CASE NO. 6446 CRB-1-21-10 CLAIM NO. 100223387	:	COMPENSATION REVIEW BOARD
DAVID EASTWOOD CLAIMANT-APPELLEE	:	WORKERS' COMPENSATION COMMISSION
v.	:	OCTOBER 14, 2022
ICNO PAINTING, INC. EMPLOYER		
and		
ACCIDENT FUND INSURANCE OF AMERICA INSURER RESPONDENTS-APPELLANTS		

APPEARANCES:

The claimant was represented by Mario Cerame, Esq., and Timothy Brignole, Esq., Brignole, Bush & Lewis, LLC, 73 Wadsworth Street, Hartford, CT 06106.

The respondents were represented by Michael W. Vernile, Esq., and Robert A. Skolnik, Esq., Montstream Law Group, 175 Capital Boulevard, Suite 204, Rocky Hill, CT 06067.

This Petition for Review from the October 1, 2021 Finding and Award by Toni M. Fatone, the Administrative Law Judge acting for the First District, was heard March 25, 2022 before a Compensation Review Board panel consisting of Chief Administrative Law Judge Stephen M. Morelli and Administrative Law Judges Daniel E. Dilzer and Carolyn M. Colangelo.

OPINION

STEPHEN M. MORELLI, CHIEF ADMINISTRATIVE LAW JUDGE. The respondents have petitioned for review from the October 1, 2021 Finding and Award of Toni M. Fatone, Administrative Law Judge acting for the First District. We find some ambiguities in the decision and accordingly remand the decision, in part, for further findings with respect to the imposition of fines and penalties.[1]

Formal hearing proceedings were conducted on March 10, 2021 and April 13, 2021 in the first district office of the Workers' Compensation Commission. The administrative law judge cited as issues for determination General Statutes § 31-275, compensability;[2] General Statutes §§ 31-275 (9) and (10), employer-employee relationship;[3] General Statutes § 31-310, compensation rate/average weekly wage;[4]

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

[2] General Statutes § 31-275 (1) defines a compensable injury as an injury "[a]rising out of and in the course of his employment or an accidental injury happening to an employee or an occupational disease of an employee originating while the employee has been engaged in the line of the employee's duty in the business or affairs of the employer upon the employer's premises, or while engaged elsewhere upon the employer's business or affairs by the direction, express or implied, of the employer . . . ."

[3] General Statutes § 31-275 (9) (A) (i), states: "'Employee' means any person who: Has entered into or works under any contract of service or apprenticeship with an employer, whether the contract contemplated the performance of duties within or without the state." General Statutes § 31-275 (10), in relevant part, defines employer as "any person, corporation, limited liability company, firm, partnership, voluntary association, joint stock association, the state and any public corporation within the state using the services of one or more employees for pay, or the legal representative of any such employer . . . ."

[4] General Statutes § 31-310 (a) states, in relevant part, that "the average weekly wage shall be ascertained by dividing the total wages received by the injured employee from the employer in whose service the employee is injured during the fifty-two calendar weeks immediately preceding the week during which the employee was injured, by the number of calendar weeks during which, or any portion of which, the employee was actually employed by the employer, but, in making the computation, absence for seven consecutive calendar days, although not in the same calendar week, shall be considered as absence for a calendar week." General Statutes § 31-310 (b) states, in relevant part, that "[e]ach August fifteenth, the chairman of the Workers' Compensation Commission, in consultation with the advisory board, shall publish tables of the average weekly wage and seventy-five percent of the average weekly wage after being reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contribution Act, to be effective the following October first . . . ."

General Statutes § 31-294d, medical treatment;[5] General Statutes § 31-307, total incapacity benefits;[6] General Statutes § 31-308 (a), temporary partial disability benefits;[7] General Statutes § 31-288 (b), penalties for undue delay;[8] and General Statutes § 31-300,

[5] General Statutes § 31-294d (a) (1) states: "The employer, as soon as the employer has knowledge of an injury, shall provide a competent physician, surgeon, or advanced practice registered nurse to attend the injured employee and, in addition, shall furnish any medical and surgical aid or hospital and nursing service, including medical rehabilitation services and prescription drugs, as the physician, or advanced practice registered nurse, or surgeon deems reasonable or necessary. The employer, any insurer acting on behalf of the employer, or any other entity acting on behalf of the employer or insurer shall be responsible for paying the cost of such prescription drugs directly to the provider. If the employer utilizes an approved providers list, when an employee reports a work-related injury or condition to the employer, the employer shall provide the employee with such approved providers list within two business days of such reporting."

[6] General Statutes § 31-307 (a) states: "If any injury for which compensation is provided under the provisions of this chapter results in total incapacity to work, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of the injured employee's average weekly earnings as of the date of the injury, calculated pursuant to section 31-310, after such earnings have been reduce by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act made from such employee's total wages received during the period of calculation of the employee's average weekly wage pursuant to section 31-310; but the compensation shall not be more than the maximum weekly benefit rate set forth in section 31-309 for the year in which the injury occurred. No employee entitled to compensation under this section shall receive less than twenty per cent of the maximum weekly compensation rate, as provided in section 31-309, provided the minimum payment shall not exceed seventy-five per cent of the employee's average weekly wage, as determined under section 31-310, and the compensation shall not continue longer than the period of total incapacity."

[7] General Statutes § 31-308 (a) states: "If any injury for which compensation is provided under the provisions of this chapter results in partial incapacity, the injured worker shall be paid a weekly compensation equal to seventy-five per cent of the difference between the wages currently earned by an employee in a position comparable to the position held by the injured employee before his injury, after such wages have been reduced by any deductions for federal or state taxes, or both, and for the federal Insurance Contributions Act in accordance with section 31-310, and the amount he is able to earn after the injury, after such amount has been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act in accordance with section 31-310, except that when (1) the physician or the advanced practice nurse attending an injured employee certifies that the employee is unable to perform his usual work but is able to perform other work, (2) the employee is ready and willing to perform other work in the same locality and (3) no other work is available, the employee shall be paid his full weekly compensation subject to the provisions of this section. Compensation paid under this subsection shall not be more than one hundred per cent, raised to the next even dollar, of the average weekly earnings of production and related workers in manufacturing of the state, as determined in accordance with the provisions of section 31-309, and shall continue during the period of partial incapacity, but no longer that five hundred twenty weeks. If the employer procures employment for an injured employee that is suitable to his capacity, the wages in such employment shall be taken as the earning capacity of the injured employee during the period of the employment."

[8] General Statutes § 31-288 (b) (1) states: "Whenever through the fault or neglect of an employer or insurer, the adjustment or payment of compensation under this chapter is unduly delayed, such employer or insurer may be assessed by the commissioner hearing the claim a civil penalty of not more than one thousand dollars for each such case of delay, to be paid to the claimant. (2) Whenever either party to a claim under this chapter has unreasonably, and without good cause, delayed the completion of the hearings on such claim, the delaying party or parties may be assessed a civil penalty of not more than five hundred dollars by the commissioner hearing the claim for each such case of delay. Any appeal of a penalty assessed pursuant to this subsection shall be taken in accordance with the provisions of section 31-301."

award of interest and attorneys' fees for undue delay.[9]

The administrative law judge made the following findings that are pertinent to our review. The claimant sustained serious injuries to his low back, left hip, both legs, and both knees on October 21, 2020, while working for the respondent-employer, ICNO Painting, Inc. See Findings, ¶ 1. Although the employer contended that the claimant was an independent contractor, the administrative law judge did not find him credible and found that an employer-employee relationship existed on the date of the claimant's injuries. See Conclusion, ¶ F. She, therefore, ordered the respondents to accept the compensability of the injuries sustained on October 21, 2020, to pay for all medical treatment and expenses incurred to the date of the decision, and to pay the claimant total disability benefits at the base compensation rate of $691.81 from the date of the accident until a form 36 was received and approved by an administrative law judge.[10] See Orders, ¶¶ I-III and Conclusions, ¶¶ H-I. The respondents did not appeal these orders.

In addition to the aforementioned findings, the administrative law judge found that the respondents' refusal to approve medical treatment was unreasonable pursuant to § 31-288 and that the respondents should pay the claimant's attorney's fees and costs for

[9] General Statutes § 31-300 states, in part, "[i]n cases where, through the fault or neglect of the employer or insurer, adjustments of compensation have been unduly delayed, the commissioner may include in the award interest at the rate prescribed in section 37-3a and a reasonable attorney's fee in the case of undue delay in adjustments of compensation and may include in the award in the case of undue delay in payments of compensation, interest at twelve per cent per annum and a reasonable attorney's fee. Payments not commenced within thirty-five days after the filing of a written notice of claim shall be presumed to be unduly delayed unless a notice to contest the claim is filed in accordance with section 31-297. In cases where there has been delay in either adjustment or payment, which delay has not been due to the fault or neglect of the employer or insurer, whether such delays were caused by appeals or otherwise, the commissioner may allow interest at such rate, not to exceed the rate prescribed in section 37-3a, as may be fair and reasonable, taking into account whatever advantage the employer or insurer, as the case may be, may have had from the use of the money, the burden of showing that the rate in such case should be less than the rate prescribed in section 37-3a to be upon the employer or insurer. In cases where the claimant prevails and the commissioner finds that the employer or insurer has unreasonably contested liability, the commissioner may allow to the claimant a reasonable attorney's fee."

[10] Orders, ¶ III refers to Conclusion, ¶ I but is actually referencing Conclusion, ¶ H.

undue delay as set forth in § 31-300. See Conclusions, ¶¶ J-K. The administrative law judge, however, did not make any findings with respect to the unreasonableness of the respondents' jurisdictional defense nor did she articulate the nature of the alleged undue delay. These are the findings that are the subject of this appeal.

The standard of review we are obliged to apply to an administrative law judge's findings and legal conclusions is well-settled. "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), *quoting* 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 [her] choice, if otherwise sustainable, may not be disturbed by a reviewing court." Fair v. People's Savings Bank, 207 Conn. 535, 540 (1988), *quoting* Del Vecchio v. Bowers, 296 U.S. 280, 287 (1935).

The Workers' Compensation Commission is a court of limited jurisdiction with the powers of the administrative law judges limited by the provisions of the Act. Thus, "[u]nless the [a]ct gives the [c]ommissioner the right to take jurisdiction over a claim, it cannot be conferred upon [the commissioner] by the parties either by agreement, waiver or conduct." Dombrowski v. New Haven, 194 Conn. App. 739, 748 (2019), *quoting*

Leonetti v. MacDermid, Inc., 310 Conn. 195, 216-17 (2013). An administrative law judge, therefore, can "exercise jurisdiction to hear a claim only under the precise circumstances and in the manner particularly prescribed by the enabling legislation." Id., 749.

Subject matter jurisdiction is "the power [of the court] to hear and determine cases of the general class to which the proceedings in question belong." Del Toro v. Stamford, 64 Conn. App. 1, 6 (2001), *quoting* Castro v. Viera, 207 Conn. 420, 427 (1988). In the context of workers' compensation claims, it is implicated only with issues concerning the existence of an employee-employer relationship or the proper initiation of the claim. See id., 8. In the current action, the respondents argued that the administrative law judge did not have subject matter jurisdiction to hear the claim because the claimant was not in an employee-employer relationship with the respondent. Rather, the respondents argued that the claimant was an independent contractor at the time of his accident.

As set forth in General Statutes § 31-275 (9) (A) (i), an employee is any person who "[h]as entered into or works under any contract of service or apprenticeship with an employer, whether the contract contemplated the performance of duties within or without the state." General Statutes § 31-275 (10), in relevant part, defines employer as "any person, corporation, limited liability company, firm, partnership, voluntary association, joint stock association, the state and any public corporation within the state using the services of one or more employees for pay." An independent contractor, on the other hand, is defined as "one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of

his employer, except as to the result of his work. . . ." (Citations omitted; internal quotation marks omitted.) Chute v. Mobil Shipping & Transportation Co., 32 Conn. App. 16, 20 (1993), *quoting* Spring v. Constantino, 168 Conn. 563, 573 (1975).

The question of whether a worker is an employee rather than an independent contractor arises frequently within this forum, commonly in the context of the construction and remodeling businesses. "The determination of the status of an individual as an independent contractor or employee is often difficult . . . and, in the absence of controlling considerations, is a question of fact. . . . . " for the administrative law judge. (Citations omitted; internal quotation marks omitted.) Id., 19-20, *quoting* Latimer v. Administrator, 216 Conn. 237, 249 (1990). The Connecticut Supreme Court has held that the right to control test, utilized in Connecticut, applies when the worker "renders a service for the other and when what he agrees to do, or is directed to do, is subject to the will of the other in the mode and manner in which the service is to be done and in the means to be employed in its accomplishment, as well as in the result to be attained." Hanson v. Transportation General, Inc., 45 Conn. App. 441 (1997), *aff'd in part*, 245 Conn. 613 (1998), *quoting* Kaliszewski v. Weathermaster Alsco Corp., 148 Conn. 624, 629 (1961).

The administrative law judge in the current matter, after hearing all of the evidence, found that the claimant was one of four painters from Connecticut who were sent to two jobsites in New Hampshire in October 2020. She further found that the claimant was transported to New Hampshire and to the jobsites by the respondent (Mr.

Robert Iacino) hereinafter "respondent", the hotel in which he stayed was paid for by the respondent, he was assigned work by the respondent, and he was instructed on the manner in which the work should be performed by the respondent. See Findings, ¶¶ 2-4, 6-7. Furthermore, the administrative law judge found that the respondent provided the claimant with all of the painting materials and equipment to perform the job. See Findings, ¶ 8. The respondent was the only person in contact with the general contractor and the claimant was paid by the respondent at the end of each work week. See Findings, ¶ 9. Based on these findings, the administrative law judge held that the respondent's testimony was not credible and/or persuasive, and that the claimant was an employee of the respondent at the time of his accident. See Conclusions, ¶¶ B, F. This aspect of the decision has not been appealed and, therefore, is not a subject for review by this panel.

The respondents have, however, appealed the finding that they are liable for penalties and attorneys' fees pursuant to General Statutes §§ 31-288 and 31-300. In their appeal, the respondents have argued that, since their jurisdictional defense was asserted in good faith, penalties for unreasonable contest should not be assessed against them. The Compensation Review Board has previously held that,

> Pursuant to § 31-300, there are four separate circumstances in which the trial commissioner is empowered to penalize an employer or insurer. Where adjustments of payments of compensation have been unduly delayed due to the fault or neglect of the employer or the insurer, the commissioner may award interest and a reasonable attorney's fee. Where adjustments or payments of compensation have been delayed in the absence of fault by the employer or insurer, the commissioner may allow interest 'as may be fair and reasonable.' Where the claimant prevails in an action and the trier finds that the employer or insurer has unreasonably contested liability, the commissioner may allow to the claimant a reasonable attorney's fee. Finally, where total or partial incapacity payments are discontinued without (1) the issuance of proper notice as required by § 31-296 and (2) a written

> approval of such cessation by the commissioner, the trier is *required* to award the claimant a reasonable attorney's fee and interest on the prematurely halted or reduced payments. (Emphasis in original.)

Abrahamson v. State/Department of Public Works, 5054 CRB-2-06-1 (January 9, 2007), *quoting* Cirrito v. Resource Group Ltd. of Conn., 4248 CRB-1-00-6 (June 19, 2001).

The element that is the alleged basis for the penalties imposed in this matter is that which refers to the claimant prevailing in his action concomitant with a finding that the respondents unreasonably contested liability. In Wierzbicki v. Federal Reserve Bank of Boston, 4147 CRB-1-99-11 (December 19, 2000), *appeal dismissed*, A.C. 21533 (January 14, 2001), this panel noted that the compensability of the claimant's case must be clear as to be indisputable by a reasonable person in order to implicate this element. Additionally, in Sanchez v. Steben's Motors, 3247 CRB-6-96-1 (December 24, 1996), this panel stated that, "as long as there is some evidence to support the requisite finding of unreasonable delay . . . the commissioner's decision to award attorneys' fees based on that delay must be affirmed." Thus, it is necessary for the administrative law judge to "articulate the basis for the finding of unreasonable contest." Blaha v. Logistec Connecticut, Inc., 4544 CRB-3-02-6 (July 9, 2003). If a Finding and Award fails to reveal any factual findings that support the conclusion that a respondent's defense rises to the level of an unreasonable contest, it cannot be affirmed. See Hudson v. State/Dept. of Correction, 4582 CRB-3-02-11 (October 31, 2003).

In Ortiz v. Highland Sanitation, 4439 CRB-4-01-9 (November 13, 2002), this board held that "[b]ecause we would be venturing a guess as to the trier's intent either way, the best solution is for us to remand this case to the trier with instruction that he clarify the status and origin of the award of interest . . . ." Subsequent thereto, in Hudson,

supra, we held that since the record was silent regarding the basis for the finding of unreasonable contest pursuant to § 31-300, the issue needed to be remanded for an articulation of the issue.

As set forth above, the administrative law judge in the current action made numerous findings regarding the existence of an employer-employee relationship. She also specifically noted that she did not find the respondent-employer credible with respect to his testimony regarding the claimant's employment status. Despite these findings, however, the administrative law judge did not specifically identify the rationale behind her findings of unreasonable contest. She was silent on whether the jurisdictional defense raised by the respondents was frivolous or unreasonable and, if she so found, the basis for such findings. Without such findings, this board has insufficient information to determine the appropriateness of her conclusion. Consequently, the question of § 31-300 must be remanded for further findings and clarification.

The administrative law judge also held that the respondents' refusal to approve medical treatment was unreasonable pursuant to § 31-288 and, therefore, subject to penalties for undue delay. In her decision, she stated, "I find, under the facts presented, the Respondent's refusal to approve medical treatment was unreasonable and therefore find penalties are justified pursuant to Section 31-288 of the Connecticut General Statutes, and a subsequent hearing is to be scheduled on the issues of Penalties For Undue Delay." Conclusion, ¶ J.

"For a respondent to be penalized for undue delay under this statute, the trial commissioner must determine the action or inaction by the respondent 'unduly delayed' benefits due the claimant. The trial commissioner must further find these delays were

due to 'fault or neglect.'" Ghazal v. Cumberland Farms, 5397 CRB-8-08-11 (November 9, 2009), *quoting* Kuhar v. Frank Mercede & Sons, Inc., 5250 CRB-7-07-7 (July 11, 2008). "While the black-letter law governing the issue of sanctions is that such a decision is left to the discretion of the trial commissioner, . . . such discretion is not unlimited and an appellate panel may reverse a judgment when it is inconsistent with the facts on the record." (Internal citation omitted.) Id.

As with the findings regarding unreasonable contest, the administrative law judge did not explain the nature of any undue delay in the provision of medical treatment, especially in light of the fact that a review of the record documents the following:

(1) The claimant was injured on October 21, 2020; a form 30C was dated December 2, 2020 with receipt by the commission on December 4, 2020; and forms 43 were dated November 19, 2020 and February 9, 2021, with receipt by the commission on November 27, 2020 and February 11, 2021, respectively.

(2) The February 9, 2021 form 43 contended, in part, that the injury did not arise out of or in the course and scope of the claimant's employment. See Administrative Law Judge's Exhibits 1-3.

(3) Formal hearings were conducted on March 10, 2021 and April 13, 2021, i.e., they were completed approximately four months after the receipt of the claimant's notice of claim. The administrative law judge's decision was issued on October 1, 2021.

(4) The claimant admitted medical records into evidence documenting some initial treatment and diagnostic studies having occurred at least through January 19, 2021. See Claimant's Exhibits A-E.

The trial and decision, though, does not articulate the nature of the undue delay nor the findings that supported a conclusion of such alleged delay. Furthermore, it does not explain which actions or inactions by the respondents constitute fault or neglect. "The 'plain language' [rule] of the statute (§ 31-288(b) C.G.S.) requires a trial commissioner to reach specific findings in support of an order for sanctions." Ghazal v. Cumberland Farms, 5397 CRB-8-08-11 (November 17, 2009) *citing* Kuhar v. Frank Mercede & Sons, Inc., 5250 CRB-7-07-7 (July 11, 2008). "For a respondent to be penalized for undue delay under this statute, the trial commissioner must determine the action or inaction by the respondent 'unduly delayed' benefits due the claimant. The trial commissioner must further find these delays were due to 'fault or neglect.'" (Footnote omitted.) Id. Thus, the absence of such specific findings make it impossible for this board to assess the appropriateness of the imposition of § 31-288 penalties. This finding regarding § 31-288 penalties must, therefore, also be remanded for further clarification.

There is error; the October 1, 2021 Finding and Award of Toni M. Fatone, Administrative Law Judge acting for the First District, is accordingly remanded for further consideration, articulation, and clarification with respect to the findings of unreasonable contest and undue delay pursuant to §§ 31-300 and 31-288. Until such articulation and clarification is set forth, the question of the amount of any potential penalties is not ripe for appellate review. The remainder of the trial decision was not the subject of this appeal and, therefore, remains valid.

Administrative Law Judges Daniel E. Dilzer and Carolyn M. Colangelo concur in this Opinion.