CASE NO. 5956 CRB-2-14-7
CLAIM NO. 200181790 : COMPENSATION REVIEW BOARD

MICHAEL DOW
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

: MARCH 9, 2015

LOWE'S
EMPLOYER
SELF-INSURED

and

SEDGWICK, CMS, INC.
ADMINISTRATOR
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by Michael L. Anderson, Esq., Anderson Law Firm, PC, 82 Chelsea Harbor Drive, Norwich, CT 06360. However, he waived oral argument and relied on his appellate documents filed.

The respondents were represented by David A. Kelly, Esq., Montstream & May, LLP, 655 Winding Brook Drive, Glastonbury, CT 06033-6087.

This Petition for Review from the April 29, 2014 Order Pursuant to C.G.S. § 31-278 of the Commissioner acting for the Second District was heard January 30, 2015 before a Compensation Review Board panel consisting of Commission Chairman John A. Mastropietro and Commissioners Randy L. Cohen and Stephen M. Morelli.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondents have appealed from the April 29, 2014 Order Pursuant to C.G.S. § 31-278 of the Commissioner acting

for the Second District. The respondents appeal was filed July 9, 2014. In that April 29, 2014 Order the trial Commissioner directed that "[t]he Respondents have 30 days to schedule an IME [Independent Medical Examination] on Chronic Regional Pain Syndrome (CRPS)." The order was issued following an informal hearing held April 24, 2014. The gravamen of the respondents-appellants appeal is that it was error for the trial Commissioner to issue the order without first holding a formal hearing.[1] We disagree**.**

The general rule is that in order to engage in any meaningful review the record from a formal hearing must be provided to the board. See e.g., Merenski v Greenwich Hospital, 4822 CRB-7-04-6 (January 12, 2005). However, we think the issue raised by the appellants is more related to the adjudicative process itself as opposed to the ordinary mixed questions of law and fact generally presented for appellate review. We are troubled by various aspects of the appeal filed.

First we note that on its face the appeal was filed more than 20 days after the order was issued by the Commissioner. Section 31-301(a)[2] provides in pertinent part:

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[1] The issues as identified in the appellants' brief are as follows:

> "1. Did the trial Commissioner' s 'Order Pursuant to C.G.S. § 31-278' deprive the respondents of their due process rights since no formal hearing was held, no transcript was established, and no evidence was submitted prior to the issuance of said Order?
>
> 2. Was the trial Commissioner's 'Order Pursuant to C.G.S. § 31-278' an abuse of power absent a Formal hearing on the merits?
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> 3. Did the trial Commissioner' s 'Order Pursuant to C.G.S. § 31-278' deprive the respondents of their due process rights by ordering the respondents to obtain an Independent Medical Examination within 30 days when the statute permits the defendant to request said examination 'at any time.'"

Appellants' Brief, p. 2.

[2] Sec. 31-301(a) provides:

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

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As we consider this matter we are reminded of this board's prior holdings as to the consequence of failing to comply with the statute's time requirements for filing an appeal. It has long been held by this board that the failure to comply with the time constraints of § 31-301(a) deprives this board of subject matter jurisdiction and thus the appeal must be dismissed.[3]

Our Supreme Court in its opinion in Stec v. Raymark Industries, Inc., 299 Conn. 346 (2010) provided an insightful analysis as to why this board's holdings that the failure to comply with the deadlines set out in § 31-301(a) were jurisdictional and not merely voidable. Justice Eveleigh writing for the majority stated:

> Additionally, this court previously has concluded that time constraints on appeals set forth in statutory schemes that are in derogation of the common law implicate subject matter jurisdiction. See, e.g., *HUD/Barbour–Waverly v. Wilson*, supra, 235 Conn. 658, 668; *Ambroise v. William Raveis Real Estate, Inc.*, supra, 226 Conn. 767, 628. The statute at issue in the present case, § 31–301(a), is part of the act, and the act "is a statutory scheme in derogation of [the] common law. . . ." (Internal quotation marks omitted.) *Lynn v. Haybuster Mfg.,*

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copies thereof. The commissioner within three days thereafter shall mail the petition and three copies thereof to the chief of the Compensation Review Board and a copy thereof to the adverse party or parties. If a party files a motion subsequent to the finding and award, order or decision, the twenty-day period for filing an appeal of an award or an order by the commissioner shall commence on the date of the decision on such motion.

[3] At oral argument counsel for the appellants expressed some surprise that he was accorded a hearing before the board. As one of the issues included in the hearing notice was "Show Cause Why Appeal Should Not Be Dismissed/31-301(a), and the appellants other claim of error was predicated on due process grounds it would seem logical to provide the appellants with an opportunity to argue before the panel. Had the appellants been of the opinion that oral argument was not necessary they could have waived same. Given that the matter is alleged to be moot then arguably the appellants could have withdrawn their appeal.

> *Inc.*, 226 Conn. 282, 297, 627 A.2d 1288 (1993). The reasoning in *Ambroise* is therefore instructive to the issue before us: "It is significant, furthermore, that [§ 31–301(a)] contains a statutory time period for taking an appeal with regard to a statutory remedy that has no common law counterpart. The right to [workers' compensation] is purely statutory. . . . Where . . . a specific time limitation is contained within a statute that creates a right of action that did not exist at common law, then the remedy exists only during the prescribed period and not thereafter. . . . In such cases, the time limitation is not to be treated as an ordinary statute of limitation, but rather is a limitation on the liability itself, and not of the remedy alone. . . . [U]nder such circumstances, the time limitation is a substantive and jurisdictional prerequisite, which may be raised . . . at any time, even by the court sua sponte, and may not be waived. . . . It is reasonable to infer, therefore, that the legislature intended the limitation on the right to appeal contained in [§ 31–301(a)] to operate similarly to [other] statutory time limitations on the right to initiate a statutory action." (Citations omitted; internal quotation marks omitted.) *Ambroise v. William Raveis Real Estate, Inc.*, supra, at 766–67; see also *HUD/Barbour–Waverly v. Wilson*, supra, at 657, (applying *Ambroise* in determining that appeal pursuant to § 47a–35 must be brought within five days of rendering of summary process judgment). This determination is in accordance with the principle that, although the act "should be broadly construed to accomplish its humanitarian purpose . . . its remedial purpose cannot transcend its statutorily defined jurisdictional boundaries." (Citations omitted; internal quotation marks omitted.) *Kinney v. State*, 213 Conn. 54, 59, 566 A.2d 670 (1989). (Emphasis ours.)

Id., 365-66.

At this juncture we hold that the appeal is dismissed for the reasons discussed above. In effect the respondents' failure to comply with the deadlines for filing an appeal waived any allegation of error arising from the trial commissioner's issuing of the April 29, 2014 written Order.[4] However, we write further as we believe additional commentary will be instructive to appellants and Workers' Compensation practitioners generally.

[4] Additionally it was conceded at oral argument that the broader issue as to the claimant's submission to the Independent Medical Examination is moot as the claimant underwent an IME in July of 2014.

The focus of the appellants' appeal appears to be that it was error for the trial Commissioner to issue what was tantamount to a discovery order without first holding a formal hearing. As the Appellate Court noted in Bidoae v. Hartford Golf Club, 91 Conn. App. 470, 478-80 (2005) the powers conferred to a Workers' Compensation Commissioner under § 31-278 and § 31-298 are even broader than those accorded to a trial court pursuant to Practice Book § 13-14. (permitting trial court's to enter certain orders so as to assure compliance with discovery orders). Section 31-278 provides 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. . . . (Emphasis ours.)

Section 31-298 provides in pertinent part;

> [T]he 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….

Among the fundamental tenets of Chapter 568 is to provide an injured worker with an expedient and certain remedy. Mingachos v. CBS, Inc., 196 Conn. 91, 97 (1985); Powers v. Hotel Bond Co., 89 Conn. 143, 147 (1915). Were we to institute a per se

requirement as to the need for a formal hearing for every order of discovery we would confound a primary objective of the Act.

As this board noted in Marandino v. Prometheus Pharmacy, 5434 CRB-6-09-2 (February 22, 2012) subsumed within the purpose underpinning our Act is the objective to return an injured worker to gainful employment. Central to achieving that goal is providing a claimant with timely access to appropriate medical care and assessment. In McCarthy v. Hartford Hospital, 5079 CRB-1-06-3 (March 8, 2007), *aff'd*, 108 Conn. App. 370 (2008), *cert. denied*, 289 Conn. 910 (2008) we noted, "[o]ur workers' compensation system is designed for physicians to play a vital role by providing medical care for injured workers, diagnosing their conditions and degrees of impairment, and facilitating their return to work once they are physically ready." Id., 8. If we were to hold in accordance with the respondents' argument our ruling would have a chilling effect on meeting that objective as well.

Further, as this board re-uttered in Quinones v. RW Thompson Company, Inc., 5792 CRB-1-12-10 (January 16, 2014) interlocutory appeals are to be discouraged. In Quinones, we quoted the following from Richardson v. Bic Corporation, 4953 CRB-3-05-6 (September 7, 2006).

> [I]n Kuba v. Michael's Landscaping & Lawn Service, 4266 CRB-4-00-7 (August 29, 2001), . . . we stated, "Unless the immediate actualization of an interlocutory ruling may result in some form of irreparable harm, such as the disclosure of sensitive and confidential information to opposing counsel; see Vetre v. State/Dept. of Children and Youth Services, 3948 CRB-6-98-12 (February 14, 2000); this board discourages parties from filing appeals before the commissioner has had a chance to rule on the merits of a case."
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> This board has given voice to that principle in order to provide guidance to parties inclined to appeal interlocutory rulings.

> "The efficient and timely resolution of cases is of prime importance given the urgent need for remedial relief that many injured claimants experience. Maintaining the integrity of final judgments is crucial to the stability of our legal system, but this concern should not overshadow the fundamental need for speedy decisionmaking in the workers' compensation arena." [Bailey v. Stripling Auto Sales, Inc., 4516 CRB-2-02-4 (May 8, 2003)]. Appeals create delay, and participants in this system should strive to keep in mind the need for deliverance of timely decisions. Unfortunately, this Commission works with limited resources, and it takes time to process cases and appeals. Thus, it helps to expedite decisionmaking if parties refrain from immediately appealing evidentiary rulings and other interlocutory rulings.

Quinones, supra.

We particularly note the concern expressed in Kuba, supra, that a consideration of the irreparable harm which may flow from failing to take up an issue raised in an interlocutory appeal is part of the analysis of whether appellate proceedings are warranted at that juncture. Applying this analysis to the instant appeal we see no irreparable harm which may come to the respondents if the issue raised awaits review following the trial Commissioner's ruling on the merits. Accordingly, the due process rights of the respondents-appellants were not constrained by the trial Commissioner's order.[5]

Given the appellants' failure to comply with the time constraints for filing an appeal pursuant to § 31-301(a) we dismiss the appeal from the April 29, 2014 Order Pursuant to C.G.S. § 31-278 of the Commissioner acting for the Second District.

Commissioners Randy L. Cohen and Stephen M. Morelli concur.

[5] Practice Book Sec. 13-16 also provides, "Any order provided in this chapter to be made by the court may be made by a judge thereof when the court is not actually in session."