CASE NO. 5806 CRB-4-12-12 : COMPENSATION REVIEW BOARD
CLAIM NO. 400078317

GLEN CARNEY
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: NOVEMBER 20, 2013

TOWN OF STRATFORD
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLEE

and

PMA MANAGEMENT CORP. OF NEW ENGLAND
ADMINISTRATOR

APPEARANCES:

The claimant was represented by Daniel Shepro, Esq., Shepro & Hawkins, LLC, 2103 Main Street, Stratford, CT 06615.

The respondent was represented by Thomas Galvin Cotter and Mathias J. DeAngelo, Esq., The Cotter Law Firm, 1980 Main Street, Suite 201, Stratford, CT 06615.

This Petition for Review from the November 28, 2012 Finding and Dismissal of the Commissioner acting for the Fourth District was heard June 28, 2013 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Charles F. Senich and Peter C. Mlynarczyk.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has appealed from a Finding and Dismissal dated November 28, 2012 where the trial commissioner denied the claimant's bid to sanction the respondent. The claimant argues that the facts of this case demonstrated that the respondent engaged in undue delay that warranted the imposition of sanctions. We note that our precedent makes the decision of whether sanctions are warranted in any given case a highly discretionary matter for the trial commissioner to determine. We are not persuaded that the trial commissioner abused his discretion as he cited specific reasons for finding the respondent's conduct reasonable. We affirm the Finding and Dismissal.

The trial commissioner reached the following findings. We note that this decision was a sequelae of a previous Finding and Award by the trial commissioner dated June 11, 2012, ("June 2012 Finding") where he found the respondent liable for the claimant's work related injuries. In that decision, the trial commissioner noted that the respondent executed a voluntary agreement on April 16, 2010, accepting injuries that were the result of August 24, 2009 and March 4, 2010 incidents at work. June 2012 Finding, ¶ 9. Subsequent to executing the voluntary agreement the respondent became aware of a June 18, 2008 motorcycle crash sustained by the claimant and challenged the compensability of some of the claimant's injuries. The trial commissioner determined in Finding, ¶ 19 of the June 2012 Finding "While the claimant did not inform all medical providers of his complete medical history, giving rise to a reasonable concern regarding the compensability of claimant's injuries on August 24, 2009 and March 4, 2010, I find both

injuries to be compensable." The trial commission later granted a number of corrections sought by the respondent documenting the claimant's nondisclosure of medical information as to the motorcycle crash to the respondent or a treating physician, but denied a correction sought that the respondent issued the voluntary agreement due to a mistake. See commissioner's ruling on Motion to Correct Finding and Award dated June 25, 2012.

The trial commissioner held a subsequent formal hearing on November 14, 2012 on the claimant's bid for sanctions. In the Finding and Dismissal the trial commissioner considered a claim that the respondent should pay for the $7,148.00 in legal time associated with the hearings for the two dates of injury in which the claimant was awarded benefits. The trial commissioner cited Findings, ¶ 19 from the June 2012 Finding in the November 2012 Finding and Dismissal wherein he concluded in Conclusion, ¶ d.

> CGS 31-300 requires a finding of fault or neglect for interest to be awarded, and a finding of undue delay in adjustments of compensation for a reasonable attorney's fee to be awarded. I find no fault or neglect, nor do I find undue delay. I reiterate Finding of Fact 19 of the prior Finding and Award that the respondents had a reasonable concern regarding the compensability of the claimed injuries.

The claimant did not file a Motion to Correct but filed a timely Petition for Review and Reasons for Appeal. The claimant argues that the trial commissioner erred as a matter of law in not levying sanctions against the respondent. The claimant compares the delays in the matter subsequent to the issuance of the voluntary agreement as similar to the statutory violations that triggered sanctions in Lewis v. State/Department of Correction, 5677 CRB-4-11-8 (August 15, 2012) and Wikander v. Asbury Automotive

Group/David McDavid Acura, 5586 CRB-4-10-9 (September 8, 2011), *aff'd,* 137 Conn. App. 665 (2012). Claimant's Brief, pp. 15-16. The respondent argues that the circumstances herein are more akin to Milewski v. Stratford, 5483 CRB-4-09-7 (July 20, 2010) where the dispute over what benefits were due the claimant under a voluntary agreement did not rise to a matter justifying sanctions against the respondent. We find the respondent's argument herein more persuasive.

As we have pointed out on many occasions, the decision as to whether sanctions are warranted in a particular case is a highly discretionary decision on the part of the trial commissioner. See Kuhar v. Frank Mercede & Sons, Inc., 5250 CRB-7-07-7 (July 11, 2008). More recently, in Mancini v. Masonicare, 5729 CRB-2-12-2 (January 29, 2013) we restated the extent of this discretion regarding sanctions on the part of a trial commissioner. In Mancini, the respondents accepted compensability of a claim by way of a voluntary agreement, but then contested the claimant's need for medical treatment. We affirmed the trial commissioner's decision not to sanction the respondents for contesting treatment in that matter.

> 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 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)."
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> 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.

Mancini, supra.

In the present case, the trial commissioner credited evidence presented by the respondent that indicated that the claimant's failure to fully address his medical history with his treating physicians created a reasonable basis for the respondent to question the causation of the claimant's injuries. A party may not be sanctioned unless there is a factual predicate that supports the imposition of sanctions. McFarland v. State/Dept. of Developmental Services, 5176 CRB-5-06-12 (December 21, 2007), *aff'd in part; rev'd in part,* 115 Conn. App. 306, 323 (2009), *cert. denied*, 293 Conn. 919 (2009). In cases where there were complex issues of causation we have generally indicated the record did not support the imposition of sanctions. See Wierzbicki v. Federal Reserve Bank of Boston, 4147 CRB-1-99-11 (December 19, 2000), *appeal dismissed*, A.C. 21533 (2001) and Malafronte v. Med-Center Home Health Care, 3888 CRB-7-98-9 (August 31, 1999). In the present case the trial commissioner explained in Finding, ¶ 19 of the June 2012

decision his rationale not to sanction the respondent. We do not find this rationale "vitiates logic." In re Shaquanna M., supra.

The claimant argues that the respondent's conduct in this matter rises to the level of violating a statute. However, no specific statutory violation is identified in the claimant's brief.[1] As we pointed out in Wikander, supra, the nature of the respondents' lapse in that matter was quite significant insofar as the trial commissioner had no choice but to grant preclusion. We made clear the gravity of that matter made the imposition of sanctions a reasonable decision for the trial commissioner to reach.

> The respondents further appeal from the award of attorneys' fees to the claimants. Their position is that pursuant to § 31-300 C.G.S., attorneys' fees may only be levied when payments due to the claimant are unduly delayed due to "fault or neglect." The respondents argue that they presented a good faith defense to the claim, and therefore the condition precedent to issue the award to the claimants was not present. In light of the precedent in Harpaz and Donahue, we believe we are compelled to uphold the award.
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> Harpaz and Donahue stand for the proposition that once a claimant files a claim before this Commission, the respondent is obligated by the terms of § 31-294c C.G.S. to take some responsive action within 28 days. The respondent may accept the claim, commence payment without prejudice while an investigation is conducted, or disclaim legal obligation for the claim. Failure to respond to a claim constitutes a violation of statute and precludes the respondent from contesting the claim. In the present case, it is acknowledged the respondents took none of the responsive actions delineated under Harpaz and Donahue. When preclusion affixed to this claim, the respondents became obligated to the claimants

[1] The claimant makes a vague argument that the respondent was statutorily obligated to pay medical bills and provide treatment after the voluntary agreement was issued. Claimant's Brief, p. 16. The claimant does not identify this statute in the brief and we will not speculate on what the claimant's position is regarding that issue. However, we note this argument is essentially inconsistent with the holding in Mancini v. Masonicare, 5729 CRB-2-12-2 (January 29, 2013). We also note that it is black letter law that a trial commissioner is the ultimate judge of what modalities of treatment are necessary in any specific claim. Cervero v. Mory's Association, Inc., 5357 CRB-3-08-6 (May 19, 2009), *aff'd*, 122 Conn. App. 82 (2010), *cert. denied*, 298 Conn. 908 (2010).

unless the trial commissioner determined the claim failed to present a prima facia case.

The trial commissioner concluded that the payments in this matter were "unduly delayed pursuant to C.G.S. 31-300" when he awarded attorneys' fees. Conclusion, ¶ j. We find this decision was consistent with recent precedent on this statute, specifically Abrahamson v. State/Department of Public Works, 5280 CRB-2-07-10 (February 26, 2009) and Merenski v. Greenwich Hospital Association, Inc., 5076 CRB-7-06-4 (June 18, 2007) (a/k/a "Merenski III"). Merenski III cited In re Shaquanna M., 61 Conn. App. 592, 603 (2001) for the proposition that a trial commissioner's decision as to whether a respondent acted to unduly delay payments was subject to an "abuse of discretion" standard. Merenski III also distinguished Malafronte v. Med-Center Home Health Care, 3888 CRB-7-98-9 (August 31, 1999), where we vacated sanctions, pointing out that in Malafronte a factual dispute was present. In the present matter it is undisputed that the respondents failed to file a timely disclaimer with this Commission. The trial commissioner's findings in this case also document delays as a result of the respondents at first seeking to interpose jurisdictional defenses, and then abandoning those defenses later stating they proved to be invalid. See Findings, ¶¶ 13 & 14. These findings are consistent with the findings in Merenski III where the respondent in that case interposed time consuming and ineffectual defenses.

While we affirmed an award of sanctions in Merenski III we affirmed the trial commissioner's denial of sanctions in Abrahamson, supra. We reviewed the "abuse of discretion" standard in that case, and concluded the complexity of the issues in that case, as well as the claimant's status as an out of state resident, acted to impede the prompt resolution of that case. We find the facts herein more congruent with Merenski III than Abrahamson. Failure to adhere to an unambiguous statutory obligation is not a complex issue which excuses a respondent's delay. While the imposition of an award for attorneys' fees following preclusion is indeed a "harsh remedy", West, supra; we find the Supreme Court has specifically encouraged this Commission to impose harsh remedies when respondents fail to file disclaimers or commence payment as mandated by statute. Harpaz, supra, 120-121, footnote, ¶ 13, pp. 130-131.

Wikander, supra.

The present case was not a case similar to Wikander or Lewis, supra, where the respondents violated an unambiguous statutory obligation.[2] This was a case where the respondent contested the case based on what the trial commissioner found was a reasonable basis for skepticism. We will not second guess the trial commissioner on what is a highly discretionary matter. Milewski, supra, *citing* Duffy v. Greenwich-Board of Education, 4930 CRB-7-05-3 (May 15, 2006).

We affirm the Finding and Dismissal.

Commissioners Peter C. Mlynarczyk and Charles F. Senich concur with this opinion.

[2] Lewis v. State/Department of Correction, 5677 CRB-4-11-8 (August 15, 2012) was a case where the respondents failed to honor their obligation under § 5-142(a) C.G.S. to make salary adjustments to an employee on the inactive payroll. No factual dispute regarding medical causation was present in that case, and as the case dealt exclusively with whether the respondents complied with the statute "[w]e find no abuse of discretion should sanctions be levied following a violation of statute." Id. As noted herein, the claimant does not point to a specific statutory violation in this matter.