

CASE NO. 6169 CRB-2-17-1  
CLAIM NO. 200189827

: COMPENSATION REVIEW BOARD

ROCKO MAGISTRI  
CLAIMANT-APPELLANT  
CROSS-APPELLEE

: WORKERS' COMPENSATION  
COMMISSION

v.

: JANUARY 9, 2018

NEW ENGLAND FITNESS  
DISTRIBUTORS, INC.  
EMPLOYER

and

TECHNOLOGY INSURANCE COMPANY  
INSURER  
RESPONDENTS-APPELLEES  
CROSS-APPELLANTS

APPEARANCES:

The claimant was represented by Mark Merrow, Esq., Law Offices of Mark Merrow, L.L.C., 760 Saybrook Road, Middletown, CT 06457.

The respondents were represented by David C. Davis, Esq., McGann, Bartlett & Brown, L.L.C., 111 Founders Plaza, Suite 1201, East Hartford, CT 06108.

This Petition for Review from the December 28, 2016 Finding & Award of Daniel E. Dilzer, the Commissioner acting for the Second District, was heard June 30, 2017 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Christine L. Engel and Randy L. Cohen.<sup>1</sup>

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<sup>1</sup> We note that Motions for Extension of Time were granted during the pendency of this appeal.

# OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. Both the claimant and the respondents in this matter have appealed a Finding & Award issued on December 28, 2016 [hereinafter “December Finding”] by the trial commissioner acting for the Second District. The respondents argue that this decision should have been barred by collateral estoppel, given that the issues of the claimant’s compensation rate and the duration of the claimant’s disability were noticed for the formal hearing that resulted in a March 24, 2016 Finding & Award [hereinafter “March Finding”] which did not address the relief due to the claimant. See Magistri v. New England Fitness Distributors, 6089 CRB-2-16-4 (May 10, 2017). The claimant, on the other hand, demands that the Workers’ Compensation Commission [hereinafter “Commission”] award attorney’s fees and interest as a result of the respondents’ failure to pay benefits subsequent to the March Finding. We find neither appeal meritorious; the trial commissioner clearly had the power to bifurcate the proceedings, address the issue of compensability separately, and then address the specifics of the compensation due to the claimant at a subsequent hearing.

The trial commissioner reached the following factual findings in his December Finding. The issues for determination were: (1) whether the claimant was totally disabled subsequent to his compensable car accident and, if so, the duration of his disability; (2) whether the medical care the claimant received was reasonable and necessary; and (3) whether sanctions against the respondents were warranted. The trial commissioner incorporated by agreement the testimony and exhibits for the December 16, 2015 formal hearing that led to the March Finding. The respondents

conceded that enough evidence was introduced into the record at the December 16, 2015 formal hearing to calculate the claimant's compensation rate and periods of lost time. In addition, they stated that "[i]t's also pretty clear to calculate what the medical treatment was and what the medical bills are." December Finding, ¶ 8. The trial commissioner noted that the claimant was taken by Ambulance Service of Manchester, L.L.C., from the accident scene and treated at Johnson Memorial Hospital on July 13, 2015. Subsequent treatment occurred at Concentra and with David M. Kruger, M.D., of Greater Hartford Orthopedic Group, P.C. An MRI was performed by Radiology Associates of Hartford, P.C., and reviewed by Michael T. Twohig, M.D. The trial commissioner deemed all this treatment reasonable and necessary.

The trial commissioner found the claimant had sustained a fracture of the L2 vertebrae in his compensable motor vehicle accident. He further concluded the claimant was temporarily totally disabled from July 13, 2015, the date of the accident, through October 11, 2015. The trial commissioner also determined that based on the claimant's earnings over the preceding fifty-two weeks, his weekly compensation rate was \$792.08. On the basis of these subordinate facts, the trial commissioner ordered the respondents to pay for the claimant's medical treatment and to pay the claimant total disability benefits for the period of July 13, 2015 through October 11, 2015 at the aforementioned weekly compensation rate. The trial commissioner denied the claimant's bid to find the respondents had unreasonably delayed payments under the totality of the circumstances, particularly as the claimant did not file a Motion to Correct the March Finding, thereby depriving the trial commissioner of the jurisdiction to modify or amend the relief

awarded at that time. The commissioner also determined that in light of totality of the circumstances, attorney's fees to the claimant were not warranted.

Both the claimant and the respondents filed timely Motions to Correct the December Finding. The respondents' motion sought to vacate the relief ordered by the December Finding, suggesting that because the March Finding had allegedly "previously litigated" these issues, the trial commissioner now lacked subject matter jurisdiction. January 6, 2017 Respondents' Motion to Correct. The claimant's motion argued that the December Finding should be modified to find the respondents had unreasonably contested the issues of total incapacity benefits and medical treatment. The claimant's motion also sought to add findings that the claimant was not obligated to file a Motion to Correct subsequent to the March decision and the claimant was entitled to attorney's fees in the sum of \$3,450. The trial commissioner denied both motions in their entirety. Both parties have filed timely Petitions for Review from the December Finding, although only the claimant has submitted Reasons of Appeal. We find no legal error in the December Finding.

In considering this appeal, we note that in this case, the facts are not in dispute, and the general deference to fact-finding promulgated in Fair v. People's Savings Bank, 207 Conn. 535 (1988) does not apply. Nonetheless, we still extend great deference to the findings of a trial commissioner. "As 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." Daniels v. Alander, 268 Conn. 320, 330 (2004), *quoting* Burton v. Mottolese, 267 Conn. 1, 54 (2003). We may reverse a decision under these circumstances only if it is contrary

to law. See Neville v. Baran Institute of Technology, 5383 CRB-8-08-10 (September 24, 2009) and Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

The genesis of both parties' grievances in this matter was the decision of the trial commissioner to bifurcate the issues and to rule solely on compensability in the March Finding. As such, this decision meant that the trial commissioner made no findings regarding the benefits due to the claimant. The gravamen of the respondents' Motion to Correct is based on an absurd application of the law; i.e., the trial commissioner can determine that an injury is compensable and then decide never to rule on the benefits to which the claimant is entitled. The respondents' argument also would directly contravene the reasoning in Cormican v. McMahon, 102 Conn. 234 (1925), wherein our Supreme Court held that "[n]o case under this Act should be finally determined when the trial court, or this court, is of the opinion that, through inadvertence, or otherwise, the facts have not been sufficiently found to render a just judgment." *Id.*, 238.

The respondents' invocation of "collateral estoppel" as a basis to deny the claimant relief is also bereft of any merit, considering that this doctrine requires that an issue actually be litigated and decided in a prior proceeding. See Cumberland Farms, Inc. v. Groton, 262 Conn. 45 (2002); Crochiere v. Board of Education, 227 Conn. 333 (1993); and Larocque v. Electric Boat Corporation, 5942 CRB-2-14-6 (July 2, 2015), n.3. In actuality, the fact that the issue of the claimant's entitlement to benefits was *not* determined in the March Finding meant it *could* be determined in a future hearing and, pursuant to Cormican, *supra*, indeed *had* to be determined. The absence of a prior

decision on the issue of benefits due to the claimant is an absolute bar to raising the doctrine of collateral estoppel to prevent this determination.

We also find the claimant's Motion to Correct and subsequent appeal to be without merit. The claimant contends that pursuant to Palm v. Yale University, 3923 CRB-3-98-10 (January 7, 2000), he was not obligated to file a Motion to Correct the March Finding. This argument is correct. If the trial commissioner had clearly limited the issues under consideration at that hearing, the claimant was not obligated to force the commissioner to consider other issues. However, this bifurcation is a two-way street and therefore bars the relief the claimant is seeking. If the commissioner did not award benefits pursuant to the March Finding, we cannot ascertain how a "factual predicate" could exist to sanction the respondents for not paying the award at that time.<sup>2</sup> McFarland v. Dept. of Developmental Services, 115 Conn. App. 306, 323 (2009). In the absence of a factual predicate, a sanction cannot be imposed.<sup>3</sup>

In any event, this board has frequently pointed out that the decision relative to whether to sanction a respondent for undue delay or unreasonable contest is vested in the discretion of the trial commissioner. See Kuhar v. Frank Mercede & Sons, Inc., 5250 CRB-7-07-7 (July 11, 2008); McMullen v. Haynes Construction Co., 3657 CRB-5-97-7 (November 12, 1998), *appeal withdrawn*, A.C. 19088 (February 19, 1999). The trial

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<sup>2</sup> The claimant argues that at the time the March Finding was issued, sufficient information had been presented to enable the respondents to calculate a compensation rate and determine the time period for which benefits were due. He presents no authority that, in the absence of an award by the trial commissioner or a Voluntary Agreement or stipulation between the parties, the respondents were legally obligated to commence payment at that point in time. While the claimant may have believed the orders in the March Finding were sufficiently specific to obligate the respondents to commence the payment of benefits, the trial commissioner apparently determined they were not. We do not find this decision was arbitrary or capricious.

<sup>3</sup> We note that in Bergin v. Dept. of Correction, 75 Conn. App. 591 (2003), *cert. denied*, 264 Conn. 903 (2003), our Appellate Court held that a plaintiff who did not receive relief in a decision from a trial commissioner could have decided either "to file a motion to correct the commissioner's findings *or* to file a direct appeal from the commissioner's dismissal of the claim for benefits." (Emphasis added.) *Id.*, 600.

commissioner's decision not to award sanctions in this case did not rise to the level "so ... as to vitiate logic" and, thus, must stand on appeal. Kuhar, *supra*, *quoting In re Shaquanna M.*, 61 Conn. App. 592, 603 (2001).

As noted, it appears that neither party in this case was satisfied by the decision of the trial commissioner to bifurcate the question of compensability and entitlement to benefits into separate hearings. Nonetheless, the trial commissioner had the right to reach this decision and it was not an error of law. We dealt with this issue at length in Martinez-McCord v. State/Judicial Branch, 5055 CRB-7-06-2 (February 1, 2007), and determined that the "[b]ifurcation of trial proceedings lies solely within the discretion of the trial court...; and appellate review is limited to a determination of whether this discretion has been abused." (Internal citations omitted.) Swenson v. Sawoska, 18 Conn. App. 597, 601 (1989).

In Martinez-McCord, *supra*, the claimant appealed, arguing that the record at the conclusion of the formal hearing was sufficient for the trial commissioner to award her benefits for psychic injuries, and we affirmed the trial commissioner's decision to hold additional hearings on the issue. Although the trial commissioner in this case could have decided not to bifurcate the proceedings and address the benefits due to the claimant at the hearing that led to the March Finding, we do not believe that, as a matter of law, he was obligated to do so.<sup>4</sup> Since the trial commissioner had the right to postpone to a

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<sup>4</sup> As we pointed out in Martinez-McCord v. State/Judicial Branch, 5055 CRB-7-06-2 (February 1, 2007), the test for whether a trier of fact is obligated to provide relief at the conclusion of a hearing, as opposed to bifurcating the proceedings, is whether the moving party establishes a "clear legal right to have the duty performed...." Miles v. Foley, 54 Conn. App. 645, 653 (1999), *aff'd*, 253 Conn. 381 (2000), *quoting Golab v. New Britain*, 205 Conn. 17, 20 (1987). The record in this instance does not establish that the trial commissioner had such a duty to issue an award.

subsequent hearing the determination of benefits due to the claimant, neither party's argument in this appeal is persuasive.

We affirm the Finding & Award.

Commissioners Christine L. Engel and Randy L. Cohen concur in this opinion.

**CERTIFICATION**

**THIS IS TO CERTIFY THAT** a copy of the foregoing was mailed this 9<sup>th</sup> day of January 2018 to the following parties:

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