

CASE NO. 6059 CRB-4-15-12
CLAIM NOS. 400072107, 400072107

: COMPENSATION REVIEW BOARD

JOSEPH COLLIER
CLAIMANT-APPELLANT

: WORKERS' COMPENSATION
COMMISSION

v.

: OCTOBER 4, 2016

LOGISTEC USA, INC.
EMPLOYER

and

CONTINENTAL CASUALTY COMPANY
NORTH RIVER INSURANCE COMPANY
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by David A. Kelly, Esq.,
Montstream & May, LLP, 655 Winding Brook Drive, PO
Box 1087, Glastonbury, CT 06033-6087.

The respondents were represented by Peter D. Quay, Esq.,
Law Office of Peter D. Quay, PO Box 70, Taftville, CT
06380.

This Petition for Review from the December 1, 2015
Finding and Dismissal of Michelle D. Truglia, the
Commissioner acting for the Fourth District was heard June
17, 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, as represented by counsel, (“appellant”) has appealed from a December 1, 2015 Finding and Dismissal (“Finding”) by Commissioner Michelle D. Truglia, determining that the appellant was not entitled to receive a penalty for late payment assessed against the respondent pursuant to § 31-303 C.G.S.¹ The trial commissioner concluded that an award of interest was unwarranted under the facts of the case. We concur with the trial commissioner’s application of law in this case and affirm the Finding and Dismissal.

Commissioner Truglia recited the following facts in her Finding. She noted the claimant had sustained two injuries, one in 1998 and one in 2004 while working for Logistec, and that there was concurrent jurisdiction for each injury under the federal Longshore and Harbor Workers’ Compensation Act (“Longshore Act”) and Chapter 568. She took administrative notice of a Stipulation reached by the parties and approved by her on June 1, 2015 (“Stipulation”). The Stipulation resolved all claims for the claimant for the 1998 and 2004 injuries under both the Longshore Act and Chapter 568. The settlement of claims under each law was interdependent, and specifically held it would be “null and void” if the settlement was not successfully approved under each Act.

¹ This statute reads as follows:

“Sec. 31-303. Day when compensation payments become due. Penalty for late payments. Payments agreed to under a voluntary agreement shall commence on or before the twentieth day from the date of agreement. Payments due under an award shall commence on or before the twentieth day from the date of such award. Payments due from the Second Injury Fund shall be payable on or before the twentieth business day after receipt of a fully executed agreement. Any employer who fails to pay within the prescribed time limitations of this section shall pay a penalty for each late payment, in the amount of twenty per cent of such payment, in addition to any other interest or penalty imposed pursuant to the provisions of this chapter.”

Findings, ¶ 5.² The Stipulation called for payment under the Longshore Act in full satisfaction of claims under both federal and state claims in the amount of \$103,441.66 to the claimant, and that the claimant's attorney would receive an attorney's fee of \$26,000.00 and costs of \$558.34. Findings, ¶ 6. The commissioner noted that the U.S. Department of Labor ("Labor Department") informed the parties on May 22, 2015 that an application to approve the Stipulation had been declined as claimant's attorney had not presented an itemized attorney fee petition as required under federal regulations. Findings, ¶ 7. The fee petition was not filed by claimant's counsel until June 24, 2015. Findings, ¶ 8. On July 8, 2015, the Labor Department approved payment of the claimant's portion of the award under the Stipulation. Various orders and motions were issued in July and early August pertaining to the balance of the award, culminating on August 11, 2015 in an "Erratum Order" issued by the Labor Department regarding the attorney fees due under the Stipulation. On August 26, 2015 full payment of the fees and costs due to the claimant's attorney was made by the respondents.

Based on these facts Commissioner Truglia concluded that since the agreement between the parties regarding the payment of attorney's fees was not finalized until Longshore Act approval was reached on August 11, 2015, the respondents could not make a payment on this portion of the award prior to that date. Therefore, she concluded the respondents' payment of attorney's fees and costs on August 26, 2015 were timely under the terms of the Longshore Act. The trial commissioner found that no interest and penalties were due under these circumstances because payment to claimant's counsel was

² We have added a paragraph number as due to an apparent scrivener's error the Finding has a paragraph 4, an unnumbered paragraph, and paragraph 6.

made in a timely manner, and Chapter 568 did not call for penalties under these circumstances.

Counsel for the claimant then filed a succession of post-judgment motions. He filed a Motion to Correct, a Motion for Extension of Time to file Reasons of Appeal, and a Motion for Articulation. The trial commissioner denied the Motion to Correct and the Motion for Articulation. The trial commissioner did issue a Memorandum of Decision on December 18, 2015 (“Memorandum”) wherein she noted that the Stipulation called for attorney’s fees and costs to be calculated from the settlement proceeds and for a single payment to the claimant to satisfy the respondents’ obligations under both the federal and state claims. As a result of the mutual obligations under the Stipulation and the concurrent jurisdiction of the Labor Department, Commissioner Truglia determined the respondents should not be penalized “where federal administrative procedure required separate approval of attorneys’ fees and costs attributable to the joint settlement.” Memorandum, p. 3.

The appellant contends that the respondents did not comply with the terms of § 31-303 C.G.S. and that Commissioner Truglia did not properly apply this statute in the Finding. We find this argument unfounded.

Under the plain meaning of § 31-303 C.G.S.³, “[p]ayments due under an award shall *commence* on or before the twentieth day from the date of such award.” (Emphasis added.) The condition precedent to enabling a trial commissioner to levy a penalty under this statute is therefore not that *all* payments due under a stipulation must occur within

³ See § 1-2z C.G.S. “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 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.”

twenty days of the award; it is that the respondent must *initiate* payments and is subject to penalty if this does not occur. The appellant makes no representation that the initial payment to the claimant of \$103,441.66 was untimely, therefore the condition precedent for the imposition of statutory penalties herein does not appear to exist. We presume that since the appellant has offered no indication to the contrary that payments to the claimant *commenced* in a timely manner. The appellant solely contests the timeliness of the second payment, which was for attorney's fees due under the Stipulation.

The argument presented by the appellant is that as per the precedent in Davis v. Forman School, 54 Conn. App. 841 (1999), penalties should be levied against a respondent who delays payment of an award under a stipulation in the same manner as penalties should be levied against a respondent who fails to make timely payment on an award ordered by a trial commissioner. We are not persuaded by this authority for a variety of reasons. We note that Davis, *supra*, specifically reviewed the legal definition of "penalty" and noted it was "a sum of money [for] which the law exacts payment by way of punishment for...not doing some act which is required to be done." *Id.*, 851. The appellant argues that the respondents should have been punished by the trial commissioner for not paying the attorney's fees in the Stipulation within twenty days. Commissioner Truglia in her Finding and her Memorandum clearly explained why this posed a matter of impossibility of performance for the respondents. The precedent in Dubrosky v. Boehringer Ingelheim Corp., 145 Conn. App. 261 (2013) clearly stands for the proposition that the various penalty provisions in Chapter 568 cannot be applied when a respondent cannot respond. *Id.*, 270-271.⁴ For the reasons that the Appellate Court

⁴ In reviewing the Finding, we note that the trial commissioner specifically found that the delay in paying the attorney's fees under the Stipulation was due to the Labor Department finding the documentation

ruled preclusion unwarranted under Dubrosky, the factual predicate necessary to levy penalties does not exist in this case.⁵

In any event, the respondents argue that the result in this case is controlled by the precedent in Schiano v. Bliss Exterminating Co., 260 Conn. 21 (2002). We agree. In Schiano the Supreme Court concluded, “that the phrase ‘payments due under an award’ within the meaning of § 31-303 does not encompass attorney’s fees included in an award. Accordingly, we hold that such fees are not subject to a penalty as a late payment under that section.” *Id.*, 25. The Supreme Court engaged in an extensive review of the legislative history of this statute, and cited the sponsor of the 1993 revisions to this statute, Representative Michael Lawlor, for the proposition that the statutory penalties were meant for payments not received by the claimant. *Id.*, 37-40. As noted herein, the claimant was fully paid before the attorney’s fees could be paid. The appellant has offered no grounds to factually distinguish the holding in Schiano from the present case, and points to no appellate precedent since the Schiano decision which would serve to limit its applicability to the facts in this case.⁶ The relief the appellant seeks is

presented by claimant’s counsel to be inadequate. See Findings, ¶ 7, Findings, ¶ 8, and Conclusion, ¶ A. Appellant essentially seeks in this case to have the trial commissioner levy a penalty upon the respondents for delays which appear to be attributable to issues with their own performance. As the Appellate Court held in Dubrosky v. Boehringer Ingelheim Corp., 145 Conn. App. 261 (2013), “[w]e have often recognized that those who promulgate statutes...do not intend to promulgate statutes...that lead to absurd consequences or bizarre results.” *Id.*, 273-274.

⁵ We have reviewed recent Compensation Review Board decisions interpreting § 31-303 C.G.S. None of these cases are supportive of the appellant’s argument herein. Instead, Marchand v. The Phineas Corp., d/b/a Sunrise Group, 5687 CRB-2-11-10 (September 18, 2012) and Melillo v. Bayer Corp., 5490 CRB-3-09-8 (September 15, 2010) stand for the proposition that respondents who initiated payment within the statutory time period were not penalized due to subsequent logistical delays. In Murray v. Stratford, 5812 CRB-4-12-12 (December 11, 2013), we pointed out that trial commissioners cannot act in an *ultra vires* manner to address issues outside the scope of Chapter 568.

⁶ In fact Appellant’s brief did not cite Schiano v. Bliss Exterminating Company, 260 Conn. 21 (2002) in any fashion.

specifically proscribed by the precedent in Schiano and could not have been granted by the trial commissioner.

As we consider this matter, we clearly see that counsel for the respondents had a dilemma. He could direct the respondent to pay the benefits due to the claimant at the earliest possible juncture and face the issues in this appeal; or he could delay payment of both the benefits due the claimant under the Stipulation and the appellant's attorney's fees until the Labor Department completed its review of the issues under the Longshore Act. That course of action could have been inconsistent with statute and clearly would not have advanced the remedial and humanitarian purposes of Chapter 568.⁷ Counsel for the respondents chose the appropriate and prudent course given this scenario and the trial commissioner correctly concluded statutory penalties were not warranted.

We concur with the trial commissioner's application of law in this case that statutory penalties against the respondents were unwarranted and affirm the Finding and Dismissal.

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

⁷ In some ways this case presents issues akin to the issues in Gill v. Brescome Barton, Inc., 5659 CRB-8-11-6 (June 1, 2012), *aff'd*, 317 Conn. 33 (2015) where alternatives to the trial commissioner's decision yielded absurd results inconsistent with public policy or binding precedent.