CASE NO. 6025 CRB-1-15-8 : COMPENSATION REVIEW BOARD
CLAIM NO. 100190494

DIANA D. MOTT
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

: AUGUST 23, 2016

KMC MUSIC, INC., a/k/a
FENDER MUSICAL INSTRUMENTS
CORPORATION
EMPLOYER

and

LIBERTY INSURANCE CORPORATION
INSURER
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by Eric A. Polinsky, Esq., Polinsky Law Group, LLC, 890 West Boulevard, Hartford, CT 06105-4139.

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

This Petition for Review[1] from the August 5, 2015 Ruling On Motion To Preclude of Christine L. Engel, the Commissioner acting for the First District, was heard April 29, 2016 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Ernie R. Walker and Nancy E. Salerno.

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

OPINION

ERNIE R. WALKER, COMMISSIONER. The present case requires us to once again consider the parameters of the statutory remedy of preclusion, pursuant to § 31-294c(b) C.G.S.[2] The respondents have appealed from Commissioner Christine L. Engel's August 5, 2015 RULING ON MOTION TO PRECLUDE ("Ruling"). The respondents-appellants, KMC Music/Fender and Liberty Mutual, argue that the remedy of preclusion was not supported by the facts in this case, and in addition, that the trial commissioner ordered medical treatment for the claimant, Diana D. Mott, in the absence of evidence establishing a *prima facia* case. The claimant argues that the trial commissioner's Order was legally proper and should be affirmed. Upon review, we

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[2] 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."

believe that the respondents' failure to proffer a disclaimer or a voluntary agreement within one year of the initiation of this claim would allow the trial commissioner to determine that the respondents failed to meet their statutory obligations. On the other hand, we concur with the respondents that the trial commissioner could not order medical treatment for the claimant in the absence of evidence establishing that causation of her current condition was linked to the compensable injury. We remand that issue to the trial commissioner for further proceedings.

The following facts were found by the trial commissioner in her Ruling. On March 21, 2013, the claimant was working for the respondent, KMC Music, Inc., when she was injured. She filed a Form 30C, via certified mail, dated April 17, 2013, which was received by the Workers' Compensation Commission on April 22, 2013. The claimant submitted a "green card" receipt indicating that the employer had received a copy of the Form 30C. Claimant's counsel stated the employer-respondent received the 30C on April 19, 2013. This is not disputed by respondents' counsel. The Form 30C alleges injuries to the claimant's "head, neck, back, left arm/elbow, left shoulder, right hand, right ankle and both knees." The work incident is described as "Tripped and fell on [a] rug runner that was not laying flat in receiving area." Findings, ¶ 5.

Subsequent to the claimant filing her claim the respondents presented evidence that they had made indemnity payments to the claimant. A payment history from the insurer indicates an indemnity payment to the claimant dated April 2, 2013 for $228.50, a second payment of $38.16 was issued on May 1, 2013 and a third for $17,613.60 dated May 30, 2014. The commissioner also noted between April 8, 2013 and September 10, 2014, several payments were issued to medical providers, or to the claimant, and noted as

medical payments. Three voluntary agreements were approved by the Workers' Compensation Commission on May 27, 2014. The date incapacity began and the date of maximum medical improvement are the same, January 27, 2014, on all three voluntary agreements. The accepted body parts are noted as "Neck, Back, Ankle and Hands/Contusion." Findings, ¶ 9, and acknowledged 5% permanent partial disabilities of the lumbar, neck and ankle. Findings, ¶ 10.

Commissioner Engel noted that commencing on May 13, 2014 informal hearings on this claim were held before the Commission and at the initial informal hearing the parties discussed the claimant's post-concussive headaches and their compensability. Post-concussive headaches continued to be an issue at subsequent informal hearings. Claimant's counsel filed, via fax, a Motion to Preclude and Memorandum of Law on June 25, 2014. The respondents filed a Form 43 on August 22, 2014. It states, "Headache treatment is unrelated to the work injury. No evidence of a head injury." Findings, ¶ 15.

The commissioner cited Harpaz v. Laidlaw Transit, Inc., 286 Conn. 102 (2008) for the standard that if a respondent failed to file a Form 43 within a year after the filing of a notice of claim that preclusion would be warranted. Having found the claimant filed a proper notice of claim, and the respondents, while they had made an indemnity payment after the date of injury and a medical payment within twenty-eight days following the filing of the Form 30C, did not file a disclaimer within the one year period, Commissioner Engel granted the Motion to Preclude in Order I. She also ordered in Order II that the respondent would pay for the medical treatment of the claimant's post-concessive headaches.

The respondents filed a Motion to Correct. The motion sought to have the Order for medical treatment deleted as the claimant had presented no supportive evidence for this relief. The motion also sought to vacate the Order of preclusion and find that the respondents had accepted the claim. The commissioner denied this Motion in its entirety and this appeal of the Ruling subsequently ensued. The respondents on appeal reiterate the legal arguments they presented in their Motion to Correct. They also argue that § 31-294c(b) C.G.S. delineates a distinction between liability and disability and the precedent since Harpaz, supra, do not support the result the trial commissioner reached in this case.

On appeal, we generally extend deference to the decisions made by the trial commissioner. "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). The Compensation Review Board cannot retry the facts of the case and may only overturn the findings of the trial commissioner if they are without evidentiary support, contrary to the law, or based on unreasonable or impermissible factual inferences. Kish v. Nursing and Home Care, Inc., 248 Conn. 379 (1999) and Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Nonetheless, while we must provide deference to the decision of a trial commissioner, we may reverse such a decision or order a remand for additional proceedings if the commissioner did not properly apply the law or reached a decision unsupported by the evidence on the record. See Ramsahai v. Coca Cola Bottling Company, 5991 CRB-1-15-2 (January 26, 2016) and Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

The respondents argue that under the facts of this case that preclusion was not warranted and is not supported by recent precedent. They argue that since they accepted compensability of this incident that Harpaz, supra, and Donahue v. Veridiem, Inc., 291 Conn. 537 (2009) can be distinguished from this case. They believe the circumstances herein are governed by Adzima v. UAC/Norden Div., 177 Conn. 107 (1979) and that they retain the ability to fully contest the extent of disability the claimant is asserting from the compensable injury. The respondents cite a number of recent Compensation Review Board decisions (Grzeszczyk v. Stanley Works, 5975 CRB-6-14-12 (December 9, 2015), *appeal withdrawn*, A.C. 38743 (2016), Negron v. CVS Caremark Corporation, 5870 CRB-4-13-8 (July 17, 2014), *appeal withdrawn*, A.C. 37062 (2015) and Williams v. Brightview Nursing & Retirement, 5854 CRB-6-13-6 (June 12, 2014)) where respondents that advanced medical treatment or indemnity benefits were held to be in a "safe harbor" from preclusion notwithstanding not having filed a disclaimer or a voluntary agreement within the initial 28 day statutory period. They also argue that the absence of medical reports linking the claimant's headaches to her work accident makes Dubrosky v. Boehringer Ingelheim Corp., 145 Conn. App. 261 (2013), *cert. denied*, 310 Conn. 935 (2013), persuasive authority and absolves the respondents of strict compliance with § 31-294c(b) C.G.S.

The claimant disputes this line of thought and believes our opinion in Domeracki v. Dan Perkins Chevrolet, 5727 CRB-4-12-1 (May 1, 2013), *appeal withdrawn*, A.C. 35673 (2016) is dispositive of the issues presented herein. In Domeracki the trial commissioner denied a Motion to Preclude when there had not been a timely disclaimer to the original claim but the respondents had continuously provided medical treatment to

the claimant for a decade. When the respondents challenged medical treatment by way of a Form 43, the claimant responded by filing a Motion to Preclude. On appeal, we determined that when a respondent failed to file a response to a notice of claim within one year, either in the way of a Form 43 denying some element of the claim or some indicia that the claim had been accepted, the claimant had the statutory right to seek preclusion.

> Arguably, as the claimant has not sustained any lost time the respondents were not compelled to offer a Voluntary Agreement. See Administrative Regulation § 31-296-1. However, we think that post Harpaz, supra, line of cases reflect that when a claimant files a Form 30C the respondents must appreciate the gravity of the claimant's declaration and respond in a meaningful way.
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> In the instant matter, the respondents commenced payment of benefits in advance of the claimant's filing of the Form 30C. Once the claimant filed the Form 30C, the respondents were obligated to file a Form 43 informing the claimant of its intention to contest, or to continue its payment of benefits and to file a Form 43 within one year of the claimant's filing of a Form 30C. It does not appear that the respondents proffered any evidence reflecting any communication with the claimant regarding the status of the claim following filing of the Form 30C.

Id.

We have examined the cases cited by the respondent to ascertain if they can be effectively distinguished from Domeracki. In Williams, supra, the respondents filed a Form 43 within weeks of the claimant filing her Form 30C. In Negron, supra, the respondents filed a preemptive Form 43, consistent with the precedent 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). In Grzeszczyk, supra, similar to Williams, supra, the respondents Form 43 was also filed in the window between the initial 28 days after the claimant's notice of claim where liability can be contested, and

the end of the 12 month statutory "safe harbor" to challenge extent of disability. In the present case, where the Form 43 was filed more than one year after the initial notice of claim was filed, we must ascertain if the respondents preserved their "safe harbor" rights by accepting the claim.

We have held that when a respondent proffers a voluntary agreement within one year of the initial notice of claim that this evinces acceptance of the claim and preserves the respondents' "safe harbor" against preclusion, even if these agreements were not accepted by the claimant and approved by the Commission. See Pagan v. Carey Wiping Materials, Inc., 5829 CRB-6-13-4 (March 28, 2014). The facts found in Pagan were that the respondents proffered a voluntary agreement to the claimant prior to having received a notice of claim, and therefore the respondents were not going to contest liability for the injury by filing a Form 43 after the notice of claim was filed. In Pagan we affirmed the denial of preclusion, finding compliance with the standards delineated in Monaco-Selmer v. Total Customer Service, 5622 CRB-3-10-12 (January 19, 2012). The problem the respondents face in this matter is unlike the pre-emptive voluntary agreement we upheld in Pagan, supra. The voluntary agreements in this case were not proffered to the claimant until more than twelve months after she filed her Form 30C, and therefore these agreements would not serve to lock in the statutory "safe harbor" under § 31-294c(b) C.G.S. by operation of law.

We do note that in a recent case this tribunal affirmed the decision of a trial commissioner who denied a Motion to Preclude when the respondents argued that they had an accepted claim, yet had failed to provide a voluntary agreement within one year. In Quinones v. RW Thompson Company, Inc., 5953 CRB-6-14-7 (July 29, 2015), *appeal*

pending, AC 38256, the trial commissioner found that the respondents had "paid the claimant 'substantial' medical and indemnity benefits until the Form 36 was approved" id., and therefore had proffered sufficient evidence at the formal hearing to document acceptance of the injury to overcome the claimant's Motion to Preclude. On appeal the claimant argued that failure to provide a disclaimer or a voluntary agreement within one year created a conclusive presumption that the Motion to Preclude should be granted. We noted in our Quinones opinion that the claimant failed to advance authority for this proposition, and indeed, the statutory language of § 31-294c(b) C.G.S. contained no reference to voluntary agreements. In Quinones we cited Pagan, supra, for the proposition "that the proffer of a voluntary agreement may, in certain situations, 'serve to demonstrate that the respondents accepted compensability of the claim."' Id. The impact of Quinones is that in the absence of filing a voluntary agreement within one year of the filing of a notice of claim, the respondent must persuade the trial commissioner that the claimant knew or should have known by virtue of some other means that the claim had been accepted. In Quinones the trial commissioner was persuaded, in part because it appeared the claimant received substantial indemnity payments during that one year period. We must examine the facts herein to ascertain if this case can be sufficiently distinguished on the facts from Quinones so as to justify a different result.

In the present case the trial commissioner cited only two indemnity payments, totaling less than three hundred dollars, had been made to the claimant within one year of her filing of a notice of claim. See Findings, ¶ 6. While the trial commissioner also noted "several" payments for medical treatment had been made, Findings, ¶ 7, we believe that a reasonable fact finder could determine that the facts herein were more akin to

Monaco-Selmer, supra, where sporadic indemnity payments did not preserve the "safe harbor" from preclusion, than Quinones, supra, where the trial commissioner found that there had been "substantial" indemnity payments which preserved the "safe harbor." While Quinones stands for the proposition that a voluntary agreement is not the *sole* means to demonstrate acceptance of a claim, we believe that in the absence of proffering a voluntary agreement within the statutory time limitation that a respondent must present persuasive evidence to the trial commissioner that demonstrates acceptance of the claim.[3] We are not persuaded that as a matter of law the evidence presented by the respondents in this case rose to that standard and therefore must defer to the trial commissioner's factual finding.

The respondents also argue another point; that a proper statutory interpretation of § 31-294c(b) C.G.S. would lead to bifurcating the time limitations to respond: providing a one year period after the filing a claim to contest liability if the respondents commenced payment on the claim, but when the respondents commenced payment on the claim that they would have an unlimited time to contest the extent of disability in accordance with Adzima, supra. Respondents' Brief pp. 6-8. We are not persuaded by this argument. We cannot extend the "plain meaning" principle of § 1-2z C.G.S.[4] in a manner that leads to

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[3] As we discussed in Pringle v. National Lumber, Inc., 5912 CRB-3-14-1 (December 31, 2014), *appeal withdrawn*, A.C. 37682 (2016), the determination of whether a Motion to Preclude should be granted is a fact driven exercise. We do note a parallel between the issue of preclusion and with the burden claimants have in obtaining § 31-308(a) C.G.S. or § 31-308a C.G.S. benefits, see McCarthy v. Hartford Hospital, 5079 CRB-1-06-3 (March 8, 2007), *aff'd*, 108 Conn. App. 370 (2008), *cert. denied*, 289 Conn. 910 (2008), which held that work searches are *not* a condition precedent to such benefits, just a means to establish eligibility. A voluntary agreement under § 31-294c(b) C.G.S. is akin to a work search under § 31-308(a) C.G.S. or § 31-308a C.G.S. as documenting that a respondent has communicated to the claimant it has accepted their claim.

[4] This statute reads as follows:
"Sec. 1-2z. Plain meaning rule. The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and

untenable results. Jalowiec Realty Associates, L.P. v. Planning & Zoning Commission, 278 Conn. 408, 414 (2006). The result herein is that when a respondent commenced any payment of a claim that they would never be obligated to advise the claimant as to whether they accepted the claim or not, and would never be subject to a motion to preclude except for the limited purpose of establishing compensability of the injury after the one year period in § 31-294c(b) C.G.S. Such a result does not appear consistent with the stringent interpretation of the preclusion statute promulgated by the Supreme Court in Harpaz, supra, and Donahue, supra. Moreover, such an interpretation would still require this tribunal in the present case to conclude that the payments made to the claimant within the one year period were adequate to preserve the respondents' "safe harbor"; and as we previously discussed, this would require us to reach a different factual finding than Commissioner Engel reached on that issue.

In addition, the respondents cannot point to any "impossibility" to providing documented acceptance of this claim within one year of the Form 30C having been filed, therefore we are not persuaded that Dubrosky, supra, mandates that we reverse the trial commissioner's decision. As we are not persuaded that granting the Motion to Preclude in the Ruling was legally erroneous, we affirm Order I of the Ruling.

We reach a different conclusion as to Order II of the Ruling. The respondents argue that in the absence of reviewing any probative evidence linking the compensable injury to the claimant's headaches that it was error for the trial commissioner to have ordered this relief. We agree. We find the Appellate Court decision in Mehan v. Stamford, 127 Conn. App. 619 (2011) is dispositive of this issue and mandates that we

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considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

vacate Order II of the Ruling. In Mehan, the Appellate Court applied the Harpaz precedent and noted "[t]he court also held that although a motion to preclude bars noncomplying employers from contesting liability, a claimant is still required 'to prove that he has suffered a compensable injury, i.e., an injury that arose out of and in the course of his employment, including the extent of his disability."' Mehan, supra, 630. This decision further went on to examine Donahue, supra, and hold that when an employer did not stipulate to benefits claimed by a claimant "when the employer does not so stipulate, an **evidentiary hearing** is necessary so that the claimant may prove her right to the compensation claimed.'' Mehan, supra, 631 (Emphasis added.)

In the present case the claimant did not present any evidence documenting her claim that her headaches are a compensable injury and the trial commissioner did not hold an evidentiary hearing to consider evidence. As we pointed out in Geraldino v. Oxford Academy of Hair Design, 5968 CRB-5-14-10 (January 20, 2016), *appeal pending*, AC 38881, even after preclusion is granted a claimant must present probative evidence supportive of the relief he or she is seeking. In the event the record lacks such evidence we will remand this matter to the trial commissioner for further proceedings.

Therefore, we vacate Order II of the Ruling as lacking the necessary foundation of evidence to support the relief granted. The trial commissioner will need to hold further proceedings on this issue. We affirm the balance of the Ruling.

Commissioner Nancy E. Salerno concurs in this opinion.

JOHN A. MASTROPIETRO, CHAIRMAN, DISSENTING. I have reviewed the facts of this case and must reach a differing position from that of the trial commissioner

and the majority of this tribunal. In my opinion the respondents paid substantial sums during the initial twelve month period. But, more importantly, when the claimant, accepted the voluntary agreements, I believe she waived any argument that preclusion may lie. Her acceptance of the voluntary agreement acknowledged in writing that the respondents accepted compensability. From that point forward, any and all disputes as to this claim were limited to arguing the extent of the claimant's disability, which places this case squarely within the fact pattern governed by Adzima, supra.

I will first reiterate the point I raised in my concurrence in Williams, supra, where I cited Menzies v. Fisher, 165 Conn. 338 (1973) as to the purpose behind the preclusion statute being 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." Menzies, supra, at 342. In the present case there is no dispute that the respondents paid some indemnity and medical benefits within the one year period following the notice of claim, but did not either submit a voluntary agreement or a Form 43 before the end of the one year period.

Had the claimant filed a motion to preclude after the one year "safe harbor" period had lapsed and before accepting the respondents' proferred voluntary agreement, I would affirm the decision of the trial commissioner. As a matter of law the respondents' conduct was not so demonstrative of acceptance as to compel the trial commissioner to deny the claimant's motion. The respondents had the opportunity to memorialize

acceptance of the claim, failed to do so within one year, and the claimant had the right to preclude them for not doing so. I would not overturn such a factual finding by the trial commissioner.

However, in the present case the claimant received voluntary agreements from the respondent which not only accepted compensability of her injuries, but constituted an offer to resolve many pending issues as to compensation for this event by establishing a compensation rate and proposing a disability rating for various injured body parts. The claimant signed and accepted the terms of these agreements on May 20, 2014 and they were approved by Commissioner Stephen M. Morelli on May 27, 2014. A reasonable person would view this as effectuating an "accord and satisfaction" of the claimant's pending demand for compensation.

A voluntary agreement is not a full and final stipulation and obviously the respondents remained liable for whatever other manifestations of the initial injury which the claimant could establish as a sequelae of that event. In the ordinary course of business such disputes would be resolved after contested hearings before a trial commissioner. However, in this case, after the issue as to the claimant's headaches were discussed and not resolved after an informal hearing on May 13, 2014 the claimant filed a motion to preclude on June 25, 2014.

By the point in this case that the claimant filed her motion to preclude she acknowledged in writing that the respondents had accepted the claim, she had been paid a substantial amount of benefits on the claim, and she had the right to seek further compensation for injured body parts or medical treatment which the voluntary agreements approved on May 27, 2014 had not encompassed. In my opinion none of the

precedent since Harpaz, supra, or Donahue, supra, mandates that a motion to preclude be approved under these circumstances. The claimant's reliance on Domeracki, supra, is unavailing in my opinion as that case can be distinguished on the facts. In Domeracki, a voluntary agreement had never been proffered and the claimant could argue that at the time he filed his motion to preclude the respondents had not unequivocally accepted compensability of his injury. In the present case, by the time the claimant filed her motion to preclude the respondents had unequivocally accepted the compensability of her injury and the claimant acknowledged this fact in writing.

Had the claimant filed a motion to preclude after the end of the one year safe harbor period and prior to receiving the voluntary agreements Domeracki would compel us to affirm the trial commissioner's decision herein. In the present case the claimant knew the respondent had accepted the case and she had received substantial benefits prior to filing her preclusion motion. This in my opinion constitutes an implied waiver of the claimant's right to seek preclusion and estops her from obtaining this relief.[5]

I note that in Dubrosky, supra, the Appellate Court laid out that there may be a viable defense to a Motion to Preclude of "impossibility." Id., 274. I would suggest that in cases where the claimant has accepted a voluntary agreement rather than move for preclusion a similar defense to preclusion may be validly interposed by the respondent. A respondent may not remedy a situation where preclusion lies by simply proferring a

[5] Presumably the claimant could have decided not to accept the voluntary agreements and have filed a motion to preclude asserting that pursuant to statute she was entitled to a hearing on her claim and sought an uncontested hearing to present a *prima facia* case in accordance with Donahue, supra, and Geraldino, supra. She decided to acknowledge the respondents' acceptance of her claim and accepted significant monetary consideration after executing these agreements. I cannot view these circumstances as permitting the claimant to subsequently obtain the remedy of preclusion after electing to accept the remedies proffered in the voluntary agreements; especially as pursuant to Adzima, supra, she could continue to argue the extent of her disability entitled her to additional treatment or indemnity benefits.

voluntary agreement. However, where a voluntary agreement is proferred before a motion to preclude is filed AND same is accepted by the claimant and, as in the instant matter substantial benefits for her injury have been paid, the rationale for the preclusion statute as described in Menzies is negated and the "harsh remedy" of preclusion, West v. Heitkamp, Inc., 4587 CRB-5-02-11 (October 27, 2003), *appeal dismissed for lack of final judgment*, AC 24805 (February 11, 2004), is unwarranted.

Accordingly, I respectfully dissent and would have vacated granting of the claimant's motion to preclude.