

CASE NO. 3161 CRB-2-95-5  
CLAIM NO. 200003150

DANIEL CANFIELD  
CLAIMANT-APPELLEE

: COMPENSATION REVIEW BOARD

v.

JOHNSON CONTROLS  
EMPLOYER

: WORKERS' COMPENSATION  
COMMISSION

and

AMERICAN MOTORISTS INS. CO.  
INSURER  
RESPONDENTS-APPELLANTS

: JUNE 17, 1998

and

SECOND INJURY FUND  
RESPONDENT-APPELLEE

APPEARANCES:

The claimant was not represented at oral argument. Notice sent to Amy M. Stone, Esq., O'Brien, Shafner, Stuart, Kelly & Morris, P.C., P. O. Drawer 929, 475 Bridge St., Groton, CT 06340.

The respondents were represented by Polly L. Orenstein, Esq., Law Offices of Michael Brodinsky, 127 Washington Avenue, P. O. Box 35, North Haven, CT 06473.

The Second Injury Fund was represented by Philip Schulz, Esq., Assistant Attorney General, 55 Elm St., P. O. Box 120, Hartford, CT 06141-0120.

This Petition for Review from the May 18, 1995 Finding and Award of the Commissioner acting for the Second District was heard December 13, 1996 before a Compensation Review Board panel consisting of the Commission Chairman Jesse M. Frankl and Commissioners George A. Waldron and Robin L. Wilson.

## OPINION

JESSE M. FRANKL, CHAIRMAN. The respondents have petitioned for review from the May 18, 1995 Finding and Award of the Commissioner acting for the Second District. They argue on appeal that the commissioner improperly denied their request to transfer liability for the instant claim to the Second Injury Fund. We reverse the trial commissioner's decision, and remand for further findings on the issue of disability.

The claimant suffers from occupationally induced asthma as the result of inhaling chemical fumes, which is set forth in a voluntary agreement approved November 29, 1991. He sustained a 32.5% permanent partial disability of each lung as a result of his October 26, 1989 injury. He had smoked cigars for 12 years during the 1970's and 1980's, but testified that he had never missed any work due to respiratory problems before the chemical exposure incident. Afterward, he missed a lot of work because of recurrent fluid buildup in his lungs.

In 1991, Dr. Godar diagnosed chronic asthmatic bronchitis due to the chemical exposure, with a mild case of underlying chronic obstructive pulmonary disease. He thought that the claimant suffered from a 25% permanent partial disability of the lungs, with 5% due to the claimant's obesity and his past smoking history. Dr. DeGraff thought that the claimant's lung impairment had increased to 50% by 1994, and that this increase was due to pulmonary fibrosis caused by asbestos exposure predating the compensable injury. He did not think that cigar smoking was a factor in the disability, and only considered the claimant mildly overweight. He also stated that he had insufficient data from which to conclude that the claimant suffered from a prior permanent pulmonary

impairment that would have materially and substantially increased the claimant's disability. When Dr. Godar re-examined the claimant on September 7, 1994, he thought that the claimant's condition had improved to a 20% permanent impairment of the lungs, with 5% still attributable to smoking and obesity. He also found no connection between asbestos exposure and the claimant's reactive airway disease.

The respondents argued, *inter alia*, that liability for this claim should be transferred to the Fund after the payment of 104 weeks of compensation, which occurred on April 29, 1993. The Fund disagreed, contending that notice under § 31-349 C.G.S. was late and that the respondents had not proven that the case medically qualified for transfer. The commissioner found that notice to the Fund was timely, but that the respondents had failed to prove a pre-existing condition made the claimant's overall disability materially and substantially greater. He therefore dismissed the claim against the Fund, which the respondents have appealed.

Pursuant to our Supreme Court's decision in Hall v. Gilbert & Bennett Mfg. Co., 241 Conn. 282 (1997), P.A. 95-277, § 4(a) applies retroactively to all pending transfer claims. That amendment, now codified at § 31-349c, provides that all controverted issues regarding the existence of a previous disability under § 31-349 must be submitted to a three-physician medical panel by the chairman of the Workers' Compensation Commission. Thus, the trial commissioner did not have jurisdiction to decide whether the claimant had a pre-existing condition that made his subsequent disability materially and substantially greater than it would have been based on the second injury alone. See, e.g., Soto v. Swank Crestline, Inc., 3255 CRB-7-96-1 (decided July 24, 1997).

However, that is not the end of this matter. The Fund has stated in its brief that the claimant has been medically disabled since at least the date of his October 26, 1989 injury. Dr. Godar testified that the claimant was continuously disabled from August 1989 forward. (Deposition, p. 28-29). Although the trial commissioner concluded that notice to the Second Injury Fund was filed in a timely manner, we do not believe that the facts found support that conclusion. Where the commissioner's legal conclusions lack support in the factual findings either by way of an incorrect application of the law or by the drawing of illegal or unreasonable inferences from the facts, this board has the authority and the responsibility to act upon those errors. See Webb v. Pfizer, Inc., 14 Conn. Workers' Comp. Rev. Op. 69, 70-71, 1859 CRB-5-93-9 (May 12, 1995).

It is undisputed that the respondents filed notice with the Second Injury Fund on October 10, 1991. Assuming disability began with an October 26, 1989 date of injury and was continuous afterward, notice would have been due on or around July 26, 1991. The findings state that the claimant had a "significant impairment" imposed on him by the compensable injury, with a light duty capacity afterward. ¶ 30, Finding and Award. The findings do not indicate whether the claimant was ever at full work capacity again after the date of his injury, however, and neither party attempted to correct the findings by filing a Motion to Correct. See Seltenreich v. Stone & Webster Engineering Corp., 15 Conn. Workers' Comp. Rev. Op. 135, 136, 2196 CRB-3-94-10 (Jan. 17, 1996). Thus, although the evidence strongly suggests in this case that the claimant experienced some impairment from the date of his injury forward, the commissioner did not make a specific finding on this issue, and we are limited to the existing findings on review.

Our Supreme Court has recently made it clear that, as long as a claimant has medical restrictions, he is disabled within the meaning of § 31-349 and the calculation of the statutory notice period, even if he is working at a light duty job for his regular pay. Innocent v. St. Joseph's Medical Center, 243 Conn. 513 (1998). It is apparent from the evidence that Innocent may be applicable here. As this board cannot make findings to supplement those of the trier, we must remand this matter for a determination of whether the claimant was medically disabled during the period between the October 26, 1989 injury and the Fund's receipt of notice on October 10, 1991. See Vasilescu v. Consolidated Freightways, 16 Conn. Workers' Comp. Rev. Op. 53, 55, 2225 CRB-7-94-12 (Oct. 18, 1996). If the claimant was disabled throughout that time period, it would follow that the Fund did not receive timely notice of the respondents' intent to transfer liability for the claimant's injury. As such, that request would have to be dismissed.

The trial commissioner's decision is hereby reversed. The matter is remanded to the trial commissioner for a determination as to the period of medical disability that the claimant experienced following the date of his injury. If it is found that the claimant was not disabled for at least several months during the period in question, thus making notice to the Fund timely, this case must be assigned to the medical panel for a determination as to whether the claimant's disability was made greater by a pre-existing condition.

Commissioners George A. Waldron and Robin L. Wilson concur.

**CERTIFICATION**

**THIS IS TO CERTIFY** that a copy of the foregoing was sent certified mail this  
17th day of June, 1998 to the following parties:

AMY M. STONE, ESQ.

Z 012 303 582

POLLY L. ORENSTEIN, ESQ.

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PHILIP SCHULZ, ESQ.

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Lorraine Lockery  
Administrative Hearings Lead Specialist