NUZZO & ROBERTS NEWSLETTER

November 2020

WORKERS' COMPENSATION UPDATE: THIRD QUARTER 2020

SUPREME COURT AND APPELLATE COURT DECISIONS

Permanent Partial Disability After a Heart Transplant

In ***Vitti v. City of Milford***, SC 20350 (2020), the Connecticut Supreme Court affirmed the finding of the trial commissioner and Compensation Review Board that the claimant was entitled to a 23% permanent partial disability following a heart transplant and not a 100% permanent partial disability of the heart as requested by the claimant.

The Court rejected the argument that for permanent partial disability, the transplanted heart should be treated the same as a prosthetic device. Instead, the Court ruled the trial commissioner properly considered the functionality of the replacement heart in assigning the permanent partial disability rating.

Principal Employer

In ***Barker v. All Roofs by Dominic***, SC 20196 (2020), the Connecticut Supreme Court affirmed the decision of the trial commissioner, the Compensation Review Board, and the Connecticut Appellate Court that the city of Bridgeport was liable to pay workers' compensation benefits as the principal employer pursuant to Connecticut General Statutes §31-291.

All Roofs was hired by the city of Bridgeport to perform work on its transfer facility. All Roofs then hired Howie's Roofing as a subcontractor. The claimant, who was employed by Howie's Roofing, was injured while working at the transfer facility. However, neither Howie's Roofing nor All Roofs had workers' compensation insurance. Therefore, the city of Bridgeport was ordered to pay benefits as the principal employer.

The Supreme Court stated it was within the city's trade or business to maintain the roof of transfer facility and thus they were liable as the principal employer under the statute. Additionally, if the city had made sure that All Roofs and Howie's Roofing had workers' compensation insurance, they would have no liability.

Motion to Preclude

In ***Dominquez v. New York Sports Club***, 198 Conn. App. 854 (2020) and ***Salerno v. Lowe's Home Improvement Center***, 198 Conn. App. 1 (2020), the Connecticut

Appellate Court addressed Motions to Preclude.

In Salerno, the trial commissioner and Compensation Review Board's decisions to grant the Motion to Preclude were affirmed. The claimant was employed by Lowe's until December 19, 2012. On November 27, 2013, the claimant filed a Form 30c for a repetitive trauma lower back injury. The employer received the Form 30c on December 3, 2013, but it did not file a Form 43 until June 18, 2015, well beyond the 28 days required to contest the claim per Connecticut General Statutes §31-294c(b).

In the 18 months between the filing of the Form 30c and the filing of the Form 43, the respondents also did not pay any indemnity benefits or medical bills. Therefore, the respondents argued this matter is covered by the exception created in ***Dubrosky v. Boehringer Ingelheim Corp.***, 145 Conn. App. 261 (2013), because it was not possible to contest the claim. Specifically, the clamant failed to request benefits or medical treatment within 28 days after the filing of the Form 30c and it was impossible to pay benefits.

In rejecting this argument the court stated, "[t]his court held [in *Dubrosky*] that, under such circumstances, when a defendant employer does not challenge the claim of a work-related injury, but challenges only the extent of the plaintiff's disability, strict compliance with the twenty-eight day statutory time frame to begin to payment of benefits will be excused when it is impossible for the [employer] to comply." ***Woodbury-Correa v. Reflexite Corp.***, 190 Conn. App. 623 (2019), citing ***Dubrosky v. Boehringer Ingelheim Corp.***, Supra, 273-275.

The present matter is distinguishable because the respondents failed to file a timely Form 43 to contest the claim within 28 days, yet they wanted to challenge the overall compensability, not just the extent of disability.

In Dominguez, the trial commissioner ruled that although the Form 43 was filed 75 days after the Form 30c, as no benefits had been requested, the Dubrosky exception applied, and the respondents were not precluded from contesting the claim. The Compensation Review Board reversed the trial commissioner on this issue and stated the Dubrosky exception had been improperly applied.

In affirming the Compensation Review Board, the Appellate Court again stated that Connecticut General Statutes §31-294c(b) and the Dubrosky exception does not extend to a situation where the employer did not accept the claim or make payments within the 28 days and failed to file a timely Form 43.

REVIEW BOARD DECISIONS

Timely Notice of Claim

In ***Fieldhouse v. Regency Coachworks, Inc.***, 6344 CRB-2-19-8 (2020), the trial commissioner ruled the claimant had not

filed a timely notice of claim and therefore, the Workers' Compensation Commission did not have subject matter jurisdiction. The Compensation Review Board reversed the trial commissioner and held the totality of the evidence supported a finding the respondents had filed a timely notice of the claim.

The claimant's November 27, 2015 injury was witnessed by her supervisor. She filled out a First Report of Injury and was incorrectly informed by the respondents' insurance agent she had two years to file a claim. After she completed the First Report of Injury, she received a pharmacy card from her employer's workers' compensation carrier.

On November 22, 2016, Ms. Fieldhouse gave a recorded statement at the request of the workers' compensation insurer. On March 27, 2017, she was directed to submit to two examinations by the insurer, in "accordance with your Workers' Compensation claim." However, as of the date of her formal hearing three years after her injury, she had not received any workers' compensation benefits.

The trial commissioner ruled that Ms. Fieldhouse did not file a file a timely notice pursuant to Connecticut General Statutes §31-294c, because she had not filed a Form 30c within a year, no hearing had been held and a Voluntary Agreement was not issued.

In reversing the trial commissioner the Compensation Review Board stated in relying on the totality of circumstances, "the claimant's interactions with her immediate supervisor and her appearance on November 22, 2016, at the workers' compensation insurer's office with the express intention of filing a workers' compensation claim, coupled with the respondents' actions in assigning a claim number, providing the claimant with two prescription cards, taking a recorded statement, and referring the claimant for an RME, serve to establish that the claimant substantially complied with the statutory provisions of §31-294c such that the respondents were provided with constructive notice of the claim."

Part-Time Firefighter Entitled to Heart & Hypertension Benefits

In ***Clark v. Town of Waterford Cohanizie Fire Department***, 6339 CRB-2-19-17 (July 15, 2020), a part-time fire fighter was found by the trial commissioner to be entitled to Connecticut General Statute §7-433c Heart and Hypertension benefits. The Compensation Review Board in a 2-1 decision affirmed the trial commissioner's finding.

The claimant was hired as a part-time firefighter on May 24, 1992 and when he was assigned to work, he had the same job requirement as the other firefighters. The only difference from full duty firefighters was he was not entitled to holiday pay, vacation pay, or pension benefits. The claimant's hours were not the same from week to week, but over time the trial commissioner ruled the hours were

consistent, thus making the claimant a "member" under the statute. The claimant also underwent a full physical before starting his employment as a part-time fighter. After working as a part-time firefighter for five years, in 1997 the claimant was hired a full-time fire fighter.

On June 24, 2017, the claimant suffered a myocardial infarction and underwent quadruple bypass surgery.

In ruling the claimant was entitled to Connecticut General Statutes §7-433c benefits, the trial commissioner noted the statute does not distinguish between part-time and full-time status. Therefore, the date of hire as a part-time firefighter is the date of hire for the application of the statute. Thus, as Mr. Clark was a firefighter before July 1, 1996, when the presumption of compensability under the Act changed, the heart attack was presumptively compensable under the old law.

In affirming the trial commissioner's ruling, the majority stated the statute does not require the firefighter to work at least 20 hours a week to be entitled Connecticut General Statute §7-433c.

In his dissent, Commissioner William Watson focused on Connecticut General Statutes §7-425(5). "Given that the definition of 'member' provided by the legislature excludes 'person who customarily works less than twenty hours per week…,' I am unable to conclude that the factual circumstances of the claimant's employment satisfy the statutory requirements of §7-433c." Therefore, Commissioner Watson does not believe the claimant was a "member" before July 1, 1996 and he is not entitled to the presumption of benefits under the statute.

FIRM NEWS

On On September 1, 2020, Attorney Jane Carlozzi retired from Nuzzo & Roberts. We thank Jane for 20 years with Nuzzo & Roberts and wish her well in her retirement.

Attorney Evan Dorney has accepted a job with a new firm, and we wish him well.

Finally, we welcome Attorney Kim Small as our newest attorney. Kim is a graduate of the University of Connecticut School of Law and she has worked in the legal profession since 2009.

WHEN IN DOUBT, CALL US

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

Contact David J. Weil at dweil@nuzzo-roberts.com, Jason K. Matthews at jmatthews@nuzzo-roberts.com, James P. Henke at jhenke@nuzzo-roberts.com, Kristin K. Mullins at kmullins@nuzzo-roberts.com, Michael D. Randall at mrandall@nuzzo-roberts.com or Kim R. Small at ksmall@nuzzo-roberts.com

NUZZO & ROBERTS, L.L.C.
P.O. Box 747, One Town Center
Cheshire, CT 06410
Phone: (203) 250-2000
Fax: (203) 250-3131
or www.nuzzo-roberts.com

To receive this newsletter via email, please visit http://www.nuzzo-roberts.com/contactus.php and complete the form provided.