CASE NO. 5982 CRB-7-15-1 : COMPENSATION REVIEW BOARD
CLAIM NO. 700143791

CURTIS NAILS
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: DECEMBER 8, 2015

FREDDIE'S U.S. MAIL, INC.
EMPLOYER

and

TRAVELERS PROPERTY & CASUALTY
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Jonathan H. Dodd, Esq., The Dodd Law Firm, LLC, Ten Corporate Center, 1781 Highland Avenue, Suite 105, Cheshire, CT 06410.

The respondents were represented by Tracey Green Cleary, Esq., Law Offices of Cynthia M. Garraty, One Hamden Center, 2319 Whitney Avenue, Suite 4C, Hamden, CT 06518.

This Petition for Review from the January 8, 2015 Memorandum Of Decision of the Commissioner acting for the Fourth District was heard August 28, 2015 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Stephen M. Morelli and Peter C. Mlynarczyk.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has appealed from a decision of the trial commissioner in this matter to grant a Form 36 and direct the claimant to undergo a detoxification program. The claimant argues that the decision reached herein is in derogation of Acquarulo v. Botwinik Bros., Inc., 139 Conn. 684 (1953) as the trial commissioner did not properly consider the potential danger and suffering involved in this modality of treatment. The respondents argue that this appeal was untimely and should be dismissed on jurisdictional grounds. They further state that on the merits the trial commissioner reached a reasonable decision based on the record presented. Upon review we concur that this appeal was filed after the statutory deadline and is jurisdictionally invalid. Moreover, on the merits we affirm the commissioner's decision, as the appropriate modality of treatment for an injured worker is a determination reserved to the trial commissioner, Cervero v. Mory's Association, Inc., 5357 CRB-3-08-6 (May 19, 2009), *aff'd*, 122 Conn. App. 82 (2010), *cert. denied*, 298 Conn. 908 (2010).

The trial commissioner in this matter issued a written opinion on November 3, 2014 ruling on the respondents' March 19, 2014 Form 36. The commissioner noted that a formal *de novo* hearing was held on May 22, 2014 with the record closing July 14, 2014. She noted that the claimant sustained a compensable back injury in 2006 and a Voluntary Agreement had been approved for the injury in 2007. She noted the claimant had been treating with Dr. Sylvia Knoploch since 2007 and the dosage of Oxycontin and Oxycodone she had been prescribing had steadily increased. The claimant underwent a Respondent's Medical Examination with Dr. Jerrold Kaplan on July 28, 2011. Dr.

Kaplan noted that the claimant had a spinal cord stimulator implanted in 2008 but this had been a failure, and he had seen multiple physicians of various specialties. The claimant testified as to problems with constipation, bowel, bladder and sexual dysfunction, depression and weight gain. Dr. Kaplan noted the claimant was on Oxycontin, Oxycodone, Pristiq, Warfarin, Xenical, and Ritalin. The claimant related to Dr. Kaplan at that time he would like to try a different pain management approach and come off the strong narcotic pain medications he was on. Dr. Kaplan recommended he attend an intensive inpatient pain management program.

The claimant was evaluated by a neuropsychologist, Robert P. Tepley, Ph.D., on March 13, 2013. The claimant told Dr. Tepley he rarely left the house, was in constant pain, and was depressed with no life goals. Dr. Tepley diagnosed the claimant with pain syndrome and major depression. He opined the claimant was an excellent candidate for an intensive residential pain management program and suggested Silver Hill Hospital ("Silver Hill") had an appropriate program.

The claimant had Dr. Knoploch deposed on April 25, 2013. She testified that subsequent to a motor vehicle accident and spine surgery the claimant presented to her for pain. She said in 2007 the claimant was wearing a fentanyl patch. She outlined her history prescribing pain medication to the claimant, and acknowledged that the claimant continues to complain of pain despite the medication. She said she had not made an effort to wean the claimant off the prescription medication. She said that she was managing the claimant's symptoms although she did not believe she could cure the claimant's condition, and she did not make a distinction between palliative care and curative care. She said that they had prescribed Ritalin to the claimant to "pump him up"

due to lethargy produced by his narcotic pain medications. The dosage of pain medication the claimant received was far higher than in 2007 and was above the average dosage. She also confirmed the claimant was suffering sexual dysfunction, constipation and urinary problems. Dr. Knoploch also discussed the claimant's referral to Dr. Tepley. While Dr. Knoploch had referred the claimant to him, she disagreed with his recommendation that the claimant undergo inpatient detoxification at Silver Hill. She said she was unable to develop any treatment for the claimant that offered similar pain relief to the narcotic medication he was on. She further stated that prescribing the claimant non-narcotic medication would be "cruel treatment" and the effort to move the claimant to a detoxification program was being suggested to save the insurer money. She did not believe the regimen at Silver Hill would be sufficient for the claimant.

At her deposition Dr. Knoploch stated she was unaware of the narcotics protocols promulgated by the Workers' Compensation Commission; and disagreed with the need for a second opinion to increase narcotics dosage when the initial treatment proves inadequate. She also said there was no written opioid agreement with the claimant; and that she had never referred any of her patients to a detoxification program. She also testified that if the claimant's detoxification program failed she would take him back as a patient.

The commissioner noted a January 10, 2014 treatment note by Dr. Knoploch restating the claimant's extensive narcotic medications and numerous ailments. The note stated that the claimant did not now want to pursue a detoxification program from his current level of opioid medication. Dr. Knoploch wrote that she supported this decision as she did not believe he could function at a lower level of medication and she did not

believe Workers' Compensation could impose such treatment, calling this recommendation "unethical and inappropriate." The claimant was evaluated at Silver Hill on February 11, 2014 for treatment in the Chronic Pain and Recovery Center 28 day multi-disciplinary program. Silver Hill opined that it thought the claimant would benefit from this program and invited him to participate. The commissioner also noted a March 21, 2014 office note from Dr. Knoploch which referenced the claimant treating with Dr. Tepley for an individual program of self-management, which the claimant seemed to benefit from but did not complete.

Based on these facts the trial commissioner concluded in her November 3, 2014 ruling that Dr. Knoploch did not have a written narcotic protocol in place as recommended by the Commission. The commissioner noted the claimant was on above-average narcotic dosages and that Dr. Kaplan and Dr. Tepley had opined that the claimant should be weaned off this medication regimen. Therefore, she determined that the weight of the medical recommendations caused her to find an in-patient detoxification program was reasonable and necessary medical treatment for the claimant. The trial commissioner granted the Form 36. She advised that this order would be vacated if the claimant entered an in-patient detoxification program at Silver Hill or another agreed upon facility within 30 days; provided the facility had a one year "after care" program. Were the claimant to refuse to enter such treatment this refusal would constitute a denial of "reasonable and necessary" medical treatment under Chapter 568. The trial commissioner also said that a condition to vacating approval of the Form 36 was for Dr. Knoploch to produce a written Opioid Agreement to the Commission, and that failure to comply with this order would

be grounds to withdraw the approval of Dr. Knoploch as treating physician for the claimant.

The claimant took no responsive action to the trial commissioner's November 3, 2014 Ruling within the next twenty days. The claimant did not file a Motion to Correct or a Motion for Articulation seeking to clarify or modify the terms of the Commissioner's ruling. On December 30, 2014 the claimant filed a hearing request and on January 8, 2015 the trial commissioner held an informal hearing. Responsive to that informal hearing, the trial commissioner filed that day a Memorandum of Decision which more fully explained the obligations Dr. Knoploch would have subsequent to the claimant's detoxification in order to remain an authorized treating physician. On January 21, 2015 the claimant filed a Petition to Review to this tribunal appealing the trial commissioner's decision.

The claimant's appeal is based on his position that the trial commissioner's January 8, 2015 Memorandum of Decision is in error. He believes substantively that the treatment program the trial commissioner directed him to undergo at Silver Hill, or a similar program, is not "reasonable and necessary medical treatment." As a result, his failure to undergo such a program is not a refusal to obtain reasonable and necessary medical treatment and the terms of § 31-294e C.G.S.,[1] which would empower a commissioner to suspend compensation to the claimant, should not apply. The

[1] This statute reads as follows:
Sec. 31-294e. Employee's option to obtain medical care at employee's expense. Refusal of employee to accept or obtain reasonable medical care. (a) At his option, the injured employee may refuse the medical and surgical aid or hospital and nursing service provided by his employer and obtain the same at his own expense.

(b) If it appears to the commissioner that an injured employee has refused to accept and failed to obtain reasonable medical and surgical aid or hospital and nursing service, all rights of compensation under the provisions of this chapter shall be suspended during such refusal and failure.

respondents argue that the claimant is simply trying to retry the facts of the case on appeal, and that the commissioner's decision was grounded in probative evidence and properly applies the law. The respondents further argue that the appeal should be dismissed as the January 8, 2015 Memorandum issued by the trial commissioner did not differ in any substantive manner from her November 3, 2014 opinion granting the Form 36. The respondents argue that the claimant's appellate rights were extinguished when he failed to file any pleading challenging that decision within twenty days, as required under § 31-301(a) C.G.S.[2] We concur with the respondents' position.

We note that we must resolve a question as to the jurisdiction of our tribunal to act prior to taking any action of the merits of an appeal. We have had opportunities in recent years to deal with the argument that an appeal has been filed in an untimely manner. In Brown v. Lawrence & Memorial Hospital, 5853 CRB-2-13-5 (April 21, 2014) the claimant offered an explanation for her late filing of an appeal but we concluded that we were not in a position to consider her appeal, as "[o]ur courts have determined that the failure of a party to file a timely appeal deprives the board of jurisdiction over the appeal. See Stec v. Raymark Industries, Inc., 299 Conn. 346 (2010)." Id. The claimant in the present case argues that the November 3, 2014 ruling by the trial commissioner was too vague and conclusory to appeal; and his appellate rights

[2] This statute reads as follows:
Sec. 31-301. Appeals to the Compensation Review Board. Payment of award during pendency of appeal. (a) 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. 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.

did not ripen until the commissioner issued her January 8, 2015 Memorandum. We disagree. The November 3, 2014 opinion issued by the trial commissioner was reached after a full evidentiary hearing and reached specific findings as to what treatment regimen was appropriate for the claimant. The claimant was obligated if he was dissatisfied or confused with this ruling to either appeal to this tribunal within twenty days, or file an appropriate motion to the trial commissioner seeking a correction or clarification within that period (see Garvey v. Atlas Scenic Studios, Inc., 5493 CRB 4-09-9 (February 14, 2012)), or his appellate rights would be extinguished pursuant to § 31-301(a) C.G.S. The claimant took neither action within that twenty day window. Therefore, we find Gonzalez v. Premier Limousine of Hartford, 5635 CRB 4-11-3 (April 17, 2012) compels us to dismiss the claimant's appeal.

We find the claimant's argument in Gonzalez similar to the claimant's argument in this case and *stare decisis* compels us to reach the same result. In Gonzalez the claimant argued his right to appeal did not ripen until the respondents' Motion to Correct was decided. However we concluded, "[b]ased on our review of the averments raised by the claimant on appeal, they clearly were aggrieved by the trial commissioner's initial Finding and Award/Finding and Dismissal issued on March 2, 2011, and their aggrievement was not prompted by the commissioner's decision on the respondent's Motion to Correct." Id. Since the "right to appeal had matured when the original Finding was issued and a timely appeal was not commenced in any fashion within twenty days. Therefore, the respondents Motion to Dismiss must be granted as this tribunal lacks subject matter jurisdiction." Id. We find the claimant herein was aggrieved by the

November 3, 2014 decision of the trial commission, took no responsive action within twenty days, and therefore we lack subject matter jurisdiction to consider the appeal.

While we believe the procedural deficiencies in the claimant's appeal were sufficiently material as to warrant a dismissal, were we to have considered the merits of the claimant's appeal we would have affirmed the trial commissioner's decision. We believe that the claimant is essentially seeking to have this panel retry the factual underpinnings of the commissioner's decision, which is beyond our role as an appellate panel. Warren v. Federal Express Corp., 4163 CRB-2-99-12 (February 27, 2001). We are not persuaded after reviewing the trial commissioner's extensive review of the claimant's medical condition and treatment that she failed to apply the legal standards enunciated in Acquarulo, supra. We note for the record that in Acquarulo the Supreme Court affirmed the decision of the trial commissioner to suspend benefits to a claimant that refused to undergo surgery, finding this decision was within the trial commissioner's discretion.

We further note that in Pagliarulo v. Bridgeport Machines, Inc., 20 Conn. App. 154 (1989) the Appellate Court noted that our statute (presently codified as § 31-294e C.G.S.) focuses on the reasonableness of the proposed treatment; and not the reasonableness of the claimant's refusal. Id., 158. The Pagiarulo opinion restates that this is a factual question for the trial commissioner to determine. Id.

In the present case the trial commissioner credited expert testimony which would support a finding that the claimant would benefit from in-patient detoxification. She considered the opinions of the claimant and his treating physician opposing this approach, but found them unpersuasive. We find our discussion of § 31-294e C.G.S. in

O'Connor v. Med-Center Home Healthcare, Inc. 4954 CRB-5-05-6 (July 17, 2006) relevant to our deliberations. In O'Connor the respondent sought a suspension of benefits to a claimant who refused to undergo an angiogram. The trial commissioner denied this relief and we affirmed this decision on appeal.

> In this case, in regards to the refusal to seek appropriate medical treatment, there was no therapeutic benefit to be gained by having the claimant undergo an angiogram. It was only useful as an investigative tool. As we held in Barnett v. Harborview Manor, 3189 CRB-3-95-10 (February 27, 1997), "[t]he reasonableness of a particular treatment is a question of fact for the commissioner to resolve . . . ." By awarding benefits to the claimant without undergoing an angiogram, one can infer the trial commissioner would have found such a requirement unreasonable.

Id.

The trial commissioner in this case could reasonably find that in-patient detoxification would be of therapeutic value to the claimant. Whether this therapeutic value outweighed the claimant's concerns as to proceeding with this treatment was a factual question for her to resolve. Since the trial commissioner is the ultimate judge of what modalities of treatment are reasonable and necessary medical care for the claimant, Cervero, supra, we must affirm her determination on this issue.

We affirm the trial commissioner's November 3, 2014 and January 8, 2015 orders. In addition, as the claimant's appeal was brought after the statutory time limit for jurisdiction, we dismiss the appeal.

Commissioners Stephen M. Morelli and Peter C. Mlynarczyk concur in this opinion.