CASE NO. 5959 CRB-8-14-9 CLAIM NO. 800175955	: COMPENSATION REVIEW BOARD
MARIE N. CARIELLO CLAIMANT-APPELLEE	: WORKERS' COMPENSATION COMMISSION
v.	: JUNE 12, 2018

HOME HEALTH CARE SERVICES, INC.
EMPLOYER

and

BROADSPIRE
INSURER
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by Christopher L. Morano, Esq., Law Offices of Christopher L. Morano, P.O. Box 200, Essex, CT 06426.

The respondents were represented by Michael V. Vocalina, Esq., Cotter, Cotter & Mullins, L.L.C., 6515 Main Street, Second Floor, Suite 10, Trumbull, CT 06611.

This Petition for Review from the August 15, 2014 Finding and Award of Preclusion of David W. Schoolcraft, the Commissioner acting for the Eighth District, was heard November 17, 2017 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Christine L. Engel and Ernie R. Walker.[1]

[1] We note that two motions for extension of time and a motion to stay were granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondents have petitioned for review from the August 15, 2014 Finding and Award of Preclusion [hereinafter "Preclusion Order"] by David W. Schoolcraft, the Commissioner acting for the Eighth District. The trial commissioner concluded that because the respondents failed to respond to the claimant's notice of claim within the statutory twenty-eight day period pursuant to General Statutes § 31-294c (b), they were precluded from interposing a defense to the claim.[2] The respondents have appealed the Preclusion Order, not on the grounds that the claimant's notice was ineffective or they did respond in some fashion to the notice, but because it was inappropriate for the commissioner to order preclusion in the absence of medical evidence supportive of the claim. We find this argument devoid

[2] General Statutes § 31-294c (b) states: "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."

of merit given that it is clearly inconsistent with our Supreme Court's analysis in Harpaz v. Laidlaw Transit, Inc., 286 Conn. 102 (2008) and Donahue v. Veridiem, Inc., 291 Conn. 537 (2009). In addition, the relief sought by the respondents, i.e., a remand to the trial commissioner in order to determine whether competent medical evidence supports a claim for benefits, is already encompassed in ¶ IV of the Preclusion Order. We therefore affirm the trial commissioner's decision to grant the claimant's motion to preclude.

The following facts are pertinent to our consideration of this matter. The claimant, a home health care worker, alleges that she sustained injuries which necessitated knee replacement surgery. She filed a Form 30C with the Workers' Compensation Commission [hereinafter "Commission"] on December 19, 2011 which described her injury, identified her employer and her place of employment, and asserted that she had sustained a repetitive trauma injury in "12/28-31, 2010 – Jan & Feb 2011." Findings, ¶ 8; Claimant's Exhibit D. The claimant did not have access to a photocopy machine but testified that she made a handwritten copy of the Form 30C and mailed it to the respondents via certified mail. The respondents received and signed for a certified mailing from the claimant on December 19, 2011. The respondents neither filed a Form 43 contesting the claim nor advanced any payments to the claimant. On February 23, 2012, the claimant filed a motion to preclude.

At the formal hearing to consider the motion for preclusion, the trial commissioner found that although the copy of the Form 30C filed with the respondents was not a verbatim copy of the notice filed with the Commission, the form contained substantively the same information. See Findings, ¶ 17, and Conclusion, ¶ F. The respondents asserted that the date of injury on the Form 30C was too vague to warrant

preclusion. The trial commissioner rejected this argument on the basis that the claim was for a repetitive trauma injury and the respondents were aware of the claimant's last date of exposure. The trial commissioner found no prejudice to the respondents and also found that the substance of the Form 30C was sufficient to have enabled the respondents to investigate and respond to the claim. Given that the respondents failed to file a Form 43 or take some other appropriate action within twenty-eight days of the claim being filed, the trial commissioner granted the motion to preclude. In ¶ IV of the Preclusion Order, he directed the parties to proceed to a formal hearing if the respondents chose not to commence payment of benefits, at which point the claimant would be left to her proof regarding compensability, extent of disability and her entitlement to benefits.

The respondents filed a motion to correct seeking to redraft the orders issued in the Preclusion Order, contending that "[t]he Supreme Court's rationale in deciding [Harpaz, supra, and Donahue, supra] needs to be revisited and overturned as it deprives the employer/insurer of procedural due process rights." September 3, 2014 Respondents' Motion to Correct, ¶ 4. This motion was denied in its entirety, and the respondents have pursued this appeal. The respondents' argument is straightforward; they believe that preclusion cannot be granted unless the claimant presents a prima facie case, including medical evidence, to the commissioner. They further contend that Harpaz does not relieve a claimant of the obligation to prove a claim with probative evidence before being awarded benefits.

We are perplexed by this argument, since it is abundantly clear that the Supreme Court, in both Harpaz and Donahue, bifurcated the issue of whether a respondent should be precluded from defending a claim from the issue of whether a claimant has met the

burden of proof that benefits should be awarded. In Geraldino v. Oxford Academy of Hair Design, 5968 CRB-5-14-10 (January 20, 2016), *appeal withdrawn*, A.C. 38881 (March 13, 2018), this board examined at great length the role of the trial commissioner following the granting of a motion for preclusion. In that case, the trial commissioner found the evidence presented by the claimant inconclusive and ordered a commissioner's examination to clarify the record. We approved of this decision, and rejected the respondents' argument that the trial commissioner should have dismissed the claim *in toto* if the claimant's evidence was not found to be fully persuasive.[3]

We also pointed out that in Donahue, supra, the court gave its imprimatur to a trial commissioner to conduct an inquiry when the commissioner is not persuaded by the evidence in the record. Id., 553-555. In addition, we explained that precedential case law governing preclusion did not change the obligations of a claimant to prove that his or her current medical condition was the result of a compensable injury sustained by the claimant. We stated:

> As … Donahue, supra, makes clear, even after preclusion a claimant must satisfy a trial commissioner through probative evidence that his or her injury is the result of an incident during the course of employment…. The standard that a trial commissioner must apply in evaluating the claimant's evidence was most recently enunciated by this tribunal in Larocque v. Electric Boat Corp., 5942 CRB-2-14-6 (July 2, 2015). "Viewing … Voronuk, [v. Electric Boat Corp., 118 Conn. App. 248 (2009)]; DiNuzzo [v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132 (2009)] and Sapko [v. State, 305 Conn. 360 (2012)] together as a whole, it is clear that since Birnie [v. Electric Boat Corp., 288 Conn. 392 (2008)] our appellate courts have restated the need for claimants seeking an award under Chapter 568 to present reliable, nonspeculative evidence and to carry their burden of proof that there is a clear nexus of proximate cause between employment and injury…." While a respondent precluded under § 31-294c(b) C.G.S. may not challenge the claimant's proof, a trial

[3] See also Wilson v. Capitol Garage, Inc., 6109 CRB-2-16-6 (May 16, 2017).

> commissioner must be satisfied, consistent with the powers enumerated under § 31-298 C.G.S., that the claimant has a "bona fide claim" see Donahue, supra, in order to award benefits for an injury. (Internal citations omitted.)

Geraldino, supra.

In Callender v. Reflexite Corp., 137 Conn. App. 324 (2012), *cert. granted*, 307 Conn. 915 (2012), *appeal withdrawn*, S.C. 19040 (September 27, 2013), our Appellate Court articulated a two-step process for deciding a motion to preclude. A claimant must establish: (1) that "the notice of claim is adequate on its face" such that the respondent was properly noticed regarding a workers' compensation claim pursuant to Chapter 568; and (2) the respondent failed to respond in accordance with the provisions of the statute. Id., 338. A claimant must also establish that, on the basis of the allegations within the Form 30C, the Commission has subject matter jurisdiction over the claim. See Volta v. United Parcel Service, 5612 CRB-7-10-12 (January 31, 2012).[4] It is well-settled that the conclusive presumption of compensability for failing to present a timely disclaimer is binding on the employer. However, "[h]ad the legislature intended not to allow the commissioner to probe the plaintiff's proof, it readily could have stated that the compensability of the injury shall be conclusively presumed, rather than that the employer is conclusively presumed to have accepted the compensability of the claim." Donahue, supra, 553.

We also note that had the Supreme Court intended to require a claimant to present prima facie proof of a claim prior to obtaining preclusion, the Donahue court would not have envisioned a circumstance in which the trial commissioner would be called upon to

[4] In Volta v. United Parcel Service, 5612 CRB-7-10-12 (January 31, 2012), this board distinguished between a legitimate challenge to a motion to preclude on jurisdictional grounds and an improper challenge relative to the causation of the claimant's injury which required that the commissioner evaluate medical records prior to granting preclusion.

act in a proactive manner if he or she were not persuaded by the claimant's evidence subsequent to granting preclusion.[5] Id., 553-554. It is clear that Donahue creates a two-step protocol. First, the trial commissioner must determine if the respondent is precluded from contesting whether the claimant sustained a compensable injury. Second, after being granted preclusion, the claimant must present evidence to the trial commissioner justifying an award of benefits. In the present matter, we are satisfied that the Preclusion Order comports with the court's analysis in Donahue and, therefore, do not find meritorious the respondents' argument that reversible error occurred.

In addition, we are not persuaded that this appeal was jurisdictionally appropriate. It is well-settled that General Statutes § 31-301(a) allows us to consider appeals from certain interlocutory rulings prior to the adjudication of the merits of a case, and we have frequently considered appeals concerning the granting or denial of a motion to preclude.[6] However, cases such as Richardson v. Bic Corporation, 4953 CRB-3-05-6 (September 7, 2006), speak to our desire for judicial economy and our interest in the expeditious resolution of disputes.

As our Appellate Court made clear in Gorelick v. Montanaro, 94 Conn. App. 14 (2006), interlocutory appeals are appropriate when the ruling being appealed either

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[5] We note that this approach might mitigate the "harsh remedy" which the Supreme Court believed the General Assembly intended preclusion to create. Donahue v. Veridiem, Inc., 291 Conn. 537, 550 (2009), *quoting* 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). We believe the concept of *stare decisis* obligates us to interpret the workers' compensation statutes in the manner directed by the Supreme Court.

[6] General Statutes § 31-301 (a) states: "At any time within twenty days after entry of an award by the commissioner, *after a decision of the commissioner upon a motion* or after an order by the commissioner according to the provisions of section 31-299b, either party may appeal therefrom to the Compensation Review Board by filing in the office of the commissioner from which the award or the decision on a motion originated an appeal petition and five copies thereof. The commissioner within three days thereafter shall mail the petition and three copies thereof to the chief of the Compensation Review Board and a copy thereof to the adverse party or parties. If a party files a motion subsequent to the finding and award, order or decision, the twenty-day period for filing an appeal of an award or an order by the commissioner shall commence on the date of the decision on such motion." (Emphasis added.)

"terminates a separate and distinct proceeding; or … so concludes the rights of the parties that further proceedings cannot affect them." Id., 32, *citing* State v. Curcio, 191 Conn. 27, 31 (1983). Had the respondents appealed the Preclusion Order on the basis that the claimant's notice was jurisdictionally defective or the respondents had actually complied with the provisions of General Statues § 31-294c, this tribunal would have been presented with a ripe dispute worthy of adjudication. The respondents did not challenge the decision to grant preclusion based on the established legal standard; instead, they sought a remand of the matter so the claimant could present additional evidence. We find this demand for relief superfluous. The trial commissioner has already determined that the claimant needs to present a prima facie case in order to obtain benefits. See Preclusion Order, ¶ IV. We fail to see how a remand of this matter would somehow achieve a result which differs from allowing the trial commissioner to rule on the merits of the claim.

In Quinones v. RW Thompson Company, Inc., 5792 CRB-1-12-10 (January 16, 2014), and Bailey v. Stripling Auto Sales, Inc., 4516 CRB-2-02-4 (May 8, 2003), this tribunal made it clear that in situations in which a party would not sustain irreparable harm if a case were to be heard on the merits, an interlocutory appeal should not be brought to the Compensation Review Board. In the present matter, if the trial commissioner determines that the claimant cannot prove she sustained a compensable injury, the respondents' concerns will be moot. If the commissioner determines otherwise and the respondents find legal error in that decision, they can appeal the award at that time. See Geraldino, supra; Wikander v. Asbury Automotive Group/David McDavid Acura, 137 Conn. App. 665, 668 n.2 (2012). At present, however, the appeal is unripe for adjudication.

There is no error; the August 15, 2014 Finding and Award of Preclusion by David W. Schoolcraft, the Commissioner acting for the Eighth District, is accordingly affirmed.

Commissioners Christine L. Engel and Ernie R. Walker concur in this opinion.

CERTIFICATION

THIS IS TO CERTIFY THAT a copy of the foregoing was mailed this 12th day of June 2018 to the following parties:

MARIA CARIELLO
20 Brookside Avenue
Westbrook, CT 06498

CHRISTOPHER L. MORANO, ESQ. 7011 2970 0000 6088 8686
Law Offices of Christopher L. Morano
P.O. Box 200
Essex, CT 06426

HOME HEALTH CARE SERVICES, INC.
163 Cedar Street, Suite 2
Branford, CT 06405

MICHAEL V. VOCALINA, ESQ. 7011 2970 0000 6088 8693
Cotter, Cotter & Mullins, L.L.C.
6515 Main Street, Second Floor, Suite 10
Trumbull, CT 06611

Jackie E. Sellars
Administrative Hearings Specialist
Compensation Review Board
Workers' Compensation Commission