CASE NO. 5912 CRB-3-14-1 : COMPENSATION REVIEW BOARD
CLAIM NO. 300082096

FRANKLIN PRINGLE
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

: DECEMBER 31, 2014

NATIONAL LUMBER, INC.
EMPLOYER

and

YORK CLAIM SERVICES (FORMERLY BERKLEY ADMINISTRATORS OF CONNECTICUT, INC.)
INSURER
RESPONDENTS-APPELLANTS

APPEARANCES: The claimant was represented by Patrick D. Skuret, Esq., Law Offices of Daniel D. Skuret, PC, 215 Division Street, Ansonia, CT 06401-0158.

The respondents were represented by Anne Kelly Zovas, Esq., Strunk, Dodge, Aiken, Zovas, LLC, 100 Corporate Place, Suite 300, Rocky Hill, CT 06067.

This Petition for Review[1] from the December 23, 2013 Finding and Decision of the Commissioner acting for the Fifth District was heard August 29, 2014 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Daniel E. Dilzer and Stephen M. Morelli.

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

OPINION

DANIEL E. DILZER, COMMISSIONER**.** The respondents have appealed from a Finding and Decision dated December 23, 2013 which granted the claimant's Motion to Preclude in this matter. The respondents argue that the case was an accepted case and therefore that preclusion should not be granted. They also argue that by providing light duty work to the claimant the respondent fulfilled the statutory requirement under § 31-294c C.G.S. to pay compensation to the claimant within 28 days of receiving his notice of claim.[2] We find that these issues are essentially questions of fact. We further find the

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[2] The relevant portions of this statute read as follows:

> **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

respondents did not file a Motion to Correct to challenge the trial commissioner's factual findings. Since we conclude that based on the factual finding a trial commissioner could have reasonably found the claimant offered a persuasive case that the Motion to Preclude should be granted; we affirm the Finding and Decision.

This case has a somewhat unusual history. The claimant filed a Form 30C on June 18, 2008 seeking benefits for a June 5, 2008 injury. The respondents did not file a Form 43 and a Motion to Preclude was filed by the claimant on October 23, 2009. On January 13, 2012 the trial commissioner denied the Motion to Preclude for the following reasons:

1. I find that this is an accepted claim and has never been contested.
2. The motion to preclude is **DENIED** and **DISMISSED.**
3. The result sought by the Claimant is contrary to the letter and spirit of Chapter 568, Workers' Compensation Act, and Connecticut General Statutes Section 31-294.

The claimant filed a Motion to Correct this Decision and Order. The trial commissioner denied the Motion in its entirety. The claimant appealed this decision to the Compensation Review Board. On February 13, 2013 we issued our opinion on that appeal Pringle v. National Lumber, Inc., 5728 CRB-3-12-2 (February 6, 2013). ("Pringle I"). In Pringle I we determined that due to recent precedent that the January 13, 2012 Decision and Order had to be remanded back to the trial commissioner. We noted that,

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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.

> the trier made no factual findings in support of his decision to deny the claimant's Motion to Preclude. Absent a recitation of the specific factual findings which the trial commissioner believes support his conclusion that the Motion to Preclude was 'contrary to the letter and spirit of Chapter 568, Workers' Compensation Act, and Connecticut General Statutes Section 31-294,' this board is unable to engage in meaningful review of his decision. As such, we are obliged to remand the matter for additional findings of fact . . . .

Id.

We also noted that our tribunal's decision in Callender a/k/a Woodbury v. Reflexite Corporation, 5504 CRB-6-09-10 (October 8, 2010) had been reversed by the Appellate Court, 137 Conn. App. 324 (2012). As a result, to the extent the trial commissioner had relied on overruled precedent in the Decision and Order, his decision was now unsound.

The trial commissioner thus reviewed the record and solicited new briefs in order to reach the additional factual findings we directed him to reach in our decision in Pringle I. After reviewing the record the trial commissioner reached the following factual findings. He found that on and prior to June 5, 2008, the claimant, Franklin Pringle, was employed by the respondent-employer, National Lumber, Inc., as a laborer and that on that date the claimant sustained a compensable injury to his back while lifting siding at an off-site location in the course of a delivery. The claimant filed a Form 30C on June 18, 2008 and the respondents stipulated that they never filed a Form 43 in this case. The first payment made on the claim was a payment for medical services made on August 5, 2008. The parties disputed whether the claimant was entitled to temporary partial disability benefits from June 5, 2008 to June 18, 2008. On the date of the accident, a co-worker brought the claimant to Concentra Medical Center for treatment and evaluation of lower back pain. The same day the claimant provided the respondent with a light-duty work

slip that indicated he could do no lifting over ten pounds and no pushing or pulling over ten pounds of force.

The trial commissioner considered the testimony of the respondent-insurer's claim examiner, Leslie Dorsey. She admitted the respondents disputed Mr. Pringle's claim for temporary partial benefits and that the respondent was denying the extent of the claimant's injuries and whether he was totally disabled or temporarily partially disabled from the date of his injury on June 5, 2008, into 2009. Ms. Dorsey agreed that the claimant returned back to work on June 19, 2008, but disputes any claim for temporary partial benefits; and further testified the first indemnity payment in this file was not paid to the claimant until January of 2009. The claimant was forced to apply for unemployment benefits in August of 2008 since he was not receiving any benefits from the respondents.

Both the claimant and witnesses for the respondent-employer testified. The claimant testified that he had been sent a letter by Bill Ryan, president of the respondent-employer and had brought this letter to the plant manager, Donald Montano, on Monday, June 16, 2008. The letter (Claimant's Exhibit D) said the claimant's doctor had cleared him for light duty work, the respondent had not refused him light duty work, and that the claimant's absence from work was voluntary and unpaid. The claimant testified that he brought the letter to Mr. Montano, who said there was no light duty work available for the claimant, he knew nothing about the letter, and that the claimant should go home and get better. The claimant further testified that on Thursday, June 19, 2008, he went into his employer to do any light work that they had available, and did this work until he was terminated. Mr. Ryan testified that he was angry with the claimant after he returned to

work light duty and … "I gave him hell." Mr. Montano testified that his recollection of the events of 2008 was very foggy in his mind. He testified a worker with restrictions typically could not work at the lumber yard, and it was possible that he told the claimant when he arrived at the workplace with a light duty slip that there was no light duty work available. Mr. Montano went on to testify that the standard rule was that there was no light-duty work at the respondent, National Lumber, Inc. Mr. Ryan admitted that it is possible that Mr. Montano told the claimant that there was no light-duty work available.

Based on these factual findings the trial commissioner concluded that the claimant filed a timely Form 30C which was adequate on its face. The respondents did not ever file a Form 43 nor did they comply with C.G.S. § 31-294c, either by filing a notice to contest the claim or by commencing payments on that claim within 28 days of the Notice of Claim. The respondents also did not make timely payments or authorize medical treatment within 28 days from the Notice of Claim and, therefore, cannot have safe harbor from preclusion. The trial commissioner found the claimant's testimony as fully credible and persuasive. Citing the testimony of Mr. Ryan and Mr. Montano that they may have told the claimant there was no light duty work available, the commissioner concluded "at the very least, there was a dispute over whether the claimant was entitled to temporary partial benefits from June 6, 2008, to June 18, 2008." Conclusion, ¶ 8. As a result, the claimant's Motion to Preclude was granted.

The respondents did not file a Motion to Correct. Instead, they filed an appeal of this decision. They argue that the respondents accepted the injury as compensable and therefore preclusion was unjustified. They further argue that by providing light duty work to the claimant for at least some period within 28 days of the notice of claim, that as

a matter of law this constituted "payment of compensation" within the statutory period. We note that as the respondents did not file a Motion to Correct, pursuant to Crochiere v. Board of Education, 227 Conn. 333, 347 (1993) and Corcoran v. Amgraph Packaging, Inc., 4819 CRB-2-04-6, 4948 CRB-2-05-5 (July 26, 2006), we must accept the validity of the facts found by the trial commissioner, and that this board is limited to reviewing how the commissioner applied the law. See Admin. Reg. § 31-301-4.

We find that this is largely determinative of the outcome of this case. At its core, a dispute as to whether or not to grant a Motion to Preclude rests on the trial commissioner evaluating the actions taken by the respondent subsequent to the filing of a notice of claim. This turns on the specific facts in each case. The seminal case on preclusion, 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.

Id., 342. These matters are at their core, matters of fact. Whether the respondent adequately responded to a notice of claim, or acted in a manner so as to prejudice the claimant, is a quintessential factual question.

We do note that in Pringle I the trial commissioner concluded that the respondents had accepted this case and therefore he denied the Motion to Preclude. As noted herein, we remanded the matter due to the absence of factual findings by the trial commissioner supporting this conclusion. We note that once the trial commissioner reviewed the

factual record, he concluded that preclusion in this case was warranted. While we cannot retry the facts of the case, Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988), 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 respondents argue that this was an accepted case and therefore preclusion should not be granted. Whether or not the respondents accepted the claimant's injury as compensable is a factual question. The factual findings herein do not document that the employer or the insurer communicated in any fashion that they had accepted the compensability of this matter during the 28 days subsequent to the filing of a Notice of Claim. We therefore distinguish this case from Pagan v. Carey Wiping Materials, Inc., 5829 CRB-6-13-4 (March 28, 2014) where we affirmed the denial of preclusion. In that case 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. We found that in Pagan the respondents commenced timely payments to the claimant and proffered a voluntary agreement to the claimant for execution where they accepted the injury as compensable. We determined that when a claimant fails to execute a voluntary agreement that acknowledged this Commission had jurisdiction over an injury, he or she could not then argue that the respondents were contesting jurisdiction. In the present case the trial commissioner did not identify any documentation offered to the claimant (such as a Form 43, a voluntary agreement or any other written communication) where he would have been advised the respondents accepted the injury.

This clearly places a greater burden on the respondents to identify a course of conduct on their part that would constitute "acceptance" of the injury.

Such a course of conduct has been identified that creates a "safe harbor" from preclusion, at least as far as preserving the respondents' ability to contest the extent of the disability. Pagan, supra. See also Williams v. Brightview Nursing & Retirement, 5854 CRB-6-13-6 (June 12, 2014) and Beshah v. U. S. Electrical Wholesalers, Inc., 5781 CRB-7-12-10 (August 14, 2013). Consistent with the holdings in Donahue v. Veridiem, Inc., 291 Conn. 537 (2009) and Harpaz v. Laidlaw Transit, Inc., 286 Conn. 102 (2008) we have held that "commencing payment" on a claim within 28 days of receiving the Notice of Claim complies with the statutory requirements of § 31-294c C.G.S.

The respondents argue that the offer of light-duty work to the claimant on or about June 19, 2008 and the claimant's subsequent performance of this work sufficed as payment of compensation for the claimant. While this is a substantive argument we conclude that the trial commissioner did not find the argument persuasive. Based on the trial commissioner's findings, (see Conclusions, ¶¶ 9 and 10) we may infer the commissioner was not persuaded the work actually performed by the claimant subsequent to his injury was indeed "light-duty" work. The commissioner also noted that there was an issue regarding whether the claimant received payment of temporary partial disability benefits for the period in which the claimant was out of work due to his injury between June 6, 2008 and June 18, 2008. Since the testimony of Ms. Dorsey was that the claimant received no indemnity payments prior to January 2009, we may infer then that the record reflects no payments were made to the claimant during this time period. We also note that prior to receiving his initial indemnity payment the claimant was terminated at work

and filed for unemployment benefits. See Findings, ¶ S. This termination from employment subsequent to the filing of a notice of claim but prior to the commencement of indemnity payments places this scenario within the scope of our precedent in Beshah, supra, and Monaco-Selmer v. Total Customer Service, 5622 CRB-3-10-12 (January 19, 2012).

In Monaco-Selmer and Beshah the claimants sought preclusion asserting that although the respondents had made some payments of compensation subsequent to the filing of a notice of claim, the payments were not sufficient to comply with the statute and therefore the respondents lost their "safe harbor." We affirmed the finding of preclusion in those cases.

> The respondents further argue that by advancing indemnity payments to the claimant without prejudice, they acted in a manner that should thwart preclusion, based on the holding in Monaco-Selmer, supra. We agree that the respondents actions here were more consistent with the statutory obligation of respondents than the actions of the respondents in the Monaco-Selmer case. Nonetheless, the trial commissioner still found them insufficient to comply with how the Supreme Court in Harpaz v. Laidlaw Transit, Inc., 286 Conn. 102 (2008) interpreted § 31-294c C.G.S. We are not persuaded this determination was in error. While the respondents did make regular payments to the claimant without prejudice, they failed to continue such payments until they finally issued a Form 43. There was a significant lapse in this case from the date payments without prejudice ceased and when a disclaimer was issued. At the point the respondents ceased making weekly payments their "safe harbor" from preclusion lapsed.

Beshah, supra.

Therefore we find that this case is dissimilar to recent cases where we have upheld a denial of preclusion such as Williams, supra, and Negron v. CVS Caremark Corporation, 5870 CRB-4-13-8 (July 17, 2014), *appeal pending*, A.C. 37062. In both

those cases the claimant continued to receive their normal pay and worked up to the time in which a Form 43 was issued by the respondents. Since the claimants in those cases had not lost any income as a result of their injury, and had received medical treatment for their injuries, we concluded that these claimants were not entitled to preclusion.[3]. In the present case the claimant worked fewer hours subsequent to his injury (see Findings, ¶ X); sustained a substantial financial loss after his termination from employment, did not receive indemnity benefits, and was not advised by way of a written disclaimer as to what the respondents were contesting. The discontinuation of work or benefits to the claimant in this case makes it akin to the situation in Monaco-Selmer and Beshah where we found no "safe harbor" from preclusion existed for a respondent that had not issued a disclaimer. Simply put, if one "commences payment" to obtain the "safe harbor" under § 31-294c C.G.S. then one must continue payment until one issues a disclaimer in order to preserve the "safe harbor." This did not occur in this case.

The respondents also argue that the precedents in Dubrosky v. Boehringer Ingelheim Corporation, 145 Conn. App. 261 (2013) and Adzima v. UAC/Norden Division, 177 Conn. 107 (1979) argue in favor of reversing the trial commissioner's decision. We are not persuaded. Dubrosky was a case where the claimant did not lose any time from work and the Appellate Court held that under the facts of that case, the respondents presented a defense of "impossibility" when they could neither pay a medical bill nor pay indemnity benefits within 28 days of the claimant filing a notice of claim.

[3] We also note that in Negron v. CVS Caremark Corporation, 5870 CRB-4-13-8 (July 17, 2014), the respondents filed a "pre-emptive Form 43." In the present case, the respondents never filed a Form 43.

Id., 273-274.[4] We are not persuaded that this case presented a similar circumstance of "impossibility" for the respondents. In addition, as the claimant points out in his brief, the Appellate Court in Dubrosky found the claimant had not been prejudiced by the respondents' delay. Claimant's Brief, p. 23. We may infer that the trial commissioner did not reach a similar conclusion herein, see Findings, ¶ S. The respondents further argue that the precedent in Adzima, supra, stands for the proposition that when a respondent accepts compensability of an injury, they do not lose the right to contest the extent of disability. Id., 115, see also Dubrosky, supra, 272. The trial commissioner in this matter did not reach a factual finding that the respondents accepted compensability of the injury.[5] While this tribunal has frequently reiterated the vitality of the precedent in Adzima, see Pagan, supra, and Negron, supra; we are unwilling to extend the holding of that case to a claim where the trial commissioner did not reach the factual finding that the respondents accepted compensability of the injury in a timely manner.

We do note that the circumstances herein, where the claimant filed a Motion to Preclude over one year after the 28 day period to contest compensability expired, are troubling from a policy standpoint. The trial commissioner's initial findings in Pringle I clearly reflect a view that such belated preclusion motions are inconsistent with the spirit

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[4] We may also distinguish Dubrosky v. Boehringer Ingelheim Corporation, 145 Conn. App. 261 (2013) from the instant case in that the respondents in Dubrosky did file a Form 43 contesting the extent of disability within one year of the notice of claim. Id., 265. In the present case no disclaimer was ever filed.

[5] At oral argument before this tribunal the respondents argued that in Findings, ¶ G, the trial commissioner found that they had accepted the claimant's injury as compensable. The finding reads as follows: "On June 5, 2008, the claimant sustained a compensable injury to his back while lifting siding at an off-site location in the course of a delivery."
As the plain meaning of the finding does not state that the respondents accepted the claimant's injury we are unwilling to interpret the finding in this manner. The trial commissioner may well have concluded after hearing the evidence that he found the claimant's injury compensable. In addition, even if we were to infer the injury was accepted by the respondents, the record is silent on whether this occurred within 28 days of the notice of claim. The failure of the respondents to seek to correct the factual findings precludes us from looking beyond the actual verbiage of the finding herein.

of Chapter 568. The concurring opinion issued in Williams, supra, also outlines the serious concerns present when a claimant filed a Motion to Preclude at a date well after preclusion can be sought. Nonetheless, these matters are policy concerns for the General Assembly or would require the reinterpretation of precedent by the Appellate and Supreme Courts. The trial commissioner did not find after reviewing the evidence that the respondents accepted this injury as compensable.[6] Once that threshold finding was reached, the holding in Harpaz, supra, directs that the remedy of preclusion is available if the claimant seeks such a remedy. As a matter of law, we cannot find error with the trial commissioner's Finding and Decision.

Therefore, we must affirm the Finding and Decision.

Commissioner Stephen M. Morelli concurs in this opinion.

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[6] At oral argument before our tribunal the respondents argued that the trial commissioner in the Finding and Decision inappropriately "flipped himself" by reaching factual findings inconsistent with his findings in Pringle I. We note that the initial finding in Pringle I did not have detailed factual findings. To the extent the trial commissioner reached a differing factual conclusion in the Finding and Decision it would have assisted the respondents to have filed a Motion to Correct to challenge the commissioner's factual determination as being inconsistent with the evidence. The failure to utilize this remedy limits our appellate review on this issue. In addition, we must affirm a legally sound decision by a trial commissioner even when this tribunal may find the outcome dubious on policy grounds, Verrinder v. Matthew's Tru Colors Painting & Restoration, 4936 CRB-4-05-4 (December 6, 2006), *appeal dismissed*, A.C. 28367 (July 25, 2007).

JOHN A. MASTROPIETRO, CHAIRMAN, CONCURRING. I respectfully opine separately from the majority opinion as I believe the Finding and Decision requires further distinctions. My concerns are on two levels. First, this is the sort of belated Motion to Preclude which I believe should be scrutinized carefully prior to being granted considering the prejudice present to the respondents in such circumstances. Secondly, I am uncomfortable with some of the legal interpretations present in the Finding and Decision and wish to reflect on the record as to my concerns.

I commented previously in the concurring opinion in Williams, supra, as to how I believe the law of preclusion has gone off track in the cases subsequent to the Supreme Court decisions in Harpaz, supra, and Donahue, supra. I reiterate those concerns as there continues to be large unresolved issues as to how to properly apply § 31-294c C.G.S. It has become clear that cases appealed to this tribunal seem far afield of what motivated the Supreme Court in Menzies, supra.

> 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. Williams, supra. *Mastropietro, concurring*.

The present case, where the Motion to Preclude was filed over a year after the Form 30C was filed, does not comport with the unfortunate situation that the Menzies precedent depicts where a claimant has been prejudiced by an unresponsive respondent.[7]

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[7] Commission records indicate that three informal hearings and one pre-formal hearing were held on this claim prior to the filing of the Motion to Preclude.

Instead, I find the factual situation outlined in Adzima, supra, to be more congruent with this case. In Adzima the respondents had failed to contest the initial liability for benefits but instead, had sent the claimant a jurisdictional voluntary agreement which he had not signed and returned. Id., 110. The Motion to Preclude occurred much later in the case, when a claim for specific benefits was presented and the respondents failed to present a timely disclaimer. Id., 109. The Supreme Court found that by proffering a jurisdictional voluntary agreement and making a total of 45 payments of benefits to the claimant that by its conduct the respondents had accepted the claim and there was no "contest" of liability. Id., 112-113, n4. The Supreme Court specifically held "[t]hus, a claim for disability, resulting from partial incapacity, under 31-308(m)[8] may not be translated into an initial claim for liability to which our holding in *Menzies v. Fisher* would apply." Id., 116.

As I noted in Williams, supra, the once robust precedent in Adzima has been subjected to "a *sub silencio* constriction" in the wake of precedent decided subsequent to Harpaz, supra, and Donahue, supra. If the intent of the Appellate Court in Dubrosky, supra, was to reinvigorate the Adzima standard, unfortunately, uncertainty has continued to prevail. In the absence of such clarity we will continue to see cases where trial commissioners can quite reasonably determine that a Motion to Preclude is "contrary to the letter and spirit of Chapter 568, Workers' Compensation Act, and Connecticut General Statutes Section 31-294." Pringle I, supra, but due to a hyper technical interpretation of our statutes, be obligated to grant such a dubious motion.

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[8] This statute was recodified as § 31-308(b) C.G.S.

The outcome herein is diametrically opposed to the result in Pringle I. However, the absence of a Motion to Correct seeking clarification should not impede us on an appellate level from reviewing a decision for its legal inadequacies.

On a purely legal basis, I am skeptical that the facts herein are so dissimilar from Dubrosky as to mandate a different result in this case. The respondents concede that by not filing a disclaimer within 28 days that they are bound to accept the compensability of the claimant's injury. By granting preclusion however, they would also be barred from contesting the extent of disability from that injury. In Dubrosky, the Appellate Court found that when a respondent cannot pay compensation within the initial 28 day period following a notice of claim that they cannot subsequently be precluded from contesting the extent of disability. There is no evidence on the record that the respondent failed to provide medical treatment for this injury; although the initial payment of a medical bill did not occur until August 5, 2008. Findings, ¶ M. The commissioner's conclusion that the respondents failed to start "commencing payment" within 28 days of the notice of claim, Conclusions, ¶¶ 5 and 6, is apparently based on the view the work provided to the claimant on and after June 19, 2008 did not suffice to "commence payments" to the claimant under the statute. Were this decision based on the premise that providing light duty work could **never** constitute compliance with § 31-294c C.G.S., I would not concur in this interpretation of the statute. I believe that providing light duty work to a claimant under certain factual circumstances can sufficiently respond to a claim so to avoid preclusion.

I reach this conclusion as I look to the terms of § 31-313 C.G.S., the light duty statute.[9] While there does certainly appear to be some level of misunderstanding between the participants in this matter concerning the availability of light duty work for the claimant, the trial commissioner ultimately concluded that within 28 days of the notice of claim the claimant did commence light duty work. See Findings, ¶¶ U and X. The record also does not include a finding that the subsequent unemployment of the claimant was due to a disability, or was due to unrelated circumstances such as economic conditions. It can be argued that this is analogous to the "no lost time" cases where preclusion has not been found appropriate such as Dubrosky, supra, Williams, supra, and Negron, supra. Under this analysis the provision of light duty work under § 31-313

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[9] The relevant terms of this statute read as follows:
Sec. 31-313. Transfer to suitable work during period of treatment or rehabilitation or because of physical incapacity. Civil penalty for failure of employer to comply. (a)(1) Where an employee has suffered a compensable injury which disables him from performing his customary or most recent work, his employer at the time of such injury shall transfer him to full-time work suitable to his physical condition where such work is available, during the time that the employee is subjected to medical treatment or rehabilitation or both and until such treatment is discontinued on the advice of the physician conducting the same or of the therapist in charge of the rehabilitation program or until the employee has reached the maximum level of rehabilitation for such worker in the judgment of the commissioner under all of the circumstances, whichever period is the longest. (2) The commissioner shall conduct a hearing upon the request of an employee who claims his employer has not transferred him to such available suitable work. Whenever the commissioner finds that the employee is so disabled, and that the employer has failed to transfer the employee to such available suitable work, he shall order the employer to transfer the employee to such work.
(b) The commissioner shall conduct a hearing upon the request of an employee claiming to be unable to perform his customary or most recent work because of physical incapacity resulting from an injury or disease. Whenever the commissioner finds that the employee has such a physical incapacity, he shall order that the injured worker be removed from work detrimental to his health or which cannot be performed by a person so disabled and be assigned to other suitable full-time work in the employer's establishment, if available; provided the exercise of this authority shall not conflict with any provision of a collective bargaining agreement between such employer and a labor organization which is the collective bargaining representative of the unit of which the injured worker is a part.
(c) Whenever the commissioner finds that an employer has failed to comply with the transfer requirements of subdivision (1) of subsection (a) of this section, or has failed to comply with any transfer order issued by him pursuant to this section, he may assess a civil penalty of not more than five hundred dollars against the employer. Any appeal of a penalty assessed pursuant to this subsection shall be taken in accordance with the provisions of section 31-301. Any penalties collected under the provisions of this subsection shall be paid over to the Second Injury Fund or its successor.

C.G.S. could constitute compliance with the "commencing payments" provision and constitute a *de facto* acceptance of the claim.[10]

I generally question the equity of approving a Motion to Preclude which is filed long after the parties have clearly outlined their differences in hearings before the trial commissioner. However, that determination was within the province of the fact finder to adjudicate and we may not usurp this role on appeal. The trial commissioner was persuaded by the claimant's evidence in this matter that the respondents failed to adequately respond to a statutory obligation and therefore preclusion was warranted. As the majority herein notes, the respondents may have caused their "safe harbor" from preclusion to lapse. As the respondents did not file a Motion to Correct, it is difficult to conclude the commissioner erred in weighing the evidence. Given the great deference we accord a trial commissioner as fact finder, I concur in the result herein; not withstanding my visceral concerns as to the potential impact of this precedent. Preclusion indeed is a "harsh remedy", West v. Heitkamp, Inc., 4587 CRB-5-02-11 (October 27, 2003); and it would be beneficial if its application was within a spirit of proportionality and equity.

[10] Presumably if the employer believed the claimant's injury was not compensable they would not offer the claimant light duty work under Chapter 568.