CASE NO. 5829 CRB-6-13-4
CLAIM NO. 601058609 : COMPENSATION REVIEW BOARD

SONIA N. PAGAN
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: MARCH 28, 2014

CAREY WIPING MATERIALS, INC.
EMPLOYER

and

THE HARTFORD
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Jennifer B. Levine, Esq., and Harvey L. Levine, Esq., Law Offices of Harvey L. Levine, 754 West Main Street, New Britain, CT 06053.

The respondents were represented by Michael J. McAuliffe, Esq., Pomeranz, Drayton & Stabnick, LLC, 95 Glastonbury Boulevard, Glastonbury, CT 06033-4412.

This Petition for Review from the March 21, 2013 Decision Re: Motion to Preclude of the Commissioner acting for the Eighth District was heard October 25, 2013 before a Compensation Review Board panel consisting of Commission Chairman John A. Mastropietro and Commissioners Charles F. Senich and Stephen B. Delaney.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has appealed from the March 21, 2013 Decision Re: Motion to Preclude [hereafter "Ruling"]. In that March 21, 2013 Ruling the Commissioner acting for the Eighth District denied the Claimant's Motion to Preclude. In proceedings before the trial commissioner the respondents contended that the Motion to Preclude should be denied because (1) they paid benefits to the claimant well before the time the claimant filed a Form 30C and (2) their acceptance of the claim was demonstrated by their issuing a voluntary agreement to the claimant. The pertinent facts relating to the denial of the Motion to Preclude are as follows.

The underlying factual scenario reflects that on February 22, 2010 the claimant sustained a compensable injury while in the employ of the respondent-employer, Carey Wiping Materials. On April 8, 2010 the claimant filed a Form 30C with the Workers' Compensation Commission and the respondent-employer respectively.[1] On September 24, 2012 claimant's counsel filed a Motion to Preclude.

The ultimate issue presented for our consideration[2] is whether the trial Commissioner erred in denying the claimant's Motion to Preclude. The claimant contends that the respondents' act of commencing the payment of benefits along with their issuing of an "uncertified, unsigned, undated and unapproved" voluntary agreement

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[1] See April 8, 2013 Ruling on Claimant's Motion to Correct and March 21, 2013 Ruling.

[2] In the proceedings before the trial commissioner, claimant's counsel initially claimed that the respondents did not make payments to the claimant so as to come within the provision permitting the respondents one year to raise a defense to the claim. The respondents offered into evidence a document identifying various payments made to, and on behalf of, the claimant. That accounting was initially marked for identification only at the October 23, 2012 Formal Hearing session. Following the December 4, 2012 testimony of the witness Amy Lamson, a team leader for the respondent-insurance carrier, The Hartford Insurance Group, the accounting was marked as a full exhibit, respondents' Exhibit 2. See December 4, 2012 Transcript, pp. 28-30.

did not permit the respondents to avail themselves of the special status or "safe harbor" conferred on those who commence the payment of benefits pursuant to §31-294c(b).[3] See Appellant's Brief, p. 4. See also Monaco-Selmer v. Total Customer Service, 5622 CRB-3-10-12 (January 19, 2012).

The specific provision of § 31-294c(b) at issue provides:

> 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….

[3] Section 31-294c(b) provides:

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 stating that the right to compensation is contested, the name of the claimant, the name of the employer, the date of the alleged injury or death and the specific grounds on which the right to compensation is contested. 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, provided the employer shall not be required to commence payment of compensation when the written notice of claim has not been properly served in accordance with section 31-321 or when the written notice of claim fails to include a warning that (1) the employer, if he has commenced payment for the alleged injury or death on or before the twenty-eighth day after receiving a written notice of claim, shall be precluded from contesting liability unless a notice contesting liability is filed within one year from the receipt of the written notice of claim, and (2) the employer shall be conclusively presumed to have accepted the compensability of the alleged injury or death unless the employer either files a notice contesting liability on or before the twenty-eighth day after receiving a written notice of claim or commences payment for the alleged injury or death on or before such twenty-eighth day. An employer shall be entitled, if he prevails, to reimbursement from the claimant of any compensation paid by the employer on and after the date the commissioner receives written notice from the employer or his legal representative, in accordance with the form prescribed by the chairman of the Workers' Compensation Commission, stating that the right to compensation is contested. Notwithstanding the provisions of this subsection, an employer who fails to contest liability for an alleged injury or death on or before the twenty-eighth day after receiving a written notice of claim and who fails to commence payment for the alleged injury or death on or before such twenty-eighth day, shall be conclusively presumed to have accepted the compensability of the alleged injury or death.

In Monaco-Selmer we held, inter alia, that the respondents' two (2) payments of $150 which they characterized as advances on temporary total disability benefits, did not permit the respondents to avail themselves of the one year tolling provision, i.e., safe harbor, permitted in § 31-294c(b).[4] At the outset we note that Monaco-Selmer was one of a number of court and Compensation Review Board cases that followed in the wake of the Supreme Court's opinion in Harpaz v. Laidlaw Transit, Inc., 286 Conn. 102 (2008) and consistent with Harpaz acknowledged the harshness of the remedy but endorsed a strict application of § 31-294c(b).[5] Id., at 119-20. See also; Domeracki v. Dan Perkins Chevrolet, 5727 CRB-4-12-1 (May 1, 2013), *appeal pending*, AC No. 35673 (May 17, 2013) citing Tanguay v. Rent-A-Center, Incorporated, 5714 CRB-8-11-12 (January 8, 2013); Black v. London & Egazarian, 30 Conn. App. 295, 304 (1993).

What makes Monaco-Selmer particularly relevant to the matter at hand was the board's holding that merely commencing some payments within the time frame set out in § 31-294c(b) did not meet the respondents' obligations. Particularly disquieting to the

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[4] "A respondent enjoys safe harbor from preclusion not by virtue of making a single payment in lieu of filing a disclaimer, but may only preserve its rights if 'it timely paid compensation.'" Monaco-Selmer, supra, *quoting* Harpaz, supra, p. 129.

[5] We stated in Domeracki, supra:

[F]ollowing 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 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).

In the period between the issuing of Domeracki, supra, and this appeal, Callender, supra, was withdrawn from the Supreme Court and the Appellate Court reversed our opinion in Dubrosky, supra. See Dubrosky v. Boehringer Ingleheim Corporation, 145 Conn. App. 261 (2013), *cert. denied*, 310 Conn. 935 (2013).

board was the seeming arbitrary basis on which payments were commenced. The board referenced the humanitarian purpose of the Workers' Compensation Act, the analysis provided by the Supreme Court in Harpaz and concluded, "In keeping with the clear imprimatur of cases…discussing our humanitarian purpose it is clear the statutory interpretation harmonious with that purpose requires that to 'commence' payments a respondent must make consistent, regular payments to the claimant until a Form 43 or Voluntary Agreement is issued."

The instant case also presents a situation where we are asked to review the legal sufficiency of the voluntary agreement and whether such a voluntary agreement was proffered. Putting aside for the moment the issues raised regarding the legal sufficiency of the voluntary agreement, we first examine the claimant's concern that the trier erred in finding that the respondents "proffered" the voluntary agreement.

Whether the voluntary agreement was proffered to the claimant is a determination that is factual in nature. As such, it is within the purview of the trial commissioner and will not be set aside unless it results from an abuse of discretion, i.e., where the matter was decided "so arbitrarily as to vitiate logic, or [was] . . . based on improper or irrelevant factors." In re Shaquanna M., 61 Conn. App. 592, 603 (2001). See Santiago v. Junk Busters, LLC, 5721 CRB-6-12-1 (January 8, 2013). Stated another way an abuse of discretion has occurred when the trial commissioner could not reasonably conclude as he did. See Martinez-McCord v. State/Judicial Branch, 5275 CRB-7-07-9 (September 12, 2008) *citing* Simmons v. Simmons, 244 Conn. 158 (1998).

In the proceedings below there was testimony from Ms. Amy Lamson, a team leader for the respondent-insurance carrier, The Hartford Insurance Group, relating to the

voluntary agreement and the carrier's process in documenting and issuing same. From that testimony the trial Commissioner could reasonably have inferred that the voluntary agreement was issued on March 11, 2010. See December 4, 2012 Transcript, pp. 31-32, 34-35. In his findings the trial Commissioner found, "The Claimant offered no evidence to suggest that she did not receive a Voluntary Agreement from the Respondents. She offered no evidence to suggest that she sought changes in the Voluntary Agreement forwarded by the Respondents. The Claimant did not even deny that she received the Voluntary Agreement." Findings, ¶ 15.

The trier's findings also reflect that the claimant's testimony lacked some degree of credibility and therefore was not accorded great weight. To that end, at one point in the proceedings the respondents presented the claimant with a copy of a Form 1A alleged to have been signed by her. [6] Upon direct examination by Attorney McAuliffe, respondents counsel, when asked if the signature on the document was hers the claimant said yes but denied remembering signing the form. When Attorney McAuliffe asked whether the claimant had filed a claim for benefits or hired an attorney to file a claim she replied that she did not remember. Later in his direct examination of the claimant; she professed confusion and did not remember how long she received payments, how long after her injury payments were made, nor could she remember when they ceased. See October 23, 2012 Transcript, pp. 15-18[7]. It does not appear that the claimant, at any

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[6] The Form 1A is a Filing Status Exemption Form utilized to compute the claimant's compensation rate.

[7] In Conclusions, ¶¶ B and C the trial Commissioner states, "I do not find the testimony of the Claimant credible. I do not believe she is unaware of whether or not she dated the Form 1A offered into evidence. The date was handwritten. I also do not believe she was confused when she testified. She was definitive that she did not sign the 1A Form on February 27, 2010 and feigned confusion for the remainder of her testimony. I do not believe the Claimant was unaware whether she received checks immediately following her injury and I do not believe she did not remember whether she filed a claim or whether she had a lawyer file a claim for her."

point, averred that she did not receive the voluntary agreement the respondents allegedly issued. We therefore conclude that the trial Commissioner's findings and conclusion as to whether the respondents issued a voluntary agreement did not result from an abuse of discretion.

We next review the claimant appellant's argument that the voluntary agreement issued by the carrier was legally insufficient and therefore could not defeat the claimant's Motion To Preclude. Here again we are not persuaded by the claimant appellant's argument. When a voluntary agreement is proffered for the purpose of resolving a dispute and binding the parties as effectively as an award made by the Commissioner, a higher degree of technical compliance is required. As we have noted on other occasions a voluntary agreement that is unsigned by a party cannot be enforced. See Richardson v. H.B. Sanson, Inc., 6 Conn. Workers' Comp. Rev. Op. 107, 590 CRD-1-87 (February 23, 1989). See also, Snyder v. Gladeview HealthCare Center, 5735 CRB-8-12-2 (February 27, 2013), *appeal pending*, AC No. 35474 (March 15, 2013).

The purpose of the voluntary agreement, however, in this instance was not to bind the parties in lieu of an award. Rather the purpose was to demonstrate that the respondents accepted compensability of the claim. We note that the voluntary agreement at issue here set out the details pertaining to; the claimant's average weekly wage; temporary partial benefit rate; body part injured; circumstances giving rise to the injury; and other pertinent details. Further, although the voluntary agreement lacked a signature, the voluntary agreement did identify the person who prepared the document on behalf of the carrier and provided a telephone number for same.

It appears that the circumstances here, i.e., where the claimant was paid benefits, and the respondents issued a voluntary agreement is exactly the scenario suggested by this tribunal in Monaco-Selmer as a means of preserving the respondents right to defend under § 31-294c(b). Were we to construe the statute so as to require that the respondents commence payment of benefits and provide a perfectly executed voluntary agreement within the 28 day time frame we would impose an impossible burden on the respondents. Such a construction would put the respondents in the untenable position of being at the mercy of claimants who refuse to sign or execute voluntary agreements within the requisite period. Requiring compliance with § 31-296[8] which pertains to voluntary agreements is logical when the purpose of the voluntary agreement is to bind the parties in lieu of an award. When the voluntary agreement is issued and considered in conjunction with the respondents commencement of payments as set out in § 31-294c(b) requiring compliance with § 31-296 is unwarranted.

We believe our conclusion is further buttressed by the Appellate Court's analysis in Dubrosky v. Boehringer Ingelheim Corporation, 145 Conn. App. 261 (2013), *cert.*

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[8] §31-296(a) provides:

If an employer and an injured employee, or in case of fatal injury the employee's legal representative or dependent, at a date not earlier than the expiration of the waiting period, reach an agreement in regard to compensation, such agreement shall be submitted in writing to the commissioner by the employer with a statement of the time, place and nature of the injury upon which it is based; and, if such commissioner finds such agreement to conform to the provisions of this chapter in every regard, the commissioner shall so approve it. A copy of the agreement, with a statement of the commissioner's approval, shall be delivered to each of the parties and thereafter it shall be as binding upon both parties as an award by the commissioner. The commissioner's statement of approval shall also inform the employee or the employee's dependent, as the case may be, of any rights the individual may have to an annual cost-of-living adjustment or to participate in a rehabilitation program administered by the Department of Rehabilitation Services under the provisions of this chapter. The commissioner shall retain the original agreement, with the commissioner's approval thereof, in the commissioner's office and, if an application is made to the superior court for an execution, the commissioner shall, upon the request of said court, file in the court a certified copy of the agreement and statement of approval.

denied, 310 Conn. 935 (2013).[9] The Appellate Court held that under circumstances in which it was impossible for a respondent to commence payment of compensation within the statutory period set out in § 31-294c(b) preclusion could not lie. While Dubrosky may not be on all fours with the matter at bar, it provides some guidance as to how we are to interpret the provisions of § 31-294c(b) when a respondent has timely commenced payments. We think the concern we identified as to vesting the claimant with the power to put a respondent in the untenable position of being manipulated into a position where it could not assert a defense under § 31-294c(b) was also expressed in Dubrosky, supra, at 273. There the court said;

> [W]here an employee files a form 30C claim for which the employer does not contest liability but fails to generate medical bills within twenty-eight days for the employer to commence payment…[requiring] strict compliance in a case such as this creates an incentive for claimants to deliberately delay seeking medical treatment until the very end of the twenty eight day period….

Id. (Emphasis ours.)

Stated another way if Dubrosky held that preclusion could not lie against a respondent for whom commencing payments was impossible, it stands to reason that preclusion cannot lie where respondents commenced payments and initiated steps to formulate a voluntary agreement.

We therefore affirm the March 21, 2013 Decision Re: Motion to Preclude of the Commissioner Acting for the Eighth District.

Commissioners Charles F. Senich and Stephen B. Delaney concur.

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[9] In Dubrosky, the Appellate Court reversed this tribunal's opinion Dubrosky v. Boehringer Ingleheim Corporation, 5682 CRB 4-11-9 (September 5, 2012).