CASE NO. 5813 CRB-4-12-12 : COMPENSATION REVIEW BOARD
CLAIM NO. 400068350

STEPHEN BARICHKO
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

: JANUARY 13, 2014

STATE OF CONNECTICUT/
DEPARTMENT OF TRANSPORTATION
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLANT

and

GALLAGHER BASSETT
THIRD-PARTY ADMINISTRATOR

APPEARANCES:

The claimant was represented by Enrico Vaccaro, Esq., 1057 Broad Street, Bridgeport, CT 06604.

The respondent was represented by Francis C. Vignati, Jr., Esq., Assistant Attorney General, Office of the Attorney General, 55 Elm Street, Hartford, CT 06141-0120.

This Petition for Review[1] from the November 28, 2012 Finding and Dismissal of the Commissioner acting for the Fourth District was heard August 30, 2013 before a Compensation Review Board panel consisting of Commissioners Charles F. Senich, Peter C. Mlynarczyk and Ernie R. Walker.

[1] We note that extensions of time were granted during the pendency of this appeal.

# OPINION

CHARLES F. SENICH, COMMISSIONER. The respondent has appealed from a Finding and Dismissal of their bid for orders seeking a repayment schedule of benefits from the claimant, Stephen Barichko, in part as a result of a moratorium from a personal injury tort award to the claimant. The trial commissioner determined that the respondent failed in their burden to prove the amount of the credit due was the amount sought in their Form 36: $52,809.73. As a result, the trial commissioner denied the Form 36 and stated further hearings were necessary. The respondent has appealed arguing that the trial commissioner failed to properly implement the orders previously reached in this matter in the April 17, 2012 Finding and Orders for this claim. The claimant argues that the trial commissioner properly determined that based on the evidence presented the respondent failed to prove their case; and the respondent neglected to avail themselves of post-judgment motions to seek redress. Upon review, we find that the necessary orders to implement the relief contemplated by the April 17, 2012 Finding and Orders have yet to be implemented. We remand this matter for further hearings to resolve the open issues herein.

The facts of this case are as follows. The claimant, a long time employee of the Department of Transportation, was involved in a compensable motor vehicle accident on February 20, 2007. He was disabled from work for a period subsequent to the accident and sought medical treatment; not all of which was authorized. The claimant also received a 30 day advance of sick leave from the respondent, which their witness testified had to be repaid from whatever settlement the claimant might have received. The

respondent scheduled the claimant to be examined by Dr. Gary Zimmerman on the issue of cervical and lumbar spine surgery. The claimant attended one examination but subsequently did not appear at scheduled examinations and the physician sought a no-show fee. The claimant testified he brought a third party lawsuit in connection with the motor vehicle accident, settling it for $50,000 and receiving a net recovery of $16,666.66. Linda Longo, an administrative hearing specialist for the treasurer's office, sent claimant's counsel a letter on September 16, 2009 confirming that the state has a lien for $16,666.66. The claimant also sought approval for cervical spine and shoulder surgery, and the respondent granted approval for shoulder surgery on April 28, 2011. Meridian Resource Co., also presented a lien for $7,130.32 representing unpaid bills from the claimant's treating physicians.

Therefore, in his April 17, 2012 Finding and Orders, the trial commissioner ordered the claimant to reimburse the respondent for the advance of sick leave days and for the claimant to pay the $1,500.00 no show fees for the missed medical examinations. The respondent was ordered to pay the Meridian lien. The claimant was found to be due temporary total disability benefits from December 28, 2009 through March 21, 2010 at the compensation rate of $803.09 with interest thereon at the rate of 12% per year, and this when added to paying the Meridian lien was anticipated to exhaust the amount of the moratorium. The remainder of the temporary total disability benefits will become due and owing to be paid at the expiration of the moratorium. The claimant was found to have had a work capacity as of August 11, 2010 but to have stopped working and therefore, no indemnity benefits were due from that date forward. The commissioner also reached this conclusion in Conclusion, ¶ h.

> I find the claimant has a permanent partial disability in the aggregate of the following: 10% of the cervical spine, with 5% pre-existing; 10% of the lumbar spine, with 5% pre-existing, and left shoulder of 10%. Credits or overpayments shall be owing in consideration of prior ratings and payments that are payable or paid.

The trial commissioner, in the April 17, 2012 Finding and Orders, indicated that additional hearings would be necessary to resolve open issues left unresolved by the prior proceedings. The respondent filed a Form 36 outlining alleged overpayments and the trial commissioner held a hearing on August 21, 2012 on the issue. The Finding and Dismissal under appeal summarizes the results of this hearing. The respondent claimed that the claimant owed the respondent a sum exceeding $79,000, which would be reduced by temporary total disability benefit payments ordered that are valued at $12,102.14, for a total of $67,077.97 owed by the claimant.[2]

The respondent offered testimony from Sharese Davis, subrogation recovery coordinator for the third party administrator Gallagher Bassett. Ms. Davis, testified as the claims adjuster for the file, was ill the day of the hearing. The trial commissioner found Ms. Davis testified that PPD overpayments resulted from payments made in a March 13, 1993 file, previous to the 2007 ratings. She said 15 percent was paid on the lumbar spine, 10 percent on the cervical spine, and 7½ percent on the left shoulder on the 1993 file. She testified that her reading of the 2007 report of the late Dr. William Lewis (who examined the claimant) stated that the 10 percent left shoulder rating, the 5 percent lumbar spine rating, and the 5 percent cervical spine ratings are attributable to the

[2] The Form 36 represented that the respondent had a credit of $52,809.73. This sum was not consistent with the sums sought at the August 21, 2012 formal hearing.

February 20, 2007 accident. Therefore, Ms. Davis testified that between the 1993 and 2007 injuries there were overpayments of 10% of the lumbar spine, 5% of the cervical spine and 7½ on the claimant's left shoulder. Ms. Davis said the overpayments were included in the claimed moratorium. She further testified that the Meridian lien had not been paid off as of the date of the hearing.

The trial commissioner concluded, based on this testimony, that the medical lien of $7,130.32 was the responsibility of the respondent and not the claimant. He further concluded that he was unable to implement prior findings in this case for the following reasons.

> e. While the prior Finding and Orders found the left shoulder rating to be 10 percent in the aggregate, questions have been raised of whether it is an additional 10 percent to the 7 ½ percent given in 1993, or a rating in the aggregate by Dr. Lewis. Since the Finding and Orders authorized the claimant to have left shoulder surgery, it is reasonable to have the claimant's left shoulder rated after the surgery – possibly by a commissioner's examiner – with the rating to include what should be attributed to the 1993 claim to resolve this point of uncertainty.
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> f. While the claimant was ordered to repay one month's sick days in the prior Finding and Orders, the issue of whether there was an overpayment and credit due the respondents depends in some part on the date of the left shoulder surgery, which was unknown as of this formal hearing.

Accordingly, the trial commissioner concluded the respondent had failed to prove that they were entitled to the overpayment amount sought in the Form 36, and denied the Form 36. The trial commissioner ordered further hearings to be held as to the amount of overpayments due to the respondent. The respondent did not file a Motion to Correct or a Motion for Articulation, but instead immediately moved to appeal the Finding and Dismissal. The gravamen of the appeal is that the trial commissioner failed to properly

implement the orders previously reached in this matter in the April 17, 2012 Finding and Orders for this claim.

The standard of deference we are obliged to apply to a trial commissioner's findings and legal conclusions is well-settled. "The trial commissioner's factual findings and conclusions must stand unless they are without evidence, contrary to law or based on unreasonable or impermissible factual inferences." Russo v. Hartford, 4769 CRB-1-04-1 (December 15, 2004), *citing* Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Moreover, "[a]s 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." Burton v. Mottolese, 267 Conn. 1, 54 (2003). However, "[w]e have held that, where the findings of a trial commissioner appear to be inherently inconsistent amongst themselves, or with the trier's conclusions, the correct approach is to remand the matter for clarification." Ortiz v. Highland Sanitation, 4439 CRB-4-01-9 (November 12, 2002).

The respondent argues that the trial commissioner failed to address, in this instant Finding and Dismissal, three issues which had already been resolved in the April 17, 2012 Finding and Orders and which had not yet been addressed; the issue as to the $16,666.00 moratorium, the issue as to the unpaid sick days and the issue as to payment of the no-show fees. We agree that these issues are governed by the "law of the case" doctrine and a conclusive interlocutory decision was reached on these matters. See, for example, Waterbury Hotel Equity, LLC v. Waterbury, 85 Conn. App. 480 (2004). The Appellate Court held as follows:

> In considering the law of the case doctrine, our Supreme Court has recognized that ‘‘[a] judge should hesitate to change his own rulings in a case and should be even more reluctant to overrule those of another judge.’’ *Breen v. Phelps*, 186 Conn. 86, 99, 439 A.2d 1066 (1982). Nevertheless, ‘‘[t]he law of the case is not written in stone but is a flexible principle of many facets adaptable to the exigencies of the different situations in which it may be invoked. . . . Our Supreme Court has recognized that the law of the case doctrine is not one of unbending rigor . . . . A judge is not bound to follow the decisions of another judge made at an earlier stage of the proceedings, and if the same point is again raised he has the same right to reconsider the question as if he had himself made the original decision. . . . In essence [the law of the case] expresses the practice of judges generally to refuse to reopen what has been decided and is not a limitation on their power. . . . Where a matter has previously been ruled upon interlocutorily, the court in a subsequent proceeding in the case *may* treat that decision as the law of the case, if it is of the opinion that the issue was correctly decided, in the absence of some new or overriding circumstance.’’

Id., 489-490.

The record does not reflect that any new information was presented to the trial commissioner on those issues. The respondent may well believe that they should have received relief on those elements of the case, but it is apparent the trial commissioner sought, at the August 21, 2012 hearing, to elicit sufficient information from the respondent to resolve **all** the open issues in the case. The trial commissioner apparently was left unsatisfied with the evidence presented by the respondent and denied all relief. The respondent cites Wannagot v. City of Shelton, 38 Conn. App. 754 (1995) and Czujak v. City of Bridgeport, 4371 CRB-4-01-3 (April 8, 2002) as providing grounds for our tribunal to order the trial commissioner to order reimbursement to the respondent. As the respondent noted in page 7 of their brief the trial commissioner “stopped short of doing

an actual calculation of said credits or over payments and also did not order a reimbursement schedule or plan."

We have reviewed the authority relied on by the respondent. These cases do not stand for the proposition that the trial commissioner must determine the amount of reimbursement to a respondent when he or she is not persuaded as to the accuracy of the information provided by the respondent to support their claim. We have reviewed the transcript of the August 21, 2012 hearing and are satisfied that the trial commissioner could have found the testimony of Ms. Davis insufficient to determine an appropriate order; in particular as the adjuster who had more specific knowledge as to the circumstances herein did not testify.[3] We find the circumstances herein therefore more similar to Gibson v. State/Department of Developmental Services-North Region, 5422 CRB-2-09-2 (January 13, 2010) than the cases cited by the respondent. In Gibson, the respondent sought to compel repayment of an alleged overpayment from a claimant, and the trial commissioner denied the request. The Compensation Review Board affirmed that decision.

> On appeal we have a limited scope of review, as our standard of review is deferential to the finder of fact. "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."
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> Daniels v. Alander, 268 Conn. 320, 330 (2004).

[3] We are puzzled as to why the respondent herein did not seek a continuance to provide testimony from the adjuster who actually handled this file; rather than resting on the testimony of the company's subrogation manager who testified she did not bring the claim file to the hearing. August 21, 2012 Transcript, pp. 23-24.

> Applying this standard to the testimony of Ms. Gallagher and the claimant, we believe the trial commissioner could have "reasonably concluded" the respondent's evidence was unpersuasive on the issue of overpayment to the claimant. As we held in Ben-Eli v. Lowe's Home Improvement Center, 5006 CRB-3-05-10 (November 16, 2006), "[o]ne can only expect the trier of fact to render a decision based on what evidence actually says, not what it should have said."

Gibson, supra.

In Gibson, we pointed out that as the respondent is the moving party on the issue of repayment of allegedly overpaid benefits, they have the burden of persuasion before this forum. Advocates for respondents in such cases should not assume that asserting a claim is the functional equivalent of proving a claim, and should endeavor to provide all necessary evidence to the trial commissioner before the record closes. Parties should not proceed under the belief this appellate body will remedy an unfavorable result resulting from an advocate's ineffective factual presentation. As the Appellate Court held in McGuire v. McGuire, 102 Conn. App. 79, 83 (2007), "[w]e have made it clear that we will not permit parties to anticipate a favorable decision, reserving a right to impeach it or set it aside if it happens to be against them, for a cause which was well known to them before or during the trial."[4]

Nonetheless we are left with the circumstances where the "law of the case" requires the claimant to make certain reimbursements to the respondent based on the

[4] The claimant focused much of his argument before this tribunal on the point that the respondent failed to seek a Motion to Correct or a Motion for Articulation seeking to address the deficiencies in this Finding and Dismissal prior to appealing the decision. See Claimant' Brief, pp. 13-14. We do not believe this decision by respondent's counsel is particularly weighty due to the fact that if the testimony of the respondent's witness was ambiguous or unpersuasive, a post-judgment motion was unlikely to rectify this matter. In addition, given the previous orders issued in this matter, we reject claimant's assertion that the respondent's actions herein were "patently frivolous." Claimant's Brief, p. 11.

April 17, 2012 Finding and Orders and the trial commissioner has not implemented these orders, or in our opinion provided a sufficient justification why conditions have changed to explain why they are not being implemented.[5] As a result the circumstances are similar to other recent cases such as Bombria v. Anthony J. Bonafine, 5740 CRB-2-12-3 (March 6, 2013) and Hubbard v. University of Connecticut Health Center, 5705 CRB-6-11-12 (November 30, 2012). In Bombria, the trial commissioner ordered reimbursement of medical expenses to the claimant's medical providers but we found the evidence supporting this decision too ambiguous to rely on. *Citing* Besitko v. McDonald's Restaurant, 12 Conn. Workers' Comp. Rev. Op. 111, 1415 CRB 8-92-5 (February 28, 1994), we remanded the issue back to the trial commissioner for additional proceedings. In Hubbard we held,

> precisely because of the ambiguity of the evidence at hand, we are unable to sustain the trier's dismissal of the claim for temporary total disability benefits. We therefore remand this matter to the trial commissioner for additional proceedings relative to the issue of whether the claimant currently has an entitlement to temporary total disability benefits. No case under this Act should be finally determined when the . . . court is of the opinion that, through inadvertence, or otherwise, the facts have not been sufficiently found to render a just judgment. Cormican v. McMahon, 102 Conn. 234, 238 (1925).

The present circumstances in this case amount to an unsustainable equipoise. Consistent with the precedent in Cormican, we remand to this matter to the trial commissioner for further proceedings consistent with the Finding and Orders of April 17, 2012.

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[5] The respondent can raise collateral estoppel issues regarding decisions reached in the April 17, 2012 Finding and Orders. See Bailey v. Stripling Auto Sales, Inc., 4516 CRB-2-02-4 (May 8, 2003).

Commissioners Peter C. Mlynarczyk and Ernie R. Walker concur in this opinion.