CASE NO. 6187 CRB-3-17-4 : COMPENSATION REVIEW BOARD
CLAIM NO. 300111908

ELDER MELLADO : WORKERS' COMPENSATION
CLAIMANT-APPELLEE COMMISSION

v. : JANUARY 15, 2019

ANTHONY URBANO/
EARTH MATERIALS, L.L.C.
NO RECORD OF INSURANCE
EMPLOYER
RESPONDENTS-APPELLANTS

and

SECOND INJURY FUND
RESPONDENT-APPELLEE

APPEARANCES:

The claimant was represented by John J. D'Elia, Esq., D'Elia Gillooly DePalma, L.L.C., 700 State Street, 4th Floor, New Haven, CT 06511.

Respondents Anthony Urbano/Earth Materials, L.L.C., were represented by John M. Walsh, Jr., Esq., Licari, Walsh & Sklaver, L.L.C., 322 East Main Street, Suite 2B, Branford, CT 06405.

Respondent Second Injury Fund was represented by Lisa Guttenberg Weiss, 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 March 29, 2017 Finding and Award Pursuant to C.G.S. § 31-355 by Scott A. Barton, the Commissioner acting for the Third District, was heard on February 23, 2018 before a Compensation Review Board panel consisting of Commission Chairman John A. Mastropietro and Commissioners Jodi Murray Gregg and Nancy E. Salerno.[1]

[1] We note that four motions for extension of time and one motion for continuance were granted during the pendency of this matter.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN.[2] The respondents have petitioned for review from the March 29, 2017 "Finding and Award Pursuant to C.G.S. § 31-355" (finding) by Scott A. Barton, the Workers' Compensation Commissioner (commissioner) acting for the Third District.[3] We find error and accordingly reverse the decision of the commissioner and remand this matter for additional proceedings consistent with this Opinion.

In his finding, the commissioner identified the following issues for determination: (1) whether the claimant had sustained a compensable injury to his head and face on January 27, 2015; and (2) whether the claimant was entitled to workers' compensation benefits pursuant to General Statutes § 31-355 (b).[4]

The commissioner made the following factual findings which are pertinent to our analysis of this appeal. On June 27, 2016, a special investigator for the State of

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[2] As of the date of oral argument in this matter, John A. Mastropietro was Chairman of the Workers' Compensation Commission.

[3] Although the Second Injury Fund appeared in this matter as a respondent, on appeal before this board, the fund is an appellee and the respondent-employers are the appellants. For purposes of clarity, our references herein to "respondents" encompass only the respondent-employers.

[4] General Statutes § 31-355 (b) states: "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."

Connecticut Office of the Treasurer filed a report stating that the claimant was injured on January 27, 2016 while in the employ of the respondents, who were not insured for workers' compensation liability on the date of the claimant's injury. The investigator also reported that "Earth Materials, L.L.C.," was listed as a company with the Secretary of State, but "Anthony Urbano" was not listed with the Secretary's office.

The commissioner further found that the claimant began working for the respondents prior to the work incident of January 27, 2016. The claimant earned $14.00 per hour and worked an average of forty hours per week. He earned $560.00 per week, and his compensation rate was $375.03 based on a filing status of married, filing jointly, with two exemptions.

On January 27, 2016, the claimant suffered compensable injuries to his head and face while in the course of his employment with the respondents. The claimant was using a chainsaw when the injuries occurred. He received treatment for his injuries at the emergency department at Yale New Haven Hospital, and also received extensive follow-up medical care at clinics for oral and maxillofacial surgery, neurology, and pediatric dentistry within the Yale New Haven Hospital system. In addition to incurring substantial medical bills as a result of his injuries, the claimant was totally disabled from employment from January 27, 2016, until July 26, 2016. The commissioner also found that the claimant may be eligible for additional disability benefits for some period after July 26, 2016.

On the basis of the foregoing, the commissioner determined that the Workers' Compensation Commission (commission) retained jurisdiction over the claim and the respondents were not insured for workers' compensation liability on the date the claimant

was injured. He further concluded that on January 27, 2016, the claimant sustained work-related injuries to his head and face while in the employment of Anthony Urbano and Earth Materials, L.L.C., and ordered the respondents "to pay all workers' compensation benefits as a result of the incident of January 27, 2016, including but not limited to medical bills, pharmaceutical bills, travel expenses, and authorization of medically necessary medical treatment." Finding; Order. In addition, the commissioner ordered the respondents to pay to the claimant temporary total disability benefits for the period of January 27, 2016, until July 26, 2016, and indicated that he would order the Second Injury Fund (fund) to make such payments if the respondents did not pay the benefits within twenty days.

On April 20, 2017, the respondents filed a motion to submit additional evidence seeking to offer testimony from Urbano regarding the commissioner's conclusion that an employer-employee relationship existed between Urbano/Earth Materials and the claimant. It is the respondents' position that the additional evidence which Urbano sought to provide, essentially attesting that the claimant was casually employed, was material to the jurisdictional issue of whether an employer-employee relationship existed. The respondents also contend that this testimony was not presented at the formal hearing because the respondents never received notice that the formal hearing had been scheduled and only learned the hearing had occurred when they received the finding.

On April 28, 2017, the respondents filed a motion to open the finding and award pursuant to the provisions of § 31-315, arguing that for the reasons set forth in their motion to submit additional evidence, the findings of the commissioner should be opened

"in order to effectuate the spirit of the Act."[5] The commissioner denied this motion on May 1, 2017, and this appeal followed.

On appeal, the respondents contend that the facts found by the commissioner were "arbitrary and capricious," in that no evidence, apart from the stipulated agreement between counsel for the claimant and the fund, was presented at the formal hearing which provided a reasonable basis for the commissioner's conclusion that the claimant was an employee of the respondents at the time of his injury. The respondents also assert that the commissioner's denial of their motion to open and his refusal to allow additional evidence into the record constituted an abuse of discretion.

We begin our analysis of this matter with a recitation of the well-settled standard of review we are obliged to apply to a commissioner's findings and legal conclusions. "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

[5] General Statutes § 31-315 provides: "Any award of, or voluntary agreement concerning, compensation made under the provisions of this chapter or any transfer of liability for a claim to the Second Injury Fund under the provisions of section 31-349 shall be subject to modification in accordance with the procedure for original determinations, upon the request of either party or, in the case of a transfer under section 31-349, upon request of the custodian of the Second Injury Fund, whenever it appears to the compensation commissioner, after notice and hearing thereon, that the incapacity of an injured employee has increased, decreased or ceased, or that the measure of dependence on account of which the compensation is paid has changed, or that changed conditions of fact have arisen which necessitate a change of such agreement, award or transfer in order properly to carry out the spirit of this chapter. The commissioner shall also have the same power to open and modify an award as any court of the state has to open and modify a judgment of such court. The compensation commissioner shall retain jurisdiction over claims for compensation, awards and voluntary agreements, for any proper action thereon, during the whole compensation period applicable to the injury in question."

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).

Returning to the matter at bar, we begin with the respondents' contention that the facts found by the commissioner were "arbitrary and capricious," in that no evidence, apart from the stipulated agreement between counsel for the claimant and the fund, was presented at the formal hearing which provided a reasonable basis for the commissioner's conclusion that the claimant was an employee of the respondents at the time of his injury. The respondents point out that because no testimony was presented and no exhibits were submitted into evidence at the formal hearing, the commissioner's conclusions regarding the existence of an employer-employee relationship were based solely on the stipulated agreement between counsel for the claimant and the Assistant Attorney General (AAG) representing the fund. However, the record contains no indication that the AAG "had any knowledge of how the appellee was involved with the appellants, how the appellee came to be where he was at the time of the injury and most importantly, the existence or nonexistence of the right to control the means and methods of his work." Id., 7. See Hanson v. Transportation General, Inc., 245 Conn. 613, 620 (1998).

In support of this argument, the respondents point to this tribunal's analysis in Beedle v. Don Oliver Home Improvement, 4491 CRB-3-02-2 (February 28, 2003). In Beedle, the commissioner heard testimony from the claimant as well as three witnesses on behalf of the respondent employer, and credited the testimony of the claimant over

that of the respondent's witnesses in concluding that an employer-employee relationship existed. This board affirmed the decision, observing that "[i]t is not up to us on review to focus our attention on the aspects of his testimony (and that of the other three witnesses) that lean in the other direction, and to decide that the balance of the evidence favors a contrary finding that the claimant was an independent contractor on the date of injury." Beedle v. Don Oliver Home Improvement, 4491 CRB-3-02-2 (February 28, 2003). See also Altieri v. R&M Builders, 3647 CRB-5-97-7 (December 18, 1998); Pepin v. Carvalho, 15 Conn. Workers' Comp. Rev. Op. 350, 3012 CRB-1-95-3 (June 26, 1996), *aff'd*, 44 Conn. App. 931 (1997) (per curiam).

The respondents argue that the present matter can be distinguished from Beedle, supra, given that no witness testimony was proffered and the AAG was not canvassed regarding the basis for her agreement with the stipulations relative to the existence of an employer-employee relationship. As such, it is the respondents' position that the commissioner improperly relied upon this stipulated agreement in resolving a jurisdictional issue.

The fund argues that although no testimony was taken and no exhibits were entered into evidence at the formal hearing, "sufficient documentation and information was provided to … counsel before commencement of the formal hearing to make a well-reasoned determination that the Claimant would be found to be an employee of the Respondent(s) and had suffered a compensable injury as claimed." Second Injury Fund's Reply to the Respondent-Appellant's Memorandum of Law, p. 4, n.1. The fund also points out that the stipulation relative to jurisdictional facts entered into by counsel for the claimant and the fund "constitutes a mutual judicial admission and under ordinary

circumstances should be adopted by the court in deciding the case." Cantonbury Heights Condominium Assn., Inc. v. Local Land Development, LLC, 273 Conn. 724, 745 (2005). However, we are not persuaded that our Supreme Court's analysis in Cantonbury is applicable to the circumstances of this matter.

In Cantonbury, which involved an action for summary judgment against two defendants, the Supreme Court determined that the stipulated fact at issue was actually an admission against interest by the claimant, who had stipulated that one of the defendants in the underlying suit had not performed the allegedly tortious activities.[6] The court affirmed the granting of summary judgment on several counts as to that particular defendant, stating, "[w]e can discern no reason to subject [the defendant] to a potential judgment for actions that the plaintiff admits were conducted by another party." Id., 745.

We therefore find that the present matter can be distinguished from Cantonbury, given that the stipulation of facts was not reached as a result of an agreement between the claimant and the respondents but, rather, arose out of negotiations between counsel for the claimant and the AAG representing the fund. This agreement does not appear to have been submitted into the record, thus depriving this board of the opportunity for appellate review.[7] However, even had the agreement been submitted into the record, we share the respondents' perplexity in wondering how the fund, which came into the case as a secondary payer pursuant to the provisions of § 31-355 (b), would have any basis

[6] In Cantonbury Heights Condominium Assn., Inc. v. Local Land Development, LLC, 273 Conn. 724 (2005), the underlying lawsuit involved, inter alia, a dispute over tree-cutting.

[7] At the March 16, 2017 formal hearing, counsel for the claimant and the Assistant Attorney General (AAG) for the Second Injury Fund reported that they had reached a stipulated agreement "to the effect that all the jurisdictional requirements have been met…" Transcript, p. 5. Claimant's counsel and the AAG also stipulated that the injury of January 27, 2015, arose out of and in the course of the claimant's employment. Id.

whatsoever for stipulating to facts relative to the nature of the respondent employers' employment relationship with the claimant.

Given that we are not persuaded that the underlying stipulation between claimant's counsel and the AAG provided a sufficient basis for the commissioner's conclusions in this matter, we are unable to sustain the finding. This is particularly so in light of the well-settled precept that a challenge to jurisdiction can be raised at any time. "[O]nce the question of lack of jurisdiction of a court is raised, '[it] must be disposed of no matter in what form it is presented;' and the court must 'fully resolve it before proceeding further with the case.'" (Internal citations omitted.) Castro v. Viera, 207 Conn. 420, 429 (1988). Moreover, it is axiomatic that subject matter jurisdiction "cannot be conferred by waiver, consent, silence or agreement of the parties." Id., 425.

The respondents have also claimed as error the trial commissioner's decision to proceed with the March 16, 2017 formal hearing in the absence of the respondents and/or their representative and his subsequent denial of the respondents' motion to open pursuant to the provisions of § 31-315. The respondents point out that at the March 16, 2017 formal hearing, the commissioner stated that despite the respondents having received proper notice of the formal hearing, and having attended all prior hearings, the respondents had "chosen to not appear here this morning." Transcript, p. 4. The respondents contend that "[t]he Commissioner's use of the term 'chosen' implies that Mr. Urbano made a conscious decision not to attend the formal hearing, which is entirely inconsistent with Mr. Urbano's actions prior to the formal hearing." Appellants' Brief, p. 5. The respondents also assert that Urbano attended and participated in every prior hearing, and even arranged for a pre-formal hearing originally scheduled for August 17,

2016, to be rescheduled. In addition, Urbano called the commission as soon as he received the finding and retained legal counsel to appeal the award. The respondents therefore contend that "[a]t the very minimum, Mr. Urbano should have been afforded the opportunity to appear before the commissioner at an informal hearing to explain his absence and allow the Commissioner to assess his credibility prior to a decision being made on the motion [to] open." Id., 5.

For its part, the fund points out that the respondents confirmed that the mailing address to which the notice of the hearing was sent was correct and was the same address at which they had received prior hearing notices. It is therefore the fund's position that the decision of the commissioner to proceed with the formal hearing was within his discretion.[8]

Having reviewed the record in its entirety, we recognize that the respondents' failure to appear at the March 16, 2017 formal hearing was inconsistent with their prior actions in defending this claim. However, it is well-settled that General Statutes § 31-298 endows a commissioner with ample discretion to conduct hearings "in a manner that is best calculated to ascertain the substantial rights of the parties and carry out the provisions and intent of this chapter."[9] In light of the degree of discretion generally

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[8] We note that both claimant's counsel and the AAG profess certainty that the notice of the March 16, 2017 formal hearing was received by the respondents. While we are of course aware of the "mailbox rule," which "provides that a properly stamped and addressed letter that is placed into a mailbox or handed over to the United States Postal Service raises a rebuttable presumption that it will be received," we do not necessarily share the belief in the infallibility of the United States Post Office demonstrated by claimant's counsel and the AAG. Echavarria v. National Grange Mutual Ins. Co., 275 Conn. 408, 418 (2005), *citing* 29 Am.Jur.2d, Evidence § 262 (1994). See also Tyler E. Lyman, Inc. v. Lodrini, 63 Conn. App. 739, 747, *cert. denied*, 258 Conn. 902 (2001).

[9] General Statutes § 31-298 provides in relevant part: "Both parties may appear at any hearing, either in person or by attorney or other accredited representative, and no formal pleadings shall be required, beyond any informal notices that the commission approves. In all cases and hearings under the provisions of this chapter, the commissioner shall proceed, so far as possible, in accordance with the rules of equity. He shall not be bound by the ordinary common law or statutory rules of evidence or procedure, but shall make

afforded a commissioner, this board has historically been reluctant to second-guess a commissioner's decisions regarding the manner in which hearings are conducted.

Moreover, we have already concluded that the subject finding cannot be sustained because the record on which it was predicated did not provide a sufficient basis for the conclusions drawn by the commissioner relative to the issue of the existence of an employer-employee relationship. As such, we decline to reach the respondents' claim of error alleging that the trial commissioner's decision to proceed with the March 16, 2017 formal hearing in the absence of the respondents and/or their representative and his subsequent denial of the respondents' motion to open constituted an abuse of discretion.

There is error; the March 29, 2017 "Finding and Award Pursuant to C.G.S. § 31-355" by Scott A. Barton, the Commissioner acting for the Third District, is accordingly reversed and remanded for additional proceedings consistent with this Opinion.

Commission Chairman John J. Mastropietro and Commissioners Jodi Murray Gregg and Nancy E. Salerno concur in this Opinion.

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inquiry, through oral testimony, deposition testimony or written and printed records, in a manner that is best calculated to ascertain the substantial rights of the parties and carry out the provisions and intent of this chapter…."