CASE NO. 03436 CRB-04-96-10
CLAIM NO. 0400017608 : COMPENSATION REVIEW BOARD

JAMES SCHIANO
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

BLISS EXTERMINATING : APRIL 8, 1998
EMPLOYER

and

SECOND INJURY FUND
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Serge Mihaly, Esq. and Andrew P. Dwyer II, Esq., Mihaly & Kascak, 925 White Plains Road, Trumbull, CT 06611.

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

This Petition for Review from the October 4, 1996 Finding and Dismissal of the Commissioner acting for the Fourth District was heard August 15, 1997 before a Compensation Review Board panel consisting of the Commission Chairman Jesse M. Frankl and Commissioners James J. Metro and John A. Mastropietro.

OPINION

JESSE M. FRANKL, CHAIRMAN. The claimant has petitioned for review from the October 4, 1996 Finding and Dismissal of the Commissioner acting for the Fourth District. He asserts several claims of error in conjunction with the commissioner's ruling that no part of a $30,000 settlement payment made to the claimant and his wife was

attributable to his wife's loss of consortium claim rather than his own workers' compensation claim. We affirm the trial commissioner's decision.

The claimant was injured in a February 25, 1986 work-related accident. An April 1989 voluntary agreement established that the claimant had a fifty percent permanent partial disability of his back, entitling him to 260 weeks of specific indemnity benefits. Pursuant to § 31-349, his claim was transferred to the Second Injury Fund on April 12, 1988. In a September 16, 1993 Finding and Award, he was found to be temporarily totally disabled from October 15, 1989 onward.

The claimant and his wife had earlier brought a lawsuit against the third party whose negligence was allegedly responsible for his accident. The employer and the Second Injury Fund both intervened pursuant to § 31-293(a). The case ultimately settled for $70,000, with the claimant and his wife receiving $30,000 in satisfaction of his claim for damages resulting from his injuries and her claim based on the loss of his consortium. Aetna, the employer's workers' compensation insurer, received $12,500 of the proceeds, and the Second Injury Fund got $10,000. However, Aetna's lien was $62,358, and the Fund's lien was for over $100,000. The commissioner found that the claimant and the Fund had reached a moratorium agreement that applied to 108 weeks of the claimant's permanent partial disability benefits. The claimant appealed that decision to this board.

In Schiano v. Bliss Exterminating, 13 Conn. Workers' Comp. Rev. Op. 45, 1852 CRB-4-93-9 (Dec. 7, 1994), we addressed the claimant's argument that Enquist v. General Datacom, 218 Conn. 19 (1991), only allows an employer to take credit against future workers' compensation payments if the claimant's recovery exceeds the amount of the employer's lien. We upheld the commissioner's interpretation of Enquist, stating that

"there is nothing in either Enquist or Love v. J.P. Stevens & Co., 218 Conn. 46 (1991), to indicate that an employer who has not recovered enough in a civil suit to fully reimburse it for claims paid to an injured employee loses its right to credit the amount of a claimant's award in the same suit against compensation payments not yet paid to the claimant. Indeed, such a result would contravene the established policy against an employee receiving compensation for the same injury from both the third party wrongdoer and the employer." Schiano, supra, 48. We also held that there was testimony in the record supporting the commissioner's finding that there was indeed an agreement regarding a $30,000 credit between the parties, and remanded the case solely for a determination as to "how much, if any, of the third-party settlement was made in satisfaction of the loss of consortium claim." Id., 49.[1]

On remand, the commissioner noted that the claimant's attorney had sent a letter to the Second Injury Fund's attorney on November 15, 1989 outlining the terms of the settlement and the $30,000 moratorium. This letter did not mention the loss of consortium claim. Similarly, another letter dated February 5, 1990 made no mention of the apportionment of the settlement proceeds for the loss of consortium claim. Although the claimant's attorney testified that he understood the loss of consortium claim to be worth up to one-half of the total settlement, the Fund's attorney testified that she did not recall any conversations with other attorneys regarding the setting aside of money for the loss of consortium claim. The commissioner found that letters sent by the Fund's attorney to the claimant's attorney supported this testimony. Further, the general release involving the third party claim did not mention a division for the loss of consortium, but

[1] A decision regarding a separate petition for review in this workers' compensation case was issued by this board in Schiano v. Bliss Exterminating, 3315 CRB-4-96-4 (decided May 16, 1997). The issues there are

did refer to "injuries sustained by James Schiano when he slipped and fell on the premises on February 26, 1986." The trial commissioner concluded that the claimant had not established that any portion of the settlement was attributable to the loss of consortium claim, and dismissed his claim for a reduction in the moratorium amount. The claimant has again appealed to this board.

Some of the issues that the claimant raises in his brief are matters that were discussed in our previous decision. We previously stated that we do not interpret Enquist, supra, as preventing an offset or moratorium where the claimant's total recovery does not exceed the full value of the insurer's lien. The claimant's contention that he would have been better off withdrawing his suit and seeking another commutation in order to get additional lump-sum money implies that it is the claimant's right to manipulate the workers' compensation system without regard for the statutory rights of employers. If a tortfeasor is responsible for a claimant's injuries, then the workers' compensation insurer should be reimbursed, assuming compliance with § 31-293. We will not revisit that issue any further, as we have already issued a decision on that matter. See Peters v. State of Connecticut/Southern Connecticut State University, 13 Conn. Workers' Comp. Rev. Op. 131, 134, 1616 CRB-5-92-12 (Feb. 1, 1995).

Similarly, we held in our 1994 decision that the commissioner did not err by requiring further hearings on the evidence regarding the payment of benefits. "The commissioner is hardly expected to render a decision on insufficient evidence if a subsequent hearing would clarify the matter. This is not the equivalent of a decisionmaker improperly failing to exercise his discretion, e.g., State v. O'Neill, 200 Conn. 268 (1986)." Schiano, supra, 49. The claimant attempts to raise the very same

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unrelated to those raised in this appeal.

argument again on this appeal. As we said, we do not make it a practice to disregard the law of cases we have already decided. Peters, supra; see also, Chase v. State of Connecticut/Department of Motor Vehicles, 15 Conn. Workers' Comp. Rev. Op. 292, 294-95, 2185 CRB-2-94-9 (June 20, 1996), *rev'd on other grounds*, 45 Conn. App. 499 (1997). The same principle applies to a third argument reprinted from the claimant's January 12, 1994 appellate brief, that being whether the commissioner improperly found that an agreement existed. As discussed above, we already upheld his decision that an agreement for a moratorium was reached. We will not reconsider that decision now.

In fact, the only issue in the claimant's brief that was not already presented to this panel is the argument that any determination of the amount of settlement proceeds attributable to Suzanne Schiano's loss of consortium claim was beyond the scope of the trial commissioner's jurisdiction. We acknowledge that Mrs. Schiano was not a party to her husband's workers' compensation claim. However, the issue here is not whether *she* can collect money for her claim; the issue is whether the *claimant's future workers' compensation benefits* must be reduced because of a recovery in a third party action. This issue is very clearly a workers' compensation matter that belongs in this forum, and the trial commissioner was not outside his authority in addressing it.

A question has also been presented as to which party had the burden of proving the nature of the settlement. Contrary to the claimant's assertions, once the trial commissioner determined that a moratorium agreement existed, it became the claimant's burden to establish that part or all of the third party settlement was due to his wife's loss of consortium claim rather than his compensable injuries. The trier found that the claimant was unable to do so, and cited the testimony of two attorneys and several letters

exchanged between said counsel in support of his decision. We find no error in his determination, as it is the commissioner's prerogative to weigh the credibility of the evidence and the testimony of the witnesses. Webb v. Pfizer, Inc., 14 Conn. Workers' Comp. Rev. Op. 69, 70-71, 1859 CRB-5-93-9 (May 12, 1995). Therefore, we affirm the decision of the trial commissioner, and deny the claimant's appeal.

Commissioners James J. Metro and John A. Mastropietro concur.