CASE NO. 5985 CRB-7-15-2 : COMPENSATION REVIEW BOARD
CLAIM NO. 700163315

BRETT RAPHAEL : WORKERS' COMPENSATION
CLAIMANT-APPELLANT COMMISSION

v. : DECEMBER 10, 2015

CONNECTICUT BALLET, INC.
EMPLOYER

and

LIBERTY MUTUAL INSURANCE GROUP
INSURER

and

GRANITE STATE INSURANCE COMPANY
INSURER

and

AMTRUST NORTH AMERICA/TECHNOLOGY INSURANCE COMPANY
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant, both individually and in his capacity as President of the Connecticut Ballet, Inc., was represented by Guy L. DePaul, Esq., Jones, Damia, Kaufman, Borofsky & DePaul, LLC, 301 Main Street, P.O. Box 157, Danbury, CT 06813.

Respondents Connecticut Ballet, Inc., and Liberty Mutual Insurance Group were represented by Brenda C.D. Lewis, Esq., Williams Moran LLC, P.O. Box 550, Fairfield, CT 06824.

Respondents Connecticut Ballet, Inc., and Granite State Insurance Company were represented by Lynn M. Raccio,

Esq., Abbott & Associates, 200 Glastonbury Boulevard, Suite 301, Glastonbury, CT 06033.

Respondents Connecticut Ballet, Inc., and Amtrust North America/Technology Insurance Company were represented by Philip T. Markuszka, Esq., Solimene & Secondo, LLP, 1501 East Main Street, Suite 204, Meriden, CT 06450.

This Petition for Review from the January 21, 2015 Amended Finding by Commissioner Michelle D. Truglia acting for the Seventh District was heard on August 28, 2015 before a Compensation Review Board panel consisting of Commission Chairman John A. Mastropietro and Commissioners Randy L. Cohen and Stephen M. Morelli.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has petitioned for review from the January 21, 2015 Amended Finding by the Commissioner acting for the Seventh District. We find error and accordingly reverse in part and remand in part for additional proceedings consistent with this Opinion.[1]

The trial commissioner, having identified as the issue before her the assessment of whether the claimant's current need for medical treatment arose from injuries sustained on March 1, 1987, April 3/4, 1991, April 4, 2001, and/or January 12, 2012, made the following factual findings which are pertinent to our review.[2] Relative to the 1987 injury, the Workers' Compensation Commission has no record of a Form 30C filed by the claimant between 1987 and 1988. The claimant never filed a timely Form 30C for the 1991 injury; however, the claimant did file an untimely Form 30C for this date of injury

[1] We note that several motions for extension of time were granted during the pendency of this appeal.
[2] At the formal hearing of September 12, 2013, the claimant testified that the actual date of this injury was April 4, 1991.

on January 28, 2013 and Liberty Mutual acknowledges having accepted liability for this date of injury. The January 28, 2013 Form 30C also included an injury to the claimant's right knee and alleged subsequent aggravations to both knees between January 12, 2012 and February 17, 2012. The claimant never filed a Form 30C for the April 4, 2001 or January 12, 2012 date of injury. Respondents filed Forms 43 on April 2, 2012, June 5, 2012, August 3, 2012, August 10, 2012, April 3, 2013, and April 8, 2013 denying medical treatment on various grounds.

Medical evidence entered into the record indicates that the claimant suffered a torn anterior cruciate ligament on or about March 1, 1987 and was seen by Eric J. Katz, M.D. Katz suggested surgery to repair the tear but it was never performed. Katz' records indicate that the claimant also presented to Katz' office complaining of a left knee injury on or about April 4, 1991; on the basis of a May 1, 1991 MRI, Katz diagnosed the claimant with a new tear of the medial and lateral meniscus as well as the pre-existing tear of the anterior cruciate ligament. At an office visit of May 14, 1991, Katz advised the claimant to undergo arthroscopic surgery, which the claimant did on June 28, 1991. Katz' records indicate that in addition to repairing the meniscal tear, the ACL tear was debrided at that time. On December 6, 1991, Katz assigned the claimant a 10-15% permanent partial disability rating to his left knee.

The claimant presented to Katz for medical treatment on May 5, 1994 for medial gastric muscle pain in his left leg. On or about April 4, 2001, Katz again diagnosed the claimant with a medial meniscus tear after the claimant had suffered another injury to the left knee, which diagnosis was confirmed by an MRI on April 12, 2001. The claimant

underwent an arthroscopic partial medial meniscectomy and chondroplasty of the patella on May 15, 2001. On December 1, 2002, the claimant once more presented for treatment, complaining of a recurring "popping" sensation in the left knee while dancing. On June 22, 2009, Katz issued a Form 42 assigning the claimant a 20% permanent partial disability rating. The claimant underwent MRI's on August 9, 2006 and April 28, 2008 which revealed progressive tricompartmental degenerative disease, especially in the medial compartment, and a questionable lateral meniscal tear. On November 28, 2008, the claimant underwent a RME with Alan Weisel, M.D., who opined that the claimant had reached maximum medical improvement and no further surgery was warranted at that time. Weisel assigned the claimant a 20% permanent partial disability rating.

The claimant underwent a round of Synvisc injections in the spring of 2009, which provided no relief. On January 5, 2010, the claimant underwent a Commissioner's Examination with Steven F. Schutzer, M.D. Noting that the claimant was presenting nearly 23 years after the original date of injury, Schutzer stated:

> In my opinion, [the claimant's] current situation is, with a reasonable degree of medical probability, directly and causally related to his original work injury, the subsequent injuries, and the two arthroscopic procedures performed, as well as coping with a chronically unstable left knee secondary to an ACL rupture in 1987.

Claimant's Exhibit F.

Schutzer also opined that arthroscopic surgery would not likely result in a significant improvement to the claimant's left knee condition and the claimant would ultimately require a total knee arthroplasty. In a follow-up examination of the claimant

conducted on November 4, 2010, Schutzer reiterated that given the end-stage arthritic condition of the claimant's left knee, an arthroscopic partial lateral meniscectomy would be unlikely to result in clinical improvement.

A February 16, 2012 office note from George H. McGinniss, M.D., states that the claimant presented complaining of right knee pain for several days subsequent to an injury. McGinniss diagnosed, inter alia, a tear of the medial meniscus. An MRI report attached to McGinniss' note indicates that the claimant had a tear of the medial meniscus along with "[d]egenerative articular changes are noted at the anterior lateral femoral condyle…." Respondents' Exhibit 5L.

In a report dated March 14, 2012, Katz opined that the claimant's ongoing difficulties were causally related to the original work injury of 1987 compounded by the other work-related injuries to the same knee. In correspondence to Commissioner Jodi Gregg dated July 31, 2012, Katz indicated that the claimant had sustained a severe sprain while working on January 12, 2012 and treated with George McGinniss, M.D. Katz also opined that in the course of coping with the sprain, the claimant had sustained a meniscal tear to the right knee as evidenced by an MRI. In correspondence to the instant trial commissioner dated October 1, 2012, Katz again opined that the claimant's current condition was "directly attributable" to the injuries sustained by the claimant on March 1, 1987 and April 4, 1991 while employed by the Connecticut Ballet, Inc. Claimant's Exhibit E.

On December 5, 2012, Katz' deposition was taken by counsel for Liberty Mutual Insurance Group. Katz testified that he first saw the claimant in 1987 and then

subsequently in 1991, 1994, 2000-2002, 2006, 2008, 2009, 2010 and possibly in 2012. Katz indicated that the claimant had had surgery in 2001 and opined that as of the date of the deposition, the claimant needed a left knee replacement. With regard to the claimant's first office visit in 1987, Katz testified that he did not know who paid the bill for the office visit but agreed that Exhibit A to his deposition indicates that the insurance company was MIC Property Indemnity Company.[3]

The medical records from Kevin Plancher, M.D., as well as the transcript from Plancher's deposition were generated in response to the claimant's injury of March 22, 2013. However, the parties specifically requested in pre-trial proceedings that the March 22, 2013 date of injury be bifurcated from the formal proceedings for the dates of injury of March 1, 1987, April 4, 1991, April 4, 2001, and January 12, 2012.

The trial commissioner, noting that the claimant, as the "alter ego" of the Connecticut Ballet, Inc., was obligated to both prosecute his claims against the ballet company and defend against them, concluded that a "clear and obvious conflict of interest" existed for nearly thirty years, particularly when the ballet company experienced lapses in insurance coverage in 1987 and 2012. The trial commissioner pointed out that because "Connecticut law provides that 'financial liability' for lapses in workers' compensation insurance coverage relative to viable, on-going Connecticut businesses shall remain with the uninsured business," Conclusion, ¶ B, the Second Injury Fund would have no "financial responsibility" to cover any losses incurred during the time

[3] Although there was evidently a discussion at the formal hearing of September 12, 2013 regarding the submission into the record of the respondents' exhibits to Katz' deposition, the exhibits do not appear to have been entered into evidence. See Transcript, pp. 30-33.

periods when the ballet company was uninsured. Id. As such, the trier concluded that the Connecticut Ballet, Inc., was solely responsible for the March 1, 1987 injury given that the Commission has no record of the claimant having filed a Form 30C and there is no evidence that a hearing was held or that either the ballet company or a commercial underwriter of workers' compensation liability paid out on the claim within one year of the claimant's date of injury.

The trial commissioner determined that the April 4, 1991 date of injury was the responsibility of Liberty Mutual Insurance Group and, because Eric Katz, M.D., simultaneously repaired both the meniscal tears arising from the April 1991 injury as well as the pre-existing ACL tear arising from the March 1, 1987 date of injury, Liberty was entitled to a 50% credit, cash reimbursement or moratorium for medical costs, indemnity and permanent partial disability benefits attributable to the 1991 surgery. The trial commissioner concluded that the medial and lateral meniscal tears sustained in April 1991 constituted new and different injuries from the ACL tear sustained in March 1987 and "[w]hile the previous ACL injury may have made the claimant more susceptible to the new injury, Liberty Mutual must take the claimant as [it] finds him with regard to assuming financial liability on the … April 3/April 4, 1991 new injury." Conclusion, ¶ D.c. The trier also concluded that the claimant's right knee claim filed on January 28, 2013 was time-barred given that no medical note attesting to this injury was attached to the Form 30C and medical records prepared contemporaneously with the April 1991 injury do not discuss a right knee injury.

In addition, the trier concluded that the April 4, 2001 date of injury, which resulted in a re-tear of the medial meniscus of the left knee, is the responsibility of Granite State Insurance. As such, Granite State is responsible for the medical and indemnity costs associated with the May 15, 2001 surgery as well as the difference between what the claimant had previously been paid for permanency to the left knee and the 20% permanent partial disability rating assigned by Katz on June 22, 2009. The trier determined that the injury of April 4, 2001 constituted a new injury given that the first repair of the meniscus occurred in 1991 and Katz had found the claimant to be at maximum medical improvement on December 6, 1991, at which time he assigned a 10-15% permanent partial disability.

The trier determined that in light of the lapse in workers' compensation insurance coverage at the time of the January 12, 2012 date of injury, which resulted in a severe strain of the claimant's left knee and a right knee meniscal tear, liability for that date of injury rested with the Connecticut Ballet. Expenses associated with that injury included any surgery to either knee attributable to that date of injury, all physical therapy, all indemnity, any increase in permanency to the left knee and any permanency rating attributable to the right knee. The trier also concluded that the January 12, 2012 injury constituted a new injury to the left knee given that Katz had assigned the claimant an increase in permanent partial disability following the April 4, 2001 date of injury. The trier found that the left knee replacement surgery recommended by Katz in his deposition of December 5, 2012 would be the responsibility of the Connecticut Ballet given that the recommendation came subsequent to the claimant's January 12, 2012 date of injury.

Moreover, the trier deemed the right knee injury also constituted a new injury and responsibility for indemnity, medical treatment and permanent partial disability would therefore lie with the Connecticut Ballet rather than any subsequent carrier.

The trial commissioner ordered that liability for the four distinct dates of injury be apportioned among Connecticut Ballet, Inc. (for the periods of no insurance), Liberty Mutual Insurance Company, and Granite State Insurance Company and its successors consistent with her findings.

The claimant filed a Motion to Correct which was denied in its entirety and this appeal followed. On appeal, the claimant contends: (1) the trial commissioner rendered findings on issues which were not the subject of the formal hearings; (2) the trial commissioner's conclusions are legally inconsistent with the subordinate facts; (3) the trier "failed to advise" the claimant of the inherent conflict of interest stemming from his role as an "alter ego" of the employer relative to Connecticut Ballet's lapses in workers' compensation insurance coverage and the effect of the "statute of non-claim regarding the 1987 injury," Appellant's Brief, p. 11; and, (4) the commissioner's decision to "advise and require" the claimant to withdraw his workers' compensation claim arising from the March 1, 1987 date of injury without "properly advising" the claimant regarding the "adverse consequences" of the withdrawal constituted an abuse of discretion. Id., 12.

The standard of deference we are obliged to apply to a trial commissioner's findings and legal conclusions is well-settled. "The trial commissioner's factual findings and conclusions must stand unless they are without evidence, contrary to law or based on unreasonable or impermissible factual inferences." Russo v. Hartford, 4769 CRB-1-04-1

(December 15, 2004), citing Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Moreover, "[a]s with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial court could have reasonably concluded as it did." Burton v. Mottolese, 267 Conn. 1, 54 (2003). "This presumption, however, can be challenged by the argument that the trial commissioner did not properly apply the law or has reached a finding of fact inconsistent with the evidence presented at the formal hearing." Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

We begin with the claimant's contention that the trial commissioner rendered findings on issues which were not the subject of the formal hearings. In this regard, the claimant points to the findings apportioning liability for the claimant's medical treatment and indemnity among the claimant's various dates of loss. The trier also made findings relative to the compensability of the claimant's right knee claim. The claimant argues that none of those issues were the subject of the formal hearings and the claimant was not aware that the trier was deciding those issues.

Our review of the evidentiary record indicates that at the first formal hearing held in this matter on September 12, 2013, the trial commissioner stated that the claimant would be withdrawing his March 1, 1987 claim and "[t]he remaining issue will be whether the Claimant's claim for medical treatment from 2012, and before, is related to any of his three current claims from [1991], 2001 and 2012." September 12, 2013 Transcript, p. 6. At the second formal hearing held on December 16, 2013, the trial commissioner stated: "And I have the issues down, before we start, is whether or not the

Claimant's current need for treatment is related to any of his claims. That's the sole issue." December 16, 2013 Transcript, p. 10. At the fourth formal hearing held on April 23, 2014, the trial commissioner stated the following:

> Now, let's just keep in mind that, you know, from the very beginning, we started on September 12th of last year, *the only issue, the only issue before me*, and this was – I have lots of cross out, because we had said it was this and then it was that, and then it was this and then it was that, but the only issue before me is whether or not the claimant's current need for treatment is related to any of the claimant's three compensation claims, all of which predated the commencement of this hearing on 9/12/13. (Emphasis added.)

April 23, 2014 Transcript, p. 4.

We also note that at the hearing of December 16, 2013, respondents' counsel questioned whether the right knee claim was separate from the claimant's claims for the left knee, December 16, 2013 Transcript, p. 74, and at the hearing of February 19, 2014, the claimant, when queried by respondents' counsel about whether it was his contention that his right knee injury was related to the left knee injury sustained on January 12, 2012, replied that it was but then went on to say, "[i]s that before us? Is that a relevant case?" February 19, 2014 Transcript, p. 23.

Generally, a workers' compensation commissioner is afforded some latitude in determining which of the issues presented at a formal hearing actually call for adjudication. It is of course "fundamental in proper judicial administration that no matter shall be decided unless the parties have fair notice that it will be presented in sufficient time to prepare themselves upon the issue." Osterlund v. State, 129 Conn. 591, 596 (1943). Nonetheless, a "[n]otice of a hearing is not required to contain an accurate

forecast of the precise action which will be taken on the subject matter referred to in the notice. It is adequate if it fairly and sufficiently apprises those who may be affected of the nature and character of the action proposed, so as to make possible intelligent preparation for participation in the hearing." Hartford Electric Light Co. v. Water Resources Commission, 162 Conn. 89, 110 (1971) (citations omitted). *See also* Casertano v. Shelton, 3329 CRB-4-96-4 (September 16, 1997).

It is also undisputed that this board has "allowed trial commissioners to rule on issues beyond the scope of the original hearing notices when the commissioner placed the parties on notice at the commencement of the formal hearing…." Henry v. Ansonia, 5674 CRB-4-11-8 (August 8, 2012). We have held that:

> since this Commission is not bound by strict pleading rules, we also recognize that a party may be apprised that a given claim is at issue by other means, such as the statements of parties at trial, the evidence they have introduced, or the papers they have filed…. Such flexibility is essential to an informal system that seeks to honor the requirements of due process while avoiding the presentation of cases in piecemeal fashion, where possible, and the undue prolongation of proceedings. (Internal citation omitted.)

Mosman v. Sikorsky Aircraft Corp, 4180 CRB-4-00-1 (March 1, 2001).

In the instant matter, our review of the notices for the formal hearings indicates that the noticed issues for adjudication consisted of compensability/causal connection, Form 43/contest of claim, medical bills, medical treatment and subject matter jurisdiction. However, as we have previously noted, at several points during the proceedings below, the trial commissioner specifically narrowed the list of noticed issues to one: the relationship between the claimant's injuries and his current need for a left

knee replacement. Such a narrowing of focus is consistent with the recommendation that "the parties involved in a formal hearing should recognize the importance of taking the time at the outset of the hearing to articulate the issues they wish to address during the proceedings. Such an eye for detail will better serve them, as confusion and uncertainty will be less likely to arise." Id.

Having identified the issue before her, the trial commissioner ultimately went on to rule on other matters well beyond the scope of whether the claimant's current need for medical treatment was related to any of the various injuries sustained while the claimant was in the employ of Connecticut Ballet, Inc. Thus, in light of the due process concerns raised by the issuance of findings which fell well outside the stated scope of the inquiry, we have little choice but to vacate the findings relative to the apportionment of the claimant's prior medical and/or indemnity payments and the compensability of the claimant's right knee injury. "Even in a relatively relaxed forum such as this Commission, fairness and due process require that parties know when they are supposed to appear before a commissioner, and the scope of the controversy to be addressed." Id.

The claimant also contends that the conclusions of the trial commissioner are legally inconsistent with the subordinate facts. We agree. In her Conclusion, ¶ F.b., the trial commissioner found that the left knee strain sustained by the claimant on January 12, 2012 constituted a new injury because "it comes subsequent to Dr. Katz having given the claimant an increase in permanent partial disability to the left knee on account of the April 4, 2001 date of injury." January 21, 2015 Amended Finding, Conclusion, ¶ F.b. The trier then finds, in Conclusion, ¶ F.c., that the left knee replacement surgery

recommended by Katz during his December 5, 2012 deposition is the responsibility of the Connecticut Ballet because Katz' recommendation occurred after the January 12, 2012 date of injury.[4]

The trial commissioner explained that she was:

> unwilling to pin all the liability on the March 1, 1987 date of injury (first injury) simply because there is a medical consensus that said ACL injury was the genesis of the claimant's current complaints. It is axiomatic that succeeding insults to the structural integrity of the claimant's left knee would weaken the claimant's left knee and make it susceptible to a subsequent injury. But each injury was different, was the subject of medical treatment and, with the exception of the January 12, 2012 injury, was assigned a permanent partial disability rating.

Id., Conclusion, ¶ G.

However, our review of the evidentiary record indicates that as far back as January 5, 2010, Steven Schutzer, M.D., in his Commissioner's Examination, opined that the claimant was suffering from "severe, end-stage left knee arthritis, in the presence of significant instability" and would "require a total knee arthroplasty when his symptoms progress and match his radiographic findings." Claimant's Exhibit F. In addition, Katz, in correspondence dated March 14, 2012, indicated that the claimant's "ongoing difficulties are causally and directly related to the original work injury of 1987 compounded by other work related injuries to the same knee." Respondents' Exhibit 13G. In his correspondence of October 1, 2012, Katz again opined that the current condition of the claimant's knee was "directly attributable to the original (1987) and subsequent (1991) injuries sustained while working for Connecticut Ballet." Claimant's

[4] The Connecticut Ballet had allowed its insurance coverage to lapse when the January 2012 injury occurred.

Exhibit E. At his deposition, when asked for his opinion regarding the claimant's need for a knee replacement, Katz stated, "I think it was related to the first time I saw him actually, in 1987. That's the time I found that he had a complete tear of his cruciate ligament." Claimant's Exhibit G, December 5, 2012 Deposition of Eric J. Katz, M.D., p. 16. In addition, Katz testified that "[d]ance is a very vigorous activity. And without an anterior cruciate ligament, there's going to be a lot of negative events going on in that knee." Id., 17. Katz opined that the original injury was "compounded by the '91 injury, but I think the '87 injury was the primary cause of his ongoing symptoms," id., and the ACL tear "was the major initial traumatic event that caused his knee to snowball downward." Id. Later, during cross-examination, when queried as to whether there was any question in his mind regarding the relationship between the injuries of 1987 and 1991 and the current condition of the claimant's knee, Katz replied, "No, there's no question in my mind." Id., 21.

The evidentiary record also contains the deposition transcript of Kevin Plancher, M.D.[5] Plancher testified that "given the nature of [the claimant's] knee and the

[5] Other than noting that the medical reports and deposition testimony of Kevin Plancher, M.D., were generated in response to the claimant's March 22, 2013 injury, which injury was bifurcated from the proceedings, the trial commissioner made no findings based upon this evidence, despite having remarked at the formal hearing of April 23, 2014 that Plancher was "the one who's going to hold the answers for you in terms of what procedures he performed and what treatment he rendered is related either exclusively to the 2013 or is it related to something that started before." Transcript, p. 27. Moreover, when respondents' counsel indicated that the injury of March 22, 2013 was not "in play," the trial commissioner stated, "I'd like to hear what Plancher has to say on that. You know, anything he has to say is going to help us put things in order here. He is a treating physician. He did take over. His opinion matters…. You know, we – it's about coming to the right, the right answer. It's not about strategically trying to block somebody from presenting or not presenting anything. We want to just get to the bottom of the case and figure out what is related to what so that we can determine whether or not he's entitled to treatment and to what extent he's entitled to it and what date of injury does that treatment attach to." Id., 30-31. It may be inferred that the trier chose not to credit Plancher's medical evidence given that the parties had requested that the March 22, 2013 date of injury be bifurcated. However, it is clear that Plancher also offered evidence pertinent to the

instability of the pre-existing ACL tear all the way back from 1987, his knee was a setup for consistent injuries…." Respondents' Exhibit 18L, June 16, 2014 Deposition of Kevin Plancher, M.D., p. 18. Plancher also stated that "the original injury in 1987 started him on a course that is unchanged because he never had stability, each time well-treated, but each time causing each subsequent injury possible [sic] as well as another injury that can occur next week because of the nature of his knee." Id., 19. Plancher explained that "[w]hen the meniscus is then taken away each time from each subsequent operation, it adds to the instability, putting the knee at a higher risk for further injuries each time." Id., 22. Plancher further testified that the arthroscopic repair he performed on the claimant on August 20, 2013 "was a treatment not only for his acute injury that he had which was a new injury, but also for a cumulative injury that started in 1987 and has never stopped since that point." Id., 24-25.

Plancher also indicated that "we now know that when you tear the medial meniscus and not have an isolated ACL, that the process begins of arthritis on that day. So that people can have an isolated ACL and not get arthritis if fixed, but if you have an ACL with a medial meniscus, you will have arthritis as you continue through life." Id., 30. Plancher stated "that it is all about the meniscus in conjunction with the ACL that causes the degenerative arthritic process to proceed in most patients," id., 33, and "we now believe that the combination, as you said, of a meniscus tear with an ACL dooms the knee in most patients…." Id., 36.

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claimant's knee injuries which had occurred prior to the injury of March 22, 2013. In addition, we are somewhat at a loss to understand how the trial commissioner could be expected to accurately assess current liability for medical treatment without taking into consideration all of the claimant's prior injuries.

In light of the foregoing medical evidence, we find no basis to affirm the trier's determination that the claimant's need for left knee replacement surgery should be attributed to the injury of January 12, 2012. The record indicates that Katz did not treat the claimant for that injury, s*ee* Claimant's Exhibit D; rather, the claimant was treated by George McGinniss, M.D., whose report of February 16, 2012, merely states that "[t]his 56-year-old ballet instructor presents complaining of right knee pain present for the last several days. He injured himself." Respondents' Exhibit 5L. Moreover, at his deposition, Katz testified that he was unaware of any specific injury that precipitated the claimant's office visit in March 2012. Claimant's Exhibit G., p. 16. Similarly, Plancher testified that he was "not aware" of a 2012 injury when he first saw the claimant in April 2013, Respondents' Exhibit 18L, pp. 15, 23, and even if the claimant had sustained a knee sprain on January 12, 2012, it would not alter his opinion. Id., 28. For his part, the claimant described the January 12, 2012 injury as a "repetitive incident," February 19, 2014 Transcript, p. 41, and stated, "I am not going to refer to it as an injury. It is not an independent injury, and the doctors have written to that effect." Id.

It is of course well-settled that "[i]t is the quintessential function of the finder of fact to reject or accept evidence and to believe or disbelieve any expert testimony…. The trier may accept or reject, in whole or in part, the testimony of an expert." (Internal citations omitted.) Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999). However, it is equally well-settled "that the finding of the commissioner cannot be sustained unless supported by the subordinate facts." Furman v. National Dairy Products Corp., 123 Conn. 327, 329 (1937). As such, we have

no alternative but to reverse the finding of the trial commissioner attributing the claimant's need for surgery to the January 12, 2012 injury and to remand this matter for additional proceedings on this issue of which of the claimant's injuries is responsible for his current need for medical treatment. "We have held that, where the findings of a trial commissioner appear to be inherently inconsistent amongst themselves, or with the trier's conclusions, the correct approach is to remand the matter for clarification." Ortiz v. Highland Sanitation, 4439 CRB-4-01-9 (November 12, 2002).

In addition, the claimant identifies as error the trial commissioner's determination that "Dr. Katz simultaneously repaired both the medial and lateral meniscal tear, as well as the pre-existing ACL tear attributable to the March 1, 1987 date of injury." Conclusion, ¶ D. We agree; our review of the record indicates that this conclusion is inconsistent with Findings, ¶ 9.a., wherein the trier states that Katz' medical records demonstrate that he never performed any surgery on the claimant's ACL tear, and Findings, ¶ 11.c., wherein the trier found that Schutzer's records demonstrated that Katz merely debrided the ACL tear when he performed the arthroscopy of June 28, 1991 to repair the claimant's torn meniscus. Moreover, this conclusion is inconsistent with the deposition testimony offered by Katz (*see* Claimant's Exhibit G, p. 11); Plancher's deposition testimony regarding his review of the claimant's MRI studies (*see* Respondents' Exhibit 18L, pp. 15-18); and Plancher's medical chart, which repeatedly states that the claimant "relays a history of a date of injury back on 4/4/1991 where he ultimately required a left knee surgery on a cruciate, but at that time, they did not really repair or reconstruct his cruciate, but just did supposedly meniscus work." *See*

Respondents' Exhibit 17L. Finally, the claimant himself testified that he did not undergo the recommended arthroscopic reconstruction. February 19, 2014 Transcript, p. 35.

It should be noted that Conclusion, ¶ D occurred in the context of the trier's findings relative to the issue of the apportionment of prior indemnity and medical costs, which findings we have vacated herein. However, given that we have remanded the matter for additional proceedings in order to determine which of the claimant's prior injuries is responsible for his current need for medical treatment, we believe that clarification regarding this claim of error is necessary in light of Plancher's opinion relative to the connection between the claimant's unrepaired ACL tear and his subsequent development of arthritis following the meniscal tears.

The claimant also contends that the trial commissioner erroneously "failed to advise" the claimant regarding the conflict of interest relative to the claimant's status as the "alter ego" of Connecticut Ballet, Inc., particularly with regard to the company's lapses in insurance coverage and the effect of the statute of non-claim for the 1987 injury. Appellant's Brief, p. 11. The claimant asserts that "[n]ever was the issue of the conflict of interest posed. Never was the fact that the Respondent-Employer's position was at odds with that of the Respondent-Insurer addressed." Id. The claimant thus argues that "[i]t is our position that a grievous error occurred and that separate counsel should have been appointed to represent the Respondent-Employer and to present its position to the Commissioner." Id., 12. We are not persuaded by the claimant's interpretation of the proper role of a trial commissioner in dealing with self-represented claimants.

In Aley v. Aley, 97 Conn. App. 850 (2006), our Appellate Court stated the following:

> it is the established policy of the Connecticut courts to be solicitous of pro se litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the pro se party. . . . Although we allow pro se litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law. (Citation omitted; internal quotation marks omitted.)

Id., 853.

Moreover, in Flood v. Travelers Property & Casualty, 5267 CRB-1-07-8 (December 8, 2008), this board observed that,

> the trial commissioner is not charged with the responsibility of "advising" the parties who appear before him during the course of the trial. The trial commissioner is expected to review the evidence submitted by the parties and to issue a decision on the merits. The trial commissioner may also insure that no unfair advantage is taken of the *pro se* claimant but may not litigate her case for her.

Id.

There is little doubt that a claimant who undertakes self-representation does so at his or her own risk, a risk which rises commensurately with the complexity of the claim. Furthermore, even taking into account the "humanitarian and remedial purposes" of the Workers' Compensation Act, Pizzuto v. Commissioner of Mental Retardation, 283 Conn. 257, 265 (2007), there is nothing in the provisions of either § 31-278 C.G.S., which articulates the powers and duties of commissioners, or § 31-298 C.G.S., which governs the conduct of hearings, to suggest that a trial commissioner is in any way, shape or form

required to serve as an "advisor" to a pro se claimant.[6] As such, we find no merit in this claim of error.[7]

In a similar vein, the claimant also argues that the trial commissioner's failure to properly advise the claimant regarding the adverse consequences associated with the withdrawal of the 1987 injury constituted error. The claimant asserts that "[t]he fact that the Claimant-Appellant as Respondent-Employer indicates that treatment had been furnished should have given the Trial Commissioner pause to [sic] encouraging the Claimant-Appellant to withdraw the 1987 claim." Appellant's Brief, p. 12. Again, while we reject the implication that the trial commissioner was in any way obligated to assist the claimant in the prosecution of his claim, our review of the evidentiary record does suggest that the circumstances surrounding the claimant's decision to withdraw his claim for the March 1987 injury were problematic.

At the first formal hearing held in this matter on September 12, 2013, the trier stated:

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[6] Section 31-278 C.G.S. (Rev. to 1987) states, in pertinent part: "Each commissioner shall, for the purposes of this chapter, have power to summon and examine under oath such witnesses, and may direct the production of, and examine or cause to be produced or examined, such books, records, vouchers, memoranda, documents, letters, contracts or other papers in relation to any matter at issue as he may find proper, and shall have the same powers in reference thereto as are vested in magistrates taking depositions and shall have the power to order depositions pursuant to section 52-148. He shall have power to certify to official acts and shall have all powers necessary to enable him to perform the duties imposed upon him by the provisions of this chapter…."

Section 31-298 C.G.S. (Rev. to 1987) states, in pertinent part: "Both parties may appear at any hearing, either in person or by attorney or other accredited representative, and no formal pleadings shall be required, beyond such informal notices as the commission approves. In all cases and hearings under the provisions of this chapter, the commissioner shall proceed, so far as possible, in accordance with the rules of equity. He shall not be bound by the ordinary common law or statutory rules of evidence or procedure, but shall make inquiry in such manner, through oral testimony or written and printed records, as is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit of this chapter…."

[7] We also note that every formal hearing notice issued by the Workers' Compensation Commission in this matter contained in the "Special Instructions" section the notation that the claimant "is advised to get counsel."

> we had considerable discussion, prior to going on the record, in terms of simply trying to determine what the Claimant's claim is and how we can best articulate that claim for purposes of rendering a decision. As we have discussed … Mr. Raphael will, shortly, stand and withdraw any claim that he has for a 1987 date of injury. That has been previously the subject of discussion, he has now come to the conclusion that he is unable to prove the existence of [a 1987] claim and will withdraw that.

September 12, 2013 Transcript, pp. 5-6.

The claimant then affirmatively withdrew his claim on the record, and the trier went on to state, "I notice [the] 87 date has been in play for quite a while and that there isn't one medical report at least that infers or expressly states that it might be related to that or is related [to] it, and he's just withdrawn that claim."[8] Id., 7. At the formal hearing held on December 16, 2013, the trial commissioner stated that "for the record, [regarding] the [1987] injury the Claimant has already stipulated that he has no claim for [the] 1987 [injury] based upon the fact that we could find no basis to make the claim timely. If there was no 30C filed, then we could not find any medical information that would save the claim." Transcript, p. 7. Respondents' counsel replied, "[c]orrect. However, he did acknowledge that we still have an opportunity to discuss a 1987 injury, because a 1987 injury, in fact, did occur and there's medical evidence to support treatment following a 1987 injury." Id. Later in that same hearing, the claimant testified

[8] The trial commissioner canvassed the claimant as follows:
Q: Alright, Mr. Raphael, do you agree with that particular statement of the record – or statement of the issue for purposes of today's hearing?
A: I do.
Q: Okay. Now, is it your intention, sir, to withdraw your claim for a 1987 date of injury?
A: Yes.
Q: All right.

that to the best of his recollection, the treatment with Katz for the 1987 injury "was covered as a workers' comp claim." Id., 31-32.

In her January 21, 2015 Amended Finding, the trial commissioner found that there was no Form 30C on record for the March 1, 1987 injury and "the claimant could enter no evidence of any medical benefits having been paid by the respondent within one year of the claimant's alleged date of injury. Findings, ¶ 7.a. The trier also found that although medical evidence submitted into the record supported the claimant's contention that he sustained an injury to his left knee on March 1, 1987, the claimant had stipulated that he had no evidence that he ever timely filed a workers' compensation claim. The trier went on to find that:

> [the claimant] has no evidence, other than Dr. Katz's vague recollection, that bills were submitted to the "Rhulen Agency, the broker at the time for his employer' for payment. No records from the Rhulen Agency or from Dr. Katz's business files were produced at the time of trial and none of the insurance carriers brought into this particular litigation have any record of payment on a 1987 claim on behalf of Connecticut Ballet, Inc. Likewise, the Commission has no paper or electronic evidence of a claim ever having been filed by the claimant on a 1987 date of injury, nor is there any evidence of a hearing being held within one year of the filing of a claim on a 1987 injury.

Findings, ¶ 8.

However, our review of the evidence reveals that the record contains an office note from Katz dated March 12, 1987 wherein the doctor, inter alia, diagnosed an ACL tear of the claimant's left knee and recommended that the claimant undergo a diagnostic arthroscopy. Respondents' Exhibit 1L. On page one, the report contains the following notation: "WORKERS COMP: D/A: 3-1-87 Rhulen Agency 217 Broadway, N.Y.

Montecello, N.Y. 12701." Id., 1. On page two, the note states in the affirmative that the claimed injury was "due to injury or sickness arising out of patient's employment." Id., 2. When queried at his deposition regarding this note, Katz testified that he was not familiar with the Rhulen Agency but that he "hoped" his office had submitted a bill. Claimant's Exhibit G., p. 8. In addition, although he did not know if the bill had ever been paid, he indicated that there was "a great deal of probability" that it had been paid in order to "maintain this relationship" between him and the claimant. Id., 19. Katz stated, "[s]uffice it to say that a bill does go out to the appropriate agency, and hopefully it gets paid, and a relationship with this office and the patient continues based upon that. And I'm assuming that's what happened here." Id., 19. When queried as to whether "there was [any] question in your mind that this was work related and the proper paperwork was submitted and payments were made and Connecticut Ballet's been in good standing?" the doctor replied, "[n]o." Id., 21-22.[9]

The Workers' Compensation Commission is a creature of statute, and "[i]t is a familiar principle that a court which exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation." Castro v. Viera, 207 Conn. 420, 427-428 (1988), *quoting* Heiser v. Morgan Guaranty Trust Co., 150 Conn. 563, 565

[9] Proof of Coverage records generated internally by the Workers' Compensation Commission demonstrate that the Connecticut Ballet Theater maintained a workers' compensation policy with Liberty Mutual numbered 1312450454016 for the coverage period of September 23, 1986 to September 23, 1987. In addition, the evidentiary record also contains an Employer's First Report of Occupational Injury or Disease dated April 4, 1988 for an injury occurring on March 1, 1987 indicating that at that time, MIC Property and Indemnity Company was the insurance carrier for a workers' compensation policy on behalf of Connecticut Ballet, Inc., bearing the number WC002604. Claimant's Exhibit A to Claimant's Exhibit G.

(1963). "[T]he compensability of a type of injury, the existence of the employer-employee relationship and the proper initiation of a claim, are all issues that implicate the threshold question of whether an entire category of claims falls under the scope of the act." Del Toro v. Stamford, 270 Conn. 532, 544-545 (2004). Section 31-294 C.G.S. [now codified at Section 31-294c(a)] sets out the statutory requirements for the proper filing of a workers' compensation claim, and a claimant's failure to comply with the provisions of this statute can prove fatal to a workers' compensation claim.[10] However, § 31-294 C.G.S. also sets forth several "exceptions" to this notice statute [now codified at § 31-294c(c) C.G.S.], one of which allows for jurisdiction to lie "if within the applicable period an employee has been furnished, for the injury with respect to which compensation is claimed, with medical or surgical care as hereafter provided in this section…." Section 31-294 C.G.S. (Revised to 1987)

[10] Section 31-294 C.G.S. (Rev. to 1987) states, in pertinent part: "No proceedings for compensation under the provisions of this chapter shall be maintained unless a written notice of claim for compensation is given within one year from the date of the accident or within three years from the first manifestation of a symptom of the occupational disease, as the case may be, which caused the personal injury, provided, if death has resulted within two years from the date of the accident or first manifestation of a symptom of the occupational disease, a dependent or dependents, or the legal representative of the deceased employee, may make claim for compensation within such two-year period or within one year from the date of death, whichever is later. Such notice may be given to the employer or any commissioner and shall state, in simple language, the date and place of the accident and the nature of the injury resulting therefrom, or the date of the first manifestation of a symptom of the occupational disease and the nature of such disease, as the case may be, and the name and address of the employee and of the person in whose interest compensation is claimed. If there has been a hearing or a written request for a hearing or an assignment for a hearing within said one-year period from the date of the accident or within said three-year period from the first manifestation of a symptom of the occupational disease, as defined herein as the case may be, or if a voluntary agreement has been submitted within the applicable period, or if within the applicable period an employee has been furnished, for the injury with respect to which compensation is claimed, with medical or surgical care as hereafter provided in this section, no want of such notice of claim shall be a bar to the maintenance of proceedings and in no case shall any defect or inaccuracy of such notice of claim be a bar to the maintenance of proceedings unless the employer shows that he was ignorant of the facts concerning such personal injury and was prejudiced by the defect or inaccuracy of such notice. Upon satisfactory showing of such ignorance and prejudice, the employer shall receive allowance to the extent of such prejudice…."

In the instant matter, the trial commissioner ultimately concluded that the March 1, 1987 date of injury was the responsibility of Connecticut Ballet, Inc., given that:

> [t]he commission has no paper or electronic record of the claimant having filed a Form 30C; there is no evidence that a hearing was held in the Commission within one year of his date of injury, and; no evidence was entered into the record to demonstrate that Connecticut Ballet, Inc. paid any of the claimant's medical bills within one year of his date of injury, or that a commercial underwriter of workers' compensation liability insurance paid out on this claim.

Conclusion, ¶ C.

As the foregoing analysis demonstrates, however, the evidentiary record does contain evidence strongly suggesting that a representative of the respondents did make a payment on this claim, and this payment occurred within one year of the date of injury. It therefore appears that the trier's findings and conclusions on the issue of the medical care furnished to the claimant relative to the injury of March 1, 1987 are not entirely consistent with the evidence presented. We therefore remand this matter for additional findings on the issue of whether the medical care furnished to the claimant in 1987 by Katz was sufficient to allow the claimant to fall within the exceptions to the notice provision. "No case under this Act should be finally determined when the … court, is of the opinion that, through inadvertence, or otherwise, the facts have not been sufficiently found to render a just judgment." Cormican v. McMahon, 102 Conn. 234, 238 (1925).

Finally, as mentioned previously herein, the claimant filed a Motion to Correct. Insofar as the trier's denial of the proposed corrections was inconsistent with the analysis

of this board as presented herein, the denial of the Motion to Correct also constituted error.

There is error; the January 21, 2015 Amended Finding by the Commissioner acting for the Seventh District is accordingly reversed in part and remanded in part for additional proceedings consistent with this opinion.

Commissioners Randy L. Cohen and Stephen M. Morelli concur.