CASE NO. 5727 CRB-4-12-1
CLAIM NO. 400041100 : COMPENSATION REVIEW BOARD

WILLIAM DOMERACKI
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

DAN PERKINS CHEVROLET : MAY 1, 2013
EMPLOYER

and

UTICA
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Daniel D. Skuret, III, Esq., The Law Offices of Daniel D. Skuret, P.C., 215 Division Street, Ansonia, CT 06401.

The respondents were represented by Timothy D. Ward, Esq., McGann, Bartlett and Brown, LLC, 111 Founders Plaza, Suite 1201, East Hartford, CT 06108.

This Petition for Review from the January 5, 2012 Findings and Order of the Commissioner acting for the Fourth District was heard October 19, 2012 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Jodi Murray Gregg and Daniel E. Dilzer.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has appealed from the January 5, 2012 Findings and Order of the Commissioner acting for the Fourth District. In that Findings and Order the trial commissioner denied the claimant's Motion to Preclude. Thereafter, the claimant filed this appeal.[1]

Although the claimant presents eleven (11) issues for our review, the gravamen of the claimant's appeal is that the trial commissioner erred in her denial of the claimant's Motion to Preclude[2]. The pertinent facts are as follows. On September 16, 1999 while in the employ of the respondent employer the claimant slipped and fell. On or about April 19, 2000 the claimant filed a Form 30C alleging that he sustained injuries to his neck, back, head, right elbow and right knee. The claimant never sustained any loss of time from work as a result of the September 16, 1999 injury.

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[1] While this appeal was pending extensions of time and a postponement were granted.

[2]The issues presented for review include the following:

1. The Trial Commissioner erred in not granting the Claimant's Motion to Preclude.
2. The Trial Commissioner's Decision was based upon a mistake of law.
3. The Trial Commissioner improperly applied the law to the facts.
4. The Trial Commissioner erred in concluding that the Respondents were not required to file a Form 43.
5. The findings of fact and conclusions by the Trial Commissioner are not substantially supported by the evidence presented.
6. The Trial Commissioner's decision failed to take into consideration undisputed testimony and evidence.
7. The conclusions of the Trial Commissioner are legally inconsistent with the subordinate facts.
8. The Trial Commissioner failed to take into consideration all the evidence submitted and the evidence the Trial Commissioner took Administrative Notice of at the time of the Formal Hearings.
9. The Trial Commissioners' findings and/or conclusions are unsupported by the evidence and the Commissioner found certain facts erroneously.
10. The Trial Commissioner should have found the facts as Claimant had presented them to the Trial Commissioner in his proposed finding of facts.
11. The Trial Commissioner erred by not granting the Claimant's Motion to Correct.

See Appellant-Claimant's Brief filed August 17, 2012.

Following the claimant's fall, the claimant began treating with Forte Chiropractic. The trier found that the respondents made payments to Forte Chiropractic through 2000, 2001, 2002 and for a portion of 2003. On February 9, 2009 the respondents filed a Form 43. The Form 43 sought to deny liability for certain medical bills generated by Forte Chiropractic. The bills to which the Form 43 related covered treatment rendered on or about March 18, 2002 and a number of other chiropractic bills for treatment provided between April 1, 2003 and January 7, 2004. On December 28, 2010 the claimant filed a Motion to Preclude which was denied.

The claimant appellant advances a number of arguments in support of his request for reversal. We begin our review with our consideration of whether the trial commissioner erred as a matter of law in failing to grant the claimant's Motion to Preclude. The claimant-appellant argues on appeal that although the respondents began paying medical bills within 28 days from the time they received the claimant's Form 30C, they are precluded from asserting defenses to the claim as they have failed to comply with § 31-294c(b) C.G.S. Specifically the claimant-appellant argues that the pertinent provision of § 31-294c(b) provides that a respondent that does not file a notice contesting liability on or before the twenty eighth day but commences payment of compensation before the expiration of the 28 days may contest compensability "on any grounds or the extent of his disability within one year from the receipt of the written notice of claim." Thus, the claimant-appellant argues that the respondents are precluded from asserting any defenses to the claim as their Form 43 was not filed within one year of their receipt of the claimant's Form 30C (i.e., April 20, 2000).

Section 31-294c(b) provides, in pertinent part:

> 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.... 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.... (Emphasis ours.)

In addition to the above the claimant cites our Supreme Court's opinion in Harpaz v. Laidlaw Transit, Inc., 286 Conn. 102 (2008) as supporting authority for his claim. In his argument the claimant notes that the particular provision of § 31-294c(b) at issue was enacted as part of the 1993 amendments to the Workers' Compensation Act. The claimant-appellant points us to Justice Katz's commentary in Harpaz, but also refers us to this tribunal's opinion in Monaco Selmer v. Total Customer Service, 5622 CRB-3-10-12 (January 19, 2012). In Monaco-Selmer we stated:

> In her opinion in Harpaz, Justice Katz undertook a review of the legislative history behind the preclusion statute. She concluded that while the 1993 amendments to the statute protected parties that paid compensation to the claimant during an investigation period not to exceed one year, the respondent in that case could not contest the extent of disability.
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> Although the 1993 public act did not state expressly that the conclusive presumption would bar such defenses, it expressly set forth the prerequisite for preserving the right to assert such defenses — timely payment of compensation.
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> See Public Act 93-228, § 8. Upon satisfying that prerequisite, the employer would have one year to raise any defense, including

> contesting the extent of disability. The language limiting this right to certain employers for a specified period of time, indicates that, just as an employer would preserve its right to assert such defenses if it timely paid compensation, the employer necessarily would lose the right to assert those same defenses if it did not pay compensation within the prescribed period. Indeed, reading the public act otherwise, an employer who complied with the legislature's clear intent to encourage timely payment would be subject to a one year limitation for contesting the extent of disability, but an employer who violated that intent by neither paying nor contesting compensability within the prescribed period would be subject to no statutory limitation on its right to contest the extent of disability.

Monaco-Selmer, supra, *quoting* Harpaz, supra, 129-130.

The appellant reminds us that our courts have acknowledged that the preclusive effects of § 31-294c(b) are harsh. See e.g., Tanguay v. Rent-A-Center, Incorporated, 5714 CRB-8-11-12 (January 8, 2013); Black v. London & Egazarian, 30 Conn. App. 295, 304 (1993). However, following the Supreme Court's opinion in Harpaz, supra, a number of court opinions have been issued in which the terms of § 31-294c(b) have been applied strictly. See e.g.; Callender v. Reflexite Corp., 137 Conn. App. 324 (2012), *cert. granted,* 307 Conn. 915 (2012); Mehan v. Stamford, 127 Conn. App. 619 (2011), *cert. denied*, 301 Conn. 911 (2011); and Donahue v. Veridiem, Inc., 291 Conn. 537 (2009). In light of the Supreme and Appellate Courts' opinions this tribunal has similarly held that a respondent's failure to meet either of the two prongs of § 31-294c(b), i.e., within 28 days, file a notice of contest (Form 43) or commence payment of compensation, the preclusive effects of the statute are triggered. See e.g.; Dubrosky v. Boehringer Ingleheim Corporation, 5682 CRB 4-11-9 (September 5, 2012), *appeal docketed,* AC No. 35030 (September 21, 2012); Volta v. United Parcel Service, 5612 CRB-7-10-12 (January 31, 2012); Monaco-Selmer v. Total Customer Service, 5622 CRB-3-10-12 (January 19,

2012); and Diaz v. Capital Improvement & Management, LLC, 5616 CRB-1-11-1 (January 12, 2012).

On February 9, 2009 the respondents filed a Form 43. Attached to the Form 43 were bills for treatment provided by Forte Chiropractic. In the bottom right hand corner of the bills attached to the Form 43 there is a designation that the bills were a "resubmission." If we understand the claimant-appellant's theory of the case, the respondent did not file their Form 43 within one year of the claimant's filing of its Form 30C and therefore it is precluded from asserting a defense to the claim. We agree.

While we may join the trial commissioner's overall sentiment that granting the claimant's Motion to Preclude under these circumstances flies in the face of equity, we are constrained by the language of § 31-294c(b). Here the respondents paid some medical bills. They, thus, put themselves in the class of respondents who having paid compensation earned the privilege of extending the time by which a written notice of contest (Form 43) must be filed. Sec. 31-294c(b) provides such respondents with an extension for the filing of its written notice of contest until one year from the date the claimant filed his written notice of claim (Form 30C). In the instant matter, while the respondents' payment of compensation satisfied the first prong of the safe harbor for preserving their right to contest, it failed to meet the second prong with their failure to meet the statutory deadline putting the claimant on notice that it was contesting the claim for payment of medical treatment.

Arguably, as the claimant has not sustained any lost time the respondents were not

compelled to offer a Voluntary Agreement. See Administrative Regulation § 31-296-1.[3] However, we think that post Harpaz, supra, line of cases reflect that when a claimant files a Form 30C the respondents must appreciate the gravity of the claimant's declaration and respond in a meaningful way.

In the instant matter, the respondents commenced payment of benefits in advance of the claimant's filing of the Form 30C. Once the claimant filed the Form 30C, the respondents were obligated to file a Form 43 informing the claimant of its intention to contest, or to continue its payment of benefits and to file a Form 43 within one year of the claimant's filing of a Form 30C. It does not appear that the respondents proffered any evidence reflecting any communication with the claimant regarding the status of the claim following filing of the Form 30C.

While we certainly wish to encourage respondents to pay benefits as expediently as possible, we do not think that either the language in the statute or current case law supports the actions of a respondent who waits over 8 years to dispute its liability for certain medical bills. Here the respondents' failure to take any appropriate action left the

[3] Administrative Regulation Sec. 31-296-1 provides:

> A voluntary agreement shall be prepared by the employer or his insurer in connection with all cases concerning which there is no dispute that the claimant suffered an accident and injury arising out of and in the course of his employment causing either temporary partial or temporary total disability beyond the three-day waiting period. The voluntary agreement shall be submitted to the claimant for execution by him and forwarded by the employer or its insurer to the commissioner having jurisdiction within three weeks after the employer has actual knowledge of the accident and that the disability will extend beyond the three-day waiting period. Failure of the employer to furnish the insurer with a wage statement for the computation of the proper compensation rate shall not excuse failure to comply with the provisions of this section. Failure or inability of the employer to secure a medical report shall not excuse failure to file a voluntary agreement whenever the employer or the insurer has actual knowledge, or with reasonable diligence could have secured knowledge, that the claimant was actually disabled by a compensable accident. Noncompliance with this section is subject to the penalty provided in Section 31-288 of the general statutes.

claimant in the position of not knowing whether his claim for benefits was accepted or would be a source of challenge.

Further if we were to rule in accordance with the trial commissioner, we would put the claimant in the unenviable position of trying to proffer evidence relating to medical treatment provided years before. Administrative Regulation § 31-279-9 provides that the respondents are entitled to periodic progress reports from a medical provider. If the respondents fail to procure or review same in a timely manner and is therefore ignorant of a claimant's continued treatment it shall not fall upon the claimant to prove the causal relationship for unpaid medical bills years after the fact.

We therefore reverse the January 5, 2012 Findings and Order of the Commissioner acting for the Fourth District denying the claimant's Motion to Preclude.[4]

Commissioners Jodi Murray Gregg and Daniel E. Dilzer concur.

[4] Having concluded as we have we need not consider any of the other issues presented for review.