CASE NO. 5975 CRB-6-14-12 : COMPENSATION REVIEW BOARD
CLAIM NO. 601043876

MARIANNA GRZESZCZYK
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: DECEMBER 9, 2015

STANLEY WORKS
EMPLOYER

and

SEDGWICK CMS
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Harvey L. Levine, Esq. and Jennifer B. Levine, Esq., Levine & Levine, 754 West Main Street, New Britain, CT 06053.

The respondents were represented by Erik S. Bartlett, Esq., McGann, Bartlett & Brown, 111 Founders Plaza, Suite 1201, East Hartford, CT 06108.

This Petition for Review[1] from the December 1, 2014 Ruling RE: Claimant's Motion To Preclude Dated June 12, 2006 of Commissioner Stephen B. Delaney acting for the Sixth District was heard September 25, 2015 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Randy L. Cohen Stephen M. Morelli.

[1] We note that a postponement and an extension of time were granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has appealed from a denial of her Motion to Preclude in this case. The trial commissioner concluded after a formal hearing that the facts as presented did not support granting preclusion pursuant to § 31-294c(b) C.G.S.[2] His reasoning is stated in an opinion entitled, "**Ruling RE: Claimant's Motion To Preclude Dated June 12, 2006"** (hereafter **"**Ruling"). The claimant appeals from the Ruling, arguing that as the respondents filed an untimely disclaimer to her claim, preclusion should be granted. We conclude that where the facts indicate the respondents paid all applicable medical bills and proffered a voluntary

[2] The text of this statute reads as follows;

"(b) Whenever liability to pay compensation is contested by the employer, he shall file with the commissioner, on or before the twenty-eighth day after he has received a written notice of claim, a notice in accord with a form prescribed by the chairman of the Workers' Compensation Commission stating that the right to compensation is contested, the name of the claimant, the name of the employer, the date of the alleged injury or death and the specific grounds on which the right to compensation is contested. The employer shall send a copy of the notice to the employee in accordance with section 31-321. If the employer or his legal representative fails to file the notice contesting liability on or before the twenty-eighth day after he has received the written notice of claim, the employer shall commence payment of compensation for such injury or death on or before the twenty-eighth day after he has received the written notice of claim, but the employer may contest the employee's right to receive compensation on any grounds or the extent of his disability within one year from the receipt of the written notice of claim, provided the employer shall not be required to commence payment of compensation when the written notice of claim has not been properly served in accordance with section 31-321 or when the written notice of claim fails to include a warning that (1) the employer, if he has commenced payment for the alleged injury or death on or before the twenty-eighth day after receiving a written notice of claim, shall be precluded from contesting liability unless a notice contesting liability is filed within one year from the receipt of the written notice of claim, and (2) the employer shall be conclusively presumed to have accepted the compensability of the alleged injury or death unless the employer either files a notice contesting liability on or before the twenty-eighth day after receiving a written notice of claim or commences payment for the alleged injury or death on or before such twenty-eighth day. An employer shall be entitled, if he prevails, to reimbursement from the claimant of any compensation paid by the employer on and after the date the commissioner receives written notice from the employer or his legal representative, in accordance with the form prescribed by the chairman of the Workers' Compensation Commission, stating that the right to compensation is contested. Notwithstanding the provisions of this subsection, an employer who fails to contest liability for an alleged injury or death on or before the twenty-eighth day after receiving a written notice of claim and who fails to commence payment for the alleged injury or death on or before such twenty-eighth day, shall be conclusively presumed to have accepted the compensability of the alleged injury or death."

agreement conceding compensability within one year of the claim being initiated, a Motion to Preclude does not lie. We affirm the trial commissioner's Ruling.

The trial commissioner reached the following factual findings after a formal hearing on the claimant's Motion to Preclude. He took administrative notice that the claimant filed a Form 30C dated February 7, 2006 alleging she sustained injuries to her neck, back, left arm and ribs as a result of a fall in respondent's parking lot on March 10, 2005 which arose out of and in the course of her employment with the respondent Stanley Works Tools. The commissioner also took administrative notice that the respondent filed a Form 43 dated June 28, 2006[3] and that the claimant had filed a Motion to Preclude dated June 12, 2006 alleging that the respondents failed to file a timely Form 43 and failed to commence payment of compensation for her injuries within the time period prescribed by statute. Medical records indicated that on March 11, 2005 the claimant received medical treatment for her injuries of March 10, 2005 at the Doctors Treatment Center. Records indicate that on May 11, 2005 the medical bill from the Doctors Treatment Center was paid in full. She was diagnosed with muscle sprain/strain in her back and left arm and released for regular duty. The commissioner also found the claimant's authorized treating physician, Dr. Gerald Becker, had evaluated the claimant on November 25, 2013 for her injuries sustained on March 10, 2005.

The trial commissioner also noted correspondence introduced into evidence by the parties indicated that the respondent accepted the claimant's back injury and if voluntary agreements were issued the hearing on the instant motion would not be pursued. The commissioner also noted a claims adjuster for the respondents, Linda Whitehouse,

[3] The Form 43 filed June 28, 2006 did not contest compensability of the claimant's March 10, 2005 injury, but contested the compensability of the claimant's ongoing need for medical treatment.

testified. Ms. Whitehouse testified the claimant's claim was accepted, her records indicated the only medical bill presented was paid and voluntary agreements were issued, all prior to this formal hearing.

Based on this evidence the trial commissioner concluded the claimant sustained a compensable injury on March 10, 2005 and received treatment for this injury on March 11, 2005. A bill for this treatment was presented to the respondents and paid, and no other bills for treatment for this injury were presented to the respondents. The respondents treated the claimant's March 10, 2005 injury as compensable and voluntary agreements were tendered to the claimant. Therefore, the trial commissioner found that the totality of the evidence and the applicable case law supported denial of the Motion to Preclude.

The claimant filed a 16 page Motion to Correct seeking to replace the original Ruling with a ruling that would have granted the Motion to Preclude. The gravamen of this Motion was the claimant's position that the respondents' conduct did not warrant "safe harbor" protection from preclusion; based on her interpretation of the precedent in Monaco-Selmer v. Total Customer Service, 5622 CRB-3-10-12 (January 19, 2012). The trial commissioner denied this motion and the claimant has commenced this appeal.

We note that we have had previous occasion to examine the parameters of the "safe harbor" from preclusion under § 31-294c C.G.S. Last year in Pringle v. National Lumber, Inc., 5912 CRB-3-14-1 (December 31, 2014), appeal pending, AC 37682, we considered the issue of whether under the facts of that case the respondents had maintained a "safe harbor" to contest the extent of disability within one year of a claim being filed and whether it was erroneous for the trial commissioner to have ordered

preclusion. We concluded in that case preclusion was warranted. A look at the precedent we applied in that case and the facts involved; compared to the factual circumstances in this case, leads us to conclude there is no legal error in the trial commissioner's decision.

In Pringle, supra, the trial commissioner found the claimant had sustained an injury and filed a Form 30C, and the respondents had never filed a Form 43. The commissioner further found the respondents had not either made timely indemnity payments within 28 days of the filing of the claim, nor had they authorized medical treatment during this time frame. As a result, the trial commissioner found the "safe harbor" had not been properly exercised by the respondents in Pringle and granted preclusion. Our analysis on appeal stressed how fact driven a decision on preclusion now is in the wake of the decisions in Harpaz v. Laidlaw Transit, Inc., 286 Conn. 102 (2008) and Donahue v. Veridiem, Inc., 291 Conn. 537 (2009).

> 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. 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.

Id.

In the present case the trial commissioner found that a single medical bill for treatment of the claimant's injury was presented to the respondents, and the respondents

paid this bill. The commissioner further found that the respondents treated the claimant's injuries as compensable and proffered voluntary agreements acknowledging acceptance of the claim. This is an important distinction between this case and Pringle, as in that 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." Id. Therefore this case is far more congruent to the circumstances in Pagan v. Carey Wiping Materials, Inc., 5829 CRB-6-13-4 (March 28, 2014), where 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. There is no evidence that the claimant lost any time at work due to this injury, therefore this case is similar in that respect to the "no lost time" cases where we upheld a denial of preclusion in Negron v. CVS Caremark Corporation, 5870 CRB-4-13-8 (July 17, 2014), appeal pending, A.C. 37062, and Williams v. Brightview Nursing & Retirement, 5854 CRB-6-13-6 (June 12, 2014). 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. This similar situation is present herein, and supports a finding the respondents are entitled to "safe harbor" protection to contest the extent of the claimant's disability.

The claimant's appeal focuses on the argument that the respondents lost their safe harbor by failing to continuously provide medical care to the claimant. She cites Beshah v. U. S. Electrical Wholesalers, Inc., 5781 CRB-7-12-10 (August 14, 2013) and Monaco-Selmer, supra, as cases which govern this situation. In those cases the respondents

advanced indemnity benefits to the claimant, but discontinued these payments prior to issuing a Form 43 denying the claim. We held that once the respondents failed to continue the payment of indemnity benefits their safe harbor lapsed. The claimant here argues that there were additional medical bills for treatment presented to the respondents which they did not honor, and this failure requires the Motion to Preclude to be granted. After examining the evidence presented on the record at the formal hearing, we are not persuaded by this argument.

The claimant's argument rests on one data point. She argues that the evidence points to her having been treated for this injury by Dr. Becker and the respondents having not paid this bill. As a result, the claimant argues although there was no lost time and the facts are not exactly congruent with those in Beshah and Monaco-Selmer the principle that the respondents failed to consistently advance benefits prior to filing a disclaimer exists and this tribunal should reach the same result and order preclusion. We have examined the testimony of Ms. Whitehouse which was the gravamen of the claimant's Motion to Correct on this point. She initially testified that all bills related to the claimant's treatment had been paid. June 18, 2014 Transcript, p. 19. On cross-examination, she could not explain why Respondent's Exhibit 2 did not include bills from Dr. Becker. Id., p. 25. Her explanation was that the original records had been provided by the prior carrier on the risk at that time and a "system glitch" might have occurred. Id., p. 26.[4] We note that the claimant's exhibits presented to the trial commissioner do

[4] At oral argument before this tribunal counsel for the parties addressed the circumstance that this claimant has multiple pending claims for benefits against the respondents and that bills for one injury may have been paid by the insurer having been associated with another date of injury. A review of Commission records documents the claimant has filed eight separate notice of claims for different injuries against the respondents for the period between March 6, 1990 and January 6, 2012.

not include any documentation in the form of business records or affidavits that would establish that there was an unpaid bill in 2005 presented to the respondents from Dr. Becker for this injury. Essentially the claimant's argument is that the respondents' failure to produce such a bill at the hearing for the Motion to Preclude proves that they failed to provide this medical treatment.

The trial commissioner was not persuaded by this argument. We believe that this was a reasonable decision. The burden of persuasion in a hearing on a Motion to Preclude rests on the moving party, i.e. the claimant. Similar to a formal hearing on the merits, if a commissioner finds all the evidence presented at the hearing unpersuasive he or she must rule for the respondents. Warren v. Federal Express Corporation, 4163 CRB-2-99-12 (February 27, 2001). The claimant argues that Dr. Becker had not been paid for service rendered prior to the respondents' June 28, 2006 disclaimer, but presented no corroborating evidence on the record besides the equivocal testimony of the respondents' claims adjuster. The trial commissioner was not persuaded and as we pointed out in Ben-Eli v. Lowe's Home Improvement Center, 5006 CRB-3-05-10 (November 16, 2006), "[o]ne can only expect the trier of fact to render a decision based on what evidence actually says, not what it should have said." Id. See also Gibson v. State/Department of Developmental Services-North Region, 5422 CRB-2-09-2 (January 13, 2010).

The respondents argue that this case is more similar to Dubrosky v. Boehringer Ingelheim Corporation, 145 Conn. App. 261 (2013), *cert. denied*, 310 Conn. 935 (2013), where the Appellate Court held that preclusion could not be ordered when a claimant did not lose any time from work after his injury requiring payment of indemnity benefits nor had generated any medical bills which the respondents could have paid during the 28 day

period after the Form 30C was filed. Both in Dubrosky and the present case the respondents did not contest the compensability of the claimant's injury. In such a case the Appellate Court held "the failure to comply strictly with § 31-294c(b) will not preclude the employer from contesting the extent of the employee's disability." Id., 274.

In the present case the respondents do not suggest that there were no medical bills that could have been paid prior to a decision as to whether to accept or contest the claim. To the contrary, they maintain that they paid the one bill which was submitted and at no time failed to pay a bill for medical treatment. They argue that they did "commence payment", id., 273, and unlike the respondents in Beshah and Monaco-Selmer, maintained that "safe harbor" until they issued a Form 43. This is an issue of fact and the trial commissioner was satisfied based on the evidence on the record that they had done so. We also note that the medical care provided to the claimant responsive to her March 10, 2005 accident was *prior* to her ever placing the respondents on notice that she was seeking benefits under Chapter 568 for this incident. We note that in Lamar v. Boehringer Ingelheim Corp., 5588 CRB-7-10-9 (August 25, 2011), *aff'd*, 138 Conn. App. 826 (2012), *cert denied*, 307 Conn. 943 (2012) and in Negron, supra, we have affirmed the practice of respondents issuing a "pre-emptive Form 43" contesting liability for an injury before the claimant has filed a Form 30C seeking benefits. We find that medical treatment provided to a claimant prior to their filing a claim for benefits is congruent to a "pre-emptive Form 43", at least as far as preserving the respondents' safe harbor rights to contest the extent of the claimant's disability. See Williams, supra.

In addition, we reject the claimant's contention at oral argument before our tribunal that the "safe harbor" period for the respondents commenced on the date of the

claimant's injury. The event triggering an obligation for the employer to take responsive action was the filing of the claimant's Form 30C on February 7, 2006. Having failed to file a Form 43 within 28 days they were bound to accept compensability of the injury. However, the respondents proffered a Form 43 contesting the need for medical treatment and voluntary agreements conceding jurisdiction well prior to the end of the twelve month period from the filing of the claim. This is clearly within the parameter of the "safe harbor' as defined by Dubrosky, supra.

As we noted in footnote 4, the claimant and the respondents have a decades-long employer-employee relationship which has involved extensive activity regarding her claims for work-related injuries. After considering the claimant's arguments before our tribunal, we are struck as to how they focus on apparent confusion on the part of the insurer as to which of the claimant's injuries should be attributed to which claim. As the Supreme Court pointed out in Menzies, supra, the purpose of the preclusion statute is to sanction dilatory and unresponsive respondents who harm claimants. Id., 342. The trial commissioner in this matter was not persuaded that the claimant had suffered any harm beyond that of not having received a prompt disclaimer to her Form 30C. Our examination of the record supports this conclusion.[5] Under these circumstances this case falls clearly within the scope of the precedent in Adzima v. UAC/Norden Division, 177 Conn. 107 (1979). Adzima 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.

[5] The claimant contends that the trier's failure to grant the Motion to Correct constituted error. Our review of that Motion indicates that the claimant was merely reiterating the arguments made at trial which ultimately proved unavailing. As such, we find no error in the trier's decision to deny the Motion to Correct. D'Amico v. Dept. of Correction, *aff'd*, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003).

Id., 115, see also Dubrosky, supra, 272 and Negron, supra. By proffering voluntary agreements the respondents acknowledged compensability of the claimant's March 10, 2005 injury. As a result, the trial commissioner could reasonably conclude the "harsh remedy" of preclusion, West v. Heitkamp, Inc., 4587 CRB-5-02-11 (October 27, 2003), was unwarranted based on the facts on the record and precedent such as Adzima, supra.[6]

We affirm the trial commissioner's Ruling as it is legally sound and supported by the facts on the record.

Commissioners Randy L. Cohen and Stephen M. Morelli concur in this opinion.

[6] The claimant argues that the trial commissioner erred in considering matters discussed within various settlement communications exchanged between the parties. Claimant's Brief, pp. 19-22. She argues the trial commissioner improperly determined she had waived her right to seek preclusion, and the commissioner allowed the respondents to interpose an equitable defense. Id. The trial commissioner's Ruling does not rely on such a representation by the claimant (See Conclusions ¶ E & ¶ F) and does not cite any precedent concerning equitable defenses. Id. We cannot ascribe reversible error to matters not cited in a commissioner's findings. Turrell v. State/DMHAS, 5640 CRB-8-11-3 (March 21, 2012), *aff'd,* 144 Conn. App. 834 (2013), *cert. denied*, 310 Conn. 930 (2013).