CASE NO. 5781 CRB-7-12-10 : COMPENSATION REVIEW BOARD
CLAIM NO. 700159349

BIZUWORK BESHAH
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

: AUGUST 14, 2013

U. S. ELECTRICAL SERVICES, INC.
EMPLOYER

and

ARCH INSURANCE
INSURER
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by John J. LaCava, Esq., Law Offices of John J. LaCava, LLC, 22 Fifth Street, Stamford, CT 06905.

The respondents U.S. Electrical Services and Arch Insurance were represented by Robert K. Jahn, Esq., Morrison Mahoney, LLP, One Constitution Plaza, 10th Floor, Hartford, CT 06103.

The respondent CNA Insurance was represented by Gregory Lisowski, Esq., Law Offices of Cynthia A. Jaworski, 175 Capital Boulevard, Suite 400, Rocky Hill, CT 06067, at the trial level but did not attend oral argument.

This Petition for Review from the September 6, 2012 Ruling on Claimant's Motion to Preclude filed January 3, 2012 of the Commissioner acting for the Seventh District was heard February 15, 2013 before a Compensation Review Board panel consisting of Commissioners Charles F. Senich, Peter C. Mlynarczyk and Nancy E. Salerno.

# OPINION

CHARLES F. SENICH, COMMISSIONER. The respondents have appealed from a Motion to Preclude granted by the trial commissioner in this matter. They argue that their actions subsequent to the claimant filing a claim for benefits were legally sufficient to satisfy the requirements of § 31-294c C.G.S. The trial commissioner concluded to the contrary. Upon reviewing the record, we believe she reached a reasonable decision in granting the claimant's Motion to Preclude. We affirm her decision.

The trial commissioner reached the following conclusions after considering a Joint Stipulation of Facts. The parties agreed that on December 2, 2010 the claimant was employed by the respondent. On or about April 11, 2011 the claimant filed a Form 30C alleging he injured his left hand and arm at work on December 2, 2010. The Form 30C was sent to the Commission and the employer via certified mail and the respondent does not contest receipt of the April 11, 2011 Form 30C. A Form 43 was filed on May 9, 2011 by the respondent, within the statutory 28 day period to respond to a notice of claim. The respondents had begun making temporary total disability payments of $370.28/week commencing in January 2011. However, those checks referenced a prior injury the claimant had sustained on November 7, 2009, and not the 2010 date of injury. Both parties agree the weekly disability payments, however, were made without prejudice in response to the December 2, 2010 claim. The respondents continued to make weekly payments following the May 9, 2011 Form 43 filing, but ceased these payments on or about September 9, 2011 without having filed a Form 36. On or about November 4, 2011 the respondents filed a second Form 43. As to medical treatment, the claimant requested

such treatment which was recommended after his alleged December 2, 2010 injury but the respondents did not pay for or authorize such treatment.

The commissioner noted that the claimant argued in his Motion to Preclude that he believed the respondents initial Form 43 was legally inadequate. The claimant also argued the subsequent Form 43 was not filed in a timely manner. The commissioner concluded that the grounds cited in the initial Form 43 were insufficient based on the standard promulgated in Menzies v. Fisher, 165 Conn. 338 (1973) requiring respondents to proffer a "specific substantive grounds" contesting claims. The commissioner identified three grounds in the disclaimer. The first ground cited in the Form 43; "Filing Ct. 43 in response to the 30C for protection of current & future defenses" is not a "specific substantive ground." Finding C.(1). The second ground cited; "Employee failed to report incident [to his employer] which allegedly occurred on 12/2/10" was not a viable defense as a First Report of Injury was not a statutory requirement for filing a claim for benefits. Finding C.(2). The third ground cited "Claimant is currently receiving benefits under 2 other W.C. claims" was deemed "simply irrelevant" by the trial commissioner. Finding C.(3). As the respondents failed to state a specific defense to the December 10, 2010 incident the Form 43 was deemed legally inadequate.

The trial commissioner then tried to ascertain if the claimant's receipt of benefits was sufficient to thwart preclusion. She determined they were not as the payments of disability benefits were made "without prejudice" and were terminated after September 9, 2011. In addition, the respondents did not pay for or authorize any requested medical treatment for the 2010 injury. The trial commissioner found the November 20, 2011 Form 43 was of "no consequence" as it was not filed within the statutory time period to

contest a claim and the initial timely Form 43 was legally inadequate. As a result the trial commissioner ordered the Motion to Preclude granted.

The respondents filed a Motion to Correct. The Motion to Correct sought to add findings that the initial Form 43 was legally adequate, and in the alternative, that the respondent's payment of disability benefits without prejudice was legally sufficient to overcome preclusion based on the holding of Monaco-Selmer v. Total Customer Service, 5622 CRB-3-10-12 (January 19, 2012). The trial commissioner rejected the Motion to Correct in its entirety and the present appeal was pursued by the respondents.

The respondents argue that the trial commissioner misapplied the law based on the facts herein. While this is a case where the facts are not in dispute, and the general deference to fact finding promulgated in Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988) does not apply, we still extend great latitude to the findings of a trial commissioner. "As 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." Daniels v. Alander, 268 Conn. 320, 330 (2004). We must determine if the trial commissioner's application of the law pertaining to § 31-294c C.G.S. was reasonable given the facts herein.

The Compensation Review Board had occasion to consider the issue of what constitutes a valid disclaimer to a claim 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 (2013). We find our analysis in Lamar pertinent to the issues at hand.

> We look to 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.

> In Tovish, supra, the five elements of a viable workers' compensation claim are outlined: (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. An effective disclaimer must contest one of the five elements of the claim.
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> The disclaimer upheld in Tovish stated, "Injury [heart attack] did not arise out of or in the course and scope of employment." Id., 274. The 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.

Id.

In the present case the initial Form 43 did not contest the jurisdiction of the Commission to hear the claim. The disclaimer also did not contest the presence of an employer-employee relationship. The disclaimer did note that the claimant had not initially reported the injury, but we agree with the trial commissioner that this does not constitute a legal defense to the claim. Pursuant to statute, the claimant had one year from the date of injury to perfect notice he was seeking benefits under Chapter 568. The stipulated facts herein indicate that the respondent concedes that the claimant complied with this statutory obligation. Consequently, we do not find the Form 43 challenges timely notice of the claim. The respondents' citation of Russell v. Mystic Seaport Museum, Inc., 252 Conn. 596 (2000) as supporting their argument that the initial disclaimer offered substantial grounds to contest compensability is unpersuasive. Nothing in the Russell opinion defined a delayed but statutorily valid reporting of an injury to this Commission as a substantive defense to compensability.

The respondents focus their argument in their brief on their position that their initial Form 43 sufficiently contested notice of the claim. In addition, at oral argument before this panel, counsel admitted that they have conceded that the other two grounds, i.e., "Claimant is currently receiving benefits under 2 other W.C. claims" and "Filing Ct. 43 in response to the 30C for protections of current & future defenses" were not defenses to the claim consistent with contesting the essential elements of a claim as defined by Tovish.

The respondents further argue that by advancing indemnity payments to the claimant without prejudice, they acted in a manner that should thwart preclusion, based on the holding in Monaco-Selmer, supra. We agree that the respondents actions here were more consistent with the statutory obligation of respondents than the actions of the respondents in the Monaco-Selmer case. Nonetheless, the trial commissioner still found them insufficient to comply with how the Supreme Court in Harpaz v. Laidlaw Transit, Inc., 286 Conn. 102 (2008) interpreted § 31-294c C.G.S. We are not persuaded this determination was in error. While the respondents did make regular payments to the claimant without prejudice, they failed to continue such payments until they finally issued a Form 43. There was a significant lapse in this case from the date payments without prejudice ceased and when a disclaimer was issued. At the point the respondents ceased making weekly payments their "safe harbor" from preclusion lapsed.

The recent Compensation Review Board decisions on this issue do not support the respondents position. In Dubrosky v. Boehringer Ingelheim Corporation, 5682 CRB-4-11-9 (September 5, 2012), pending at A.C. #35030, we rejected the respondent's argument that they could not have paid for medical treatment within 28 days of receiving

a Form 30C and should be absolved for not filing a disclaimer due to "impossibility." While we noted that unlike Monaco-Selmer, the claimant was not financially harmed by the delay, we held "[w]hile it may not have been possible in this case to pay for medical care or pay indemnity benefits without prejudice, it was possible to file a Form 43 (or in the alternative, accept the claim) and advise the claimant as to what the respondent's intentions were. We believe that when this does not occur our precedent mandates that the trial commissioner grant a Motion to Preclude." Dubrosky, supra. This panel followed similar reasoning in Domeracki v. Dan Perkins Chevrolet, 5727 CRB-4-12-1 (May 1, 2013), where the payment of benefits did not absolve the respondent from their obligation to file a Form 43. We have consistently held that it is the obligation of a respondent to proffer a timely Form 36 or Form 43 prior to seeking to terminate benefits to a claimant. See Duntz v. Ales Roofing and Caulking Co., 5772 CRB-6-12-8 (July 22, 2013). The two month gap herein between the cessation of benefits and the filing of the Form 43 clearly voided the safe harbor from preclusion available under § 31-294c C.G.S. for payments without prejudice.

The Motion to Preclude is affirmed.

Commissioners Peter C. Mlynarczyk and Nancy E. Salerno concur in this opinion.