

NUZZO & ROBERTS

NEWSLETTER

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WORKERS' COMPENSATION UPDATE: THIRD QUARTER 2018

In recent months, the Connecticut courts and the Compensation Review Board have issued several important decisions regarding workers' compensation law.

SUPREME AND APPELLATE COURT DECISIONS

Limitation of the Moratorium

In Callahan v. Car Parts International, L.L.C., 329 Conn. 564 (2018), the Connecticut Supreme Court reversed the trial commissioner and Compensation Review Board regarding whether the respondents are entitled to a moratorium against future benefits for the one-third of the workers' compensation lien that was not reimbursable.

In this matter, the Connecticut Supreme Court addressed the amount of the potential moratorium against future benefits pursuant to Connecticut General Statutes §31-293(a) after the statute was amended in 2011. The question was whether the moratorium applies to the one-third portion of the employer's lien that inures solely to the employee's benefit. The employer claimed a right to a

setoff against its obligation to pay for post-judgment workers' compensation benefits until those benefits exceed the claimant's total recovery from the proceeds of the third-party action, including the one-third portion the employee received from the one-third reduction in the employer's recovery. The Supreme Court concluded the employer does not receive a credit against later arising benefits for the one-third portion paid to the employee. The employee's one-third portion is not subject to the moratorium.

This matter settled for \$100,000. After deducting the plaintiff's attorney's fees and the litigation costs, \$66,000 remained for distribution. The respondents had a lien of \$74,000 and received a \$44,000 reimbursement from the \$66,000. The respondents sought a \$22,000 moratorium against future benefits. Please note the limitation of the moratorium only arises when the employee commences the third-party lawsuit. Furthermore, if the settlement had been higher and the respondents had received the two-thirds reimbursement, after deducting the one-third that could not be reimbursed to the respondents, the net balance received by the claimant can still be used as a moratorium against future benefits.

Collateral Estoppel

In Filosi v. Electric Boat Corp., 330 Conn. 231 (2018), the claimant had been awarded benefits under the federal Longshore and Harbor Workers' Compensation Act (33 U.S.C. § 901 et seq.) for the death of her husband due to lung cancer from workplace asbestos exposure. She also sought benefits under the Connecticut Workers' Compensation Act. The administrative law judge in the Longshore case determined the claimant had established that her decedent husband's lung cancer was work-related, crediting the testimony of one of the claimant's experts that the husband's asbestos exposure was a "substantial contributing cause" in the development of the lung cancer.

In the subsequent Connecticut workers' compensation case, the claimant argued the respondents were collaterally estopped from litigating the issue of causation due to the administrative law judge's order in the federal Longshore case. The trial commissioner determined the respondents were not precluded from challenging causation because the administrative law judge had not defined the causal connection required under the Longshore Act. The trial commissioner then concluded the claimant had not proven the decedent husband's workplace exposure to asbestos was a substantial contributing factor in the development of his lung cancer, as required by the Connecticut Workers' Compensation Act, and dismissed the claim for benefits.

The claimant appealed to the Compensation Review Board, which reversed the trial commissioner's decision, concluding the administrative law judge in the federal case relied on a medical opinion that was sufficient to satisfy the causation standard required by the Connecticut Workers' Compensation Act.

After the respondents appealed, the Connecticut Supreme Court affirmed the Compensation Review Board's decision, holding the board correctly determined the respondents were collaterally estopped from litigating the issue of causation under the state act. Specifically, the administrative law judge's finding under the Longshore Act was preclusive in the Connecticut workers' compensation case because the administrative law judge applied the same substantial factor standard that applies under the Connecticut Workers' Compensation Act.

A Municipality Can be a Principal Employer

In Barker v. All Roofs by Dominic, 183 Conn. App. 612 (2018), the Connecticut Appellate Court affirmed the finding of the trial commissioner and Compensation Review Board that the City of Bridgeport was the principal employer pursuant to Connecticut General Statutes § 31-291 and liable to pay the claimant benefits because the employer did not have insurance.

At a formal hearing, it was determined the claimant was an employee of the

uninsured roofing subcontractor repairing the roof of the city's transfer station. As the subcontractor did not have insurance, the Second Injury Fund, pursuant to Connecticut General Statutes § 31-255, was liable to pay benefits. After the formal hearing, Second Injury Fund filed a motion to have the City of Bridgeport pay benefits as the principal employer.

The City of Bridgeport argued it was not liable as a principal employer because the roofing work the claimant "was performing when he was injured was not a part or process of the city's trade or business." The Appellate Court found Connecticut General Statutes §31-291 applies to governmental entities. The Appellate Court then ruled the trial commissioner correctly concluded the city has a responsibility to manage, maintain, repair, and control its property, including its garbage and refuse disposal facilities, and therefore the work performed to accomplish those responsibilities made the city the principal employer.

Bifurcation of Issues

In Mikucka v. St. Lucian's Residence, Inc., 183 Conn. App. 147 (2018), the trial commissioner at a formal hearing ruled the claimant had reached maximum medical improvement and was no longer entitled to temporary total disability benefits. At the formal hearing the claimant did not argue she had failed to reach maximum medical improvement, but instead alleged she was permanently totally disabled pursuant to the Osterlund

standard. The trial commissioner stated she would bifurcate the issues of maximum medical improvement and whether the claimant was vocationally disabled. Specifically, the trial commissioner offered to schedule a hearing in three weeks to address the alleged vocational disability. The claimant chose not to accept this option.

The Appellate Court affirmed the trial commissioner's conclusions regarding maximum medical improvement and dismissed the appeal regarding whether the claimant is vocationally disabled. The Appellate Court concluded, the trial commissioner did not deny the claimant's due process right to have a formal hearing on vocational disability, but instead chose to bifurcate the issues which was appropriate. Therefore, as no formal hearing has been held on vocational disability, the issue was not ripe for appellate review.

The Trial Commissioner Properly Applied the Law

In a matter successfully argued by this office, the Connecticut Appellate Court in Dahle v. Stop and Shop Supermarket Co., 185 Conn. App. 71 (2018), affirmed the decision of the trial commissioner and Compensation Review Board that the claimant was not entitled to temporary total disability benefits without a Social Security offset pursuant to Connecticut General Statutes § 31-307.

The claimant argued the trial commissioner and Compensation Review Board had erred in refusing to correct allegedly erroneous evidence and in denying the claimant's request to introduce new evidence to prove that supposed delays had caused her to be subject to the Social Security offset. The Appellate Court found the evidence in question pertained to a different issue decided at a different formal hearing which the trial commissioner did not have the authority to correct.

The Connecticut Appellate Court also ruled that although the Social Security offset was subsequently repealed, it was in effect at the time of the claimant's injury, and therefore, applied to her claim.

The Trial Commissioner's Conclusions Are Supported by the Evidence

In Diaz v. Dept. of Social Services, 184 Conn. App. 538 (2018), the Connecticut Appellate Court affirmed the trial commissioner's and Compensation Review Board's dismissal of the claimant's request for cervical surgery because it was not work related. Specifically, the claimant suffered a cervical injury in two motor vehicle accidents unrelated to work. The claimant argued her repetitive work and ergonomics of her workstation made her injury substantially worse and contributed to the need for surgery.

Based on the evidence, the trial commissioner concluded the claimant

suffered spinal injuries during her two prior motor vehicle accidents and the cervical fusion surgery was recommended long before the claimant filed her workers' compensation claim. The trial commissioner concluded the need for cervical surgery was not work related.

COMPENSATION REVIEW BOARD DECISIONS

Motion to Preclude

In Dominguez v. New York Sports Club, 6210 CRB-7-17-8 (August 28, 2018), the claimant filed a Form 30C on July 6, 2016 for a March 24, 2016 date of injury. The respondents did not file a Form 43 within 28 days of the receipt of the Form 30C and on August 26, 2016, the claimant filed a Motion to Preclude. An untimely Form 43 was filed in September 2016.

The trial commissioner granted the Motion to Preclude in part by ordering the respondents to accept the case, but allowed the respondents to contest the extent of disability because they had not been asked to pay any medical or indemnity benefits. The Compensation Review Board overturned the trial commissioner's ruling and granted the Motion to Preclude in whole.

In this matter, the respondents argued that because they were not presented with any medical bills or asked to pay indemnity benefits prior to their filing of the Form 43, they could contest the extent of

disability. However, the Compensation Review Board stated that “in prior cases that have come before this tribunal, we have held that when a respondent files an untimely disclaimer and fails to accept compensability of the injury, the respondent is fully precluded from defending the claim.” Additionally, the respondent had not attempted to file a Voluntary Agreement accepting the case within one year to create a “safe harbor” that would have allowed them to contest the extent of disability.

Injury in the Course of Employment

In Thomas v. City of Bridgeport, 6206 CRB-3-17-7 (July 30, 2018), the claimant suffered a fracture to the right femur while playing in a softball game on behalf of his City of Bridgeport department. The injury was found to be compensable and to have occurred arising out of and in the course of his employment. Essentially, the claimant believed that when his supervisor asked him to play in the game, he did not have any option to say no as it was an obligation of his job.

Although the testimony of the supervisor did not fully support the claimant’s allegation whether he had a choice to play in the game, the trial commissioner accepted the representation of the claimant.

In affirming the trial commissioner’s conclusions, the Compensation Review Board relied on Anderton v. WasteAway

Services, L.L.C. 91 Conn. App. 345 (2005), where a sports injury sustained while the claimant was “on the clock” was deemed compensable.

WHEN IN DOUBT, CALL US

We are only a phone call away. If you have any questions, call us!!

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