CHANG v. PIZZA HUT OF AMERICA, NO. 4122 CRB-6-99-9 (7-17-2001)

ALVA CHANG, CLAIMANT-APPELLEE v. PIZZA HUT OF AMERICA, INC., EMPLOYER, and AMERICAN MANUFACTURERS MUTUAL INSURANCE CO., KEMPER INSURANCE COMPANIES, INSURER, RESPONDENTS-APPELLEES and SECOND INJURY FUND, RESPONDENT-APPELLANT

CASE NO. 4122 CRB-6-99-9 CLAIM NO. 600003735Compensation Review Board WORKERS' COMPENSATION COMMISSION

JULY 17, 2001

The pro se claimant was not represented at oral argument.

The respondent employer and its insurer were represented by Polly L. Orenstein, Esq., 2750 Dixwell Avenue, P.O. Box 187289, Hamden, CT 06518.

The Second Injury Fund was represented by Taka Iwashita, Esq., Assistant Attorney General, 55 Elm Street, P.O. Box 120, Hartford, CT 06141-0120.

This Petition for Review from the September 8, 1999 Finding and Award of the Commissioner acting for the Sixth District was heard March 30, 2001 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners George A. Waldron and Ernie R. Walker.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN.

The Second Injury Fund has petitioned for review from the September 8, 1999 Finding and Award of the Commissioner acting for the Sixth District. In that decision the trial commissioner concluded that the respondents substantially complied with the re-notification requirements of § 31-349 (e)

by attempting personal delivery of the re-notice on September 29, 1995 (prior to the October 1, 1995 filing date), and when that delivery was rejected by immediately sending said re-notice to the Fund via certified mail which was received by the Fund on October 2, 1995. In support of its appeal, the Fund contends that § 31-349 (e) requires that notice be provided to the Fund prior to October 1, 1995 by certified mail only, and that § 31-349 (e) must be strictly construed. We find no error.

Section 31-349 (e) requires re-notification of pending claims for transfer.[1] Specifically, § 31-349 (e) requires: "All claims for transfer of injuries for which the fund has been notified prior to July 1, 1995, shall be deemed withdrawn with prejudice, unless the employer or its insurer notifies the custodian of the fund by certified mail prior to October 1, 1995, of its intention to pursue transfer pursuant to the provisions of this section." October 1, 1995 fell on a Sunday.

In the instant case, the parties stipulated that the claim medically qualifies for transfer and that the respondents' original notice to the Fund was timely. The trial commissioner further found that on Friday, September 29, 1995, Ed Berch, a representative of the respondent insurer, personally delivered the re-notice of the claim to Kevin Saba, the then head of the Second Injury Fund. The trial commissioner found that Saba "advised him he would not accept personal service/presentation . . . but had in fact accepted other hand delivered renotice packets from other carriers." (Finding ¶ 6). On September 29, 1995, Mr. Berch returned to his office and sent the re-notice by certified mail to the Fund. As the Fund was closed on Sunday, October 1, 1995, it did not receive the certified re-notice until Monday, October 2, 1995.

The trial commissioner noted that the facts of the instant case were on point with the facts in Correnti v. Grossman's, Inc., 3858 CRB-8-98-7
(Aug. 31, 1999). We agree. In Correnti, the facts are indeed

similar, including the fact that Mr. Berch in both cases attempted personal service of the re-notice to Mr. Saba on September 29, 1995, and was refused despite Mr. Saba's acknowledgment that he had previously accepted personal service of re-notices.

In support of its appeal, the Fund relies on the board's decision inSanders v. GAE Services, 3481 CRB-5-96-11 (April 29, 1998) which held that § 31-349 (e) requires renotice to be received by the Fund prior to October 1, 1995. We do not find Sanders, supra, to be controlling because in Sanders, the re-notice was sent by mail to the Fund and was received on October 2, 1995, whereas here the respondents' representative attempted to present re-notice in person on September 29, 1995. prior to the October 1, 1995 filing date. In both this case and in Correnti, supra, the trial commissioners concluded that said in-person delivery substantially complied with § 31-349 (e). For the same reasons that we affirmed the trial commissioner's decision in Correnti, supra, we now affirm the trial commissioner in the instant case.

We agree with the trial commissioner that the attempted personal delivery of the re-notice on September 29, 1995 substantially complied with the re-notice requirements of § 31-349 (e). It is undisputed that the respondents' representative attempted delivery of the re-notice in a timely manner on September 29, 1995. As in Correnti, supra, in the instant case the Fund has not alleged, either at the trial level or in its appeal, that any prejudice would have resulted by accepting the respondents' personal delivery in the instant case. Moreover, we do not agree with the Fund's contention that it was irrelevant whether or not Mr. Saba accepted personal service of re-notices prior to September 29, 1995. (Fund's Brief, pp. 3-4). The trial commissioner specifically found that Mr. Saba "had in fact accepted other hand delivered renotice packets from other carriers." (Finding ¶ 6) (emphasis added). This finding is supported by the testimony of Ed Berch

(March 29, 1999 Transcript, p. 7) and the Fund did not introduce any contrary evidence. Indeed, the Fund chose not to present testimony from Kevin Saba.

This board is "obligated to hear the appeal on the record of the hearing before the commissioner and not to retry the facts." Riciglianov. J. J. Ryan Corp., 53 Conn. App. 158, 160 (1999). "The conclusions drawn by him from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them." Id., 160-61 (quoting Castro v. Viera, 207 Conn. 420, 435 (1988). In the instant case, the trial commissioner found that the respondents' representative personally brought the re-notice to Kevin Saba at the Fund on September 29, 1995, and that Saba refused delivery although in the past he had accepted personal delivery. (Finding ¶ 6). The trial commissioner's conclusion that said in-person delivery substantially complied with § 31-349 (e) is not contrary to law and must be upheld.

The trial commissioner's decision is affirmed.

Commissioners George A. Waldron and Ernie R. Walker concur.

CERTIFICATION THIS IS TO CERTIFY THAT a copy of the foregoing was mailed this 17th day of July 2001 to the following parties:

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[1] We note that our Supreme Court has concluded that “the re-notification provision contained in § 31-349, as revised in 1995, has no constitutional flaw that is cognizable either under the contract clause or the due process clause of the United States constitution.” Cece v. Felix Industries, Inc., 248 Conn. 457, 466
(1999).