CASE NO. 6249 CRB-1-18-3 : COMPENSATION REVIEW BOARD
CLAIM NOS. 800174241, 800136573 & 800119601

: WORKERS' COMPENSATION COMMISSION

THOMAS TOMASZEK, SR.
LINDA V. TOMASZEK, CONSERVATOR
CLAIMANT-APPELLANT

v. : MARCH 1, 2019

NORTON'S AUTO & MARINE SERVICE, INC.
EMPLOYER

and

GIRARD MOTORS, INC.
ADDITIONAL EMPLOYER

and

ONE BEACON INSURANCE COMPANY (N/K/A LAMORAK INSURANCE COMPANY THROUGH TPA ARMOUR RISK MANAGEMENT SERVICES, INC.)
ACE USA/ESIS
SAFECO PROPERTY & CASUALTY COMPANIES
THE HARTFORD
TRAVELERS PROPERTY & CASUALTY
TRANSCONTINENTAL INSURANCE COMPANY
INSURERS
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by his wife and conservator, Linda V. Tomaszek, who appeared as a self-represented party.

Respondent-employer Norton's Auto and Marine Service, Inc., and One Beacon Insurance (n/k/a Lamorak Insurance Company Through TPA Armour Risk Management Service, Inc.) were represented by Marla L. Seligson, Esq., Esty & Buckmir, L.L.C., 2340 Whitney Avenue, Hamden, CT 06518.

Respondent-employer Norton's Auto and Marine Service, Inc., and ACE USA/ESIS were represented by Michael A. Burton, Esq., and David C. Davis, Esq., McGann, Bartlett & Brown, L.L.C., 111 Founders Plaza, Suite 1201, East Hartford, CT 06108.

Respondent-employer Norton's Auto and Marine Service, Inc., and Safeco Property & Casualty Companies were represented by David A. Kelly, Esq., Montstream & May, L.L.P., 655 Winding Brook Drive, P.O. Box 1087, Glastonbury, CT 06033-6087.

Respondent-employer Girard Motors, Inc., and The Hartford were represented by Frank Ancona, Esq., The Law Offices of David J. Mathis, 150 Cogswell Street, Second Floor, Hartford, CT 06105.

Respondent-employer Norton's Auto and Marine Service, Inc., and Travelers Property & Casualty were represented by Melissa A. Murello, Esq., Law Offices of Cynthia M. Garraty, P.O. Box 2903, Hartford, CT 06104-2903.

In proceedings below, Respondent-employer Norton's Auto and Marine Service, Inc., and Transcontinental Insurance Company were represented by Elizabeth B. Zaccardi, Esq., Law Offices of Cynthia A. Jaworski, 200 Glastonbury Boulevard, Suite 201, Glastonbury, CT 06033. Transcontinental Insurance Company did not appear at oral argument.

This Petition for Review from the February 8, 2018 Finding and Award in Part and Dismissal in Part of Ernie R. Walker, the Commissioner acting for the Second District, was heard September 28, 2018 before a Compensation Review Board panel consisting of Commission Chairman Stephen M. Morelli and Commissioners Scott A. Barton and Jodi Murray Gregg.[1]

[1] We note that a motion for extension of time was granted during the pendency of this appeal.

OPINION

STEPHEN M. MORELLI, CHAIRMAN. The claimant has appealed from a Finding and Award in Part and Dismissal in Part (finding) by Commissioner Ernie R. Walker (commissioner), concluding that the claimant did not sustain a traumatic brain injury on January 11, 2011, or a repetitive trauma injury prior to that date. The commissioner also determined that surgery performed on February 11, 2014, was neither reasonable nor necessary treatment for a compensable injury sustained on April 6, 1998.[2] Although the claimant's treating physicians testified in favor of compensability, the commissioner did not find their arguments persuasive. The claimant has appealed from this denial. However, the respondents have filed a motion to dismiss this appeal, arguing that it was statutorily untimely and the board therefore lacks jurisdiction to consider the matter. We find this motion meritorious and dismiss the claimant's appeal.

The commissioner reached the following factual findings at the conclusion of the formal hearing in this matter. The commissioner noted that there had been a Finding and Award issued to the claimant for binaural hearing loss in 2006 citing a October 29, 2002 date of injury; the claimant executed a full and final stipulation in 1997 for a 1992 injury, and the claimant and the respondents had executed voluntary agreements in 2003 and 2009 for an April 6, 1998 back injury. At all relevant times, the claimant was an employee of Norton's Auto & Marine Service, Inc. (Norton's). The commissioner noted

[2] We note that in Findings, ¶ 2.b., the commissioner referenced a prior injury of April 6, 1988, and in Conclusion, ¶ B, a prior compensable injury of June 4, 1998 (the date of the claimant's discectomy). Given that the record indicates, and the parties do not dispute, that the claimant sustained a prior compensable injury on April 6, 1998, we deem these notations harmless scrivener's error. See D'Amico v. Dept. of Correction, 73 Conn. App. 718, 729 (2002), *cert. denied*, 262 Conn. 933 (2003).

that the claimant testified extensively, particularly regarding the events of January 11, 2011, when he was treated at Lawrence & Memorial Hospital after work.

The commissioner also noted the testimony of the claimant's treating physician, Frank W. Maletz, M.D., an orthopedic surgeon. Maletz had treated the claimant since April 15, 1998, when he presented with a six-month history of low back and right leg pain. An MRI revealed a right-side L5-S1 herniation, and the claimant underwent a "laminotomy on a single-level discectomy and what is commonly referred to as a fragmentectomy" on June 4, 1998. Respondents' Exhibit 5, pp. 11-12. The claimant, who was a yard worker for Norton's at the time, returned to work with a fifty-pound lifting restriction on or about July 21, 1998. On March 9, 1999, Maletz determined that the claimant had reached maximum medical improvement from this injury and assessed a twenty-two percent permanent partial disability rating to the claimant's lumbar spine. See Respondents' Exhibit 4. The respondents' carrier at the time, One Beacon, accepted the injury and paid the claimant his permanency benefits pursuant to a voluntary agreement.

The claimant continued to treat in 1999, 2000, 2001 and 2002, with no significant reports that workplace activities had aggravated his back injury. In September 20, 2002, an MRI revealed significant epidural scarring from the 1998 surgery. The claimant underwent a triple cardiac bypass in November 2007. A July 8, 2008 MRI revealed degenerative changes in the claimant's spine and, in 2010, Maletz opined that the claimant was demonstrating more symptomatic spinal stenosis. However, on December 20, 2010, Maletz indicated that the claimant was not a surgical candidate and

could continue to work without restrictions; he also opined that the claimant's right leg pain was related to his prior bypass procedure.

The commissioner noted that on January 11, 2011, the claimant was treated at the Lawrence & Memorial Hospital emergency department for suspicion of a stroke after he was found at work with his head resting on a table; "[h]is speech was slurred and he had difficulty ambulating." Findings, ¶ 24. He noted that the emergency room report indicated that the claimant was quite intoxicated and had a blood alcohol level of 0.32. The claimant was observed overnight at the hospital, and denied being intoxicated, but he was found to have a completely normal neurological examination and his diagnosis at discharge was "[a]cute alcohol intoxication and alcoholism." Findings, ¶ 26, *quoting* Respondents' Exhibit 6, p. 1.

The claimant did not return to work after January 11, 2011, and he was not examined again by Maletz until June 27, 2011. On August 15, 2011, Maletz noted that the "Claimant had mild residual neuropathy from his work-related back surgery" but was cleared to return to his employment, albeit with a climbing restriction. Respondents' Exhibit 4. On October 11, 2012, the claimant underwent an MRI which "revealed postoperative changes at the L5-S1 level, including an osteophyte potentially contacting the L5 nerve root." Findings, ¶ 28; see also Respondents' Exhibit 4. The claimant was referred to pain management on April 1, 2013, at which time Maletz also noted that the claimant could benefit from lumbar fusion surgery. On February 11, 2014, the claimant underwent a lumbar fusion at L4-5 and L5-S1 to address his progressively disabling back pain and radicular symptoms. Maletz opined that this surgery was required to address the progression of the earlier injury and surgery.

A respondents' medical examination (RME) and a commissioner's examination were performed on the claimant. Gerald J. Becker, an orthopedic surgeon, performed the RME on March 11, 2015 and, subsequent to that examination, opined that there was no evidence of a work-related repetitive trauma injury to the claimant's lumbar spine on or before January 11, 2011. In that regard, Becker also stated that he did not find objective evidence of deterioration at L5-S1 in the 2002, 2008, 2010 or 2012 MRI scans. Patrick R. Tomak, a neurosurgeon, performed a commissioner's examination on August 26, 2015. Tomak noted that the claimant had sustained a back injury on or about October 14, 1989, when he fell out of a tree, and Tomak opined that the fall could have been the primary injury to the claimant's lumbar spine. Tomak stated that "he could not pinpoint a repetitive injury as a source of pain or a causative factor in this matter," Findings, ¶ 38, and it was "impossible" to determine causation of the claimant's condition from the history he had been given. Findings, ¶ 39. He stated, "[i]t is not clear to me at all that this is a work-related injury." Findings, ¶ 40, *quoting* Respondents' Exhibit 2, p. 4.

The commissioner noted that the claimant submitted two separate forms 30C to the Workers' Compensation Commission (commission) on July 18, 2011. One notice recited a specific date of injury of January 11, 2011, and alleged that the claimant had sustained a brain injury after collapsing at work. The other notice alleged repetitive trauma injuries on or prior to January 11, 2011, to the claimant's neck, arms, hands, back, knees, lungs and ears (hearing loss). The respondents filed timely disclaimers for all the alleged injuries.

Based on the foregoing, the commissioner found that the claimant had sustained a compensable injury on April 6, 1998, which injury required a discectomy. The claimant

was paid permanency benefits and returned to work after the injury. He continued to work until the January 11, 2011 incident, when he was found at work in an "unresponsive state." Conclusion, ¶ D. The commissioner found the cause of that incident to be alcohol intoxication, noting that after the claimant was observed at the hospital, a stroke was ruled out, and the claimant had a blood alcohol level of 0.32, which was four times the legal limit for operating a motor vehicle. He therefore dismissed the January 11, 2011 brain injury claim.

The commissioner also found that the claimant's testimony provided insufficient evidence that he had sustained any repetitive trauma to his back, neck, knees, lungs or ears (hearing loss), and noted that the repetitive trauma claim was not sufficiently supported by the treating physician's record. Although the commissioner found that Maletz did present a prima facie case that the claimant had sustained a work-related repetitive trauma spine injury on January 11, 2011, he did not find Maletz' treatment records credible or persuasive on that point. However, he did find credible and persuasive the opinions of Becker and Tomak opining that evidence of workplace causation was lacking. Therefore, he dismissed the claim for a repetitive trauma spine injury and concluded that the February 11, 2014 surgery was neither reasonable nor necessary treatment for the compensable injury of April 6, 1998.

The commissioner issued his finding on February 8, 2018. The claimant did not file a motion to correct the finding or any other post-judgment motion, but he did file a petition for review on March 1, 2018. Three of the respondents-appellees have filed a motion to dismiss this appeal, arguing that because it was commenced in an untimely manner pursuant to General Statutes § 31-301(a), this board lacks the jurisdiction to rule

on the appeal.[3] Given that we find the facts in this matter are indistinguishable from Sutherland Hofler v. State/Dept. of Developmental Services, 6173 CRB-5-17-1 (December 12, 2017), we concur with the respondents. In Sutherland, we stated that:

> consistent with Mankus v. Mankus, 4958 CRB-1-05-6 (August 22, 2006), *aff'd*, 107 Conn. App. 585 (2008), *cert. denied*, 288 Conn. 904 (2008), and 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), … "[o]nce a determination is reached that we lack subject matter jurisdiction no further inquiry is warranted." Mankus, supra. Our decision in Bond v. Lee Manufacturing, Inc., 5868 CRB-8-13-8 (April 21, 2016), also stands for the proposition that prior to taking any action on the merits of an appeal, we must resolve any questions pertaining to whether we have jurisdiction to consider the appeal. In Brown v. Lawrence & Memorial Hospital, 5853 CRB-2-13-5 (April 21, 2014), the claimant offered an explanation for her late filing of an appeal, but we concluded that we were not in a position to consider the matter because "[o]ur courts have determined that the failure of a party to file a timely appeal deprives the board of jurisdiction over the appeal." Id.

Id.; see also Stec v. Raymark Industries, Inc., 299 Conn. 346 (2010).

In Sutherland, this tribunal also stated the following:

> In the present matter, the claimant was obligated, if she was dissatisfied with or confused about the trial commissioner's Finding and Denial, to either appeal to this tribunal within twenty days, or file an appropriate motion with the trial commissioner seeking a correction or clarification within that period. See Garvey v. Atlas Scenic Studios, Inc., 5493 CRB-4-09-9 (February 14, 2012). Otherwise, her appellate rights would be extinguished pursuant to General Statutes § 31-301 (a). The claimant failed to take either action within that twenty-day window. Given that the claimant, although aggrieved by the December 14, 2016 decision

[3] General Statutes § 31-301 (a) states: "At any time within twenty days after entry of an award by the commissioner, after a decision of the commissioner upon a motion or after an order by the commissioner according to the provisions of section 31-299b, either party may appeal therefrom to the Compensation Review Board by filing in the office of the commissioner from which the award or the decision on a motion originated an appeal petition and five copies thereof. The commissioner within three days thereafter shall mail the petition and three copies thereof to the chief of the Compensation Review Board and a copy thereof to the adverse party or parties. If a party files a motion subsequent to the finding and award, order or decision, the twenty-day period for filing an appeal of an award or an order by the commissioner shall commence on the date of the decision on such motion."

> of the trial commissioner, took no responsive action within twenty days, we therefore lack subject matter jurisdiction to consider the appeal.

Id.

In the present matter, the claimant failed to exercise his right to respond to the finding within the jurisdictional time period. Having failed to exercise this right, we may not offer the claimant relief at this juncture. [4] In Sutherland Hofler, supra, we also explained that when an aggrieved party fails to file a motion to correct (which occurred both in that case and in the present case), we cannot review the facts found by the commissioner even if we retained jurisdiction to do so.

> However, in light of the fact that the claimant is unrepresented, we provide the following additional analysis. Even had we retained jurisdiction to consider the claimant's appellate arguments, we would deem these arguments an effort to retry the factual findings of the trial commissioner on appeal. Macon v. Colt's Manufacturing, 5505 CRB-1-09-10 (September 27, 2010), *appeal dismissed*, A.C. 32785 (December 13, 2010), is dispositive of that issue. Our standard of review is limited to addressing findings of fact that are "clearly erroneous." Berube v. Tim's Painting, 5068 CRB-3-06-3 (March 13, 2007). The trial commissioner in this matter, similar to the trial commissioner in Macon, reached findings of fact which were consistent with the testimony and evidence that he found credible and probative, but were unsupportive of the relief the claimant sought. In neither Macon nor the present case was a Motion to Correct filed challenging the factual findings of the trial commissioner. Therefore, as we pointed out in Stevens v. Raymark Industries, Inc., 5215 CRB-4-07-4 (March 26, 2008), *appeal dismissed*, A.C. 29795 (June 26, 2008), when this occurs, "we must accept the validity of the facts found by the trial commissioner, and ... this board is limited to reviewing how the commissioner applied the law." Id. See also Admin. Reg. § 31-301-4.

Id.; see also Samaoya v. Gallagher, 102 Conn. App. 670, 675 (2007).

[4] At oral argument before our tribunal, Mrs. Tomaszek claimed that she had been advised by commission staff that the deadline to file an appeal was March 1, 2018. We do not believe that such an argument overcomes the court's holding in Stec v. Raymark Industries, Inc., 299 Conn. 346 (2010), which essentially stands for the proposition that we lack jurisdiction to consider an untimely appeal.

After considering the documents filed on the claimant's behalf and the oral argument presented before the commission, we conclude that the claimant essentially believes the commissioner's factual findings were erroneous because his conclusions defy common sense. The claimant also argues that there were significant errors in the opinions of Becker and Tomak. In addition, he points out that a state unemployment board hearing reached different factual conclusions regarding the claimant's intoxication and the mechanism of the January 11, 2011 injury. However, given that the claimant bears the burden of proof in proceedings before our commission to establish that he or she is entitled to relief, we conclude that the commissioner simply was not persuaded by the claimant's evidence. See Torres v. New England Masonry Company, 5289 CRB-5-07-10 (January 6, 2009). As an appellate body, we must respect that decision. In any event, we do not have jurisdiction to take any action due to the untimely filing of the appeal.

There is no error; the February 8, 2018 Finding and Award in Part and Dismissal in Part is accordingly affirmed and the appeal is dismissed for lack of jurisdiction.

Commissioners Scott A. Barton and Jodi Murray Gregg concur in this opinion.