.O. Box 5020
108 Leigus Road, 1st Floor
Wallingford, CT 06492

MID-STATE METAL BUILDING COMPANY, L.L.C.
325 Main St
Farmington, CT 06032

CONNECTICUT METAL STRUCTURES
MARLA L. SELIGSON, ESQ.
ESTY & BUCKMIR, L.L.C.
2340 WHITNEY AVENUE
HAMDEN, CT 06518

JOY L. AVALLONE, ESQ. 7011 2970 0000 6088 7497
Office of the Attorney General
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120

____
Jackie E. Sellars
Administrative Hearings Specialist
Compensation Review Board
Workers' Compensation Commission