CASE NO. 6179 CRB-3-17-3 : COMPENSATION REVIEW BOARD
CLAIM NUMBERS: 300091943, 300109698, 800104958, 300022716 & 400061214

MARCIA SMITH-GLASPER : WORKERS' COMPENSATION
CLAIMANT-APPELLANT COMMISSION

v. : MARCH 22, 2018

STATE OF CONNECTICUT/
SOUTHERN CONNECTICUT
STATE UNIVERSITY et al.
EMPLOYERS
SELF-INSURED
RESPONDENTS-APPELLEES

and

GALLAGHER BASSETT SERVICES, INC.
ADMINSTRATOR

APPEARANCES:

The claimant was represented by Kevin M. Blake, Esq., Jonathan Perkins Injury Lawyers, 965 Fairfield Avenue, Bridgeport, CT 06605.

The respondents were represented by Lisa Guttenberg Weiss, 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 February 8, 2017 Finding and Dismissal and the March 28, 2017 Amended February 8, 2017 Finding and Dismissal of Jack R. Goldberg, 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.

# OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has appealed from a Finding and Dismissal issued on February 8, 2017 and amended on March 28, 2017 concluding that the claimant had not perfected a claim for Chapter 568 benefits or, in the alternative, established that she had sustained a compensable injury. The claimant argues that she presented evidence supporting the nexus between her employment and her medical condition and the respondent employer at that time was on notice regarding a work-related injury. In the absence of a timely written claim for benefits, the claimant had the burden of persuading the trier of fact that the medical care exception pursuant to General Statutes § 31-294c (c) was met.[1] We do not find the claimant's evidence compelled a finding that this exception was met, and the Workers' Compensation Commission [hereinafter "Commission"] therefore had no jurisdiction to award benefits to the claimant. We affirm the trial commissioner's findings.[2]

The trial commissioner identified compensability, causation, and subject matter jurisdiction as the issues for determination. The issue of jurisdiction was raised by the respondents, who filed a Motion to Dismiss asserting that the claimant failed to file a timely claim for benefits.

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[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."

[2] As noted, on February 8, 2017, the trial commissioner issued a Finding and Dismissal and subsequently amended this decision on March 28, 2017. For the purposes of this appeal, we will review the facts and conclusions reached by the trial commissioner in his amended Finding and Dismissal.

The claimant was employed by various agencies of the Connecticut state government (the Department of Labor, Housatonic Technical Community College, and Southern Connecticut State University) between 1993 and 2010. She testified that she sustained various injuries while acting in the course of her employment for these employers. She filed a First Report of Injury on October 7, 2010, claiming that she had experienced a recurrence of an arm injury earlier that morning. In that report, she indicated that she had noticed tingling in her fingers and soreness in her wrists, elbows, shoulders and neck when she awoke that morning. The claimant testified that she attributed the pain to a problem with the design and use of her workstation at Southern Connecticut State University. She also testified that the problem had occurred in 2008 and she had complained about the situation at that time. In response, a specialist in ergonomics from the Department of Administrative Services assessed the workstation and made recommendations, after which the desk was raised and a chair was purchased. The claimant, however, testified that she was then moved out of that workstation to a smaller desk which had not been redesigned and was located in a smaller office.

The claimant also testified regarding her medical history. She indicated that subsequent to the 2010 incident, she consulted with a neurosurgeon, Patrick Senatus, M.D., who diagnosed cervical stenosis and performed an anterior cervical discectomy and fusion on February 23, 2011. In a June 30, 2011 note, Dr. Senatus stated that he saw no clear evidence that the claimant's employment contributed to her degenerative disease or caused the cervical stenosis. Richard A. Bernstein, M.D., an orthopedic hand specialist, treated the claimant after the 2008 incident. He testified that he could not find an objective cause for the claimant's pain symptoms and attributed them to elbow

synovitis. Dr. Bernstein also testified that he saw the claimant on October 14, 2010, after a referral from her primary care physician, Abisola Afolalu, M.D., because of pain and discomfort in both arms, her neck, and shoulders. He diagnosed degenerative disc disease in the cervical spine. He testified that he does not believe the cervical spine and the elbow conditions are related, and although he did not know the specifics of the claimant's complaint about her workstation, he discounted the likelihood that this would have created an inability to extend her arm or caused degenerative arthritis of the cervical spine. He testified that unless there was something extraordinary about the claimant's workstation, he did not believe the workstation was a significant contributing factor to the neck arthritis.

The commissioner reviewed the claim's history. Adolph Ellis, Assistant Branch Manager for Gallagher Bassett Services, Inc., the third-party administrator for State of Connecticut workers' compensation claims, testified that his review of the claimant's five files disclosed that she did not file a Form 30C in any of the claims, including the one for the October 7, 2010 elbow injury. The respondent-employer as of that date filed a Form 43 with this Commission on November 1, 2010. The claimant testified she did not pursue a claim for her cervical problem and surgery until March 2015. On December 29, 2015, the respondents filed a Motion to Dismiss for lack of subject matter jurisdiction due to late notice of the claim. The trial commissioner also noted that Anthem Blue Cross Blue Shield [hereinafter "Anthem"] asserted a lien for which it sought reimbursement of $25,367.16 it paid between October 2010 and August 2013 against charges of $47,600.11.

Based on these facts, the commissioner concluded that the claimant's testimony was not credible. He found Dr. Bernstein credible and persuasive and also found persuasive Dr. Senatus' opinion that there was no clear evidence suggesting that the claimant's employment contributed to her degenerative disc disease or was a cause of her cervical stenosis. He concluded that the claimant's elbow and cervical issues were not caused by a workstation problem and the claimant's elbow and cervical issues were not connected to each other. Instead, he found the claimant's cervical problem was caused by degenerative disc disease and constituted cervical stenosis. Finally, he concluded that the claimant failed to file a timely notice of claim for an injury to her cervical spine on October 7, 2010. As a result, he granted the respondents' Motion to Dismiss the claim for lack of subject matter jurisdiction. He also concluded that the claimant's medical condition was not related to a prior work-related injury and dismissed the claim. Finally, given that he had determined the claim was not compensable, he dismissed the Anthem lien.

The claimant filed a Motion to Correct in response to the Amended Finding and Dismissal. The motion sought to replace the factual findings reached by the trial commissioner with findings that: (1) the claimant's injuries could be attributed to her workstation; (2) Louis Iorio, M.D., a doctor not cited in the Finding and Dismissal, had opined that the claimant's injuries were exacerbated by her workstation; and (3) because the respondent employer had paid for the claimant's treatment in 2010, the claim was accepted. The trial commissioner rejected this motion in its entirety and the claimant has prosecuted this appeal. She argues that the evidence demonstrates that the respondent employer was aware of a work-related injury well before she filed a Form 30C, and

because the respondent paid for treatment of this injury, this Commission has jurisdiction over the claim. We are not persuaded by this argument, in part because the trial commissioner reached a different conclusion concerning the facts in evidence.

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).

There is a substantial body of precedent involving claimants who have asserted that the medical care exception, as contemplated by General Statutes § 31-294c (c), obviated their need to file a timely written notice of claim. To the extent these efforts have been successful, it has been because the trial commissioner was persuaded that the factual circumstances were such that the respondent had constructive knowledge that a claim for Chapter 568 benefits was highly probable. Often, these circumstances included the fact that the respondent transported the claimant to a medical provider after being

made aware of a work-related injury. See Spencer v. Manhattan Bagel Company, 5419 CRB-8-09-1 (January 22, 2010); Pernacchio v. New Haven, 3911 CRB-3-98-10 (September 27, 1999), *aff'd*, 63 Conn. App. 570 (2001). In the present matter, the record is devoid of any evidence that the respondent provided such transportation. The record also lacks any documentation suggesting that a specific incident occurred which would have made the respondent unequivocally aware of a nexus between the claimant's injury and her employment because she was treated for a specific traumatic injury peculiar to her employment. See Wetmore v. Paul Frosolone and Seasonal Services of Connecticut, Inc., 6176 CRB-5-17-2 (February 7, 2018).

Instead, on the basis of both the facts and the law, this case more closely resembles other cases in which claimants treated for ailments on their own under their employer's group health insurance and never followed up after the treatment with a written notice of claim. In those instances, we have upheld the decision of trial commissioners when they have not been persuaded that the medical care exception was satisfied. See, for example, Valenti v. Norwalk Hospital, 5871 CRB-3-13-8 (July 16, 2014), *appeal dismissed*, A.C. 37054 (April 6, 2015), in which we stated:

> This board has considered cases where claimants attempted to rely on the furnishing of medical care exception and where one of the allegedly pertinent facts was payment of the providers' services by the employer through its group health insurer. We have held that relying on payment by an employer's group health insurer, in and of itself, does not confer knowledge on the employer that there is a potential Workers' Compensation claim.

Valenti, supra, *citing* Culver v. Cyro Industries, 4444 CRB-7-01-10 (February 21, 2003).

In this case, the claimant's medical treatment was paid for by her group health insurer, Anthem. Although a First Report of Injury was filed, the claimant provided no

additional notice of her interest in seeking compensation within the one-year period immediately thereafter. We cannot distinguish this case on either the facts or the law from Miller v. State/Judicial Branch, 5584 CRB-7-10-8 (November 28, 2011). In Miller, the claimant argued that because he had filed a First Report of Injury and obtained medical treatment under a group health carrier, this constituted sufficient notice to satisfy the medical care exception. We disagreed.

> From reviewing the various exhibits presented by the claimant in this matter, it does appear that the employer was advised as to the date and the place of the alleged accident and the nature of the injury. None of these documents, however, constitute an affirmative "claim" for compensation under Chapter 568. "[T]he written notice intended is one which will reasonably inform the employer that the employee is claiming or proposes to claim compensation under the Act." Pernaccchio v. New Haven, 63 Conn. App. 570, 575 (2001). The claimant had one year from the date of injury to place his employer on notice that he was claiming the injury as compensable. The trial commissioner concluded his various documentary filings did not do so.

Miller, supra; see also Pegolo v. Trueline Corp., 5656 CRB-5-11-6 (May 15, 2012).

The Appellate Court reached a similar result when it affirmed our decision in Izikson v. Protein Science Corp., 5814 CRB-8-12-12 (November 15, 2013), *aff'd*, 156 Conn. App. 700 (2015). In Izikson, we affirmed the trial commissioner's decision that the medical care exception had not been met when the claimant: (1) sustained an injury; (2) filed a First Report of Injury; (3) obtained treatment and underwent surgery paid for by the group health carrier; and (4) never perfected a claim with a written notice. The Appellate Court affirmed our decision, stating that "this failure on the part of the plaintiff supports the commissioner's determination that the plaintiff failed to comply with the notice of claim requirement mandated by § 31-294c (a)." Izikson v. Protein

Science Corp., 156 Conn. App. 700, 712 (2015). The facts in the present matter are closely aligned with the facts in Izikson and we cannot distinguish a difference.

In any event, in order to qualify for the medical care exception and support an award of benefits for her injury, the claimant needed to establish that the etiology of the ailment which caused her need for surgery in 2011 was work-related. The trial commissioner concluded that the claimant's elbow and cervical issues were not caused by a problem at her workstation and her cervical injury was due to degenerative disc disease. His conclusions were based on the opinions of Drs. Bernstein and Senatus. We note the similarity between this case and another case in which a claimant asserted his back injury was compensable. See Pupuri v. Benny's Home Service, LLC, 5697 CRB-2-11-11 (November 5, 2012).

In Pupuri, the trial commissioner did not find the claimant was a credible witness, and noted that there was medical evidence, including an MRI report and notes from an emergency room visit, suggesting that the claimant had a pre-existing degenerative condition.

> The trial commissioner's findings indicate that the treating physician himself suggested the claimant's ailments may have been degenerative or idiopathic in nature. The circumstances herein are similar to other cases when evidence presented at the formal hearing suggested an alternative cause for an injury other than a work-related incident. [3]

Id. See also Burns v. Southbury, 5608 CRB-5-10-11 (November 2, 2011); Torres v. New England Masonry Company, 5289 CRB-5-07-10 (January 6, 2009); Do v. Danaher Tool Group, 5029 CRB-6-05-12 (November 28, 2006).

[3] Burns v. Southbury, 5608 CRB-5-10-11 (November 2, 2011), is particularly relevant to this discussion, because the trial commissioner in Burns relied on the opinion of the claimant's surgeon who had opined that the claimant's need for surgery was due to a degenerative condition unrelated to the compensable work injury. In the present matter, the trial commissioner relied upon the opinion of Dr. Senatus, who had performed the claimant's discectomy and fusion and opined that he saw no clear evidence that the claimant's employment had contributed to her degenerative disc disease. Findings, ¶ 10.

Although the claimant's Motion to Correct indicates that she did present medical evidence supportive of causation, the trial commissioner obviously did not find this evidence persuasive or probative, and it was within his discretion to find such evidence unreliable. [4] See Pupuri, supra; Gibbons v. UTC/Pratt & Whitney, 4000 CRB-8-99-3 (April 12, 2000), *aff'd*, 63 Conn. App. 482 (2001), *cert. denied*, 257 Conn. 905 (2001); O'Reilly v. General Dynamics Corp., 52 Conn. App. 813 (1999).

Finally, we note that the trial commissioner found the claimant was not a credible witness. Reaching such a conclusion is the prerogative of the trial commissioner. In Burton, supra, the Supreme Court indicated that this decision may not be revisited on appeal:

> Credibility must be assessed … not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude…. An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] … [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom…. As a practical matter, it is inappropriate to assess credibility without having watched a witness testify, because demeanor, conduct and other factors are not fully reflected in the cold, printed record. (Internal quotation marks omitted.)

Burton, supra, 40, *quoting* Briggs v. McWeeny, 260 Conn. 296, 327 (2002).

As our Appellate Court pointed out in Baron v. Genlyte Thomas Group, LLC, 132 Conn. App. 794 (2012), "[t]he commissioner, as finder of fact, is the sole arbiter of credibility…." Id., 804. In addition, this board has stated that "our precedent requires a

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[4] We uphold the trial commissioner's denial of the claimant's Motion to Correct. We conclude that he did not find the evidence cited in this motion probative or persuasive. 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); Vitti v. Richards Conditioning Corp., 5247 CRB-7-07-7 (August 21, 2008).

trial commissioner to dismiss a claim when he finds the claimant lacks credibility." Toroveci v. Globe Tool & Metal Stamping Co., Inc., 5253 CRB-6-07-7 (July 22, 2008). We may not intercede in findings of credibility. "If the trier is not persuaded by the claimant's evidence, there is nothing that this board can do to override that decision on appeal." Wierzbicki v. Federal Reserve Bank of Boston, 4147 CRB-1-99-11 (December 19, 2000), *appeal dismissed*, A.C. 21533 (2001).

Having found no error, the February 8, 2017 Finding and Dismissal and the March 28, 2017 Amended February 8, 2017 Finding and Dismissal of Jack R. Goldberg, the Commissioner acting for the Fifth District, are accordingly affirmed.

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 22nd day of March 2018 to the following parties:

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