CASE NO. 5983 CRB-3-15-1 : COMPENSATION REVIEW BOARD
CLAIM NO. 300063883

KEITH MASE : WORKERS' COMPENSATION
CLAIMANT-APPELLANT COMMISSION

v. : JANUARY 14, 2016

BRANHAVEN CHRYSLER PLYMOUTH
EMPLOYER

and

GUARD INSURANCE
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Vincent J. Mase, Sr., Esq., Law Office of Vincent J. Mase, Sr., LLC, 64 Thompson Street, Unit B-106, East Haven, CT 06513.

The respondents were represented by Lawrence R. Pellett, Esq., McGann, Bartlett & Brown, LLC, 111 Founders Plaza, Suite 1201, East Hartford, CT 06108.

This Petition for Review from the December 31, 2014 Finding and Dismissal by Jack R. Goldberg the Commissioner acting for the Third District was heard on June 26, 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 claimant has petitioned for review from the December 31, 2014 Finding and Dismissal by the Commissioner acting for the Third District. We find no error and accordingly affirm the decision of the trial commissioner.[1]

The trial commissioner, having identified the issues before him as (1) medical bills and (2) interest, attorney's fees and penalties for undue delay, made the following factual findings which are pertinent to our review. The claimant sustained a compensable injury to his lumbar spine on January 23, 2003.[2] A jurisdictional voluntary agreement was approved by the Workers' Compensation Commission on June 30, 2003. The claimant testified that in 2003, the respondents paid for low back surgery and wage loss indemnity benefits following the surgery. Isaac Goodrich, M.D., the claimant's treating physician, assigned the claimant a ten-percent permanent partial disability rating of the lumbar spine, which benefits were paid by the respondents following the approval of a voluntary agreement on October 9, 2007.

The claimant testified that he underwent a second lumbar spine surgery in 2008 with Patrick Tomak, M.D., for which medical and wage loss benefits were again paid by the respondents. On September 10, 2012, respondents' counsel signed a voluntary agreement acknowledging the claimant's entitlement to an additional six-percent

[1] We note that a motion for extension of time was granted during the pendency of this appeal.
[2] In Findings, ¶ 2 of the December 31, 2014 Finding and Dismissal, the date of injury is reported as January 24, 2003. We deem this harmless scrivener's error. See D'Amico v. Dept. of Correction, 73 Conn. App. 718, 729 (2002), *cert. denied*, 262 Conn. 933 (2003).

permanent partial disability of the lumbar spine. On December 12, 2012, respondents' counsel wrote to claimant's counsel regarding the voluntary agreement, which had not been returned to the respondents. On February 22, 2013, claimant's counsel responded, indicating that he was withdrawing a previous offer of settlement and was seeking an informal hearing because the claimant had suffered a relapse and would be undergoing more surgery. Claimant's counsel reported that Tomak had diagnosed a rupture to the same disc that was injured in the original injury of January 23, 2003, and the issues noticed in the hearing request included insurance coverage, medical coverage and weekly payments. The claimant underwent surgery on February 26, 2013, and submitted the claim through his group health insurance.

Respondents' counsel replied on March 6, 2013, seeking updated medical records and informing claimant's counsel that he should have forwarded updated medical records rather than requesting a hearing, as a hearing might not be necessary once the medical records were reviewed. On March 11, 2013, claimant's counsel responded, suggesting respondents fax a copy of a HIPAA medical release and reiterating the necessity for the scheduled April 16, 2013 informal hearing. On April 2, 2013, respondents' counsel forwarded the HIPAA forms to the claimant's attorney along with a request for the names of the claimant's treating physicians and primary care physician. On April 5, 2013, claimant's counsel requested a cancellation and continuance of the April 16, 2013 informal hearing because he was going to be out of the country for two weeks. The medical authorization forms were returned to the respondents on May 23, 2013.

On June 7, 2013, the respondents sent requests for medical records to Tomak and Yale-New Haven Hospital regarding the compensability of the February 26, 2013 surgery. On September 29, 2013, October 8, 2013 and October 15, 2013, respondents' counsel sent correspondence to claimant's counsel requesting the claimant's employment and medical records. On November 22, 2013, respondents' counsel sent correspondence to claimant's counsel seeking production of the claimant's medical records to correlate with the bills submitted for payment.

At an informal hearing held on October 25, 2013, the trial commissioner recommended that the respondents pay the claimant for nine weeks of temporary total disability benefits and $650.00 in out-of-pocket medical expenses, and left the matter "on request." Five days later, the claimant sought another informal hearing, which was held on December 13, 2013. At that time, another trial commissioner recommended that the claimant be paid for 11.09 weeks of indemnity as well as the $150.00 fee Tomak had charged the claimant for a causation opinion. On January 19, 2014, claimant's counsel filed a claim for sanctions. The respondent insurer sent the claimant two checks dated May 9, 2014, one in the amount of $4,644.75 and the second for $3,715.80. Claimant's counsel is seeking $7,225.00 in attorney's fees, representing 28.9 hours of work at $250.00 per hour, for the period of September 16, 2013 through August 25, 2014.[3]

On the basis of the foregoing, the trial commissioner concluded that the respondents had paid all of the medical and indemnity expenses associated with the

[3] In 2012 and 2013, several informal hearings were also held concerning the claimant's cervical spine and hearing loss claims against the Magna Carta Insurance Company. On February 18, 2014, those claims were resolved by full and final stipulation for $60,000.00.

claimant's compensable injuries of the lumbar spine in 2003 and 2008. The trial commissioner also found that the claimant, having undergone surgery of the lumbar spine just four days after alerting the respondents to the need for the surgery and then submitting the claim to his group health insurance carrier, had a legal obligation to prove the 2013 surgery was compensable under Chapter 568. The trier held that the respondents appropriately investigated whether the claimant's 2013 surgery was compensable and constituted reasonable and necessary medical care. The trier also determined that the claimant "handled the claim for benefits as if the issue of whether the February 26, 2013 surgery was compensable was obvious and without providing the necessary medical and employment records necessary to advance the claim," Conclusion, ¶ g, and the $150.00 bill generated for Tomak's causation opinion "constituted a special report that the claimant needed to make a prima facie showing." Conclusion, ¶ h. Finally, the trier concluded that there was no "enforceable order" requiring the respondents to pay the 11.09 weeks of indemnity or the $150.00 special report fee, Conclusion, ¶ i, and there was no fault or neglect in the administration of this claim by the respondent employer or insurer. The trial commissioner therefore dismissed the claim for sanctions as well as the claim for payment of Tomak's special report fee of $150.00.

The claimant has appealed the trial commissioner's decision, asserting that the trier's denial of sanctions constituted an abuse of his discretion.[4] We find the claim of error to be without merit.

The Workers' Compensation Act provides for the award of interest, penalties and/or attorney's fees for undue delay through two separate statutes. Section 31-288(b) C.G.S. (Rev. to 2003) states:

> Whenever (1) through the fault or neglect of an employer or insurer, the adjustment or payment of compensation due under this chapter is unduly delayed, or (2) either party to a claim under this chapter has unreasonably, and without good cause, delayed the completion of the hearings on such claim, the delaying party or parties may be assessed a civil penalty of not more than five hundred dollars by the commissioner hearing the claim for each such case of delay. Any appeal of a penalty assessed pursuant to

[4] The respondents filed a Motion to Dismiss for failure of claimant's counsel to prosecute the appeal with reasonable diligence. The respondents assert that the claimant failed to file his Reasons of Appeal pursuant to Admin. Reg. § 31-301-2, which regulation requires that this document be filed within ten days of filing the Petition for Review. Our review of the record indicates that on February 6, 2015, the claimant filed a "Motion for Extension of Time to Comply with the Petition for Review Filed With the Commissioner of the Third District," which motion was granted until February 13, 2015. On February 17, 2015, the claimant filed a document entitled "Petition for Review – Appeal to the Compensation Review Board Appellants [sic] Reasons for the Petition for Review." Correspondence from the respondents dated February 17, 2015 indicates that the respondents were not copied on the claimant's motion for an extension of time, and at oral argument held in this matter on June 26, 2015, counsel for the respondents stated that he never received the Reasons of Appeal. Nevertheless, given that that the claimant's brief was timely filed on April 15, 2015, we do not believe the respondents were unduly prejudiced by the claimant's failure to copy them on the document purporting to function as the Reasons of Appeal. Chang v. Pizza Hut of America, Inc., 4122 CRB-6-99-9 (November 28, 2000). Moreover, in Sager v. GAB Business Services, Inc., 11 Conn. App. 693 (1987), the Appellate Court stated that "the reasons of appeal required by § 31-301-2 of the state agency regulations serve an identical function as a preliminary statement of issues…. Where an appellant fails to file timely a preliminary statement of issues as required by Practice Book § 4013(a)(1), the appeal is voidable. The appellee may then move to dismiss the appeal in accordance with Practice Book § 4056, which provides in relevant part that … such motion shall be filed within ten days after the time when such paper was required to be filed. Where an appellee fails to move for dismissal within the ten day period, the motion dismiss comes too late and the defect is deemed waived." Id., 697. In the matter at bar, the respondents did not file their Motion to Dismiss until March 4, 2015, which date fell beyond the ten-day deadline for both the original due date for the Reasons of Appeal and the date granted by extension; as such, we deem the alleged filing defect "waived."

this subsection shall be taken in accordance with the provisions of section 31-301.

In addition, § 31-300 C.G.S. allows for the assessment of interest and attorney's fees for undue delay.[5] In Cirrito v. Resource Group Ltd. of Conn., 4248 CRB-1-00-6 (June 19, 2001), this board set out the following parameters relative to the application of sanctions pursuant to § 31-300 C.G.S.

> … there are four separate circumstances in which the trial commissioner is empowered to penalize an employer or insurer. Where adjustments or payments of compensation have been unduly delayed due to the fault or neglect of the employer or insurer, the commissioner may award interest and a reasonable attorney's fee. Where adjustments or payments of compensation have been delayed in the absence of fault by the employer or insurer, the commissioner may allow interest "as may be fair and reasonable." Where the claimant prevails in an action and the trier finds that the employer or insurer has unreasonably contested liability, the commissioner may allow to the claimant a reasonable attorney's fee. Finally, where total or partial incapacity payments are discontinued without (1) the issuance of proper notice as required by § 31-296 and (2) a written approval of such cessation

[5] Section 31-300 C.G.S. (Rev. to 2003) states, in pertinent part: "In cases where, through the fault or neglect of the employer or insurer, adjustments of compensation have been unduly delayed, or where through such fault or neglect, payments have been unduly delayed, the commissioner may include in the award interest at the rate prescribed in section 37-3a and a reasonable attorney's fee in the case of undue delay in adjustments of compensation and may include in the award in the case of undue delay in payments of compensation, interest at twelve per cent per annum and a reasonable attorney's fee. Payments not commenced within thirty-five days after the filing of a written notice of claim shall be presumed to be unduly delayed unless a notice to contest the claim is filed in accordance with section 31-297. In cases where there has been delay in either adjustment or payment, which delay has not been due to the fault or neglect of the employer or insurer, whether such delay was caused by appeals or otherwise, the commissioner may allow interest at such rate, not to exceed the rate prescribed in section 37-3a, as may be fair and reasonable, taking into account whatever advantage the employer or insurer, as the case may be, may have had from the use of the money, the burden of showing that the rate in such case should be less than the rate prescribed in section 37-3a to be upon the employer or insurer. In cases where the claimant prevails and the commissioner finds that the employer or insurer has unreasonably contested liability, the commissioner may allow to the claimant a reasonable attorney's fee…. In any case where the commissioner finds that the employer or insurer has discontinued or reduced any such payment without having given such notice and without the commissioner having approved such discontinuance or reduction in writing, the commissioner shall allow the claimant a reasonable attorney's fee together with interest at the rate prescribed in section 37-3a on the discontinued or reduced payments."

> by the commissioner, the trier is *required* to award the claimant a reasonable attorney's fee and interest on the prematurely halted or reduced payments. (Emphasis in the original.)

Id.

Regardless of which statutory remedy is being sought, it is well-settled that the decision to apply sanctions for unreasonable delay and/or unreasonable contest is discretionary. Duffy v. Greenwich-Board of Education, 4930 CRB-7-05-3 (May 15, 2006); McMullen v. Haynes Construction Co., 3657 CRB-5-97-7 (November 12, 1998). Thus, the factual findings of the trier relative to the issue of sanctions are subject to the same standard of review as any other findings of fact. "As 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." Daniels v. Alander, 268 Conn. 320, 330 (2004) citing Burton v. Mottolese, 267 Conn. 1, 54 (2003). Our scope of review of these determinations is therefore sharply constrained, as it is limited to whether the trial commissioner's decision constituted an abuse of discretion, which "exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided based on improper or irrelevant factors." In re Shaquanna M., 61 Conn. App. 592, 603 (2001).

Returning to the matter at bar, we note at the outset that the claimant did not file a Motion to Correct; as a result, "we must accept the validity of the facts found by the trial commissioner and this board is limited to reviewing how the commissioner applied the

law." Corcoran v. Amgraph Packaging, Inc., 4819 CRB-2-04-6, 4948 CRB-2-05-5 (July 26, 2006). The factual findings reflect that although the claimant underwent surgery on February 26, 2013 for the alleged relapse of a previously accepted workers' compensation injury, respondents were still requesting medical records on November 22, 2013 to correspond with medical bills which had been submitted for payment.[6] Moreover, the factual findings also indicate that rather than providing the respondents with the updated medical records following the surgery, the claimant instead asked that the respondents provide him with HIPAA releases, which releases were not returned to the respondents until May 23, 2013. It is axiomatic that when prosecuting a claim for workers' compensation benefits, "the injured employee bears the burden of proof, not only with respect to whether an injury was causally connected to the workplace, but that such proof must be established by *competent evidence*." (Emphasis in the original.) Dengler v. Special Attention Health Services, 62 Conn. App. 440, 447 (2001), *quoting* Keenan v. Union Camp Corp., 49 Conn. App. 280, 282 (1998). As such, common sense dictates that it behooves a claimant seeking payment for medical expenses to provide respondents with the pertinent medical records as expeditiously as possible.

The factual findings also reflect that at informal hearings held on October 25, 2013 and December 13, 2013, two different trial commissioners recommended the respondents make payment to the claimant. Relative to these recommendations, the claimant contends that the trial commissioner failed to assign them the appropriate

[6] The claimant apparently concedes that the respondents did not have the information necessary to pay on the claim until October 16, 2013. Appellant's Brief, p. 3, ¶ 19.

evidentiary weight and points out that the respondents never stated they would not make payment in accordance with the triers' recommendations.[7] This claim of error seems to reflect a fundamental misunderstanding regarding the purpose of informal hearings. Section 31-297a C.G.S. (Rev. to 2003) states that "[i]n any informal hearing held by the commissioner or chairman of the Workers' Compensation Commission in regard to compensation under the provisions of this chapter, any recommendations made by the commissioner or chairman at the informal hearing *shall be reduced to writing and, if the parties accept such recommendations, the recommendations shall be as binding upon both parties as an award by the commissioner or chairman*…." [Emphasis added.] As such, absent a written agreement signed by the parties, any recommendations made by a trial commissioner at an informal hearing are not binding.

Moreover, simply because the lawyer who appeared at the informal hearing on behalf of the respondents intimated that he or she was in agreement with the trier's recommendations, that intimation did not automatically guarantee that the lawyer's client – i.e., the insurer – was necessarily in agreement or would comply. The most efficacious strategy for securing an Order which is binding upon all parties is to request a formal hearing. Not only was that not done in this matter, but claimant's counsel testified that an

[7] The claimant states that "[w]hat Commissioner Goldberg failed to recognize or consider that [sic] when a Commissioner looks at the attorney or adjuster for the Respondent and instructs those representatives to pay the claim and those representatives nod their head or simply say "yes, Commissioner" then that is a contract because those representatives have every right and opportunity to say "no, Commissioner" at which time the Commissioner can then schedule a "formal Hearing" on the matter. Appellant's Brief, p. 4, ¶ 22.

informal hearing scheduled for March 20, 2014 was cancelled at his request. August 25, 2014 Transcript, pp. 17-18; *see also* Respondents' Exhibit 8.

The record before us provides no explanation as to why the respondents ultimately decided to pay on the claim in May 2014 without proceeding to a formal hearing. Obviously, it would have been better for all concerned had payment to the claimant been made more promptly. Nevertheless, given the totality of circumstances in this appeal, we are not persuaded that the trial commissioner's decision to deny the claimant's motion for sanctions constituted an abuse of discretion.

There is no error; the December 31, 2014 Finding and Dismissal by the Commissioner acting for the Third District is accordingly affirmed.

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