CASE NO. 6397 CRB-4-20-7 CLAIM NO. 400104430	:	COMPENSATION REVIEW BOARD
JOHN J. BRITTO CLAIMANT-APPELLANT	:	WORKERS' COMPENSATION COMMISSION
v.	:	JULY 2, 2021
BIMBO BAKERIES EMPLOYER		
and		
ESIS INSURER RESPONDENTS-APPELLEES		

APPEARANCES:

The claimant was represented by Victor M. Ferrante, Esq., Attorney at Law, P.C., 1087 Broad Street, Suite 202, Bridgeport, CT 06604.

The respondents were represented by Clayton J. Quinn, Esq., The Quinn Law Firm, LLC, 204 South Broad Street, Milford, CT 06460.

This Petition for Review from the May 21, 2020 Ruling on Motion to Preclude by Jodi Murray Gregg, the Commissioner acting for the Fourth District, was heard December 18, 2020 before a Compensation Review Board panel consisting of Commission Chairman Stephen M. Morelli and Commissioners William J. Watson III and David W. Schoolcraft.[1]

[1] We note that two motions for extension of time were granted during the pendency of this appeal.

OPINION

STEPHEN M. MORELLI, CHAIRMAN. The claimant has appealed from the decision reached by Commissioner Jodi Murray Gregg (commissioner) to deny his motion to preclude.[2] In her Ruling on Motion to Preclude (ruling) dated May 21, 2020,

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[2] The relevant statutes governing notice of claim, preclusion and the alternative to written notice of claim General Statutes § 31-294c states: "Notice of claim for compensation. Notice contesting liability. Exception for dependents of certain deceased employees. (a) No proceedings for compensation under the provisions of this chapter shall be maintained unless a written notice of claim for compensation is given within one year from the date of the accident or within three years from the first manifestation of a symptom of the occupational disease, as the case may be, which caused the personal injury, provided, if death has resulted within two years from the date of the accident or first manifestation of a symptom of the occupational disease, a dependent or dependents, or the legal representative of the deceased employee, may make claim for compensation within the two-year period or within one year from the date of death, whichever is later. Notice of claim for compensation may be given to the employer or any commissioner and shall state, in simple language, the date and place of the accident and the nature of the injury resulting from the accident, or the date of the first manifestation of a symptom of the occupational disease and the nature of the disease, as the case may be, and the name and address of the employee and of the person in whose interest compensation is claimed. An employee of the state shall send a copy of the notice to the Commissioner of Administrative Services. An employee of a municipality shall send a copy of the notice to the town clerk of the municipality in which he or she is employed. An employer, other than the state or a municipality, may opt to post a copy of where notice of a claim for compensation shall be sent by an employee in the workplace location where other labor law posters required by the Labor Department are prominently displayed. In addition, an employer, opting to post where notice of a claim for compensation by an employee shall be sent, shall forward the address of where notice of a claim for compensation shall be sent to the Workers' Compensation Commission and the commission shall post such address on its Internet web site. An employer shall be responsible for verifying that information posted at a workplace location is consistent with the information posted on the commission's Internet web site. If an employee, other than an employee of the state or a municipality, opts to mail to his or her employer the written notice of a claim for compensation required under the provisions of this section, such written notice shall be sent by the employee to the employer by certified mail. As used in this section, "manifestation of a symptom" means manifestation to an employee claiming compensation, or to some other person standing in such relation to him that the knowledge of the person would be imputed to him, in a manner that is or should be recognized by him as symptomatic of the occupational disease for which compensation is claimed.

(b) 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

the commissioner concluded that the respondents filed a responsive pleading to the claimant's December 12, 2017 notice of claim within twenty-eight days of having received actual notice of the claim. More specifically, the commissioner concluded that the claimant's form 30C notice of claim dated December 12, 2017, was not properly served until January 18, 2018, when the notice was hand delivered to respondents' counsel, and therefore the respondent's filing of a form 43 that same day was timely.

On appeal, the claimant argues that as the postal service attempted delivery of his December 12, 2017 notice of claim, and that this was effective service for purposes of General Statutes § 31-321. He argues that because the respondents did not file a disclaimer within twenty-eight days of the attempted delivery, the commissioner erred in failing to grant preclusion. Our review of the facts as found by the commissioner and the applicable law reflects the commissioner did not err in her conclusion.

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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 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.

(c) Failure to provide a notice of claim under subsection (a) of this section shall not bar maintenance of the proceedings if there has been a hearing or a written request for a hearing or an assignment for a hearing within a one-year period from the date of the accident or within a three-year period from the first manifestation of a symptom of the occupational disease, as the case may be, or if a voluntary agreement has been submitted within the applicable period, or if within the applicable period an employee has been furnished, for the injury with respect to which compensation is claimed, with medical or surgical care as provided in section 31-294d. No defect or inaccuracy of notice of claim shall bar maintenance of proceedings unless the employer shows that he was ignorant of the facts concerning the personal injury and was prejudiced by the defect or inaccuracy of the notice. Upon satisfactory showing of ignorance and prejudice, the employer shall receive allowance to the extent of the prejudice."

The factual predicate to this matter commences with the claimant's filing of a form 30C written notice of claim in February of 2017. That form 30C (dated February 10, 2017 and received by the commission on February 21, 2017) alleged a left knee injury sustained on January 21, 2017. See Claimant's Exhibit C. The commissioner found that the respondents filed a timely disclaimer to that form 30C. See Claimant's Exhibit B. See Statement of Facts, ¶ 2. The respondents' disclaimer asserted as their basis for disclaiming liability that the injury was "causally related to a personal medical condition."

The commissioner found that during the course of informal hearings there was a discussion among the parties that the mechanism of the injury was not limited to the discrete incident alleged in the February 10, 2017 form 30C but was the result of repetitive trauma, and this was "memorialized" in an October 13, 2017 letter from claimant's counsel to respondents' counsel. Statement of Facts, ¶¶ 3-4.

In December 2017, the claimant filed with the commission the second form 30C referenced above. Although the second form 30C cited an injury to both knees, the notice referenced the same claim number as was assigned to the first form 30C.

In her finding, the commissioner noted the testimony of claimant's attorney that he had mailed a copy of that second form 30C to the respondent-employer, then she made the following material findings relative to that mailing and the respondent's response thereto:

> 7. The envelope was addressed to 328 Selleck Street #A, which is the correct address for the Respondent-Employer.
> 8. The Respondent-Employer has a very noticeable sign on the building which reads "Office (with an arrow pointing to the left) 328 Selleck Street A."

9. The Form 30C was returned to Attorney Ferrante. The envelope is marked "undeliverable as addressed and unable to forward."
10. The outside of the envelope documents that the mail carrier attempted to deliver the enclosed Form 30C to the Respondent-Employer on 12/14/17, 12/15/17 and 12/30/17.
11. On January 18, 2018, at an informal hearing regarding the January 21, 2017 left knee specific injury claim, Attorney Bunnell received a copy of the Form 30C initiating the repetitive trauma claim from Claimant's counsel.
12. Attorney Bunnell, as counsel for the Respondent-Employer, filed a Form 43 denying the repetitive trauma claim on that same day, January 18, 2018.

Statement of Facts, ¶¶ 7-12.

Based on those facts, the commissioner denied the motion to preclude on the grounds the respondent was only properly noticed of the bilateral knee repetitive trauma claim at an informal hearing that took place on January 18, 2018, "when Claimant's counsel delivered the Form 30C to the Respondent-Employer's counsel in person." Conclusion, ¶ C. Her rationale for this conclusion stated:

> I find that the Form 30c alleging bilateral knee repetitive trauma was not delivered to the Respondent-Employer. Although the certified envelope had the correct address for the Respondent-Employer, and despite the clear and bold signage on the building indicating where the office for the Respondent-Employer was located, for reasons unknown, the mail carrier failed to deliver the notice to the Respondent-Employer. The Form 30C was returned to the Claimant on January 10, 2018. The outside of the envelope was marked "undeliverable." Therefore, the Respondent-Employer did not receive proper notice when the Claimant initially filed the claim in December of 2017.

(Emphasis ours.) Conclusion, ¶ B.

The commissioner's conclusion that the respondents did not receive proper notice when the claimant initially filed the claim in December of 2017 is supported by the fact that the postal service never delivered the form 30C. However, the claimant argues that

notwithstanding the lack of actual receipt, precedent such as Morgan v. Hot Tomato's, Inc., DIP, 4377 CRB-3-01-3 (January 30, 2002), dictates that preclusion should have been granted. He also suggests we should apply the "mailbox rule" to assume that a properly posted letter was properly delivered. Echavarria v. National Grange Mutual Ins. Co., 275 Conn. 408 (2005). We are not persuaded by these arguments.

We will first address the "mailbox rule" argument. Id. The commission has a statutory framework for providing notice to parties in General Statutes § 31-321.[3] This statute requires the use of registered or certified mail which enables the commissioner to ascertain in cases such as this one whether a party actually received a notice. In the present case, she determined based on the evidence presented that the respondents never received notice.[4] The commissioner reasoned that because the respondents did not know of the second form 30C, they had no ability to file a disclaimer.[5]

We now consider claimant's argument that this case is no different than Morgan, supra, a case in which we affirmed a ruling of preclusion against a respondent even though it did not actually take possession of the registered mailing containing the notice.

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[3] General Statutes § 31-321 states: "Unless otherwise specifically provided, or unless the circumstances of the case or the rules of the commission direct otherwise, any notice required under this chapter to be served upon an employer, employee or commissioner shall be by written or printed notice, service personally or by registered or certified mail addressed to the person upon whom it is to be served at the person's last-known residence or place of business. Notices on behalf of a minor shall be given by or to such minor's parent or guardian or, if there is no parent or guardian, then by or to such minor."

[4] To assume that a properly addressed and mailed piece of mail was received may make sense in some cases, but not in a case such as this when we know for a fact it was returned to the claimant as undelivered.

[5] We also note that although the claimant cites Echavarria v. National Grange Mutual Ins. Co., 275 Conn. 408 (2005), as grounds for applying the mailbox rule, in Velez v. Domino's Pizza, 5105 CRB-1-06-6 (September 26, 2007), we cited Bepko v. St. Paul Fire & Marine Insurance Co., 2006 WL 2331076 (D. Conn. 2006) (Dorsey, J.), as an example of where the "mailbox rule" was successfully refuted at trial. "In addition, the plaintiff in Bepko offered a rather detailed factual argument that he was not in the country to sign for the cancellation notice, his employees were instructed not to sign for him, and the signature on the receipt was not his. He argued successfully, using parol evidence, that the presumption of receipt under Connecticut law in Echavarria v. National Grange Mutual Insurance Co., 275 Conn. 408 (2005) should not be upheld since he had not received the notice." Velez, supra.

We do not agree that our precedent in Morgan required the commissioner to grant preclusion in this case.

We begin by noting that in Morgan, the commissioner found "substantial evidence" that the postal service had attempted to obtain the signature of a Hot Tomato's representative on five occasions. He also found that the envelope containing the form 30C was returned to the claimant as "unclaimed mail." It was on this basis that the commissioner concluded the efforts "constituted compliance with § 31-294c (a) on the part of the claimant." Id.

In this case, the respondents presented testimony from a former manager at the facility, Stephen Costa, who testified as to the procedures for accepting mail at this facility. This would involve ringing a buzzer and having an employee meet a carrier at an exterior door. See October 29, 2019 Transcript, pp. 7-9. He further testified that it was "highly unlikely" that a postal carrier made multiple efforts to deliver mail to this facility during business hours and was denied entry. Id., pp. 13-14.

Furthermore, the record before the commissioner in our case indicates that the outside of the envelope which was addressed certified mail to the respondent-employer was stamped "RETURN TO SENDER. UNDELIVERABLE AS ADDRESSED. UNABLE TO FORWARD." Claimant's Exhibit H. While the claimant did present a tracking log purporting to document more than one delivery attempt, this does not definitively answer the question as to whether the postal carrier actually brought this to the proper location at the 328 Selleck Street complex. The evidence before the commissioner documented that the location was a multi-building facility, only one of which was used by the respondent-employer. See Claimant's Exhibits Q, U. The postal

service's marked indication on the envelope "UNDELIVERABLE AS ADDRESSED", in the absence of further credited evidence, suggests that this notice was never presented to a responsible party who refused to accept the letter.

The postal carrier who purported to have attempted the delivery did not testify. The claimant presented testimony from a retired postal carrier, Delvecchio, who testified that in his opinion a postal carrier had attempted to deliver this notice to the proper address and the notice had been refused. See September 16, 2019 Transcript, pp. 40-46. Delvecchio, however, had never delivered mail to those premises, having worked during his career at other post offices. He also testified that he had never delivered mail to this respondent nor had he spoken to any letter carrier who had done so, see id., pp. 46-47, nor was he familiar with the procedure the respondent utilized for accepting mail or deliveries. See id., p. 49.

In Morgan, the issue we faced on appeal was a factual finding that the claimant properly effectuated service upon the respondent, with the respondent challenging that factual conclusion on appeal. In the present matter, the commissioner resolved the same factual issue adversely to the claimant. While in Morgan, supra, the commissioner concluded "'substantial evidence' indicates that the postal service attempted to obtain the signature of a Hot Tomato's representative on five occasions" in this case, the commissioner concluded "for reasons unknown, the mail carrier failed to deliver the notice to the Respondent-Employer." Conclusion, ¶ B. The commissioner, after reviewing the exhibits and hearing the testimony of Delvecchio and Costa, reached a different factual determination than the commissioner in Morgan reached as to whether service had been actually attempted at the respondent's business. This factual

determination as to whether service had actually occurred is a matter an appellate panel cannot disturb on appeal. See Dudley v. Radio Frequency Systems, 4995 CRB-8-05-9 (July 17, 2006).

The claimant also asserts that it was error to deny his motion to correct. Our review of the motion to correct suggests that, for the most part, the claimant merely sought to have the commissioner amend her factual findings so that they would comport with the claimant's preference as to the inferences to be drawn. As our Appellate Court noted in Diaz v. Dept. of Social Services, 184 Conn. App. 538, 558 (2018), *cert. denied*, 330 Conn. 971 (2019), where a movant merely seeks to have the commissioner conform his findings to the [movant's] view of the facts the motion will be denied.[6]

Our review of the record indicates that the trier's conclusion that the notice had not been delivered to the respondent-employer prior to the January 18, 2018 informal hearing is supported by the record before her. The conclusions and factual findings of a commissioner will not be disturbed unless without evidence, contrary to law or based on unreasonable or impermissible factual inferences. See Sapko v. State, 305 Conn. 360 (2012) and Fair v. People's Savings Bank, 207 Conn. 535, (1988). We find no error on the part of the commissioner.

Commissioners William J. Watson III and David W. Schoolcraft concur in this Opinion.

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[6] We do note that the claimant sought to add a finding that Delvecchio had testified that the label stating "Undeliverable as addressed," and "Unable to forward," was merely a generic stamp which "goes on anything that needs to be returned." We presume that had the commissioner found that statement persuasive she would not have cited the "undeliverable" wording as one of the bases for her conclusion that the respondent-employer did not receive proper notice. A commissioner is not obligated to restate all of the testimony a party's witness if it does not affect the outcome of her decision. In this case the assertion, if true, would not compel a different result.