CASE NO. 6111 CRB-5-16-6 : COMPENSATION REVIEW BOARD
CLAIM NO. 500139071

LARRY GREENE : WORKERS' COMPENSATION
CLAIMANT-APPELLANT COMMISSION

v. : JUNE 9, 2017

ANSONIA COPPER & BRASS
EMPLOYER

and

AIG CLAIMS, INC.
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

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

The respondents were represented by Richard T. Stabnick, Esq., Pomeranz, Drayton & Stabnick, L.L.C., 95 Glastonbury Boulevard, Glastonbury, CT 06033-4412.

This Petition for Review from the June 15, 2016 Dismissal of Claim by Thomas J. Mullins, the Commissioner acting for the Fifth District, was heard on December 16, 2016 before a Compensation Review Board panel consisting of Commission Chairman John A. Mastropietro and Commissioners Ernie R. Walker and Nancy E. Salerno.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has petitioned for review from the June 15, 2016 Dismissal of Claim by Thomas J. Mullins, the Commissioner acting for the Fifth District. We find error and accordingly reverse the decision of the trial commissioner and remand this matter for additional hearings consistent with this Opinion.[1]

In his June 15, 2016 Dismissal of Claim, the trial commissioner stated that a formal hearing had been scheduled on that date for 1:00 p.m. and the sole issue for discussion at the hearing was the claimant's entitlement to post-specific wage loss differential pursuant to § 31-308a C.G.S.[2] The trier, noting that "[t]his was the third time the formal hearing on this claim had been rescheduled on behalf of the claimant," and "[t]he claimant failed to appear for said formal hearing on this date with no notice,"

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[1] Three motions for extension of time were granted during the pendency of this appeal.

[2] Section 31-308a C.G.S. (Rev. to 2003) states: "(a) In addition to the compensation benefits provided by section 31-308 for specific loss of a member or use of the function of a member of the body, or any personal injury covered by this chapter, the commissioner, after such payments provided by said section 31-308 have been paid for the period set forth in said section, may award additional compensation benefits for such partial permanent disability equal to seventy-five per cent of the difference between the wages currently earned by an employee in a position comparable to the position held by such injured employee prior to his injury, after such wages have been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act in accordance with section 31-310, and the weekly amount which such employee will probably be able to earn thereafter, after such amount has been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act in accordance with section 31-310, to be determined by the commissioner based upon the nature and extent of the injury, the training, education and experience of the employee, the availability of work for persons with such physical condition and at the employee's age, but not more than one hundred per cent, raised to the next even dollar, of the average weekly earnings of production and related workers in manufacturing in the state, as determined in accordance with the provisions of section 31-309. If evidence of exact loss of earnings is not available, such loss may be computed from the proportionate loss of physical ability or earning power caused by the injury. The duration of such additional compensation shall be determined upon a similar basis by the commissioner, but in no event shall the duration of such additional compensation exceed the lesser of (1) the duration of the employee's permanent partial disability benefits, or (2) five hundred twenty weeks. Additional benefits provided under this section shall be available only to employees who are willing and able to perform work in this state.

(b) Notwithstanding the provisions of subsection (a) of this section, additional benefits provided under this section shall be available only when the nature of the injury and its effect on the earning capacity of an employee warrant additional compensation."

dismissed the claim for temporary partial benefits in light of the claimant's failure to prosecute. June 15, 2016 Dismissal of Claim.

On June 26, 2016, the claimant filed a Motion to Reopen and Vacate Decision and Order Dated June 15, 2016, which was denied, and this appeal followed. On appeal, the claimant, who had been represented by counsel at the June 15, 2016 hearing, argues that the trial commissioner abused his discretion by: (1) failing to grant a continuance to ascertain why the claimant did not attend the formal hearing; (2) dismissing the claim for § 31-308a C.G.S. benefits; (3) failing to allow the parties to submit evidence at the formal hearing; (4) failing to grant the claimant's Motion to Reopen and Vacate Decision and Order; and, 5) failing to grant the claimant's Motion to Correct.

It is of course axiomatic that "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). However, it is equally well-settled that although "[o]ur courts have long held that every reasonable presumption should be given to the trier's discretionary action," Goulbourne v. State/Department of Correction, 5955 CRB-1-14-8 (July 29, 2015), on occasion it can be necessary to "ask whether the trier's exercise of discretion was such that it constituted an abuse of discretion." Id. "An abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors." In re Shaquanna M., 61 Conn. App. 592, 603 (2001).

In the present matter, we note at the outset that our analysis is somewhat hampered by the fact that the trial commissioner did not recite any factual findings in his

June 15, 2016 Order. However, attached to the claimant's Motion to Reopen and Vacate Decision and Order Dated June 15, 2016, is an affidavit signed by the claimant which serves to shed some light on the circumstances which led to the dismissal. See Claimant's Motion to Reopen and Vacate Decision and Order Dated June 15, 2016, Exhibit A. In this affidavit, the claimant, who attested to being sixty-six (66) years old, stated that although he remembered having a telephone conference with his lawyer on May 11, 2016 in which the upcoming formal hearing was discussed, he did not remember that the formal was scheduled for June 15, 2016 at 1:00 p.m. In the interim, the claimant and his wife were invited by their daughter to attend their granddaughter's graduation in Virginia, an invitation which they accepted.

While in Virginia, the claimant was contacted by another daughter who resides with him and his wife informing the claimant that his attorney had dropped off a note at his home requesting that the claimant get in touch with his attorney immediately as he had missed the formal hearing. The claimant indicated that his attorney had been unable to reach him by telephone because the number had been suspended on or about June 10, 2016 and service was not restored until June 17, 2016. The claimant stated that had he remembered the date of the hearing, he would not have agreed to attend his granddaughter's graduation in Virginia. The claimant also indicated that he has "shown up for all prior Formal Hearings that have taken place on [his] Workers' Compensation files and would never intentionally not show up for a scheduled Formal Hearing."[3] June 24, 2016 Affidavit, ¶ 12.

[3] Although no formal hearings were held in the instant claim prior to the hearing on June 15, 2016, the records of the Workers' Compensation Commission reflect that in 2013, in another claim brought by the claimant unrelated to the matter at bar, formal proceedings were held on September 10, 2013 and October 10, 2013.

In addition, the claimant indicated that his wife has been in ill health with issues affecting her eyes, balance and equilibrium and her health has worsened over the last year. As a result, the claimant has assumed more responsibility for caring for his wife since being laid off from Ansonia Copper & Brass and Cuni Casting, L.L.C. The claimant acknowledged that he does occasionally forget things, particularly doctors' appointments. He also explained that in the past, he had relied upon his wife to help him remember his appointments but because of her health issues, she has not been able to do as much as she used to. The claimant extended his apologies to the trial commissioner and the respondents for his memory lapse and requested that the Workers' Compensation Commission reverse the dismissal of his claim for § 31-308a C.G.S. benefits and set the matter down for another hearing.

In addition to the foregoing affidavit, claimant's counsel submitted into the record correspondence from respondents' counsel dated December 18, 2015 addressed to the then-acting trial commissioner for the Fifth District requesting a postponement of the January 6, 2016 formal hearing by agreement. See Claimant's Motion to Reopen and Vacate Decision and Order Dated June 15, 2016, Exhibit B. Claimant's counsel also submitted correspondence dated March 15, 2016 addressed to the trial commissioner involved in this appeal requesting that a formal hearing scheduled for March 24, 2016 be continued by agreement. Id., Exhibit C. In both instances, the request for a continuance was prompted by scheduling conflicts on the part of claimant's counsel.

The respondents do not challenge the claimant's narrative of events as set forth in the affidavit or the claimant's brief. However, they do point out that in Rindos v. J.F. Barrett & Sons, 3188 CRB-3-95-8 (February 27, 1997), this board upheld the trial

commissioner's dismissal of a claim in light of the claimant's failure to appear at a formal hearing. We have reviewed our reasoning in Rindos and find that the matter is distinguishable from the present appeal.

In Rindos, the claimant, who had contended that an "emergency" required her to report to work on the date of the hearing, did not notify the respondents of her inability to attend the formal until the day before the hearing, and claimant's counsel did not inform the trial commissioner of her inability to go forward until the formal hearing had commenced. The trier dismissed the claim and, in affirming that decision, this board relied on precedent set forth in Mercado v. Personal Moving Services, 14 Conn. Workers' Comp. Rev. Op. 364, 2023 CRB-4-94-5 (September 26, 1995) wherein we affirmed the trier's denial of a postponement of a formal hearing to a respondent who had waited until the day before the hearing to request the postponement. In addition to citing Administrative Regulations § 31-279-2 and § 31-279-4 C.G.S., we observed that because the respondent did not "allege any reason for the *dilatory conduct* of waiting until the day prior to the hearing to request the postponement … we conclude that it was within the trial commissioner's discretion to conduct the formal hearing and to issue a decision without the respondent's participation."[4] (Emphasis added.) Id., 365. Given that the record before us indicates that the requests for postponement in this matter were filed some nineteen (19) and nine (9) days prior to the two prior scheduled formal hearings,

[4] Admin. Reg. § 31-279-2 C.G.S. (Rev. to 2003) states: "Punctual appearance by an authorized representative at every conference or hearing assigned by the commissioner is required, unless such attendance is excused by the commissioner prior to the conference or hearing."
Admin. Reg. § 31-279-4 C.G.S. (Rev. to 2003) states: "Unless prior approval for cause is secured from the commissioner, a claim assigned for a formal hearing shall be decided on the basis of the evidence adduced by the parties at the time and place designated. No party can assume the granting of a continuance to produce witnesses at a later date, or for any other reason not regularly recognized in a judicial proceeding."

respectively, we do not find that a charge of "dilatory conduct" can reasonably be leveled at the claimant herein.

In affirming the trier's decision in Rindos, we also relied upon our decision in Muniz v. Koteas, 13 Conn. Workers' Comp. Rev. Op. 284, 1720 CRB-4-93-5 (April 21, 1995) wherein the respondents brought a wide-ranging appeal challenging the trial commissioner's determination that an employer/employee relationship existed. We affirmed the commissioner on all issues; specifically with regard to the respondents' contention that the commissioner had erred in refusing to schedule a continuance of the hearing so the respondents could present additional evidence, we noted that in fact, the transcript of the proceedings demonstrated that the trial commissioner had allowed the parties two weeks to notify him if they needed another hearing.[5] As had been the case in Mercado, we cited Admin. Reg. § 31-279-4 C.G.S.; we then stated that "[i]t is within the broad discretion of the commissioner to grant or deny a continuance, and such a decision is virtually unreviewable." Muniz, 288.

In making that statement, we were citing Jackson v. Commissioner of Correction, 227 Conn. 124 (1993) (Berdon, J., dissenting), which involved an appeal in a writ of habeas corpus petition. However, a closer analysis of Justice Berdon's remarks in Jackson demonstrates that Justice Berdon actually stated the following: "This court has granted the trial court such broad discretion in determining whether to grant or deny a continuance that an appeal on that issue is for all practical purposes frivolous." Id., 145. Moreover, in its majority opinion, the court stated that "[w]e have repeatedly recognized

[5] In Muniz v. Koteas, 13 Conn. Workers' Comp. Rev. Op. 284, 1720 CRB-4-93-5 (April 21, 1995), it was actually claimant's counsel who had requested a continuance of the formal hearing in order to present a rebuttal witness. In our Opinion, we remarked that "[t]he respondent has not explained to this Board how it was prejudiced by the commissioner's failure to schedule another hearing in order for the claimant to present a rebuttal witness." Id., 289.

… that the denial of a request for a continuance is appealable." Id., 136. In light of our Supreme Court's pronouncement in Jackson, supra, we deem it well within the prerogative of an appellate board to review a trier's denial of a request for a continuance. We further find that in light of the disparate circumstances between the instant matter and Rindos, our reasoning in Rindos is not applicable to the matter at bar.

Having reviewed the foregoing, we are unable to sustain the trial commissioner's decision to dismiss the claim for § 31-308a C.G.S. benefits. It is with some reluctance that we reach this result, as we are of course mindful of the deference an appellate body owes to the trier of fact. We also recognize that the provisions of § 31-298 C.G.S., which address the conduct of hearings, afford the trial commissioner wide latitude in determining how best to "ascertain the substantial rights of the parties…." Nevertheless, under the particular circumstances of this matter, we simply do not find that an affirmance of the commissioner's decision to dismiss the § 31-308a C.G.S. claim would comport with the remedial nature and humanitarian purpose of the Workers' Compensation Act. Dubois v. General Dynamics Corporation, 222 Conn. 62, 67 (1992). "No case under this Act should be finally determined when the … court is of the opinion that, through inadvertence, or otherwise, the facts have not been sufficiently found to render a just judgment." Cormican v. McMahon, 102 Conn. 234, 238 (1925).[6]

There is error; the Dismissal of Claim is accordingly reversed and remanded for additional proceedings consistent with this Opinion.

Commissioners Ernie R. Walker and Nancy E. Salerno concur.

[6] The claimant also contends that the trial commissioner's failure to allow the claimant to present evidence at the June 15, 2016 formal hearing and his denial of the claimant's Motion to Correct constitute error. In light of our determination that the trier's dismissal of the claim for § 31-308a C.G.S. benefits was erroneous, we decline to enter into a discussion of whether the trier should have allowed the claimant's evidentiary submissions into the record. With regard to the Motion to Correct, insofar as the trial commissioner's denial of the proposed corrections was inconsistent with the findings presented herein, that denial also constituted error.