CASE NO. 6226 CRB-8-17-10 : COMPENSATION REVIEW BOARD
CLAIM NOS. 800185446 & 800185111

JAMES M. HANKARD : WORKERS' COMPENSATION
CLAIMANT-APPELLEE COMMISSION

v. : OCTOBER 17, 2018

STATE OF CONNECTICUT
DIVISION OF CRIMINAL JUSTICE/
OFFICE OF THE CHIEF STATE'S
ATTORNEY
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLANT

and

GALLAGHER BASSETT SERVICES, INC.
ADMINISTRATOR

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 Lawrence G. Widem, Esq., Assistant Attorney General, Office of the Attorney General, P.O. Box 120, Hartford, CT 06141-0120.

This Petition for Review from the September 20, 2017 Findings and Orders of Peter C. Mlynarczyk, the Commissioner acting for the Eighth 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 a motion for extension of time was granted during the pendency of this appeal.

OPINION

SCOTT A. BARTON, COMMISSIONER: The respondent has appealed from Findings and Orders in which Commissioner Peter C. Mlynarczyk awarded the claimant permanent partial disability benefits as a result of a stroke which the commissioner deemed the sequelae of the claimant's compensable hypertension. The commissioner also determined that the respondent had unduly delayed completion of the hearing and levied sanctions against the respondent.[3] The respondent challenged the methodology behind the award of permanency benefits, claiming it was inconsistent with Safford v. Owens Brockway, 262 Conn. 526 (2003). The respondent also argued that the trial commissioner had committed error by refusing to admit a Respondent's Medical Examination [hereinafter "RME"] into evidence in derogation of General Statutes § 31-294f.[4]

The claimant contends that the expert witness credited by the trial commissioner offered an opinion on permanent disability which provided an evidentiary basis for

[3] Although the respondent originally included the issue of undue delay as one of its Reasons for Appeal, it did not brief this issue and, as a result, we deem it abandoned on appeal. See St. John v. Gradall Rental, 4846 CRB-3-04-8 (August 10, 2005), *appeal withdrawn*, A.C. 26883 (December 14, 2005). Regardless, unless the record is devoid of a factual predicate to support the award of sanctions, a trial commissioner is vested with the discretion to determine if sanctions are warranted. See McFarland v. Dept. of Developmental Services, 115 Conn. App. 306 (2009), *cert denied*, 293 Conn. 919 (2009); Kuhar v. Frank Mercede & Sons, Inc., 5250 CRB-7-07-7 (July 11, 2008).

[4] General Statutes § 31-294f (a) states: "An injured employee shall submit himself to examination by a reputable practicing physician or surgeon, at any time while claiming or receiving compensation, upon the reasonable request of the employer or at the direction of the commissioner. The examination shall be performed to determine the nature of the injury and the incapacity resulting from the injury. The physician or surgeon shall be selected by the employer from an approved list of physicians and surgeons prepared by the chairman of the Workers' Compensation Commission and shall be paid by the employer. At any examination requested by the employer or directed by the commissioner under this section, the injured employee shall be allowed to have in attendance any reputable practicing physician or surgeon that the employee obtains and pays for himself. The employee shall submit to all other physical examinations as required by this chapter. The refusal of an injured employee to submit himself to a reasonable examination under this section shall suspend his right to compensation during such refusal.
(b) All medical reports concerning any injury of an employee sustained in the course of his employment shall be furnished within thirty days after the completion of the reports, at the same time and in the same manner, to the employer and the employee or his attorney."

commissioner's decision to award the claimant a twenty-five (25) percent permanency rating to the brain. The claimant also argues that it was well within the commissioner's discretion to conclude that the respondent had delayed the RME beyond a reasonable time frame and, accordingly, to refuse to allow the RME into evidence. Upon review of the evidentiary record and the law, we find the claimant's position more persuasive. We therefore affirm the Findings and Orders.

The trial commissioner reached the following findings of fact at the conclusion of the formal hearing. He took administrative notice of a May 14, 2015 Finding and Award in which Commissioner David W. Schoolcraft found the claimant's hypertension compensable. He also took administrative notice of a May 6, 2016 Finding and Award in which the commissioner concluded that the claimant's compensable hypertension condition was a significant factor in causing the claimant's February 7, 2014 embolic stroke and the respondent employer was therefore liable for all compensation and medical care arising out of the stroke. In addition, the trial commissioner took administrative notice of a voluntary agreement approved on March 21, 2016, which established an average weekly wage for the claimant.[5]

At the formal hearing, the claimant testified that he began having symptoms of a stroke on February 5, 2014, and was unable to work from February 6, 2014, through February 23, 2014, because of the stroke. He was again unable to work on August 21, 2014, because of post-stroke symptoms. See March 23, 2017 Transcript, p. 37. The claimant indicated that after being totally disabled from work following the stroke, his treating physician, Isaac E. Silverman, M.D., allowed him to return to part-time work for

[5] In Findings, ¶ 3, the trial commissioner describes this document as a "Form 36." We deem this harmless scrivener's error. See Hernandez v. American Truck Rental, 5083 CRB-7-06-4 (April 19, 2007).

five hours per day beginning on February 24, 2014. Id. The claimant also testified regarding his out-of-pocket expenses and time lost from work in order to attend medical appointments. In addition, the claimant indicated that "[a]s a result of the stroke, he continues to experience mental confusion, forgetfulness, jumbled words, fatigue and weakness, loss of balance, speech difficulties, throat congestion, voice paralysis, left arm numbness, facial paralysis, and abnormal reflexes and weakness." Findings, ¶ 4.h. He has not received claimed temporary total benefits, temporary partial benefits, lost-time reimbursement, reimbursement for out-of-pocket expenses, or permanent partial disability benefits. Counsel for the respondent stipulated to the claimant's veracity regarding the issue of lost time.

The trial commissioner also considered the opinion of Dr. Silverman, who examined the claimant on September 6, 2016, and completed a Form 42 indicating that the claimant has a twenty-to-thirty (20-to-30) percent permanent impairment of the brain. Claimant's Exhibit E. At a deposition held on February 10, 2017, the doctor testified that he would be comfortable with a commissioner awarding a permanent impairment rating of twenty-five (25) percent. See Claimant's Exhibit F, p. 24. The commissioner noted that the respondent "had ample time to comply with the Finding and Award of May 6, 2016 but it has inexplicably failed to do so and failed to provide any reasonable excuse for having failed to comply." Findings, ¶ 8. The commissioner also noted that counsel for the claimant, who sought sanctions for undue delay, submitted an invoice documenting his hourly fees and time spent.

Based on this record, the commissioner concluded that the claimant was totally disabled during the period of February 6, 2014, through February 23, 2014, and again on

August 21, 2014, as a result of the embolic stroke suffered on February 7, 2014. The commissioner also concluded that the claimant was partially disabled as a result of the stroke for the period of February 24, 2014, through March 16, 2014, and lost fifteen hours a week during each of those three weeks. In addition, the commissioner determined that the claimant had lost three hours for medical treatment during the period from April 28, 2014, through July 5, 2014, and should be reimbursed for those hours at his hourly pay rate. The commissioner further concluded that the claimant had sustained a twenty-five (25) percent impairment to his brain, and the respondent's failure to pay the benefits ordered in the May 6, 2016 Finding and Award constituted undue delay. The commissioner also found that claimant's counsel had expended 19.1 hours of attorney time as a result of this delay. As a result, the commissioner ordered the respondent to pay benefits to the claimant as follows:

I. The Respondent shall pay the Claimant $3,116.41 for Temporary Total Disability Benefits owed.
II. The Respondent shall pay Temporary Partial Disability Benefits in the amount of $1,056.84.
III. The Respondent shall reimburse the Claimant $1,419.38 for lost time pursuant to C.G.S. Sec. 31-312.
IV. The Respondent shall pay the Claimant Permanent Partial Disability Benefits of $985.00 per week for 130 weeks commencing September 6, 2016, with interest thereon calculated in accordance with C.G.S. 31-295(c).[6]
V. The Respondent shall pay $4,775.00 in attorney's fees as a result of its undue delay of this claim.
VI. In accordance with C.G.S. Sec. 31-300, the Respondent shall also pay interest on Temporary Total and Temporary Partial Disability Benefits, commencing twenty (20) days from the May 6, 2016 Finding and Award.

Orders, ¶¶ I through VI.

[6] At the formal hearing held on October 10, 2017, the trial commissioner stated that it was "obvious under the law" that the claimant's permanency payments for his disability to the brain would need to be paid consecutively following the conclusion of the permanency payments for his disability to the heart. Transcript, p. 7.

Immediately after the issuance of the Findings and Orders, the respondent filed a "Respondent/Employer's Motion for Reconsideration/Motion for Clarification/Motion to Open Judgment" dated September 26, 2017, requesting that the trial commissioner vacate the Findings and Orders to allow the respondent more time to obtain an RME. The respondent predicated its argument on the grounds that the guidelines for RME's promulgated by the Workers' Compensation Commission [hereinafter "Commission"] are not statutorily mandated. The commissioner denied this motion on October 2, 2017. The respondent then filed a "Respondent/Employer's Motion to Open Judgment" dated October 5, 2017, contending that the provisions of General Statutes § 31-315 warranted opening the judgment, there had been a "stacking of PPD benefits," and the evidentiary record provided an inadequate basis for the award of permanent partial disability benefits to the brain. The trial commissioner denied this motion at a formal hearing held on October 10, 2017. On the same day that the commission received the motion to open the judgment, it also received the respondent's petition for review and, a few days later, its reasons of appeal.[7]

Prior to considering the merits of this appeal, we must consider a motion to dismiss filed by the claimant challenging the jurisdiction of this tribunal to consider this matter. He claims that the appeal, which was commenced via a petition for review dated October 17, 2017, and received by the Commission on October 18, 2017, was untimely pursuant to the provisions of General Statutes § 31-301 (a) and therefore did not confer

[7] Subsequent to filing this appeal, the respondent filed a motion to correct and a motion for articulation, both of which were denied in their entirety by the trial commissioner. The respondent has not appealed these denials. We would note, however, that the respondent's motion to correct essentially sought to interpose the respondent's conclusions relative to the law and the facts presented and, as such, the trial commissioner retained the discretion to deny this motion. 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).

jurisdiction upon the commission.[8] The claimant points out the appeal documents were filed more than twenty days after the issuance of the Findings and Orders, and points to this board's decision in Gonzalez v. Premier Limousine of Hartford, 5635 CRB-4-11-3 (April 17, 2012), for the proposition that only a post-judgment motion styled as a "motion to correct" can toll the appeal period contemplated by the provisions of General Statutes § 31-301 (a). As such, the claimant argues that because the respondent filed a different post-judgment motion within the twenty-day period following the issuance of the Findings and Orders, the appeal period expired prior to the filing of the petition for review.

We do not find this argument meritorious. This board did not address that issue in Gonzalez, and the claimant's interpretation is at odds with the "plain meaning" of General Statutes § 31-301 (a).[9] In Gonzalez, we held that a claimant who was clearly aggrieved by the original finding could not delay filing his appeal until the post-judgment motions filed by the respondent had been addressed. We stated that "[t]he claimant could have filed an appeal within twenty days of that decision or filed a post-judgment motion seeking to have the trial commissioner undo elements of the factual findings and/or alter the relief ordered. The claimant did neither." Id. See also Stec v. Raymark Industries, Inc., 299 Conn. 346 (2010).

[8] 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."

[9] General Statutes § 1-2z states: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

In addition, we concluded that if an aggrieved claimant did not act within the statutory time period following a trial commissioner's decision, he or she was barred from seeking appellate relief. In the present matter, the respondent did file timely post-judgment motions, but the claimant argues that the motions failed to toll the appeal period. The "plain meaning" of General Statutes § 31-301 (a) establishes that filing "a motion" within twenty days of the issuance of a finding serves to toll the appeal period to the Compensation Review Board until the trial commissioner acts on that motion. The statute does not articulate the specific information which must be included in such a motion. Given that the respondent in the case at bar filed post-judgment motions within the statutory twenty-day period and, once those motions were denied, filed a timely appeal to this tribunal within the statutory twenty-day period, we therefore have jurisdiction to consider this matter on the merits and accordingly deny the claimant's motion to dismiss.

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).

As mentioned previously herein, the respondent contends that the trial commissioner erroneously refused to allow into evidence an RME challenging the opinion of Dr. Silverman. Our review of the record indicates that at the formal hearing on March 23, 2017, respondent's counsel represented that Robert H. Berland, M.D., had conducted an RME on January 9, 2017. The claimant restated his standing objection that on October 5, 2016, Commissioner Schoolcraft had directed the respondent to initiate an RME within fifteen days and the respondent had not complied with that order. See March 23, 2017 Transcript, pp. 10-13. Respondent's counsel indicated that a series of "extenuating circumstances" had caused the delay in initiating and completing the RME and Dr. Berland was not scheduled to be deposed until April 27, 2017. Id., 13. The trial commissioner then asked respondent's counsel if he possessed any evidence which would demonstrate that the respondent had initiated an RME within fifteen days. Respondent's counsel indicated that he did not have any such evidence, and the trial commissioner sustained the claimant's objection to admitting the RME report.

The respondent contends that this decision was in error and deprived it of its due process rights. The respondent points to Bailey v. State, 65 Conn. App. 592 (2001), for the proposition that a respondent essentially has an unlimited right to present an RME prior to the adjudication of a formal hearing. "[A] commissioner must always protect the substantial rights of the parties [which] include the right of the employer … independently to examine the claimant, to notice his deposition, and to insist on hearing

his personal testimony at a formal hearing." (Internal quotation marks omitted.) Id., 604, *quoting* Pietraroria v. Northeast Utilities, 254 Conn. 60, 72 (2000). The respondent also challenges Commissioner Schoolcraft's decision to rely upon the Workers' Compensation Commission Payor/Provider Guidelines, promulgated via Chairman's Memorandum No. 2010-01, in issuing his October 5, 2016 Order.[10] Section I A. 6. c. of these guidelines directs respondents to schedule an RME within twelve calendar days of the receipt of medical reports. The respondent contends that such limitations are inconsistent with the express terms of General Statutes § 31-294f (a).

For his part, the claimant cites Briggs v. American Medical Response, 4302 CRB-3-00-9 (September 24, 2001), *appeal dismissed*, A.C. 22383 (January 31, 2002), for the proposition that when a trial commissioner determines that obtaining an RME has been delayed, a respondent may be denied the opportunity to present such evidence at a formal hearing. In Briggs, we remarked that a respondent cannot rely on the court's analysis in Bailey to "hold a case open indefinitely…." Id. We also observed that "[t]he appellants were not deprived of a meaningful opportunity to offer evidence pertaining to the primary issue in this case. The trier simply found, based on the nature of the evidence in question, that they did not act seasonably in obtaining their revised opinion." Id. In the present matter, the respondent had not deposed its expert as of the date of the formal hearing, the claimant asserted he was prejudiced by the delay, and the trial commissioner found the claimant's position meritorious. It is well-settled that pursuant to General Statutes § 31-298, trial commissioners retain a great deal of discretion in managing the

[10] See Workers' Compensation Commission Chairman's Memorandum No. 2010-01 dated June 1, 2010 entitled: "Payor and Medical Provider Guidelines to Improve the Coordination of Medical Services ~ Effective July 1, 2010."

proceedings before them, particularly with regard to evidentiary issues.[11] See Valiante v. Burns Construction Company, 5393 CRB-4-08-11 (October 15, 2009). In order to reverse the trial commissioner's conclusion on this issue, we would need to determine that his decision constituted an abuse of discretion.[12]

Goulbourne v. State/Department of Correction, 5461 CRB-1-09-5 (May 12, 2010), *appeal withdrawn*, A.C. 32294 (June 30, 2011), informs us that no abuse of discretion occurred in the present matter. In Goulbourne, the trial commissioner refused to admit an RME report into evidence because the respondents had originally defended the claim solely on jurisdictional grounds and the case was subsequently found to be jurisdictionally valid. The respondents raised Bailey as precedent, and we distilled their argument as follows:

> The respondent argues in their brief that the Bailey precedent creates a virtually unlimited entitlement to demand that the claimant submit to a medical examination at any time of the respondent's choosing…. The Appellate Court in that decision determined the legislature meant to use the word "shall" to constitute a mandatory obligation on the claimant. The Bailey decision, which predated the enactment of § 1-2 z C.G.S.,

[11] General Statutes § 31-298 states: "Both parties may appear at any hearing, either in person or by attorney or other accredited representative, and no formal pleadings shall be required, beyond any informal notices that the commission approves. In all cases and hearings under the provisions of this chapter, the commissioner shall proceed, so far as possible, in accordance with the rules of equity. He shall not be bound by the ordinary common law or statutory rules of evidence or procedure, but shall make inquiry, through oral testimony, deposition testimony or written and printed records, in a manner that is best calculated to ascertain the substantial rights of the parties and carry out the provisions and intent of this chapter. No fees shall be charged to either party by the commissioner in connection with any hearing or other procedure, but the commissioner shall furnish at cost (1) certified copies of any testimony, award or other matter which may be of record in his office, and (2) duplicates of audio cassette recordings of any formal hearings. Witnesses subpoenaed by the commissioner shall be allowed the fees and traveling expenses that are allowed in civil actions, to be paid by the party in whose interest the witnesses are subpoenaed. When liability or extent of disability is contested by formal hearing before the commissioner, the claimant shall be entitled, if he prevails on final judgment, to payment for oral testimony or deposition testimony rendered on his behalf by a competent physician, surgeon or other medical provider, including the stenographic and videotape recording costs thereof, in connection with the claim, the commissioner to determine the reasonableness of such charges."

[12] We note that in Falkowski v. W. E. Bassett Company, 5711 CRB-4-11-12 (December 3, 2012), this tribunal affirmed the levy of sanctions against a claimant when the record indicated that claimant's counsel had delayed scheduling an RME.

> however, failed to consider the import of the presence of the word "reasonable" in the statute. (Internal citation omitted.)

Id.

In Goulbourne, this tribunal concluded that under the circumstances of that case, the trial commissioner reasonably decided not to admit the RME and to limit the respondents to the defense they had originally advanced.

> The record in this matter clearly indicates the respondent was given every opportunity in the 2006 proceedings to present medical evidence contesting the claimant's medical evidence supporting compensability. Their attorney, however, represented that he would only offer such evidence to contest the disability rating due the claimant were this claim found to be jurisdictionally proper. The trial commissioner specifically approved such evidence, but as we noted, approved it solely for that purpose. The respondent then did not object to such limitations on the use of such evidence, and indeed, did not provide it to the tribunal. This fact pattern creates what amounts to the "law of the case" that the respondent has declined to present such evidence on the record in a seasonable manner.

Id.

It is clear that Commissioner Schoolcraft's October 5, 2016 order anticipated that the respondent would move expeditiously to obtain an RME and complete discovery in this matter. Having failed to do so by the March 23, 2017 hearing, and having failed to proffer evidence of compliance with the guidelines promulgated by this Commission, Commissioner Mlynarczyk could reasonably find that the respondent had not obtained its RME within a reasonable time frame and, pursuant to General Statutes § 31-298, bar the RME from being introduced as evidence. The respondent was afforded the opportunity to obtain an RME but failed to exercise its right in a reasonable manner. We conclude that this decision did not constitute an abuse of discretion and therefore find no error.

We now turn to the claim of error relative to the trial commissioner's permanent partial disability award of twenty-five (25) percent predicated on the opinion of Dr. Silverman. The respondent, relying on our Supreme Court's analysis in Safford v. Owens Brockway, 262 Conn. 526 (2003), argues that the doctor originally opined that the claimant's disability was between twenty (20) and thirty (30) percent and it was therefore error for the trial commissioner to choose a specific number within that range. However, in Aylward v. Bristol/Board of Education, 5756 CRB-6-12-5 (May 15, 2013), *aff'd,* 153 Conn. App. 913 (2014) (per curiam), this tribunal reviewed the court's analysis in Safford, and we now conclude, having reviewed our analysis in Aylward and the evidentiary basis for the permanency rating, that Safford is not on point in the present matter.

In Safford, the trial commissioner "had three ratings of impairment to a scheduled body part from which to choose: Brown's 12 percent rating, Glass' 15 percent rating or Glass' 14 percent rating applying the American Medical Association guidelines to Brown's initial assessment." Id., 536. In the present case, we have a single medical witness who opined on the issue of permanency. Moreover, Dr. Silverman, at his February 10, 2017 deposition, testified that he would be comfortable with a trial commissioner's decision to award a twenty-five (25) percent rating. Claimant's Exhibit F, p. 24. As such, the evidentiary record contained a reference to a specific disability rating which the trial commissioner chose to adopt. In Aylward, we stated that "we are not allowed to speculate on what evidence the trier of fact finds persuasive and reliable in the absence of the commissioner identifying such evidence." Id. However, in the present matter, we can clearly identify the evidence found reliable by the commissioner. "We

have held that it is within the discretion of the trial commissioner to accept some, but not all, of a physician's opinion." Lopez v. Lowe's Home Improvement Center, 4922 CRB-6-05-3 (March 29, 2006). Given that the trial commissioner found Dr. Silverman's twenty-five (25) percent rating reliable, we are unable, as an appellate panel, to intercede in this determination.

The respondent's claims of error in this case essentially challenge the trial commissioner's discretionary rulings. Having determined that the evidentiary record provided a reasonable basis for the trial commissioner's conclusions regarding the permanent partial disability award and his refusal to accept the RME into evidence, we must affirm the Findings and Orders.

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