CASE NO. 6176 CRB-5-17-2 CLAIM NO. 400085693	: COMPENSATION REVIEW BOARD
RANDY WETMORE CLAIMANT-APPELLEE	: WORKERS' COMPENSATION COMMISSION
v.	: FEBRUARY 7, 2018

PAUL FROSOLONE and
SEASONAL SERVICES OF
CONNECTICUT, L.L.C.
EMPLOYER
NO RECORD OF INSURANCE
RESPONDENT-APPELLANT

and

SECOND INJURY FUND
RESPONDENT-APPELLEE

APPEARANCES:

The claimant was represented by John J. D'Elia, Esq., D'Elia, Gillooly, DePalma, L.L.C., Granite Square, 700 State Street, New Haven, CT 06511.

The respondent-appellant was represented by Ryan P. Driscoll, Esq., Berchem, Moses & Devlin, P.C., 75 Broad Street, Milford, CT 06460.

The respondent-appellee was represented by Richard Hine, 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 January 17, 2017 Finding and Award of Jack R. Goldberg, the Commissioner acting for the Fifth District, was heard August 25, 2017 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Christine L. Engel and Daniel E. Dilzer.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondent, Paul Frosolone, both individually and in his capacity as owner of Seasonal Services of Connecticut, L.L.C., [hereinafter "Seasonal Services"] has appealed from a January 17, 2017 Finding and Award issued to the claimant. He contends that the trial commissioner erroneously determined that the claimant had provided him adequate notice to confer jurisdiction on the Workers' Compensation Commission [hereinafter "Commission"] over the claimant's November 9, 2009 injury. He takes issue with the trial commissioner's determination that his response to the incident was sufficient to trigger the medical care exception to the notice requirements as set forth in General Statutes § 31-294c (c).[1] We note that a determination as to whether this exception has been met is a quintessentially fact-driven exercise, and one which is global in nature. Based on the totality of the circumstances in this matter, we conclude that the trial commissioner could determine the exception had been met. Therefore, we affirm the Finding and Award.

The trial commissioner reached the following factual findings in his Finding and Award. He noted that the claimant testified that he worked for Seasonal Services "under the table" and resided at a trailer located at 18 Clark Street in West Haven, which was the business address of Seasonal Services and another firm affiliated with Frosolone, Fire

[1] General Statutes § 31-294c (c) states: "Failure to provide a notice of claim under subsection (a) of this section shall not bar maintenance of the proceedings if there has been a hearing or a written request for a hearing or an assignment for a hearing within a one-year period from the date of the accident or within a three-year period from the first manifestation of a symptom of the occupational disease, as the case may be, or if a voluntary agreement has been submitted within the applicable period, or if within the applicable period an employee has been furnished, for the injury with respect to which compensation is claimed, with medical or surgical care as provided in section 31-294d. No defect or inaccuracy of notice of claim shall bar maintenance of proceedings unless the employer shows that he was ignorant of the facts concerning the personal injury and was prejudiced by the defect or inaccuracy of the notice. Upon satisfactory showing of ignorance and prejudice, the employer shall receive allowance to the extent of the prejudice."

Equipment of Connecticut. The claimant said he paid $100 a month towards utility expenses for his dwelling. He began work for Frosolone in 2009 and was never given a W-2 or any other tax form. His work involved landscaping, filling fire extinguishers, and shoveling and plowing snow in the winter. He was paid $10 per hour and worked six to seven hours per day. He did not own any of the equipment necessary for performing these jobs and all the equipment was provided by the respondent, who also drove him to the work sites. He testified he was paid twice by a firm named Firelone, Inc., but was told not to cash the checks. He believed that this fire equipment company was owned by Frosolone's late father. He also indicated he was not paid for long periods of time and eventually had to file a complaint with the Connecticut labor department wage division claiming $5,295 in unpaid wages, which sum was ultimately paid by money order and not by a check drawn on any company's account.

The claimant related the events of November 9, 2009. He said he was mowing a lawn in Milford at the home of the respondent's sister-in-law, using a large walk-behind mower, when the bagger slipped off, his right hand slipped inside the area where the blades were turning, and he lost his right index finger. He immediately notified the respondent's sister-in-law, who became hysterical and called the respondent. The respondent, who was working at another location, came back to the house, obtained a towel and some ice, and wrapped the claimant's hand before driving him to Milford Hospital. The respondent was with the claimant at the hospital when he was treated, and was asked to return to the scene of the accident and look for the severed finger. The respondent did so, found the finger, wrapped it in a sheet or rag, and brought it back to

the hospital. The claimant testified that the respondent told two nurses at the hospital he would pay the hospital bill and he was the employer.

The claimant testified that afterwards, he presented the respondent with two bills, and both times, the respondent gave him a sealed envelope and told him the envelope contained a check for the hospital that should be mailed. No additional bills were received from the hospital. The claimant did not check the envelope contents. The claimant also admitted that on the date of his accident, while being treated at the hospital, he confirmed hospital records from a previous visit indicating that he was unemployed, his emergency contact person was his sister, and the information was still accurate. The claimant said he had revision surgery on the day of the accident and had nerves removed from his hand and finger thereafter. He subsequently had a pain stimulator implanted.

Frosolone also testified at the formal hearing, and indicated that he is the owner of Seasonal Services of Connecticut, L.L.C. He said he entered the hospital with the claimant, but did not speak to the triage nurse other than to state he would return to the accident scene and attempt to locate the missing finger. He did locate the missing finger and brought it back to the hospital, but he did not remain there with the claimant. He denied paying the bills for the claimant's follow-up medical care. Frosolone admitted that Seasonal Services owned the mower the claimant was using when he was injured and the claimant routinely wore a shirt with the Seasonal Services company logo. Nonetheless, he said the claimant worked for Frosolone's father at Firelone, Inc., inspecting fire extinguishers and performing repairs. He said he had sent a letter to the State of Connecticut indicating that the claimant worked for Firelone, Inc., for ten to

sixteen hours per week at $10 per hour in an effort to help the claimant qualify for state assistance. The letter did not state that the claimant worked for Seasonal Services.

The trial commissioner noted that an investigator for the Second Injury Fund had issued a report indicating that the respondent did not have workers' compensation insurance. The trial commissioner also noted that counsel for the respondent had represented that Seasonal Services, and not Frosolone individually, was the employer of the claimant on the date of his injury. In addition, the commissioner noted that the settlement agreement for the claimant's wage claim filed with the Connecticut Department of Labor identified the claimant's employer as Paul Frosolone a/k/a Seasonal Services. The trial commissioner further found that a bill for the claimant's injury issued by Milford Hospital was paid by Medicaid.

Based on the foregoing, the trial commissioner concluded the claimant's testimony was credible and persuasive while the respondent's testimony was neither persuasive nor credible. He found the claimant sustained a work-related injury on November 9, 2009 which caused his right index finger to be severed. The commissioner concluded that Frosolone and Seasonal Services were the employer of the claimant and there was no actual difference between them. Regarding whether the respondent had notice of the claim, the trial commissioner concluded as follows:

> I find that Paul Frosolone drove the claimant to the hospital, made himself known as the employer, returned to the accident scene to locate the severed index finger, and returned the finger to the hospital emergency room, acts that together are to be read as the employer providing medical treatment to the claimant pursuant to CGS 31-294d and that confer jurisdiction on this commission to hear this claim.[2]

[2] General Statutes § 31-294d (a) (1) states in relevant part: **"**The employer, as soon as the employer has knowledge of an injury, shall provide a competent physician or surgeon to attend the injured employee and, in addition, shall furnish any medical and surgical aid or hospital and nursing service, including medical

Conclusion, ¶ I.

The trial commissioner also determined that the respondent did not carry workers' compensation insurance on November 9, 2009. He ordered the respondent to provide all reasonable and necessary medical treatment for the claim and indicated that additional hearings were to be held to ascertain the claimant's average weekly wage and compensation rate, the duration and amount of indemnity benefits and medical bills, concurrent employment, and the applicability of General Statutes § 31-355.[3]

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rehabilitation services and prescription drugs, as the physician or surgeon deems reasonable or necessary. The employer, any insurer acting on behalf of the employer, or any other entity acting on behalf of the employer or insurer shall be responsible for paying the cost of such prescription drugs directly to the provider."

[3] General Statutes § 31-355 states in relevant part: "(a) The commissioner shall give notice to the Treasurer of all hearing of matters that may involve payment from the Second Injury Fund, and may make an award directing the Treasurer to make payment from the fund.

(b) When an award of compensation has been made under the provisions of this chapter against an employer who failed, neglected, refused or is unable to pay any type of benefit coming due as a consequence of such award or any adjustment in compensation required by this chapter, and whose insurer failed, neglected, refused or is unable to pay the compensation, such compensation shall be paid from the Second Injury Fund. The commissioner, on a finding of failure or inability to pay compensation, shall give notice to the Treasurer of the award, directing the Treasurer to make payment from the fund. Whenever liability to pay compensation is contested by the Treasurer, the Treasurer shall file with the commissioner, on or before the twenty-eighth day after the Treasurer has received an order of payment from the commissioner, a notice in accordance with a form prescribed by the chairman of the Workers' Compensation Commission stating that the right to compensation is contested, the name of the claimant, the name of the employer, the date of the alleged injury or death and the specific grounds on which the right to compensation is contested. A copy of the notice shall be sent to the employee. The commissioner shall hold a hearing on such contested liability at the request of the Treasurer or the employee in accordance with the provisions of this chapter. If the Treasurer fails to file the notice contesting liability within the time prescribed in this section, the Treasurer shall be conclusively presumed to have accepted the compensability of such alleged injury or death from the Second Injury Fund and shall have no right thereafter to contest the employee's right to receive compensation on any grounds or contest the extent of the employee's disability.

(c) The employer and the insurer, if any, shall be liable to the state for any payments made out of the fund in accordance with this section or which the Treasurer has by award become obligated to make from the fund, together with cost of attorneys' fees as fixed by the court If reimbursement is not made, or a plan for payment to the fund has not been agreed to by the Treasurer and employer, not later than ninety days after any payment from the fund, the Attorney General shall bring a civil action, in the superior court for the judicial district where the award was made, to recover all amounts paid by the fund pursuant to the award, plus double damages together with reasonable attorney's fees and costs as taxed by the court. Any amount paid to the Treasurer by the employer or insurer after the filing of an action, but prior to its completion, shall be subject to an interest charge of eighteen per cent per annum, calculated from the date of original payment from the fund."

The respondent filed a Motion to Correct which sought to substitute findings that Seasonal Services was the claimant's sole employer and Frosolone did not employ the claimant. The trial commissioner denied this motion in its entirety, and the respondent has commenced this appeal. The gravamen of the appeal is that the facts as found do not warrant the trial commissioner's conclusion that the respondent's actions triggered the medical care exception to the requirements for filing a timely notice of claim. The respondent relies on Kulis v. Moll, 172 Conn. 104 (1976), for this position. As he views that case, the lack of effective notice deprives the Commission of the power to award the claimant benefits.

Prior to considering the merits of this matter, we note that the claimant filed a Motion to Dismiss, arguing that the appeal was filed in an untimely manner. The respondent has objected, arguing that the appeal was filed within twenty days of the denial of the motion to correct by the trial commissioner and was therefore timely. We agree. For the reasons stated in Garvey v. Atlas Scenic Studios, Inc., 5493 CRB-4-09-9 (February 14, 2012), we deny the Motion to Dismiss.

We turn now to the merits of the respondent's appeal and note at the outset 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). "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 respondent relies on Kulis, supra, for the proposition that merely driving an injured claimant to a hospital does not rise to the level of "furnishing medical care" and the trial commissioner therefore erred in concluding the respondent's actions in the present matter constituted the furnishing of medical care.[4] We are not persuaded by this argument because we find Kulis is factually distinguishable from this case. The claimant has cited Carlino v. Danbury Hospital, 1 Conn. App. 142 (1984), for his position that the trial commissioner in this case acted properly. We note that in Carlino, our Appellate Court extensively reviewed Kulis and that discussion is applicable to the present case.

> Kulis v. Moll, supra, on which the defendant relies, does not control here. There the court held that the employer's act of driving his employee to the hospital did not constitute the furnishing of medical care. Id., 107. The case turned on the fact, however, that there was no evidence to indicate whether the plaintiff, whom the defendant found on the ground, had suffered a sudden illness, an accident or an external assault before the defendant drove him to the hospital; thus, the defendant had no indication of his potential exposure until much later when his opportunity for investigation had passed. Id., 111-12. In this case, the plaintiff's statement to Selleck gave sufficient indication of a

[4] The respondent also cites Henry v. Ansonia, 5832 CRB-4-13-4 (August 6, 2014), for the proposition that transporting a claimant to a hospital is insufficient to trigger the medical care exception to the notice requirements. However, in Henry, we distinguished the facts of that case (the claimant was brought to hospital for tests and released) with cases in which the claimant was in greater immediate distress, such as Hodges v. Federal Express Corporation, 5717 CRB-7-12-1 (January 4, 2013), *appeal withdrawn*, A.C. 35342 (2013) and Pernacchio v. New Haven, 3911 CRB-3-98-10 (September 27, 1999), *aff'd*, 63 Conn. App. 570 (2001). In those cases, the medical care exception was satisfied by transporting the claimant to a hospital.

> work-related injury with ample opportunity for prompt investigation.[5]

Carlino, supra, 148-49.

In the present matter, it should have been immediately apparent to the respondent that the claimant had sustained a serious work-related injury for which a claim for workers' compensation benefits was highly probable. The claimant had not sustained some form of idiopathic injury for which a claim under Chapter 568 was unlikely to be sought but, rather, had sustained a traumatic injury peculiar to the risks attendant in operating the respondent's lawn-mowing equipment. As Carlino, supra, explains, the circumstances surrounding the injury, as well as the fact that the respondent drove the claimant to the hospital for medical attention, should have put a reasonable person on notice to commence an investigation of the circumstances and to anticipate the claimant would seek workers' compensation benefits.

We also note that unlike the circumstances in Kulis, supra, wherein the respondent drove the injured employee to the hospital and took no further action, in the present case, medical professionals at Milford Hospital directed the respondent to return to the site of the claimant's injury and locate and retrieve the claimant's severed finger. Findings, ¶¶ 2.l, 3.b, 3.c, and Conclusion, ¶ I. The respondent followed these directions and returned to the hospital with the finger. Although the respondent was not a medical professional, a reasonable fact-finder could determine that the respondent's material assistance in "furnishing medical care" weighed against extending the precedent in Kulis to the facts in this case.

[5] The individual identified as "Selleck" in Carlino v. Danbury Hospital, 1 Conn. App. 142 (1984), was a physician employed by the respondent who treated the claimant immediately after her alleged injury.

The respondent also argues that because evidence in the record suggests that the claimant's treatment was paid for by Medicaid, this payment defeats a claim for jurisdiction. See Findings, ¶ 9. The respondent argues that any evidence the respondent did not pay for medical services related to the injury means the respondent cannot be deemed to have "furnished medical care" within the meaning of the statute. We are not so persuaded. We note that in Spencer v. Manhattan Bagel Company, 5419 CRB-8-09-1 (January 22, 2010), the claimant sustained a neck ailment at her place of employment and her employer drove her to and from a chiropractor to treat for the injury. The employer, however, never paid the claimant's chiropractic bills, and when the claimant argued she had met the medical care exception, the trial commissioner dismissed the claim for want of jurisdiction. We reversed that decision, citing Gesmundo v. Bush, 133 Conn. 607 (1947).

> Consistent with the foregoing analysis, then, we find that the trial commissioner's decision to dismiss the instant matter on the basis of a determination that the employer never paid the claimant's chiropractic bill constituted error. It does not appear that the standard set forth in Gesmundo and Kulis was correctly applied to the facts of the claim. In Gesmundo, the court stated that "[t]he injury … was reported to the defendant's superintendant, and he sent the plaintiff to a doctor who attended injured employees of the defendant." Gesmundo, supra, at 612. The court made it quite clear that the mechanism of payment was irrelevant; "it is the fact that the defendant, through its superintendent, made provision for medical treatment that makes unnecessary the formal notice." Id.

Spencer, supra.

We find that the test delineated in Spencer governs our inquiry, and after reviewing the totality of the circumstances, we believe the respondent herein should have reasonably expected to defend a claim for workers' compensation benefits in light of the events of November 9, 2009.

> Our review of prior case law, particularly Gesmundo, supra, and Kulis, supra, suggests that the relevant line of inquiry in ascertaining whether the requirements of the medical care exception have been satisfied does not hinge upon whether an employer paid a certain medical invoice. Rather, *the inquiry is global in nature*, and should ideally lead to a determination as to whether the employer could reasonably expect that a workplace injury for which a claimant has received medical attention might conceivably lead to a workers' compensation claim against the employer. To that end, "[t]he trial commissioner has a certain amount of discretion to make the determination of whether activities the employer engaged in constituted medical care as to meet the medical care exception within the meaning of the statute." Delconte, supra. *See also* Horn v. State/Dept. of Correction, 3727 CRB-3-97-11 (December 16, 1998); Griffith-Patton v. State /Dept. of Agriculture, 13 Conn. Workers' Comp. Rev. Op. 177, 1888 CRB-1-93-11 (March 10, 1995), *aff'd*, 41 Conn. App. 911 (1996) (per curiam), *cert. denied*, 237 Conn. 930 (1996). (Emphasis added.)

Id.

We believe the trial commissioner in this case applied the "global test" appropriately. Indeed, given the facts of this matter, the respondent herein probably had more reason to anticipate a claim for workers' compensation benefits than the respondent in Spencer, in which this tribunal reversed a determination reached by the trial commissioner to the contrary. In addition, the trial commissioner in this claim found the claimant to be a credible and persuasive witness, Conclusion, ¶ C, and the claimant testified that he received envelopes from the respondent which he believed were payments that should be forwarded to the hospital to pay off his bills. Findings, ¶ 2.k. The trial commissioner therefore had credible testimony that the respondent had made payments of some indeterminate amount to "furnish medical care," although, pursuant to Spencer, the failure to have done so would not have obligated the trial commissioner to dismiss the claim.

Finally, the respondent argues in his Motion to Correct that if a party were to be found liable for the claimant's injuries, it should only be Seasonal Services and not both the firm and Frosolone in his personal capacity. We note that the trial commissioner denied the Motion to Correct, and we may presume that he found the evidence supporting this position to be either unpersuasive or not probative. 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). The evidence presented in this case provided a reasonable basis for a fact-finder to conclude that Frosolone and Seasonal Services so commingled their activities that Seasonal Services was Frosolone's alter ego. See, e.g., Findings, ¶¶ 2.a, 2.d, 2.e and 2.g. In light of the rationale for such a finding as set forth in 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), we determine that the commissioner had a sufficient factual predicate for finding Frosolone personally responsible for satisfying this claim.

In light of the precedent as set forth in Spencer, supra, and its progeny, a trial commissioner must apply a "global test" to ascertain if the medical care exception of General Statutes § 31-294c has been met. After reviewing the facts of this case, we believe the trial commissioner reasonably concluded that the medical care exception to the requirements for filing a timely notice of claim was satisfied.

We therefore affirm the Finding and Award.

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

CERTIFICATION

THIS IS TO CERTIFY THAT a copy of the foregoing was mailed this 7th day of February 2018 to the following parties:

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