

CASE NO. 5729 CRB-2-12-2  
CLAIM NO. 200149647

: COMPENSATION REVIEW BOARD

DEBORAH MANCINI  
CLAIMANT-APPELLANT

: WORKERS' COMPENSATION  
COMMISSION

v.

: JANUARY 29, 2013

MASONICARE  
EMPLOYER

and

PMA GROUP  
INSURER  
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Neil Johnson, Esq.,  
AAAA Legal Services, PC, 96 Webster Street, Hartford,  
CT 06114.

The respondents were represented by David C. Davis, Esq.,  
McGann, Bartlett & Brown, LLC, 111 Founders Plaza,  
Suite 1201, East Hartford, CT 06108.

This Petition for Review from the January 20, 2012 Finding  
and Dismissal of the Commissioner acting for the Second  
District was heard August 17, 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 appeals from the January 20, 2012 Finding and Dismissal of the Commissioner acting for the Second District<sup>1</sup>. In the proceedings before the trial Commissioner the claimant sought temporary total benefits for the period July 2010 until May 18, 2011. In the alternative the claimant sought temporary partial disability benefits pursuant to §31-308 (a) or wage replacement benefits pursuant to §31-308a for this same time period. Additionally, the claimant sought payment of interest and attorney's fees pursuant to §31-300 on the basis of the respondents alleged unreasonable contest of surgery and sanctions pursuant to §31-288 (b) on the basis of the respondents alleged undue delay in authorizing surgery.

The pertinent facts appear to be as follows. On September 24, 2003 while in the employ of the respondent Masonicare the claimant fell and injured her right knee and shoulder. The respondent accepted the claim and issued a voluntary agreement. On December 21, 2006 the claimant consulted Dr. Richard Linburg, an orthopedic hand surgeon, due to problems with her hands. Dr. Linburg noted that the claimant had been using crutches for the past 17 months and injected the junction of the claimant's left wrist and thumb. It is worth noting that at the time of this examination, Dr. Linburg specifically stated he did not believe that the claimant suffered from carpal tunnel syndrome.

On January 11, 2007 Dr. Linburg again examined the claimant and in his report that followed opined that claimant had carpal tunnel syndrome and a "congenital accessory connection of her flexor pollicis longus (FPL) to her flexor digitorum profundus". Finding, ¶ 6. Dr. Linburg also recommended surgery. The claimant elected

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<sup>1</sup> We note that an extension of time was granted to the claimant appellant during the pendency of this appeal.

not to have surgery at this juncture. Further Dr. Linburg's report did not provide any opinion as to the causal relationship between claimant's September 2003 injury and her need for hand surgery.

In 2008 Dr. Michael Joyce performed a total right knee replacement. That surgery was causally related to the September 24, 2003 incident and benefits were paid. Claimant reached maximum medical improvement on March 30, 2009 and was accorded a 50% permanent partial disability of her leg (77.5 weeks of specific indemnity). Section 31-308 (b) benefits were paid until September 23, 2010.

On July 19, 2010 the claimant returned to Dr. Linburg. She again essentially reiterated her 2007 complaints concerning her hands and surgery was recommended. Dr. Linburg's office notes from this date do not reference a causal connection between claimant's hand complaints and the accepted injury of September 24, 2003.

In August 2010 claimant's attorney requested a hearing for the purpose of discussing medical treatment, authorization for surgery and settlement. A hearing was held October 26, 2010 and the respondent argued that the claimant had not provided documentation as to the causal connection between the proposed hand surgery and the work injury of September 2003. Claimant's counsel agreed to ask Dr. Linburg for a clarification of his opinion.

On November 8, 2010 Dr. Linburg issued a note opining that claimant's chronic use of crutches as a result of her September 2003 injury directly resulted in her hand problems. Thereafter, the respondents arranged for the claimant to be examined by Dr. Tarik Kardestuncer, also a hand surgeon. Dr. Kardestuncer examined the claimant on January 11, 2011 and opined, inter alia, that claimant had bilateral carpal tunnel

syndrome and based on the history presented by the claimant the likely cause was claimant's use of crutches.

On January 24, 2011 an informal hearing was held. Respondent's counsel attended the hearing, however, claimant's counsel did not appear. On February 10, 2011 respondent's counsel wrote to Dr. Kardestuncer. In that communication respondent's counsel, Attorney David Davis questioned the accuracy of the history provided by the claimant. In his communication Attorney Davis stated that there was no evidence claimant had used crutches until she sustained a "twisting injury July 24, 2005 at Block Island". Finding, ¶ 15. Attorney Davis inquired if Dr. Kardestuncer was of the opinion that the alleged incident on Block Island was a substantial factor in the resulting carpal tunnel syndrome. On March 7, 2011, Dr. Kardestuncer replied that it was his belief that claimant's history of using crutches prior to July 2005 was "most likely the significant aggravating cause of her carpal tunnel syndrome". Finding, ¶ 16.

On March 29, 2011 a hearing was held at the request of the claimant. Again respondent's counsel appeared and claimant's counsel did not. On that same date the claims adjuster faxed an authorization for the surgery proposed by Dr. Linburg. Thereafter, on May 18, 2011 Dr. Linburg operated on claimant's left hand and performed a carpal tunnel release. On June 1, 2011, Dr. Linburg performed a carpal tunnel release on the right hand and corrected the claimant's congenital accessory connection anomaly.

Following the claimant's May 18, 2011 surgery claimant was put on temporary total disability. On November 3, 2011 Dr. Linburg released the claimant to regular work. On November 9, 2011 the respondent filed a Form 36 which was objected to by claimant's counsel. An informal hearing was held on December 9, 2011 the subject of

which was claimant's contest to the Form 36. In his January 20, 2012 Finding and Dismissal the trial Commissioner commented that "claimant's counsel was unable to articulate any basis for the objection so the Form 36 was granted, retroactive to the date of receipt." Finding, ¶ 25.

In his conclusion the trial Commissioner dismissed; the claim for total disability benefits for the period from July 2010 until May 18, 2011, claims for §31-308 (a)/§31-308a benefits for the same period, claimant's claim for attorney's fees/interest due to the respondent's unreasonable contest and penalties for the respondent's undue delay in authorizing the hand surgery. See §§31-300, 31-288(b). In her appeal the claimant raises two basic issues; (1) whether the trial Commissioner erred in failing to find the respondents unreasonably contested the claimant's carpal tunnel surgery and/or unduly delayed same and (2) whether the trial Commissioner erred in failing to award temporary total disability benefits for the period following Dr. Linburg's recommendation for surgery (July 19, 2010). We begin our review with consideration of whether the trial Commissioner erred in failing to find the respondents unreasonably contested claimant's medical treatment or unduly delayed same.

The essence of the claimant's appellate argument is that the respondents had no basis for contesting the claimant's need for bilateral hand surgery. The claimant contends that the hand surgery was initially recommended January 11, 2007 and was put off due to claimant's knee surgery. Dr. Linburg examined the claimant in July 2010 and again recommended surgery. The claimant argues that it was not until after Dr. Linburg's July 2010 recommendation of surgery that the respondents initiated their inquiry and challenge to the causal relationship between claimant's September 2003 fall at her

workplace, and the need for hand surgery. The claimant argues, in part, that the failure of the respondents to authorize surgery within 5 business days as suggested in the Payor Provider Guidelines<sup>2</sup> issued by this commission, constituted an unreasonable contest. We believe the claimant's argument cannot stand as the claimant appears to be offering this argument for the first time on appeal. Our review of the testimonial record before the trial Commissioner does not reflect an instance where the claimant alleged the respondents failed to comply with the Payor Provider Guidelines as a basis for either an unreasonable contest or undue delay. As such, the claimant may not raise it for the first time on appeal.<sup>3</sup> See Jones v. Connecticut Children's Medical Center, 131 Conn. App. 415, 432 (2011).

As we have noted on numerous occasions, the burden of proof as to causation lies with the claimant. Torres v. New England Masonry Co., 5289 CRB-5-07-10 (January 6, 2009); Weir v. Transportation North Haven, 5226 CRB-1-07-5 (April 16, 2008). Except in the most limited circumstances respondents are entitled to question and defend their liability for proposed medical treatment. Cf., Harpaz v. Laidlaw Education Services, 286 Conn. 102 (2008). (Pursuant to § 31-294c(b) the respondent's failure to properly contest claim may result in its preclusion from asserting certain defenses to the claim). Whether the respondent's contest to its liability for the surgery rose to the level of unreasonable pursuant to §31 300 is a question of fact. As such, the standard of review, inter alia, is

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<sup>2</sup> The more complete title for the Payor Provider Guidelines is the Payor and Medical Provider Guidelines to Improve the Coordination of Medical Services took effect July 1, 2010.

<sup>3</sup> Our holding here should not be interpreted as an indication that we will countenance a party's failure to comply with the suggested time frames set out in the Payor Provider Guidelines. It merely indicates that the claimant failed to properly prepare the issue for our review.

whether the trial Commissioner's conclusion constitutes an abuse of his discretion. As this tribunal recently noted in Santiago v. Junk Busters, LLC, 5721 CRB-6-12-1 (January 8, 2013) "an abuse of discretion may exist 'when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors.' In re Shaquanna M., 61 Conn. App. 592, 603 (2001)."

Further this tribunal stated in Murray v. Mass Mutual Life Ins. Co., 4590 CRB-1-02-11 (November 20, 2003), "[a]s the fact finder who has presided over a contested case, the trial commissioner is in the best position to decide whether a respondent has reasonably conducted its defense, and possesses a considerable amount of discretion in making such a finding. Prescott v. Community Health Center, Inc., 4426 CRB-8-01-8 (Aug. 23, 2002)." Our review of the trial Commissioner's conclusion on the issue of whether the respondents unreasonably contested the claimant's claim for surgery on her hands does not indicate that the conclusion reached by the trier was a result of an abuse of his discretion.

We note that the trial Commissioner has provided a Memorandum of Decision in addition to his January 20, 2012 Finding and Dismissal. While the trial Commissioner was not compelled to include a Memorandum of Decision with his Finding and Dismissal, in this instance it provides details as to the trier's analytical reasoning. For example, the commissioner noted in his Memorandum of Decision:

Prior to the December 7, 2010 hearing there was no medical causation opinion to support the proposed hand/wrist surgery, so I am hard-pressed to call the refusal to that point a delay on the part of the respondents, let alone an undue delay.

The evidence of an alleged causal connection between the work injury in the carpal tunnel syndrome was first produced

on December 7, 2010 and the RME was conducted by Dr. Tarik Kardestuncer on January 11, 2011. There was nothing unreasonable about arranging such an examination and the timing was perfectly reasonable.

Memorandum of Decision, p. 5.

Additionally, the trial Commissioner stated:

Arguably, the decision to write back to Dr. Kardestuncer and ask him to reconsider his understanding of the history of the case could be said to have delayed the surgery by some weeks. However, ... I do not think the request was unreasonable and, therefore, I do not believe that any resulting delay was “undue” delay.

Id.

The trial Commissioner additionally noted the failure of the claimant’s representative to appear for two scheduled hearings concerning the proposed surgery.

Finally, we consider the claimant’s argument that she was entitled to temporary total benefits for the period from July 2010 until May 18, 2011. The claimant’s argument, in essence, is that had the respondents not availed themselves of their due process and statutory right to seek its own medical opinion on the issue of causation of the proposed surgery, the claimant would have been entitled to temporary total benefits for the period in question. The conclusion which the claimant would have us reach is predicated on an entire scheme of speculative suppositions. First, we would need to assume that the claimant’s hand surgery would have occurred within days of Dr. Linburg’s July 19, 2010 examination of the claimant. Secondly we would need to assume that the claimant was incapable of any gainful employment until May 18, 2011.<sup>4</sup>

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<sup>4</sup> Again, we reference the trial Commissioner's Memorandum of Decision.

The notion that the claimant was short-changed on total disability payments because of the delayed surgery might make some sense if we assume that, regardless of when the surgery was done, she would not have been cleared to work until November of 2011. The claimant had her



The logical assumptions necessary for such a finding are far too attenuated from the evidentiary record or lack thereof.

We therefore affirm the January 20, 2012 Finding and Dismissal of the Commissioner acting for the Second District.

Commissioners Jodi Murray Gregg and Daniel E. Dilzer concur.

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operations in late-May and early- June of 2011 and was cleared for full-duty work in roughly six months. By what logic would I conclude that had she undergone the surgery in the summer of 2010 her recovery would have taken more than twice as long and that she would have still been entitled to TTD [temporary total disability] until November of 2011? More to the point, it is the claimant's burden to prove her incapacity status during the time in question and she has offered no evidence on that question. Memorandum of Decision, p. 2.