CASE NO. 6479 CRB-4-22-7 CLAIM NO. 400109794	:	COMPENSATION REVIEW BOARD
GIOVANNA DESIMONE CLAIMANT-APPELLEE	:	WORKERS' COMPENSATION COMMISSION
v.	:	APRIL 13, 2023
GRIFFIN HEALTH SERVICES CORPORATION EMPLOYER		
and		
PMA MANAGEMENT CORPORATION OF NEW ENGLAND INSURER RESPONDENTS-APPELLANTS		

APPEARANCES:

The claimant was represented by Richard W. Lynch, Esq., Lynch, Traub, Keefe & Errante, 52 Trumbull Street, PO Box 1612, New Haven, CT 06506-1612.

The respondents were represented by Colette S. Griffin, Esq., Strunk Dodge Aiken Zovas, 200 Corporate Place, Suite 100, Rocky Hill, CT 06067. After oral argument, Attorney Griffin filed a notice of appearance on March 13, 2023 changing the law firm from Howd & Ludorf, LLC to Strunk Dodge Aiken Zovas.

This Petition for Review from the June 21, 2022 Finding and Award of Preclusion by Brenda D. Jannotta, the Administrative Law Judge acting for the Fourth District, was heard November 18, 2022 before a Compensation Review Board panel consisting of Chief Administrative Law Judge Stephen M. Morelli and Administrative Law Judges Daniel E. Dilzer and Carolyn M. Colangelo.[1]

[1] We note that three motions for extension of time were granted during the pendency of this appeal.

OPINION

STEPHEN M. MORELLI, CHIEF ADMINISTRATIVE LAW JUDGE. The respondents appealed from an order precluding them from contesting liability pursuant to General Statutes § 31-294c (b).[2] They argued that the decision of the administrative law judge in this case was unreasonable and contrary to law. Specifically, they contended that the form 43 (disclaimer)[3] filed prior to the claimant's October 10, 2018 form 30C that cited a repetitive trauma injury to the knees was sufficiently detailed to constitute an effective disclaimer. The claimant argued that the administrative law judge acted reasonably in concluding the evidence presented warranted the remedy of preclusion.

---

[2] General Statutes § 31-294c (b) states in relevant part: "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."

[3] "A form 43 is a disclaimer that notifies a claimant who seeks workers' compensation benefits that the employer intends to contest liability to pay compensation. If an employer fails timely to file a form 43, a claimant may file a motion to preclude the employer from contesting the compensability of his claim." Mehan v. Stamford, 127 Conn. App. 619, 623 n.6, *cert. denied*, 301 Conn. 911 (2011).

We have reviewed the facts herein and the precedent governing disclaimers in our forum such as 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) and Tanguay v. Rent-A-Center, Incorporated, 5714 CRB-8-11-12 (January 8, 2013), *appeal withdrawn*, A.C. 35327 (July 11, 2013). After reviewing this precedent, we do not believe the administrative law judge properly applied the law in this matter and we are compelled to vacate the Finding and Award of Preclusion.

The administrative law judge reached the following factual findings and legal conclusions in the June 21, 2022 Finding and Award of Preclusion (finding). She found the claimant was employed by Griffin Health Services, Inc. (respondent-employer) on March 8, 2018. On that date, the claimant alleged that she sustained injuries to her bilateral knees due to repetitive motions of kneeling, squatting, and bending over due to her employment as a housekeeper. See Findings, ¶ 3. The claimant sent the form 30C dated October 10, 2018 via certified mail to the respondent-employer. The respondents stipulated that this form 30C was properly served and was received by the respondent-employer on October 15, 2018. See November 29, 2021 Transcript, pp. 5-6.

The respondents filed a form 43 dated February 5, 2019, which was received by the commission on February 13, 2019, contesting claimant's right to compensation of benefits in response to the form 30C dated October 10, 2018, stating, "[n]o credible evidence, medical or otherwise, to link repetitive work activities to bilateral knee problems. Medical reports demonstrate claimant has significant osteoarthritis in both knees. Repetitive work activities do not cause bilateral knee osteoarthritis. Claim is contested." Form 43 filed February 13, 2019; see also Findings, ¶ 6. The administrative

law judge noted that this disclaimer was received by the commission on February 13, 2019, which was after the expiration of the twenty-eight day statutory period pursuant to § 31-294c (b). She also noted the claimant stated that the respondents did not commence payment to her within the twenty-eight day statutory period pursuant to § 31-294c (b).[4] See Findings, ¶ 8.

Issues pertaining to a prior injury to one of the body parts in the 2018 claim were also considered by the administrative law judge. Prior to the March 8, 2018 claim, the claimant sustained a compensable left knee injury on August 17, 2010 while working for the same respondent-employer. The commission approved a voluntary agreement for this injury on June 7, 2011, which listed the left knee for a specific event, "knee contusion" with the cause of injury listed as "[s]triking against or stepping on." On the August 17, 2010 compensable traumatic left knee injury claim, the respondents filed a form 43, notice to contest, dated April 9, 2018, which was received by the commission on April 11, 2018. This form 43, dated April 9, 2018, contests a left knee contusion and the box on the form for "an Occupational Disease or a Repetitive Trauma" is not checked. The respondent-insurer attached a cover letter to the form 43 that stated, "[e]nclosed is a Form 43 for the need for treatment as it relates to bilateral knees." Respondents' Exhibit 1. The form explained the grounds for contesting the claim as, "[r]espondents contend that employee's current treatment to the left knee is not related to that of the date of injury of 8/17/2010 or any other injury with Griffin Health Services" and offered more detailed grounds for contest as they,

[4] Findings, ¶ 8 states the time period to commence payment under the statute was twenty days. We deem this a harmless scrivener's error. See Hernandez v. American Truck Rental, 5083 CRB-7-06-4 (April 19, 2007).

> contend treatment to the right knee as claimant has no accepted injury on file. Respondents further contend that there is a lack of medical evidence supporting causal connection of the aforementioned injuries to her employment. Said medical condition, expenses and disabilities are the result of inherent medical problems or due to other medical factors that are not causally traced to Claimant's employment. Respondents therefore deny liability for medical bills, disabilities, etc. in connection with said claim/injury. Any medical bills and/or claims for indemnity should be submitted to claimant's Health Insurance Carrier and/or Short Term Disability.

Id.

The administrative law judge also took administrative notice of the claimant's motion to preclude dated September 29, 2021, that was received by the commission on October 6, 2021. This motion to preclude moved that the respondents be precluded from contesting her claim for compensation as a result of work-related injuries to her bilateral knees that occurred on March 8, 2018, and argued the respondents' responsive pleadings lacked the specificity that is necessary to prevent the motion to preclude. The administrative law judge noted the respondents filed an objection to the preclusion motion which the commission received on February 22, 2022. Based on this record, she reached the following conclusions:

1) The claimant was an employee of the respondent-employer on March 8, 2018.

2) The claimant alleges to have sustained injuries to both knees on March 8, 2018, while in the course and scope of employment with the respondent-employer due to repetitive trauma.

3) The claimant properly filed a Form 30C alleging injury to both knees due to repetitive motions – kneeling, squatting, and bending over as part of her job as a housekeeper that was received by the Workers' Compensation Commission and the respondent-employer on October 15, 2018.

4) The information provided on the Form 30C was adequate notice to apprise the respondents of the claim for compensation, including the claimant's name and employer, date, and nature of the injury, which allowed for the respondents to thoroughly investigate the claim or, if appropriate, to file a Form 43, Notice to Compensation Commissioner and Employee of Intention to Contest Employee's Right to Compensation Benefits.

5) The respondents failed to disclaim liability by not filing a Form 43 within twenty-eight days after receiving the claimant's Form 30C as required by Connecticut General Statutes § 31-294c (b).

6) The respondents did not present evidence that payment of benefits was commenced to the claimant or her medical providers within twenty-eight days of October 15, 2018.

7) The Form 43 dated April 11, 2018, filed in the August 17, 2010, compensable left knee injury claim was not preemptive because it did not reference the same injury as claimed in the Form 30C dated October 15, 2018, and it failed to check the box for contesting an Occupational Disease or Repetitive Trauma.

Conclusions, ¶¶ 1-7.

As a result, the administrative law judge granted the claimant's motion to preclude. The respondents filed a motion to correct. The motion sought a wholesale revision of the finding, with the corrected decision determining that the respondents' April 9, 2018 disclaimer sufficiently apprised the claimant in a timely manner of the nature of the respondents' defense, *citing* 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); see also Tovish v. Gerber Electronics, 19 Conn App. 273 (1989); Duglenski v. Waterbury, 4913 CRB-5-05-2 (January 18, 2006), *appeal dismissed for lack of final judgment/lack of jurisdiction*, A.C. 27333 (June 8, 2006); and DiStasi v. Watertown-Board of Education, 5010 CRB-5-05-10 (September 25, 2006). The administrative law judge granted only one correction which did not materially impact the

decision and the respondents have pursued this appeal. They argued that at no time was the claimant unaware of the nature of the defense being presented to her 2018 claim and whatever cited deficiencies in the disclaimer filed prior to the claimant's form 30C for a repetitive trauma injury did not rise to a level worthy of granting the remedy of preclusion. The claimant argued that the administrative law judge correctly determined the respondents failed to meet their statutory obligation to disclaim liability to the specific injury for which the claimant sought to obtain benefits.

We begin our analysis with a recitation of the standard of deference we are obliged to apply to a trier's findings and legal conclusions. "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). "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).

The central question herein is the sufficiency of the preemptive disclaimer filed by the respondents on April 11, 2018, and whether it properly advised the claimant that the respondents intended to contest liability for a repetitive trauma injury on her knees.

While the administrative law judge concluded it was not sufficient, we believe that it sufficiently apprised the claimant as to the respondent's position regarding her injuries so that an order of preclusion was unwarranted. Our rationale for this decision is based on examining the evolving and nuanced state of the law of preclusion since the seminal decisions in Donahue v. Veridiem, Inc., 291 Conn. 537 (2009) and Harpaz v. Laidlaw Transit, Inc., 286 Conn. 102 (2008).

A full and detailed evaluation of the text of the disclaimer and the circumstances that prompted its issuance is especially important when the disclaimer purports to be a preemptive disclaimer.[5] We note that in 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), our tribunal cited the Appellate Court's decision in Tovish v. Gerber Electronics, 19 Conn. App. 273 (1989), where the opinion defined the necessary prerequisites of an effective disclaimer, which are: (1) jurisdiction; (2) timely notice or the presence of an exception to notice; (3) the legal qualification of the claimant as employee; (4) the legal qualification of the respondent as employer; and (5) the occurrence of a "personal injury" as per the statute. The disclaimer upheld in Tovish stated, "[I]njury (heart attack) did not arise out of or in the course and scope of employment." Id., 274. Our Appellate Court concluded, "the defendants' disclaimer clearly contests the fifth element. We are persuaded the disclaimer was sufficient to apprise the plaintiffs that the defendants were challenging an element the plaintiffs were obliged to prove in order to meet the prima facie threshold for their claim." Id., 276.

[5] We noted in 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), that preemptive disclaimers have been deemed compliant with the preclusion statutes since Elmassri v. Vinco, Inc., 584 CRD-7-87, 5 Conn. Workers' Comp. Rev. Op. 96 (June 2, 1988).

The form 43 filed on April 11, 2018 by the respondents herein stated "employee's current treatment to the left knee is not related to that of the date of injury of 8/17/2010 or *any other injury* with Griffin Health Services. Respondents contend treatment to the right knee as claimant has no accepted injury on file." (Emphasis added). Respondents' Exhibit 1. The terms of this document clearly advise the claimant that the respondent is contesting workplace causation of an injury to either knee, and would appear to conform to the standard delineated in Tovish. The term "any other injury" would appear to encompass not just the single accidental injury the claimant sustained on June 7, 2011, but also the repetitive trauma injury claimed in the claimant's October 15, 2018 notice of claim.

We now examine Tanguay v. Rent-A-Center, Incorporated, 5714 CRB-8-11-12 (January 8, 2013), *appeal withdrawn*, A.C. 35327 (July 11, 2013), and find there are many similarities between that decision and the case at bar. In Tanguay, the respondents were aware the claimant had reported a right knee injury and filed a preemptive form 43 which inaccurately disclaimed an injury to the claimant's left knee. The claimant then filed a form 30C for a right knee injury and the respondents did not disclaim the right knee injury claim until after the statutory twenty-eight day period to respond had elapsed. The claimant filed a motion to preclude which was granted. On appeal, this tribunal reversed the decision.

Our opinion in Tanguay first examined the decision in Menzies v. Fisher, 165 Conn. 338 (1973), where our Supreme Court held:

> [w]hen evaluating a Form 43, 'the sufficiency of the notice under the statute must be judged not by the technical meaning which a court might attach to it, nor by a meaning the defendant subsequently discloses at the hearing, but rather by the criterion of

> whether it reveals to the claimant specific substantive grounds for the contest.'

Tanguay, supra, *quoting* id., 345. In Tanguay, we continued to point out:

> [i]n reviewing the amended statute, the Menzies court remarked that "[t]he object which the legislature sought to accomplish is plain. Section 31-297(b)[6] was amended to ensure (1) that employers would bear the burden of investigating a claim promptly and (2) that employees would be timely apprised of the specific reasons for the denial of their claim.

(Footnote added.) Tanguay, supra, *quoting* id., 343.

The Tanguay opinion continued by noting that "[t]here have been a number of instances when this board has reversed a trier's decision to grant a Motion to Preclude which was predicated on a technical deficiency." Tanguay v. Rent-A-Center, Incorporated, 5714 CRB-8-11-12 (January 8, 2013), *appeal withdrawn*, A.C. 35327 (July 11, 2013), c*iting* West v. Heitkamp, Inc., 4587 CRB-5-02-11 (October 27, 2003), *appeal dismissed for lack of final judgment*, A.C. 24805 (February 11, 2004). In West, this tribunal declined to preclude a respondent over what it regarded as the omission of "two or three 'magic words' in the Form 43." Turning to the merits of the case in Tanguay, this tribunal acknowledged "the disclaimer filed by the instant respondents comported with the essential elements as articulated in the provisions of § 31-294c (b) C.G.S." but "erroneously cited an injury to the wrong knee." Id. After consideration as to whether the claimant was prejudiced by this error under the circumstances, we determined "we simply do not concur with the trier that the defect in the respondents' disclaimer constituted a sufficiently substantive error such that the granting of a Motion to Preclude was warranted." Id.

[6] This statute was subsequently recodified as General Statutes § 31-294c (b).

The issue as to whether an error in a disclaimer was sufficiently material so as to warrant a motion to preclude was also a central point considered in Duglenski v. Waterbury, 4913 CRB-5-05-2 (January 18, 2006), *appeal dismissed for lack of final judgment/lack of jurisdiction*, A.C. 27333 (June 8, 2006) and DiStasi v. Watertown-Board of Education, 5010 CRB-5-05-10 (September 25, 2006). In DiStasi, we affirmed the conclusion of a finder of fact that the absence of a checked box noting the contest of a repetitive trauma claim did not preclude the respondent from litigating the claim.

> In regards to the absence of a checked box on the Form 43 regarding the issue of repetitive trauma, we recently opined in Duglenski, supra, that one must read the disclaimer as whole when this occurs and "[a] reasonable person reading this would assume the respondent was challenging the notion that the claimant had suffered a cardiovascular condition compensable under either § 7-433c C.G.S. or the Workers' Compensation Act itself." Id. We applied our previous holding in West, supra, "the respondents provided enough information here to notify the claimant of the substantive ground for their contest" to deem the Form 43 legally sufficient notwithstanding the unchecked box. We find the present case indistinguishable from Duglenski or West.

Id.

Our decision in Duglenski, supra, upon which we relied on in DiStasi, supra, is also relevant to our review herein. In Duglenski, "the respondent also included in its Form 43 the date of the alleged specific injury, which served also as the date of last exposure to repetitive trauma. The box for occupational disease or repetitive trauma was left blank." We conclude that a reasonable person would have determined, from the text of the disclaimer, that the respondents were contesting the claim. We, therefore, reverse the order of preclusion that has been appealed. In so doing, we discussed earlier precedent that this tribunal believed compelled such a determination.

> The instant fact pattern is much more similar to that in West than it is to the fact pattern in Russell v. Mystic Seaport Museum, Inc., 252 Conn. 596 (2000). In Russell, it was clear from the context of the Forms 43 that the respondent was focusing solely on a 1991 date of injury rather than on an alleged period of repetitive traumatic incidents that had occurred prior to September 23, 1994. That is not the case here. Also, the fact that a single notice alleging both repetitive trauma and accidental injury was filed in West, while two separate notices of claim were filed in this case, does not create a material distinction between the two cases. In fact, the respondents' argument may be even stronger here than it was in West, as the 'repetitive trauma' box was merely left blank, rather than having been marked 'N/A.' Given that the claimant had alleged both specific and repetitive trauma injuries, the respondents' failure to fill in that blank does not create much confusion, and does not detract significantly from the impact of the language written below in the space for 'Reasons for Contest.' Accordingly, we follow the precedent of West, and reverse the decision of the trial commissioner.

Duglenski v. Waterbury, 4913 CRB-5-05-2 (January 18, 2006), *appeal dismissed for lack of final judgment/lack of jurisdiction*, A.C. 27333 (June 8, 2006).

In recent years, our decisions in cases such as Salerno v. Lowe's Home Improvement Center, 6101 CRB-6-16-05 (November 14, 2018), *aff'd*, 198 Conn. App. 879 (2020) and Dominguez v. New York Sports Club, 6210 CRB-7-17-8 (August 28, 2018), *aff'd*, 198 Conn. App. 854 (2020), have clearly distinguished between preemptive disclaimers, where the claimant and the respondent may have engaged in a course of conduct where the claimant was generally aware of the respondent's position as to a potential claim for benefits, and late disclaimers, where the remedial purposes of Menzies, supra, are much more apparent as the claimant may have no knowledge as to what the respondents' posture is towards the claim.

In reviewing the record in its totality, we simply cannot conclude that a reasonable person would not have determined that the respondents, as of their April 11, 2018 disclaimer, were contesting compensability of an injury to either knee under

whatever theory of recovery the claimant advanced. In Respondent's Exhibit 1, a cover letter to the form 43, the respondent's claim adjuster informed the claimant that the form 43 addressed "the need for treatment as it relates to *bilateral* knees." (Emphasis added.) While the claimant may argue that the citation in the cover letter of the initial date of injury represented the respondent was treating the matter as only the initial accidental injury to the left knee, this is not reconcilable with the language in the form 43 where the respondents contest the matter due to "lack of medcial (sic) evidence supporting causal connection of the aforementioned *injuries*." (Emphasis added.) We, therefore, cannot find the precedent in Russell, supra, where the notices from the respondent focused solely on a single date of injury, applicable herein.

Consistent with the purpose of the disclaimer statute promulgated in Menzies, supra, we inquired with counsel for the claimant at our tribunal's hearing to elucidate as to how the fact pattern herein prejudiced the claimant. After considering his arguments, we are not persuaded that in this matter the claimant was actually prejudiced in any manner by whatever deficiencies the pre-emptive disclaimer contained. While counsel raises the specter of a "slippery slope" should we rule for the respondent in this matter, such concerns in our view cannot outweigh the cost of imposing a "harsh remedy," upon the respondent when our precedent does not support such a remedy. West, supra.

While the instant form 43 did not check the box for repetitive trauma, our precedent does not make that an irredeemable defect as a matter of law when the claimant later proceeds with a repetitive trauma claim.

Therefore, we vacate the Order and Finding of Preclusion and remand this matter for a contested hearing on the merits.

Administrative Law Judges Daniel E. Dilzer and Carolyn M. Colangelo concur in this Opinion.