

BARTON v. WATERBURY COMPANY, 3428 CRB-5-96-9 (6-6-1997)

VIRGINIA BARTON, CLAIMANT-APPELLEE v. WATERBURY COMPANY,
EMPLOYER and GAB ROBINS NORTH AMERICA, INSURER, RESPONDENTS-
APPELLANTS

CASE NO. 3428 CRB-5-96-9 Workers' Compensation Commission
JUNE 6, 1997

The claimant was represented by George Greenstein, Esq.,
Goldblatt, Greenstein Rashba.

The respondents were represented by Dominick C. Statile, Esq.,
Montstream May.

This Petition for Review from the September 10, 1996 Order of
the Commissioner acting for the Fifth District was heard May
9, 1997 before a Compensation Review Board panel consisting of
the Commission Chairman Jesse M. Frankl and Commissioners
James J. Metro and John A. Mastropietro.

OPINION

JESSE M. FRANKL, CHAIRMAN.

The respondents have petitioned for review from a September
10, 1996 Order of the Commissioner acting for the Fifth
District. They seek reversal of the trial commissioner's order
for a medical examination pursuant to § 31-294f C.G.S. The
claimant has filed in response a Motion to Dismiss the appeal
and a Motion to Submit Additional Evidence. We find no error
on review.

The claimant alleges that she banged her head on a fire
extinguisher during the course of her employment on October
20, 1994. In her Form 30C, she complained of head and neck
pain and vision problems. The respondents have denied any
liability for medical problems after January 16, 1995, as per

their Form 43 and two Forms 36. On February 22, 1995, Commissioner Spain ordered an examination with Dr. Fischbein for the purpose of evaluating the claimant's psychiatric condition. (Claimant's Exhibits B and C). However, Dr. Fischbein could not see the claimant for several months, so the examination was reassigned to Dr. Rubenstein.

At the formal hearing on September 9, 1996, the claimant's attorney stated that he intended to place the respondents' attorney on the stand to inquire about the manner in which the examination with Dr. Rubenstein was arranged. Apparently, the change was made after respondents' counsel had an ex parte discussion with Commissioner Spain. Counsel also contended that Dr. Rubenstein's report was tainted because respondents' counsel sent him a letter before the examination explaining his clients' point of view. Noting the recent decisions of this board that stress the importance of commissioner's exams, the trier opined that there was a serious flaw in the process by which this particular exam was arranged, and stated that another examination should be held. Respondents' counsel initially objected, but later stated on the record that there was an agreement that Dr. Rubenstein would be adopted as an independent medical examiner and that his report would be sent to Dr. Hale, who would perform the commissioner's examination. Transcript, p. 15.

The respondents-appellants argue in their brief that claimant's counsel was fully aware of and had consented to the change in examiners, and that he had asked for and received a copy of the letter from the respondents to Dr. Rubenstein prior to the exam. They contend that he only objected after the contents of the report proved to be unfavorable to his client. They also argue that the trier should not have ordered another commissioner's examination with Dr. Hale because there was no conflict of opinion among the doctors concerning the claimant's psychiatric condition.

Pursuant to § 31-294f(a), a claimant "shall submit himself to

examination by a reputable practicing physician or surgeon, at any time while claiming or receiving compensation, upon the reasonable request of the employer or at the direction of the commissioner." Nowhere does the statute require that there be a measurable conflict among the medical opinions in evidence before the commissioner may order an examination pursuant to that statute. *Ruilova v. Accurate Electronics, Inc.*, 3211 CRB-4-95-11 (decided Jan. 16, 1997), does not suggest otherwise. The commissioner's authority to find the facts of a workers' compensation case and to "make inquiry . . . in a manner that is best calculated to ascertain the substantial rights of the parties" certainly entitles her to request an examination where she believes it necessary to reach a reliable conclusion regarding the claimant's condition. See § 31-298

C.G.S. Out of necessity, this also gives the trier the right to govern the process by which the examiner is chosen.

As the commissioner noted, this board has recently stressed the importance of a commissioner's examination in workers' compensation proceedings, and the expectation among all parties that it will provide strong guidance to the trier. *Iannotti v. Amphenol/Spectra-Strip*, 13 Conn. Workers' Comp. Rev. Op. 319, 321, 1829 CRB-3-93-9 (April 25, 1995). It is imperative, therefore, that the commissioner be comfortable with the circumstances of the § 31-294f examination before she can be expected to consider the resulting report in her decision. Here, it appears that the respondents requested a replacement examination with Dr. Rubenstein outside the presence of claimant's counsel. Also, it was revealed at oral argument that, several weeks preceding the commissioner's examination, the respondents sent a letter to Dr. Rubenstein. The claimant's counsel did not obtain a copy of this letter until the day before the examination was to take place.

This manner of notice did not afford the claimant sufficient time to object to the examination. Instead, the parties should

have communicated with each other and reached an agreement on the contents of any letter to be sent to a prospective commissioner's examiner before such a letter was sent. At the very least, permission from the commissioner to send the letter should have been obtained by respondents' counsel. Under these circumstances, the trier was well within her rights as the trier of fact to order another commissioner's examination in place of the one with Dr. Rubenstein.

Furthermore, respondents' counsel stated at the formal hearing that an agreement had been reached making Dr. Rubenstein an independent medical examiner and Dr. Hale the commissioner's examiner. The respondents do not explain why we should not construe this agreement as having settled this issue. It would appear to this board that the respondents' grounds for objection in this appeal were waived at that point. We thus dismiss the respondents' appeal, and remand this matter to the district for further proceedings. The issues of the claimant's Motion to Dismiss and Motion to Submit Additional Evidence need not be reached in this opinion.

Commissioners James J. Metro and John A. Mastropietro concur.