CASE NO. 4724 CRB-3-03-9
CLAIM NO. 300005037 : COMPENSATION REVIEW BOARD

MICHAEL HOROBIN
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

CITY OF WEST HAVEN : DECEMBER 2, 2004
EMPLOYER

and

CIRMA
INSURER
RESPONDENTS-APPELLEES
CROSS-APPELLANTS

and

SECOND INJURY FUND
RESPONDENT-APPELLANT
CROSS-APPELLEE

APPEARANCES:

The claimant was represented by Chris DePalma, Esq., Kennedy, Johnson, D'Elia & Gillooly, L.L.C., 545 Long Wharf Drive, New Haven, CT 06511.

The respondent employer and insurer were represented by James Sullivan, Esq., Maher & Williams, P.O. Box 550, Fairfield, CT 06430.

The Second Injury Fund was represented by Lisa G. Weiss, Esq., Assistant Attorney General, 55 Elm Street, P.O. Box 120, Hartford, CT 06141-0120.

These Petitions for Review from the September 10, 2003 Finding and Award of the Commissioner acting for the Third District were heard May 28, 2004 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners A. Thomas White, Jr., and Charles F. Senich.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondent employer/insurer and the Second Injury Fund have both petitioned for review from the September 10, 2003 Finding and Award of the Commissioner acting for the Third District. They raise several claims of error on appeal. We find error with respect to the amount of Dr. Gilstein's medical bill and with regard to the trier's conclusion on joint and several liability, while affirming on the other grounds of appeal that the appellants have raised.

Before we discuss the factual circumstances of this case, we shall consider two procedural matters: the lateness of the respondent insurer CIRMA's Reasons of Appeal, and the challenge they raise to the timeliness of the trier's award. We begin by explaining that § 31-300 C.G.S. requires that a written copy of the commissioner's findings and award be sent to each party "no later than one hundred twenty days" after the conclusion of any hearing. Although this provision of the law is mandatory, a late decision is not automatically void. One of the parties must affirmatively raise an objection before the tardy decision is invalidated. Furthermore, the parties may waive their respective rights to object to a late decision either explicitly or implicitly by conduct. Stewart v. Tunxis Service Center, 237 Conn. 71, 80 (1996); Schreck v. Stamford, 72 Conn. App. 497, 500 (2002). Our state courts of appeal have held that

consent to the lateness of a judgment may be implied when the parties fail to object "seasonably" to a late judgment. Waterman v. United Caribbean, Inc., 215 Conn. 688, 692 (1990); Schreck, supra.

The last formal hearing in this case was held in this matter on January 17, 2003, when the record was closed following the submission of proposed findings. According to CIRMA's brief, the parties granted the trier a two-week extension for issuance of the Finding and Award on or about May 17, 2003. However, the commissioner did not publish a decision until September 10, 2003. The Second Injury Fund (hereinafter Fund) was the first party to petition for review from that decision, filing its appeal on September 24, 2003. Simultaneously with its petition for review, the Fund filed a very detailed Motion to Correct with the trial commissioner pursuant to Admin. Reg. § 31-301-4 and its Reasons of Appeal pursuant to Admin. Reg. § 31-301-2.[1] Neither lists the tardiness of the trier's decision as a ground for error.

On September 29, 1993, the respondent employer and insurer filed their petition for review. They also filed a motion for a three-week extension of time to file a Motion to Correct, and an extension of time to file Reasons of Appeal until two weeks after their prospective Motion to Correct would be ruled upon. The trier did not issue a ruling on the former motion, though the latter motion was granted by this board. The trial commissioner issued his ruling on the Fund's Motion to Correct on January 26, 2004. At that point, CIRMA had not yet filed its own Motion to Correct. Both appellants successfully sought extensions of time to file their appellate briefs through April 6, 2004. CIRMA then filed a set of four documents on April 7, 2004, including a request to

[1] Administrative Regulation § 31-301-2 requires Reasons of Appeal to be filed within ten days of the filing of the appeal petition.

incorporate the Motion to Correct of the Fund, a Motion to Submit Late Reasons of Appeal, Reasons of Appeal, and a brief. The latter two of these documents contain CIRMA's first mention of the tardiness of the trier's decision. In total, it took CIRMA 208 days from the issuance of the Finding and Award to raise this objection.

With respect to the late Reasons of Appeal, CIRMA states in its motion that they were not submitted earlier due to "internal administrative errors," which were not caught until CIRMA's counsel began to prepare his brief. The respondents allege that none of the other parties to the appeal have been prejudiced by this oversight, and seek to have the tardiness excused. An appellant's failure to file timely Reasons of Appeal renders the appeal voidable by this agency. See Sager v. GAB Business Services, Inc., 11 Conn. App. 693, 697 (1987). An appellee who seeks to dismiss an appeal for failure to file papers within an allotted time must file a prompt motion to dismiss under Practice Book § 66-8 once the ground for dismissal arises. Id., 697-98; Chang v. Pizza Hut of America, Inc., 4122 CRB-6-99-9 (November 28, 2000). This board may also schedule a "show cause" hearing at any time under the more general rubric of "failure to prosecute with proper diligence." Id., citing Tamarit v. Ottolini, 145 Conn. 586, 589 (1958) (court may, upon its own motion, dismiss appeal for failure to prosecute with due diligence).

Because neither the appellee nor this agency has actively sought dismissal of CIRMA's appeal, and no prejudice to the parties is otherwise apparent from our acceptance of this document, we will accept CIRMA's late Reasons of Appeal. There is a caveat to this acceptance, however. Among the respondents' Reasons of Appeal is the

assertion that the trial commissioner lost jurisdiction over this case by failing to issue his decision within either the 120-day period after the record closed, or the two-week extension period granted by the parties. Our acceptance of these late Reasons of Appeal does not confer a stamp of "seasonableness" on CIRMA's objection to the trier's Finding and Award.

The respondents could have immediately objected to the lateness of the trier's decision; yet, they waited seven months to do so. Attributing this oversight to "internal administrative errors" does little to excuse such a long delay. In the recent case of Bernardo v. Capri Bakery, 4570 CRB-3-02-9 (February 10, 2004), this board held that it was unseasonable for an appellant to first raise an objection to a trier's untimely award 119 days after the decision was issued. We relied on a similar outcome in Dichello v. Holgrath Corporation, 49 Conn. App. 339, 352 (1998) (280-day delay in objecting), and contrasted the cases of Simotas v. Norwalk Hospital Association, 4530 CRB-7-02-5 (May 20, 2003), where we had deemed seasonable a similar objection that had been made only 18 days after the trier's late decision was issued. The situation here is very similar to those in Bernardo and Dichello, and warrants the same result. Therefore, we hold that the appellants have waived any objection to the tardiness of the trial commissioner's decision under § 31-300.

With respect to the underlying facts of this case, the trial commissioner found that the claimant sustained a low back injury on May 2, 1986, while working as a mechanic for the respondent City of West Haven. This led to symptoms of depression, for which the claimant saw Dr. Gilstein, a psychologist. The Fund accepted liability for the back injury and its sequelae pursuant to the transfer provisions of § 31-349 C.G.S., as the

claimant had a back condition that pre-existed the May 2, 1986 injury. As the claimant's recovery progressed, he returned to work for the city at a less strenuous job. He was then involved in a fall at the workplace on December 6, 1991, which caused injuries to his back, neck, right knee, head and nose. Liability for the back injury was transferred to the Fund, while the other physical injuries remained the responsibility of the respondent CIRMA, the insurer for the city of West Haven.

The 1991 injury caused the claimant to again develop symptoms of depression, and he again sought psychological counseling from Dr. Gilstein. Knee surgeries were performed in 1992 and 1993, but chronic pain persisted in the right lower extremity, as well as in the claimant's back. This made it difficult for the claimant to sleep, eat or concentrate. He was hospitalized in February 1997 with symptoms of suicidal ideation, and received total disability benefits from 1991 through late 1997. Dr. Gilstein's bills were also paid through workers' compensation.

The claimant then entered into a stipulation agreement with the Fund, which was considered and approved by Commissioner Waldron on November 13, 1997. The stipulation expressly addressed the May 2, 1986 lumbar spine and psychosocial condition injuries and the December 6, 1991 lumbar spine injury, and noted that liability for each of these injuries had been transferred to the Fund. The claimant was paid $50,000 as payment for releasing his disputed claim, including "all results upon the claimant past, present and future, and for all claims for past, present and future medical, surgical, hospital and incidental expenses, . . . and all claims of any nature out [of] the foregoing accidents either wholly, partially, specifically, physical or mental, known or unknown." Stipulation, ¶ 13. The claimant's wife, Alison Horobin, also received $275,000 in

settlement of her future claim as a dependent widow. On October 12, 2000, the claimant entered into another stipulation, this time with the City of West Haven and CIRMA. That settlement resolved liability for the forehead, nose, cervical spine and right knee injuries, but left open the brain injury/psychosocial condition, which had been denied by the respondents and was excluded from the stipulation.

Meanwhile, the claimant continued to see Dr. Gilstein occasionally through December 2001. The trier noted an unpaid balance of $2,860 in medical bills for Dr. Gilstein's treatment since 1992. See Findings, ¶ 18. Dr. Gilstein believes that the claimant continues to be disabled from work due to his compensable psychiatric condition. He explained that the claimant's original depressive reaction from the 1986 injury had improved to the point where he could return to work, but was aggravated and made worse following the 1991 compensable accident. Dr. Rubenstein, a psychiatrist who examined the claimant on the Fund's behalf in December 1996, also attributed the claimant's depression to his compensable back and knee injuries. He agreed that the claimant was unable to perform work.

At the formal hearing below, the claimant sought further temporary total disability benefits for his continuing incapacity, along with payment of outstanding medical bills for his psychological care. A crucial issue thus became the scope of the 1997 stipulation. The trial commissioner took testimony from Commissioner Waldron on that issue, and made note of Commissioner Waldron's observation that, according to his own note sheet, the stipulation was only a partial agreement, with some aspects of the claim remaining open. The trier then observed that Commissioner Waldron's hearing notes did not indicate that the 1991 psychiatric injury was made part of the stipulation agreement.

The trial commissioner also noted that a Fund claims settlement specialist waived the Fund's appearance at the stipulation approval hearing, and elected not to have the agreement reviewed by an attorney from the state Attorney General's office. The settlement specialist had been aware that the stipulation did not refer to a psychosocial condition stemming from the 1991 injury, but was under the impression that the psychiatric claim arose from the 1986 injury only. The stipulation was consistent with that belief, as it did not specifically mention a psychological aspect to the claimant's 1991 injury. The trier also found that the claimant had sent a letter to the Fund on August 28, 1997, indicating that his depression had worsened as a result of the 1991 injury.

The trier then concluded that the claimant's psychiatric condition was causally related to the December 6, 1991 work-related injury, and that the claimant was entitled to total disability benefits from October 12, 1997 forward because of his psychiatric condition. He deemed the respondents jointly and severally liable for Dr. Gilstein's outstanding medical bill of $2,860, and for the claimant's temporary total disability benefits. Both the Fund and CIRMA then filed petitions for review, raising claims of error that concern the findings of fact that the trier drew from the evidence, his reading of the 1997 stipulation with the Fund, and his analysis of the applicable law.

As a general matter, this board's review of a trial commissioner's decision requires that we respect the trier's authority to assess the credibility of the evidence and determine which, if any, of that evidence is reliable. Burse v. American International Airways, Inc., 262 Conn. 31, 37 (2002); Duddy v. Filene's (May Department Stores Co.), 4484 CRB-7-02-1 (October 23, 2002). With regard to questions of fact that depend upon the testimony of witnesses or physical evidence, it is not our role to second-guess the

inferences drawn by the trial commissioner. Id.; Degnan v. Employee Staffing of America, Inc., 4580 CRB-3-02-10 (October 27, 2003). Factual findings may be disturbed on appeal only if they lack evidentiary support in the record, or if they omit material and undisputed facts. Burse, supra; Warren v. Federal Express Corp., 4163 CRB-2-99-12 (February 27, 2001). On questions that involve interpretation of the law, our review is plenary, though this board may modify a trier's legal conclusions only where they result from an incorrect application of the law to the subordinate facts, or from an inference illegally or unreasonably drawn from them. Mazzone v. Connecticut Transit Co., 240 Conn. 788, 792 (1997); Warren, supra.

Much of the appellants' attention is focused on the approved stipulation between the claimant and the Fund, which in their view precludes the claimant from seeking further benefits for his psychological depressive condition. In the context of workers' compensation, a stipulated agreement "is a compromise and release type of settlement similar to settlements in civil personal injury cases where a claim is settled with a lump sum payment accompanied by a release of the adverse party from further liability." Duni v. United Technologies Corp./Pratt & Whitney Aircraft Division, 239 Conn. 19, 30-31 (1996), quoting Muldoon v. Homestead Insulation Co., 231 Conn. 469, 479-80 (1994); Malz v. State/University of Connecticut Health Center, 4701 CRB-6-03-7 (August 20, 2004). In short, a stipulation is a contract. A stipulated award constitutes a final decision, and once approved, may not be reopened by a trial commissioner absent the satisfaction of one of the conditions listed in § 31-315 C.G.S. (e.g., increased incapacity, changed conditions of fact, fraud, mistake, etc.). Jaworski v. Four Seasons Limousine, 15 Conn. Workers' Comp. Rev. Op. 438, 2200 CRB-7-94-11 (September 5, 1996). Where

the invalidation of a contract is sought on account of mistake or fraud, we note that extrinsic evidence may be admitted in support of such a claim. Alstom Power, Inc. v. Balcke-Durr, Inc., 269 Conn. 599, 609-610 (2004). Such parol evidence may also be admitted to explain ambiguities that appear in an instrument. Id.

The Fund contends that the claimant has not satisfied any of the conditions listed in § 31-315, and therefore may not reopen the stipulation. However, the claimant is not specifically seeking to reopen the stipulation; rather, he contends that the terms of the stipulation do not preclude his claim. The Fund has proffered the stipulation as an affirmative defense to the claim. A dispute has thus arisen concerning the scope of the language contained in the stipulation.

The Fund and CIRMA contend that the claimant's psychological condition resulting from the 1991 injury is unambiguously included in the agreement, while the claimant contends that the language of the stipulation "in no way reflected an agreement between the parties to resolve the claimant's psychological claim arising out of the 1991 work injuries." Brief, p. 8. Insofar as this issue and related issues must be resolved in order to determine whether the terms of the stipulation preclude the instant claim for benefits, we construe the underlying action as implicitly incorporating a motion to modify or reopen the approved stipulation. See Murphy v. West Haven, 14 Conn. Workers' Comp. Rev. Op. 300, 2197 CRB-3-94-10 (September 11, 1995)(CRB construed appeal as motion to modify award).

In order for a stipulation to be valid and binding, it must contain all of the necessary contractual elements. "'The existence of a contract is a question of fact to be determined by the trier on the basis of all the evidence. . . . To form a valid and binding

contract in Connecticut, there must be a mutual understanding of the terms that are definite and certain between the parties. . . . To constitute an offer and acceptance sufficient to create an enforceable contract, each must be found to have been based on an identical understanding by the parties.'" Richter v. Danbury Hospital, 60 Conn. App. 280, 288 (2000), quoted in Cheverie v. Ashcraft & Gerel, 65 Conn. App. 425, 439 (2001), *cert. denied*, 258 Conn. 932 (2001). Thus, a contract cannot be formed without a "meeting of the minds," the existence of which is a factual question. Gillis v. Gillis, 21 Conn. App. 549, 552 (1990), *cert. denied*, 215 Conn. 815 (1990).

In construing the stipulation, we must first identify its boundaries by addressing the notation "partial stip only" that was written on the copy of the contract in evidence (Claimant's Exhibit B). We agree with the Fund that this language should not be deemed part of the contract, as there is no evidence that the parties reached a meeting of the minds with respect to its inclusion. The extraneous notation was not negotiated by the Fund, and they posit that the notation was "made for the convenience of the administrative staff to prevent closure and archiving of Claimant's remaining open file with the other Respondent, City of West Haven." Second Injury Fund Brief, p. 11. Commissioner Waldron acknowledged that the notation was written in his handwriting, and explained that he would have written "partial stip only" to prevent the file from being sent to storage, as there were still open issues concerning the claimant's other injuries. September 24, 2002 Transcript, pp. 6-7. The commissioner did not know whether the Fund had ever been made aware of the notation he had placed on certain copies of the stipulation. Id., p. 10. Absent any evidence of mutual consent to this term, the "partial stip only" language cannot be read as part of the contract for the purpose of our review.

In his brief, the claimant contends that there was likewise no "meeting of the minds" with regard to the inclusion of the 1991 psychological claim in the contract, as it specifically addressed the 1986 lumbar spine and psychosocial injuries, but only purported to address the lumbar spine with respect to the 1991 injury. Relevant to this argument is Corrected Finding #63, which states, "The Stipulation Agreement entered into between the claimant, Michael Horobin, and the State of Connecticut Second Injury Fund, (Claimant's Exhibit B), correctly set for[th] the Second Injury Fund's understanding of Mr. Horobin's injuries as they relate to the 1986 work-related accident (low back and psychiatric), and the 1991 work-related accident (low back). (Hearing transcript of 9/24/02, Pg. 48, 49.)" The cited transcript pages contain the testimony of the Fund claims specialist who negotiated the settlement on behalf of the Fund and drafted the stipulation. Transcript, pp. 16, 20. The settlement specialist testified that, at the time the stipulation agreements were drafted, he had no specific knowledge that there was a psychiatric claim being made with respect to the 1991 injury. Id., p. 48. In contrast, the stipulation expressly resolves the 1986 back and psychological injury claim, which he was aware of during his preparation of the settlement contract.

The claimant, meanwhile, was clearly aware of his own 1991 psychiatric claim when he resolved his back claim with the Fund on November 13, 1997. As one would expect, this is reflected throughout the record. In terms of his expectation regarding settlement, he said that his understanding at the time had been that the Fund was leaving the 1991 psychiatric condition open, and that it was not to be part of the agreement. May 23, 2002 Transcript, p. 45; see also Findings, ¶ 43. The trier also found that the claimant

sent a letter to the Fund dated August 28, 1997, in which he indicated that his depression had been made worse by the December 6, 1991 injury. Findings, ¶ 67.

This important discrepancy between the parties' respective understandings of the 1991 injury claim may have led the Fund to draft a settlement that did not specifically cite both the 1986 and 1991 psychological injuries. However, if this was a mistake on the Fund's part, it was a unilateral mistake that would not by itself invalidate an approved stipulation. "The kind of mistake that would justify the opening of a stipulated judgment . . . must be mutual; a unilateral mistake will not be sufficient to open the judgment." Rodriguez v. State, 76 Conn. App. 614, 624 (2003). A mutual mistake is one common to both parties that effects a result neither intended. Id. Here, there is no evidence of any mistake on the part of the claimant. Based on the trier's findings and the evidence in the record, it appears that the claimant comprehended his case perfectly well going into the settlement proceedings, and adopted a strategy accordingly. Whatever the terms of the settlement may have been, they reflected an accurate understanding on his part. Thus, the stipulation cannot be invalidated on the ground that no contract was formed due to mutual mistake.

What, then, does the stipulation say? Absent definitive contract language, the interpretation of a contract is ordinarily a question of fact, with appropriate deference being accorded to the finding of the trier. Gurliacci v. Mayer, 218 Conn. 531, 567 (1991); Bead Chain v. Saxton Products, Inc., 183 Conn. 266, 274-75 (1981). "A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he language used must be accorded its common,

natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract." Tallmadge Bros., Inc. v. Iroquois Gas Transmission System, L.P., 252 Conn. 479, 498 (2000). In contrast, where the ordinary meaning of contractual language is specific and leaves no room for interpretation, the intent of the parties' contractual commitments becomes a determination of law, and the scope of appellate review is plenary. Days Inn of America, Inc. v. 161 Hotel Group, Inc., 55 Conn. App. 118, 123 (1999); see also, Tallmadge Bros., Inc., supra, 497 ("parties meant what they said and said what they meant, in language sufficiently definitive to obviate any need for deference to the trial court's factual findings as to the parties' intent").

There is no specific test in our law to determine whether contract language is sufficiently definite and unambiguous to warrant review as a question of law rather than as one of fact. Tallmadge Bros., Inc., supra, 496. The prevailing legal approach is of necessity more general, as stated in the federal Second Circuit Court's opinion in Travelers Indemnity Co. v. Scor Reinsurance Co., 62 F.3d 74 (2nd Cir. 1995). There the court explained, "A contract is ambiguous under Connecticut law if its meaning regarding the point at issue is not clear simply from reading it, and a trier of fact interpreting the document is thus forced to chose between two or more possible meanings." Id., 78, citing Ballato v. Board of Education, 33 Conn. App. 78 (1993), *cert. denied*, 228 Conn. 923 (1994). Whether or not contract language is ambiguous is itself a question of law. Schiavone v. Pearce, 79 F.3d 248, 252 (2nd Cir. 1996).

The Fund contends that the language of the stipulation is unambiguous, and that it provides for a full and final settlement of all claims of any nature, including mental claims, arising out of either injury. Looking at the language of the stipulation with

respect to the closure of the psychiatric claim stemming from the 1991 injury, we disagree with the Fund's assertion. The stipulation is ambiguous, as there could be more than one reasonable construction of this agreement.

Paragraph 1 lists the 1986 injuries as "lumbar spine and a psychosocial condition," while listing the 1991 injury as merely "lumbar spine." By mentioning a psychosocial condition with regard to the 1986 injury, but not the 1991 injury, an implied distinction between the two incidents is arguably created that suggests that no psychosocial condition was included as part of the 1991 injury claim. Paragraph 13, however, purports to settle "any and all claims of any nature out of the foregoing accidents either wholly, partially, specifically, physical or mental, known or unknown," while ¶ 16 states that the claimant understands the agreement to be "a full and final settlement and that it is intended to deal with any and all conditions, known or unknown, which exists as of the date hereof . . . on account of said alleged accident occurring on May 2, 1986 and December 6, 1991." Given the inconsistency among these provisions, one could rationally read the document as supporting both the inclusion and exclusion of the 1991 psychological condition. Thus, the stipulation is ambiguous as a matter of law. This entitled the trier to consider extrinsic evidence in determining its intended meaning as a question of fact, to which finding we must defer on review if it is supported by evidence. Alstom Power, Inc., supra; Gurliacci, supra.

In that light, we revisit the claimant's above argument that there was no "meeting of the minds" with respect to the inclusion of the 1991 psychological condition. There, we noted that the trial commissioner had credited the claimant's testimony that he did not intend to settle that claim, and had also credited the settlement specialist's testimony that

he was not aware that there was a psychological claim related to the 1991 back injury. These findings are directly supported by evidence in the record. On the strength of these findings, the trier interpreted the ambiguous contractual language in the claimant's favor, as he ordered the Fund to assume liability (jointly and severally) with CIRMA for treatment and benefits related to the psychological condition. Leaving aside the issue of joint and several liability for the moment, we must uphold that interpretation of the stipulation on review. The trier reasonably determined that the terms of the stipulation were not intended to encompass the 1991 psychological injury. Therefore, the claimant was not precluded by the stipulation from bringing forth the instant claim.

This brings us to the next claim of error. Both the Fund and CIRMA assert that the trier should not have declared them jointly and severally liable for the effects of the claimant's psychological condition arising from the 1991 back injury. The cases of Hernandez v. Gerber Group, 222 Conn. 78 (1992), and Hatt v. Burlington Coat Factory, 263 Conn. 279 (2003), are cited as supporting authority for this position, along with the language of § 31-299b and § 31-349 C.G.S. We disagree with this claim of error insofar as it suggests that both parties cannot share liability for the claimant's psychological condition in this instance. We do, however, reverse the trier's imposition of an order of joint and several liability, as the parties were not notified that such a theory of liability was under consideration, and they did not attempt to determine their proportional degrees of joint responsibility for the claimant's psychological condition.

Hernandez was a case in which a claimant with a pre-existing arterial condition suffered a 1985 heart attack in the course of his employment. After the workers' compensation insurer paid benefits for 104 weeks, the claim was transferred to the

Second Injury Fund pursuant to § 31-349(a) C.G.S. The claimant subsequently required a cardiac catheterization, which caused damage to his right leg. The Fund attempted to argue that they were not responsible for the disability to the leg, because there was no pre-existing disability of that leg. The trial commissioner found that the right leg injury was "so inextricably woven into the claimant's myocardial infarction that it cannot be said to be a separate injury," and ordered the Fund to accept transfer. This board reversed that ruling, reasoning that the Supreme Court's decision in Lovett v. Atlas Truck Leasing, 171 Conn. 577 (1976), required it to hold that the leg injury was legally separate from the pre-existing heart condition.

The Court overturned this board's ruling and reinstated the commissioner's decision. Though Lovett recognized that a single accident may cause a worker to suffer multiple separate injuries, it merely held that such injuries may not be transferred in unison to the Fund when only one of those injuries was materially exacerbated by a pre-existing condition. Where there is a causal connection between that pre-existing condition and a subsequent injury (whether it be to the same body part or a different body part), however, the situation is not the same, and liability may be assigned to the Fund. "The purpose of the Fund is to relieve employers from having to bear the cost of preexisting medical conditions. That purpose would be thwarted if employers were required to bear the cost of causally related sequelae of preexisting medical conditions." Hernandez, supra, 87.

The legal effect of Hernandez on this case is to make the Fund liable for the sequelae of the claimant's pre-existing back injury, which include the 1986 and 1991 back injuries, and any psychological conditions that are causally connected to those

injuries. The Fund would not be responsible for injuries that are not causally connected to that pre-existing condition, which include the other body parts that the claimant injured on December 6, 1991, along with any sequelae from those injuries. CIRMA accepted responsibility for those body parts pursuant to the 2000 stipulation (though they did not resolve the claimant's psychological claim). The complication here is that among the sequelae of those injuries is the very same psychological condition that is also partially attributable to the back injury that has been transferred to the Fund. The trial commissioner found and concluded that the claimant's psychiatric condition "is causally related to the December 6, 1991 work-related accident in which [the claimant] suffered injuries to his back, neck, right knee, nose and head." Findings, ¶ A. We note that no attempt was made to divide any type of proportional responsibility for the psychological condition between the Fund's back injury and CIRMA's right knee injury.

The Fund is a creature of statute, of course, and its liability for any claim is wholly statutory in nature. With respect to cases that transferred under § 31-349(a) before the closing of the Fund to new injuries, such as the instant claim, the Fund essentially stepped into the shoes of the insurer who was liable for the first injury. The Fund's role was to assume liability for all benefits that were deemed attributable to the pre-existing injury by the second injury legislation. Fimiani v. Star Gallo Distributors, Inc., 248 Conn. 635, 645-46 (1999). Yet, the mechanism of the Fund's involvement here is different from that of a workers' compensation insurer who would have coverage on a particular accident date, thereby becoming liable for all of the injuries that resulted from that accident.

In the case of two different insurers who are on the risk for successive accidental injuries, the insurer on the risk at the time of the second injury currently retains sole liability for the entire injury under § 31-349. Hatt, supra; see also, Malz v. State/University of Connecticut Health Center, 4701 CRB-6-03-7 (August 20, 2004)(where separate injuries involving different body parts combine to render claimant totally disabled, employer/insurer on risk at time of second injury does not have a right to apportionment). This is so notwithstanding the fact that a pre-existing injury may have substantially contributed to the subsequent disability. No form of common-law apportionment between insurers is available in cases of separate and distinct second injuries, and there is no relief available under the statutory forms of apportionment that have been created under the Workers' Compensation Act such as § 31-299b (for single periods of multiple exposure to repetitive trauma or occupational disease) and § 31-349 (which, having been closed to new injuries, now provides that claims for subsequent injuries "shall remain the responsibility of the [second] employer or insurer under the provisions of this section"). Hatt, supra. The situation is covered by § 31-349, and the claim stays with the insurer on the risk for the last injury.

The instant situation is different. In essence, two "insurers"—the Fund and CIRMA—are concurrently on the risk for different aspects of an accident that occurred on December 6, 1991, with one insuring the back, and the other insuring the several remaining body parts. The claimant's psychological ailment is a single condition that is a causal sequela of all of those injuries. In this unusual set of combined circumstances, one can reasonably say that both the Fund and CIRMA should be held liable for any medical care or disability benefits related to the psychological condition, as both are liable for

injuries that were found to be a substantial cause of that psychological condition. Findings, ¶ A. The parties responsible for an injury are the ones responsible for paying the associated expenses. Here, both the Fund and CIRMA have responsibilities in that regard.

To date, it does not appear that the parties have made any attempt to determine their respective percentages of responsibility for the claimant's psychological condition, based upon medical evidence. Given our holding on the other issues in this case, we would encourage the parties to pursue such an agreement. If the Fund and CIRMA cannot determine respective percentages of responsibility in this case, further proceedings will be required, at which the potential applicability of the joint and several liability doctrine could be discussed. We acknowledge that the Workers' Compensation Act does not directly address the division of liability that should occur in this rare circumstance.

Finally, the Fund challenges the trier's factual findings concerning the existence of total disability and the amount of Dr. Gilstein's medical bills, arguing that its Motion to Correct was denied in error. In cases where the trier has found that a claimant has established the existence of a compensable period of disability, that decision will be upheld on appeal unless there is insufficient medical evidence in the record to support a finding that such a condition exists within a reasonable degree of probability. Murchison v. Skinner Precision Industries, Inc., 162 Conn. 142, 151 (1972); Duddy, supra. After reviewing the medical reports of Dr. Gilstein, we hold that there is sufficient evidence in the record to support the trial commissioner's finding of total disability from October 1997 forward. We note that no specific cutoff date for total disability was prescribed in

Dr. Gilstein's December 20, 2001 report, which simply stated that a gradual return-to-work plan should be implemented "when appropriate." Claimant's Exhibit D.

As for Dr. Gilstein's $2,860 medical bill, we agree with the Fund's argument that there is insufficient evidence in the record to justify that amount. Dr. Gilstein's December 20, 2001 letter to the claimant states that his outstanding balance for psychotherapy is $460. Exhibit D, supra. This contradicts the inference that the trier drew from Dr. Gilstein's letter of February 25, 1993, which detailed an outstanding balance at that time of $2400 for visits taking place from December 6, 1991 through February 25, 1993. One would not normally assume that this bill would have remained unpaid for almost nine years without some specific mention by Dr. Gilstein. The trier, however, added the two bills together to determine an outstanding balance as of 2003. Absent more specific evidence supporting that inference, we must reverse that portion of the award and remand the case to the trier for an additional finding on this matter.

The trial commissioner's decision is accordingly affirmed in part, and reversed in part with direction to remand for an additional finding regarding Dr. Gilstein's medical bill.

Commissioners A. Thomas White, Jr., and Charles F. Senich concur.