CASE NO. 5968 CRB-5-14-10 : COMPENSATION REVIEW BOARD
CLAIM NO. 500154775

PATRICIA GERALDINO
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

: JANUARY 20, 2016

OXFORD ACADEMY OF HAIR DESIGN
EMPLOYER

and

THE HARTFORD INSURANCE GROUP
INSURER
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by Daniel D. Skuret, III, Esq., and Patrick D. Skuret, Esq., Law Offices of Daniel D. Skuret, P.C., 215 Division Street, Ansonia, CT 06401-0158.

The respondents were represented by Richard T. Stabnick, Esq., Law Offices of Pomeranz, Drayton & Stabnick, LLC, 95 Glastonbury Boulevard, Suite 216, Glastonbury, CT 06033-4412.

This Petition for Review[1] from the October 16, 2014 Findings and Orders of Commissioner Scott A. Barton acting for the Fifth District was heard August 28, 2015 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Randy L. Cohen and Stephen M. Morelli.

[1] We note that a postponement and extensions of time were granted during the pendency of this appeal.

OPINION

RANDY L. COHEN, COMMISSIONER. This appeal presents a new fact pattern for the Compensation Review Board to consider. This is a case where we have already affirmed a Motion to Preclude pursuant to § 31-294c(b) C.G.S. against the respondents, Geraldino v. Oxford Academy of Hair Design, 5840 CRB-5-13-5 (April 17, 2014) and following a formal hearing the claimant was awarded benefits. The respondents have appealed from the Finding and Orders, asserting various elements of relief are inconsistent with the evidence on the record. The claimant argues that subsequent to preclusion the respondent lacks the ability to seek any post-hearing relief, and the appeal is not viable. On the merits, the claimant argues that the relief in the Finding and Orders was supported by the record, and the trial commissioner has the authority to bifurcate a claim and seek additional hearings if it is necessary.

After consideration of the law and the facts we conclude that the claimant's interpretation of § 31-294c(b) C.G.S. is in error. We do not believe that once a respondent is precluded from contesting liability of a claim for benefits that this event serves in perpetuity to bar the respondent from bringing legal error to the attention of the Compensation Review Board. This amounts to the sort of "absurd or unworkable result" proscribed by the paramount statute governing statutory interpretation, § 1-2z C.G.S.[2] Moreover, it is inconsistent with appellate precedent as to the preclusion statute. As to the merits of the respondents' appeal; we conclude that the trial commissioner did not

[2] The text of this statute reads as follows:
"**Sec. 1-2z. Plain meaning rule.** The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

sufficiently identify the factual basis in the record for various findings he reached in the Finding and Orders. We remand those issues to the trial commissioner for further proceedings.

The trial commissioner reached the following factual conclusions at the end of the formal hearing. The claimant was hired by the respondent-employer in 2007 as their head cosmetology instructor. She was employed at their facility at Oxmour Plaza in Seymour and she described her work activities in the following manner.

> I had to instruct the students on the art of cosmetology. First I would teach them theory, and I would teach them how to manipulate hair by shampooing, conditioning, sectioning, cutting, brushing, teasing, combing, foiling, roller sets, perming with tiny perm rods, braiding, painting nails, applying makeup, clipper-cutting on men. And that's what I was teaching.

Findings, ¶ 3.

The claimant testified that she used her hands extensively in this job. She also testified she was responsible for a number of administrative duties, such as moving heavy chairs, receiving office supply shipments from UPS and W.B. Mason, and lifting jugs of hair spray and shampoo. She said she was not allowed to sit down at her job and she was on her feet from six to eight hours per day. On October 26, 2010 the Oxmour Plaza facility was closed and the claimant was directed by her employer to pack up all the equipment, records and material there so it could be moved to a new location. She described that process as follows.

> Well, on top of all my instructing all the students and the cleaning and whatnot, I had to pack up everything: The gallons of shampoos, conditioners, the hair products, file cabinets full of students' files... So every file, all the chapters files, all the quizzes, all the dittos, all the papers, boxes of VHS tapes, two VHS players that were on a high shelf, boxes of CDs, hair color, old nail machines, old credit card machines. Everything that was not

> nailed down I had to put in a box, on top of answering the phone, helping with the clients, helping the students. On top of that, I was told to clean whatever I took out, also, so I had to bend and stoop and clean inside cabinets and reach and clean the high shelving.

Findings, ¶ 12.

The claimant said that she packed 40 to 50 boxes without any help and completed this task by October 29, 2010. She said she was in a lot of pain afterward, took Motrin and lay down on the couch all weekend. On November 2, 2010 she had to unpack all these boxes at the employer-respondent's new facility on North Street in Seymour. It was a multistory building and the claimant said she had to go up and down stairs about 50 times in the process of unpacking these boxes unaided. On her last trip up the stairs that day the claimant "felt a stabbing pain in [her] left calf." She described that her "vein burst" leaving a "softball-size bruise" on her "left calf." The claimant "told her boss" about the incident at the "end of [her] shift." Findings, ¶ 16. The claimant said she was in excruciating pain after this incident and by the next morning she had pain symptoms in her neck, back, arms, wrists, fingers, hands and legs. Since the claimant was very concerned about her left leg she contacted her vascular surgeon, Dr. Marsel Huribal. The claimant continued to work through the week but said she was slowed by the pain she was experiencing.

The claimant was examined by Dr. Huribal on November 5, 2010. She had treated with him since 2008 for chronic venous insufficiency and had received a "radiofrequency ablation" procedure previously. Findings, ¶ 20. At this examination she described suffering numbness, drilling pain in her right knee, and pressure from her knees to her ankles. She was prescribed compression stockings and directed to keep her leg elevated. She was also directed to have an MRI performed to determine if she had

radiculopathy, possibly at L4-L5, and she was recommended to have a neurologist or an orthopedic surgeon review the MRI. She was released back to work by Dr. Huribal. The claimant underwent the lumbar MRI on December 16, 2010. The study revealed "degenerative disc disease and diffuse disc bulge at L5-S1." Findings, ¶ 24.

Subsequent to the MRI the claimant was examined by Dr. Patrick Mastroianni on January 11, 2011. She described her condition as of that date as follows.

> Most mornings and days feels like drilling in my right knee. Numbness pain, right hand shakes at times, incredible pain nonstop from neck to back, down right arm + right leg, + down left leg. At times feels like electricity running through body + spiders crawl up legs + pressure from knees down.

Findings, ¶ 25.

Dr. Mastroianni's January 11, 2011 report noted that the claimant had no immediate trauma preceding the claimant's symptoms but noted that she had done a "fair amount of lifting" in the week prior to their appearance. He also noted the claimant's history of varicose vein problems and prior treatment. Findings, ¶ 26. He diagnosed the claimant with a bulging disc at L5-S1, but further concluded the lumbar scan results did not explain her right shoulder and right arm symptoms and recommended she obtain a cervical MRI. The claimant underwent the cervical MRI on January 18, 2011. She was diagnosed with "multilevel degenerative changes with a severe left foraminal narrowing at C5-6 and a moderate left foraminal narrowing at C6-7." Findings, ¶ 28. On February 3, 2011 Dr. Mastroianni noted there were "sizeable disc herniations at C5-6 and C6-7" and further noted the MRI findings as "striking." As a result of these findings he recommended "an anterior cervical discectomy" and "interbody bone graft fusion" with

"plate fixation." Dr. Mastroianni provided an "out of work" note due to the scheduled surgery. Findings, ¶ 29.

The claimant then was examined by Dr. Scott Waller, an orthopaedic surgeon, on February 8, 2011 for a "pre-op appointment" regarding her scheduled cervical spine fusion. Dr. Waller concurred with Dr. Mastroianni as to the claimant's condition and need for surgery. Prior to the claimant's surgery on February 21, 2011 she was in great pain, but continued to work until February 18, 2011, she also said she frequently required help as she was dropping things a lot. The claimant underwent a two level cervical fusion on February 21, 2011 performed by Dr. Mastroianni and Dr. Waller. After the surgery, she was prescribed physical therapy and prescription medications as well as follow-up appointments to assess her progress. Dr. Waller's reports after the surgery indicated the claimant's symptoms improved and on April 27, 2011 she was released to "part time" work by Dr. Mastroianni.

The claimant returned to the employer-respondent seeking work but was advised there was no light duty work available. She engaged in a job search until October 2013 when she obtained a job at Valley Discount Oil, where she worked 28 hours per week at $10 per hour. Following her surgery Dr. Mastroanni on October 24, 2011 noted "very significant improvement" in the claimant's symptoms. Dr. Waller referred the claimant to a pain management doctor, Dr. Mohan Vodapally. The claimant presented to this doctor on February 24, 2012 with "pain in the lower neck, both shoulders, and tingling and numbness in both upper extremities." Findings, ¶ 40. Dr. Vodapally recommended a "trial of a cervical epidural steroid injection" and a "nerve conduction" (EMG/NCS) study "to rule out carpal tunnel syndrome" bilaterally "depending on the" results of the

injection. Findings, ¶ 41. The injection was provided on March 22, 2012. The record does not contain the specific results of a nerve conduction study. She stopped treating with Dr. Vodapally as she was getting "worse" after this injection. Findings, ¶ 41.

On April 16, 2012 Dr. Waller notes that the claimant "remains very symptomatic with continued complaints of bilateral upper extremity burning, numbness, and tingling." The claimant felt these symptoms in her bilateral hands but denied "any neck pain." Dr. Waller's April 16, 2012 report referenced the "EMG/NCS of the [Claimant's] bilateral upper extremities dated 4/2/2012 shows **no evidence** of carpal tunnel syndrome nor radiculopathy at either upper extremity." Findings, ¶ 43. (Emphasis in original.) Dr. Waller suspected possible "thoracic outlet" syndrome due to "lingering nerve" symptoms and prescribed "Neurontin." Id. Subsequent examinations by Dr. Waller in May and July of 2012 indicated the claimant's symptoms had improved under this modality of treatment.

The trial commissioner noted the claimant testified that she had not sustained any lumbar or cervical spine injury or pain prior to her work for the employer-respondent on or about November 2, 2010. The claimant also denied sustaining an injury or pain to her hands, legs and arms prior to that date, and further attributed her varicose vein problems to her employment. The commissioner noted that the claimant's treaters had offered opinions as to causation of her injuries. On February 16, 2012, Dr. Mastroianni provided a causation medical report regarding the claimant's "cervical" and "lumbar" spine and concluded "the lifting related injury of October and early November of 2010 at work, was responsible for this patient's cervical and lumbar disc pathology." Findings, ¶ 46. Dr.

Mastroianni further offered a causation opinion as to the claimant's arm and hand condition.

> Currently, Mrs. Geraldino has **symptoms** consistent with carpal tunnel syndrome. Based upon the history of tremendous amount of repetitive use motion to the hands and arms at work, I would conclude that repetitive use injury was a substantial factor in the production of her carpal tunnel syndrome. (Emphasis added.)

Findings, ¶ 47. (Emphasis in original.)

Dr. Mastroianni ascribed permanent partial disability ratings to the claimant of 25% of the cervical spine, 10% of the lumbar spine and 10% of the hands. The commissioner also noted Dr. Waller presented a May 12, 2012 opinion as to the causation of the claimant's cervical spine issues;

> that within reasonable medical probability, Ms. Geraldino's neck condition is causally related to heavy repetitive lifting that she did perform at work around October, 2010. Therefore by association the need for surgery on Ms. Geraldino's neck as well as her subsequent and ongoing monitoring and treatment should also be considered causally related to her work activities/work injury.

Findings, ¶ 49.

The commissioner also reviewed a September 26, 2013 report of Dr. Huribal that ascribed extensive exacerbation of the claimants "underlying...severe venous reflux disease and venous hypertension" to her employment; but did not opine to causation of her deep vein thrombosis condition or of the bursting vein that the claimant testified to; nor her need for ablation treatment. Findings, ¶ 51.

Based on this factual foundation the trial commissioner concluded that claimant's testimony was credible, and that she sustained her burden of proof that her cervical spine and lumbar spine injuries were work related. The commissioner found the opinions of Dr. Waller and Dr. Vodapally credible and their treatment of the claimant's cervical and

lumbar spine, including the February 21, 2011 fusion surgery, was reasonable and necessary and causally related to the compensable injury. The trial commissioner was less definitive as to his assessment of Dr. Mastroianni's opinions. The trial commissioner did not find credible his opinion the claimant suffered from carpal tunnel syndrome, citing evidence presented to the contrary by Dr. Waller and Dr. Vodapally. He also did not find Dr. Mastroainni's lumbar spine impairment rating to be credible, and ordered a Commissioner's examination to ascertain a permanency rating for this body part. However, the trial commissioner did specifically find credible Dr. Mastroanni's causation opinions as to the claimant's cervical and lumbar spine injuries and his opinion as to her permanent impairment rating for her cervical spine. The commissioner found that Dr. Huribal was credible but noted he had not provided an opinion related to the extent of the claimant's injury as a result of her employment, and that further hearings will be required as to the extent of the claimant's vascular injuries. As to the claimant's hand injuries the trial commissioner ruled as follows. "Further hearings may be required to determine what if any injuries were sustained to the Claimant's bilateral hands relative to her employment with the Respondent. Any opinions regarding the Claimant's bilateral hands must take into consideration the Claimant's prior employment." Conclusion, ¶ DD.

The Commissioner ordered the respondents to accept compensability of the claimant's cervical and lumbar spine injuries and that the respondents were directed to pay the claimant temporary total and temporary partial disability benefits, as well as the permanency benefits for the claimant's spinal injuries. The commissioner said further hearings would be required for the claimant's bilateral hand and bilateral leg injuries. The respondents filed a Motion to Correct. This motion sought modifications to various

findings and the deletion of the conclusion that additional hearings were needed for the claimant's hand and leg injuries. The Motion to Correct also sought to add new conclusions that the claimant failed to sustain her burden of proof she sustained a compensable venous reflux and/or venous hypertension injury as well as conclusions that claimant failed to prove she sustained a compensable bilateral carpal tunnel injury, and that, therefore, these claims should be denied. The claimant filed a Motion to Preclude/Objection asserting that the precedent in Donahue v. Veridiem, Inc., 291 Conn. 537 (2009) and Harpaz v. Laidlaw Transit, Inc., 286 Conn. 102 (2008) barred the respondents from filing any pleading challenging the evidence presented by the claimant at any time subsequent to the granting of the Motion to Preclude. The claimant also argued that the Motion to Correct had procedural deficiencies. The trial commissioner granted the claimant's Motion to Preclude/Objection and the respondents have commenced the instant appeal.

The respondents' appeal restates their arguments in the Motion to Correct that the claimant failed to prove at the formal hearing that she sustained a compensable bilateral carpal tunnel injury or a compensable bilateral leg injury; and therefore these claims should be dismissed. They further find the commissioner's decision to hold further hearings on these issues was legally in error. They also believe it was error for the trial commissioner to determine they had no right to file a post trial brief or a Motion to Correct. The claimant restates her position that subsequent to preclusion being granted the respondents can take no action whatsoever to challenge the claimant's evidence. At oral argument before our tribunal, counsel for the claimant stated that the effect of

preclusion was to collaterally estop the respondents from ever challenging the claimant's evidence, and counsel asked for this appeal to be dismissed.

On appeal, we generally extend deference to the decisions made by the trial commissioner. "As 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." Daniels v. Alander, 268 Conn. 320, 330 (2004). In a case such as this one, where preclusion has already been granted to the claimant, our review is focused on the legal standards employed by the trial commissioner in evaluating the claimant's claim and evidence. While we must provide deference to the decision of a trial commissioner, we may reverse such a decision if the commissioner did not properly apply the law or reached a decision unsupported by the evidence on the record. Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

Our initial inquiry must focus on whether the respondents had the right to contest this claim in any manner once the record of the formal hearing in this matter closed. If the effect of § 31-294c(b) C.G.S. is to effect a permanent bar to the respondents taking any action subsequent to preclusion, then we need not consider the merits of the respondents argument. After reviewing the statute and the precedent relevant to this question, we conclude the respondents did have the ability to appeal. While the holdings of Donahue, supra, and Mehan v. Stamford, 5389 CRB-7-08-10 (October 14, 2009), *aff'd*, 127 Conn. App. 619 (2011), *cert. denied*, 301 Conn. 911 (2011) govern and limit the respondents' rights as to the formal hearing process, we find they are not germane to the appellate rights of respondents. We reach this conclusion as we believe the appellate

role of this tribunal is separate and distinct from the fact–finding prerogative of a trial commissioner.

We also conclude that a formal hearing as to a claim filed under Chapter 568 is a fact-finding exercise; whereas appellate proceedings are a contest as to the legal sufficiency of the result reached at a formal hearing. While a litigant may be barred by statute from challenging evidence presented at a hearing, we cannot bar a litigant from challenging an application of law. The right of an aggrieved party to bring claims of legal error to a tribunal's attention goes to the fundamental principal of procedural due process. See, for example, Williams v. Bartlett, 189 Conn. 471, 475-478 (1983). Our Supreme Court has clearly delineated the difference between the fact-finding prerogative of a trial commissioner and our statutory jurisdictional powers to hear appeals from their decisions. See Crochiere v. Board of Education, 227 Conn. 333, 347-349 (1993); Hall v Gilbert & Bennett Mfg. Co., 241 Conn. 282, 291 (1997) and Spatafore v. Yale University, 239 Conn. 408, 418 (1996).

It is appellate tribunals such as ours, and not a trial commissioner, which are the ultimate arbiter if based on the facts of a case the legal interpretation of § 31-294c(b) C.G.S. bars the relief sought by an appellant. There is no question 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).[3]

[3] We find the situation created by the claimant's interpretation of our statute untenable for another reason. Were a claimant to obtain preclusion against a respondent, proceed to a formal hearing, and find the trial commissioner's decision legally flawed he or she could appeal to our tribunal to obtain relief. On the other hand, the interpretation presented by the claimant bars the respondent from bringing similar error by the trial commissioner to our attention. We find no rationale in the statute for such a lack of reciprocity; which is repugnant to the concept of procedural due process.

From this fundamental premise we review the case law interpreting the preclusion statute. We note that in Donahue, supra, the Supreme Court discussed preclusion in terms of acting as a "conclusive presumption" and citing State v. Harrison, 178 Conn. 689 (1979), they described this concept as "a conclusive presumption does more than shift the burden; it deprives the jury of any **fact-finding** function as to intent." (Emphasis added.) Id., 549. The Supreme Court concluded the plain language of § 31-294c(b) C.G.S. did not allow employers to have an adversarial role in the "proceedings." Id. However, the Supreme Court further stated that as to preclusion "[w]e do not believe that this rather harsh remedy should be imposed without ensuring that both parties have been provided with the **due process protections** inherent in a formal proceeding." (Emphasis added.) Id., 550. A review of the rest of the Donahue decision indicates the limitations the Supreme Court placed on respondents at "proceedings" involved barring their counsel from participation at formal hearings. Id., 550-555. We further note that footnote 10 of Donahue, supra, clarified that the Supreme Court did not extend the holding of Harpaz, supra, to require the payment of a claim that, notwithstanding the preclusion of the respondent, was otherwise not "bona fide." Id.

In Mehan, supra, the respondents appealed the Finding and Award arguing that since the commissioner was prohibited from considering any evidence they sought to present at the formal hearing, they were denied due process of law. Mehan, supra, 629. The Appellate Court cited Donahue for the proposition "[t]here is nothing . . . to suggest that an employer has the right to test the **evidence** proffered by the claimant . . . by way of question or argument." Id., 631. (Emphasis added.) The Appellate Court further

concluded that the defendant's argument amounted to a request to overturn Harpaz and Donahue and declined the entreaty. Id., 631.

We do not equate the situation in this case to the factual circumstances in Donahue and Mehan. In both those cases the respondents were found to be unable to cross-examine witnesses or present evidence to contest, after a Motion to Preclude has been granted, a claim presented at a formal hearing. The respondent in this case did not seek to present any evidence or challenge the claimant's evidence prior to having the record close and having the trial commissioner issue a Finding. Neither Donahue nor Mehan address the appellate rights of a respondent subsequent to a trial commissioner reaching a Finding after an uncontested hearing. Therefore, we find the factual background and legal issues herein distinguishable from the cases the claimant relies upon, and look to the statutes and other appellate precedent for guidance.[4]

Preclusion is a statutory mechanism, as are appeals from the trial commissioner to the Compensation Review Board, and to ascertain the appropriate bounds of preclusion

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[4] We wish to bifurcate the issue of whether the respondents were barred from submitting a Motion to Correct from the issue of whether the trial commissioner erred by denying a Motion to Correct subsequent to preclusion. The claimant advances an argument the trial commissioner found persuasive that the precedent in Donahue v. Veridiem, Inc., 291 Conn. 537 (2009) barred the consideration of **any** argument presented by the respondent in the fact finding process. To the extent a Motion to Correct is "an effort to bring factual evidence to the trial commissioner's attention in an effort to obtain a Finding that is consistent with such facts", Brockenberry v. Thomas Deegan d/b/a Tom's Scrap Metal, Inc., 5429 CRB-5-09-2 (January 22, 2010), *aff'd*, 126 Conn. App. 902 (2011) (Per Curiam), such a motion is inconsistent with the holding in Donahue, supra, and a commissioner should deny such a motion. However, that is not the sole purpose of a Motion to Correct. This motion is also relevant to identify what a litigant believes are evidentiary deficiencies in the Finding prior to bringing their appeal. See Dorenbosch v. Hoffman Landscapes, 5734 CRB-7-12-2 (February 14, 2013), or to identify an inaccurate application of law Berry v. State/Dept. of Public Safety, 5162 CRB-3-06-11 (December 20, 2007).

As we pointed out in Stevens v. Raymark Industries, Inc., 5215 CRB-4-07-4 (March 26, 2008), *appeal dismissed*, AC 29795 (June 26, 2008) when a Motion to Correct is not filed we may give a factual finding conclusive effect. If a factual finding is based on unreliable evidence, DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132 (2009), it would seem a respondent would arguably be denied due process were they to be barred from having any mechanism to bring this issue to appellate review. As a result, we do not believe a respondent is barred from utilizing a Motion to Correct subsequent to preclusion as a means to identify alleged error for appellate tribunals.

we must review the applicable statutes. The Supreme Court in State v. Kevalis, 313 Conn. 590 (2014) has recently restated the appellate standard for interpreting a statute. We believe it is pertinent to the issues raised herein.

> In construing a statute, the first objective is to ascertain the intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of the case, including the question of whether the language actually does apply. . . . General Statutes § 1-2z directs this court to **first consider the text of the statute and its relationship to other statutes to determine its meaning.** Only if we determine that the statute is not plain and unambiguous and does not yield absurd or unworkable results may we consider extratextual evidence of its meaning, such as the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . We presume that the legislature did not intend to enact meaningless provisions. . . . [S]tatutes must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant . . . . (Citations omitted; footnote omitted; internal quotation marks omitted.)

(Emphasis added.) Id., 599-600.

The relevant terms of the preclusion statute, § 31-294c(b) C.G.S. read as follows;

> (b) Whenever liability to pay compensation is contested by the employer, he shall file with the commissioner, on or before the twenty-eighth day after he has received a written notice of claim, a notice in accord with a form prescribed by the chairman of the Workers' Compensation Commission stating that the right to compensation is contested, the name of the claimant, the name of the employer, the date of the alleged injury or death and the specific grounds on which the right to compensation is contested. The employer shall send a copy of the notice to the employee in accordance with section 31-321. If the employer or his legal representative fails to file the notice contesting liability on or before the twenty-eighth day after he has received the written notice of claim, the employer shall commence payment of compensation for such injury or death on or before the twenty-

> eighth day after he has received the written notice of claim, but the employer may contest the employee's right to receive compensation on any grounds or the extent of his disability within one year from the receipt of the written notice of claim, provided the employer shall not be required to commence payment of compensation when the written notice of claim has not been properly served in accordance with section 31-321 or when the written notice of claim fails to include a warning that (1) the employer, if he has commenced payment for the alleged injury or death on or before the twenty-eighth day after receiving a written notice of claim, shall be precluded from contesting liability unless a notice contesting liability is filed within one year from the receipt of the written notice of claim, and (2) the employer shall be conclusively presumed to have accepted the compensability of the alleged injury or death unless the employer either files a notice contesting liability on or before the twenty-eighth day after receiving a written notice of claim or commences payment for the alleged injury or death on or before such twenty-eighth day. An employer shall be entitled, if he prevails, to reimbursement from the claimant of any compensation paid by the employer on and after the date the commissioner receives written notice from the employer or his legal representative, in accordance with the form prescribed by the chairman of the Workers' Compensation Commission, stating that the right to compensation is contested. Notwithstanding the provisions of this subsection, an employer who fails to contest liability for an alleged injury or death on or before the twenty-eighth day after receiving a written notice of claim and who fails to commence payment for the alleged injury or death on or before such twenty-eighth day, shall be conclusively presumed to have accepted the compensability of the alleged injury or death.

The statute governing the right of a party to appeal an adverse decision from a trial commissioner is § 31-301(a) C.G.S. It reads as follows;

> (a) At any time within twenty days after entry of an award by the commissioner, after a decision of the commissioner upon a motion or after an order by the commissioner according to the provisions of section 31-299b, either party may appeal therefrom to the Compensation Review Board by filing in the office of the commissioner from which the award or the decision on a motion originated an appeal petition and five copies thereof. The commissioner within three days thereafter shall mail the petition and three copies thereof to the chief of the Compensation Review Board and a copy thereof to the adverse party or parties. If a party

> files a motion subsequent to the finding and award, order or decision, the twenty-day period for filing an appeal of an award or an order by the commissioner shall commence on the date of the decision on such motion.

We note that the two statutes do not reference each other. The preclusion statute contains no reference to barring a respondent's right to appeal a decision reached after a formal hearing; it states that subsequent to preclusion the respondent must accept the compensability of the claimant's injury. While the Supreme Court's interpretation of § 31-294c(b) in Donahue, supra, has extended its terms to bar a challenge to the extent of a claimant's disability, the "plain meaning" of this statute is silent on whether issues beyond compensability may be addressed. The appeal statute contains no words of limitation on what either party may appeal to the Compensation Review Board.[5] "We are also mindful that "[t]he court may not, by construction, supply omissions in a statute or add exceptions or qualifications, merely because it opines that good reason exists for so doing . . . ." Walter v. State, 63 Conn. App. 1, 8 (2001). See also Gamez-Reyes v. Biagi, 136 Conn. App. 258, 274 (2012). We note that the nature of a workers' compensation claim is such that it may remain open for the injured worker's lifetime to address disability or medical treatment that result from a compensable injury. Schenkel v. Richard Chevrolet, Inc., 4639 CRB-8-03-3 (March 12, 2004), *aff'd*, 123 Conn. App. 55 (2010). As the claimant views § 31-294c(b) C.G.S., presumably the respondent would be barred decades after preclusion from contesting issues unforeseeable at the time the claim was filed. We find that this statutory interpretation yields results which are unreasonable and untenable akin to the respondents' interpretation of § 31-275(9)(B)(iv) we rejected in

[5] "Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed." State v. Kevalis, 313 Conn. 590, 603 (2014).

Lopez v. Gregory Pannone and Louis Pannone, 5933 CRB-7-14-5 (April 29, 2015). The plain meaning of § 1-2z C.G.S. requires that we reject such an unworkable interpretation of our statutes. See Lamar v. Boehringer Ingelheim Corp., 138 Conn. App. 826, 835 (2012).

Moreover, our appellate courts have clearly enunciated that a respondent has a right to appeal adverse decisions reached subsequent to the granting of a Motion to Preclude. The initial case that established this principle was Castro v. Viera, 207 Conn. 420 (1988). In Castro, our tribunal concluded that the trial commissioner should have granted a motion to preclude as the respondent failed to file a timely disclaimer as required by statute. The respondents argued that since there was a jurisdictional defense to the claim (lack of employee-employer relationship), they could appropriately raise this defense notwithstanding preclusion. Reviewing cases such as Adzima v. UAC/Norden Division, 177 Conn. 107 (1979) the Supreme Court determined the defendants had the right to raise a jurisdictional defense. Castro, supra, 430-436. See, specifically footnote 9 of Castro, supra. The Supreme Court restated this principle in a later case where the defendants failed to file a timely disclaimer, and then appealed on the grounds the claimant's injury was outside the jurisdictional scope of Chapter 568, Del Toro v. Stamford, 270 Conn. 532 (2004). In Del Toro the Supreme Court held "the employer can always contest the existence of 'jurisdictional facts.'" Id., 543.

The claimant believes that the touchstone decisions in Harpaz, supra, Donahue, supra, and Mehan, supra, have fundamentally altered an appellant's right to seek an appeal after a Motion to Preclude is granted. However, subsequent to those decisions the Appellate Court restated the principles previously promulgated in Castro, supra, and Del

Toro, supra. In Wikander v. Asbury Automotive Group/David McDavid Acura, 137 Conn. App. 665 (2012) the claimant obtained preclusion against the respondents for failing to file a timely disclaimer. Id., 667. Nonetheless, the Appellate Court held that this did not bar the respondents from the right to bring an appeal contesting the award of benefits to the claimant. Id., 668, fn. 2, citing Castro, supra, and Del Toro, supra.[6] The precedent in Wikander is therefore incompatible with the claimant's argument that the effect of the Donahue decision was to extinguish a respondent's right to bring an appeal after a Motion to Preclude has been granted.

In this case the respondents have asserted that the claimant's bid for benefits for injuries to her arms and legs were not consistent with the legal standard enunciated in cases such as DiNuzzo, supra. Essentially the respondents are asserting that the claimant's evidence was inadequate on a legal basis to sustain the relief the trial commissioner ordered after the formal hearing. We believe this is a form of legal error which a respondent, even after having been precluded from challenging evidence at the formal hearing, may bring to the attention of our tribunal. We note that subsequent to the conclusion of a trial appellate courts may consider "plain error."[7] [8]

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[6] We note that when a respondent raises an issue of an award to a claimant being void *ab initio* due to a lack of subject matter jurisdiction, the Appellate Court has approved raising this issue by way of a motion to open and vacating the award after any statutory appeal period from the initial award had run. See Mankus v. Mankus, 107 Conn. App. 585, 589-590 (2008), *cert. denied*, 288 Conn. 904 (2008) (award vacated due to fraudulent claim of employee-employer relationship). This precedent is inconsistent with the claimant's position that once preclusion enters the respondents can take no further action to address legal error.

[7] Since our right to review the legal sufficiency of an award of benefits requires a party to file an appeal to this tribunal under § 31-301 C.G.S; were we to extend the holding of Donahue v. Veridiem, Inc., 291 Conn. 537 (2009) to bar an appeal by a respondent after preclusion we would act in derogation of Practice Book Sections § 60-5 and § 61-1 which enable appellate tribunals to consider whether a decision of a trial court is legally sound. We do not read the bar on a respondent challenging evidence post -preclusion under § 31-294c(b) C.G.S. to extend beyond the fact finding hearing that results in a finding. Once a final decision by a trial commissioner occurs, due process requires that a mechanism exist to enable this tribunal to address "plain error" should it exist.

In the present situation, consistent with Donahue, supra, and Mehan, supra, only the claimant was able to present evidence and the trial commissioner has completed his fact-finding duties based solely on the unrebutted evidence she presented. We find that the record is complete, and the question presented on appeal is one of whether the record is sufficient as a matter of law to support elements of the Finding and Orders.[9] We therefore believe this situation is beyond the parameters of the holdings in Donahue supra, and Mehan, supra, (which govern hearings before a trial commissioner) and believe we are legally empowered to consider the merits of the respondents appeal.[10]

The substantive issues raised by the respondents are not as involved as the issues regarding their right to bring an appeal. Essentially they argue that the trial commissioner was not presented with sufficient probative evidence to support his orders regarding the claimant's bilateral arm injuries and bilateral leg injuries. As the precedent

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[8] The circumstances herein are congruent to the issues addressed in Westport Taxi Service, Inc. v. Westport Transit District, 235 Conn. 1 (1995). In that case the defendant raised for the first time on appeal an argument that elements of the relief ordered by the trial court were legally impermissible. Id., 37. The plaintiff argued that this was untimely. The Supreme Court reached this issue, however, and we find this element of their reasoning applies to an appeal to this tribunal after a trial commissioner reaches a decision in a case where preclusion had been ordered.

> Second, neither party is prejudiced by our decision to review this issue under the plain error rule. Unlike the issues of immunity and treble damages in this case, our interpretation of the statutes does not require further fact-finding by the trial court, and both parties have had an opportunity to present arguments regarding their proposed statutory interpretation in their appellate briefs. Plain error review may be appropriate where the record is complete and the question is essentially one of law, so that neither party is prejudiced.

Id., 37-38.

[9] We note that the "plain error rule" was applied by the Appellate Court in addressing an appeal brought by the respondent from a decision reached by our tribunal. See Salmeri v. Dept. of Public Safety, 70 Conn. App. 321, 328, fn. 6 (2002).

[10] Since the respondent was unable prior to the issuance of a finding to raise issues of evidentiary inadequacy in what was *de facto*, an uncontested formal hearing, we believe the application of the "plain error rule" for this appellate proceeding is appropriate. See Connecticut Rules of Appellate Procedure (Horton & Bartschi) p. 42, where one enumerated ground (¶ 13) for such an appeal is "where the record is complete and the question is essentially one of law."

in Donahue, supra, makes clear, even after preclusion a claimant must satisfy a trial commissioner through probative evidence that his or her injury is the result of an incident during the course of employment. Id., 553-555. The standard that a trial commissioner must apply in evaluating the claimant's evidence was most recently enunciated by this tribunal in Larocque v. Electric Boat Corp., 5942 CRB-2-14-6 (July 2, 2015).

> Viewing the precedent in Voronuk, [v. Electric Boat Corp., 118 Conn. App. 248 (2009)]; DiNuzzo [v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132 (2009)] and Sapko [v. State, 305 Conn. 360 (2012)] together as a whole, it is clear that since Birnie [v. Electric Boat Corp., 288 Conn. 392 (2008)] our appellate courts have restated the need for claimants seeking an award under Chapter 568 to present reliable, nonspeculative evidence and to carry their burden of proof that there is a clear nexus of proximate cause between employment and injury.

Id.

While a respondent precluded under § 31-294c(b) C.G.S. may not challenge the claimant's proof, a trial commissioner must be satisfied; consistent with the powers enumerated under § 31-298 C.G.S., that the claimant has a "bona fide claim" see Donahue, supra, in order to award benefits for an injury.[11]

In their Motion to Correct the respondents sought to amend the Conclusions reached as to the claimant's alleged carpal tunnel syndrome and bilateral leg injuries. As for the claim of carpal tunnel syndrome the respondents sought to remove Conclusion, ¶ DD. They argue that the claimant failed to present probative evidence proving she sustained carpal tunnel syndrome as a result of her work activities. They point to the trial

[11] As we pointed out in Larocque v. Electric Boat Corporation, 5942 CRB-2-14-6 (July 2, 2015) "[t] he Supreme Court in Sapko v. State, 305 Conn. 360 (2012) also cited DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132 (2009) for the following proposition, 'it is the plaintiff who bears the burden to prove an unbroken sequence of events that tied [the employee's] injuries to the [employer's conduct]. . . . The existence of the proximate cause of an injury is determined by looking from the injury to the negligent act complained of for the necessary causal connection.' Id., 372." Id. Fn. 6.

commissioner specifically finding Dr. Mastrianni's opinion not credible that the claimant suffered from carpal tunnel syndrome in Conclusion, ¶ CC. They further point to the trial commissioner citing Dr. Waller's contrary opinion the claimant did not demonstrate evidence of carpal tunnel syndrome favorably in Conclusion, ¶ V; and the trial commissioner finding Dr. Waller a credible witness in Conclusion, ¶ BB. Therefore, they do not believe the evidence the trial commissioner found credible and probative supports the result reached on this issue. The respondents argue the findings are internally inconsistent and do not support the ultimate conclusion.

After review and deliberation we are uncertain as to what the trial commissioner decided in Conclusion, ¶ DD. He stated that further hearings "may" be required on this issue. At the conclusion of a formal hearing we believe the trial commissioner must reach a definitive conclusion as to whether additional hearings are required or not. A non-definitive conclusion such as Conclusion, ¶ DD is inconsistent with our precedent in Aylward v. Bristol/Board of Education, 5756 CRB-6-12-5 (May 15, 2013), *aff'd*, 153 Conn. App. 913 (2014) (Per Curiam), Risola v. Hoffman Fuel Company of Danbury, 5120 CRB-7-06-8 (July 20, 2007), AC 29056, *appeal dismissed for lack of final judgment* (2007), and Bazelais v. Honey Hill Care Center, 5011 CRB-7-05-10 (October 25, 2006), AC 30307, *appeal withdrawn* (2009). In those cases we determined a Finding and Award was ambiguous and it was inappropriate to speculate on what the trial commissioner determined after reviewing the evidence. While it appears the trial commissioner was not persuaded the claimant sustained carpal tunnel syndrome; he made no definitive ruling on this question. The trial commissioner was presented with evidence from a witness he found to be credible, Dr. Waller, that the claimant may suffer from thoracic outlet

syndrome. The commissioner made no affirmative determination regarding this issue. Given these inconsistencies, we must remand this issue back to the trial commissioner for an articulation as to what conclusion he reached on the claimant's bilateral hand injuries and what further actions, if any, are required to reach a resolution.[12] [13]

We also find the trial commissioner's decision on the issue of the claimant's bid for benefits for bilateral leg injuries tentative. We note that the trial commissioner found Dr. Huribal credible. Conclusion,¶ Z. However, this conclusion, as well as Conclusion, ¶ W and ¶ X cites significant limitations as to the witness' testimony regarding injuries and modalities of treatment. The claimant presented no other evidence from an expert witness concerning these injuries. Nonetheless, the trial commissioner appears to have continued the entire issue for further proceedings without reaching a definitive conclusion as to what compensable leg injuries he believed the claimant has sustained based on the evidence on the record. For the reasons stated in Aylward, supra, Risola, supra, and Bazelais, supra, we remand this issue to the trial commissioner for a clarification as to what leg injuries he believed the claimant had proven by the evidence she presented at the formal hearing.[14]

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[12] The respondents suggest consistent with the precedent in Donahue, supra, that the trial commissioner resolve any limitations or ambiguities in the claimant's evidence on the bilateral arm and bilateral leg issues by ordering a Commissioner's Examination pursuant to § 31-294f C.G.S. See Respondents' Brief, p. 5, where respondents note that the trial commissioner ordered such an exam concerning the impairment rating for the claimant's lumbar spine. See Conclusion, ¶ FF. As we are remanding this matter back to the trial commissioner, we leave determination as to this issue for his decision.

[13] The claimant believes that the Finding and Orders should be upheld as a trial commissioner has the authority to bifurcate a claim and seek additional evidence should they deem it necessary, citing Martinez-McCord v. State/Judicial Branch, 5055 CRB-7-06-2 (February 1, 2007). While we agree the trial commissioner has the authority to order additional hearings when he or she deems it necessary, when these hearings are ordered the trial commissioner should provide a definitive rationale for such hearings in the text of the findings.

[14] The precedent in Donahue, supra, suggests that claimants who have obtained a Motion to Preclude have a presumption in their favor that they have sustained a compensable injury. A legitimate concern exists,

We reach this determination in part based on our understanding of the definitive ruling made by the trial commissioner in the Finding and Orders. In the orders issued by the trial commissioner on page 16 of the Finding and Orders the commissioner stated: "Further hearings will be required to determine the extent of injury to the Claimant's bilateral legs and bilateral hands consistent with this opinion." We therefore conclude that the trial commissioner had reached a threshold determination based on the evidence presented that the claimant had sustained *some* repetitive trauma injury to these body parts as a result of her employment. The commissioner did not believe the evidence presented by the claimant enabled him to reach a determination as to the extent of injury or precise nature of injury to these contested body parts. The Supreme Court's opinion in Donahue, supra, provides an imprimatur for a trial commissioner to conduct their own inquiry when they are unsatisfied as to the evidence on the record in a preclusion case. Id., 552-555. Therefore we are satisfied the Finding and Orders comport with Donahue and therefore, do not accept the respondent's argument reversible error is present herein.

We note the seminal case on disclaimers Menzies v. Fisher, 165 Conn. 338 (1973) stated the purpose behind the preclusion statute was to "correct some of the glaring inequities and inadequacies of the Workmen's Compensation Act [such as] the needless, prejudicial delays in the proceedings before the commissioners, delays by employers or insurers in the payment of benefits, lack of knowledge on the part of employees that they

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however when a claimant fails to offer a persuasive case based on credible probative evidence that he or she has sustained an injury to a specific body part as a result of their employment that the determination as to whether the injury to this body part is compensable may be continued indefinitely to enable the claimant to marshal more proof. Such a circumstance is akin to the impermissible piecemeal litigation we found unsustainable in Evensen v. Stamford, 5541 CRB-7-10-4 (March 31, 2011). See also Kearns v. Torrington, 119 Conn. 522, 529 (1935) and Tutsky v. Y.M.C.A. of Greenwich, 9 Workers' Comp. Rev. Op. 29, 902 CRB-7-89-8 (January 17, 1991), *aff'd*, 28 Conn. App. 536, 542 (1992). In light of the trial commissioner's apparent determination the claimant's arm and leg injuries were compensable and further hearings were to determine the extent of disability, we do not find error in the Finding and Orders.

were entitled to benefits and the general inequality of resources available to claimants with bona fide claims." Menzies, supra, 342. The purpose of this statute is not to change the burden of proof a claimant must present to establish a prima facia case. Nor is it to bar appellate tribunals from examining the legal sufficiency of an award to a claimant subsequent to preclusion. Preclusion may well serve as a "rather harsh remedy" against the respondent. Donahue, supra, 550. However, it does not act to materially alter the burden of proof under Chapter 568 proceedings or materially restrict the rights of litigants under § 31-301 C.G.S. See Wikander, supra.

Therefore, we remand the issues of the pending claim for the claimant's bilateral arm and bilateral leg injuries for further proceedings as described herein.

Commissioner Stephen M. Morelli concurs in this opinion.

JOHN A. MASTROPIETRO, CHAIRMAN, CONCURRING. This year is the 800th anniversary of the Magna Carta, the foundational document behind Anglo-American jurisprudence and the evolution of the right of "due process." The concept that a decision reached by a finder of fact could be challenged by an aggrieved litigant and reviewed by an appellate tribunal for error is deeply ingrained in our culture. I agree wholeheartedly with the legal analysis in the majority opinion, but write separately in concurrence to express my profound surprise at the argument raised by the claimant that this tribunal could not even consider the respondents' appeal in this matter.

As the majority opinion points out, the claimant argues that the effect of § 31-294c(b) C.G.S. creates a bar in perpetuity to the respondent **ever** challenging the evidence presented by the claimant, even in an appellate forum. I concur that creates an absurd result which is barred by § 1-2z C.G.S., but further note that this result would be a

radical departure from principles well established in Connecticut common law for centuries. I view a case where a respondent has been subject to preclusion as essentially indistinguishable from a defendant under the common law who has been defaulted for failure to appear or to plead. In this scenario, similar to the hearing procedures delineated in Donahue, supra, the court would hold a hearing in damages and the defendant would be barred from challenging the plaintiff's evidence at that forum.[15] Prior to the adoption of the United States Constitution, our Supreme Court of Errors determined that when a default judgment has been entered against a defendant by a trial court that an aggrieved litigant does not lose the right to take an appeal of that judgment to a higher court. See Mead v. Coggshall, Kirby's Reports 17 (1786).

A recent example of this approach was discussed by our Appellate Court in Percy v. Lamar Central Outdoor, LLC, 147 Conn. App. 815 (2014). In Percy, the Appellate Court denied the defendant's bid to reopen a default judgment so as to interpose a belated defense. Id., 818-823. Consistent with the Appellate Court's reasoning as to the effect of § 31-294c(b) C.G.S., in Mehan, supra, the court concluded the defendant did not have a persuasive due process argument as to being denied an ability to interpose a defense at the hearing, as it had the opportunity to present a timely defense on the merits and did not do so. The Appellate Court, did however, fully consider the defendant's appellate argument that the relief ordered by the trial court was excessive and unsupported by the factual evidence on the record. Id., 823-828. The defendant in Percy had to concede

[15] I note that the General Assembly has codified this standard pursuant to § 52-221 C.G.S.

liability as a consequence of their default; yet, they did not lose their right to bring an appeal to contest the result of this liability.[16]

The General Assembly's enactment of Chapter 568 in 1913 supplanted the use of civil litigation as a means to resolve damage claims for injuries sustained in the course of employment. On the other hand, it is abundantly clear that our administrative proceedings must be conducted in accordance with the principles of due process which are an immutable feature of our society. See the recent opinion in Passalugo v. Guida-Seibert Dairy Co., 149 Conn. App. 478 (2014).

> As our appellate courts previously have observed, there exists an inherent overlap between the right to due process and the right to fundamental fairness in administrative proceedings. See *Grimes* v. *Conservation Commission*, 243 Conn. 266, 273 n.11, 703 A.2d 101 (1997); *Megin* v. *Zoning Board of Appeals*, 106 Conn. App. 602, 607 n.6, 942 A.2d 511, cert. denied, 289 Conn. 901, 957 A.2d 871 (2008). ''[A]dministrative hearings, including those held before workers' compensation commissioners, are informal and governed without necessarily adhering to the rules of evidence or procedure. . . . Nonetheless, administrative hearings must be conducted in a fundamentally fair manner so as not to violate the rules of due process. . . .

Id., 484, fn.6.

Previously the Appellate Court considered the question as to the impact of a trial commissioner deciding not to consider evidence presented by the respondent to challenge a witnesses' opinion. In Bryan v. Sheraton-Hartford Hotel, 62 Conn. App. 733 (2001)

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[16] The Supreme Court has further found "writs of error" a viable means to bring appeals to their attention even from decisions from which no statutory right of appeal existed. See Cannavo Enterprises, Inc., v. Burns, 194 Conn. 43, 45-48 (1984) and Bridgeport Hydraulic Co. v. Rempsen, 124 Conn. 437, 442-444 (1938). In Cannavo, supra, the Supreme Court questioned whether aggrievement could be limited since "to do so would deprive a litigant of all appellate review." Id., 48, see also fn.7 citing Chief Justice Maltbie's opinion in Reilly v. State, 119 Conn. 217, 221-224 (1934) that a writ of error could serve to challenge error on the record in a default judgment. In Bridgeport Hydraulic Co., supra, Chief Justice Maltbie opined "a failure to provide for a review of an award of damages in such a case would be a departure from established practice and would open the way to serious question as to the constitutionality of the provision." Id., 443.

the Appellate Court held that the trial commissioner's decision not to permit the respondents a means to challenge a medical report supportive of the claimant's theory as to the causation of her injuries constituted reversible error.

> An integral premise of due process is that a matter cannot be properly adjudicated ''unless the parties have been given a reasonable opportunity to be heard on the issues involved . . . .'' (Citations omitted.) *Bloom* v. *Zoning Board of Appeals*, 233 Conn. 198, 205, 658 A.2d 559 (1995). The defendants were not heard at all on the defining question. We conclude, therefore, that the commissioner violated the defendants' due process rights.

Id., 741.[17]

Under the legal theory advanced by the claimant in this case, the respondents not only would be barred from submitting rebuttal evidence or cross-examining witnesses subsequent to preclusion, but would be barred from bringing **any** legal error to the attention of an appellate tribunal. I cannot reconcile a circumstance where a respondent must "not be heard at all" within either the overall concept of "due process" or the precedent in Bryan.

If an aggrieved litigant lacks the means to bring error to the attention of an appellate tribunal, how can one protect the right of due process? What safeguards would exist to protect a respondent from an award issued subsequent to preclusion which was reached as a result of fraud or mistake? Or permit the review of an award that was arbitrary and capricious in some other manner? The answers to these rhetorical questions are self-evident. There would be no safeguards and the right of due process would be held in the hands of a single unaccountable magistrate. In addition, the conclusive

[17] I note that Bryan v. Sheraton-Hartford Hotel, 62 Conn. App. 733 (2001) did not involve a respondent subject to preclusion. However, had the respondent been barred from the ability to appeal the issue as to whether the claimant presented a *prima facia* case as to causation, I believe the precedent in Cannavo, supra, Reilly, supra, and Bridgeport Hydraulic Co., supra, would have compelled reversal of that decision.

presumption present subsequent to preclusion would likewise be subject to the same constitutional infirmities as the original heart and hypertension law had if awards could not be appealed to the Compensation Review Board to redress alleged error, including but not limited to the possibility a claimant may not have presented a *prima facia* case to the trial commissioner. See Ducharme v. Putnam, 161 Conn. 135, 140-143 (1971).

Further, I do not believe our courts would support an interpretation such as the claimant espouses. The Appellate Court considered Dubrosky v. Boehringer Ingelheim Corp., 145 Conn. App. 261 (2013) and for the purposes of our discussion here the merits of the appeal are of no moment. However, a review of the appellate procedure is notable as it indicates our appellate tribunals view as to the right of appeal.

In Dubrosky, respondents appealed from a decision in which preclusion was granted. The first step in their appeal was to bring the issue to this tribunal. Believing that error was committed on the issue of granting preclusion by both the trier's and this board's concurrence of the trial commissioner's decision, the respondents filed an appeal with the Appellate Court. The Appellate Court accorded the respondents the requested review and, in fact, reversed this board's opinion and thereby the trier's determination on preclusion. It is difficult to fathom that our court would have engaged in such review if it was of the opinion that preclusion barred such review. Additionally, the fact that the court reversed a ruling granting preclusion just buttresses the injustice that would arise if we were to hold as the instant claimant argues.

An appellate panel such as the Compensation Review Board may well determine that the relief sought by a litigant is barred by our statute or our precedent. Nonetheless, neither our precedent or our statutes serves to bar a litigant from bringing averment of

legal error in a decision reached by a trial commissioner to our attention so that an independent decision may be made as to whether relief is legally warranted. Therefore, I concur in the majority opinion and reiterate that no matter the effect of preclusion on a trial commissioner, it does not "bar the courthouse door" to appellate review.