Compensation Quarterly

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THE WORKERS' COMPENSATION UPDATE

A Chat With Administrative Law Judge Randi L. Cohen:

Her Life as a Lawyer and Reflections on Being a Judge

By Heather Porto

CQ: Judge Cohen, first I would like to congratulate you on your retirement. We had a great time celebrating your 15 years of service as a Commissioner and Administrative Law Judge at the Workers' Compensation Section of the Bar Association's retirement party at the Water's Edge at Giovannis and I wanted to thank you for agreeing to do this interview today.

Can you first tell the readers a little background on where you went to college and law school?

RC: I went to UCONN and graduated in 1979 then went onto Suffolk University Law School. After law school I went right into private practice and thankfully passed the bar that summer. I went to law school in Boston because I figured it would be my only experience living in the City because I always knew I wanted to settle in Connecticut.

CQ: **When you came back to Connecticut and went into private practice, for those that do not know you or are not from Fairfield County, can you tell us about your professional background and what your legal career entailed?**

RC: My first job was with Rubens, Lazinger and Radcliffe, in Bridgeport. As anyone who practices law knows, when I got out of law school, I had no idea what it really was about and Sam Lazinger taught me how to do workers comp.

CQ: **And what did you think about workers comp?**

RC: I loved it. I loved representing the people who got hurt and being able to help them. I stayed with them for about eight years until I was pregnant with my second child. I then went to Bove, Milici & Josem in Norwalk until 1996 when I decided to go into practice with my husband.

CQ: **How was it working with your husband (Michael Corsello)?**

RC: It was great! He was a criminal lawyer and I did the personal injury and workers comp. He had the downstairs of the building and I had the upstairs. We stayed away from each other's domain and it was all good. I did that until I was appointed to this Commission in 2007.

CQ: **Was becoming a Judge something you were always interested in doing and why did you decide to make that career change?**

RC: I always really respected the commissioners. It wasn't until I was offered the opportunity in 2007 that I thought I might actually have the chance to do it and I was totally on board to do it.

CQ: **Once you got your feet wet as a commissioner, were you glad you accepted the position?**

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IN THIS UPDATE

Get Ready For Certification

By Robert S. Bystrowski

The CBA Workers' Compensation Section has always been ahead of the curve in its emphasis on continuing legal education—years before it was mandated by the MCLE commission in 2016. Seminars by workers' compensation lawyers, for workers' compensation lawyers, have been offered to members of the section for decades. In furtherance of the goal of increasing the level of professionalism in the practice of workers' compensation law, the section went even further, and established a board certification program, designating its first class of specialists in 2001. Since that time, dozens of practitioners, representing both claimants and respondents, have qualified for this prestigious designation. The section encourages all those who have the requisite qualifications to consider submitting an application and sitting for the examination. The next scheduled opportunity to achieve this status is Spring, 2024. We encourage all those eligible to apply for this prestigious credential.

While the workers' compensation section presents a number of interesting and educational CLE opportunities throughout the year, under the direction of the CLE committee of the workers' compensation executive committee, over the next twelve months there will be a special series of short form seminars, two hours in length, designed to provide a comprehensive overview of the gamut of topics and issues relevant to practicing workers' compensation at the highest level—from the basics of ethics and jurisdiction, to pursuit of appeals to the CRB, Appellate and Supreme courts of Connecticut. Attendance at this series is a "must" for those who are contemplating sitting for the board certification examination—but is just as valuable as a primer and refresher on the topics encountered in your daily practice, for those lawyers already certified, or those newly admitted to the bar. Each seminar will be available in-person and in webinar format, and recorded for future reference.

The series will begin with ethics and professionalism, presented by two of the hottest speakers on the ethics circuit—Dana Hrelic and David Atkins. Dana and David will present the issues in the form of hypotheticals, reflecting topics regularly arising in the workers' compensation forum. Topics will include confidentiality, conflicts of interest, meritorious claims, expediting litigation, candor toward the tribunal, fairness to the opposing party, impartiality and decorum toward the tribunal, truthfulness in communications with others not clients, and communication with persons and entities represented by counsel.

The ethics presentation will be followed by a series of two-hour seminars covering the seminal cases in the area of workers' compensation, including the holdings, applications and significant dissents. The first program will supplement the offerings of the workers' compensation section at the 2023 Connecticut Legal Conference, and feature Lucas Strunk as a presenter. Each of the caselaw seminars will feature an experienced and respected member of the workers' compensation community—and there will be representation from both the claimants' and respondents' bar.

The cases presented will be varied in scope, and a working knowledge of these decisions is vital to achieving and maintaining a high level of competency in the practice area. The topic areas include-- Who can bring a claim? Can a claim be brought against this employer? Does a claim qualify as an injury? Is the notice/denial timely? How do you calculate benefits? What benefits is the claimant entitled to? Can liability be apportioned? How do you address third-party exposure from both claimant and respondent perspectives? How should claims be properly administered? And many, many more..

In summary, the workers' compensation section will offer a plethora of CLE content during the next year, valuable for all practitioners, from the young lawyer to the experienced, board-certified specialist. We look forward to you joining us this year in this journey of learning, and thank you for your continued support of the work done by your fellow section members in furtherance of continuing education and board certification, for the benefit of our section, and the workers' compensation system as a whole.

Editors' note: Robert S. Bystrowski is the Vice-Chair of the Workers' Compensation Section and is a partner at Morrison & Mahoney. He is a board-certified workers' compensation specialist.

A Modern Look at Work Locality Requirements Under C.G.S. §31-308(a)

By Alexander J. Sarris

We live in an era where traditional notions of weekdays spent at an office building for "9 to 5" employment are falling by the wayside. This steady progression can be linked with technological advancements allowing remote work as efficiently (arguably) as before often from the comforts of home. It can also be said, following the onset of the COVID pandemic, that the environment in which we live is another catalyst in the progression of non-traditional employment options – such as remote online work – becoming more common and accepted by employers.

A changing workplace dynamic has implications within the context of various workers' compensation statutes. One such statute is C.G.S. §31-308(s) regarding compensation for partial incapacity.

To begin, look at the statutory language when dealing with any issue of statutory interpretation. *Spears v. Garcia*, 263 Conn. 22, 28-29 (2003). Section 31-308(a) mandates an injured employee receive entire weekly workers' compensation indemnity benefits upon satisfaction of three factors: (1) certification by the treating medical provider for that injured employee that the employee is unable to perform his or her usual work but is able to perform other work, **(2) the employee is ready and willing to perform other work in the same locality** and (3) no other work is available. (Emphasis added.) Defining "locality" in a modern workplace is critical and can be decisive in determining eligibility for partial incapacity compensation.

What does "locality" actually mean though? Merriam-Webster dictionary defines it as "a particular place, situation, or location." Black's Law Dictionary provides slight nuance by adding "a definite region; vicinity; neighborhood; community" to the definition. Neither source is particularly enlightening for our purposes nor considers variables such as an employee who began employment remotely at the time of injury or a Connecticut employee who moved out of state but is still looking to work remotely for a Connecticut company.

Surprisingly, there is a dearth of case law on the locality requirement of §31-308(a). The issue was directly addressed ten years ago in *Santiago-Vivo v. City of Bridgeport*, 5716 CRB-4-12-1 (Dec. 11, 2012). *Santiago-Vivo* was a case of first impression without Compensation Review Board, Appellate Court or Supreme Court guidance. It involved a claimant pursuing §31-308(a) benefits following a sedentary work capacity restriction that was put in place after she left her employment in Bridgeport, Connecticut and relocated to Florida without plans to return. In denying the indemnity benefits, the trial commissioner interpreted §31-308(a) to define "locality" as the geographic area only within the State of Connecticut. The CRB affirmed the trial commissioner's decision and examined the legislative history and intent before concluding that the legislative purpose behind §31-308(a) was to define "locality" not as whatever location the claimant might choose to reside in but rather the geographic area of employment as it existed at the time of the claimant's injury.

It is also important when analyzing legislative intent to determine the meaning of a statute that "we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction…. In applying these principles, we are mindful that the legislature is presumed to have intended a just and rational result." *Teresa T. v. Ragaglia,* 272 Conn. 734, 748 (2005). Finally, a basic rule of statutory construction dictates that, ordinarily, where the legislature has mandated specific factors to be taken into consideration to reach a result, other factors cannot be considered. *State v. Vickers,* 260 Conn. 219, 225 (2002). Absent evidence to the contrary, statutory itemization is proof of legislative intent that a list of conditions or requirements is intended to be exclusive. *Id*. On its face, §31-308(a) limits the requirements for availing oneself to work only in the same locality and does not seem to take into consideration remote employment opportunities that may be available elsewhere.

The legislature addressed an amendment to §31-308(a) since COVID. In 2021, the legislature passed P.A. 21-196, §59, to amend §31-308(a) so as to include "physician assistant" as an acceptable treating medical provider under subsection (1). Interestingly enough, however, the legislature did not feel obligated to further clarify subsection (2) to more thoroughly define "locality" even with the proliferation of remote employment positions over the past few years.

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A Modern Look at Work Locality Requirements Under C.G.S. §31-308(a)

Although not directly on point, post-COVID insight into this issue may be found from an April 2020 Compensation Review Board decision of *Gfeller v. Big Y Foods*, 6322 CRB-2-19-5 (April 8, 2020). In *Gfeller*, the CRB affirmed the decision of the trial commissioner who awarded §31-308(a) benefits to an injured worker previously terminated from employment for cause. The trial commissioner concluded that the injured worker sufficiently demonstrated a credible willingness to work and distinguished the employer's internal corporate policy prohibiting the rehiring of employees terminated for cause versus its actual ability to accommodate light duty work restrictions for the injured employee. Perhaps most tellingly, the CRB reiterated the determinative factor that the employee did not decline an offer of work from the employer as none was given.

Despite its age, the specter of Santiago-Vivo continues to loom in the background. Near the end of the CRB opinion there is an example explaining that an injured employee in Norwalk, Connecticut would be required to seek other light duty work also in the general vicinity of Norwalk, Connecticut to receive §31-308(a) benefits presuming all other requirements were met. However, footnote 2, at the end of this discussion, provides some tantalizing insight, albeit in dicta. Footnote 2 notes instructs that prior to July 1, 1993, case law and legislative history interpreted §31-308(a) to protect claimants from having to perform job searches far from their homes as opposed to the area where the employer has its place of business. For example, a worker in the northeast corner of Connecticut would not be denied benefits on the basis of showing other work was available in the southwestern tip of the State. With that said, however, footnote 2 takes administrative notice that the border areas of New York, Massachusetts and Rhode Island are economically integrated with adjoining Connecticut communities and commuting to work in Connecticut from such areas or performing job searches there would be reasonable under §31-308(a). The CRB was careful to advise that it did not find such conclusions relevant to the appeal.

For the time being, §31-308(a) does not allow claimants seeking compensation benefits for partial incapacity to avail themselves for work opportunities beyond the same locality within Connecticut – even if remote work is available. With that said, whether or not that would under the following scenarios is certainly up for debate: (1) an employee who worked remotely at the time of injury; (2) an employee who moved out of Connecticut but is looking for remote work with a Connecticut employer; (3) an employer that offers to accommodate an injured employee with a light duty restriction for work that can be performed remotely; or (4) an adjoining state outside of Connecticut but in close geographical proximity to the claimant.

Thus far, it appears that administrative law judges and the CRB will continue to defer to the legislature and adopt traditional interpretations of "locality" for purposes of §31-308(a). But, it only takes one case to change everything.

Editors' Note: Alexander J. Sarris is a partner with the Arch Law Group, LLP.

A Chat With Administrative Law Judge Randi L. Cohen

RC: From day one I was grateful and very excited to do a good job. At that point, I had been representing claimants for 25 years and I welcomed the change.

CQ: What skills do you think you took from private practice that helped you the most when you became a commissioner?

RC: Definitely knowing the law, knowing the nuances and being skilled at practicing workers compensation law. I also found that after all those years of representing claimants I was very comfortable speaking with them. That was especially helpful in conducting hearings with unrepresented claimants. It has also contributed to my success in conducting mediations.

CQ: Once you had your job on the bench, what skills would you say you developed that you did not have before in private practice?

RC: Something that I had to work on was when you are an advocate it's easy to know what to do because you know who you represent. I had a fear that when I first started doing this, because I represented claimants for so long, that I feared I would not be able to be impartial. I was relieved and surprised to find that once somebody wasn't my client, it was easy to be impartial. Once you are impartial it's sometimes difficult to decide what to do, but really once they are not your client, they are not that cute anymore and it becomes easier to make decisions.

CQ: What was the biggest challenge that you faced in becoming a Judge that you did not expect?

RC: The biggest challenge is that things are not as cut and dry as you think they are going to be. Once you no longer have a horse in the game, it is sometimes very difficult to decide what is the right thing to do because you want to do right by everybody. You do not represent the respondent and you do not represent the claimant and you want to get it right and you want to make it fair.

That's a challenge, but if you know the law and you use your common sense you can often get it right.

CQ: **Looking back is there one case in your career, either in your private practice or as a Judge that stands out to you with respect to workers comp?**

RC: There have been many. There are some cases that you will use as a reference point for your definition of someone who is totally disabled but I can't really pinpoint one case that is the most memorable. There are so many cases, you remember the facts but you don't always remember the outcomes. That's why I love mediation. I was lucky to be able to do a fair amount of mediation in the Commission, because the cases that end up going to formal hearings are the really difficult ones. It's challenging to decide those sometimes and somebody has to win and somebody has to lose. I believe that is not always the right answer and that is why I love mediation because I think you can reach a better compromise that way.

CQ: **And that's why after you retired as a Judge, you ended up deciding to continue working part time doing mediation?**

RC: Absolutely, I think that's the better way to resolve cases because sometimes what's right is a little closer to the middle, rather than somebody wins everything and somebody loses everything.

CQ: **Let's give a little plug for yourself, you will be doing private mediation?**

RC: Yes, part time in my business Resolve It. But I also want to note that when I started out as a commissioner, I had an agenda and that was to get everything to move along efficiently. As a claimant's attorney I experienced many delays in trying to get things done efficiently. In the old days(laughing), I would go to a hearing and nothing would get done, I would go to another hearing 6 weeks later and for example, the other side still would not have gotten an RME. When I first got appointed and had the opportunity to shadow some other commissioners, it was Commissioner Walker who said to me that you can hold people accountable. That was a revelation to me! I really appreciated it. He said you can still give them due process but hold them accountable at the same time and I ran with that. Before Chairman Mastropietro put the guidelines in place, I would say to people if you want to get a RME, that's great, but you need to schedule it within thirty days or you're not going to get one. People understood that and complied. To me that was really important because as a claimant's lawyer you know what to do with "yes" and you know what to do with "no", but you don't have a lot of choices when there is just no answer or when the answer is yes but then nothing happens. It is really important for people to be accountable so you can move the case along. That was my priority.

CQ: **What is one piece of advice you would give to new attorneys that are practicing workers compensation on either the claimants or respondents side?**

RC: Listen to your client and be as prepared as you can be. Write it out for yourself before you go to a hearing. If you go to a hearing and you are looking for TT because your client has not been paid, speak to your client, if nowhere else but in the parking lot before you go up to the hearing to find out if your client has been paid. Do your homework. I did learn since I have been a commissioner, that the respondents sometimes have the same problems with their clients not communicating with them. It's not always their fault and they don't want to throw their clients under the bus.

CQ: **With respect to formal hearings, can you give one tip to new lawyers and seasoned lawyers that can help them?**

RC: Be as prepared as you can be. The Judges can only find the evidence that you give them. When you go to a formal hearing you need to be really clear about what it is you are looking for. Before we start the formal hearing, I always on the record go over with the parties what it is exactly you are looking for. Are you looking for TT, medical treatment…are there bills to be paid? Be very clear on what it is you're looking for because if you have not stated exactly what you're looking for it is very difficult for the commissioner to find that for you.

CQ: **What would you say was the most enjoyable part of being a Judge?**

RC: The professionalism and comradery of the bar, as it is an exceptional bar. Everyone has such a strong work ethic and gets along with each other and I think that is so awesome. I love being able to help people resolve matters. It is very rewarding.

CQ: **Is there any advice you would give to the sitting Judges to improve the commission?**

RC: Let lawyers be lawyers. That has helped me. If you are the commissioner/now Judge, you have to be the authority in the room but I think it is really important to not to start a fight where there is not one. Offer advice, make recommendations and give people room to do the right thing.

CQ: **Personally, what are you looking forward to the most in your retirement?**

RC: While I love workers compensation, and did not want to step away completely, I really wanted time with my grandbabies. I look forward to staying in contact with everyone through mediations.

Editors' Note: Heather Porto is a partner at Strunk, Dodge, Aiken and Zovas in Rocky Hill, CT. Attorney Porto represents municipalities, insurers, third party administrators and employers in defense of workers' compensation matters throughout the state of Connecticut.

All Administrative Law Judges, Workers' Compensation Practitioners, and Staff Members of the Workers' Compensation Commission Offices are Invited to Participate at the...

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Shuttle Meadow Country Club

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Monday, September 11, 2023

- Registration begins at 11:00 a.m.
- Lunch will be from 11:00 a.m. to 11:45 a.m.
- Shotgun Start at 12:00 p.m.
- Cocktail Reception at 5:00 p.m. and
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Case Comments

By Meghan A. Woods

COMPENSATION REVIEW BOARD DECISIONS

To open a stipulation, a claimant needs to present a persuasive argument that some form of fraud, accident, or mutual mistake was present that vitiated the approval of the agreement. Whether a claimant is competent to execute an agreement constitutes a question of fact.

Milkulski v. A. Duie Pyle, Inc., 6448 CRB-7-21-11 (January 11, 2023)

The claimant settled his workers' compensation claims against the respondents by way of two full and final stipulations. The first agreement was for indemnity-only in the amount of $781,000. Following the approval of that agreement, the claimant sought to re-open the stipulation. In lieu of further proceedings on the matter, the parties agreed to a second stipulation to resolve the claim to re-open the indemnity settlement, as well as to close the medical portion of his claim. The agreement provided for a one-time payment of $39,500 to resolve the request to re-open the indemnity stipulation, $500 in exchange for the claimant executing a general release, and for the funding of a Center for Medicare & Medicaid Services ("CMS")-approved Medicare Set Aside ("MSA") in the amount of $779,296. The MSA was to be professionally-administered by a third party, Ametros.

The second stipulation was approved on the record before an administrative law judge on February 20, 2020. The claimant subsequently moved to open the second settlement agreement, arguing that various medical providers would not accept payment from the MSA's administrator, Ametros, and therefore, he should be allowed to self-administer the MSA account. After a formal hearing on the claimant's motion before a different administrative law judge, the claimant's motion was denied, with the trial judge finding that the respondents had performed their obligations under the agreement by funding the MSA, and that the agreement was not entered into due to a mistake of fact or fraud. This appeal followed.

On appeal, the claimant alleged that the terms of the stipulation were inconsistent with his understanding, that the written agreement was not presented to him until right before trial, and that there was some form of misconduct on the part of the respondents by funding the MSA prior to the approval of the stipulation. He also alleged incompetency to enter into the stipulation due to a psychiatric condition, for which he presented no evidence or medical testimony. The Board held that pursuant to *Dombrowski v New Haven,* 6149 CRB-3-16-10 (September 11, 2017), *aff'd*, 194 Conn. App. 739 (2019) *cert. denied,* 335 Conn. 908 (2020) and *Franklin v. Pratt & Whitney*, 6330 CRD-5-19-5 (March 18, 2020), the claimant must show that some form of fraud, accident, or mutual mistake occurred that vitiated the approval of the agreement in order to prevail on a motion to open the stipulation. The Board reviewed the transcripts of the February 20, 2020 hearing and concluded that the claimant was properly canvassed by the administrative law judge at the initial settlement hearing regarding the MSA requirement, that he was afforded multiple opportunities to review the documents with the administrative law judge but he declined to do so, and that the claimant was competent at the settlement hearing. Therefore, the trial judge properly denied the motion to open, and the Compensation Review Board ("The Board") affirmed the trial judge's decision.

The test for determining whether particular conduct is a proximate cause of an injury is whether it was a substantial factor in producing the result.

Lemaire v. New England Industrial Truck, Inc., 6466 CRB-3-22-1 (January 26, 2023)

The claimant was employed by the respondent-employer, New England Industrial Truck, Inc., as a heavy equipment mechanic. He sustained an injury to his lumbar spine on November 24, 2010. In 2011, he underwent an L4-5 laminotomy, partial hemilaminectomy at L5 with the foraminotomy of the L5 nerve root and excision of a 4-5 disk to the right. He was subsequently deemed to have a 10% permanent partial disability to his lumbar spine as a result, but was able to return to full duty work as a heavy equipment mechanic.

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On November 23, 2015, he sustained a second injury to his lumbar spine while working for the respondent-employer. Subsequently, he underwent a second surgery- a bilateral fusion with pedicle screws at L4-5 and L5-S1, transforaminal lumbar interbody fusions at L4-5 and L5-S1, and a left-sided decompression at L3-4. He was eventually able to return to work, but only at a light-duty, part—time capacity.

Then, on October 12, 2018, the claimant was breaking down some boxes in a seated position when he twisted and "felt something" in his back. He was in substantial pain, and his primary care physician and his orthopedic physician ended up keeping him out of work. The respondent's insurance carriers for the November 23, 2015 and October 12, 2018 dates of injury disagreed over who was responsible for the claimant's current work status and treatment needs. As a result, the claimant underwent examinations by several physicians, and received several different opinions on the cause of his condition, the need for treatment, and his work capacity. Dr. Gerald Becker found that the November 23, 2015 injury was causal, and assigned a 30% permanent partial disability. He did not comment on the October 12, 2018 event. Dr. Howard Lantner found that the October 12, 2018 incident was an exacerbation of the claimant's preexisting condition and that the November 23, 2015 injury was the significant contributing factor in the claimant's condition. He found the claimant totally disabled. Dr. John Strugar, a commissioner's examiner, found that the claimant's November 23, 2015 injury was the significant contributing factor in his condition, and that the October 12, 2018 was not a new injury.

The case was subsequently heard by an administrative law judge who found that the October 12, 2018 incident was not a compensable injury, and that the November 23, 2015 injury was a significant contributing factor in the claimant's current disability and need for treatment. The administrative law judge also found that the claimant was totally disabled, and ordered the respondents to start temporary total disability benefits until a form 36 was filed and approved. The respondent-insurer for the November 23, 2015 date of injury, Broadspire, filed a motion to correct and a motion for articulation, which were denied, and thereafter appealed.

On appeal, the claimant did not take a position on causation, but contended that the administrative law judge properly found that he was totally disabled. The respondents-appellants, Broadspire, argued that the administrative law judge found facts that were not supported by, or were contrary to, the evidence. They also argued that the judge misapplied the law to the underlying facts, decided issues that were outside of the cited issues for determination, erred in holding that the claimant remained totally disabled, and that the claimant did not raise and/or meet his burden with respect to C.G.S. § 31-315. Lastly, they argued that the administrative law judge erred in denying all or part of their motion to correct and motion for articulation. The respondent-appellees, Unicarriers Americas Corp., and Tokio Marine America, argued that the findings should be upheld, as the assessment of the weight and credibility of the evidence rests with the trial judge, whose findings and conclusions were legally consistent with the underlying facts. They disagreed, however, with the finding regarding the claimant's total disability status.

The Board noted that the trial judge's findings must stand unless they are without evidence, contrary to law, or based on unreasonable or impermissible factual inferences. First, with regards to the issue of proximate cause of the claimant's condition, the Board noted that the test for determining whether particular conduct is a proximate cause of an injury is whether it was a substantial factor in producing the result. The substantial factor standard is met if the employment "materially or essentially contributes to bring about injury…"[1]. The Board noted this analysis is necessarily fact-driven and that the trial judge properly applied the law to the facts based on multiple doctors' opinions, the judge's discretion and rationale in her opinion, and her consideration of the totality of the evidence. The Board held that, given testimony from the claimant's treating physician on claimant's trajectory of symptoms and need for treatment prior to the October 12, 2018 injury, that it was reasonable for the trial judge to have found that the claimant's condition was a result of the November 23, 2015 injury. Therefore, the Board affirmed the trial judge's decision on compensability. The Board also affirmed the trial judge's decision on the claimant's total disability status, stating that the claimant's primary care physician had continued to totally disable him and therefore there was medical evidence to support the trial judge's conclusion that the claimant was totally disabled. Furthermore, the respondents failed to file a form 36 to discontinue temporary total benefits, and therefore, did not follow the appropriate statutory requirements to contest and discontinue the claimant's temporary total benefits. Lastly, the Board rejected the respondent's argument that it was improper for the judge to deny their motions to correct and for

[1] *See, Norton v. Barton's Bias Narrow Fabric Co., 106 Conn. 360, 365 (1927).*

articulation. The Board stated that this was merely an effort by the respondents to substitute their own findings of fact in order to obtain a more favorable decision, and that a trial judge has discretion to conclude which evidence is material and probative.

Evaluation of eyewitness credibility is exclusively for the finders of fact and an administrative law judge's decision that a witness was credible will only be reversed if the judge reached a decision unsupported by the record.

Zezima v. City of Stamford/Board of Education., 6472 CRB-7-22-4 (February 3, 2023)

The respondents appealed from a Finding and Award by the trial judge who found that the claimant's fall at home was compensable sequelae of a prior work injury. The case stemmed from an incident at a school where the claimant, a teacher, was hit on the head. There was a dispute over the extent of his head injury, and the symptoms he experienced as a result of that injury. About a month after the injury, the claimant alleged that he experienced a dizzy spell which caused him to fall at his home, which in turn aggravated the work injury and his current condition and symptoms. A formal hearing was held on the issue of whether the fall at home was a sequelae of the original work injury. Medical evidence was submitted by way of multiple physicians' opinions on the claimant's diagnosis from the original injury, and whether the fall at home was a sequelae of same, or whether it was due to another unrelated medical condition and not a result of the original work injury. Direct testimony from the claimant was also heard. The trial judge found the claimant's medical evidence from multiple physicians to be credible, and that the injuries from the fall at home were compensable sequelae of the original injury. She did not find the respondents' medical examiner to be credible. The respondents filed a motion to correct seeking a number of findings related to alleged discrepancies in the claimant's narrative, and a finding of credibility for various expert witnesses. The administrative law judge denied that motion in its entirety and the respondents appealed.

On appeal, the respondents argued that the administrative law judge drew unreasonable inferences from the claimant's evidence and that the claimant's narrative should not have been found credible. The Board noted that the trier of fact must be the one responsible for finding the truth amidst conflicting claims and evidence. Evaluations of witness credibility are exclusively for the finder of fact, particularly when a witness offers live testimony at a formal hearing. The Board reviewed the record and found that the administrative law judge could reasonably find the medical reports and opinions of the claimant's treaters to be credible and persuasive. The Board noted that the appeal constituted an effort to have an appellate panel reweigh the evidence presented to the trier of fact and come to a different conclusion. It noted that great deference is given to the fact-finding prerogatives of administrative law judges, but that the Board may reverse a decision where the judge did not properly apply the law or reached a decision unsupported by evidence on the record. However, that was not the case here. Ultimately, the administrative law judge's opinion that the claimant and his expert's testimony was credible were conclusions based on an assessment of evidence, so the decision must be affirmed on appeal.

An entitlement to permanent partial disability benefits can be established by either evidence that a claimant reached maximum medical improvement or an agreement between the parties sufficient to establish a binding meeting of the minds regarding a permanent partial disability.

Esposito v. City of Stamford, 6470 CRB-7-22-4 (February 6, 2023)

The claimant petitioned for review of a March 22, 2022 Findings and Order. The claimant was an alleged surviving spouse and sole presumptive dependent of the decedent, who was awarded total disability benefits due to a significant visual impairment in accordance with C.G.S. § 31-307 in 1984. In 1998, the respondents filed a form 36 contesting the decedent's ongoing entitlement to total disability benefits. The commissioner denied the form 36 and ordered the respondents to continue making payments pursuant to § 31-307(c)(1) because the decedent's eye injury satisfied the standard for total incapacity and the condition had persisted until that time. [2] The June 9, 1998 award was never appealed and no additional findings or orders were issued. Thereafter, the decedent died on November 7, 2020, at which time the claimant was legally married to the decedent. The surviving spouse, now

[2] *The decedent initially received total disability benefits pursuant to § 31-307(a) which was revised to § 31-307(c)(1) for the total and permanent loss of sight or the reduction to one-tenth or less of normal vision in both eyes.*

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the claimant, sought payment of permanent partial disability benefits for her husband's vision loss. She contended that consistent with the commissioner's prior findings regarding the permanent nature and the extent of her husband's vision loss, the decedent's right to permanency benefits vested several years before his death and upon his death, the claimant became entitled to the vested permanency benefits. The trial judge agreed, but found that the respondents continued to pay statutory total disability benefits following the June 9, 1998 formal hearing, and therefore were entitled to a credit for the benefits paid since then. Since the total amount of benefits paid between June 9, 1998 and the decedent's death on November 7, 2020 were greater than the number of weeks for each eye that the decedent's permanent partial disability would amount to, the respondents did not owe anything to the claimant. The claimant appealed those findings.

On appeal, the claimant argued that, because the decedent was never given payment of permanency benefits during his lifetime, the benefits vested in 1998 and automatically inured to the benefit of the claimant's surviving spouse upon his death. The respondents argued that the 1998 Findings and Award did not constitute a designation of maximum medical improvement. They also argued that because neither the date of maximum medical improvement nor the extent of impairment was established, the decedent's entitlement to permanent partial disability benefits never vested.

On review, the Board affirmed the result reached by the administrative law judge, but on alternative grounds. The Board noted that total incapacity benefits and permanent partial disability benefits compensate an injured worker for different losses. The Board distinguished the claimant's claim from *Cappellino v. Cheshire*, 226 Conn. 569 (1993), where a commissioner ordered payment of an unpaid permanency award to a surviving spouse. Importantly, in Cappellino, a permanent disability was definitively established during the decedent's lifetime. In this case, the decedent did not receive a permanency rating during his lifetime. Further, the Board noted that an injured worker's entitlement to permanent partial disability benefits vests when the worker reaches maximum medical improvement. The Board concluded that in the absence of proof that a claimant has reached maximum medical improvement, or an agreement between the parties sufficient to establish a binding meeting of the minds regarding a permanent partial disability rating, there is no established entitlement to permanent partial disability benefits. The Board rejected a holding that would create an automatic entitlement to permanent partial disability due to a finding of statutory total incapacity. Lastly, the Board held that the issue of when the award vested was moot in light of their conclusion that no entitlement to permanency was established during the decedent's lifetime.

The decision on whether a claimant is totally disabled is a holistic determination of work capacity, and an administrative law judge's finding regarding total disability status will stand unless the finding was contrary to the evidence, contrary to the law, or based on unreasonable or impermissible factual inferences.

Asberry v. Bunker Hill Properties, Inc., 6469 CRB-1-22-3 (February 21, 2023)

The respondent appealed a Finding and Award that found the claimant to be totally disabled as the result of compensable injuries he sustained while employed by the respondent-employer. The administrative law judge concluded that the claimant's treating physician offered persuasive opinions that linked the claimant's condition to a work injury that left him totally disabled. The respondents appealed, arguing that was an unreasonable inference based on the evidence presented.

The Board affirmed. The standard for deference to the administrative law judge's findings and legal conclusions must stand unless they are without evidence, contrary to law or based on unreasonable or impermissible factual inferences. Further, a standard for whether a claimant is realistically employable requires an analysis of the effects of the compensable injury, in combination with his pre-existing talents, deficiencies, education, vocational background and more. The Board emphasized that the decision of whether a claimant is totally disabled is a holistic determination of work capacity that can include considerations of medical experts and their credibility. The administrative law judge found that the claimant's treating physician deemed the claimant totally disabled from performing the types of work in which the record suggested he was employable. The Board therefore found no error in the administrative law judge's findings regarding the credibility of the treating physician, and the totality of the record supported the findings. The decision awarding the claimant temporary total disability benefits was affirmed.

For purposes of complying with the twenty-eight-day requirement under Conn. Gen. Statute § 31-294(b), the notice of intent to contest a claim must be received by the Commission within twenty-eight days; the act of mailing the notice is not sufficient to comply with the statute.

Ajdini v. Frank Lill & Son Incorp., 6474 CRB-4-22-4 (March 17, 2023)

In affirming the trial judge's granting of the claimant's motion to preclude, the Board held that "mailing" is not tantamount to "filing" for purposes of a form 43.

The respondents petitioned for review from a granting of the claimant's motion to preclude, and the finding of preclusion that attached thereto. It was undisputed that the claimant was injured in the course of his employment with the respondent-employer on two separate dates, July 6, 2018 and July 17, 2018. The claimant filed two separate forms 30C, one for each date of injury, with the Worker's Compensation Commission and the respondent-employer, both of which received the form 30Cs on May 6, 2019. In response to these forms, the respondent-employer sent two forms 43 seeking to contest compensability of these claims. They were mailed to the Worker's Compensation Commission and the respondent-employer on May 29, 2019. The Commission received the forms on June 3, 2019, and the claimant and June 6, 2019. Thereafter, the claimant filed a motion to preclude the respondents from contesting liability, alleging that the respondents did not comply with the requirements of Conn. Gen. Statute § 31-294(b) in that they did not file a form 43 within twenty-eight days of receiving the claimant's form 30Cs. The trial judge granted the claimant's motion and precluded the respondent-employer from contesting compensability, and this appeal followed.

On appeal, the respondents argued that they met their obligation to notify the claimant of their intent to contest liability because the forms were mailed within twenty-six days after receipt of form 30C. The claimant argued that the statute was clear and unambiguous, and the form 43s were not filed within twenty-eight days, and therefore, were untimely and the trial judge's granting of the claimant's motion to preclude was proper.

The Board agreed with the claimant and affirmed the finding of preclusion. The Board held that "mailing" is not the same as "filing." Pursuant to § 31-294(b), a contest of liability must be filed with the Commission on or about the twenty-eighth day after they have received a written notice of claim. The language of Conn. Gen. Statute § 31-294(b) was clear and unambiguous that the form 43 must be filed with the commission on or before the twenty-eighth day after receipt of notice of a claim. The Board further noted that the respondent's mailbox rule argument was flawed because the customary usage and definitions of the term "filing" means the actual presentation of a document at the relevant agency for inclusion into the official record. The Board also looked at how the Commission treats the filing of other forms, and noted that, for example, the commission treats the term "serve" with regard to a form 36 as meaning "filed". The Board also held that the mailbox rules' rebuttable presumption that if something is mailed it will be received does not correlate to it being received in a timely manner. Lastly, the Board rebutted the respondent's argument that this holding would encourage claimants to intentionally not accept form 43 and then file for preclusion against the respondents. The Board discussed that this argument is flawed because the potential for preclusion is based on the date of filing of the document with the Commission and not the date of receipt by the claimant.

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