CASE NO. 6352 CRB-7-19-10 CLAIM NO. 700184316	:	COMPENSATION REVIEW BOARD
KELLY BEEL CLAIMANT-APPELLEE	:	WORKERS' COMPENSATION COMMISSION
v.	:	DECEMBER 16, 2020

ERNST & YOUNG, LLC
EMPLOYER

and

AMERICA CASUALTY
INSURANCE COMPANY
INSURER
RESPONDENTS-APPELLANTS

APPEARANCES: The claimant was represented by Scott Wilson Williams, Esq., Williams Law Firm, L.L.C., Two Enterprise Drive, Suite 412, Shelton, CT 06484.

The respondents were represented by Giovanna T. Giardina, Esq., Law Offices of Kathryn M. A. Young, 53 State Street, 5th Floor, Boston, MA 02109.

This Petition for Review from the September 26, 2019 Finding and Award of Preclusion by Brenda D. Jannotta, the Commissioner acting for the Seventh District, was heard April 24, 2020 before a Compensation Review Board panel consisting of Commission Chairman Stephen M. Morelli and Commissioners Randy L. Cohen and William J. Watson III.[1]

[1] During the pendency of this appeal and following oral argument, the parties requested that the matter be stayed so as to permit them to pursue alternative dispute resolution through mediation. Following the failure to effect resolution through mediation the parties requested that the board proceed with consideration of this matter.

OPINION

STEPHEN M. MORELLI, CHAIRMAN. The respondents have appealed from the September 26, 2019 Finding and Award of Preclusion (finding) issued by Commissioner Brenda D. Jannotta (commissioner) acting for the Seventh District. The issue before the commissioner was whether the preclusive effects of General Statutes § 31-294c (b) should be applied to the respondents. The respondents argue that although their form 43 disclaimer was an untimely response to the claimant's form 30C written notice of claim pursuant to the provisions of § 31-294c (b)[2], they should be allowed to contest the extent of the claimant's injuries.

[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. 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."

On appeal the respondents seek review of; (1) whether the commissioner erred in concluding that the claimant's written notice of claim was sufficient such that the respondents could properly investigate the claim and (2) whether the commissioner erred in concluding the respondents' actions in this matter did not permit them to be within the "safe harbor" from the effects of preclusion as expressed in Dubrosky v. Boehringer Ingelheim Corp., 145 Conn. App. 261, *cert. denied*, 310 Conn. 935 (2013).

We commence our review by noting the procedural posture of this appeal. The parties appeared before the commissioner at a formal hearing on April 4, 2019. At that hearing the parties stipulated to the following facts.

a. An employer/employee relationship existed on the claimed date of injury of May 17, 2018.

b. There was a compensable injury on May 17, 2018.

c. A Form 30C was received by the Worker's Compensation Commission on August 31, 2018.

d. A Form 30C was received by the employer on September 4, 2018.

e. The Claimant received, at no cost to her, short-term disability benefits from July 23, 2018 through December 20, 2018.

f. The Claimant underwent cervical spine surgery performed by Dr. Gitelman on September 20, 2018.

g. There was no request by the Claimant to CNA, the Workers' Compensation insurer, for indemnity or medical benefits through to at least October 5, 2018.

h. The Respondent submitted a Form 43 that was received by the Workers' Compensation Commission on October 5, 2018.

i. There is a question regarding whether the Form 30C contained the correct address of the location where the fall occurred on May 17, 2018.

j. CNA commenced payment of a wage benefit, advancing temporary total disability commencing on December 21, 2018 and continuing.

Findings, ¶¶ 6.a-j.

Additionally, the commissioner took administrative notice of the claimant's August 31, 2018 form 30C seeking benefits for a May 14, 2018 injury, administrative notice of the respondents form 43 received by the Workers' Compensation Commission on October 5, 2018[3] and administrative notice of a motion to preclude filed by the claimant on October 16, 2018.

The respondents filed a timely petition for review. However, the respondents did not file a motion to correct. Thus, our review is limited to the facts as found by the commissioner and whether there was error as a matter of law. See e.g.; Rosenfield v. Metals Selling Corp., 229 Conn. 771 (1994); Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

We first consider whether the commissioner's determination that the written notice of claim provided adequate notice to the respondents was error. We begin with this issue as our courts have been very clear that the preclusive provisions of § 31-294c (b) are not triggered without the claimant's substantial compliance with the notice

[3] The form 43 stated that the reason for contest was: "Respondents deny that claimant fell at parking garage at location of GCP Applied Technologies, Main Ave, in Norwalk, CT on or about 5/17/18. Respondents deny that claimant injured head, neck and back as a result of the alleged slip and fall on or about 5/17/18. Respondents reserve all rights pending further investigation."

provisions of the Workers' Compensation Act. As noted in Chase v. State, 45 Conn. App. 499, 503-04 (1997),

> [The statute] was enacted to require a prompt and thorough investigation of the employee's claim so as to yield a specific disclaimer of liability and to avoid unnecessary delay in the adjudication of workers' claims. As a result, *if the notice of claim is sufficient to allow the employer to make a timely investigation of the claim, it triggers the employer's obligation to file a disclaimer*. (Emphasis added.)

Id., 503-04, *quoting* Pereira v. State, 228 Conn. 535, 542 (1994), f.8 omitted.

As to the first issue, i.e., whether the claimant's form 30C was sufficient so as to enable a timely investigation of the claim, we affirm the commissioner's conclusion. The respondents argued the form 30C did not correctly apprise the respondents of the location of the alleged incident.[4] See Findings, ¶¶ 7-8. The commissioner concluded the respondents' ability to investigate the claim was not prejudiced by the address as stated in the form, deeming it a "minor defect." Findings, ¶ 10. She further found the form 30C was timely filed and was adequate notice to the respondents so as to enable them to investigate the claim and file a disclaimer. See Findings, ¶¶ 9, 11. We find no error.

The second issue presented for review is whether the commissioner erred in failing to find the respondents qualified for the "safe harbor" from the effects of preclusion permitted in Dubrosky v. Boehringer Ingelheim Corp., 145 Conn. App. 261, *cert. denied*, 310 Conn. 935 (2013).

Dubrosky held that where it was impossible for a respondent to commence payment of benefits within the statutory time under § 31-294c (b), the respondents could

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[4] The form 30C indicated that on May 17, 2018, the claimant slipped and fell at GCP Technologies, Main Avenue, Norwalk, CT. See form 30C for which the commissioner took administrative notice at the April 4, 2019 formal hearing.

not be precluded from contesting the extent of disability. The pertinent facts in Dubrosky were that there were no medical bills generated within the statutory time period after the filing of the written notice of claim for which it could render payment. Additionally, the claimant had not lost any time from work and therefore, it was impossible for the respondents to comply with that part of § 31-294c (b) permitting them to make compensation payments within the statutory period.

The respondents' contention in this matter is that they made payments to the claimant prior to the filing of the form 30C and those payments continued without interruption. They contend that the payments made should permit them to avail themselves of the Dubrosky exception to preclusion.

As the stipulated facts reflect, the payments that were made to the claimant for a period before the filing of the form 30C and for a period thereafter (from July 23, 2018 through December 20, 2018), were pursuant to a short-term disability policy. Payments made commencing December 21, 2018, were stipulated as "advancing temporary total disability benefits." Findings, ¶ 6.j. The respondents posit that these benefits should be considered as reflecting continuous payments and effectively preserve their right to contest the extent of disability. The respondents' argument might be accorded greater weight if the payments were ascribed to the claimant as payments of compensation pursuant to General Statutes § 31-275 (4).[5]

[5] General Statutes § 31-275 (4) states: "'Compensation' means benefits or payments mandated by the provisions of this chapter, including, but not limited to, indemnity, medical and surgical aid or hospital and nursing service required under section 31-294d and any type of payment for disability, whether for total or partial disability of a permanent or temporary nature, death benefit, funeral expense, payments made under the provisions of section 31-284b, 31-293a or 31-310, or any adjustment in benefits or payments required by this chapter."

As we noted above, the conclusions reached by the commissioner are based on the parties stipulation of facts. As to the payments made between July 23, 2018 and December 20, 2018 on the basis of a short term disability policy, the record is devoid of any evidence of communication to the claimant as to what those payments represented, i.e., whether they were payments of compensation as that term is defined in § 31-275 (4). We have held in previous opinions that payments made without a timely disclaimer and within a year of the filing of notice should provide some indication to the claimant that only the extent of disability remains contested. Cf: Grzeszczyk v. Stanley Works, 5975 CRB-6-14-12 (December 9, 2015), *appeal withdrawn*, A.C. 38743 (June 15, 2016) (respondents proffering of a voluntary agreement indicated the claim was accepted). See also Pagan v. Carey Wiping Materials, Inc., 5829 CRB-6-13-4 (March 28, 2014). Further in Lefevre v. TPC Associates, Inc., 6255 CRB-4-18-3 (March 26, 2019), *appeal withdrawn*, A.C. 42802 (April 22, 2019), this board held that payments made by the employer to a "GoFundMe" charitable solicitation set up for the claimant did not constitute the payment of compensation pursuant to § 31-275 (4) as the evidence did not support the respondent employer's claim.

Given the respondents strong reliance on Dubrosky v. Boehringer Ingelheim Corp., 145 Conn. App. 261, *cert. denied*, 310 Conn. 935 (2013), we think some further discussion of Dubrosky and why it is not dispositive of the matter on review is warranted. Indeed, there are certain factual similarities between Dubrosky and the matter on review. In Dubrosky, the respondents conceded that an injury occurred and that they only sought to contest the extent of the claimant's disability. As occurred in the present matter, that declaration was given at a formal hearing. See Findings, ¶ 6.b and id., 266. However,

our review of Dubrosky reflects that the contents of the form 43 filed differ significantly from the disclaimer filed in this matter.

The Dubrosky court noted that the untimely form 43 at issue there stated:

> The defendant's form 43 stated the following: "[The defendant] maintains that the current need for treatment and any periods of future disability are related to the underlying preexisting degenerative joint disease and not the work incident of 01/09/09. Ongoing treatment should be placed to group insurance. In addition; prior payment of medicals have been paid without prejudice. Carrier is seeking a medical authorization from the employee to collect all prior records."

Id., n.7.

The Dubrosky disclaimer appears to inform the claimant that the respondents were disputing the extent of the injury and not disputing that a compensable injury occurred. As that form 43 alludes, and as the Dubrosky court found, the respondents were presented with an invoice for medical treatment provided to the claimant and that invoice was paid by the respondents within seventeen days of receipt. Id., 265.

In the instant matter the respondents contend that despite the contents of their disclaimer, they evidenced "an intention to accept the claim" prior to the formal hearing. Unfortunately, the very thin record presented on review does not provide support for the respondents' claim. The record in the instant matter includes a transcript of the formal hearing held April 4, 2019. That transcript is a total sum of seven pages and is overarchingly concerned with the stipulated facts agreed to by the parties. There is no evidence that the respondents proffered a voluntary agreement nor does the record indicate that the respondents indicated prior to the formal hearing that they were limiting their dispute to the extent of disability.

The cases cited by the respondents where the actions of the respondents in providing benefits to the claimant were deemed sufficient to overcome a motion to preclude, were all cases where the respondents took some action providing benefits and/or protecting their right to defend in a manner consistent with caselaw. See Grzeszczyk v. Stanley Works, 5975 CRB-6-14-12 (December 9, 2015), *appeal withdrawn*, A.C. 38743 (June 15, 2016) (respondents proffered a voluntary agreement conceding compensability and paid for medical treatment); Negron v. CVS Caremark Corporation, 5870 CRB-4-13-8 (July 17, 2014), *appeal withdrawn*, A.C. 37062 (December 21, 2015) (respondents provided medical care and filed a pre-emptive disclaimer); Shymidt v. Eagle Concrete, LLC, 6018 CRB-7-15-6 (May 4, 2016) (respondents provided medical treatment and indemnity benefits prior to claimant's filing a form 30C); and Williams v. Brightview Nursing & Retirement, 5854 CRB-6-13-6 (June 12, 2014) (respondents paid for medical treatment).

We therefore affirm the September 26, 2019 Findings and Award of Preclusion by Brenda D. Jannotta, the Commissioner acting for the Seventh District.

Commissioners Randy L. Cohen and William J. Watson III concur in this Opinion.