CASE NO. 6032 CRB-6-15-9 : COMPENSATION REVIEW BOARD
CLAIM NO. 601055356

MARCELLA WOODBURY-CORREA
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: JUNE 22, 2016

REFLEXITE CORPORATION
EMPLOYER

and

ST. PAUL TRAVELERS
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Jennifer B. Levine, Esq., and Harvey L. Levine, Law Offices of Levine & Levine, 754 West Main Street, New Britain, CT 06053.

The respondents were represented by Deborah J. DelBarba, Esq., Law Offices of Charles G. Walker, 300 Windsor Street, Hartford, CT 06145-2138.

This Petition for Review from the September 8, 2015 Memorandum Re: Motion to Preclude of Stephen B. Delaney the Commissioner acting for the Sixth District was heard March 18, 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 the denial of her Motion to Preclude pursuant to § 31-294c C.G.S.[1] She asserts that in the absence of a timely filed disclaimer the trial commissioner was obligated to grant her motion. We find this case legally and factually indistinguishable from Grzeszczyk v. Stanley Works, 5975 CRB-6-14-12 (December 9, 2015). For the reasons outlined at length in Grzeszczyk we affirm the trial commissioner's ruling on the claimant's Motion to Preclude.

The trial commissioner, Stephen B. Delaney, reached the following factual findings in the "Memorandum Re: Motion to Preclude" dated September 8, 2015 which denied the Motion to Preclude. He found that as of April 17, 2009 an employment

[1] The text of 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."

relationship existed between the claimant and the respondent and on that date the claimant properly filed a Form 30C claiming repetitive trauma injuries to her neck, bilateral upper limbs, lower back and complete lower left limb including the left knee with triggering to complete right lower limbs. Findings, ¶ 2. The commissioner reached the following finding.

> "Evidence produced at the formal hearing as well as the contents of the commission's file indicate that a *proper and timely* Form 43 was not filed by the respondent." Findings, ¶ 3 (Emphasis added).

Commissioner Delaney further found on February 24, 2014, the claimant filed a Motion to Preclude and the respondents objected to this motion on January 5, 2015. The commissioner noted the claimant's testimony at the formal hearing and reached the following findings in Findings, ¶ 6.

> The claimant testified at the formal hearing held on March 19, 2015. She testified in relevant part:
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> a. She took personal vacation time and/or sick time between April 17, 2009 and May 30, 2009 associated with necessary medical treatment.
> b. She had other workers' compensation claims pending.
> c. She believed she treated with Dr. Manning and Dr. Grahling between the time period of April 17, 2009 and May 30, 2009 for instant repetitive trauma claim.
> d. She further testified that she believed that her group health insurance paid for this treatment. The treatment could have been in 2008 or 2009 stating, "I have a memory because I was going to the doctor…I was in the doctor's office all the time that's why I can't tell what time period but I was in the doctor's office."
> e. She spoke with the respondent's human resource manager regarding all of her claims as well as claiming benefits she may be entitled to for the April 17, 2009 repetitive trauma claim.

The trial commissioner further took administrative notice that the claimant has been represented by counsel since April 17, 2009 and the commission file reflects there were never any claims for indemnity or medical benefits for the claimant. The first

hearing on this matter was March 26, 2014 on the Motion to Preclude. Based on these factual findings Commissioner Delaney concluded "the claimant's testimony regarding medical and indemnity benefits unreliable and hence not credible." Conclusion, ¶ J. Therefore, he found no credible evidence was presented that the claimant claimed either medical or indemnity benefits for her alleged injuries during the 28 day period following the filing of the Form 30C, and the first claim for benefits for this claim was coincidental with the filing of the Motion to Preclude. Conclusion, ¶ K. As a result "[i]t was impossible for the respondents to comply with the statutory requirements to issue any benefit payments during the 28 day period following the filing of the claimant's Form 30C as no benefits were claimed." Conclusion, ¶ L. Consequently, the trial commissioner denied the Motion to Preclude.

The claimant filed a Motion to Correct asserting the trial commissioner's decision was in error as the respondents had not presented affirmative evidence of impossibility and the commissioner erroneously took administrative notice of the file. The commissioner denied this motion and the claimant pursued this appeal.

The gravamen of the claimant's appeal is that this case is not akin to the fact pattern in Dubrosky v. Boehringer Ingelheim Corporation, 145 Conn. App. 261 (2013) and that the "impossibility" defense to preclusion should not have been accepted by the trial commissioner. In page 7 of the claimant's January 20, 2016 brief she argues, "[i]n this case, the commissioner found that the respondents never filed a Form 43 with the workers' compensation commission as required by the act. Therefore, statutory preclusion must lie."

That statement is unequivocally factually incorrect. The respondents did file a Form 43 contesting the claim which was received by the commission on July 24, 2009, a date more than 28 days after the claimant filed her Form 30C seeking benefits but well within the one year safe harbor period to contest the extent of disability as delineated in Donahue v. Veridiem, Inc., 291 Conn. 537 (2009). The trial commissioner in Findings, ¶ 3, found that the respondents had not filed "a *proper and timely* Form 43." (Emphasis added). We suggest that the trial commissioner inartfully expressed herein in Findings, ¶ 3, that the Form 43 that was filed was not "proper" as it was not "timely."[2] To suggest in pleadings before this commission, and indeed again at oral argument before this tribunal, that a Form 43 had *never* been filed by the respondents, or that the evidence presented would support such a factual finding by the trial commissioner, is a distortion of the facts on the record.[3]

We turn to the facts as they are. The trial commissioner found that an untimely Form 43 had been filed but that the respondents proffered a persuasive defense of "impossibility" consistent with the holding of Dubrosky, supra. We look to the terms of Findings, ¶ 6. The trial commissioner determined that claimant did not present persuasive evidence that subsequent to filing her claim that she had lost any time from work which would trigger the respondents' obligation to provide indemnity benefits prior to filing a Form 43 in order to preserve their "safe harbor." The trial commissioner also

[2] We have reviewed the Form 43 and it clearly contests the nexus between the claimant's repetitive trauma injuries and her employment. As a result it is "proper" insofar as it contests a necessary element of her claim in accordance with 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) and Tovish v. Gerber Electronics, 19 Conn. App. 273 (1989), and any deficiency in this filing is limited to its timeliness.

[3] We are particularly struck by this appellate argument insofar as the claimant presented the actual Form 43 filed by the respondents at the formal hearing as Claimant's Exhibit C.

did not find the claimant presented persuasive evidence that she had sought medical care for this injury and the respondents had failed to pay for such treatment. We note that the exhibits presented by the claimant did not include any medical bills or reports of treatment which occurred between the date of the Form 30C and the respondents' filing of a Form 43. Nor did the claimant submit any documentary evidence that her absence from work during this time period was due to her alleged work injuries. The sole evidence supporting the claimant's argument supportive of granting preclusion was a calendar and her own testimony.

We have previously held that subsequent to Dubrosky one cannot grant preclusion solely based on the use of a calendar. Williams v. Brightview Nursing & Retirement, 5854 CRB-6-13-6 (June 12, 2014). The commissioner found the claimant not to be a credible witness and as he is the sole judge of witness credibility, Burton v. Mottolese, 267 Conn. 1, 40 (2003), we cannot find his conclusions herein unreasonable. The claimant simply did not proffer a credible argument that subsequent to filing her Form 30C the respondents failed in their obligation to respond, and therefore the "safe harbor" under Dubrosky was in effect as the respondents filed a Form 43 within the one year period provided for under § 31-294c C.G.S.

As noted at the outset, this case cannot be distinguished on the facts or on the law from Grzeszczyk, supra. In both cases the claimant filed a Form 30C and the respondents' disclaimer was filed after the statutory 28 day period had lapsed. In both cases the claimant argued the respondents' subsequent conduct did not warrant "safe harbor" protection from preclusion. In Grzeszczyk the trial commissioner found a single medical bill had been submitted and paid by the respondent, and we affirmed that the

respondents had taken the necessary responsive action to protect their safe harbor. In the present case the trial commissioner found that there had been no event subsequent to the claimant filing the Form 30C to which the respondents could have reacted and determined their "safe harbor" was in place. Citing Pringle v. National Lumber, Inc., 5912 CRB-3-14-1 (December 31, 2014), we noted how a decision on a Motion to Preclude is essentially a fact-driven exercise.

> At its core, a dispute as to whether or not to grant a Motion to Preclude rests on the trial commissioner evaluating the actions taken by the respondent subsequent to the filing of a notice of claim. This turns on the specific facts in each case. The seminal case on preclusion, Menzies v. Fisher, 165 Conn. 338 (1973) states the purpose behind the preclusion statute was 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. These matters are at their core, matters of fact. Whether the respondent adequately responded to a notice of claim, or acted in a manner so as to prejudice the claimant, is a quintessential factual question.

Id.

The trial commissioner concluded that no medical bills were submitted for payment, see Dubrosky, supra, and the claimant had not lost time from work Williams, supra. The determination herein that the claimant had not established her case for preclusion is consistent with our precedent.

We turn now to the claimant's argument that the trial commissioner was obligated to grant her Motion to Correct finding that she was entitled to preclusion in this case.[4] As

[4] The respondents argued that the Motion to Correct was filed outside the twenty day window subsequent to the trial commissioner's decision under § 31-301(a) C.G.S. and is therefore, invalid as a matter of law. See Respondents' Brief, pp. 7-8. We note that prior to the expiration of the statutory deadline the claimant

we pointed out in Brockenberry v. Thomas Deegan d/b/a Tom's Scrap Metal, Inc., 5429 CRB-5-09-2 (January 22, 2010), *aff'd*, 126 Conn. App. 902 (2011)(Per Curiam) a trial commissioner is not bound to accept the view of the case presented by a litigant. Counsel for the claimant argues that there is a due process issue herein as the commissioner took administrative notice of the contents of the file, and did not require the respondents to present what she would regard as sufficient evidence of an "impossibility defense." We are perplexed with this argument as claimant's counsel herself sought to have the trial commissioner take administrative notice of various documents in the file, see January 5, 2015 Hearing Transcript pp. 4-6. Moreover, as we held in Quinones v. RW Thompson Company, Inc., 5953 CRB-6-14-7 (July 29, 2015), *appeal pending*, AC 38256, our trial commissioners conduct hearings under the statutory authority of § 31-298 C.G.S. which directs commissioners to conduct hearings in a manner seeking an equitable resolution of disputes.

> . . . the commissioner shall proceed, so far as possible, in accordance with the rules of equity. He shall not be bound by the ordinary common law or statutory rules of evidence or procedure, but shall make inquiry, through oral testimony, deposition testimony or written and printed records, in a manner that is best calculated to ascertain the substantial rights of the parties and carry out the provisions and intent of this chapter.

Id.

We have long noted that preclusion is a "harsh remedy", West v. Heitkamp, Inc., 4587 CRB-5-02-11 (October 27, 2003). We find no error herein from a trial commissioner utilizing his authority to obtain relevant information from the file necessary to determine whether the harsh remedy of preclusion was warranted, consistent with the precedent in Quinones, supra.

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sought an extension of time to file her Motion to Correct, which was granted. We believe that this served to toll the time limitation on filing this Motion. See Admin. Reg. Sec. 31-301-4.

We find no error from the trial commissioner's denial of the Motion to Correct.

Therefore, we find no error from the trial commissioner's Memorandum Re: Motion to Preclude dated September 8, 2015. Preclusion was not warranted under the facts of this case.

We affirm this decision.

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