CASE NO. 6525 CRB-2-23-12 CLAIM NOS. 800210040; 800210038; 800207534; 800207382; 800207383; 800207384; 800207535; & 800207742	:	COMPENSATION REVIEW BOARD
TACHICA CALLAHAN CLAIMANT-APPELLANT CROSS-APPELLEE	:	WORKERS' COMPENSATION COMMISSION
v.	:	NOVEMBER 22, 2024
ICARE HEALTH MANAGEMENT D/B/A SILVER SPRING CARE CENTER EMPLOYER		
and		
MEMIC INDEMNITY COMPANY INSURER RESPONDENTS-APPELLEES CROSS-APPELLANTS		

APPEARANCES:

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

The respondents-appellees were represented by Christopher Buccini, Esq., Strunk, Dodge, Aiken, Zovas, L.L.C., 200 Corporate Place, Suite 100, Rocky Hill, CT 06067.

This Petition for Review from the November 30, 2023 Finding and Dismissal by Soline M. Oslena, the Administrative Law Judge acting for the Second District, was heard August 23, 2024 before a Compensation Review Board panel consisting of Chief Administrative Law Judge Stephen M. Morelli and Administrative Law Judges Shanique D. Fenlator and Benjamin Blake.[1]

[1] The claimant filed a motion to admit additional evidence on January 12, 2024. We ruled on this motion in a Ruling Re: Motion to Submit Additional Evidence issued on May 10, 2024 denying her motion.

OPINION

STEPHEN M. MORELLI, CHIEF ADMINISTRATIVE LAW JUDGE. Both the claimant and the respondents have commenced timely appeals from the November 30, 2023 Finding and Dismissal by Administrative Law Judge Soline M. Oslena. The administrative law judge found that the claims filed in these matters were jurisdictionally untimely and dismissed the claims as they were brought more than one year after the claimant alleged she had been injured. The trier determined the claimant failed to establish that these injuries were the result of an "occupational disease" as defined in our statute,[2] which allows for a longer statute of limitations.[3] The claimant appealed from that determination. The respondents appealed from the inclusion of findings in the Finding and Dismissal which they believe address the merits of the claims and go beyond determining whether the commission had jurisdiction over them.

Having reviewed these matters, we conclude that the administrative law judge could have reasonably determined that the injuries alleged by the claimant did not emanate from an occupational disease as she presented no expert opinions that established her occupation was unusually susceptible to those types of injuries. See Malchik v. Division of Criminal Justice, 266 Conn. 728, 734-35 (2003). We, therefore,

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[2] General Statutes § 31-275 (15) provides: "'Occupational disease' includes any disease peculiar to the occupation in which the employee was engaged and due to causes in excess of the ordinary hazards of employment as such, and includes any disease due to or attributable to exposure to or contact with any radioactive material by an employee in the course of his employment."

[3] General Statutes § 31-294c (a) provides in relevant part: "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."

affirm the dismissal of this claim as jurisdictionally untimely. As for the respondents' appeal, we conclude that once there was a determination that the commission lacked jurisdiction, no further inquiry as to the merits of this claim should have occurred. See Mankus v. Mankus, 4958 CRB-1-05-6 (August 22, 2006), *aff'd*, 107 Conn. App. 585 (2008), *cert. denied*, 288 Conn. 904 (2008). We, therefore, grant the relief sought by the respondents in their appeal.

We will summarize the relevant facts found by the administrative law judge who took administrative notice of eight separate forms 30C.[4] She also noted the claimant submitted thirty-one exhibits and the respondents submitted ten exhibits. The administrative law judge identified the "sole issue for determination" to be whether the claims regarding the claimant's alleged injuries had been filed in a timely manner under the statute so as to provide subject matter jurisdiction to the commission.

The administrative law judge found the claimant had been employed by the respondent as a certified nursing assistant (CNA) from December 31, 2015 to October 27, 2017. The claimant testified that her work duties were very labor intensive and required heavy lifting of patients weighing up to 200 pounds. See Findings, ¶ 6, *citing* May 1, 2023 Transcript, pp. 55-56. Her initial date of injury was June 19, 2017 and included claimed injuries to her lumbar spine and left hip as a result of a lifting incident. The

[4] 1. D.O.L. October 2, 2017 file # 800210040 no 30C on file; Form 43 received November 2, 2020 - spine and hips; 2. D.O.L. October 28, 2017 file # 800210038 no 30C on file; Form 43 received November 3, 2020, pelvis, spine & hips; 3. D.O.L. September 27, 2018 file # 800207534 30C received February 14, 2020 bilateral shoulders; Form 43 received February 4, 2020; 4. D.O.L. December 28, 2019 file # 800207382 30C received January 28, 2020 pelvic; Form 43 received February 4, 2020; 5. D.O.L. December 24, 2019 file # 800207383 30C received January 28, 2020 left hip; Form 43 received February 14, 2020; 6. D.O.L. December 31, 2019 file # 800207535 30C received January 28, 2020 left hip; Form 43 received February 14, 2020; 7. D.O.L. February 11, 2020 file # 800207535 30C received February 14, 2020, neck, back, skull; Form 43 received March 2, 2020; 8. D.O.L. February 28, 2020 file # 800207742 30Cs received March 4, 2020 and March 12, 2020 lumbar spine and left hip; Form 43 received March 26, 2020. Another 30C received November 17, 2022 left hip; Form 43 received December 2, 2022.

claim dated October 31, 2017 was settled on November 19, 2019 by a full and final stipulation agreement.

The claimant now contends that she has suffered sequalae of that original injury and her left hip osteoarthritis is the result of an occupational disease, as her symptoms have progressed since the initial June 19, 2017 injury. While noting the claimant's testimony and voluminous medical documentation as to the impact of the June 2017 injury, the administrative law judge found that none of the medical reports "specifically addresses how her left hip osteoarthritis, and any other injuries are distinctively associated with or peculiar to her occupation as a CNA with the respondent." Findings, ¶ 16. Based on this record, the administrative law judge concluded that while the evidence supported a finding that the claimant sustained a specific injury as a result of her employment on June 19, 2017, "the claimant failed to prove that her alleged injuries were peculiar or more likely to be caused by her occupation as a certified nursing assistant than would other kinds of manual labor employment carried out under the same circumstances." Conclusion, ¶ G. Furthermore, since the administrative law judge held that the claimant's injury more closely resembled a repetitive trauma injury, rather than an occupational disease, she concluded that the claims were time-barred because they were not filed within the one-year jurisdictional requirements of General Statutes § 31-294c.[5] The administrative law judge, therefore, dismissed the claims as a result of untimely notice that deprived the commission of jurisdiction.

[5] Only the initial two claims, 800210040 and 800210038, which the administrative law judge took administrative notice of, were related to the time period in which the claimant was employed by the respondents.

Both the claimant and the respondents filed motions to correct. The claimant's motion sought wholesale changes to the finding by incorporating medical evidence that she claimed established that she had sustained her injury as the result of an occupational disease. The respondents sought to have five of the individual conclusions stricken from the finding because they addressed the merits as to whether the claimant's condition was due to a compensable injury despite the issue for the formal hearing being limited to a determination as to jurisdiction. Both motions were denied in their entirety.

On appeal, we generally extend deference to the decisions made by the administrative law judge. "As 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." Daniels v. Alander, 268 Conn. 320, 330 (2004), *quoting* Burton v. Mottolese, 267 Conn. 1, 54 (2003). The Compensation Review Board cannot retry the facts of the case and may only overturn the findings of the administrative law judge if they are without evidentiary support, contrary to the law, or based on unreasonable or impermissible factual inferences. See Kish v. Nursing & Home Care, Inc., 248 Conn. 379, 384 (1999) and Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988).

The singular question that the administrative law judge needed to resolve was whether the Workers' Compensation Commission had jurisdiction over the claims. No mention was made in the decision regarding the multiple dates of loss alleged by the claimant and whether an employer-employee relationship existed on those dates. Instead, the primary focus was on whether the claimant's alleged injuries should be found to be "occupational disease" as contemplated by statute and case law. If the claimant did not

sustain her burden of proof, then the commission lacked subject matter jurisdiction and, as we held in Mankus, "[o]nce a determination is reached that we lack subject matter jurisdiction no further inquiry is warranted." Id. As noted above, the administrative law judge focused her analysis on the question of "occupational disease." In doing so, she determined that none of the expert opinions presented by the claimant stated that the nature of her injury was peculiar to her occupation as a certified nursing assistant. Having reviewed the record herein, we find that conclusion was reasonable.

The longstanding precedent regarding the burden of proof for occupational diseases is that the condition must be "peculiar to the occupation."

> Section 31-275 (15) defines "[o]ccupational disease" as "any disease peculiar to the occupation in which the employee was engaged and due to causes in excess of the ordinary hazards of employment as such, and includes any disease due to or attributable to exposure or to contact with any radioactive material by an employee in the course of his employment."
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> "In interpreting the phrase occupational disease, we have stated that the requirement that the disease be peculiar to the occupation and in excess of the ordinary hazards of employment, refers to those diseases in which there is a causal connection between the duties of the employment and the disease contracted by the employee. In other words, [the disease] need not be unique to the occupation of the employee or to the workplace; it need merely be so distinctively associated with the employee's occupation that there is a direct causal connection between the duties of the employment and the disease contracted. Hansen v. Gordon, 221 Conn. 29, 35, 602 A.2d. 560 (1992). Thus, an occupational disease does not include a disease which results from the peculiar conditions surrounding the employment of the claimant in a kind of work which would not from its nature be more likely to cause it than would other kinds of employment carried on under the same conditions. Madeo v. I. Dibner & Bro., Inc., 121 Conn. 664, 667, 186 A. 616 (1936)." (Internal quotation marks omitted.) Crochiere v. Board of Education, 227 Conn. 333, 352-53, 630 A.2d 1027 (1993).

Malchik, supra, 734.

In Chappell v. Pfizer, 5139 CRB-2-06-10 (November 19, 2007), this board affirmed the finding and award of an occupational disease because the claimant presented expert testimony that his specific job duties at the Pfizer fermentation tanks were a direct cause of his ailments. Our Appellate Court affirmed that award and noted that "the duties of the plaintiff's employment are not common occurrences in most of the working world . . . ." Chappell v. Pfizer, Inc., 115 Conn. App. 702, 713 (2009). This board also found in favor of the claimant in Woodmansee v. Milford, 5768 CRB-4-12-7 (December 18, 2013), because he provided expert testimony that his Hepatitis C was an occupational disease peculiar to his employment as an emergency medical technician. Citing Estate of Doe v. Dept. of Correction, 268 Conn. 753 (2004), we concluded that the claimant's risk of sustaining such an infection at his job was significantly increased "because his employment as a correction officer in the emergency response unit was more likely to cause this disease 'than would other kinds of employment carried on under the same conditions.'" Id., *quoting* Madeo v. I. Dibner & Brother, Inc., 121 Conn. 664, 667 (1936).

Conversely, in Malchik, supra, the court held that the claimant "introduced no credible evidence that would support his claim that his cardiac condition was a disease peculiar to his occupation and due to hazards in excess of employment." Id., 733. Similarly, in DiGiovanni v. Lombardo Brothers Mason Brothers Contractors, 5869 CRB-5-13-8 (August 5, 2014), this board affirmed a dismissal of the claim because the claimant did not produce sufficient evidence that would support a finding that heavy labor as a mason was demonstrably distinguishable from heavy labor in other construction work or other occupations in which heavy labor is performed. As such, in

examining the statute and case law, it is clear that the "peculiar to employment" criteria must be proven in order to establish that an injury constitutes an occupational disease.

Having stated the relevant precedent, we turn to the current claimant's evidence. She argued that the opinions of Carrie Redlich of Yale Occupational and Environmental Medicine and Vincent Williams of UConn Health established that her injuries sustained working as a CNA was an occupational disease. See Compensation Review Board Transcript, August 23, 2024, pp. 5-6, 9, 17, 24; see also Claimant's Brief, p. 33. We have reviewed this evidence and hold that the administrative law judge could reasonably have found that it did not establish that the claimant sustained an occupational disease. Williams' December 7, 2020 report describes the claimant's injuries as "degenerative in nature" and further states "osteoarthritis is a disease process and not related to the type of work she did." Respondent's Exhibit 2. Redlich's reports do contain frequent opinions associating the claimant's injury with her employment. See in particular Claimant's Exhibit F (August 7, 2021 report), Exhibit P (February 2, 2023 report), Exhibit Q (June 21, 2021 report), and Exhibit T (September 8, 2022 report). See also Claimant's Exhibits G, U, X-Z, BB and EE. However, none of these reports contain any opinions as to whether the claimant's employment as a CNA made her more susceptible to sustaining her alleged injuries. As a result, the administrative law judge could readily determine the claimant's injury more closely resembled the injury in DiGiovanni, which was not due to an occupational disease, than the injuries in Chappell and Woodmansee.

While the administrative law judge reviewed all this evidence and concluded, consistent with Malchik, supra, and DiGiovanni, supra, that the claimant's injuries were not due to an occupational disease, the claimant argued that a number of cases actually

supported her position. The claimant further argued that had the administrative law judge properly considered the standards promulgated in Cashman v. McTernan School, Inc., 130 Conn. 401 (1943) and Malinowski v. Sikorsky Aircraft Corporation, 6216 CRB-8-17-8 (August 26, 2019), *aff'd*, 207 Conn. App. 266 (September 7, 2021), she would have reached a different result. We have reviewed those cases and conclude they are distinguishable from the current matter since they deal with the evidentiary standard to ascertain if an injury is compensable and do not discuss the elements of an occupational disease claim.

The claimant also relied upon Bode v. Connecticut Mason Contractors, The Learning Corridor, 130 Conn. App. 672 (2011), *cert. denied*, 302 Conn. 942 (2011), to argue that the administrative law judge did not consider all of her evidence and, had she done so, the result would have been different. We believe, however, having reviewed the record herein, that all of the evidence presented prior to the record closing was considered by the administrative law judge. In addition, none of the evidence herein would have compelled a different result had it been credited by the trier of fact. Therefore, Bode, supra, is unpersuasive.[6] The record herein simply does not establish that claimant's injury claims were peculiar to her employment.

We turn to the respondents' cross-appeal. They argued that it was error for the administrative law judge to have addressed the merits as to whether the claimant sustained a compensable injury as the formal hearing was limited to whether the

[6] The claimant's brief also cites a great deal of precedent which concerns issues beyond the scope of the formal hearing and the Finding and Dismissal, such as the standards for opening a stipulation. We have disregarded this precedent as not pertinent to the determination of this appeal.

commission had jurisdiction over the claim, and that question was resolved in a manner adverse to the claimant. We agree with the respondents.

We note that the respondents filed a motion to correct[7] seeking to have Findings, ¶¶ B-C, E-F and H stricken from the Finding and Dismissal, and this motion was denied in its entirety. The appeal seeks to have Findings, ¶¶ B-C and F stricken, so we will presume the respondents have abandoned their claim for relief as to Findings, ¶¶ E and H. See Christy v. Ken's Beverage, Incorporated, 5157 CRB-8-06-11 (December 7, 2007). Having reviewed the findings at issue, we find that they contain determinations as to the merits of the claims presented and go beyond a jurisdictional determination. At the formal hearing, the administrative law judge informed the parties "that the focus of today's formal hearing will be solely on jurisdiction" May 1, 2023 Transcript, p. 6 and "[w]e're proceeding, specifically, on the jurisdictional aspect of this, because everything else will flow from that." Id., p. 7. Having directed the parties at the inception of the hearing that the issues would be confined to matters of jurisdiction, it was error to address in the finding anything the parties were not directed to litigate. See Palm v. Yale University, 3923 CRB-3-98-10 (January 7, 2000). As we held in Henry v. Ansonia, 5674 CRB-4-11-8 (August 8, 2012), "[d]ue process requires that both parties be properly advised as to the relief under consideration at the formal hearing so that they may prepare their most persuasive arguments." Consequently, we grant the relief sought by the respondents.

[7] We note the claimant also filed a motion to correct which the administrative law judge denied in its entirety. We deem it an attempt to replace the conclusions reached by the administrative law judge with the claimant's view of the evidence. The administrative law judge was under no obligation to adopt the claimant's position. See Brockenberry v. Thomas Deegan d/b/a Tom's Scrap Metal, Inc., 5429 CRB-5-09-2 (January 22, 2010), *aff'd*, 126 Conn. App. 902 (2011) (per curiam).

The Finding and Dismissal by Soline M. Oslena, the Administrative Law Judge acting for the Second District is affirmed. Findings, ¶¶ B-C and F are directed to be stricken from the Finding and Dismissal.

Administrative Law Judges Shanique D. Fenlator and Benjamin Blake concur in this Opinion.