CASE NO. 5911 CRB-4-14-2 : COMPENSATION REVIEW BOARD
CLAIM NO. 400065936

JOHN GRAHAM (Estate) and
CARMEL GRAHAM (Widow) : WORKERS' COMPENSATION
CLAIMANTS-APPELLEES COMMISSION

v. : JANUARY 29, 2015

OLSON WOOD ASSOCIATES, INC.
F.D. RICH HOUSING CORP.
EMPLOYERS

and

ARROWPOINT CAPITAL CORPORATION
THE HARTFORD
INSURERS
RESPONDENTS-APPELLEES

and

CONNECTICUT INSURANCE GUARANTY ASSOCIATION (CIGA)
INSURER
RESPONDENT-APPELLANT

APPEARANCES:

The claimants were represented by Catherine Ferrante, Esq., Early, Lucarelli, Sweeney & Meisenkothen, LLC, One Century Tower, 11th Floor, 265 Church Street, P.O. Box 1866, New Haven, CT 06508-1866.

Respondents F.D. Rich Housing Corp. and the Hartford Insurance Group were represented by Robert J. Enright, Esq., McGann, Bartlett & Brown, 111 Founders Plaza, Suite 1201, East Hartford, CT 06108.

Respondents Olson Wood Associates, Inc., and Arrowpoint Capital Corporation were represented by Scott A. Leventhal, Esq., LoRicco, Trotta & LoRicco, LLC, 216 Crown Street, Suite 502, New Haven, CT 06510.

Respondents Olson Wood Associates, Inc., and the Hartford Insurance Group/NEWCCC were represented by Michael J. McAuliffe, Esq., Pomeranz, Drayton & Stabnick, LLC, 95 Glastonbury Boulevard, Suite 216, Glastonbury, CT 06033-4453.

Respondent Connecticut Insurance Guaranty Association appearing in lieu of Reliance Insurance Company was represented by Joseph T. Passaretti, Jr., Esq., Montstream & May, LLP, 655 Winding Brook Drive, P.O. Box 1087, Glastonbury, CT 06033.

This Petition for Review from the February 4, 2014 Ruling on Motion to Dismiss/Ruling on Motion to Reinstate Party by the Commissioner acting for the Eighth District was heard on August 29, 2014 before a Compensation Review Board panel consisting of Commission Chairman John A. Mastropietro and Commissioners Daniel E. Dilzer and Stephen M. Morelli.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. Respondent Connecticut Insurance Guaranty Association has petitioned for review from the February 4, 2014 Ruling on Motion to Dismiss/Ruling on Motion to Reinstate Party by the Commissioner acting for the Eighth District. We find no error and accordingly affirm the decision of the trial commissioner.[1]

The trial commissioner found pertinent the following procedural history regarding this matter. In September 2006, the claimant employee filed several notices of claim ("Form 30C") alleging that he had sustained a lung injury due to asbestos exposure while

[1] We note that a motion for extension of time was granted during the pendency of this appeal.

working for several different employers. The claim was placed on the Middletown (Eighth District) asbestos docket, and informal and pre-formal hearings ensued which were attended by representatives for the various alleged employers and insurance carriers. In 2008, the claimant employee died, and his dependent widow filed a claim which was joined to the decedent's claim.

Subsequently, Reliance Insurance, which was on the risk for F.D. Rich Housing Corp., became insolvent and its liability was transferred to the Connecticut Insurance Guaranty Association ("CIGA"). On June 22, 2009, CIGA filed a motion to dismiss, alleging that this Commission did not have jurisdiction over CIGA.[2] Commissioner Ernie R. Walker denied the motion on June 25, 2009 and CIGA appealed to the Compensation Review Board ("CRB"). The CRB, in light of the absence of a record, issued an order declaring the appeal was premature and remanded the matter for "a Formal Hearing or other appropriate action." See Order dated July 13, 2009.

On January 26, 2011, a formal hearing commenced before Commissioner Amado J. Vargas. The noticed issues were: (1) permanent partial disability; (2) survivor's benefits; and (3) total incapacity benefits. Testimony was taken but no exhibits were entered into evidence; rather, the trial commissioner stated that the purpose of the formal would be to "clear the room of who doesn't need to be here and then we will get to the

[2] At the hearing of January 29, 2014, counsel for CIGA indicated that the basis for its initial motion to dismiss was our Supreme Court's decision in Hunnihan v. Mattatuck Mfg. Co., 243 Conn. 438 (1997) wherein the court held that CIGA, on behalf of an insolvent insurer, was not obligated to pay its proportionate share of an award granted in a claim brought pursuant to § 31-299b C.G.S. Hunnihan was subsequently modified by Franklin v. Superior Casting, 302 Conn. 219 (2011), wherein our Supreme Court held that the provisions of § 31-299b C.G.S. do apply when CIGA has assumed liability for an insolvent workers' compensation carrier that would have been the last insurer on the risk.

meat of the case at the next session." January 26, 2011 Transcript, p. 9. Claimants' counsel indicated that he did not object to CIGA's motion to dismiss, and Commissioner Vargas announced that he would be dismissing CIGA and four other parties from the case. On May 25, 2011, the trial commissioner issued a Finding and Decision which did not recite any findings of fact but did grant several motions to dismiss, including CIGA's. No party appealed this Finding and Decision.[3]

On November 29, 2012, Commissioner Vargas held another formal hearing, which session was again concerned with which parties should be held and who could be released.[4] Counsel for CIGA was present at that hearing at the request of Commissioner Vargas, who had raised the possibility that CIGA might need to be brought back into the case. At the hearing, counsel for the Hartford Insurance Group ("The Hartford") made an oral motion to dismiss relative to its liability as an insurer of F.D. Rich. The trial commissioner instructed The Hartford to file a written motion to dismiss and advised all of the parties to file a formal request to have CIGA cited back into the claim. On January 14, 2013, The Hartford filed a "Motion to Dismiss by Respondents F.D. Rich Housing Corporation and Hartford Insurance Group." On February 7, 2013, the claimants filed a "Motion to Cite in the Connecticut Insurance Guaranty Association," arguing that the dismissal of CIGA in 2011 was "simply interlocutory and provisional."

[3] This Finding and Decision was revised and reissued on June 9, 2011 reflecting a correction of the parties represented by one of the attorneys for the respondents.

[4] A formal hearing was also held on April 26, 2012; however, because one of the attorneys for the respondents had discovered his firm had a conflict of interest and it would be necessary for him to withdraw from the case, all new motions were deferred pending the appointment of substitute counsel.

On February 14, 2013, The Hartford filed a "Motion to Re-Join and Otherwise Re-Cite Connecticut Insurance Guaranty Association."

On August 28, 2013, a few days before his retirement from the Commission, Commissioner Vargas held another formal hearing. Testimony was taken from the claimant's widow but the parties agreed that a determination as to whether the claimant's widow was a presumptive dependent, along with the other remaining issues in the case, would be reserved to the commissioner who was scheduled to take Commissioner Vargas' place in the Eighth District. The parties also agreed that rather than seeking a mistrial, they would allow the new commissioner to take over the formal hearing in progress and decide the case following the presentation of evidence. The issues of whether CIGA should be cited back into the case and/or The Hartford dismissed were deferred pending a subsequent hearing.

On January 29, 2014, a formal hearing was held before the new trial commissioner to hear oral argument on The Hartford's motion to dismiss and the motions to cite CIGA back into the claim. The trial commissioner advised the parties that they had the right to insist on starting the formal hearing from the beginning but all declined. Following oral argument, the hearing was adjourned so the trial commissioner could decide the two subject motions before proceeding to the merits of the claimants' case. The trier denied The Hartford's motion to dismiss on the basis that there was neither agreement nor acquiescence on the part of the other litigants to release F.D. Rich or the Hartford from the claim. The trial commissioner noted that apart from the limited

testimony proffered by the claimant's widow, no evidence had yet been entered into the record, and he was therefore not "inclined to dismiss any part of the claimant's case for lack of evidence before the taking of evidence had really begun." February 4, 2014 Ruling, p. 3. The trial commissioner also found unpersuasive the evidence submitted by The Hartford in support of its motion.[5]

Relative to the motions to cite CIGA back into the claim, the trial commissioner noted at the outset his "perplexity" in the face of CIGA's argument that CIGA had been "adjudicated not a party to this matter *after* a full evidentiary Formal Hearing with oral testimony and subsequent Finding and Decision granting CIGA's Motion to Dismiss." Id., p. 3. (Emphasis in the original.) The trier pointed out that the nine-page transcript for the January 26, 2011 formal hearing contained no testimony, and no other evidence was taken at that time. In addition, the transcript indicated that Commissioner Vargas had stated that the purpose of the formal would be to "clear the room of who doesn't need to be here and then we will get to the meat of the case at the next session." Transcript, p. 9. Moreover, although Commissioner Vargas had entitled the document resulting from the hearing a "Finding," it did not actually contain any findings of fact or state his rationale for granting CIGA's motion. The instant trier also noted that none of the parties in attendance at the hearing stipulated that CIGA had no liability to the claimant. As

[5] In support of its motion to dismiss, Hartford Insurance Group submitted a Social Security print-out purporting to show that although the decedent may have been employed by F.D. Rich during a period of time when The Hartford was on the risk, the meagerness of his earnings signified that the claimant must not have had sufficient exposure to asbestos to justify keeping The Hartford in the case. The second piece of evidence was the claimant's deposition testimony from 2006 which counsel for The Hartford argued did not serve as a sufficient basis to implicate F.D. Rich in the claim. As of the date of the formal hearing on January 29, 2014, neither of these submissions had been submitted into the evidentiary record.

such, the trial commissioner concluded that Commissioner Vargas granted CIGA's motion largely because the claimant had no objection, and summarized the status of the claim at that time as follows:

> The reason for the acquiescence is clear. CIGA would only have potential liability if the last date of occupational exposure fell during the time F.D. Rich was covered by the Reliance policy. As the case stood in early 2011, it seemed there was insurance coverage (i.e., with a solvent carrier) after the Reliance coverage period, so the claimant appeared to have nothing to lose by CIGA's departure, since CIGA's share would simply be absorbed by the solvent carriers.

February 4, 2014 Ruling, p. 4.

The trial commissioner also pointed out that while there is an understandable impulse for "culling the herd," id., 4, in asbestos cases because of the large number of potential respondents, until the date of last exposure has been determined, along with the identity of the party against whom the award will be made pursuant to § 31-299b C.G.S., any agreements to release parties must be viewed as interlocutory.[6] The trial commissioner rejected CIGA's assertion that its dismissal constituted a binding judgment which, absent an appeal within twenty days, could only be undone by the application of

[6] Section 31-299b C.G.S. (Rev. to 2005) states, in pertinent part: "If an employee suffers an injury or disease for which compensation is found by the commissioner to be payable according to the provisions of this chapter, the employer who last employed the claimant prior to the filing of the claim, or the employer's insurer, shall be initially liable for the payment of such compensation. The commissioner shall, *within a reasonable period of time after issuing an award*, on the basis of the record of the hearing, determine whether prior employers, or their insurers, are liable for a portion of such compensation and the extent of their liability. If prior employers are found to be so liable, the commissioner shall order such employers or their insurers to reimburse the initially liable employer or insurer according to the proportion of their liability…." (Emphasis added.)

§ 31-315 C.G.S.[7] Rather, the trier concluded that in light of the litigants' agreement that he continue hearing the matter, his obligations pursuant to § 31-278 C.G.S. necessitated that he grant the motions citing CIGA back into the claim and overrule CIGA's objection to same.[8] The trier also found that this decision would not prejudice CIGA given that no exhibits had yet been put into evidence and CIGA had reserved the right to recall the one witness who had already testified. In addition, the trier assured CIGA that it would be provided a reasonable time period to prepare for the continuation of the formal hearing.

CIGA filed a motion for articulation, which was denied, and this appeal followed.[9] On appeal, CIGA argues that the trial commissioner erred in concluding that the May 25, 2011 Finding by Commissioner Vargas was not a binding final judgment. CIGA also contends that the trial commissioner erroneously applied the provisions of

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[7] Section 31-315 C.G.S. (Rev. to 2005) states: "Any award of, or voluntary agreement concerning, compensation made under the provisions of this chapter or any transfer of liability for a claim to the Second Injury Fund under the provisions of section 31-349 shall be subject to modification in accordance with the procedure for original determinations, upon the request of either party or, in the case of a transfer under section 31-349, upon request of the custodian of the Second Injury Fund, whenever it appears to the compensation commissioner, after notice and hearing thereon, that the incapacity of an injured employee has increased, decreased or ceased, or that the measure of dependence on account of which the compensation is paid has changed, or that changed conditions of fact have arisen which necessitate a change of such agreement, award or transfer in order properly to carry out the spirit of this chapter. The commissioner shall also have the same power to open and modify an award as any court of the state has to open and modify a judgment of such court. The compensation commissioner shall retain jurisdiction over claims for compensation, awards and voluntary agreements, for any proper action thereon, during the whole compensation period applicable to the injury in question."

[8] Section 31-298 C.G.S. (Rev. to 2005) states, in pertinent part: "Both parties may appear at any hearing, either in person or by attorney or other accredited representative, and no formal pleadings shall be required, beyond any informal notices that the commission approves. In all cases and hearings under the provisions of this chapter, the commissioner shall proceed, so far as possible, in accordance with the rules of equity. He shall not be bound by the ordinary common law or statutory rules of evidence or procedure, but shall make inquiry, through oral testimony, deposition testimony or written and printed records, in a manner that is best calculated to ascertain the substantial rights of the parties and carry out the provisions and intent of this chapter…."

[9] The trial commissioner's denial of Hartford Insurance Group's motion to dismiss has not been appealed.

§ 31-315 C.G.S. in his February 4, 2014 Ruling. Finally, CIGA claims as error the trier's denial of its Motion to Articulate.

When conducting appellate review, it is of course well established that "[t]he trial commissioner's factual findings and conclusions must stand unless they are without evidence, contrary to law or based on unreasonable or impermissible factual inferences." Russo v. Hartford, 4769 CRB-1-04-1 (December 15, 2004), citing Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). We acknowledge that the case at bar differs somewhat from the norm in that rather than making factual findings and reaching conclusions based on evidence presented, the instant trial commissioner was called upon to review the procedural history of the claim and rule upon motions implicating several statutory provisions of the Workers' Compensation Act. Nevertheless, our role in examining the trier's actions is still defined by the same maxim we would normally apply: to wit, "[a]s with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial court could have reasonably concluded as it did." Burton v. Mottolese, 267 Conn. 1, 54 (2003).

In its appeal, CIGA asserts that the trial commissioner erred in concluding that CIGA's dismissal from the claim pursuant to the May 25, 2011 Finding of Commissioner Vargas was interlocutory rather than a binding final judgment. CIGA points out that the scheduling of a formal hearing was consistent with the remand order from this board and the hearing notice associated with that formal hearing specifically stated that the purpose

of the hearing was, inter alia, CIGA's Motion to Dismiss. CIGA also contends that just because neither the claimant nor Hartford Insurance Group chose to enter any evidence or object to the granting of CIGA's motion, that "does not nullify the reality that a full evidentiary hearing took place." (Emphasis in the original.) Appellant's Brief, p. 8. In addition, CIGA postulates that it was error for the instant trier to conclude that the hearing of January 26, 2011 was not a full evidentiary hearing simply because no evidence was submitted into the record. CIGA points out that the same evidence currently being relied upon to bring it back into the claim – i.e., the claimant's deposition testimony taken in 2006 – was available to all the parties at the time of January 26, 2011 hearing and therefore can be accorded no probative value at this juncture relative to the issue of CIGA's dismissal. CIGA also argues that pursuant to the provisions of § 31-301 C.G.S., "if a Finding and Decision on a motion is not appealed within twenty days, then it may be considered final and may be enforced in the same manner as a judgment of the Superior court."[10] Id., 11.

As discussed previously herein, the assessment of liability in apportionment claims is governed by the provisions § 31-299b C.G.S., which state:

> If an employee suffers an injury or disease for which compensation is found by the commissioner to be payable according to the provisions of this chapter, the employer who last employed the claimant prior to the filing of the claim, or the employer's insurer, shall be initially liable for the payment of such compensation. The

[10] Section 31-301(a) C.G.S. (Rev. to 2005) states, in pertinent part: " At any time within twenty days after entry of an award by the commissioner, after a decision of the commissioner upon a motion or after an order by the commissioner according to the provisions of section 31-299b, either party may appeal therefrom to the Compensation Review Board by filing in the office of the commissioner from which the award or the decision on a motion originated an appeal petition and five copies thereof…."

> commissioner shall, within a reasonable period of time after issuing an award, on the basis of the record of the hearing, determine whether prior employers, or their insurers, are liable for a portion of such compensation and the extent of their liability. If prior employers are found to be so liable, the commissioner shall order such employers or their insurers to reimburse the initially liable employer or insurer according to the proportion of their liability….

A close reading of this statute indicates quite clearly that the legislature intended that the apportionment of liability among the various respondents in these claims can *only* occur after the conclusion of litigation on the merits of the underlying claim. We recognize that over the years, certain procedural customs and conventions have evolved which are unique to the management of the asbestos docket. Nevertheless, in the final analysis, it is the actual provisions of the Workers' Compensation Act which must provide the framework for assessing the merits of a claim. Thus, although it has long been the practice, in the interests of efficiency and convenience, to "excuse," by agreement, certain participants from attending all of the hearings which occur during the prosecution of an asbestos claim, it may safely be said, given the sequence of events contemplated by § 31-299b C.G.S., that any party who elects not to participate in hearings is doing so at its own risk. As such, we are fully in agreement with the instant trial commissioner's statement that "until the date of last exposure has been determined – and with it the identity of the party against whom an award would be made under section 31-299b -- agreements to let out certain parties must be viewed as interlocutory." February 4, 2014 Ruling, p. 4.

CIGA asserts that this statement "is true only when the motion to dismiss is granted at an informal hearing and at the peril of the party being released by agreement with no adjudication." Appellant's Brief, p. 14. In light of our review of the actual language of § 31-299b C.G.S, we disagree. We are likewise not persuaded by CIGA's assertion that its dismissal occurred after a full evidentiary hearing; while the circumstances surrounding CIGA's dismissal may have been addressed to some degree at the hearing in question, it is quite clear, from a review of the transcripts of all the hearings held prior to the hearing of January 29, 2014, that findings relative to the underlying merits of the claim, including the threshold issue of compensability, were still pending. It is to this point that the trial commissioner was presumably alluding when he claimed to be "perplexed" by CIGA's claim that it had been dismissed following a full evidentiary hearing. It may thus be reasonably inferred that the trial commissioner deemed the lack of evidentiary submissions at the hearing of January 26, 2011 to be secondary to the fact that this supposed "full evidentiary hearing" preceded any findings on the merits of the underlying claim as contemplated by § 31-299b C.G.S.

It is regrettable that CIGA's motion to dismiss was granted pursuant to a formal hearing. In light of the provisions of § 31-299b C.G.S., it can be argued that a formal hearing was not the correct procedural vehicle for the remedy sought. Nevertheless, the provisions of § 31-299b C.G.S. are quite clear that apportionment occurs *after* the merits of the underlying claim have been adjudicated. To allow a party to escape liability prematurely because of a procedural irregularity, thereby potentially thwarting an injured

claimant's ability to collect an award of benefits, not only does violence to the plain meaning of the statute but also clearly runs counter to the remedial nature and humanitarian purpose of the Workers' Compensation Act.[11]

There is no error; the February 4, 2014 Ruling on Motion to Dismiss/Ruling on Motion to Reinstate Party by the Commissioner acting for the Eighth District is accordingly affirmed.

Commissioners Daniel E. Dilzer and Stephen M. Morelli concur in this opinion.

[11] In light of the trier's conclusion that the granting of CIGA's motion to dismiss was not a final judgment, we decline to enter into a discussion regarding the hypothetical application of the provisions of §§ 31-301 or 31-315 C.G.S. We likewise decline to address the appellant's claim of error relative to the trial commissioner's denial of its Motion for Articulation, given that the gravamen of the motion was a request for further explication of the trier's purported application of § 31-315 C.G.S.