CASE NO. 6306 CRB-3-19-1 CLAIM NO. 300111102	:	COMPENSATION REVIEW BOARD
CHRISTINA NICHOLS CLAIMANT-APPELLEE	:	WORKERS' COMPENSATION COMMISSION
v.	:	NOVEMBER 15, 2019

ADVANCED POLYMER REPAIRS
EMPLOYER
NO RECORD OF INSURANCE
RESPONDENT-APPELLANT

and

SECOND INJURY FUND
RESPONDENT-APPELLEE

APPEARANCES:

The claimant was represented by James D. Moran, Jr., Esq., Law Offices of James D. Moran, Jr., 41 Holmes Avenue, Waterbury, CT 06710.

Respondent Advanced Polymer Repairs did not file a brief or attend oral argument.

The Second Injury Fund was represented by Kenneth H. Kennedy, Jr., Esq., Assistant Attorney General, Office of the Attorney General, 55 Elm Street, P.O. Box 120, Hartford, CT 06141-0120 who did not file a brief or attend oral argument.

This Petition for Review from the December 19, 2018 Finding and Award Pursuant to C.G.S. § 31-355 of Scott A. Barton, the Commissioner acting for the Third District, was heard June 21, 2019 before a Compensation Review Board panel consisting of Commission Chairman Stephen M. Morelli and Commissioners Peter C. Mlynarczyk and David W. Schoolcraft.

OPINION

STEPHEN M. MORELLI, CHAIRMAN. The respondent herein has appealed from a Finding and Award (finding) issued by Commissioner Scott A. Barton (commissioner) following a formal hearing in which the respondent did not participate.[1] The commissioner determined that the claimant was an employee of the respondent and sustained compensable arm and spine injuries while in the course of her employment. The respondent challenges the existence of an employee-employer relationship and argues that the claimant's injury occurred in New York, which he believes should be the venue of any proceedings to secure compensation. The claimant argues that this appeal is jurisdictionally invalid as the result of a late filing pursuant to General Statutes § 31-301(a)[2] and should be dismissed. We also note the respondent has not filed a brief nor did he appear at the hearing before this tribunal, which constitutes a failure to properly prosecute the appeal pursuant to Practice Book § 85-1. As we find the initial pleading in this matter was filed more than twenty days after the issuance of the finding, we find the appeal to be jurisdictionally untimely and we dismiss this appeal.

We will briefly summarize the factual background in this matter. The claimant was hired by the respondent at her home in Clinton, Connecticut in December 2013. She was employed by the respondent through April 2015, as a sales representative for the

[1] Although the Second Injury Fund is a respondent in this matter before this board, for purposes of clarity, our references herein to "respondent" encompass only the respondent-employer.

[2] 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."

firm in New York City. The claimant travelled to the city and carried bags of epoxy material and concrete tiles with her on subways to presentations. She described this work as physically demanding. The claimant worked out of her home in Clinton booking sales appointments and preparing for presentations. She testified she was paid $750 per week by the respondent.

In February 2015, the claimant described symptoms related to her cervical spine such as numbness and tingling. She was examined by a primary care physician, David B. Parmelee, D.O., on February 16, 2015, who originally diagnosed the claimant with carpal tunnel syndrome and tennis elbow. See Findings, ¶ 7. After therapy for these conditions failed to result in improvement, Parmelee ordered a cervical spine MRI for the claimant. The MRI was performed on May 15, 2015, and identified "[d]egenerative changes at C5-6" and a "[r]ight central C6-7 disc protrusion." Claimant's Exhibit A. Subsequently, the claimant began treating with Jonathan N. Grauer, M.D., who confirmed her belief that these symptoms were the result of carrying heavy items at work. On October 5, 2015, Grauer performed a cervical decompression and fusion surgery on the claimant. The commissioner also noted that physical therapy notes from Yale-New Haven Hospital associated the claimant's tendonitis with "carrying objects and overuse" and "excessive carrying of luggage, bags and computers around NYC frequently last couple months." Findings, ¶ 10.

The claimant filed a form 30C on November 9, 2015, claiming a repetitive trauma injury to her cervical spine, left and right arm. The respondent filed a form 43 on July 24, 2017, contesting, among other issues, the existence of an "E/E relationship" and compensability. The parties stipulated that the claimant was totally disabled between

April 1, 2015 and December 31, 2015, and temporarily partially disabled between January 1, 2016 and January 1, 2017. See Findings, ¶ 14. The commissioner also noted that an investigator for the State Treasurer's office, George Petropoulos, found that the respondent, a New Jersey firm, was not insured in Connecticut for workers' compensation claims as of February 1, 2015.

Based on the evidence, the commissioner concluded the Commission had jurisdiction over this injury as the claimant was an employee of the respondent and performed at least 50 percent of her work within the State of Connecticut. He determined that she sustained a work related repetitive trauma injury to her cervical spine which disabled her from April 1, 2015 until January 1, 2017 and required medical treatment including the cervical trauma surgery, which also led to permanent impairment. He also determined the respondent was not insured for Connecticut workers' compensation liability. See Conclusion, ¶¶ A-E, H. He ordered the respondent to pay the claimant benefits and should they fail to do so, directed the Second Injury Fund to do so pursuant to General Statutes § 31-355. The respondent did not file a motion to correct this finding within twenty days of its issuance on December 19, 2018. Instead, the firm's principal filed a "Notice of Appeal" and "Reasons for Appeal" dated January 22, 2019, received by the Commission on January 25, 2019.

The claimant has argued that this appeal was initiated outside the twenty day statutory time limitations of General Statutes § 31-301(a) and must be dismissed as jurisdictionally invalid. As the finding was issued on December 19, 2018, and the appeal was commenced more than thirty days later, the appeal is outside the twenty day statutory appeal period. We find these circumstances both factually and legally indistinguishable

from the scenario in Rios v. Boehle's Express, 6027 CRB-6-15-9 (June 21, 2016), where the claimant failed to file a timely appeal.

> We note that the respondents have raised a challenge as to the jurisdiction of our tribunal to act on this appeal via a motion to dismiss. This motion asserts the appeal herein was not filed within the statutory twenty day period from a trial commissioner's decision and therefore we lack jurisdiction. We must resolve this question prior to taking any action of the merits of an appeal. We have had opportunities in recent years to deal with the argument that an appeal has been filed in an untimely manner. 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 her appeal, as "[o]ur courts have determined that the failure of a party to file a timely appeal deprives the board of jurisdiction over the appeal. See Stec v. Raymark Industries, Inc., 299 Conn. 346 (2010)." Id. The claimant was obligated if he was dissatisfied or confused with this ruling to either appeal to this tribunal within twenty days, or file an appropriate motion to 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)), or his appellate rights would be extinguished pursuant to § 31-301(a) C.G.S. The claimant took neither action within that twenty day window. As the claimant herein was aggrieved by the May 4, 2015 decision of the trial commissioner and took no responsive action within twenty days, we lack subject matter jurisdiction to consider the appeal.

Id.[3]

In the documents filed, the respondent's principal claimed that he had not received timely notice of the decision, and filed this appeal immediately after being advised of the decision by counsel for the Second Injury Fund. The appellant in Rios, supra, made a similar argument, which we addressed in footnote three of that opinion.

[3] See also Swaggerty v. Hartford, 6262 CRB-1-18-4 (March 15, 2019); Tomaszek v. Norton's Auto & Marine Service, Inc., 6249 CRB-1-18-3 (March 1, 2019), *reconsideration denied*, A.C. 42716 (May 7, 2019); and Sutherland Hofler v. State/Dept. of Developmental Services, 6173 CRB-5-17-1 (December 12, 2017), A.C. 43383 (September 12, 2019), *appeal dismissed* (November 5, 2019) and A.C. 43444 (September 27, 2019), *appeal dismissed* (October 29, 2019) and A.C. 43474 (October 7, 2019), *appeal dismissed* (November 5, 2019).

> The claimant said at oral argument before our tribunal that he had not been advised of the appeal deadline and that was why the late appeal should be excused. As we explained in Byczajka v. Stamford, 5023 CRB-7-05-11 (March 26, 2008) a party must present persuasive evidence that they did not receive notice within the appeal period that prevented the filing of a timely appeal, citing Kudlacz v. Lindberg Heat Treating Co., 250 Conn. 581 (1999) and Schreck v. Stamford, 250 Conn. 592, 595 (1999). In the absence of evidence claimant's counsel at the formal hearing had not received timely notice of the May 4, 2015 Finding, we cannot grant this relief.

Id.

We note that while the hearing of this matter was properly noticed to all parties for June 21, 2019, the respondent did not appear nor did counsel appear at the hearing on their behalf. The respondent in this matter has presented no documentation corroborating his claim as to not receiving notice of the finding, nor appear at the hearing before our tribunal to present an argument on this issue. Accordingly, we lack jurisdiction to consider this appeal as it was filed in an untimely manner.[4] The failure of the respondent, in this matter, to file an appellate brief or to attend oral argument before this tribunal, provides an alternative ground to dismiss the appeal. These circumstances are factually and legally indistinguishable from Hubbard v. Dyce Trucking, LLC, 6080 CRB-6-16-3 (October 4, 2016). In Hubbard, counsel for the respondent-employer-appellant commenced the appeal on March 16, 2016. The appellant was properly noticed that the matter would be heard on our September 23, 2016 docket and did not appear for oral argument on that date. We dismissed that appeal for failure to prosecute.

In the matter at bar, the appellant has failed to submit a brief in support of this appeal or take any other affirmative action to prosecute the appeal. At oral argument,

[4] See also Tiffany v. Cheer Virtue Evolution & Athletic Training Center, LLC, 6046 CRB-7-15-11 (August 23, 2016), where uncorroborated claims as to the respondent not receiving notice of a formal hearing and therefore being unable to present a defense were rejected by the Compensation Review Board.

counsel representing the claimant moved to dismiss the respondent-employer's appeal. Pursuant to the precedent in Angol v. In Your Neighborhood Construction, 5125 CRB-1-06-8 (March 16, 2010), Lopez v. A. Anastasio Fence Co., 5101 CRB-4-06-6 (May 23, 2007) and Bernier v. American Ref-Fuel Company of Southeast Connecticut, 4876 CRB-2-04-10 (December 23, 2005), the appeal is subject to dismissal for failure to prosecute with proper diligence pursuant to Practice Book § 85-1.[5]

As we lack subject matter jurisdiction to consider this appeal, and the respondent-appellant did not properly prosecute this appeal, we herein dismiss this appeal.

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

[5] Practice Book § 85-1 states: "Lack of Diligence in Prosecuting or Defending Appeal. If a party shall fail to prosecute an appeal with proper diligence, the court may dismiss the appeal with costs. If a party shall fail to defend against an appeal with proper diligence, the court may set aside in whole or in part the judgment under attack, with costs, and direct the entry of an appropriate final judgment by the trial court against the party guilty of the failure. If that party is a defendant in the action, the directed judgment may be in the nature of a judgment by default for such amount as may, upon a hearing in damages, be found to be due. If that party is a plaintiff in the action, the directed judgment may be one dismissing the action as to that plaintiff, and the judgment shall operate as adjudication upon the merits. The statutory provisions regarding the opening of judgments of nonsuit and by default shall not apply to a judgment directed under the provisions of this rule. (P.B. 1978-1997, Sec. 4184A.)"