CASE NO. 5854 CRB-6-13-6 : COMPENSATION REVIEW BOARD
CLAIM NO. 601058963

LILLIE B. WILLIAMS
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: JUNE 12, 2014

BRIGHTVIEW NURSING & RETIREMENT
EMPLOYER

and

GALLAGHER BASSETT SERVICES, INC.
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

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

The respondents were represented by Nicholas W. Francis, Esq., Law Office of Jonathan M. Zajac, LLC, 152 Simsbury Road, PO Box 699, Avon, CT 06001.

This Petition for Review from the May 30, 2013 Findings and Orders of the Commissioner acting for the Sixth District was heard January 24, 2014 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Stephen B. Delaney and Michelle D. Truglia.

OPINION

STEPHEN B. DELANEY, COMMISSIONER. The claimant appeals from the denial of her Motion to Preclude. With the exception of a superfluous finding which should be acknowledged as having no weight in further proceedings, we affirm the trial commissioner's decision. We affirm the denial of the Motion to Preclude.

The following facts are pertinent to our discussion. The claimant filed a Form 30C with the Commission on April 8, 2010 which alleges that on October 28, 2009 she injured her whole back, both legs, both shoulders, and neck while "lifting pushing pulling– geriatric patient care. Keeping a 100 year old man from falling on the floor" while employed at Brightview.[1] The box on the Form 30C indicating an occupational disease or repetitive trauma is checked. On May 19, 2010 the commission received a Form 43 denial of a "10/28/10" injury. On April 9, 2012 the commission received a Motion to Preclude from the claimant, which motion is the subject of this action.

The claimant testified that she was working at Apple Rehab in Avon on October 28, 2009 and the injury occurred as described in the Form 30C. After notifying her employer she was sent to Concentra for treatment and she received a period of physical therapy. Concentra limited her to light duty work and she received a light duty assignment. The doctors at Concentra eventually returned her to full duty work and she kept working. She doesn't believe that she lost any time from work as a result of this injury. After her release to full duty she did all her CNA duties until a subsequent 2010 injury.

[1] The named respondent in this claim is "Brightview" but the claimant testified that on the date of the injury she was working at "Apple Rehab." We have reviewed the transcript and are uncertain as to the nature of the discrepancy; February 27, 2013 Transcript, pp. 11-15, but are satisfied it is not material to the resolution of the instant dispute.

A claim adjuster for Gallagher Basset, the respondent's carrier, also testified. Ms. Kasey Salvas testified that the claimant's October 28, 2009 claim was a medical-only claim, so any treatment that she needed was accommodated for her light duty, and Ms. Salvas testified she believed those restrictions were accommodated. Gallagher Bassett paid for all requested medical treatment. To her knowledge, medical treatment has never been denied. The date of service for the first treatment was October 30, 2009 and the last was November 24, 2009, when the Claimant was released to full duty. All of the bills were paid. Ms. Salvas further testified the date of injury on the Form 43, "10/28/10" was a typographical error.

Based on this record the trial commissioner concluded that the claimant initiated a claim and the respondents provided the claimant with light duty work and provided medical treatment immediately following the initiation of the claim. The trial commissioner further found that the inaccurate date of injury on the Form 43 was a scrivener's error and therefore not a fatal defect. Accordingly the trial commissioner denied the Motion to Preclude.

The claimant filed a Motion to Correct. This motion sought in part to expunge the testimony of the claimant and Ms. Salvas and to order the Motion to Preclude granted. The trial commissioner denied the Motion in its entirety and the present appeal then ensued.

The gravamen of the claimant's argument was contained in their Motion to Correct, wherein they argued that neither the claimant nor the respondent should have been asked to present any evidence and the decision as to the preclusion should have been made by the trial commissioner solely on the pleadings in the file. We have

reviewed appellate precedent back to the original cases establishing the current legal framework for preclusion cases i.e. Donahue v. Veridiem, Inc., 291 Conn. 537 (2009) and Harpaz v. Laidlaw Transit, Inc., 286 Conn. 102 (2008). None of this precedent stands for the proposition that a Motion to Preclude can be decided solely by use of a calendar, despite the fervent assertions of claimant's counsel.

Donahue, supra, points out that a conclusive presumption of compensability exists pursuant to § 31-294c(b) C.G.S. when a respondent fails either to file a proper disclaimer within 28 days of the Form 30C being filed or commence payments. Id., 548. The Supreme Court in Donahue also pointed out that this conclusive presumption did not relieve the burden on the claimant to prove her case. Id., 546, n. 7. This decision also points out that a Commissioner may seek information from an employer "to aid in the adjudication of a claim." Id., 555, n. 11.

A review of a Form 43 indicates that it contains no provision for outlining how the respondent is providing either medical payments to the claimant responsive to the Form 30C or making weekly indemnity payments to the claimant responsive to the Form 30C. The form only provides for notification to the claimant and the Commission as to the substantive reason why the claim is being contested. As previously noted, a respondent can comply with the preclusion statute even when they have not immediately filed a Form 43, as they can make payments to the claimant for up to one year before determining whether they are contesting liability. In order for a respondent to demonstrate that they have complied with the alternative compliance mechanism under the statute of making payment to the claimant, see Harpaz, supra, 129-130, the respondent must be able to present evidence to the trial commissioner that they have

made such payment. Denying the respondent the ability to present such evidence would eviscerate the concept of due process. See Balkus v. Terry Steam Turbine, Co., 167 Conn. 170, 177 (1974) and Bryan v. Sheraton-Hartford Hotel, 62 Conn. App. 733, 740 (2001). Therefore the claimant's argument that the trial commissioner erred by obtaining testimony from her and the respondent as to whether the respondents had made payments within 28 days of the Form 30C being filed is bereft of logic and merit.

The Appellate Court recently ruled on issues very similar to the case at bar in Dubrosky v. Boehringer Ingelheim Corporation, 145 Conn. App. 261 (2013). We find Dubrosky substantially on point and give that decision *stare decisis*. In Dubrosky the claimant filed a Form 30C in February 18, 2009. The respondents filed a Form 43 on October 20, 2009. The claimant filed a Motion to Preclude which was granted by the trial commissioner. On appeal, the respondent argued that as it paid medical bills for the claimant prior to filing its Form 43 that it should be afforded safe harbor from preclusion. They argued that as the claimant lost no time from work during the initial 28 day period to respond to the claim and presented no medical bills prior to the end of that period that it was a matter of impossibility for the respondent to respond within the statute's time frame. While this tribunal disagreed with the respondent, see Dubrosky v. Boehringer Ingelheim Corporation, 5682 CRB-4-11-9 (September 5, 2012), *rev'd*, 145 Conn. App. 261 (2013), *cert. denied*, 310 Conn. 935 (2013), the Appellate Court reversed that decision and promulgated a new test for determining when preclusion should be granted.

> In deciding a motion to preclude, the commissioner must engage [in] a two part inquiry. First, he must determine whether the employee's notice of claim is adequate on its face. See General Statutes § 31–294c (a). Second, he must decide whether the employer failed to comply with § 31–294c either by filing a notice to contest the claim or by commencing payment on that claim

> within twenty-eight days of the notice of claim. See General Statutes § 31–294c (b). If the notice of claim is adequate but the employer fails to comply with the statute, then the motion to preclude must be granted. *Callender* v. *Reflexite Corp.*, 137 Conn. App. 324, 338, 49 A.3d 211, cert. granted on other grounds, 307 Conn. 915, 54 A.3d 179 (2012).

Id., 268-269.

In reviewing the law and the facts in Dubrosky the Appellate Court determined that when no medical bills had been presented to the respondent for payment within the 28 day period to contest liability that it was impossible for the respondent to comply with the preclusion statute. "Thus, where notice, by filing a form 43 or commencing medical payments is impossible to provide in a timely manner, the failure to comply strictly with § 31-294c (b) will not preclude the employer from contesting the extent of the employee's disability." Id., 274.[2]

In the present matter the trial commissioner concluded after hearing the evidence that the respondents had paid for the claimant's medical treatment even before the claimant filed the Form 30C. Since this tribunal and the Appellate Court have approved the practice of filing a "pre-emptive disclaimer" see Lamar v. Boehringer Ingelheim Corp., supra, 138 Conn. App. 826 (2012), this clearly satisfies the test in Donahue and Callender of commencing payments to the claimant during the time period under which a Form 43 would otherwise need to be filed. It would be irrational to conclude that the impossibility of performance (as what occurred in Dubrosky) should yield a more

[2] The claimant argues that Callender v. Reflexite Corp., 137 Conn. App. 324 (2012) stands for the proposition that a trial commissioner may not look beyond the four corners of the Form 30C and a Form 43 when determining a Motion to Preclude. We note that the Appellate Court in Dubrosky v. Boehringer Ingelheim Corporation, 145 Conn. App. 261 (2013) cited Callender, supra, as authority but reached a result diametrically opposed to this position. Accordingly, we find the claimant's reliance on Callender to be ineffectual.

favorable outcome to the respondent than what occurred here, which was actual performance. See Lamar, supra, ''[w]e have often recognized that those who promulgate statutes . . . do not intend to promulgate statutes . . . that lead to absurd consequences or bizarre results.'' Id., 835.

The claimant also argues that the disclaimer eventually filed by the respondents in this case is fatally flawed as it cites an inaccurate date of injury. She cites Russell v. Mystic Seaport Museum, 252 Conn. 596 (2000) as being on point. We do not agree. In Russell the various disclaimers filed all failed to comport with the standards delineated in Tovish v. Gerber Electronics, 19 Conn. App. 273 (1989). The disclaimer in the present case has only one error: the citation of a date of injury which is obviously erroneous as it postdates the filing of the disclaimer itself, as it cited the correct day and month but the incorrect year. The trial commissioner determined this was obviously a typographical error. We agree and fail to see how any reasonable person would not have recognized that this lapse was unintentional in nature, or how the claimant could be prejudiced in any manner by this document.

The trial commissioner's decision that the inaccurate date herein due to a scriveners' error was not a fatal defect is in full accord with our precedent. In DiStasi v. Watertown-Board of Education, 5010 CRB-5-05-10 (September 25, 2006) we found a technical deficiency in a disclaimer was immaterial and did not warrant granting preclusion, finding the case indistinguishable from Duglenski v. Waterbury, 4913 CRB-5-05-2 (January 18, 2006), *appeal dismissed for lack of final judgment/lack of jurisdiction*, A.C. 27333 (June 8, 2006) and Tovish, supra, where alleged technical deficiencies in a disclaimer did not rise to a level warranting a Motion to Preclude. The

test in all these cases is whether the disclaimer would have adequately apprised a reasonable person as to what the respondent was contesting. Given this commission's long precedent as to affording obvious scrivener's errors no weight, see Hernandez v. American Truck Rental, 5083 CRB-7-06-4 (April 19, 2007), we find the Commissioner's decision herein legally sound.[3]

The claimant raises a single meritorious issue on appeal. She argues that the trial commissioner should not have issued a conclusion on whether the claim herein was based on a repetitive trauma or accidental injury theory of recovery, as this issue did not involve the jurisdictional issue of whether preclusion should be granted. See Correction, ¶ 5 in the claimant's Motion to Correct. We discussed some of these issues recently in Geraldino v. Oxford Academy of Hair Design, 5840 CRB-5-13-5 (April 17, 2014), which cited Russell, supra, for the proposition that the theory of recovery in a workers' compensation case is not a significant factor in determining whether preclusion lies. For the reasons stated in Geraldino, we believe the trial commissioner should not have addressed the issue of repetitive trauma at this juncture and this conclusion (Conclusion, ¶ F) should be accorded no weight. Since further proceedings will likely be required in this matter, we find that this is harmless error, Peters v. Corporate Air, Inc., 14 Conn. Workers' Comp. Rev. Op. 91, 1679 CRB-5-93-3 (May 19, 1995) as a future hearing will need to consider the underlying merits of this claim.

The respondents clearly complied in this matter with the requirements of § 31-294c(b) C.G.S. to respond to the claim by paying for medical treatment. The disclaimer

[3] We note that in consideration of a Notice of Claim, we have long held that errors as to a date of injury are not fatal to the claim unless the respondent can establish they were materially prejudiced. See Kingston v. Seymour, 5789 CRB-5-12-10 (September 10, 2013) and Surowiecki v. UTC/Pratt & Whitney, 4233 CRB-8-00-5 (May 24, 2001). We see no reason not to hold disclaimers to a reciprocal standard.

herein was filed within one year of the Form 30C and clearly advised the claimant as to what the respondent was contesting. The Motion to Preclude under these circumstances should be denied and was denied.

We affirm the denial of the Motion to Preclude.

Commissioner Michelle D. Truglia concurs in this opinion.

CHAIRMAN JOHN A. MASTROPIETRO, CONCURRING.

I concur wholeheartedly in the outcome of this case but write separately in order to address broader issues which are raised by this appeal.

In reviewing the facts of the case herein, one is struck by the fact that our precedent over the issue of preclusion in the wake of Harpaz, supra, and its progeny now misses the forest (was the claimant prejudiced by the respondent's actions?) for the trees (was the correct form filed on the correct date?). In my opinion there was no merit to the claimant's Motion to Preclude. The claimant did not miss any time from work nor was she denied any timely medical treatment for her injuries. The statute permits a respondent to pay without prejudice for up to one year while they investigate the claim and determine whether they will contest the matter. In this case the Motion to Preclude was brought long **after** that statutory time period had elapsed and long after the claimant had been advised of the respondent's position.

I note the seminal case on disclaimers Menzies v. Fisher, 165 Conn. 338 (1973) states the purpose behind the preclusion statute was to "correct some of the glaring inequities and inadequacies of the Workmen's Compensation Act [such as] the needless, prejudicial delays in the proceedings before the commissioners, delays by employers or insurers in the payment of benefits, lack of knowledge on the part of employees that they

were entitled to benefits and the general inequality of resources available to claimants with bona fide claims." Menzies, supra, at 342. In this case the claimant suffered no delay in payment; no delay in medical treatment, and received timely knowledge as to the respondent's intentions. Failure to grant preclusion does not deny claimants the right to seek an award on the merits. To the extent that the adjudication of this claim has been delayed, it has been due to a futile effort to obtain preclusion on hypertechnical grounds rather than seek a determination on the merits.

We have previously expressed concern as to the possible misuse of the notice statute. See Lamar v. Boehringer Ingelheim Corp., 5588 CRB-7-10-9 (August 25, 2011), *aff'd,* 138 Conn. App. 826 (2012), *cert. denied*, 307 Conn. 943 (2013), Verrinder v. Matthew's Tru Colors Painting & Restoration, 4936 CRB-4-05-4 (December 6, 2006), *appeal dismissed*, AC 28367 (July 25, 2007) and Christy v. Ken's Beverage, Incorporated, 5157 CRB-8-06-11 (December 7, 2007). While preclusion is a valuable and necessary tool, I believe that we are inadvertently enabling the filing of preclusion motions in an effort to inequitably manufacture compensability of unmeritorious claims. We have not tolerated such conduct in the past in proceedings before our commission. See Mankus v. Mankus, 4958 CRB-1-05-6 (August 22, 2006), *aff'd,* 107 Conn. App. 585 (2008), *cert*. *denied*, 288 Conn. 904 (2008).

I believe it is now time to revisit the issue of how to apply the preclusion statute so as to properly align the law with the stated objectives in Menzies. When a claimant receives immediate benefits following a workplace incident the "delays by employers or insurers in the payment of benefits," id., 342, which was the impetus behind the Menzies decision are not present. Reading Menzies and its less heralded companion case, Adzima

v. UAC/Norden Division, 177 Conn. 107 (1979) in their entirety, one clearly identifies an articulated public policy forcing respondents to respond to a claim in some fashion in a prompt manner, and to penalize dilatory conduct on their part. In the present case the respondents acted in a timely manner by immediately paying the claimant's medical expenses and providing light duty work. On the other hand, the claimant delayed filing her Motion to Preclude until very late in the proceeding. Is it not equitable to expect both parties in a contested matter to act in a nondilatory manner, and not create a situation where a claimant could gain an advantage by using dilatory tactics?

I also note that in recent years the appellate courts while citing Adzima, supra, have through their application of that precedent left us confused. Prior to Harpaz, supra, we understood the holding of Adzima to stand for the proposition that even when a respondent has conceded compensability of a claim by way of preclusion or a voluntary agreement that the respondent still has the right to contest the extent of disability. Id., 115. Indeed Adzima, suggested that it was unwarranted to extend the holding of Menzies to such cases. Id. The Supreme Court could certainly overrule either Menzies or Adzima were they inclined to do so, but unfortunately the current state of the law has resulted in a *sub silencio* constriction of the Adzima precedent and the *de facto* revision of Menzies, with a result that potentially supports ambush litigation by a claimant. I do not regard this as a an appropriate objective of the law.

What would be a more desirable state of the law would be one where we expected reciprocity and equity from all litigants before this Commission. The appellate courts could interpret § 31-278 C.G.S. and § 31-298 C.G.S. as empowering the trial commissioner to determine the equity of the circumstances when ruling on a Motion to

Preclude. This, in my view, would be more likely to lead to achieving the objectives delineated in Menzies. In the alternative, legislative enactment of placing a similar time limit to contest a disclaimer or the lack thereof similar to the time to file a disclaimer could be implemented, as this would expedite matters and create a more even playing field. I believe a robust and definitive response is essential, however, as in the absence of clarity we will continue to see our adjudicatory system strain under the weight of specious and stale claims of preclusion.

The purpose of the system "is to provide a prompt, efficient, simple and inexpensive procedure for obtaining benefits related to employment." Pietraroia v. Northeast Utilities, 254 Conn. 60, 74 (2000). In considering issues related to statutory preclusion, I believe we must keep our eyes fixed strategically upon the forest described in Pietraroia, and not become hopelessly entangled in the arguments of litigants who seek to exploit dilatory tactics to gain tactical advantage.