CASE NO. 6101 CRB-6-16-5 : COMPENSATION REVIEW BOARD
CLAIM NO. 601072205

GARY SALERNO : WORKERS' COMPENSATION
CLAIMANT-APPELLEE COMMISSION

v. : NOVEMBER 14, 2018

LOWE'S HOME IMPROVEMENT CENTER
EMPLOYER
SELF-INSURED

and

SEDGWICK CMS, INC.
THIRD-PARTY ADMINISTRATOR
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by Richard O. LaBrecque, Esq., Grady & Riley, L.L.P., 86 Buckingham Street, Waterbury, CT 06710-1908.

The respondents were represented by David A. Kelly, Esq., Montstream & May, L.L.P., Salmon Brook Corporate Park, 655 Winding Brook Drive, P.O. Box 1087, Glastonbury, CT 06033-6087.

This Petition for Review from the May 6, 2016 Ruling re: Motion to Preclude of Daniel E. Dilzer, the Commissioner acting for the Sixth District, was heard April 27, 2018 before a Compensation Review Board panel consisting of Commissioners Scott A. Barton, Jodi Murray Gregg and Stephen M. Morelli.[1] [2]

[1] As of the date this matter was heard by the Compensation Review Board, Commission Chairman Stephen M. Morelli had not yet been appointed to that position.
[2] We note that two motions for extension of time and two continuances were granted during the pendency of this appeal.

OPINION

SCOTT A. BARTON, COMMISSIONER: The respondents have appealed from the May 6, 2016 Ruling re: Motion to Preclude [hereinafter "Ruling"] issued by Commissioner Daniel E. Dilzer granting a motion to preclude filed by the claimant subsequent to commencing his claim for benefits. The trial commissioner determined that because the respondents' disclaimer ("form 43") was filed more than one year after the claimant commenced the claim, the respondents' "safe harbor" to contest extent of disability had lapsed and they were precluded from defending the claim pursuant to Donahue v. Veridiem, Inc., 291 Conn. 537 (2009). The respondents argue that under the facts of this case, an "impossibility defense" existed for filing a disclaimer and the trial commissioner erred in not applying our Appellate Court's analysis in Dubrosky v. Boehringer Ingelheim Corp., 145 Conn. App. 261 (2013), *cert. denied*, 310 Conn. 935 (2013).

Having reviewed the matter, we believe that Dubrosky can be distinguished on the facts. Moreover, we are not willing to extend the "safe harbor" provision, as contemplated by General Statutes § 31-294c (b), to cases in which there is no evidence that the respondents ever accepted the compensability of the claim, either through their course of conduct or through written documentation.[3] Accordingly, we affirm the Ruling.

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[3] 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

The trial commissioner reached the following factual findings which are pertinent to our inquiry. He found that the claimant worked for Lowe's between March 31, 2006, and December 19, 2012, as a sales specialist in the plumbing department. This job required the repetitive lifting of heavy plumbing fixtures, some of which weighed over 100 pounds. The claimant experienced increasing difficulty lifting heavy objects until he was ultimately unable to do his job in December 2012. He reported worsening sciatic pain down his right leg, and eventually reached a point where he could no longer walk for more than ten or fifteen minutes without having to stop and rest. In December 2012, he stopped working and consulted his family physician, Lynne M. Todd, M.D., who, in January 2013, prescribed physical therapy. When this treatment did not result in long-term relief, Dr. Todd referred the claimant to Hussein I. Alahmadi, M.D., a neurosurgeon with Hartford HealthCare Medical Group. Dr. Alahmadi ordered an MRI

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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. If an employer has opted to post an address of where notice of a claim for compensation by an employee shall be sent, as described in subsection (a) of this section, the twenty-eight-day period set forth in this subsection shall begin on the date when such employer receives written notice of a claim for compensation at such posted address."

and suggested pain management and an injection, neither of which provided any relief. He then recommended an L4-5 lumbar fusion, which he performed on June 17, 2013.

On November 29, 2013, the Workers' Compensation Commission [hereinafter "Commission"] received a notice of claim ("form 30C") in which the claimant alleged he had sustained "repetitive trauma lifting at work" with a date of loss of December 19, 2012.[4] The trial commissioner noted that the form 30C had been sent by United States mail, return receipt requested, to the respondent-employer and the Commission. The form 30C was received by the respondent-employer prior to December 3, 2013. The respondents filed a form 43 dated June 16, 2015, contesting the claim. The form 43 was received by the Commission on June 18, 2015, eighteen months after receipt of the claimant's form 30C. The trial commissioner found that the respondents did not pay the claimant for any of his lost time or for the medical treatment related to the repetitive trauma claim. The claimant moved to preclude the respondents from contesting the claim.

On the basis of the foregoing, the trial commissioner found the claimant credible and concluded that his form 30C had been timely filed and properly submitted to both the Commission and the respondents. He also concluded that the respondents neither filed a timely disclaimer nor paid the claimant's indemnity or medical costs in order to avail themselves of the "safe harbor" provisions of General Statutes § 31-294c (b). As a result, he granted the claimant's motion to preclude and set the matter down for additional hearings in accordance with Donahue, supra, to allow the claimant the opportunity to prove his claim.

[4] We note that in Findings, ¶ 7, the trial commissioner recited the date of loss as "December 19, 2013." We deem this harmless scrivener's error. See Hernandez v. American Truck Rental, 5083 CRB-7-06-4 (April 19, 2007).

The respondents filed a motion to correct seeking a denial of the motion to preclude and requesting that the trial commissioner add findings indicating that the claimant paid for his medical treatment through his group health insurance and the time lost from work was paid for through long-term and short-term disability policies. The trial commissioner denied the motion to correct in its entirety and the respondents have pursued this appeal. They argue that the trial commissioner failed to properly apply the court's reasoning in Dubrosky, supra, and, had he done so, he would have denied the motion to preclude. They also argue that the claimant's form 30C, which alleged a repetitive trauma injury, was too vague to support preclusion. We are not persuaded by these arguments.

The standard of deference we are obliged to apply to a trial commissioner's findings and legal conclusions is well-settled. "The trial commissioner's factual findings and conclusions must stand unless they are without evidence, contrary to law or based on unreasonable or impermissible factual inferences." Russo v. Hartford, 4769 CRB-1-04-1 (December 15, 2004), *citing* Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Moreover, "[a]s with any discretionary action of the trial court, 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), *quoting* Thalheim v. Greenwich, 256 Conn. 628, 656 (2001). "This presumption, however, can be challenged by the argument 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).

We begin with the respondents' claim of error regarding the alleged inadequacy of the form 30C. The respondents contend that this document, in which the claimant asserted he sustained a repetitive trauma injury on his final day of employment, was too irregular to support a motion to preclude because it "failed to set forth a description of the injury." Respondents' Brief, p. 5. We note that this defense to preclusion is very similar to the argument advanced by the respondents in Geraldino v. Oxford Academy of Hair Design, 5840 CRB-5-13-5 (April 17, 2014), which this board deemed unpersuasive. In Geraldino, the respondents contended that the claimant was not actually working on the date of injury listed on the claimant's form 30C, and the notice did not properly describe the injury. We rejected these arguments, remarking:

> [W]e do not find the respondents could have been prejudiced by the Form 30C as it clearly states the claimant sustained an injury during a period when she was employed by respondent and was filed within one year of the alleged date of last exposure. See Kingston v. Seymour, 5789 CRB-5-12-10 (September 10, 2013), where we cited Surowiecki v. UTC/Pratt & Whitney, 4233 CRB-8-00-5 (May 24, 2001), for the proposition that "the failure to prove the exact date upon which an accidental injury occurred does not preclude this Commission from exercising jurisdiction over a claim for compensation."

Geraldino, supra, *quoting* Roche v. Danbury Hospital, 3592 CRB-7-97-5 (July 13, 1998).

In addition, "in Palmieri v. Simkins Industries, Inc., 5694 CRB-3-11-11 (October 10, 2012), and Goulbourne v. State/Department of Correction, 5192 CRB-1-07-1 (January 17, 2008), we pointed out that the 'last day of exposure' is the standard for determining the timeliness of a claim for repetitive trauma." Id. In Palmieri, we had concluded, in reliance upon Russell v. Mystic Seaport Museum, Inc., 252 Conn. 596 (2000), that the claimant's form 30C adequately described an injury which would be

deemed compensable under Chapter 568.[5] We noted that the Russell court had stated that:

> the rule that the statute of limitations period begins to run from the date of last exposure for some repetitive trauma injuries has no relevance, and bears no logical relationship, to the rule requiring sufficient time related information in a notice of claim to allow an employer to investigate a repetitive trauma injury. Consequently, our determination of when the statute of limitations begins to run for certain types of repetitive trauma injuries is irrelevant to a determination of whether the plaintiff's notice of claim complied with § 31-294c (a).

Russell, supra, 616.

In Geraldino, supra, we also noted that in Callender v. Reflexite Corp., 137 Conn. App. 324, 338 (2012), *cert. granted,* 307 Conn. 915 (2012), *appeal withdrawn,* S.C. 19040 (September 25, 2013), our Appellate Court limited its consideration of whether a form 30C supported preclusion to the four corners of the document. As such, in Geraldino, we concluded that the claimant had adequately apprised the respondents of an alleged compensable injury that fell within this Commission's jurisdiction and the respondents had simply failed to respond.[6] We find that because we are unable to distinguish the present matter from Geraldino on either the facts or the law, we cannot sustain this claim of error.

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[5] See also Lamar v. Boehringer Ingelheim Corp., 138 Conn. App. 826 (2012), *cert. denied*, 307 Conn. 943 (2013), in which our Appellate Court, in reliance upon Russell v. Mystic Seaport Museum, Inc., 252 Conn. 596 (2000), determined that a response to a precise date of injury was unnecessary when a respondent disclaimed liability for a repetitive trauma injury if "the date listed … fell within the time period established by the [claimant's] form 30C…." Lamar, supra, 839. In the present case, it may be inferred that the specific date cited by the claimant in his form 30C was his alleged last date of injurious exposure.

[6] To the extent that the respondents argue that the claimant failed to sufficiently describe the mechanism of injury in his form 30C, see Respondents' Brief, pp. 5-6, they are advancing a defense as to causation rather than jurisdiction. This board has previously observed that when a trial commissioner is examining whether to grant a motion to preclude, consideration of a causation defense is improper. See Geraldino v. Oxford Academy of Hair Design, 5840 CRB-5-13-5 (April 17, 2014); Volta v. United Parcel Service, 5612 CRB-7-10-12 (January 31, 2012).

We next turn to the respondents' contention that the trial commissioner failed to properly apply the court's analysis as set forth in Dubrosky, supra. The respondents argue that because the claimant did not seek indemnity benefits or submit medical bills within twenty-eight days of filing his form 30C, it was "impossible" for them to comply with the provisions of General Statutes § 31-294c (b). The respondents also point out that the claimant obtained his medical treatment through his group health insurance. As a result, they argue that the "safe harbor" to contest elements of the claim should be preserved. We find this argument indistinguishable from that advanced by the respondents in Dominguez v. New York Sports Club, 6210 CRB-7-17-8 (August 28, 2018), *appeal pending*, A.C. 42089 (September 12, 2018), which argument we deemed meritless.

In Dominguez, we noted that "the claimant, for reasons unknown, did not seek payment for his medical treatment through the respondents' workers' compensation insurer or seek indemnity benefits for his lost time while treating for the injury…." Id. Nonetheless, we found preclusion appropriate, given that we were "not persuaded that the respondents were prejudiced because they were somehow impeded in their ability to respond to and investigate the Form 30C later filed by the claimant." Id. We also noted that in Dubrosky, supra, the respondents, within one year of the filing of the claimant's notice of claim, proffered a voluntary agreement accepting the claim as compensable. This voluntary agreement was critical in ascertaining whether the motion to preclude should be granted or, in the alternative, the respondents could contest the claim on the issue of the claimant's extent of disability as delineated in Adzima v. UAC/Norden Division, 177 Conn. 107 (1979).

A review of this tribunal's decisions in which we found persuasive the "safe harbor" of Adzima when challenging the extent of disability after a motion to preclude has been filed indicates that in those cases, the respondents, either through documentation or through their conduct, had accepted the compensability of the underlying claim.

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We can point to a number of other cases in which the respondents, either through documentation or through conduct, accepted the compensability of a claim and preserved the "safe harbor" despite an untimely disclaimer. See Bradford v. Griffin Health Services Corp., 5878 CRB-4-13-9 (March 23, 2017), *appeal withdrawn*, A.C. 40330 (February 1, 2018); Shymidt v. Eagle Concrete, LLC, 6018 CRB-7-15-6 (May 4, 2016); Grzeszczyk v. Stanley Works, 5975 CRB-6-14-12 (December 9, 2015), *appeal withdrawn,* A.C. 38743 (June 15, 2016); Quinones v. RW Thompson Company, Inc., 5953 CRB-6-14-7 (July 29, 2015), *appeal pending,* A.C. 38256 (August 19, 2015); and Williams v. Brightview Nursing & Retirement, 5854 CRB-6-13-6 (June 12, 2014). In the present matter, the respondents argue that they were confronted with the same "impossibility" defense as the respondent faced in Dubrosky, supra, given that the claimant neither presented any medical bills for payment within twenty-eight days of filing his claim nor demanded any indemnity benefits. The respondents' contention is correct, and the cases are congruent on that point.

The point at which the two cases diverge, however, involves an action which was not impossible for the respondents in the present matter to take: to provide some sort of representation that they had accepted the compensability of the incident described in the claimant's Form 30C. The respondents in Dubrosky did do this; however, in the present matter, the respondents filed a Form 43 explicitly challenging the causation of the claimant's injury. In prior cases that have come before this tribunal, we have held that when a respondent files an untimely disclaimer and fails to accept compensability of the injury, the respondent is fully precluded from defending the claim. Mott v. KMC Music, Inc., 6025 CRB-1-15-8 (August 23, 2016), and Pringle v. National Lumber, Inc., 5912 CRB-3-14-1 (December 31, 2014), *appeal withdrawn*, A.C. 37682 (March 30, 2016), are examples of cases in which a respondent's failure to accept the claim led to full preclusion.

Dominguez, supra.

In the present matter, the respondents have neither advanced an argument nor proffered any evidence establishing that within one year of the filing of form 30C, they, either through documentation or course of conduct, accepted the compensability of the underlying claim. As we explained in Dominguez, supra, cases such as Mott, supra, and Pringle, supra, stand for the proposition that this lack of response causes the Adzima "safe harbor" to lapse.[7] Given that we are unable to distinguish this matter from Dominguez on either the facts or the law, we therefore reach the same result. The respondents are fully precluded from defending the claim.

Accordingly, the May 6, 2016 Ruling re: Motion to Preclude of Daniel E. Dilzer, the Commissioner acting for the Sixth District, is affirmed.

Commission Chairman Stephen M. Morelli and Commissioner Jodi Murray Gregg concur in this opinion.

[7] We affirm the trial commissioner's denial of the respondents' motion to correct. This motion sought to interpose the respondents' conclusions relative to the law and the relevance of the facts presented; as such, the trial commissioner retained the discretion to deny these corrections. See D'Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003); 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); Liano v. Bridgeport, 4934 CRB-4-05-4 (April 13, 2006).