CASE NO. 5870 CRB-4-13-8 CLAIM NO. 400086696	: COMPENSATION REVIEW BOARD
CORALYS NEGRON CLAIMANT-APPELLANT	: WORKERS' COMPENSATION COMMISSION
v.	: JULY 17, 2014
CVS CAREMARK CORPORATION EMPLOYER SELF-INSURED	
and	
GALLAGHER BASSETT SERVICES ADMINISTRATOR RESPONDENTS-APPELLEES	

APPEARANCES:

The claimant was represented by Patrick D. Skuret, Esq., Law Offices of Daniel D. Skuret, PC, 215 Division Street, PO Box 158, Ansonia, CT 06401.

The respondents were represented by James T. Baldwin, Esq., Coles, Baldwin & Kaiser, LLC, 1261 Post Road, Fairfield, CT 06824.

This Petition for Review from the July 17, 2013 Findings and Order of the Commissioner acting for the Fourth District was heard February 28, 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

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has appealed from a Findings and Order which denied her Motion to Preclude. She argues that as the respondent failed to respond to her Form 30C in a timely fashion, preclusion was required in this case. We find that in situations such as the instant case, where the respondents were found to have provided medical care to the claimant and filed a pre-emptive Form 43 before the claimant filed a formal notice of claim, preclusion is not applicable. We affirm the Findings and Order.

The trial commissioner reached the following factual findings. On March 27, 2011 the claimant was in the course of her employment with CVS when she alleges she sustained an injury while lifting totes. A First Report of Injury dated June 6, 2011 claimed right shoulder pain as the result of lifting totes. On June 8, 2011 the Gallagher Bassett adjuster assigned to the claim made first contact with the claimant and advised her to go to Concentra or a walk-in clinic to see what her diagnosis was. On June 10, 2011 the respondent determined the claim was compensable for a right shoulder strain. The claim notes indicate that at that time the claim would be handled on a pay without prejudice basis. The claimant commenced medical treatment for her right shoulder pain on June 16, 2011 at Hill Health Center with a complaint of right shoulder pain, and was prescribed physical therapy for sprains and strains of the right shoulder. The respondent authorized the recommended physical therapy with the Griffin Hospital PT Department and later authorized the claimant to treat with Dr. Ignatius Komninakas at Valley Orthopaedic Specialists, LLC.

Dr. Komninakas assessed a right shoulder sprain on August 30, 2011 and recommended anti-inflammatories, physical therapy and a four-week follow up. The respondent authorized the physical therapy. On September 28, 2011 Dr. Komninakas prescribed additional physical therapy and the respondent authorized the twelve sessions he recommended. On October 13, 2011 the claimant attended an RME with Dr. Edward Staub. He opined that treatment to date had been reasonable and necessary but physical therapy could be discontinued with a home exercise program in place to strengthen the right shoulder. He did not think the claimant had yet reached MMI.

By January 2012 the claimant had attended 14 physical therapy sessions since her September 28, 2011 prescription. On January 11, 2012, Dr. Komninakas prescribed additional physical therapy. The respondent denied this request on January 13, 2012. On January 18, 2012 the respondent filed a Form 43, dated January 12, 2012 denying additional formal physical therapy as not medically necessary based on the RME with Dr. Staub. The Form 43 identified the date of the injury, the names of the employer and the claimant, as well as the grounds under which the respondent was contesting the right to compensation. On March 1, 2012 the respondent denied authorization for additional physical therapy that had been requested by Dr. Komninakas' office. The same day, the claimant filed a Form 30C seeking benefits for a March 27, 2011 injury to the right shoulder, right arm and neck. The Form 30C was received by CVS on March 3, 2012 and the Workers' Compensation Commission on March 5, 2012.

Subsequent to the filing of the Form 30C the respondent filed two additional Form 43's; the first on September 26, 2012 denying the claimant sustained a neck/cervical injury on March 27, 2011 and the second on January 28, 2013 also denying

the claimant sustained a cervical spine injury on the claimed date of injury. On September 18, 2012 Dr. Komninakas opined for the first time that the claimant was totally disabled from employment. Prior to that time, the claimant had continued working with restrictions and she had not lost time from work.

The trial commissioner also documented the respondent's payment for medical treatment and indemnity benefits. The respondent commenced payment of bills to Valley Orthopaedic Specialists, LLC on October 7, 2011. As of January 7, 2013 the respondent had issued payment to that office for treatment rendered to the claimant from August 30, 2011 through October 12, 2012. Checks for this purpose were issued on the following dates: October 7, 2011; November 1, 23 & 28, 2011; December 1, 15, 22 & 27, 2011; January 3, 4, 12 & 27, 2012; February 12, 2012; March 23 & 26, 2012; July 5, 9 & 12, 2012; November 8 & 27, 2012 and December 13, 2012. On September 29, 2011 and October 18, 2011 the respondent issued payment to Griffin Hospital for treatment rendered to the claimant from July 5, 2011 through August 18, 2011, and in November of 2012 they issued three payments to Stone River Pharmacy. On January 14, 2013 the respondent issued payment to the claimant for eight weeks of temporary total disability without prejudice.

Based on these subordinate facts the trial commissioner concluded the respondent commenced investigation of this claim and made first contact with the claimant within a week of the work incident having been reported. At that time, the claimant was advised to see a medical provider in order to ascertain a diagnosis. The respondent commenced payment for the claimant's medical treatment on September 29, 2011 and continued issuing payment for her treatment through at least December 13, 2012. The respondent

also filed a pre-emptive Form 43 on January 18, 2012 that specifically denied further formal physical therapy based on the examination with Dr. Staub; and this disclaimer identified the claimant, the employer, the date of injury and the grounds in which the respondent was defending the claim. The Form 30C was filed in March 2012 and before the 28th day after their receipt of the Form 30C the respondent commenced payment and continued to pay for the claimant's medical treatment through at least December 13, 2012. Prior to September 18, 2012 the claimant continued working and there had been no claim for lost time or indemnity benefits. The second Form 43 was sufficiently specific to apprise the claimant of the grounds on which the claim was being contested. The commissioner found that the respondent timely investigated this claim and commenced payment of compensation before the 28th day after having received the Form 30C. The commissioner also found that these payments were consistent and substantial and constituted an affirmative response to the claim. Therefore, per C.G.S. Section 31-294c, the respondent had up to one year from their receipt of the Form 43 to File a Notice of Contest.[1] Consequently, the commissioner denied the Motion to Preclude.

[1] The statute in question reads as follows.

Sec. 31-294c. Notice of claim for compensation. Notice contesting liability. Exception for dependents of certain deceased employees. (a) No proceedings for compensation under the provisions of this chapter shall be maintained unless a written notice of claim for compensation is given within one year from the date of the accident or within three years from the first manifestation of a symptom of the occupational disease, as the case may be, which caused the personal injury, provided, if death has resulted within two years from the date of the accident or first manifestation of a symptom of the occupational disease, a dependent or dependents, or the legal representative of the deceased employee, may make claim for compensation within the two-year period or within one year from the date of death, whichever is later. Notice of a claim for compensation may be given to the employer or any commissioner and shall state, in simple language, the date and place of the accident and the nature of the injury resulting from the accident, or the date of the first manifestation of a symptom of the occupational disease and the nature of the disease, as the case may be, and the name and address of the employee and of the person in whose interest compensation is claimed. An employee of the state shall send a copy of the notice to the Commissioner of Administrative Services. As used in this section, "manifestation of a symptom" means manifestation to an employee claiming compensation, or to some other person standing in such relation to him that the

knowledge of the person would be imputed to him, in a manner that is or should be recognized by him as symptomatic of the occupational disease for which compensation is claimed.

(b) 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.

(c) Failure to provide a notice of claim under subsection (a) of this section shall not bar maintenance of the proceedings if there has been a hearing or a written request for a hearing or an assignment for a hearing within a one-year period from the date of the accident or within a three-year period from the first manifestation of a symptom of the occupational disease, as the case may be, or if a voluntary agreement has been submitted within the applicable period, or if within the applicable period an employee has been furnished, for the injury with respect to which compensation is claimed, with medical or surgical care as provided in section 31-294d. No defect or inaccuracy of notice of claim shall bar maintenance of proceedings unless the employer shows that he was ignorant of the facts concerning the personal injury and was prejudiced by the defect or inaccuracy of the notice. Upon satisfactory showing of ignorance and prejudice, the employer shall receive allowance to the extent of the prejudice.

(d) Notwithstanding the provisions of subsection (a) of this section, a dependent or dependents of a deceased employee seeking compensation under section 31-306 who was barred by a final judgment in a court of law from filing a claim arising out of the death of the deceased employee, whose date of injury was between June 1, 1991, and June 30, 1991, and whose date of death was between November 1, 1992, and November 30, 1992, because of the failure of the dependent to timely file a separate death benefits claim, shall be allowed to file a written notice of claim for compensation not later than one year after July 8, 2005, and the commissioner shall have jurisdiction to determine such dependent's claim.

The claimant filed a Motion to Correct seeking to find facts consistent with granting preclusion, and seeking to have the Motion to Preclude granted. The trial commissioner denied the Motion in its entirety. The commissioner did add a supplemental Finding concerning medical treatment the claimant sought on June 16, 2011 at the Cornell-Scott Hill Health Center, which the claimant contended had not been paid for by the respondent. The Commissioner found the claimant had failed to provide evidence that this provider had ever billed the respondent for treatment. The claimant has now pursued the instant appeal. The gravamen of her argument is that as the respondent failed to file a Form 43 within 28 days subsequent to the filing of the Form 30C; preclusion must be granted. We are not persuaded by this argument.

On appeal, we generally extend deference to the decisions made by the trial commissioner. "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." Daniels v. Alander, 268 Conn. 320, 330 (2004). The Compensation Review Board cannot retry the facts of the case and may only overturn the findings of the trial commissioner if they are without evidentiary support, contrary to the law, or based on unreasonable or impermissible factual inferences. Kish v. Nursing and Home Care, Inc., 248 Conn. 379 (1999) and Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Nonetheless, while we must provide deference to the decision of a trial commissioner, we may reverse such a decision if the commissioner did not properly apply the law or reached a decision unsupported by the evidence on the record. Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12

(November 19, 2007).

The trial commissioner in this matter declined to grant a Motion to Preclude. We find that the focus of the claimant's argument rests on a number of cases where either this tribunal or the Appellate Court found that the respondents failed to file a timely Form 43 contesting a claim *subsequent* to the claimant filing a Form 30C. See Callender v. Reflexite Corp., 137 Conn. App. 324 (2012); Beshah v. U. S. Electrical Wholesalers, Inc., 5781 CRB-7-12-10 (August 14, 2013); Domeracki v. Dan Perkins Chevrolet, 5727 CRB-4-12-1 (May 1, 2013) and Monaco-Selmer v. Total Customer Service, 5622 CRB-3-10-12 (January 19, 2012). We find all these cases factually and legally distinguishable from this case and of little precedential weight. The circumstance herein is that a pre-emptive Form 43 was filed by the respondent *before* the claimant filed her Form 30C. The aforementioned cases did not deal with pre-emptive disclaimers. Therefore our analysis must be based on whether this disclaimer comports with the standards delineated in 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).

In Lamar the respondent sent the claimant a Form 43 which disclaimed responsibility for the claimant's medical condition by asserting it did not arise out of the claimant's employment. The claimant then filed a Form 30C seeking compensation for the same ailment which the respondent had denied responsibility for. The claimant's subsequent Motion to Preclude was denied by the trial commissioner and this tribunal affirmed the decision, noting "there is no statutory or precedential impediment to a respondent filing such a pre-emptive disclaimer of liability when they become aware a Chapter 568 claim may be imminent." Id. We noted that pursuant to appellate precedent

the purpose of a disclaimer under our Act was to advise the claimant as to whether their claim was being contested and "[w]hen a preemptive Form 43 is filed by an employer, clearly the respondent has not met the threshold of failing to contest liability to the claimant's injury." Id., 14.

The Appellate Court affirmed our decision. In so doing, their opinion offered this reasoning on the issue of a pre-emptive disclaimer, which we find relevant to the case at bar.

> We also agree with the defendant that its form 43 satisfies the statutory requirements of § 31-294c (b). ''Our Supreme Court, in discerning the legislative intent behind the notice requirement of General Statutes (Rev. to 1968) § 31-297 (b), now § 31-294c (b), explained that the statute is meant to ensure (1) that employers would bear the burden of investigating a claim promptly and (2) that employees would be timely apprised of the specific reasons for the denial of their claim. . . . The court noted that the portion of the statute providing for a conclusive presumption of liability in the event of the employer's failure to provide timely notice was intended to correct some of the glaring inequities of the workers' compensation system, specifically, to remedy the disadvantaged position of the injured employee . . . .'' (Citation omitted; internal quotation marks omitted.) *DiBello* v. *Barnes Page Wire Products, Inc*., 67 Conn. App. 361, 372, 786 A.2d 1234 (2001), cert. granted on other grounds, 260 Conn. 915, 796 A.2d 560 (2002) (appeal withdrawn June 26, 2002); see also *Chase* v. *State*, 45 Conn. App. 499, 503, 696 A.2d 1299 (1997).
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> The defendant indisputably investigated the plaintiff's claim in a prompt manner, as its form 43 was filed before the form 30C. Additionally, the defendant made clear to the plaintiff the reason it was contesting the claim under the act; that is, the plaintiff's injury did not arise out of or in the course of his employment. Because this form 43 alerted the plaintiff to the specific substantive ground on which the defendant contested compensability, we conclude that the form 43 was sufficient. fn 13. See *Pereira* v. *State*, supra, 228 Conn. 541.

Lamar, 138 Conn. App. 826, 840 (2012).

We have reviewed the Form 43 dated January 12, 2012 and the Form 30C dated March 1, 2012. Both forms reference the same employer, the same claimant and a date of injury of March 27, 2011. The Form 43 references an injury to the claimant's right shoulder. The Form 30C references the right shoulder, right arm and neck. We believe it is obvious that the pre-emptive disclaimer references the same injury for which the claimant now seeks compensation. For that reason, the Appellate Court's reasoning in Callender, supra, that the respondent could not have assumed the claimant's Form 30C applied to a prior injury and forego filing a timely disclaimer, is inapplicable herein. Prior to filing a notice of claim the claimant was advised of the respondent's position as to her March 27, 2011 injury. Based on the precedent in Lamar, a Motion to Preclude was therefore not viable.

Notwithstanding the lack of material distinctions between the Lamar case and this case, the claimant argues that the disclaimer herein was inadequate as it did not contest the compensability of the injury, as did the disclaimer in Tovish v. Gerber Electronics, 19 Conn. App. 273 (1989). We are not persuaded. The respondent is clearly entitled even if they accept the compensability of a specific injurious event to contest the extent of disability caused by this event and the reasonableness of further medical treatment. The claimant was clearly put on notice that the respondent, based on the opinions of Dr. Staub, were contesting her need for any further medical treatment due to her injury of March 27, 2011. The disclaimer herein was **not** a "general denial" as proscribed by Menzies v. Fisher, 165 Conn. 338 (1973) as it adequately advised the claimant of what the respondent was contesting and the rationale for the contest.

Moreover, we look to the respondent's actions in providing the claimant medical treatment for her compensable injury immediately subsequent to this incident and conclude that the respondent was within the "safe harbor" from preclusion available under § 31-294c C.G.S. pursuant to Harpaz v. Laidlaw Transit, Inc., 286 Conn. 102, 129-130 (2008), wherein the respondent had one year from the date of the incident to present a defense. The claimant argues that Beshah, supra, is on point as there allegedly was a failure on the part of the respondent to provide continuous payment of medical bills pertaining to this injury. That is a factual issue, however, and the trial commissioner resolved this issue in a manner adverse to the claimant. We cannot retry facts on appeal, Fair, supra.[2]

We have also reviewed the holding of Dubrosky v. Boehringer Ingelheim Corporation, 145 Conn. App. 261 (2013), *cert. denied*, 310 Conn. 935 (2013) and Adzima v. UAC/Norden Division, 177 Conn. 107 (1979). We find the respondent's conduct in this case did not rise to the level of what precedent establishes as grounds to grant preclusion. 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

[2] Considering that the respondent had provided medical care to the claimant immediately subsequent to the incident where she was injured, we question whether a Form 30C in this matter was legally redundant and of no actual legal effect? The claimant clearly could assert reliance on the "medical care exception" under § 31-294c(c) C.G.S., were the respondent to have challenged the Commission's jurisdiction over the injury. As the purpose of a Form 30C is to satisfy the written notice requirements under § 31-294c(a) C.G.S. to vest this Commission with jurisdiction over an injury, and the proffering of medical care to the claimant by the respondent vested the Commission with jurisdiction over the injury, we question raising the legal status of a Form 30C under these circumstances for the purpose of asserting future preclusion. Pursuant to Harpaz v. Laidlaw Transit, Inc., 286 Conn. 102, 129-130 (2008), at the time the claimant filed written notice we believe the respondent was already within the one year "safe harbor' to pay benefits without prejudice prior to accepting or contesting the claim.

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. In the present case the trial commissioner concluded all medical bills presented to the respondent were paid, and the respondent commenced providing medical treatment virtually immediately after the workplace incident. Despite the claimant's argument in the present case to the contrary, the Appellate Court in Dubrosky has stated that "an employer who is contesting liability is distinguishable from one who solely contests the extent of the disability." Id., 271-272.[3]

The respondent in this matter acknowledges the Commission has jurisdiction over the claimant's injury so we find the precedent in Adzima, cited in Dubrosky, instructive. In Adzima the Supreme Court clearly explained the holding in Menzies, supra, was not intended to bar a respondent from contesting the extent of disability in cases where they accepted compensability. "Neither that case nor the provisions of 31-297(b) [now § 31-294(b) C.G.S.] were intended to apply to a situation where, as here, an employer accepts liability to pay a compensable injury, but contests only on the issue of the *extent* of the employee's disability." Adzima, supra, 112 (Emphasis added). The Adzima decision further stated, '"[w]henever *liability* to pay compensation is contested by the employer,' the employer must file a specific defense." Id., 113 (Emphasis added). The

[3] We also note that in Dubrosky v. Boehringer Ingelheim Corporation, 145 Conn. App. 261 (2013) the Form 43 filed by the respondent utilized somewhat similar verbiage to the Form 43 filed by the respondent in the present case. See Footnote 7 of Dubrosky.

> "The defendant's form 43 stated the following: '[The defendant] maintains that the current need for treatment and any periods of future disability are related to the underlying preexisting degenerative joint disease and not the work incident of 01/09/09. Ongoing treatment should be placed to group insurance. In addition; prior payment of medicals have been paid without prejudice. Carrier is seeking a medical authorization from the employee to collect all prior records.'"

decision continued to point out the difference between a threshold basis of contesting jurisdiction for an injury - where preclusion was warranted - and contesting the extent of disability due to an injury. "Here, there was no question that Adzima's injury was a compensable injury within the terms of the workmen's compensation statute, i.e., that he had a 'right to receive compensation'; the only contest concerned the extent of his lower back disability." Id., 114. Based on the facts in that case, the Supreme Court refused to extend the holding of Menzies, where the employer failed to effectively contest the threshold issue of compensability, to the issues raised as to the extent of disability. Adzima, supra, 114-116.

We find this situation similar. The respondent had contested the extent of disability and had not raised any challenge to compensability. We find the threshold failure to either contest or accept the case, as what occurred in Menzies, simply not present herein and find this case congruent to Adzima. The same result - denying the Motion to Preclude - is called for in this matter.

The trial commissioner in this case could reasonably find from the facts on the record that the claimant had not presented a compelling reason that the Motion to Preclude should be granted.[4] The respondent was within the "safe harbor" of § 31-294c C.G.S. at the point in which they filed a pre-emptive Form 43 contesting further treatment. Therefore, we affirm the Findings and Order.

Commissioners Stephen B. Delaney and Michelle D. Truglia concur in this opinion.

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[4] The claimant asserts error from the trial commissioner's denial of its Motion to Correct. Since the Motion to Correct essentially sought to interpose the claimant's conclusions as to the facts presented, we find no error. See D'Amico v. State/Department of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003) and Liano v. Bridgeport, 4934 CRB-4-05-4 (April 13, 2006).