CASE NO. 6285 CRB-4-18-8 CLAIM NO. 700175723	:	COMPENSATION REVIEW BOARD
CLAUDE YOUNG CLAIMANT-APPELLANT	:	WORKERS' COMPENSATION COMMISSION
v.	:	SEPTEMBER 18, 2019
TRADESOURCE, INC. EMPLOYER		
and		
GALLAGHER BASSETT SERVICES THIRD-PARTY ADMINISTRATOR RESPONDENTS-APPELLEES		

APPEARANCES:

The claimant appeared at oral argument before the board as a self-represented party.

The respondents were represented by Tushar G. Shah, Esq., Montstream & May, L.L.P., 655 Winding Brook Drive, P.O. Box 1087, Glastonbury, CT 06033-6087.

This Petition for Review from the June 26, 2018 Findings and Order by Randy L. Cohen, the Commissioner acting for the Fourth District, was heard May 17, 2019 before a Compensation Review Board panel consisting of Commission Chairman Stephen M. Morelli and Commissioners Peter C. Mlynarczyk and David W. Schoolcraft.[1]

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

OPINION

STEPHEN M. MORELLI, CHAIRMAN. The claimant has appealed from the Findings and Order (finding) issued by Commissioner Randy L. Cohen (commissioner) on June 26, 2018. In the finding, the commissioner considered and denied the claimant's bid to open the Award by Stipulation for Full and Final Settlement (stipulation) of his claim pursuant to General Statutes § 31-315.[2] The stipulation was approved by this commission on June 2, 2016, and the claimant has sought to open it and set it aside, arguing that it improperly contained a provision allowing the respondents to proceed on a General Statutes § 31-293 (a) lien against the claimant's recovery in a third party action.[3]

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[2] General Statutes § 31-315 states: "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."

[3] General Statutes § 31-293 (a) states: "When any injury for which compensation is payable under the provisions of this chapter has been sustained under circumstances creating in a person other than an employer who has complied with the requirements of subsection (b) of section 31-284, a legal liability to pay damages for the injury, the injured employee may claim compensation under the provisions of this chapter, but the payment or award of compensation shall not affect the claim or right of action of the injured employee against such person, but the injured employee may proceed at law against such person to recover damages for the injury; and any employer or the custodian of the Second Injury Fund, having paid, or having become obligated to pay, compensation under the provisions of this chapter may bring an action against such person to recover any amount that he has paid or has become obligated to pay as compensation to the injured employee. If the employee, the employer or the custodian of the Second Injury Fund brings an action against such person, he shall immediately notify the others, in writing, by personal presentation or by registered or certified mail, of the action and of the name of the court to which the writ is returnable, and the others may join as parties plaintiff in the action within thirty days after such notification, and, if the others fail to join as parties plaintiff, their right of action against such person shall abate unless the employer, insurance carrier or Second Injury Fund gives written notice of a lien in accordance with this subsection. In any case in which an employee brings an action against a party other than an employer who failed to comply with the requirements of subsection (b) of section 31-284, in accordance with the provisions of this section, and the employer is a party defendant in the action, the employer may join as a party plaintiff in the action. The bringing of any action against an employer shall not constitute notice to

He claimed he had not agreed to this and believed the stipulation contained a lien waiver, and alleges he would have not agreed to the stipulation absent such a waiver. The commissioner determined the stipulation was properly approved and denied the claimant's motion to open.

After considering the claimant's argument on appeal, we determine that the question as to whether to open the stipulation was essentially a factual question. Further, the commissioner's determination was consistent with the evidence she credited. In any

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the employer within the meaning of this section. If the employer and the employee join as parties plaintiff in the action and any damages are recovered, the damages shall be so apportioned that the claim of the employer, as defined in this section, shall take precedence over that of the injured employee in the proceeds of the recovery, after the deduction of reasonable and necessary expenditures, including attorneys' fees, incurred by the employee in effecting the recovery. If the action has been brought by the employee, the claim of the employer shall be reduced by one-third of the amount of the benefits to be reimbursed to the employer, unless otherwise agreed upon by the parties, which reduction shall inure solely to the benefit of the employee, except that such reduction shall not apply if the reimbursement is to the state of Connecticut or a political subdivision of the state including a local public agency, as the employer, or the custodian of the Second Injury Fund. The rendition of a judgment in favor of the employee or the employer against the party shall not terminate the employer's obligation to make further compensation which the commissioner thereafter deems payable to the injured employee. If the damages, after deducting the employee's expenses as provided in this subsection, are more than sufficient to reimburse the employer, damages shall be assessed in his favor in a sum sufficient to reimburse him for his claim, and the excess shall be assessed in favor of the injured employee. No compromise with the person by either the employer or the employee shall be binding upon or affect the rights of the other, unless assented to by him. For the purposes of this section, the claim of the employer shall consist of (1) the amount of any compensation which he has paid on account of the injury which is the subject of the suit, and (2) an amount equal to the present worth of any probable future payments which he has by award become obligated to pay on account of the injury. The word "compensation", as used in this section, shall be construed to include incapacity payments to an injured employee, payments to the dependents of a deceased employee, sums paid out for surgical, medical and hospital services to an injured employee, the burial fee provided by subdivision (1) of subsection (a) of section 31-306, payments made under the provisions of sections 31-312 and 31-313, and payments made under the provisions of section 31-284b in the case of an action brought under this section by the employer or an action brought under this section by the employee in which the employee has alleged and been awarded such payments as damages. Each employee who brings an action against a party in accordance with the provisions of this subsection shall include in his complaint (A) the amount of any compensation paid by the employer or the Second Injury Fund on account of the injury which is the subject of the suit, and (B) the amount equal to the present worth of any probable future payments which the employer or the Second Injury Fund has, by award, become obligated to pay on account of the injury. Notwithstanding the provisions of this subsection, when any injury for which compensation is payable under the provisions of this chapter has been sustained under circumstances creating in a person other than an employer who has complied with the requirements of subsection (b) of section 31-284, a legal liability to pay damages for the injury and the injured employee has received compensation for the injury from such employer, its workers' compensation insurance carrier or the Second Injury Fund pursuant to the provisions of this chapter, the employer, insurance carrier or Second Injury Fund shall have a lien upon any judgment received by the employee against the party or any settlement received by the employee from the party, provided the employer, insurance carrier or Second Injury Fund shall give written notice of the lien to the party prior to such judgment or settlement."

event, the respondents filed a motion to dismiss the appeal, arguing that it was statutorily untimely and this board lacks jurisdiction to consider the appeal. We find the respondents' motion meritorious and therefore dismiss the claimant's appeal.

The commissioner found the following facts which are relevant to our consideration of this appeal. She noted that the claimant alleged that he sustained a compensable head and neck injury on September 2, 2015, and in January 2016, a form 36 was approved by the commission based on the respondents' medical documentation that the claimant could return to work. Informal and pre-formal hearings were held in February and March 2016. During this period, the claimant was represented first by Attorney Scott Williams and then by Attorney Thomas Cotter. On May 18, 2016, the claimant attended a pre-formal hearing as a pro se party, at which time an attorney for the respondents, Michael Vernile, presented a settlement offer. Attorney Vernile testified his initial offer was for $4500; which was rejected. He said he then suggested a settlement of $4500 plus a lien waiver as to the claimant's third-party suit. The commissioner who conducted that hearing, Michelle Truglia, made notes that the claimant wanted to take his chances at a hearing and did not make notes as to a lien waiver being discussed. Subsequent to the May 18, 2016 hearing, the respondents presented a new settlement offer of $10,750, which the claimant decided to accept.

On or about May 31, 2016, Attorney Vernile e-mailed the stipulation to the claimant along with supporting documents: A "Stipulation and What It Means" form, and a "Stipulation Questionnaire." The claimant responded with an e-mail which presented a question as to a $1075 allocation on page five of the stipulation. Attorney Vernile responded that this was for a Medicare set-aside allocation. The claimant

e-mailed back to thank him for the explanation. On June 2, 2016, the claimant, and Attorney Vernile signed the stipulation agreement and attended a stipulation approval hearing before Commissioner Charles Senich. At that hearing, Commissioner Senich approved the stipulation. Page six of the stipulation stated the following:

> It is agreed by and between the parties hereto that this stipulation was not induced nor entered into by fraud, accident, mistake or duress and that none of the parties hereafter shall have any further claims under the Workers' Compensation Act of the State of Connecticut; except such rights granted by said Act under Sections 31-293, 31-349, 31-299b and any amendments thereto or any other common law apportionment remedies are fully reserved.

Findings, ¶ 16.

Commissioner Senich's notes from the stipulation approval hearing of June 2, 2016 indicate that he reviewed the stipulation with the claimant and spoke to him at length about it. However, about a year later on April 25, 2017, the claimant and Attorney Vernile appeared at an informal hearing before Commissioner Scott Barton at which time the claimant expressed his interest in moving to open the stipulation pursuant to § 31-315. During this interval, the claimant had retained Attorney Maximiliano Zayas in a related third-party claim of Young v. S.P.C. Construction, LLC, et al, FBT-CV-17-6064614-S. Commissioner Barton's notes indicate that the claimant alleged that he believed the 2016 agreement "was to not allow the respondent to pursue [third-]party lien." Findings, ¶ 18. Commissioner Barton scheduled the matter for a formal hearing.

At the formal hearing, the claimant testified that the respondents had agreed to a lien waiver and that it was left out of the stipulation either by mistake, or intentionally, which he believed would be fraud. He also stated he executed the stipulation under

duress. He testified that the terms in the stipulation were different than what he agreed to at the pre-formal hearing. He noted that he had read the stipulation prior to the June 2, 2016 hearing and, while page six of the stipulation did state the respondents retained their rights under § 31-293 and he had been "a little bit quirky" about that paragraph, but he did not ask Commissioner Senich about that provision at the approval hearing. See Findings, ¶ 22.b., *quoting* November 15, 2017 Transcript, p. 23. He stated that he believed lien waivers were, in some settings, set out in a separate document. Although Commissioner Senich did ask at the hearing if he had any questions, he signed the stipulation believing Attorney Vernile agreed to a waiver. He said he subsequently sent Attorney Vernile a voice message stating "I haven't received the waiver that we had agreed upon," but that Attorney Vernile never called him back. Findings, ¶ 22.e., *quoting* November 15, 2017 Transcript, p. 28.

Regarding his claim of duress, the claimant said this was based on him not having received benefits since the January 11, 2016 form 36 approval. He testified that he had asked Commissioner Senich what would happen were he to not sign the stipulation and, instead, opted to seek to reinstate weekly benefits through litigation. He said that the commissioner told him a hearing could not be scheduled for about a month and a half, so he signed the stipulation. See Findings, ¶ 22.h., *citing* November 15, 2017 Transcript, p. 54.

Commissioner Truglia testified that, "I don't have any independent recollection of what was said. If, you know, other than what's in the notes" from the May 18, 2016 hearing. See Findings, ¶ 23, *quoting* January 30, 2018 Transcript, p. 18. Commissioner Senich testified that his notes reflected that he spoke to the claimant "at length" in regard

to approving a stipulation. There is no reference in his notes to the claimant being under duress. He was asked if he "would have approved a stipulation if [he] believed an individual to have been under duress in signing." He replied, "No." Findings, ¶ 24, *quoting* March 20, 2018 Transcript, p. 23.

Based on this record, Commissioner Cohen found Attorney Vernile's testimony regarding the lien waiver to be credible and persuasive, in that a lien waiver had been included as part of a settlement offer, but that offer had been rejected by the claimant, and the lien waiver was not offered again. She found Commissioner Truglia and Commissioner Senich's testimony credible, and found Commissioner Senich had canvassed the claimant at length and made him aware that he was releasing all of his claims under the Workers' Compensation Act. She found that the respondents had reserved their rights under § 31-293 against the third-party claim and that they had not procured this agreement by fraud, nor was the absence of a lien waiver a matter in the final settlement agreement a mutual mistake. She also found the claimant was not under duress at the time he signed the stipulation, and had adequate time to review the document and ask any questions as to its terms. Therefore, she found the conditions required to open a stipulation under § 31-315 had not been met, and denied the motion to open. She also directed Attorney Zayas to release the amount of the § 31-293 lien, minus statutory reduction, to the respondents.

Commissioner Cohen issued her finding on June 26, 2018. The claimant did not file a motion to correct the finding; he filed his first responsive pleading, a petition for review, on August 8, 2018. The respondents then filed a motion to dismiss on August 13,

2018, arguing that as the claimant failed to respond to the finding within the statutory twenty-day appeal period provided in General Statutes § 31-301(a) and, therefore, the Commission lacked subject matter jurisdiction to consider the appeal.[4] The respondents then filed a second motion to dismiss dated November 2, 2018, noting that the claimant had failed to file timely reasons for appeal in this matter.

We must first resolve the question of subject matter jurisdiction before considering the merits of any appeal as "[o]nce a determination is reached that we lack subject matter jurisdiction no further inquiry is warranted." Mankus v. Mankus, 4958 CRB-1-05-6 (August 22, 2006), *aff'd*, 107 Conn. 585, *cert. denied*, 288 Conn. 904 (2008). We find that we considered these issues most recently in Swaggerty v. Hartford, 6262 CRB-1-18-4 (March 15, 2019), which we found indistinguishable from our earlier cases on untimely appeals, notably, Sutherland Hofler v. State/Dept. of Developmental Services, 6173 CRB-5-17-1 (December 12, 2017). In Sutherland, we remarked that:

> 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 of the trial commissioner, took no responsive action within twenty

[4] 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."

> days, we therefore lack subject matter jurisdiction to consider the appeal.

Id.

The claimant argues that due to postal delays he did not receive a copy of the finding in a timely manner, and this delay should obviate strict compliance with the statutory time requirements for filing an appeal, *citing* Horobin v. West Haven, 4724 CRB-3-03-9 (December 2, 2004), *appeal dismissed*, A.C. 26111 (March 30, 2005). He also claims that commission staff provided him with inaccurate advice as to appeal filing deadlines. After review of the factual circumstances, we are not persuaded by this argument.[5] Our Supreme Court decision in Stec v. Raymark Industries, Inc., 299 Conn. 346 (2010), has made clear that "[o]ur courts have determined that the failure of a party to file a timely appeal deprives the board of jurisdiction over the appeal." Brown v. Lawrence & Memorial Hospital, 5853 CRB-2-13-5 (April 21, 2014).[6]

Therefore, we find the respondents' motion to dismiss must be granted in this matter as we lack jurisdiction to offer relief to the claimant. However, even were we to have had jurisdiction to consider the claimant's appellate arguments, we would find them essentially an effort to retry the factual findings of Commissioner Cohen on appeal. Our precedent in Macon v. Colt's Manufacturing, 5505 CRB-1-09-10 (September 27, 2010),

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[5] As the respondents document in their motion to dismiss, the claimant did not file any appeal paperwork until over forty days after the commissioner issued the finding in this matter. In addition, the claimant had received actual delivery of the finding from the United States Postal Service on July 11, 2018, the fifteenth day following issuance of the finding. As we held in Byczajka v. Stamford, 5023 CRB-7-05-11 (March 26, 2008), the twenty-day appeal period commences from when a decision from a commissioner is mailed, unless pursuant to Kudlacz v. Lindberg Heat Treating Co., 250 Conn. 581 (1999), the party through no fault of its own, does not obtain notice during the statutory appeal period. As we find the claimant herein had actual notice of the finding prior to the end of the statutory appeal period and took no responsive action, we cannot offer relief on appeal.

[6] As the respondents point out in their motion to dismiss, even were we to toll the start of the appeal period to the July 11, 2018 date of receipt of the finding by the claimant, the claimant's appeal was filed twenty-eight days later, on August 8, 2018, well beyond the twenty-day appeal period.

appeal dismissed, A.C. 32785 (December 13, 2010), is dispositive of these issues. 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 commissioner in this matter, similar to the commissioner in Macon, reached findings of fact which were consistent with the testimony and evidence that she 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 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 that this board is limited to reviewing how the commissioner applied the law. See Admin. Reg. § 31-301-4." Id.

The claimant, at oral argument before this tribunal, did present an argument that he believes the result herein was contrary to law. He cited Richter v. Danbury Hospital 60 Conn. App. 280 (2000), for the proposition that the contract herein should not have been construed in the manner that the commissioner construed it; as he believes that a lien waiver must, as a matter of law, be incorporated in a separate document.[7] We disagree. Richter involved the reversal of a finding of summary judgment where the contractual issues under dispute were remanded for a factual determination. In this case, the factual determination as to the provisions of the stipulation, which included an

[7] It is unclear in what context the claimant may have encountered a settlement agreement where a lien waiver was done by a separate document, but this is certainly not the practice in Connecticut workers' compensation claims. When the consideration given by a respondent includes waiver of its lien rights on third-party actions, those terms are routinely – if not universally – expressly stated in the stipulation document presented to the commissioner for approval. Indeed, we are hard pressed to see how it would be proper to do otherwise, since the commissioner must know the terms of any settlement agreement before deciding whether it should be approved.

enforceable lien under § 31-293, has already occurred. Richter cited Gurliacci v. Mayer 218 Conn. 531, 567 (1991), for the proposition that "[o]rdinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact. . . ." (Internal quotation marks omitted; citations omitted.) Richter, supra, 290, *quoting* Bank of Boston Connecticut v. Scott Real Estate, Inc., 40 Conn. App. 616, 621, *cert. denied*, 237 Conn. 912, 675 (1996). We also note that in Ouelette v. New England Masonry Company, 5424 CRB-7-09-2 (January 14, 2010), we opposed an effort by a litigant to essentially renegotiate the terms of what he decided at a later date to be a suboptimal bargain. "Had the claimant sought to protect his right to receive full payment of the entire 20% permanency rating the document should have been drafted so as to accomplish this goal, and it was not." Id. The commissioner in this case concluded that the claimant was properly canvassed, was not under duress and agreed to the terms of the stipulation. General Statutes § 31-315 does not offer relief to either claimants or respondents for what essentially constitutes second-guessing as to what they should have agreed to at the time a stipulation is approved.

In any event, we do not have jurisdiction to take any action due to the untimely filing of the appeal. Therefore, we affirm the finding.

Commissioners Peter C. Mlynarczyk and David W. Schoolcraft concur in this opinion.