CASE NO. 5953 CRB-6-14-7 : COMPENSATION REVIEW BOARD
CLAIM NO. 601060991

WILFREDO QUINONES : WORKERS' COMPENSATION
CLAIMANT-APPELLANT COMMISSION

v. : JULY 29, 2015

RW THOMPSON COMPANY, INC.
EMPLOYER

and

FEDERATED MUTUAL INSURANCE COMPANY
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 C. Varunes, Esq., Varunes & Associates, P.C., 5 Grand Street, Hartford, CT 06106.

This Petition for Review from the July 11, 2014 Ruling on Motion to Preclude by the Commissioner acting for the Sixth District was heard on March 20, 2015 before a Compensation Review Board panel consisting of Commissioners Randy L. Cohen, Stephen M. Morelli and Daniel E. Dilzer.

OPINION

RANDY L. COHEN, COMMISSIONER. The claimant has petitioned for review from the July 11, 2014 Ruling on Motion to Preclude by the Commissioner acting for the Sixth District. We find no error and accordingly affirm the findings of the trial commissioner.[1]

The following procedural background is relevant to the analysis of this matter. The claimant filed a Form 30C dated September 7, 2010 with the Workers' Compensation Commission on October 25, 2010. A second Form 30C dated February 4, 2011 was filed with the Workers' Compensation Commission on February 10, 2011. Both Forms 30C allege the claimant sustained injuries on March 16, 2010 which arose out of and in the course of his employment. A Motion to Preclude dated February 9, 2012 was filed with the Workers' Compensation Commission on February 29, 2012. The respondents filed an objection to this Motion on March 9, 2012. On April 18, 2012, a formal hearing was held on the Motion to Preclude before Commissioner Clifton Thompson. At the close of the formal the parties were given thirty days for the submission of briefs.

Prior to rendering a decision on the Motion to Preclude, Commissioner Thompson passed away. On May 24, 2012, counsel for both sides agreed that a new trial commissioner could rule on the Motion to Preclude based on the record of the April 18, 2012 formal hearing. The case was transferred to another commissioner, who issued an

[1] We note that two motions for extension of time and a motion for continuance were granted during the pendency of this appeal.

order, *sua sponte*, scheduling the matter for a continued formal hearing on October 1, 2012. On September 5, 2012, claimant's counsel filed an objection to the matter being reopened. On October 15, 2012, the trial commissioner overruled the claimant's objection, relying on precedent set forth in Stevens v. Hartford Accident & Indemnity Co., 29 Conn. App. 378 (1992). The claimant subsequently filed a Motion for Articulation, which was denied, and a Motion to Correct which the trial commissioner also denied, noting that he had not ordered a trial de novo. The claimant filed a Petition for Review and Reasons for Appeal seeking to overrule the trial commissioner's ruling in this matter.

On January 16, 2014, the Compensation Review Board issued its decision, stating that "the present dispute is unripe for appellate adjudication." Quinones v. RW Thompson Company, Inc., 5792 CRB-1-12-10 (January 16, 2014). The matter was remanded to the trial commissioner for further proceedings, and on May 15, 2014, a continued formal hearing was held in this matter. At this hearing, claimant's counsel, relying on her previous objections and briefs, again objected to the reopening of the record. The trial commissioner made the following additional findings which are pertinent to our review of this matter.

At the formal hearing held on April 18, 2012 before Commissioner Thompson, the claimant testified that he was employed by the respondent employer in April of 2004 and continued working there until he sustained injuries on March 16, 2010. April 18, 2012 Transcript, p. 7. The claimant also testified regarding the circumstances

surrounding his injuries and verified the authenticity of his signatures on the Forms 30C. Id., 7-8. In addition, the claimant indicated he was paid compensation following his injuries because he was unable to work. Id., 10.

The claimant was once again called to testify at the formal hearing of May 15, 2014. The trial commissioner canvassed the claimant as to his recollection concerning the checks he had received following the injury of March 16, 2010. The claimant indicated that he was unable to answer any of the trier's questions despite an attempt to refresh his recollection by showing him a transcript of his prior sworn testimony. The trier then asked counsel for the respective parties if either of them had any information relative to the payments. Claimant's counsel denied having any such information, but respondents' counsel provided a benefit statement illustrating the medical and indemnity benefits paid to the claimant by the respondent insurer.[2] A Form 36 was approved on October 17, 2011 based on the respondents' contention that the claimant was "able to return to work as demonstrated by surveillance."

The trier determined that the evidence presented demonstrated that the respondents paid the claimant "substantial" medical and indemnity benefits until the Form 36 was approved, and claimant's counsel had objected to the Form 36 on procedural grounds after its approval and requested a hearing. Conclusion, ¶ Q. Noting that the time frame for the payments to the claimant exceeded the one-year "safe harbor"

[2] The statement recites weekly indemnity payments to the claimant in the amount of $328.58 per week for the period of March 23, 2010 through November 8, 2011, totaling $28,257.88, and payments to medical providers for the period of April 13, 2010 through October 27, 2011 totaling $66,996.09. See Commissioner's Exhibit 1.

provision pursuant to § 31-294c(b) C.G.S., and the Motion to Preclude was filed on February 29, 2012, three months after the approval of the Form 36, the trial commissioner determined that because the claimant elected to proceed to a formal hearing on the issue of preclusion rather than the granting of the Form 36, "[t]he Form 36 remains the law of the case."[3] Conclusion, ¶ U. The trial commissioner concluded that the respondents had acknowledged a compensable claim and immediately began paying medical and indemnity benefits until a Form 36 was approved. The trier denied the Motion to Preclude, stating that "[t]he granting of the Motion based upon these facts offends this Commissioner's notion of equity and fairness which is the lynchpin of our Act." Conclusion, ¶ W.

[3] Section 31-294c(b) C.G.S. (Rev. to 2009) states, in pertinent part: "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…. 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…. 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 claimant filed a Motion to Correct which was denied in its entirety, and this appeal followed. On appeal, the claimant essentially raises two claims of error: (1) the trial commissioner exceeded his authority by disregarding the parties' stipulations and reopening the formal hearing *sua sponte* for the purposes of cross-examining the claimant and admitting additional evidence; and (2) the trial commissioner erroneously denied the claimant's Motion to Preclude given that the respondents had failed to assert a valid defense.

We begin our analysis with a recitation of the well-settled standard of review we are obliged to apply to a trial commissioner's findings and legal conclusions. "The 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). Moreover, "[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). Thus, "[i]t is … immaterial that the facts permit the drawing of diverse inferences. The [commissioner] alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court." Fair, supra, 540 (1988), quoting Del Vecchio v. Bowers, 296 U.S. 280, 287 (1935).

Turning to an examination of the merits of the appellant's first claim of error, we note at the outset that § 51-183f C.G.S. provides in pertinent part that, "if any judge of the Superior Court is retired because of disability, dies or resigns during the pendency of any proceeding before him, any other judge of that court, upon application, shall have power to proceed therewith as if the subject matter had been originally brought before him." In Stevens v. Hartford Accident & Indemnity Co., 29 Conn. App. 378 (1992), our Appellate Court reviewed the proper application of § 51-183f C.G.S., remarking that:

> recent amendments to rule 63 of the Federal Rules of Civil Procedure provide proper guidance to our trial courts in both carrying out the mandate of 51-183f and ensuring that no party is deprived of its due process right to a decision by the judge who heard and saw the witnesses. Rule 63 now provides: "If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties. In a hearing or trial without a jury, the successor judge shall at the request of a party recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness."

Id., 385.

The Stevens court set forth six "steps" which should be adopted by a successor judge hearing a matter pursuant to the provisions of § 51-183f C.G.S. The successor judge should:

> (1) become familiar with the entire existing record, including, but not necessarily limited to, transcripts of all testimony and all documentary evidence previously admitted; (2) determine, on the basis of such record and any further proceedings as the court deems necessary, whether the matter may be completed without prejudice to the parties; (3) if the court finds the matter may not be

> completed without prejudice to the parties it should declare a mistrial, but if the court finds that the matter may be completed without prejudice to the parties then; (4) *upon request of any party, or upon the court's own request, recall any witness whose testimony is material and disputed and who is available to testify without due burden;* (5) take any other steps reasonably necessary to complete the proceedings; and (6) render a decision based on the successor judge's own findings of fact and conclusions of law. (Emphasis added.)

Id., 386.

Turning to the matter at bar, the claimant asserts that "the trial commissioner did not have the authority to *sua sponte* reopen the formal hearing record to conduct a trial de novo where he demanded additional evidence from the respondent and that he cross-examine the Claimant." Appellant's Brief, p. 9. We disagree. First, as the foregoing discussion illustrates, the "six step" process set forth in Stevens clearly afforded the trial commissioner the right to recall the claimant for additional testimony. Second, the claimant's assertion seems to betray a profound disregard for the provisions of § 31-298 C.G.S., which state, in pertinent part, that:

> 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.

Third, claimant also appears to have overlooked the provisions of § 31-278 C.G.S., which confer upon the trial commissioners the "power to summon and examine under oath such witnesses, and [to] direct the production of, and examine or cause to be

produced or examined, such books, records, vouchers, memoranda, documents, letters, contracts or other papers in relation to any matter at issue as he may find proper…."[4] Finally, we would draw the claimant's attention to the provisions of § 31-282 C.G.S., which specifically state that "[i]f any compensation commissioner dies before the final settlement of any matter in which he had been acting in his official capacity, his successor in office may continue such matter to its completion." (Emphasis added.) Thus, in light of the discretion afforded to the trial commissioner by the court's reasoning in Stevens, supra, as well as the provisions of § 31-278 C.G.S., § 31-298 C.G.S., and § 31-282 C.G.S., we are not persuaded that the trial commissioner in any way exceeded his authority in this matter. Rather, the record indicates that the trial commissioner, in a reasonable exercise of his discretion, and consistent with the directive set forth in Stevens, supra, simply chose to recall for additional testimony a witness who had previously testified and to admit evidence which was material and germane to the issue in dispute.[5]

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[4] Section 31-278 (Rev. to 2009) states, in pertinent part: "Each commissioner shall, for the purposes of this chapter, have power to summon and examine under oath such witnesses, and may direct the production of, and examine or cause to be produced or examined, such books, records, vouchers, memoranda, documents, letters, contracts or other papers in relation to any matter at issue as he may find proper, and shall have the same powers in reference thereto as are vested in magistrates taking depositions and shall have the power to order depositions pursuant to section 52-148. He shall have power to certify to official acts and shall have all powers necessary to enable him to perform the duties imposed upon him by the provisions of this chapter…. If a commissioner is disqualified or temporarily incapacitated from hearing any matter, or if the parties shall so request and the chairman of the Workers' Compensation Commission finds that it will facilitate a speedier disposition of the claim, he shall designate some other commissioner to hear and decide such matter…."

[5] We note the assertion by the claimant that, "there is no statutory or jurisprudential authority discussing the commissioner's role to intercept an adjudicatory proceeding to assist in the defense or prosecution of a particular claim or issue. It is the advocates or attorneys that take an active role, whereas the commissioners remain, for the most part, a passive participant." Appellant's Brief, p. 17. In light of the

The claimant also contends that the trial commissioner's reliance upon Stevens, supra, constituted error because the trier did not take into account the exceptions to the applicability of Stevens as set forth in Gorelick v. Montanaro, 94 Conn. App. 14 (2006). In Gorelick, the Appellate Court discussed the issue of when a successor judge would "have the power to decide [a] case, pursuant to General Statutes § 51-183f without specific compliance with the holding in Stevens v. Hartford Accident & Indemnity Co., 29 Conn. App. 378 (1992)." Gorelick, supra, fn. 14. The court noted that "[a]s a general rule, due process considerations require that a party in a case tried without a jury is entitled to a decision by the judge who heard the evidence…. A successor judge ordinarily has the power to complete any acts left incomplete by a predecessor judge that do not require weighing and comparing evidence." Id.

However, the Gorelick court identified three exceptions to a successor judge's general lack of authority: first, "when a successor judge is granted such authority under the provisions of a statute, such as § 51-183f"; second, "when it is unnecessary to make credibility determinations with respect to the testimony of witnesses or when credibility determinations are not involved," id., and third, when the parties waive by stipulation "the right to a decision by a judge who heard the evidence." Id. Relative to the third exception, the court observed that such a stipulation "is not necessarily binding on the court and, under the circumstances of a particular case, the court may be justified in disregarding it." Id. The Gorelick court also stated that, "[a]lthough *Stevens* addressed

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foregoing discussion regarding §§ 31-278 and 31-298 C.G.S., this strikes us as a rather peculiar characterization of the role of the trial commissioner.

the power of a successor judge to make his or her findings of fact based solely on transcribed testimony and exhibits, no Connecticut court has, to our knowledge, defined the power of litigants to stipulate to such a procedure, thereby circumventing the procedures required under § 51-183f." Id.

Returning to the matter at bar, the claimant asserts that the trial commissioner erred in applying the six-step rule set forth in Stevens, supra, because the issue of preclusion is "purely procedural" and does not involve credibility determinations. As such, the matter fell within one of the exceptions envisioned in Gorelick and the trial commissioner should not have sought additional testimony from the claimant or made determinations based upon the credibility of that testimony. Appellant's Brief, p. 9. We are not so persuaded. First, there is nothing in the provisions of § 31-294c(b) C.G.S. to suggest that the analysis of whether preclusion lies is "purely procedural." Indeed, the statute at a minimum requires that the trial commissioner examine 1) the sufficiency of the employer's Form 43 and the claimant's Form 30C and the parties' compliance with the provisions of § 31-321 C.G.S.; 2) a claimant's potential obligation to reimburse an employer for benefits received after the Commission's receipt of a Form 43; and 3) whether the employer falls within the "safe harbor" because it either commenced payments within twenty-eight days and/or filed a timely Form 43.[6] In addition, nowhere

[6] Section 31-321 C.G.S. (Rev. to 2009) states: "Unless otherwise specifically provided, or unless the circumstances of the case or the rules of the commission direct otherwise, any notice required under this chapter to be served upon an employer, employee or commissioner shall be by written or printed notice, service personally or by registered or certified mail addressed to the person upon whom it is to be served at the person's last-known residence or place of business. Notices in behalf of a minor shall be given by or to his parent or guardian or, if there is no parent or guardian, then by or to such minor."

in Harpaz v. Laidlaw Transit, Inc., 286 Conn. 102 (2008), or its progeny does any court suggest that the "harsh penalty," id., 130, of preclusion is "purely procedural." Moreover, the fact that the Appellate Court in Callender v. Reflexite Corp., 137 Conn. App. 324 (2012) identified a "two-part inquiry" which a trial commissioner must undertake when deciding preclusion does not inexorably lead to the inference that the court intended to reduce the issue to a "purely procedural" matter.

In the instant claim, evidence was presented by the claimant himself that the employer made payments immediately following the injury. The assessment of whether these payments sufficed to place the employer within the "safe harbor" as contemplated by § 31-294c(b) C.G.S., or if recourse to the "safe harbor" was even necessary, is not "purely procedural" but, rather, material and germane to the issue of whether preclusion should be granted. The claimant's credibility was directly implicated in this assessment; as such, the trier was well within his discretion to examine the claimant's credibility and make reasonable inferences therefrom.

The claimant also asserts that the trial commissioner erred in applying Stevens, supra, because the "evidence reflects that both parties stipulated in writing to a decision by a successor commissioner based on a review of the evidence before the original commissioner." Appellant's Brief, p. 13. Thus, per Gorelick, this stipulation "takes this case out of the *Stevens* rule." Id. We disagree. Our examination of the documentary evidence (attached as Exhibit A to the Appellant's Brief) which purportedly serves as a "stipulation" reveals that the May 24, 2012 correspondence from claimant's counsel to

the Commission was primarily a position statement reflecting claimant's objection to a trial de novo, while correspondence to the Commission from respondents' counsel of the same date indicates that the respondents "have no objection to this matter be [sic] reassigned to a new Commissioner for a Finding on the papers based on the April 18, 2012 Formal Hearing Transcript and the Briefs submitted by the parties." In our estimation, neither of these documents rises to the level of a "stipulation," and the evidentiary record contains no other document which even remotely resembles a stipulation. Moreover, even if such a stipulation did exist, the trial commissioner would have been under no compunction to abide by its terms, given that "[a]lthough ordinarily stipulations of the parties are adopted, the court may disapprove the parties' agreement when it finds reason." Gorelick, supra, fn. 14. As such, we find unavailing the claims of error relative to the Gorelick exceptions to the Stevens rule. The trier in no way abused his discretion in deciding to reconvene the formal hearing and take additional evidence in this matter.

In a second claim of error, the claimant contends that the trial commissioner erroneously denied the Motion to Preclude because the respondents failed to assert a valid defense. The claimant argues that "[o]nce the commissioner found the Respondents failed to timely and properly file a Form 43 or a Voluntary Agreement to a properly and legally sufficient Form 30C, the inquiry should have ended." Appellant's Brief, p. 20. The claimant further avers that "[t]he commissioner's conclusions that the respondents' implicit acknowledgement of Claimant's compensable claim by paying benefits to the

Claimant for a period of time absolved them from timely filing a Form 43 or V.A. ignores the clear dictates of the statute."[7] Id., 21. We find both these assertions to be without merit.

First, with regard to the respondents' "failure" to file a Form 43, we note at the outset that at the formal hearing of April 18, 2012, the claimant appeared and testified, in response to a query by Commissioner Thompson, that he received checks from the insurance company following the date of the injury. April 18, 2012 Transcript, p. 10. Additionally, at the formal hearing held on May 15, 2014, the successor trial commissioner accepted into evidence, over the objection of claimant's counsel, a benefits statement showing the medical and indemnity payments made in the claim until such time as a Form 36 was approved. (See footnote 2, supra.) In light of the evidence presented, the trial commissioner reasonably concluded that because the compensability of the claim was not and had never been contested, the respondents were never obligated to file a Form 43. The trier's conclusion is supported by the reasoning of our Appellate court in Dubrosky v. Boehringer Ingelheim Corp., 145 Conn. App. 261 (2013), *cert. denied*, 310 Conn. 935 (2013) wherein the court stated that:

> [t]he language of form 43 indicates that it is to be used by employers who are contesting their liability to pay alleged compensation benefits. The form does not include a space for those employers who initially accept liability but may later, after investigation, choose to contest the extent of the disability. This distinction is not a superficial one, as an employer who is

[7] In light of the evidence presented herein, we reject the claimant's contention that the trial commissioner should have concluded that the respondents' acknowledgement of the claim was merely "implicit." Appellant's Brief, p. 21.

> contesting liability is distinguishable from one who solely contests the extent of the disability.

Id., 271-272.

The claimant also contends that the trial commissioner erred in failing to grant preclusion in light of the respondents' failure to file a voluntary agreement. The claimant asserts that "according to our case law, an employer's failure to file a Form 43 notice contesting liability or issue a Voluntary Agreement within one year of the employee's filing of the notice of claim will automatically result in the conclusive presumption of compensability." Appellant's Brief, p. 11. The claimant provides no authority for this position, and we are likewise unacquainted with any authority which stands for that proposition. Moreover, nowhere in the language of § 31-294c(b) C.G.S. – the statute governing preclusion -- do the words "voluntary agreement" appear. Finally, while the provisions of § 31-296 C.G.S. and Admin. Reg. § 31-296-1 C.G.S. do set out the parameters for preparation and delivery of a voluntary agreement, we note that Admin. Reg. § 31-296-1 C.G.S. clearly states the penalty for non-compliance is not the "automatic granting of preclusion" but, rather, "the penalty provided in section 31-288 of the general statutes."[8] Thus, while this board has recognized that the proffer of a

[8] Section 31-296(a) C.G.S. (Rev. to 2009) states, in pertinent part, that: "If an employer and an injured employee, or in case of fatal injury the employee's legal representative or dependent, at a date not earlier than the expiration of the waiting period, reach an agreement in regard to compensation, such agreement shall be submitted in writing to the commissioner by the employer with a statement of the time, place and nature of the injury upon which it is based; and, if such commissioner finds such agreement to conform to the provisions of this chapter in every regard, the commissioner shall so approve it. A copy of the agreement, with a statement of the commissioner's approval, shall be delivered to each of the parties and thereafter it shall be as binding upon both parties as an award by the commissioner…."

Admin. Reg. § 31-296-1 (Rev. to 2009) states, in pertinent part: "A voluntary agreement shall be prepared by the employer or his insurer in connection with all cases concerning which there is no dispute

voluntary agreement may, in certain situations, "serve to demonstrate that the respondents accepted compensability of the claim," Pagan v. Carey Wiping Materials, Inc., 5829 CRB-6-13-4 (March 28, 2014); *see also* Monaco-Selmer v. Total Customer Service, 5622 CRB-3-10-12 (January 19, 2012), the claimant is vastly overstating the significance of the role of a voluntary agreement in assessing the validity of a Motion to Preclude.

There is no error; the July 11, 2014 Ruling on Motion to Preclude by the Commissioner acting for the Sixth District is accordingly affirmed.

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

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that the claimant suffered an accident and injury arising out of and in the course of his employment causing either temporary partial or temporary total disability beyond the three-day waiting period. The voluntary agreement shall be submitted to the claimant for execution by him and forwarded by the employer or its insurer to the commissioner having jurisdiction within three weeks after the employer has actual knowledge of the accident and that the disability will extend beyond the three-day waiting period.… Noncompliance with this section is subject to the penalty provided in section 31-288 of the general statutes."