CASE NO. 5878 CRB-4-13-9 : COMPENSATION REVIEW BOARD
CLAIM NO. 400088584

FRANCES BRADFORD
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: MARCH 23, 2017

GRIFFIN HEALTH SERVICES CORP.
EMPLOYER
SELF-INSURED

and

PMA MANAGEMENT CORP. OF NE
THIRD-PARTY ADMINISTRATOR
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Daniel D. Skuret, III, Esq., and Patrick Skuret, Esq., The Law Offices of Daniel D. Skuret, P.C., PO Box 158, 215 Division Street, Ansonia, CT 06401.

The respondents were represented by Timothy D. Ward, Esq., McGann, Bartlett & Brown, LLC, 111 Founders Plaza, Suite 1201, East Hartford, CT 06108.

This Petition for Review[1] from the August 26, 2013 Finding and Dismissal of Jack R. Goldberg, the Commissioner acting for the Fourth District, was heard December 16, 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 postponements and extensions of time were granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant in this matter has appealed from the denial of her Motion to Preclude. The trial commissioner, Jack R. Goldberg, determined in a Finding and Dismissal reached after a formal hearing that the claimant had not established that consistent with § 31-294c(b) C.G.S.[2] the respondent should be precluded from being able to contest this claim. On appeal, she argues that the respondents' actions subsequent to her filing of a Form 30C were inadequate to preserve the savings clause under the statute allowing the respondents to contest the extent of disability from the claimant's injury. After consideration of the arguments presented and reviewing the record, we determine that Commissioner Goldberg reached a reasonable decision in denying the Motion to Preclude. We affirm the Finding and Dismissal.

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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."

Commissioner Goldberg reached the following factual findings in the Finding and Dismissal. He noted that a number of facts had been stipulated to prior to the hearing; including: a) that this Commission had jurisdiction in this matter; b) that an employer/employee relationship was present; c) that the employer/respondent received a Form 30C on July 16, 2012 but that no Form 43 was filed within 28 days of receipt of the July 16, 2012 notice; d) that no benefits were paid from the date of the Form 30C as opposed to the date of receipt of any medical bills; and e) and that no voluntary agreement was issued within 28 days of the incident where the claimant sustained injury. The claimant was the sole witness to testify and she said she was employed as a scrub technician at the respondent-employer when she fell in the operating room on July 20, 2011. She said she did not miss more than three days of work. The claimant testified she went to see Dr. Patrick Mastroianni on July 3, 2012. He ordered a CAT scan of the head, and MRI of the cervical, thoracic, and lumbar spine, and told her on July 12, 2012 she needed surgery because her cervical spine was forming the shape of an hourglass. Dr. Mastroianni told her the cervical problem was related to the operating room fall the previous year, and scheduled surgery for July 30, 2012.

The claimant signed a Form 30C on July 14, 2012. It was received by this commission on July 17, 2012 and by the employer on July 16, 2012. The Form 30C claims she sustained injuries on July 20, 2011 to the head and right shoulder. The claimant testified she talked to Nancy Shields at Human Resources and advised her that she needed to have a decompressive cervical laminectomy on July 30, 2012 and would be filing a workers' compensation claim. She testified Ms. Shields responded that she couldn't say if the claim would be accepted because she was going on vacation the next

day, but would have someone get in touch. The claimant testified that no one ever called her back.

The respondents filed a Form 43 with the Commission on August 22, 2012 disclaiming a contusion injury relating to multiple body parts and contending the claimant had a pre-existing condition and any work injury was temporary in nature and did not aggravate an underlying condition. The respondents did not pay bills for the cervical spine surgery and treatment nor were indemnity benefits paid for time missed from work after the cervical spine injury. A Motion to Preclude was received on August 27, 2012 seeking to have the Commission preclude the respondents from contesting the claimant's right to receive compensation on any ground or the extent of her disability. The respondents filed an objection to this motion on March 20, 2013. The objection claims preclusion should not be allowed because the claim is limited by the injuries claimed on the Form 30C, the savings clause applies, and the case was accepted and no voluntary agreement was required. The respondents argued that even if there is some form of preclusion, it is limited to the period of benefits associated with the Form 30C and does not bar a contest of the extent of disability or injuries claimed.

The trial commissioner found the respondents paid for medical treatment and medical bills for the head and right shoulder between August 27, 2011 and February 1, 2012. He also found the claimant testified she did not claim the cervical spine injury on the Form 30C because she thought she only was supposed to list the body parts that actually struck the wall in the operating room.

Based on these facts Commissioner Goldberg concluded that the claimant was not a credible witness. He found the claimant signed a Form 30C on July 14, 2012 alleging

head and shoulder injuries but not a cervical spine injury despite her contention that she was told 11 days earlier by Dr. Mastroianni that she had a cervical spine injury relating to her work incident of July 20, 2011. He concluded the claimant did not claim a cervical spine injury in her Form 30C and the respondents cannot be held responsible for not disclaiming nor paying benefits for a cervical spine injury that was not claimed pursuant to the requirements of Chapter 568. The commissioner concluded that the savings clause under § 31-294c(b) C.G.S. applies to the head and right shoulder injuries since the respondents paid all medical benefits sought, no indemnity benefits were owed, and a Form 43 was filed within one year of the filing of the Form 30C. In addition, since the claimant did not lose three days of work due to her injury, a voluntary agreement did not need to be issued pursuant to Section 31-296-1 of the Connecticut Administrative Regulations. As a result, he denied the Motion to Preclude.

The claimant filed a Motion to Correct seeking a number of corrections and a new conclusion granting the Motion to Preclude. The trial commissioner denied this Motion in its entirety. They have commenced the instant appeal arguing that as a matter of law, the facts herein would compel the trial commissioner to grant the Motion to Preclude. They cite cases such as Callender v. Reflexite Corporation, 137 Conn. App. 324 (2012), Pringle v. National Lumber, Inc., 5912 CRB-3-14-1 (December 31, 2014) and Volta v. United Parcel Service, 5612 CRB-7-10-12 (January 31, 2012) as grounds to overturn the Finding and Dismissal. Upon review, we are unpersuaded as to any legal error.

In Callender, the Appellate Court outlined the standard for consideration of a workers' compensation appeal.

> We first set forth our standard of review applicable to workers' compensation appeals. ''It is the power and the duty of the

> commissioner, as the trier of fact, to determine the facts.'' *Castro* v. *Viera*, 207 Conn. 420, 435, 541 A.2d 1216 (1988). ''[T]he commissioner is the sole arbiter of the weight of the evidence and the credibility of witnesses . . . .'' *Keenan* v. *Union Camp Corp*., 49 Conn. App. 280, 286, 714 A.2d 60 (1998). ''[W]hen a decision of a commissioner is appealed to the review division, the review division is obligated to hear the appeal on the record of the hearing before the commissioner and not to retry the facts.'' (Internal quotation marks omitted.) *Ricigliano* v. *J.J. Ryan Corp*., 53 Conn. App. 158, 160, 728 A.2d 1161 (1999), appeal dismissed, 252 Conn. 404, 746, A.2d 787 (2000).

Id., 331.

We do note that we have the power to intercede on appeal were we to determine 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 trial commissioner concluded that based on the facts in this case the claimant was not entitled to preclusion. As we review this case, we find the case is more congruent to the cases where we have affirmed a commissioner who denied a preclusion motion than the precedent cited by the claimant.

The claimant believes that the Form 30C she submitted along with her conversation with Ms. Shields were sufficient to put the respondents on notice that she was claiming her neck injury as part of the compensable injury she sustained on July 20. 2011. The difficulty herein is that the actual verbiage in the Form 30C did not include the neck as an injured body part. The claimant argues that her conversation with Ms. Shields constituted adequate notice to the respondents that she was seeking compensation for a cervical spine injury. However, the trial commissioner who observed the claimant testify did not find the claimant a credible witness. That determination is exclusively the

province of the trier of fact. See Burton v. Mottolese, 267 Conn. 1, 40 (2003) and Barbee v. Sysco Food Services, 5892 CRB-8-13-11 (October 16, 2014), *aff'd*, 161 Conn. App. 902 (2015)(Per Curiam). We must infer that the trial commissioner did not accept the claimant's account of her conversation with Ms. Shields[3] and therefore the sole documentation as to what the claimant was claiming as a compensable injury as of July 16, 2012 was what the claimant stated within the four corners of the Form 30C.

The Form 30C, which the respondents were obligated to respond to, asserted the claimant had sustained a compensable injury to her head and right shoulder. The respondents have at no time questioned whether the claimant sustained an injury at the workplace on July 20, 2011, nor do they advance any jurisdictional defense to her claim. The Form 43 filed more than 28 days after the claimant filed her Form 30C, but within one year of her notice of claim contests the claimant's need for surgery or medical treatment as being causally related to her work injury. Therefore, this disclaimer contests the "extent of disability" resultant from a compensable injury which the respondents concede occurred.

The cases cited by the claimant in support of her appeal generally do not appear to be on point. In Volta, supra, the respondents attempted to assert a putative jurisdictional defense after the time to file a timely disclaimer had passed. We determined that the respondents were actually contesting causation of the claimant's injury and consistent with DeAlmeida v. M.C.M. Stamping Corporation, 29 Conn. App. 441, 448 (1992) the

[3] The trial commissioner denied corrections sought by the claimant which sought to add findings supportive of her account of her conversations with the respondent. We may therefore infer he did not accept this testimony as reliable. See 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); D'Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003); and Liano v. Bridgeport, 4934 CRB-4-05-4 (April 13, 2006).

time to assert that defense had lapsed. In the present case jurisdiction is not being contested. In Callender, supra, the claimant's notice asserted a new and separate injury from a prior compensable injury she had sustained. The Appellate Court determined that when such a claim is presented the respondent must file a disclaimer to the alleged new injury or be subject to preclusion. Id., 338. In the present case the respondents *did* file a disclaimer, albeit within the "safe harbor" period where compensability of the incident is conceded and only the extent of disability can be contested. In Pringle, "[t]he respondents did not *ever* file a Form 43 nor did they comply with C.G.S. § 31-294c, either by filing a notice to contest the claim or by commencing payments on that claim within 28 days of the Notice of Claim." (Emphasis added.) We rejected the respondents claim on appeal that they had actually accepted the claim, as there was no documentation that this had been communicated to the claimant. We also noted that issues of preclusion are driven by the facts found by the trial commissioner and these facts were adverse to the respondent.

> 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. Id., 342. 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.

Pringle, supra.

The trial commissioner resolved the factual issues in this case in a manner adverse to the claimant. We may not retry those facts on appeal Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). On the facts, we find this case more closely resembles a number of recent decisions where this tribunal has found the facts did not support preclusion. See Shymidt v. Eagle Concrete, LLC, 6018 CRB-7-15-6 (May 4, 2016) and Grzeszczyk v. Stanley Works, 5975 CRB-6-14-12 (December 9, 2015). In Grzeszczyk, although the employer's disclaimer was filed more than 28 days from the notice of claim, the claimant had not lost any time from work and did not persuade the trial commissioner that the respondents had failed to make any necessary payments for her medical expenses. We cited the precedent in Dubrosky v. Boehringer Ingelheim Corporation, 145 Conn. App. 261 (2013), *cert. denied*, 310 Conn. 935 (2013) that "the failure to comply strictly with § 31-294c(b) will not preclude the employer from contesting the extent of the employee's disability." Id., 274. We determined, "[u]nder these circumstances this case falls clearly within the scope of the precedent in Adzima v. UAC/Norden Division, 177 Conn. 107 (1979). Adzima stands for the proposition that when a respondent accepts compensability of an injury, they do not lose the right to contest the extent of disability. Id., 115." Grzeszczyk, supra.[4]

In Shymidt, supra, the claimant filed two separate Forms 30C for two contemporaneous but distinct injuries, received indemnity benefits for a time, and when the respondents filed a Form 43 contesting the claimant's shoulder injury he filed a Motion to Preclude arguing the indemnity benefits should be attributable solely to the other injury. We affirmed the trial commissioner's denial, noting that a single period of

[4] In Grzeszczyk v. Stanley Works, 5975 CRB-6-14-12 (December 9, 2015) the respondents proffered voluntary agreements accepting compensability of the injuries subsequent to filing their Form 43.

indemnity benefits could serve to preserve the respondents' "safe harbor" rights for concurrent injuries[5], and citing Lamar v. Boehringer Ingelheim Corp., 138 Conn. App. 826 (2012) and Williams v. Brightview Nursing & Retirement, 5854 CRB-6-13-6 (June 12, 2014) for the proposition that provision of medical care prior to receipt of a Form 30C can act in the same manner as the "pre-emptive disclaimer" to preserve a respondent's safe harbor rights. As the trial commissioner in the present case found that the respondents had paid all medical bills submitted for the injury prior to the claimant filing her Form 30C, see Findings, ¶ 10, and Conclusion, ¶ h, we believe that the precedent in Shymidt supports affirming the Finding and Dismissal.[6]

Finally the claimant challenges the aforementioned conclusion by the trial commissioner that all medical bills due for the compensable injury had been paid prior to the respondents' disclaimer in this matter. She claims that this is akin to the circumstance in Monaco-Selmer v. Total Customer Service, 5622 CRB-3-10-12 (January 19, 2012) where a lapse in payment of indemnity payments due the claimant divested the respondents of "safe harbor" status from preclusion. We determine that this argument essentially challenges the factual finding of the trial commissioner in this case. The trial commissioner did not reach a finding that the respondents were on notice contemporaneous with the claimant's cervical spine surgery that she was seeking to have it addressed as a workers' compensation matter. The rationale of Dubrosky, supra,

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[5] See Gill v. Brescome Barton, Inc., 5659 CRB-8-11-6 (June 1, 2012) *aff'd*, 142 Conn. App. 279 (2013), *cert. granted*, 310 Conn. 912 (2013), *aff'd*, 317 Conn. 33 (2015).

[6] Had the respondents failed to either file a disclaimer or proffer a voluntary agreement to the claimant within one year from her filing of the Form 30C then it is likely that preclusion would have been granted, see Mott v. KMC Music, Inc., 6025 CRB-1-15-8 (August 23, 2016). In the present case the disclaimer was filed in the "safe harbor" period where consistent with Adzima v. UAC/Norden Division, 177 Conn. 107 (1979) the extent of a disability due to a compensable injury may be contested.

applies to this case, in that the claimant argues that the respondent failed to proffer medical care for an injury where claimant had not yet filed a notice of claim prior to the time the treatment was provided.[7] The medical care that could be directly linked to the injury described in the claimant's Form 30C had been provided by the respondent prior to the notice being filed. The "safe harbor" described in Williams, supra, was clearly preserved.

As we pointed out in Ben-Eli v. Lowe's Home Improvement Center, 5006 CRB-3-05-10 (November 16, 2006) "[o]ne can only expect the trier of fact to render a decision based on what evidence actually says, not what it should have said." When one describes an injury on a Form 30C one can only expect a respondent to respond to the injury as it is actually described and a trial commissioner to rule on preclusion based on the four corners of the Form 30C. We also note in DiStasi v. Watertown Board of Education, 5010 CRB-5-05-10 (September 25, 2006) we declined to reverse a trial commissioner who determined that an allegedly vague disclaimer was inadequate grounds to grant a Motion to Preclude. Since preclusion is "a harsh remedy" West v. Heitkamp, Inc., 4587 CRB-5-02-11 (October 27, 2003), *appeal dismissed for lack of final judgment*, A.C. 24805 (February 11, 2004), fundamental fairness argues against granting preclusion when there is legitimate ambiguity as to the extent of the injuries asserted in the notice of claim.

[7] Essentially the claimant argues that since the July 30, 2012 surgery was performed at the respondents' hospital that knowledge that the procedure was responsive to a compensable injury should be imputed to the respondents. The trial commissioner did not reach this factual finding and in light of the fact that this treatment occurred over one year after the July 20, 2011 incident where the claimant sustained injury we will not reach a differing factual conclusion on this issue.

In this case granting the Motion to Preclude would not relieve the claimant of her obligation to present a prima facia case supportive of her claim her neck surgery was due to a compensable injury, see Donahue v. Veridiem, Inc., 291 Conn. 537, 553-555 (2009). Conversely, denial of a Motion to Preclude does not bar the claimant from prosecuting her claim. It merely allows the respondents to challenge her evidence and legal arguments. Id., 550. A contested hearing over the extent of disability emanating from an incident where jurisdiction has been established either by way of a voluntary agreement or a disclaimer filed in the period subsequent to 28 days from the notice of claim but prior to one year thereafter is precisely the circumstance governed by the precedent in Adzima, supra. The Finding and Dismissal herein is therein consistent with the law.

Therefore, we affirm the Finding and Dismissal.

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