CASE NO. 6435 CRB-6-21-7 CLAIM NO. 601036144	:	COMPENSATION REVIEW BOARD
BARBARA DAHLE CLAIMANT-APPELLANT	:	WORKERS' COMPENSATION COMMISSION
v.		APRIL 1, 2022
STOP & SHOP COMPANIES, INC. EMPLOYER SELF-INSURED		
and		
CHUBB INSURANCE AND RETAIL BUSINESS SERVICES, LLC INSURER RESPONDENTS-APPELLEES		
and		
SECOND INJURY FUND RESPONDENT-APPELLEE		

APPEARANCES:

The claimant-appellant appeared at oral argument before the board as a self-represented party. At the trial level the claimant-appellant was represented by Attorney Barbara Collins (November 26, 2003-May 11, 2010) and by Attorney Richard Bruno (May 11, 2010-March 22, 2013).

The respondents-appellees, Stop & Shop Companies, Inc., and Chubb Insurance and Retail Business Services, LLC, were represented by James P. Henke, Esq., Nuzzo & Roberts, LLC, One Town Center, Cheshire, CT 06410.

The respondent-appellee, Second Injury Fund, was represented by Francis C. Vignati, Jr., Esq., Assistant Attorney General, Office of the Attorney General, 165 Capitol Avenue, Suite 4000, Hartford, CT 06106-1668.

This Petition for Review from the June 24, 2021 Ruling on Motion to Reopen by Maureen E. Driscoll, the Administrative Law Judge acting for the Sixth District, was heard November 19, 2021 before a Compensation Review Board panel consisting of Administrative Law Judges Brenda D. Jannotta, Randy L. Cohen and Toni M. Fatone.[1]

OPINION

BRENDA D. JANNOTTA, ADMINISTRATIVE LAW JUDGE. The claimant has appealed from the June 24, 2021 ruling on her motion to re-open (hereinafter "motion to open") the June 4, 2008 decision issued by then Commissioner Ernie R. Walker (hereinafter "Walker Decision"). In his decision, Walker granted the claimant's request for General Statutes § 31-308a benefits but denied her request for additional medical treatment. The claimant appealed the June 4, 2008 decision to this board. In the June 5, 2009 decision of the Compensation Review Board, it was noted that multiple doctors had offered opinions regarding additional medical treatment. Since the trier acted within his discretion in assessing the credibility of the various medical opinions, his decision was affirmed. The claimant did not appeal the board's June 5, 2009 decision. After a formal hearing conducted on October 7, 2020, Maureen E. Driscoll, Administrative Law Judge for the Third District, denied the claimant's request to open the June 4, 2008 Finding and Award/Finding and Dismissal of Commissioner Walker and the claimant appealed to this tribunal. We find no error and accordingly affirm the decision of the judge.

[1] Effective October 1, 2021, the Connecticut Legislature directed that the phrase "Administrative Law Judge" be substituted when referencing a workers' compensation commissioner. See Public Acts 2021, No. 18, § 1.

The administrative law judge identified the only issue for determination at the October 7, 2020 formal hearing to be whether the motion to open the finding and award/finding and dismissal issued by Walker dated June 4, 2008 should be granted. In her reasons of appeal, the claimant contended that her request should have been granted because (1) unless a claim is settled on a full and final basis, the Workers' Compensation Commission has continuing jurisdiction; (2) there were mistakes in the documentation submitted into evidence at the June 3, 2008 formal hearing; (3) there have been changed conditions of fact; (4) her incapacity has increased; and (5) the Workers' Compensation Commission was careless and/or negligent in the handling of her claim. In their opposition to the opening of the June 4, 2008 decision, the respondents argued that (1) the June 5, 2009 decision by this board constituted a final judgment; (2) pursuant to Connecticut Practice Book § 17-4, the claimant was time barred from opening that decision because she did not do so within four months from the date of its issuance;[2] and (3) the claimant did not meet the requirements for the opening of the 2008 decision as set forth in General Statutes § 31-315.[3]

[2] Connecticut Practice Book § 17-4 (a) states that, "[u]nless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, any civil judgment or decree rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months succeeding the date on which notice was sent. The parties may waive the provisions of this subsection or otherwise submit to the jurisdiction of the court."

[3] General Statute § 31-315 states that, "[a]ny award of, or voluntary agreement concerning, compensation made under the provisions of this chapter or any transfer of liability for a claim to the Second Injury Fund under the provisions of section 31-349 shall be subject to modification in accordance with the procedure for original determination, upon the request of either party or, in the case of a transfer under section 31-349, upon request of the custodian of the Second Injury Fund, whenever it appears to the compensation commissioner, after notice and hearing thereon, that the incapacity of an injured employee has increased, decreased or ceased, or that the measure of dependence on account of which the compensation is paid has changed, or changed conditions of fact have arisen which necessitate a change of such agreement, award, or transfer in order properly to carry out the spirit of this chapter. The commissioner shall also have the same power to open and modify an award as any court of the state has to open and modify a judgment of such court. The compensation commissioner shall retain jurisdiction over claims for compensation, awards and voluntary agreements, for any proper action thereon, during the whole compensation period applicable to the injury in question."

After the close of the record, the administrative law judge took notice of the following chronology of awards, orders, rulings, and appeals that are pertinent to our review of this matter. The claimant sustained compensable injuries to her left hip and right shoulder on August 8, 2003, as set forth in jurisdictional voluntary agreements approved on January 18, 2005. During the June 3, 2008 formal hearing, and the subsequent appeal to this board, the claimant was represented by Attorney Barbara Collins. At the commencement of the June 3, 2008 formal hearing, the parties stipulated to compensable injuries to the left hip and right shoulder; that Scott Organ, an orthopedic surgeon, was the authorized treating physician; that Organ had rated the claimant with a 5 percent of the right shoulder on March 17, 2006; that the claimant was deemed to be at maximum medical improvement on September 5, 2006; and that the claimant's specific award equal to a 5 percent permanent impairment of the right shoulder had been paid in full. See June 3, 2008 Transcript, pp. 4-6. Following the June 3, 2008 formal hearing, Walker ordered the payment of § 31-308a benefits for 9.75 weeks at the claimant's base compensation rate of $381.21. Walker also denied the claimant's request for additional medical treatment based on Organ's opinion that additional treatment would be palliative and not curative. On January 7, 2014, the parties entered into a stipulation to date to resolve certain claims for total and partial disability benefits. In 2015, additional formal hearings were conducted before then Commissioner Stephen B. Delaney regarding the offset provisions of General Statutes § 31-307 (e) and its impact on benefits paid to the claimant following her 2014 shoulder surgery. Delaney's September 28, 2015 decision found that, although § 31-307 (e) had been repealed, the offset applied to the claimant's benefits due to the date of injury rule. The claimant appealed to this board, which

affirmed Delaney's decision. Thereafter, the claimant appealed to the Appellate Court, which also affirmed Delaney's decision. See Findings, ¶¶ 6, 7.A-B, 8, 9.A, 9.D, and 9.F. The court further held that "[t]he board properly determined that it did not have the authority to 'correct' findings from the 2008 commissioner's decision – a decision that had become final when the plaintiff did not appeal the 2009 board decision affirming the 2008 commissioner's decision . . . ." Dahle v. Stop & Shop Supermarket Co., 185 Conn. App. 71, 80 (2018), *cert. denied*, 330 Conn. 953 (2018). Also, see Finding, ¶ 9.H.

In addition to taking administrative notice of the aforementioned chronology, the administrative law judge found the following facts. During Organ's September 25, 2007 deposition, he testified that he had performed surgery on the claimant's elbow and there were no plans to do surgery on any of the claimant's other body parts. Organ further confirmed that the claimant was at maximum medical improvement from an orthopedic standpoint and had a 5 percent permanent impairment rating. The claimant eventually underwent surgery to her right shoulder on September 17, 2014, and was paid total disability benefits which were subject to a § 31-307 (e) offset. Since Delaney's 2015 decision, the claimant was authorized to be seen by various physicians and was paid for an increased permanent impairment of the right upper extremity. The claimant continued, however, to contend that she was entitled to total disability benefits between February 6, 2006 and September 17, 2014. In support of this allegation, the claimant presented a disability slip dated August 20, 2014, from Jeffrey Goldberg her primary care physician, in which he opined that the claimant had been disabled from all work due to her shoulder and hip problems since November of 2004. See Findings, ¶¶ 22-23, 26, and 29.

The claimant sought to open the June 4, 2008 decision to allow the introduction of new evidence that she believed should have been included in the record in 2008. The claimant also argued that the decision was flawed because the earlier rating was for the elbow and not the shoulder and that she did not reach maximum medical improvement for the shoulder until after her 2014 surgery. During her testimony at the October 7, 2020 formal hearing, the claimant could not articulate any fraud, misrepresentation, mutual mistake of fact, and/or accident involved in the 2008 decision. The claimant also acknowledged that she was represented by counsel at the time of the 2008 formal hearing. See Finding, ¶ 33.

Based on her review of the existing record, as well as the claimant's testimony and the multiple exhibits that she introduced at the October 7, 2020 formal hearing, the administrative law judge held that:

> The Walker Decision is a picture, a snapshot in time, if you will, showing the observer the historical facts and circumstances of this case as of the time the decision was rendered. The claimant's request to undo the Walker Decision as a steppingstone to prove her total disability claim is misplaced, and claimant's attempt to open the award is tantamount to a request to retry an issue lost on appeal. Claimant's request to open the award to submit additional evidence, some of which was available at the time of trial, and other portions of which did not exist until long after the decision was rendered, is without merit.

Conclusion, ¶ W.

Consequently, the administrative law judge held that the Walker Decision remained a valid decision and the law of the case.

In assessing the claimant's appeal, we will first review the respondents' argument regarding timeliness and the application of § 17-4 of the Connecticut Practice Book.[4]

[4] Connecticut Practice Book § 17-4(a) states that, "[u]nless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, any civil judgment or decree rendered in the Superior

The language of that section specifically states that the four-month deadline applies unless the tribunal has continuing jurisdiction. The Compensation Review Board has held that the commission retains continuing jurisdiction during the whole period applicable to the injury in question and that, absent a full and final settlement, the commission has jurisdiction over subsequent claims for benefits and/or treatment. See Bailey v. Stripling Auto Sales, Inc., 4516 CRB-2-02-4 (May 8, 2003). Regardless of the continuing jurisdiction of the Workers' Compensation Commission, however, this board has also recognized that,

> "The law aims to invest judicial transactions with the utmost permanency consistent with justice. . . . Public policy requires that a term be put to litigation and that judgments, as solemn records upon which valuable rights rest, should not lightly be disturbed or overthrown. . . . [T]he law has established appropriate proceedings to which a judgment party may always resort when he deems himself wronged by the court's decision. . . . If he omits or neglects to test the soundness of the judgment by these or other direct methods available for that purpose, he is in no position to urge its defective or erroneous character when it is pleaded or produced in evidence against him in subsequent proceedings. Unless it is entirely invalid and that fact is disclosed by an inspection of the record itself the judgment is invulnerable to indirect assaults upon it. (Internal quotation marks omitted.) Lampson Lumber Co. v. Hoer, 139 Conn. 294, 297-98, (93A.2d 143) (1952), quoting 1 A. Freeman, Judgments (5th Ed. 1925) § 305, pp. 602-603. (Emphasis ours.)"

Gerte v Logistec of CT, Inc., 4820 CRB-3-04-6 (June 24, 2005), dismissed for lack of final judgement, 283 Conn. 60 (2007) *quoting* In re Shamika F., 256 Conn. 383, 406-7 (2001).

It is also instructive to consider some of decisions of the appellate courts regarding final judgments. In Hunt v. Naugatuck, 273 Conn. 97 (2005), our Supreme Court held that "the [administrative law judge], in any given case, may issue multiple

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Court may not be opened or set aside unless a motion to open or set aside is filed within four months succeeding the date on which notice is sent. The parties may waive the provisions of this subsection or otherwise submit to the jurisdiction of the court."

findings and awards throughout the period of compensability, with each award fixing the claimant's benefits as of the formal hearing date on the basis of the claimant's then existing condition." Id., 104. Furthermore, in Hummel v. Marten Transport, Ltd., 282 Conn. 477, (2007), it was held that "General Statutes § 31-301a provides that, in the absence of an appeal, '[a]ny decision' of the board shall become final after the expiration of twenty days from the issuance of notice of the decision."[5] Id., 489-90. The rationale for this practice is that "allowing retroactive recalculations of awards in nonpending cases . . . would plunge the workers' compensation system into a state of paralytic uncertainty." Jones v. Redding, 296 Conn. 352, 374 (2010) *quoting* Marone v. Waterbury, 244 Conn. 1, 18-19 (1998).

Thus, while we acknowledge the positions of both parties, we believe that the four-month requirement is not determinative in all situations. It is more appropriate to review each claim on an individual basis, see Hummel, supra, 488, considering both the nature of the award or order (decision by an administrative law judge, voluntary agreements, form 36, etc.), the timeliness of the request to open, the facts of the case, as well as the reasons for the request.

With respect to the case at bar, the request to open is in reference to a 2008 decision rendered by a trial judge following the conclusion of formal hearing proceedings. The decision was appealed to this panel which affirmed the trial court decision. No appeal was taken to the appellate court. Consequently, as confirmed by the appellate court in 2018, the 2008 trial finding and order was a final decision not amenable

[5] General Statutes § 31-301a states that, "[a]ny decision of the Compensation Review Board, in the absence of an appeal therefrom, shall become final after a period of twenty days has expired from the issuance of notice of the rendition of the judgment or decision."

to being opened. Nevertheless, we will address some of the arguments set forth by the parties.

First, the claimant contends that there was a mutual mistake of fact in the issuance of the 2008 decision because the finding spoke to the right shoulder rather than the right elbow. She further notes that she was not at maximum medical improvement as demonstrated by her need for shoulder surgery in 2014. The courts have consistently held that,

> "[t]he kind of mistake that would justify the opening of a stipulated judgment . . . must be mutual; a unilateral mistake will not be sufficient to open the judgment." Magowan v. Magowan, 73 Conn. App. 733, 741(2003), *cert. denied*, 262 Conn. 934 (2003). The Appellate Court "has defined a mutual mistake as 'one that is common to both parties and effects a result that neither intended. . . .'" (Citation omitted; internal quotation marks omitted.) Regis v. Connecticut Real Estate Investors Balanced Fund, Inc., 28 Conn. App. 760, 765, *cert. denied,* 224 Conn. 907 (1992). Also, a ("mutual mistake exists where both parties are mutually mistaken about the same material fact.") Dainty Rubbish Service, Inc. v. Beacon Hill Assn., Inc., 32 Conn. App. 530, 537 (1993).

Rodriguez v. State, 76 Conn. App. 614, 624-625 (2003). In the current action, Organ testified that the claimant was at maximum medical improvement and that surgery for the shoulder was not anticipated. The fact that the claimant eventually had shoulder surgery six years later does not equate to a mutual mistake as to her condition in 2008. Illustrative of this conclusion is the decision of the Supreme Court of Errors of Connecticut in Wallace v. Lux Clock Co., 120 Conn. 280 (1935), wherein the claimant-widow's motion to re-open [open] the stipulation was denied despite the fact that it was erroneously based on a non-fatal diagnosis for her husband rather than her husband's actual carcinoma condition. See id., 285. The claimant's contentions, therefore, do not meet the definition of "mutual mistake of fact." Id., 285-86.

Second, the claimant contends that the 2008 decision should be opened due to a change in her condition. This argument, however, goes to the heart of the administrative law judge's statement regarding the decision being a mere snapshot in time. Unless a claim is settled on a full and final basis, an administrative law judge in the workers' compensation forum has continuing jurisdiction to address issues as they arise. In the matter at hand, this was clearly demonstrated by the claimant's ability to return to the forum and be authorized to undergo shoulder surgery in 2014, receive a period of total disability benefits following her surgery, and to be paid for an increase in the permanent impairment of her upper extremity. As noted above, though, the need for finality in judgments upon which either or both parties can rely does not equate to such changes in condition being the basis to open a judgment rendered more than a decade earlier.

Third, the claimant contends that the alleged carelessness and/or negligence in the handling of her claim on the part of the Workers' Compensation Commission constitutes justification for the opening of the Walker Decision. As proof of these alleged failings on the part of the commission staff, the claimant points to the reference to a disability to the shoulder rather than the elbow. A review of the June 3, 2008 transcript, however, provides a different perspective of the events of 2008.

> BY COM. WALKER: In addition the parties have agreed to stipulate to certain issues of which I will read into the record and make part and parcel of my finding in this matter. The parties agree and stipulate that the claimant suffered a compensable injury to her left hip and right shoulder on August 8, 2003. Parties agree and stipulate that the claimant's treating doctor in the claim is Dr. Organ. The parties agree and stipulate that the claimant was rated a 5% of the right hip and no rating was ever proffered in regards to the ---
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> BY ATT. COLLINS: No, right shoulder.

> BY COM. WALKER: Right shoulder I apologize, no rating was ever proffered in regards to the left hip. The parties agree and stipulate that the claimant has claimed problems and pain from the onset of her initial date of injury of August 8, 2003 in regards to her left hip and right shoulder. Parties agree and stipulate that the claimant was paid a 5% permanent partial disability of the right shoulder with a MMI date by agreement of the parties of September 5, 2006 per a report of Dr. Organ dated March 17, 2006.

June 3, 2008 Transcript, pp. 4-5.

This board notes that the claimant was represented by counsel at the time that this stipulation of facts was presented to Walker at the 2008 formal hearing. Furthermore, said counsel not only agreed to the stipulated facts as read into the record by Walker, but also corrected Walker when he misspoke about the body part that had been rated. Consequently, as per the decision in Marriott v. Northington Builders, 3357 CRB-1-96-5 (November 7, 1997), it can be inferred that the claimant, who was represented by competent counsel at the time of the stipulated agreement, can be deemed to understand the implications of such agreement. The reference to the right shoulder rating rather than the right elbow, therefore, is harmless error and insufficient grounds upon which to open the 2008 decision.

Finally, this board reiterates the long-standing policy against parties having multiple bites at the apple after failing to meet their burdens in the original proceedings. See Biehn v. Bridgeport, 5232 CRB-4-07-6 (September 11, 2008), *appeal withdrawn*, A.C. 30336 (March 9, 2011). "If a claimant has failed to address relevant issues during the first set of formal hearing proceedings, he does not get a second, third or fourth bite at the apple when he later realizes that he forgot something. A party is not entitled to present his case in a piecemeal fashion, nor may he indulge in a second opportunity to

prove his case if he initially fails to meet his burden of proof." Krajewski v. Atlantic Machine Tool Works, Inc., a/k/a Atlantic Aerospace Textron, 4500 CRB-6-02-3 (March 7, 2003).

In the current action, the reports from Organ, as well as reports from Bristol Hospital, David Bomar, Hartford Hospital Radiology, Jefferson Radiology, Thomas Stevens, and Eugene Lucier, all of whom treated the claimant, were all available at the time of the 2008 formal hearing. Furthermore, many other medical records, including those from Jerrold Kaplan, Roy Beebe, John Fulkerson, Clifford Rios, Nicholas Bontempo, Douglas Wisch, and Michael LeGeyt, all of whom provided medical services to the claimant, were available at the time of the 2015 formal hearing. Nonetheless, this issue was not raised during the 2015 proceedings nor was a request for retroactive total disability benefits made at that time. The failure of the claimant to have some or all of these records admitted into the record either in 2008 and/or in 2015 or to raise the issue in either proceeding does not provide her with the opportunity to do so twelve years later.

During oral argument before this panel, the claimant contended that she was not trying to relitigate the 2008 decision but that she was merely attempting to modify it. Since some of the medical opinions were not available in 2008, the claimant argues that they should now be considered by the administrative law judge and this board and that she should be paid retroactive total disability benefits between 2006 and 2014. As explained above, though, the 2008 decision was a final judgment and, while the claimant was able to obtain medical treatment and be paid some indemnity benefits due to the changes in her condition subsequent to 2008, to open the decision based on the facts before us would be improper.

The June 24, 2021 Ruling on Motion to Reopen by Administrative Law Judge Maureen E. Driscoll, acting on behalf of the Third District, is accordingly affirmed.

Administrative Law Judges Randy L. Cohen and Toni M. Fatone concur in this opinion.