CASE NO. 5992 CRB-1-15-3 : COMPENSATION REVIEW BOARD
CLAIM NO. 100189553

PATRICK CALLAGHAN
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: MARCH 2, 2016

CAR PARTS INTERNATIONAL, LLC
EMPLOYER

and

PEERLESS INSURANCE COMPANY
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented Sarah Mather, Esq., and Gary J. Strickland, Esq., Dressler Strickland, 84 Cedar Street, Hartford, CT 06106.

The respondents were represented by William Shea, Esq., Law Offices of Meehan, Turret & Rosenbaum, 108 Leigus Road, First Floor, Wallingford, CT 06492.

This Petition for Review from the February 20, 2015 Finding and Order of Christine L. Engel the Commissioner acting for the First 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 and Daniel E. Dilzer.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has appealed from a Finding and Order where the trial commissioner, Commissioner Christine L. Engel, determined that the respondents were entitled to a moratorium of $22,020.67 from the claimant's settlement of a lawsuit against a third party tortfeasor. The claimant argues that this decision is incompatible with Public Act 11-205 which in his opinion, would permit him to retain these funds. The respondents dispute this legal interpretation as inconsistent with the precedent in Enquist v. General Datacom, 218 Conn.19 (1991) and Love v. J. P. Stevens & Co., 218 Conn. 46 (1991) which affirm the enforceability of moratoriums against the proceeds of tort lawsuits. We find this dispute is solely a question of attempting to reconcile a statute over case law precedent. Given the drafting of Public Act 11-205, we cannot discern a legislative intent to overrule the precedent in Enquist and Love. Therefore, we affirm the Finding and Order.

The trial commissioner found the following facts at the conclusion of the formal hearing in this matter. The claimant, Patrick Callaghan, was involved in a work related motor vehicle accident on June 22, 2012. The respondent-employer was insured by Peerless Insurance Company ("Peerless"). The claimant pursued a third party claim, which settled on February 25, 2014 in the amount of $100,000.00 and the respondent intervened in the third party lawsuit. The respondent had paid $74,226.04 in compensation benefits to the claimant, which was a sum greater than the total net recovery from the third party lawsuit. The claimant reimbursed Peerless $44,041.33 out of the third party recovery. This amount was two-thirds of the net proceeds as required

by C.G.S. § 31-293(a) as amended by Public Act 11-205;[1] and the claimant has retained the remaining $22,020.67 of the net settlement proceeds.

---

[1] This statute reads as follows.

"Sec. 31-293. Liability of third persons to employer and employee. Limitations on liability of architects and engineers. Limitations on liability of insurers, self-insurance service organizations and unions relating to safety matters. (a) When any injury for which compensation is payable under the provisions of this chapter has been sustained under circumstances creating in a person other than an employer who has complied with the requirements of subsection (b) of section 31-284, a legal liability to pay damages for the injury, the injured employee may claim compensation under the provisions of this chapter, but the payment or award of compensation shall not affect the claim or right of action of the injured employee against such person, but the injured employee may proceed at law against such person to recover damages for the injury; and any employer or the custodian of the Second Injury Fund, having paid, or having become obligated to pay, compensation under the provisions of this chapter may bring an action against such person to recover any amount that he has paid or has become obligated to pay as compensation to the injured employee. If the employee, the employer or the custodian of the Second Injury Fund brings an action against such person, he shall immediately notify the others, in writing, by personal presentation or by registered or certified mail, of the action and of the name of the court to which the writ is returnable, and the others may join as parties plaintiff in the action within thirty days after such notification, and, if the others fail to join as parties plaintiff, their right of action against such person shall abate unless the employer, insurance carrier or Second Injury Fund gives written notice of a lien in accordance with this subsection. In any case in which an employee brings an action against a party other than an employer who failed to comply with the requirements of subsection (b) of section 31-284, in accordance with the provisions of this section, and the employer is a party defendant in the action, the employer may join as a party plaintiff in the action. The bringing of any action against an employer shall not constitute notice to the employer within the meaning of this section. If the employer and the employee join as parties plaintiff in the action and any damages are recovered, the damages shall be so apportioned that the claim of the employer, as defined in this section, shall take precedence over that of the injured employee in the proceeds of the recovery, after the deduction of reasonable and necessary expenditures, including attorneys' fees, incurred by the employee in effecting the recovery. If the action has been brought by the employee, the claim of the employer shall be reduced by one-third of the amount of the benefits to be reimbursed to the employer, unless otherwise agreed upon by the parties, which reduction shall inure solely to the benefit of the employee, except that such reduction shall not apply if the reimbursement is to the state of Connecticut or a political subdivision of the state including a local public agency, as the employer, or the custodian of the Second Injury Fund. The rendition of a judgment in favor of the employee or the employer against the party shall not terminate the employer's obligation to make further compensation which the commissioner thereafter deems payable to the injured employee. If the damages, after deducting the employee's expenses as provided in this subsection, are more than sufficient to reimburse the employer, damages shall be assessed in his favor in a sum sufficient to reimburse him for his claim, and the excess shall be assessed in favor of the injured employee. No compromise with the person by either the employer or the employee shall be binding upon or affect the rights of the other, unless assented to by him. For the purposes of this section, the claim of the employer shall consist of (1) the amount of any compensation which he has paid on account of the injury which is the subject of the suit, and (2) an amount equal to the present worth of any probable future payments which he has by award become obligated to pay on account of the injury. The word "compensation", as used in this section, shall be construed to include incapacity payments to an injured employee, payments to the dependents of a deceased employee, sums paid out for surgical, medical and hospital services to an injured employee, the burial fee provided by subdivision (1) of subsection (a) of section 31-306, payments made under the provisions of sections 31-312 and 31-313, and payments made under the provisions of section 31-284b in the case of an action brought under this section by the employer or an action brought under this section by the employee in which the employee has alleged and been awarded such payments as damages. Each employee who brings an action against a party in accordance with the provisions of this subsection shall include in his complaint (A) the amount of any compensation paid by the employer or the Second Injury Fund on account of the injury which is the subject of the suit,

The claimant had a medical appointment with Dr. W. Jay Krompinger, his authorized treating physician, on May 20, 2014. The respondent has denied payment for the cost of this examination, arguing that the claimant should exhaust the $22,020.67 from his share of the third party settlement for compensable expenses before it becomes obligated to pay for additional treatment. The claimant contended there should be no moratorium because he believes Public Act 11-205, which requires that the reimbursable portion of any third party recovery be reduced by one-third for the benefit of the claimant, does not permit the respondent to reclaim the one-third reduction in the form of a moratorium.

The trial commissioner cited what she regarded as the relevant portion of § 31-293(a) C.G.S. This reads as follows:

> If the action has been brought by the employee, the claim of the employer shall be reduced by one-third of the amount of the benefits to be reimbursed to the employer, unless otherwise agreed upon by the parties, which reduction shall inure solely to the benefit of the employee, except that such reduction shall not apply if the reimbursement is to the state of Connecticut or a political subdivision of the state including a local public agency, as the employer, or the custodian of the Second Injury Fund.

Joint Exhibit 4. Emphasis in original.

---

and (B) the amount equal to the present worth of any probable future payments which the employer or the Second Injury Fund has, by award, become obligated to pay on account of the injury. Notwithstanding the provisions of this subsection, when any injury for which compensation is payable under the provisions of this chapter has been sustained under circumstances creating in a person other than an employer who has complied with the requirements of subsection (b) of section 31-284, a legal liability to pay damages for the injury and the injured employee has received compensation for the injury from such employer, its workers' compensation insurance carrier or the Second Injury Fund pursuant to the provisions of this chapter, the employer, insurance carrier or Second Injury Fund shall have a lien upon any judgment received by the employee against the party or any settlement received by the employee from the party, provided the employer, insurance carrier or Second Injury Fund shall give written notice of the lien to the party prior to such judgment or settlement."

The commissioner noted the respondents' lien exceeded the net proceeds of the third party lawsuit as the maximum amount which could have been reimbursed to the respondents would have been $66,062.00.

At the hearing counsel for the claimant argued that the amended terms of this statute required a one third reduction in the amount which could have been reimbursed. He stated that the term ". . . shall inure solely to the benefit of the employee," meant that this sum of money was exempt from a moratorium for the respondents' benefit. Counsel for the respondents argues that the legislative history of Public Act 11-205 contained no evidence it was meant to eliminate an employer's moratorium. They also argued that by limiting the moratorium the claimant would receive a "double recovery."

The trial commissioner cited floor statements made in the General Assembly in regards to Public Act 11-205 by Senator Coleman, Senator Kissel, Representative Fox, Representative Candelora, and Representative Rowe. The commissioner also cited the Supreme Court's opinions in Enquist and Love that moratoriums were correct and proper and noted that in Enquist the Supreme Court specifically ruled that in the absence of a moratorium a claimant would receive an impermissible double recovery.

Based on the facts of this case and the law presented the trial commissioner reached the following conclusions.

1. Connecticut General Statute §31-293(a), as amended by Public Act 11-205, does not eliminate a Respondents' moratorium of the amount a claimant realizes from a third party claim.

2. Although there are some statements that the amendment to the statute will provide incentives to employees to bring third party claims, there is no discussion of a moratorium in the legislative history of Public Act 11-205.

3. The decisions in *Enquist* and *Love* mandate a moratorium in favor of the employer out of funds retained by the plaintiff after a third party claim.

Accordingly, the trial commissioner ordered that a moratorium for $22,020.67 shall be honored by the claimant. The claimant did not file a Motion to Correct, but went directly to appeal the Finding and Order. His argument is essentially that the Finding and Order does not apply the terms of Public Act 11-205, and that had the trial commissioner followed the intent of this legislation she would have found no moratorium was appropriate.

It is black letter law 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). "This presumption, however, can be challenged by the argument that the trial commissioner did not properly apply the law or has reached a finding of fact inconsistent with the evidence presented at the formal hearing." Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007). The facts herein are undisputed and the sole question before our tribunal is whether the trial commissioner properly applied the statute.

At the hearing before this tribunal the litigants argued that § 31-293(a) C.G.S. as amended by Public Act 11-205, stood for two separate results as applied to this case. Upon review we conclude that this statute is indeed ambiguous. As a result, although § 1-2z directs us to apply the "plain meaning" of a statute, we must go further when ascertaining the scope of this statute.

> When the relevant statutory text and the relationship of that text to other statutes do not reveal a meaning that is plain and unambiguous, our analysis is not limited, and we look to other factors relevant to determining the meaning of § 12-408, including

> its legislative history, the circumstances surrounding its enactment and its purpose. *Nine State Street, LLC* v. *Planning & Zoning Commission*, 270 Conn. 42, 46, 850 A.2d 1032 (2004). ‘‘The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation.’’ (Internal quotation marks omitted.) *Tarnowsky* v. *Socci*, 271 Conn. 284, 287 n.3, 856 A.2d 408 (2004).

DaimlerChrysler Services North America , LLC v. Commissioner of Revenue Services, 274 Conn. 196, 202-203 (2005).

We have reviewed the floor statements of legislators on Public Act 11-205 as the trial commissioner did in the Finding and Order. We also have reviewed the testimony presented to the Judiciary Committee by proponents and critics of the legislation. The gravamen of this bill was the belief by counsel for claimants that in the absence of some statutory relief, liens asserted by workers' compensation carriers were an insuperable impediment to settling cases against third party tortfeasors, as the carrier would assert a right against the entire proceeds of the settlement. Such clearly was the case as a result of the aforementioned Enquist and Love decisions, as well as in two more recent cases interpreting § 31-293(a) C.G.S., Thomas v. Dept. of Developmental Services, 297 Conn. 391 (2010) and Cruz v. Montanez, 294 Conn. 357 (2009). In both those cases the Supreme Court confirmed the primacy of a lien for advanced workers' compensation benefits against the entirety of the claimant's net settlement in a third party tort action. In Cruz, supra, the claimant argued that as he had been awarded solely noneconomic damages in a jury verdict, that this sum was beyond the scope of the lien for benefits advanced to compensate him for economic damages and medical expenses. The Supreme Court held the entirety of the respondents' lien could be applied to this award. Id., 366-372.

In Thomas, supra, this tribunal concluded that the respondents' lien not only applied to prior advances of workers' compensation benefits, but to future benefits as well. See Thomas v. State/Dept. of Developmental Services, 5293 CRB-8-07-11 (October 22, 2008), *aff'd*, 297 Conn. 391 (2010). The Supreme Court noted that Enquist, supra, had applied the statutory lien to unknown future benefits. Thomas, supra, 397-398. While the claimant argued that the lien should not be applied to unknown, future benefits she might receive from the respondent, id., 408, the Supreme Court found this position "untenable." Id., 409. The Supreme Court interpreted the statute in the following manner.

> . . . we conclude that the legislature intended for the statute to provide a safety net to those employees whose claims are undervalued in settlement or judgment rather than to provide a windfall to those employees whose claims are more accurately assessed. Thus, if an employee incurs future compensable expenses that ultimately exceed the net proceeds of the employee's third party recovery, that employee would benefit from the safety net in the statute because the employee could continue to claim benefits from the employer. If, however, an employee's net proceeds from a third party recovery are greater than the employee's future compensable expenses, then that employee would not be permitted to claim additional workers' compensation benefits and thereby realize a windfall recovery.

Id., 410.

We believe the Thomas decision authoritatively states what the law was on the issue of workers' compensation liens prior to the enactment of Public Act 11-205.[2] Our

[2] At oral argument before our tribunal, discussions occurred as to whether the purpose of Public Act 11-205 was to exempt from attachment the one-third of recovery customarily charged as a contingent legal fee in tort lawsuits. We conclude that this issue was addressed in Thomas v. Dept. of Developmental Services, 297 Conn. 391 (2010) and the Supreme Court found that the statute, as amended in 1993, already provided for an exemption for legal costs and fees.

> During the debate on the bill containing the 1993 amendment to § 31-293 (a), Representative William J. Varese, evidently recognizing that the proposed lien provision was silent on the subject, asked whether an employer's lien would

question is to what extent did the General Assembly's actions in 2011 provide claimants greater protections from liens under Public Act 11-205? Basically, there are two possible formulations of the new statutory language that one third of a third party award "shall inure solely to the benefit of the employee." The claimant argues that this language constitutes a permanent bar to having these funds ever expended on any future workers' compensation expenses. The respondents argue that this Act only applies to the lien in existence at the time of the settlement.

The genesis of Public Act 11-205 was House Bill 6474, which was first considered by the General Assembly's Judiciary Committee in a public hearing held March 4, 2011. A spokeswoman for the insurance industry, Susan Giacalone, spoke against the bill primarily on the argument "the State shouldn't be getting into dictating contracts for third parties." March 4, 2011 Judiciary Committee Hearing Transcript, p. 27. An advocate for the Connecticut Trial Lawyers Association, William J. Sweeney, argued that this bill was necessary as compensation insurance carriers had become intransigent about compromising their liens in order to expedite settlement of third party tort claims; "the comp carrier still wants a hundred percent back." Id., 127. Mr.

> include the full amount of the third party recovery or only the net amount, after the deduction of costs and fees. Representative Michael P. Lawlor, the proponent of the bill and cochairperson of the committee that introduced the bill, replied that the current law already allowed for such deductions and that, if the 1993 amendment were to pass, those deductions would still be part of the law. 36 H.R. Proc., Pt. 18, 1993 Sess., pp. 6183–84. A review of § 31-293 (a) reveals that Representative Lawlor was referring to the deductions for ''reasonable and necessary expenditures, including attorneys' fees, incurred by the employee in effecting the recovery''; General Statutes § 31-293 (a); which language appears in the portion of the statute discussing the rights of an employer that intervenes in an employee's action against a third party tortfeasor.

Id., 406.

Since the statute in existence prior to 2011 already provided for an exemption against legal fees we conclude the purpose of Public Act 11-205 was to provide a means to compensate the claimant with a net recovery above and beyond what he or she owed legal counsel.

Sweeney sought a statute mandating "that there's a credit to the claimant of up to a third of the recovery in order to get the case settled." Id., 128.[3]

The State House of Representatives considered this bill on May 17, 2011. Representative Fox explained that the purpose of the bill was to limit the eligible portion of the insurance carrier's lien to two-thirds of what the claimant received in the settlement; as well as to provide that this one-third exemption did not go to plaintiff's counsel in addition to any fee counsel was previously entitled to. "It would be to the benefit of the employee and/or plaintiff provided that the settlement did have sufficient funds by which to effectuate such a settlement." House Proc. Vol. 54, Part 10.

There was substantial discussion as to the merits of this bill in the House. However, the concerns expressed by Representative Schofield, Representative Simanski, Representative Srinivasan, and Representative Klarides were focused on the exemption in the bill regarding the state or its political subdivisions. Representative Candelora inquired if this bill would prioritize "the employee's damages first"? Id. Representative Fox explained that intent was to ensure that third party suits were pursued, as "many times these cases are never brought because of the complications that can arise from reimbursement of 100 percent of a lien." Id. Representative Shaban announced his opposition to this bill as he believed it would "promote more lawsuits." Id. Representatives Rowe and Smith declared their support for the bill as they believed encouraging recovery from tort defendants would benefit injured workers. Representative Hetherington raised his concern as to whether the bill would create a

[3] As described in fn.2, supra, Mr. Sweeney reiterated that the purpose of this legislation was not to cover attorney fees, and rather was to pass the credit exempt from a carrier's compensation lien "onto the client in order to get the case resolved." March 4, 2011 Judiciary Committee Hearing Transcript, p. 130.

double recovery. He also concurred with concerns his colleagues had as to the state exemption, and declared his opposition to the bill. Representative Candelora also declared his opposition, believing the bill would raise costs to business. Following this debate the House passed the bill by a roll call vote of 93 yeas to 51 nays.

The Senate took up this bill June 8, 2011. Senator Coleman explained that the purpose of the bill was to "provide for one-third of reimbursements for Workers' Compensation payments or settlements to be reserved for the employee in the case." Senate Proceeding Vol. 54, Part 22. Senator Welch engaged in a colloquy with Senator Coleman as to the policy behind the bill. Senator Coleman explained it was simply to "provide the employee some incentive to actually seek the recovery of whatever damages to award that could be secured from the third party that caused the accident." Id. Senator Kissel spoke in support of the bill, explaining "[b]y taking one-third and setting it aside, it acts as a motivation of- -or- -it allows for individuals who may be up in the air as to whether to pursue that third-party claim to have the motivation to do that." Id. The Senate passed the bill by a vote of 25 yeas to 11 nays.

After reviewing the full legislative history we are struck as to what was <u>not</u> discussed. The General Assembly clearly wanted to limit the available recovery to an insurance carrier from a tort settlement to two-thirds of what the claimant recovered against their lien for prior expenses advanced to the claimant. The legislature also evinced a clear position that this carve-out should not be utilized to enhance legal fees to trial lawyers above and beyond the existing contingency fee system. These funds were now available "solely to the benefit" of the claimant. However, the sole discussion that addressed the impact this Act had on future workers' compensation benefits was a

tangential reference in floor debate by Representative Hetherington which the bill's sponsor did not respond to. The claimant argues that once the initial lien for *prior* expenses had been reduced (and those expenses rendered unrecoverable) that the respondents lost any moratorium rights against *future* compensation expenses. In light of the Supreme Court's rationale in Thomas, supra, we are not persuaded. The floor debate and the committee testimony did not address the moratorium statute in any manner. Essentially, what the General Assembly did was permit a claimant who settled a tort claim and sustained little or no future compensation expenses to retain this "windfall." To that extent the legislation clearly contravenes Thomas and Enquist and does provide a new benefit to claimants. The legislative history offers no direct statement that a respondent must advance future benefits to the claimant prior to the claimant exhausting the moratorium from the tort settlement. We find no evidence from the legislative history that the General Assembly intended to undo that element of the Thomas and Enquist precedent, wherein future compensation expenses are within the scope of the moratorium.

In the claimant's brief on page 9 he argues that the trial commissioner's decision eviscerates the purpose of the statute. "The Trial Commissioner's decision renders Public Act 11-205 illusory and a nullity because the moratorium effectively takes back the amounts given by the one-third reduction. The Trial Commissioner's decision removes the incentive intended by the legislature."

We do not necessarily agree. The claimant reaps an immediate tangible benefit by having much of the respondents' lien for prior expenses being rendered unenforceable. This occurs because one third of the net settlement inures to the claimant even if, due to a lien for prior expenses, the respondents were still owed money. The effect of Public Act

11-205 is to place the claimant in the same position for settling a case for less than the respondents' lien than he would have been had a court settlement or judgment prior to the effective date of this Act yielded a recovery in excess of the respondents' lien. The lien for prior advances is rendered satisfied and the claimant has some net proceeds to his benefit; which may be subject to a moratorium for future compensation expenses. A reasonable interpretation of the purpose of this Act was to create a situation when a large compensation lien did not present an insuperable obstacle to settling tort lawsuits. The trial commissioner's interpretation is consistent with this approach.

The claimant's argument that members of the General Assembly may have intended to provide claimants a sum of money from court settlements exempt from a statutory moratorium is also not unreasonable. However, in the absence of any reference in the legislative history from proponents of the bill outlining its impact on the moratorium statute or the numerous Supreme Court decisions interpreting this statute, or any affirmative representation that this bill impacted future workers' compensation benefits, we are not persuaded the legislation as drafted was intended to achieve those goals.[4]

Therefore, we affirm the Finding and Order.

Commissioners Randy L. Cohen and Daniel E. Dilzer concur in this opinion.

[4] We reach this conclusion in large part due to absence of discussion evincing an intent to modify the moratorium statute. It is well established that the "legislature is always presumed to have created a harmonious and consistent body of law. . . . [T]his tenet of statutory construction . . . requires [this court] to read statutes together when they relate to the same subject matter." Brennan v. Brennan Associates, 316 Conn. 677, 685 (2015). While Public Act 11-205 only concerns § 31-293(a) C.G.S. we have difficulty reconciling the claimant's statutory interpretation of Public Act 11-205 with the balance of the amended statute.