CASE NO. 6018 CRB-7-15-6 : COMPENSATION REVIEW BOARD
CLAIM NO. 700163472

ELIAS SHYMIDT
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: MAY 4, 2016

EAGLE CONCRETE, LLC
EMPLOYER

and

NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA
AIG CLAIM SERVICES
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Robert Sciglimpaglia, Jr., Esq., Ventura Ribeiro and Smith, 101 Merritt 7, Third Floor, Norwalk, CT 06851.

The respondents were represented by Craig Abbott, Esq., and Joseph O. Cogguillo, III, Esq., Abbott & Associates, 200 Glastonbury Boulevard, Suite 301, Glastonbury, CT 06033.

This Petition for Review from the June 5, 2015 Finding and Denial of Jodi M. Gregg the Commissioner acting for the Seventh District was heard January 22, 2016 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Ernie R. Walker and Nancy E. Salerno.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has appealed from a Finding and Denial issued by the trial commissioner, Jodi Murray Gregg, denying his Motion to Preclude. The claimant argued that the respondents' failure to file a Form 43 within twenty eight days of his filing a Form 30C commencing a claim for benefits for a left shoulder injury mandated granting his preclusion motion. The trial commissioner, however, found that the respondents commenced payment of benefits to the claimant for this injury prior to the filing of the Form 30C and therefore, pursuant to § 31-294c(b) C.G.S.[1] [2] was within the "safe harbor" period to investigate the claim. On appeal we find

[1] 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."

the trial commissioner's decision is in accord with relevant precedent on the issue of preclusion and is supported by evidence she found probative and persuasive. We therefore, affirm the Finding and Denial.

The trial commissioner found the following facts at the conclusion of the formal hearing. On June 22, 2012, the claimant filed two separate Forms 30C with the Workers' Compensation Commission, regarding two different injuries that occurred on the same date of April 27, 2012. One Form 30C reflects an injury sustained to the claimant's left shoulder and the other Form 30C claimed bilateral foot injuries. The respondent received both claims the day after they were filed. Prior to the claims having been filed the claimant received medical treatment for the bilateral foot claim and indemnity benefits from the Respondent-Employer beginning on May 9, 2012. These weekly benefits continued to be paid to the claimant until the approval of a Form 36 submitted on November 20, 2012 because the claimant had returned to work. On February 22, 2013 the Seventh District Office of the Workers' Compensation Commission received a Form 43 from the Respondent-Employer dated February 4, 2013 denying the left shoulder injury. On October 22, 2013, the claimant filed a Motion to Preclude received by the commission on October 24, 2013 stating that the Respondent-Employer should be precluded from contesting the left shoulder claim due to the Form 43 having been filed in an untimely manner.

Based on these factual findings the trial commissioner concluded the Respondent-Employer commenced the payment of benefits to the claimant on May 9, 2012, prior to the filing of both Forms 30C and filed a Form 43 contesting the left shoulder received on

[2] Conclusion, ¶ A, of the Finding and Denial cites this statute as "§ 31-294(b)." We find this is a mere scrivener's error and afford it no weight. We also note the Finding and Denial contains various scrivener's errors as to dates. We have cited the accurate dates in this opinion.

February 7, 2013, which is within one year from the receipt of the notice of claim.[3] Therefore, Commissioner Gregg found that the Respondent-Employer complied with the requirements under § 31-294c(b) C.G.S. and should not be precluded from contesting the April 27, 2012 left shoulder claim. Consequently she denied the Motion to Preclude. The claimant filed a Motion to Correct seeking clarifications as to the Finding and Denial. The trial commissioner denied this Motion in its entirety and the claimant commenced this appeal.

We note the standard of deference we are obliged to apply to a trial commissioner's findings and legal conclusions is well-settled. "The trial commissioner's factual findings and conclusions must stand unless they are without evidence, contrary to law or based on unreasonable or impermissible factual inferences." Russo v. Hartford, 4769 CRB-1-04-1 (December 15, 2004), *citing* Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Moreover, "[a]s 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." 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).

On appeal, the claimant acknowledges that he had received medical and indemnity benefits for his April 27, 2012 injuries prior to his having filed a Form 30C.

[3] The Form 43 filed for the claimant's left shoulder injury received February 7, 2013 stated among the reasons for contest "[t]he condition does not qualify as a personal injury under the Workers Comp Act CGS 31-275(16)."

He argues, however, that it was a material issue whether those benefits were proffered for his foot injury or for his shoulder injury. He argues that he did not receive any benefits for his shoulder injury and therefore the respondents should be precluded from contesting the compensability or the extent of disability of this injury. As the claimant interprets this situation the holdings in Pagan v. Carey Wiping Materials, Inc., 5829 CRB-6-13-4 (March 28, 2014) and Pringle v. National Lumber, Inc., 5912 CRB-3-14-1 (December 31, 2014) should compel this panel to reverse the trial commissioner. We are not persuaded. We note that in Pagan we affirmed a trial commissioner's factual findings that the respondents had accepted the claimant's injury and that preclusion should not be granted. In Pringle, we concluded the trial commissioner reached a factual determination that the respondents had allowed their "safe harbor" to lapse, as unlike the respondents in Williams v. Brightview Nursing & Retirement, 5854 CRB-6-13-6 (June 12, 2014), the respondents had ceased providing benefits to the claimant prior to issuing a Form 43 or a voluntary agreement. In the present case there appears to be no dispute that the claimant received indemnity payments for all periods of lost time from work he sustained from the April 27, 2012 injury. Nor is an argument advanced that the respondents had failed to provide medical treatment for the shoulder injury.

We note that when a claimant sustained concurrent injuries to two separate body parts which individually or collectively would disabled him or her for work that only one benefit for incapacity can be paid. This was the essential basis for our holding in Gill v. Brescome Barton, Inc., 5659 CRB-8-11-6 (June 1, 2012) where we affirmed the trial commissioner's determination that when two different carriers were on the risk for two separate knee injuries, that the indemnity benefits subsequent to bilateral knee

replacement surgery should be divided between the two carriers. The Appellate Court affirmed our decision, 142 Conn. App. 279 (2013) and this decision was upheld by the Supreme Court, 317 Conn. 33 (2015). Based on the logic of Gill, we see no reason why a single period of indemnity payments cannot serve to preserve the "safe harbor" rights under § 31-294c(b) C.G.S. for the respondents in regards to concurrent injuries.

The claimant also argues that our holding in Monaco-Selmer v. Total Customer Service, 5622 CRB-3-10-12 (January 19, 2012) compels reversal of the trial commissioner's decision. Upon review we find this argument is essentially similar to the claimant's argument which we rejected in Grzeszczyk v. Stanley Works, 5975 CRB-6-14-12 (December 9, 2015), appeal pending, AC 38743. In Grzeszczyk we distinguished Monaco-Selmer from the facts in that case as in Monaco-Selmer 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. In Grzeszczyk the trial commissioner found that there had been no lapse of indemnity payments and the respondents retained their "safe harbor' rights under § 31-294c(b) C.G.S. In Conclusion, ¶ B, Commissioner Gregg determined that the respondents' Form 43 contesting the claimant's shoulder injury had been filed within one year of the Form 30C having been filed for this claim. Since she also found facts consistent with an uninterrupted proffer of indemnity benefits for the claimant's injuries, we find the case herein is congruent to Grzeszczyk and not Monaco-Selmer.

As we pointed out in Williams, supra, the provision of medical care prior to receipt of a Form 30C can act in the same manner as the "pre-emptive disclaimer" which

Lamar v. Boehringer Ingelheim Corp., 138 Conn. App. 826 (2012) found met the requirement in Donahue v. Veridiem, Inc., 291 Conn. 537 (2009). Indemnity payments to the claimant proffered before the claimant files a Form 30C have the same effect as a preemptive Form 43 insofar as protecting the rights of the respondent to later contest the claim. Since the claimants in Williams, supra, and Grzeszczyk, supra, had not lost any income as a result of their injuries 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 that the respondents are entitled to "safe harbor" protection to contest the extent of the claimant's shoulder disability.[4] [5]

For the foregoing reasons we therefore affirm the Finding and Denial.

Commissioners Ernie R. Walker and Nancy E. Salerno concur in this opinion.

[4] The claimant is also arguing it was error for the trial commissioner to have denied his Motion to Correct. We conclude that the trial commissioner did not find the evidence supportive of this Motion persuasive or probative, and therefore do not find error herein.

[5] The respondents have also interposed an argument that the claimant's Motion to Preclude should be denied as a result of laches, citing Kalinowski v. Meriden, 5028 CRB-8-05-11 (January 24, 2007). As there was no finding of fact by the trial commissioner on the issue as to whether the claimant's filing of the Motion to Preclude constituted undue delay, we decline to address this argument on appeal.