CASE NO. 6210 CRB-7-17-8 CLAIM NO. 700177636	: COMPENSATION REVIEW BOARD
JOSEPH F. DOMINGUEZ CLAIMANT-APPELLANT	: WORKERS' COMPENSATION COMMISSION
v.	: AUGUST 28, 2018

NEW YORK SPORTS CLUB
EMPLOYER

and

NATIONWIDE MUTUAL INSURANCE COMPANY
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by John J. Morgan, Esq., Barr & Morgan, 84 West Park Place, Third Floor, Stamford, CT 06901.

The respondents were represented by James T. Baldwin, Esq., Coles, Baldwin, Kaiser & Creager, L.L.C., One Eliot Place, 3rd Floor, Fairfield, CT 06824.

This Petition for Review from the July 25, 2017 Finding and Order of Christine L. Engel, the Commissioner acting for the Seventh District, was heard February 23, 2018 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Scott A. Barton and Jodi Murray Gregg.[1]

[1] We note that a motion for extension of time was granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has appealed from a Finding and Order issued by Commissioner Christine L. Engel which granted, in part, a motion to preclude filed against the respondents subsequent to the claimant commencing a claim for benefits. The effect of the trial commissioner's decision was to permit the respondents to contest the claimant's extent of disability at the formal hearing. The claimant argues that under the facts of this case, the trial commissioner erred in applying our Appellate Court's analysis in Dubrosky v. Boehringer Ingelheim Corp., 145 Conn. App. 261 (2013), *cert. denied*, 310 Conn. 935 (2013). The claimant contends that our Supreme Court's analysis in Donahue v. Veridiem, Inc., 291 Conn. 537 (2009), and Harpaz v. Laidlaw Transit, Inc., 286 Conn. 102 (2008), supports granting the motion to preclude in full.

After reviewing the matter, we believe that Dubrosky can be distinguished on its facts, and we are not willing to extend the "safe harbor" provision pursuant to 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 written documentation or a course of conduct.[2] Accordingly, we vacate those findings in the trial commissioner's

[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-

decision which limit the scope of the claimant's relief and direct that the claimant's motion to preclude be granted in full.

The trial commissioner reached the following factual findings in her Finding and Order. Based in part on a Joint Stipulation of Facts, she found that the claimant had executed and filed a Form 30C notifying the employer and the Workers' Compensation Commission [hereinafter "commission"] that he had suffered an injury to his left upper extremity with a date of injury of March 24, 2016. The commission received this notice on July 5, 2016, and the New York Sports Club received the notice on July 6, 2016. The commission received the claimant's motion to preclude on August 26, 2016. The motion to preclude states that as of the date the motion was signed, August 23, 2016, the respondents had failed to file a responsive Form 43. The respondents drafted a Form 43 dated September 16, 2016, which was received at the commission's seventh district office on September 19, 2016. The Form 43 read as follows:

> Alleged injury did not arise out of or in course of employment; no medical records supporting compensability presented to employer and no request for medical or indemnity benefits presented to employer for payment to date.

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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."

Joint Exhibit C.

The trial commissioner noted that the respondents cited Dubrosky, supra, as well as Negron v. CVS Caremark Corporation, 5870 CRB-4-13-8 (July 17, 2014), *appeal withdrawn*, A.C. 37062 (December 21, 2015), in support of their position. The respondents also point out that the claimant did not request indemnity benefits or the payment of medical bills. Therefore, they believe they cannot be precluded from contesting the claim after the twenty-eight (28) days prescribed by General Statutes § 31-294c (b). The claimant, on the other hand, argues that there is a critical difference between his claim and the factual scenario in Dubrosky, in which the respondent accepted the underlying claim but sought to reserve its right to contest the extent of the disability.

The trial commissioner cited various portions of the Dubrosky decision in her Finding and Order and also cited the provisions of the statute. She reached the following conclusions:

A. The Joint Stipulation of Facts comports with the documents filed in the Seventh District, accurately describes the chronology of events and is persuasive.

B. The Claimant presented no medical bills, nor did he request payments for indemnity benefits, within the twenty-eight (28) day period, thereby preventing the Respondents from complying with the provisions of C.G.S. § 31-294c (b).

C. The Respondents did not file a Form 43 denying the claim for compensation benefits within the twenty-eight (28) day time period of C.G.S. § 31-294c (b).

D. The Appellate Court decision in Dubrosky v. Boeringer Ingelheim, although it deals with an accepted work injury and this claim deals with a wholly denied injury, applies to this situation.

E. The Respondents' Form 43 was filed too late to contest the compensability of the Claimant's claim, but due to its

> inability to pay indemnity benefits or medical payments the Respondents' Form 43 is not too late to contest the extent of disability should the circumstances allow such a contest.

July 25, 2017 Finding and Order.

The trial commissioner granted the motion to preclude in part, ordering the respondents to accept the underlying injury but allowing them to contest the extent of disability. The claimant did not file a motion to correct but did file a timely appeal. He argues that the trial commissioner erred in failing to grant the motion to preclude in its entirety. The respondents contend that the trial commissioner's decision comports with Dubrosky, supra, and should be affirmed. We are persuaded that the claimant's position is more consistent with appellate precedent concerning preclusion, in part because we are skeptical that the respondents' conduct in this matter constituted a "good faith" contest which was limited to challenging the extent of the claimant's disability. In evaluating a disclaimer in a claim for benefits, our first analysis must be to examine what the disclaimer actually disclaims. In their Form 43, the respondents contested whether the claimant had sustained *any* injury in the course of employment, *not* the extent of that injury. See Joint Exhibit C.

In our inquiry, we note that the facts in this matter are not in dispute because the parties submitted a Joint Stipulation of Facts. Therefore, we are not bound by our customary deference to the fact-finding prerogative of the trial commissioner. See Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Rather, the present matter constitutes a case of legal interpretation in which our deference to a trial commissioner "can be challenged by the argument that the trial commissioner did not properly apply the law…." Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19,

2007). Therefore, we must ascertain if the Finding and Order comports with Dubrosky, supra, and other subsequent appellate cases involving preclusion.

Prior to Dubrosky, our Supreme Court, in Donahue, supra, considered a scenario very similar to the case at bar. In that matter, the claimant alleged that she had sustained a workplace injury but presented scant medical documentation in support of her claim, even at the formal hearing. The respondents filed an untimely Form 43 and then challenged the claimant's evidence relative to causation at the formal hearing. Although the claimant had obtained some additional medical evidence regarding causation, the trial commissioner was not persuaded.

> The commissioner concluded that the motion to preclude should be granted and, therefore, that the plaintiff's January 17, 2002 back claim was compensable. The commissioner concluded, however, that the plaintiff's claim for reimbursement of medical bills and for permanent partial disability benefits should be denied.

Id., 542-543.

The claimant appealed, arguing that once the motion to preclude had been granted, the respondents should have been barred from challenging her evidence. While this tribunal did not agree with that argument, see Donahue v. Veridiem, Inc., 5074 CRB-6-06-3 (March 28, 2007), *rev'd,* 291 Conn. 537 (2009), the Supreme Court did accept the claimant's contention and reversed our decision. The court noted that prior case law had interpreted General Statutes § 31-294c (b) (and its predecessor statutes) as having created a "conclusive presumption" in favor of the claimant once preclusion has been granted. Donahue, supra, 548. The Supreme Court concluded that this presumption barred respondents from challenging the claimant's evidence.

> To read preclusion to allow the employer to cross-examine witnesses and to submit written argument in opposition to the plaintiff's claim would translate, essentially and simply, to a

> sanction barring the employer from introducing its own expert witness. An employer could do much to avoid the sting of such a limited sanction, however, by hiring a medical expert to prepare his counsel to ask the appropriate medical questions on cross-examination to discredit the plaintiff or her expert. Such a result hardly would comport with the board's own description of preclusion as a "harsh remedy."

Id., 550.

Subsequent to Donahue, several appellate cases addressed circumstances in which a respondent filed an untimely disclaimer to a notice of claim but posited an explanation for the delay. These decisions applied the long-standing holding of Adzima v. UAC/Norden Division, 177 Conn. 107 (1979), under which respondents retain a "safe harbor" to contest the extent of disability arising from an injury deemed compensable due to preclusion. We have reviewed these decisions and note that we generally upheld such claims when it was clear that the respondents had accepted the compensability of the underlying injury. For example, in Dubrosky, supra, the trial commissioner found that "the respondent had accepted the claim although no voluntary agreement had been issued as of the close of the record." Dubrosky v. Boehringer Ingelheim Corporation, 5682 CRB-4-11-9 (September 5, 2012), *rev'd*, 145 Conn. App. 261 (2013), *cert. denied*, 310 Conn. 935 (2013). See also Dubrosky, supra, 266. Therefore, although the respondent in the present matter focuses on the similarities between this case and Dubrosky, the two cases can be factually distinguished.

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. The respondents in the present matter contend that Negron, supra, is supportive of the trial

commissioner's decision. However, we note that Negron is factually quite dissimilar from the case at bar, given that in Negron, the respondent filed a "pre-emptive disclaimer" prior to the filing of the Form 30C in accordance with Lamar v. Boehringer Ingelheim Corp., 5588 CRB-7-10-9 (August 25, 2011), *aff'd*, 138 Conn. App. 826 (2012), *cert. denied*, 307 Conn. 943 (2012). The Negron respondent advanced payment for medical treatment to the claimant prior to filing a disclaimer, and the trial commissioner found that the medical payments "were consistent and substantial and constituted an affirmative response to the claim." Negron, supra. Moreover, "[t]he respondent had contested the extent of disability and had not raised any challenge to compensability." Id. Hence, we find Negron factually distinguishable.

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.

In Mott, supra, the respondents failed to provide a disclaimer within one year of the notice of the claim and did not proffer a voluntary agreement until after the "safe harbor" period had lapsed. The trial commissioner determined that preclusion was appropriate and we affirmed that decision. Although this tribunal has "held that when a respondent proffers a voluntary agreement within one year of the initial notice of claim … this evinces acceptance of the claim and preserves the respondents' 'safe harbor' against preclusion," that was not the case in Mott. Id. Rather, we reviewed our reasoning in Quinones, supra, and held that:

> The impact of Quinones is that in the absence of filing a voluntary agreement within one year of the filing of a notice of claim, the

> respondent must persuade the trial commissioner that the claimant knew or should have known by virtue of some other means that the claim had been accepted.

Mott, supra.

Having determined that the respondents' conduct did not demonstrate acceptance of the claim within the "safe harbor" period of one year, we concluded that "the respondents cannot point to any 'impossibility' to providing documented acceptance of this claim within one year of the Form 30C having been filed, therefore we are not persuaded that Dubrosky, supra, mandates that we reverse the trial commissioner's decision." Id.

A somewhat similar scenario presented itself in Pringle, supra, wherein the trial commissioner, after considering the issue on remand, decided that the respondents had not responded to the claim in a manner which preserved their "safe harbor" and therefore granted a motion for preclusion. We affirmed this decision. In Pringle, the trial commissioner found that the respondents had never filed a Form 43, made any payments to the claimant, or authorized any medical treatment within twenty-eight days of the notice of claim. The trial commissioner did not find any "impossibility." As for accepting the claim,

> the trial commissioner did not identify any documentation offered to the claimant (such as a Form 43, a voluntary agreement or any other written communication) where he would have been advised the respondents accepted the injury. This clearly places a greater burden on the respondents to identify a course of conduct on their part that would constitute "acceptance" of the injury.

Id.

After examining our prior analysis in Negron, supra, and Williams, supra, we found that Pringle was dissimilar because the claimant in Pringle had experienced a loss

of income and was never advised regarding the nature of the contest. Given that the respondents' conduct did not allow for the inference that the claim had been accepted, we denied their request to apply Adzima, supra, stating that "we are unwilling to extend the holding of that case to a claim where the trial commissioner did not reach the factual finding that the respondents accepted compensability of the injury in a timely manner." Pringle, supra.

In the present matter, the respondents attempt to justify their conduct by claiming that they had "no knowledge of the nature and extent of that alleged injury…." Appellees' Brief, p. 7. Our review of the record leads us to question this assertion. The claimant filed a contemporaneous First Report of Injury, which document identified the locus of the injury as the claimant's workplace. See Joint Exhibit E, Respondents' Exhibit 1. Moreover, the claimant, in his deposition transcript, testified that he had missed time from work to undergo shoulder surgery and was terminated for unrelated reasons immediately upon his return. See Joint Exhibit E, pp. 30-31, 46-48. The claimant also testified that he texted his co-workers regarding the nature of his injury immediately after the incident. Id., 37, 44; see also Joint Exhibit E, Claimant's Exhibit 1.

Although it is true 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, we are 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. See Nalband v. Davidson Company, Inc., 4944 CRB-8-05-5 (May 19, 2006). We note that in Dubrosky, supra, the claimant was injured off-site and did not notify his employer until three days

later; in addition, he "did not immediately seek medical treatment and did not miss any time from work." Id., 264. As such, the respondents in Dubrosky objectively had even less reason to anticipate that a claim for benefits would be filed than the respondents in the instant matter.

In Dubrosky, the respondents ultimately accepted the injury. In the present case, the "four corners" of the Form 43 filed by the respondents constitute a denial of liability, given that the form states that the "[a]lleged injury did not arise out of or in course of employment." Joint Exhibit C. Although the Dubrosky court addressed at length the limitations of the Form 43 and the difficulties attendant upon using a Form 43 to interpose an "Adzima-style" defense, we take administrative notice that many respondents currently utilize the "Reason for Contest" box on the Form 43 to explain which elements of a claim they are contesting. See Dubrosky, supra, 273-275. In the present claim, the respondents contested the existence of a compensable injury; as such, although the Finding and Order purports to limit the respondents solely to challenging extent of disability, we are skeptical that at future formal hearings, the respondents, having expressly challenged liability in their disclaimer, will limit their defense in that manner.

It is our opinion that the case at bar is similar to other cases which have come before this tribunal in which the respondents advanced a disclaimer on the pretense of contesting jurisdiction and then argued that preclusion should applied. However, after we reviewed these disclaimers, it was apparent that the actual defense being raised by the respondents involved a challenge to causation. Geraldino v. Oxford Academy of Hair Design, 5840 CRB-5-13-5 (April 17, 2014), and Volta v. United Parcel Service, 5612

CRB-7-10-12 (January 31, 2012), represent two such matters in which we held that such an approach did not overcome preclusion. In the present matter, the claimant filed a jurisdictionally proper notice of claim and the respondents filed an untimely disclaimer denying liability. At no time did the respondents "cure" the fact that it was no longer legally possible to contest compensability by proffering a voluntary agreement or providing another form of evidence that they had accepted the claim. Under these circumstances, we believe the present matter is distinguishable from Dubrosky, supra, and the directive of Donahue, supra, compels us to reverse the trial commissioner.

We therefore vacate Conclusion, ¶¶ D and E, of the Finding and Order and direct that the respondents be precluded from presenting a defense in this matter. The claimant may proceed, subject to appropriate inquiry by the trial commissioner. See Cariello v. Home Health Care Services, Inc., 5959 CRB-8-14-9 (June 12, 2018).

Commissioners Scott A. Barton and Jodi Murray Gregg concur in this opinion.