

CASE NO. 6255 CRB-4-18-3
CLAIM NO. 400103994

: COMPENSATION REVIEW BOARD

RYAN LEFEVRE
CLAIMANT-APPELLEE

: WORKERS' COMPENSATION
COMMISSION

v.

: MARCH 26, 2019

TPC ASSOCIATES, INC.
EMPLOYER

and

THE HARTFORD
INSURER
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by Donna Civitello, Esq.,
Carter & Civitello, One Bradley Road, Suite 305,
Woodbridge, CT 06525.

The respondents were represented by Lynn M. Raccio,
Esq., Tentindo, Kendall, Canniff & Keefe, L.L.P.,
510 Rutherford Avenue, Hood Business Park, Boston, MA
02129.

This Petition for Review from the March 9, 2018 Findings
and Ruling on Motion to Preclude by Randy L. Cohen, the
Commissioner acting for the Fourth District, was heard on
September 28, 2018 before a Compensation Review Board
panel consisting of Commission Chairman Stephen
M. Morelli and Commissioners Scott A. Barton and David
W. Schoolcraft.¹

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

OPINION

STEPHEN M. MORELLI, CHAIRMAN. The respondents have petitioned for review from the March 9, 2018 Findings and Ruling on Motion to Preclude (finding) by Randy L. Cohen, the Commissioner acting for the Fourth District (commissioner). We find no error and accordingly affirm the decision of the commissioner.

In her finding, the commissioner, having identified the respondents' motion to preclude as the sole issue to be addressed in the formal hearing, made the following factual findings which are pertinent to our review of this matter. The claimant, through counsel, filed a notice of claim (form 30C) dated December 6, 2016, stating that on August 3, 2016, he suffered work-related cardiopulmonary arrest which resulted in injuries to multiple body parts and organs. Both the respondent-employer, TPC Associates, Inc. (TPC), and the Workers' Compensation Commission (commission) received the form 30C on December 9, 2016. On March 7, 2017, the claimant filed a motion to preclude alleging that the respondents had failed to file a "Notice of Intention to Contest Liability" (form 43) or pay any benefits pursuant to the Workers' Compensation Act within twenty-eight days of their receipt of the notice of claim. On March 23, 2017, the respondents filed a form 43 contesting the claim.²

The claimant is unable to manage his own affairs and was unable to testify at the formal hearing. His wife, Kirstie Lefevre, who has been appointed as conservator for her husband, testified in his stead. Since the date of the injury, Lefevre has handled all of the claimant's financial affairs and medical decisions and served as the contact person for

² In Findings, ¶ 4, the commissioner stated that the form 43 was filed on March 15, 2017. We deem this harmless scrivener's error. See *D'Amico v. Dept. of Correction*, 73 Conn. App. 718, 729 (2002), *cert. denied*, 262 Conn. 933 (2003). We note that subsequent Forms 43 were also filed on May 18, 2017 and March 23, 2018.

TPC. She has also acted as the contact person for TPC's short- and long-term disability carrier and the health insurance carrier. Roseanne Vargo, Lefevre's sister-in-law, established a "GoFundMe" internet page to solicit charitable contributions from the general public to assist the Lefevre family.

Kim Battaglia is the co-owner and corporate secretary for TPC. On or about December 29, 2016, she made a \$20,000 donation to the claimant's GoFundMe account and charged the donation to TPC's American Express credit card. The parties stipulated that this donation was made before the expiration of the twenty-eight day period following TPC's receipt of the notice of claim. The respondents contend that all of their forms 43 were timely, asserting that their pre-emptive payment of medical expenses prior to the receipt of the form 30C, and their payment of twenty-six weeks of temporary total disability benefits in a lump sum within twenty-eight days of the receipt of the form 30C, preserved the "safe harbor" provision of General Statutes § 31-294c (b), thus giving them one year to contest the compensability of the claim.³

³ General Statutes § 31-294c (b) states: "Whenever liability to pay compensation is contested by the employer, he shall file with the commissioner, on or before the twenty-eighth day after he has received a written notice of claim, a notice in accord 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. The employer shall send a copy of the notice to the employee in accordance with section 31-321. If the employer or his legal representative fails to file the notice contesting liability on or before the twenty-eighth day after he has received the written notice of claim, the employer shall commence payment of compensation for such injury or death on or before the twenty-eighth day after he has received the written notice of claim, but the employer may contest the employee's right to receive compensation on any grounds or the extent of his disability within one year from the receipt of the written notice of claim, provided the employer shall not be required to commence payment of compensation when the written notice of claim has not been properly served in accordance with section 31-321 or when the written notice of claim fails to include a warning that (1) the employer, if he has commenced payment for the alleged injury or death on or before the twenty-eighth day after receiving a written notice of claim, shall be precluded from contesting liability unless a notice contesting liability is filed within one year from the receipt of the written notice of claim, and (2) the employer shall be conclusively presumed to have accepted the compensability of the alleged injury or death unless the employer either files a notice contesting liability on or before the twenty-eighth day after receiving a written notice of claim or commences payment for the alleged injury or death on or before such twenty-eighth day. An employer shall be entitled, if he prevails, to reimbursement from the claimant of

Lefevre testified that the claimant has been in either a hospital or a skilled nursing facility since August 3, 2016. The bills for the claimant's treatment have been paid by the claimant's health insurance and by Lefevre, who paid \$3,864.40 out of pocket. To her knowledge, none of the medical bills have been paid by TPC or The Hartford. Since the date of the injury, the claimant has been receiving either short- or long-term disability benefits paid by Principal Financial Group. These disability benefits are pursuant to the claimant's employment with TPC.

In September 2016, Lefevre received a check for \$2,000 from TPC; a Cigna insurance representative told Lefevre that she was required to meet a \$3,000 deductible before the health insurance plan would pay medical bills, and the employer would then reimburse the employee \$2,000. Lefevre subsequently incurred another \$3,000 in deductible payments because the claimant's incident occurred in between a changeover in health insurance plans. After paying out the additional \$3,000 in deductible payments, Lefevre received another check from TPC in the amount of \$2,000 on October 10, 2016.

Battaglia testified that she and her brother, Tom Cafora, are co-owners of TPC, which employs approximately forty-eight people. Battaglia functions as the "office manager, payroll, HR, operations manager, controller sometimes." May 18, 2017

Transcript, p. 36. On August 23, 2016, TPC had a workers' compensation insurance

any compensation paid by the employer on and after the date the commissioner receives written notice from the employer or his legal representative, in accordance with the form prescribed by the chairman of the Workers' Compensation Commission, stating that the right to compensation is contested. Notwithstanding the provisions of this subsection, an employer who fails to contest liability for an alleged injury or death on or before the twenty-eighth day after receiving a written notice of claim and who fails to commence payment for the alleged injury or death on or before such twenty-eighth day, shall be conclusively presumed to have accepted the compensability of the alleged injury or death. If an employer has opted to post an address of where notice of a claim for compensation by an employee shall be sent, as described in subsection (a) of this section, the twenty-eight-day period set forth in this subsection shall begin on the date when such employer receives written notice of a claim for compensation at such posted address."

policy with The Hartford. There was no self-retention under the policy. When an employee is injured at work, Battaglia is normally the person who fills out a “first response” form and sends it to the insurance company, which then assumes management of the claim. *Id.*, 41. However, she did not do that in this case. Battaglia knew that the claimant would be eligible for short- and long-term disability through the employer’s policy and believed it was a matter of days before the short-term disability benefits commenced. Prior to their commencement, she paid the claimant for his accrued personal and vacation time.

Battaglia discussed the decision to make the \$20,000 donation to the GoFundMe campaign with her brother, Tom. She intended the donation to be in addition to the disability benefits the claimant would be receiving. She testified that she had received correspondence from the claimant’s attorney stating that “they were looking into the workers’ comp, and I knew I had so many days to make a payment in lieu of receiving the, that form.... It was compensation for Ryan.” *Id.*, 40. TPC had never paid weekly total disability benefits for any other employee; The Hartford always took care of investigating and paying the claims. Battaglia never discussed making the \$20,000 donation with The Hartford and she never asked The Hartford for reimbursement for the donation.

Battaglia believed that the \$20,000 payment represented approximately twenty-six weeks of compensation for the claimant and did discuss the donation with the acting controller at that time, William DeFranco.⁴ Battaglia indicated that the \$2,000 reimbursement of medical expenses to Lefevre on two occasions was in accordance with

⁴ Battaglia testified that the claimant’s gross wages were “about \$940 and change, gross, at a regular week, at 40 hours.” May 18, 2017 Transcript, p. 38.

the health insurance policy in effect for all of the company's employees. When the form 30C came in the mail, it was signed for by Rosemary Keeler, the secretary who sits at the front desk and is responsible for distributing the mail. Normally, Keeler would have given the form 30C to Battaglia, who would have opened it and forwarded it to the insurance company. She did not do that in this case because she did not receive the form 30C, and agreed that "somehow it got hung up." *Id.*, 51.

As of December 2016, William DeFranco was the acting controller for TPC and was in charge of the financial records of the company. He testified that he was not involved in the discussions regarding the amount of money to be given to the claimant via the GoFundMe account. He did not recall any discussions attempting to approximate the amount of a workers' compensation payment at that time, and he did not recall anyone telling him that the \$20,000 donation was intended as a workers' compensation payment. The donation was entered into the company books as an "employee welfare expense"; the types of expenses which normally fell into that category included college tuition reimbursements, Christmas gifts, employee "perks," and other miscellaneous payments to employees that did not represent reimbursements for business-related expenses. Claimant's Exhibit G, p. 24. The only workers' compensation expenses were premium payments to the insurer, which were always entered into the ledger as "general insurance." *Id.*, 23.

Based on the foregoing, the commissioner concluded that Lefevre and DeFranco were credible and persuasive, but Battaglia was not credible or persuasive "as to the narrow issue presented in this formal hearing. Specifically, I do not find that the \$20,000 donation was calculated to approximate 26 weeks of compensation to the claimant

pursuant to the Workers' Compensation Act." Conclusion, ¶ D. The commissioner determined that at the time TPC made the \$20,000 to the GoFundMe campaign, it was aware of the nature and extent of the claimant's total disability and the extent of his medical expenses. The commissioner found that although the donation was "very generous," and occurred within twenty-eight days of the respondent-employer's receipt of the form 30C, the donation did not constitute "'compensation' under the Workers' Compensation Act." Conclusion, ¶ F.

The commissioner further determined that apart from the GoFundMe donation, the respondent-employer made no other payments to the claimant, other than the two partial reimbursements for health insurance premiums mandated under its health insurance policy and the payments for sick time and vacation pay to which the claimant was entitled under the terms of his employment. She concluded that the GoFundMe donation did not satisfy the statutory provisions of General Statutes § 31-294c (b), which require that a respondent "commence payment of compensation" within twenty-eight days of its receipt of a notice of claim. The commissioner granted the claimant's motion to preclude and ordered that a formal hearing be scheduled for the claimant to present medical evidence in support of compensability of the claim, noting that "[t]he respondent is barred from challenging that evidence." Orders, ¶ 2.

The respondents filed a motion to correct, and the commissioner granted in part one proposed correction clarifying the forms 43 of which she had taken administrative notice, and one correction in full in which she adopted the respondents' description of the claimant's GoFundMe page.⁵ The other fifteen proposed corrections were denied in their

⁵ The respondents' motion to correct was accompanied by a voluminous array of attachments. On April 5, 2018, the claimant, noting the "hundreds of pages of documents, including 65 pages of medical and other

entirety, and this appeal followed. On appeal, the respondents argue that the commissioner's conclusions regarding the motion to preclude "were without evidence, were based upon impermissible or unreasonable factual inferences and/or were based upon an incorrect application of the law to the subordinate facts." Appellants' Brief, p. 7, *citing* Burse v. American International Airways, Inc., 262 Conn. 31, 37 (2002). The respondents also contend that the commissioner's denial of their motion to correct constituted error because the corrections sought were material and would have "[affected] the outcome of the case." Tovish v. Gerber Electronics, 32 Conn. App. 595, 599 (1993), *appeal dismissed*, 229 Conn. 587 (1994). We find neither claim of error persuasive.

We begin our analysis of this matter with a recitation of the well-settled standard of review we are obliged to apply to a trial 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 could have reasonably concluded as it did." Burton v. Mottolese, 267 Conn. 1, 54 (2003), *quoting* Thalheim v. Greenwich, 256 Conn. 628, 656 (2001). Thus, "it is ... immaterial that the facts permit the drawing of diverse inferences. The [commissioner] alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing

records that were not introduced into evidence at the formal hearing," filed a "Claimant's Notice of Intention to File Objections to Respondents' Motion to Correct." However, the commissioner had already ruled on the motion to correct on April 4, 2018, thus rendering the claimant's objection moot.

court.” Fair v. People’s Savings Bank, 207 Conn. 535, 540 (1988), *quoting* Del Vecchio v. Bowers, 296 U.S. 280, 287 (1935).

In Callender v. Reflexite Corp., 137 Conn. App. 324 (2012), *cert. granted*, 307 Conn. 915 (2012), *appeal withdrawn*, S.C. 19040 (September 25, 2013), our Appellate Court, in reviewing an appeal involving a motion to preclude, stated the following:

In deciding a motion to preclude, the commissioner must engage a two part inquiry. First, he must determine whether the employee’s notice of claim is adequate on its face. See General Statutes § 31-294c (a). Second, he must decide whether the employer failed to comply with § 31–294c either by filing a notice to contest the claim or by commencing payment on that claim within twenty-eight days of the notice of claim. See General Statutes § 31–294c (b). If the notice of claim is adequate but the employer fails to comply with the statute, then the motion to preclude must be granted.

Id., 338.

In reviewing the matter at bar, we note that neither the sufficiency nor the timeliness of the claimant’s notice of claim is in dispute; it is therefore necessary to determine whether the evidentiary record provided a sufficient basis for the commissioner’s conclusion that the respondents failed to comply with the statutory provisions set forth in § 31-294c (b). The respondents argue that the \$20,000 contribution to the claimant’s GoFundMe page represented a payment of workers’ compensation benefits for approximately twenty-six weeks of payments, if calculated at the claimant’s compensation rate, or for twenty-one weeks, if calculated at his gross weekly wage. The respondents further contend that the \$20,000 payment was paid within twenty-eight days of their receipt of the notice of claim and the forms 43, which were filed on March 23, 2017 and May 18, 2017 respectively, were issued prior to the lapse of

those benefits. The respondents assert that “[t]he Respondent-Employer had no other reason to make these payments to the Claimant except for his lost wages and medical expenses resulting from the alleged injury,” Appellants’ Brief, p. 9, and point out that “[t]he GoFundMe page was established by the Claimant’s family to help with his medical expenses and lost wages resulting from the alleged injury.” Id.

Our review of the formal proceedings in this matter indicates that Battaglia, in her role as co-owner of TPC, attempted to testify to that effect, stating that the payment “was compensation for Ryan.” May 18, 2017 Transcript, p. 40. However, when asked on direct examination, “was it your testimony before that when you made that donation ... you personally intended it to be a workers’ comp payment,” Battaglia replied, “[n]o. I received a letter from their attorney, the family’s attorney, saying they were going to pursue it, and I didn’t have the form from them, yet.” Id., 41-42. When queried regarding her receipt of claimant’s counsel’s correspondence of December 2, 2016, she acknowledged that she had interpreted the letter as a notice of claim, and then said, “I think.” Id. 43. When claimant’s counsel asked, “[s]o even though you knew [the claimant] was going to get short term disability and long term disability, you made this additional payment of 20,000, that in your mind was equivalent to a certain number of weeks of pay, as a charitable donation?” Battaglia again replied, “[n]o, as compensation to Ryan.” Id., 43-44.

Battaglia also testified regarding her familiarity with the company’s general procedures for handling workers’ compensation claims, which usually involved nothing more than forwarding notices of claim to The Hartford; she denied ever paying workers’ compensation benefits directly to an injured employee on any previous occasion. She

denied either speaking with a representative at The Hartford before making the GoFundMe donation, or requesting reimbursement from The Hartford for the donation, which had been placed on the company's American Express card. She also testified, over respondents' counsel's objection, that while ordinarily the secretary at the front desk would have signed for the form 30C and delivered it to Battaglia for forwarding to The Hartford, that didn't happen in this instance, and Battaglia conceded that "somehow it got hung up." *Id.*, 51.

The commissioner did not find Battaglia's testimony compelling, and concluded that she had not been credible regarding the contention that the "\$20,000 donation was calculated to approximate 26 weeks of compensation to the claimant pursuant to the Workers' Compensation Act." Conclusion, ¶ D. It is of course well-settled that credibility determinations are generally impervious to appellate review. "It is the sole province of the trial court to weigh and interpret the evidence before it and to pass upon the credibility of witnesses." Smith v. Smith, 185 Conn. 491, 493 (1981).

We also note that the deposition testimony offered by the then-controller at the time of the donation, William DeFranco, was not consistent with Battaglia's testimony. DeFranco indicated that Battaglia had inquired about the proper account to which the donation should be applied, and he advised that it be applied to the employee welfare account, but Battaglia didn't provide any paperwork to explain the charge. See Claimant's Exhibit G, p. 18. He also testified that although he had participated in the discussions with Battaglia and her brother regarding the donation, he "really wasn't sure what they were doing," *id.*, 20, and he wasn't "really sure how [he] was doing workmen's comp either with them." *Id.*, 23.

DeFranco also denied being able to “recall any discussion of trying to approximate the amount of a worker’s compensation benefit at that time,” *id.*, 38, and did not “recall whether anyone told [him] at that time that this \$20,000 payment was intended to be a workers’ comp. payment.” *Id.*, 39. He also testified that he advised Battaglia and her brother to put the donation in the employee welfare account, because he didn’t know what “their plans were in their mind....” *Id.* He indicated that he didn’t think the donation represented a workers’ compensation payment but he needed to check with Battaglia to make sure; however, he also stated that the company’s general ledger contained no category or account for making workers’ compensation payments directly to employees.

Having reviewed DeFranco’s testimony, it is quite clear that his recollection of the circumstances surrounding the donation differed markedly from Battaglia’s, and we note that the commissioner specifically found DeFranco to be “credible and persuasive.” Conclusion, ¶ C. Our review of the record indicates that the credibility inferences drawn by the commissioner were reasonable; we therefore have no basis for reversing her decision in this regard.

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. (Citations omitted; internal quotation marks omitted.)

Briggs v. McWeeny, 260 Conn. 296, 327 (2002).

In addition to her findings relative to the credibility of the witnesses, the commissioner also concluded that the GoFundMe donation did not constitute “compensation under the Workers’ Compensation Act” pursuant to the provisions of § 31-294c (b). Conclusion, ¶¶ F, H. As previously discussed herein, that statute requires a respondent to “commence payment of compensation” within twenty-eight days of its receipt of a notice of claim. General Statutes § 31-275 (4) defines “compensation” as follows:

“Compensation” means benefits or payments mandated by the provisions of this chapter, including, but not limited to, indemnity, medical and surgical aid or hospital and nursing service required under section 31-294d and any type of payment for disability, whether for total or partial disability of a permanent or temporary nature, death benefit, funeral expense, payments made under the provisions of section 31-284b, 31-293a or 31-310, or any adjustment in benefits or payments required by this chapter.

As claimant’s counsel accurately points out, “[a] plain reading of the definition clearly does not encompass a GoFundMe contribution...” Appellee’s Brief, p. 24. In addition, although the respondents have asserted that payment of the two \$2,000 deductible reimbursements constituted payment of medical expenses as contemplated by the provisions of § 31-275 (4), this position is contradicted by Battaglia’s direct testimony indicating that such deductible reimbursements were paid to all TPC employees, when warranted, pursuant to the terms of the company’s health insurance policy. See May 18, 2017 Transcript, p. 49. The record also reflects that neither TPC nor The Hartford have paid any of the claimant’s medical bills. See May 18, 2019 Transcript, p. 18.

In light of the statutory definition of “compensation” set forth in § 31-275 (4), we are not persuaded that the commissioner erred in concluding that the GoFundMe donation

did not constitute “compensation” as contemplated by the provisions of either § 31-294c or § 31-275 (4). Apart from Battaglia’s testimony, which was ultimately deemed unreliable, the evidentiary record in this matter provides no reasonable basis for concluding otherwise. We would note that this board has previously affirmed decisions in which a trier determined that sporadic and/or nominal payments to a claimant following the respondents’ receipt of a notice of claim were insufficient to achieve compliance with the requirements of § 31-294c. See, e.g., Mott v. KMC Music, Inc., 6025 CRB-1-15-8 (August 23, 2016); Monaco-Selmer v. Total Customer Service, 5622 CRB-3-10-12 (January 19, 2012). Given, then, that the record in the present matter provides a more than adequate basis for the commissioner’s conclusions regarding both the credibility of the witnesses and the legal insufficiency of the GoFundMe donation, we are unable to sustain the respondents’ appeal.⁶

We confess to being troubled by the factual circumstances of this exceedingly difficult claim, and recognize that our decision in this matter may appear inequitable in light of the respondent-employer’s generosity in making a voluntary and sizeable donation to the claimant’s GoFundMe page. Nevertheless, it is axiomatic that our workers’ compensation system is “a creature of statute,” and this commission “must act strictly within its statutory authority, within constitutional limitations and in a lawful manner.... It cannot modify, abridge or otherwise change the statutory provisions, under which it acquires authority unless the statutes expressly grant it that power.” (Internal

⁶ As noted previously herein, the respondents have also claimed as error the commissioner’s denial of the balance of their motion to correct. Our review of the denied proposed corrections indicates that the respondents were merely reiterating arguments made at trial which ultimately proved unavailing. As this board has previously observed, when “a Motion to Correct involves requested factual findings which were disputed by the parties, which involved the credibility of the evidence, or which would not affect the outcome of the case, we would not find any error in the denial of such a Motion to Correct.” Robare v. Robert Baker Companies, 4328 CRB-1-00-12 (January 2, 2002).

citation omitted.) Waterbury v. Commission on Human Rights & Opportunities, 160 Conn. 226, 230 (1971).

There is no error; the March 9, 2018 Findings and Ruling on Motion to Preclude by Randy L. Cohen, the Commissioner acting for the Fourth District, is accordingly affirmed.

Commissioners Scott A. Barton and David W. Schoolcraft concur in this Opinion.