CASE NO. 5990 CRB-7-15-2 : COMPENSATION REVIEW BOARD
CLAIM NOS. 700117212/700114582/
700134771

EDWARD FRANTZEN : WORKERS' COMPENSATION
CLAIMANT COMMISSION

v. : FEBRUARY 24, 2016

DAVENPORT ELECTRIC
EMPLOYER

and

OHIO CASUALTY INSURANCE COMPANY
INSURER

and

AMERICAN STATES INSURANCE COMPANY
INSURER
RESPONDENTS

APPEARANCES:

The interests of the claimant from July 13, 2007 to May 8, 2014 were represented by Enrico Vaccaro, Esq., 1057 Broad Street, Bridgeport, CT 06604.

The interests of the claimant from March 18, 1998 to April 1, 2005 were represented by David M. Cohen, Esq., Wofsey, Rosen, Kweskin & Kuriansky, LLP, 600 Summer Street, Stamford, CT 06901.

The respondents were not involved in the proceedings below and did not appear at oral argument.

This Petition for Review from the February 19, 2015 Finding and Award of Michelle D. Truglia, Commissioner acting for the Seventh District, was heard on September 25, 2015 before a Compensation Review Board panel consisting of Commissioners Randy L. Cohen, Stephen M. Morelli and Daniel E. Dilzer.

OPINION

RANDY L. COHEN, COMMISSIONER. This matter concerns a fee dispute. Claimant's counsel has petitioned for review from the February 19, 2015 Finding and Award of Michelle D. Truglia, Commissioner acting for the Seventh District. We find error and accordingly affirm in part, reverse in part, and remand this matter for additional proceedings consistent with this Opinion.[1]

In her Finding and Award, the trial Commissioner identified two issues for determination: (1) whether the Connecticut Workers' Compensation Commission [hereinafter "Commission"] has subject matter jurisdiction over an attorneys' fee dispute between claimant's former and current counsel; and (2) the proper apportionment of the attorneys' fee in the amount of One Hundred Seventy Thousand Dollars ($170,000.00) pursuant to the May 13, 2014 Order of trial Commissioner Charles F. Senich. Having taken administrative notice of all the documents on file at the Commission, the trier made the following factual determinations which are pertinent to our review. The parties in this matter were subject to the provisions of the Connecticut Workers' Compensation Act, Chapter 568, of the Connecticut General Statutes. The claimant brought three separate claims for compensation benefits arising from alleged injuries to the left ankle and low back on September 15, 1994, a cervical injury of February 10, 1998, and a low

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[1] We note that three motions for extension of time were granted during the pendency of this appeal.

back injury of October 9, 2003. The claimant had three different law firms representing his interests during the prosecution of these claims.[2]

The trial Commissioner took administrative notice of a stipulation approval hearing convened on May 8, 2014 with Enrico Vaccaro, Esq., [hereinafter "appellant"] and Judith Rosenberg, Esq. [hereinafter "appellee"]; Richard Aiken, Esq., counsel for the respondents, was also in attendance.[3] In addition, the trier took administrative notice of a full and final stipulation approved by Commissioner Charles F. Senich on May 8, 2014 for Eight Hundred Fifty Thousand Dollars ($850,000.00). Commissioner Senich approved a twenty-percent (20%) attorneys' fee and ordered the appellant to hold the attorneys' fee in escrow until the dispute over the distribution of the attorneys' fees was resolved. There was no indication at that time that a formal hearing would be required for anything other than a decision on the division of the escrowed attorneys' fees; the issue of subject matter jurisdiction had not been raised.

At the May 8, 2014 hearing, the appellee was ordered to file a brief setting out her position on May 23, 2014; she filed her brief on May 20, 2014 attaching a copy of her fee agreement, a contemporaneous statement of time and charges and a considerable number of documents detailing her work for the claimant in his various claims before the Commission. The appellant was ordered to file his response by June 6, 2014; he filed his

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[2] Judith Rosenberg, Esq. and Patricia Carreiro, Esq., of Wofsey, Rosen & Kuriansky, LLP, represented the interests of the claimant from March 18, 1998 to April 1, 2005; Allan Cane, Esq., represented the interests of the claimant from April 27, 2005 until the substitution of a new attorney on July 13, 2007; Enrico Vaccaro, Esq., represented the interests of the claimant from July 13, 2007 until May 8, 2014. Despite being sent notification of all hearings relative to this fee dispute, Attorney Cane did not appear for any proceedings.

[3] We note that several members of Wofsey, Rosen & Kuriansky, LLP, have appeared in this matter; in the interests of simplicity, we refer to all of them as the "appellee."

brief on June 13, 2014 and limited his remarks to a challenge to the Commission's subject matter jurisdiction over the fee dispute and an attack on the validity of the appellee's claim to the escrowed attorneys' fees. He did not attach a copy of his own fee agreement with the claimant or include a statement of any time and charges to support his claim for fees.

Formal proceedings were convened on September 30, 2014 to address the distribution of fees in accordance with the May 23, 2014 Order as well as the appellant's challenge to the Commission's subject matter jurisdiction. No request was made to bifurcate the issue of subject matter jurisdiction from the fee dispute; accordingly, the trial Commissioner addressed both issues in her finding. On January 30, 2015, the record was reopened in order to allow the appellant the opportunity to submit into evidence a copy of his fee agreement with the claimant and a statement of contemporaneous time and charges attributable to his representation of the claimant. He timely submitted his fee agreement and settlement statement but did not submit the statement of contemporaneous time and charges attributable to this representation of the claimant.

The appellee's fee agreement is embodied in her March 18, 1999 letter to the claimant. The letter indicated that her office had agreed to represent the claimant in connection with his workers' compensation claim and the fee for that representation would be twenty percent (20%) of any amounts collected "for permanent partial disability or the other contested benefits, *or any full or partial settlement amounts.*" (Emphasis in the original.) Findings, ¶ 10. In her brief, the appellee stated that:

> when the claimant terminated representation of her firm, they had "accomplished acceptance of the compensability of his back problems, including treatment and all types of benefits relative thereto. The compensability of his neck problems had been accomplished including treatment at [sic] all types of benefits." She states that the only remaining issues were issues of future work capacity and additional treatment.

Findings, ¶ 11.

During the six years that the appellee and other members of her firm represented the claimant, they received $7,578.35 in fees and reimbursement for costs. As of September 30, 2015, the date of the formal hearing, there remained outstanding costs in the amount of $765.47. The trier found that:

> [Rosenberg's] position is that she, and other members of her firm, put in "an enormous amount of work on this file and accomplished acceptance of the back, acceptance of the neck, treatment for the ankle the back and the neck and a third claim of exacerbation to provide full coverage going into the future. This entire foundation was firmly in place when the claimant terminated their representation."

Findings, ¶ 12.

Given that the appellant did not submit any statement for time and charges in this claim, the trier found it was impossible to determine the scope and value of his representation of the claimant between July 13, 2007 and May 8, 2014. The appellant contended that once the trial Commissioner had approved the stipulation to settle the claim, the Commission lost subject matter jurisdiction over the attorneys' fee dispute. In addition, he argued that the provisions of § 31-327(b) C.G.S. deprive the Commission of jurisdiction because they do not "explicitly provide the commission with authority to

adjudicate a dispute between former and current counsel as to entitlement to, and/or apportionment of, a previously approved attorneys' fee."[4] Findings, ¶ 15, *quoting* Claimant's Trial Brief, p. 2. As such, the appellant maintained that the Commission's power is limited to examining the fee agreements to ensure they are consistent with fee guidelines.

The trial Commissioner, noting that a challenge to the Commission's subject matter jurisdiction can be raised at any time, stated that the "express" language of § 31-327(b) C.G.S. provides:

> '*All* fees of attorneys … for services under this chapter shall be subject to the approval of the commissioner.' Accordingly, while the Connecticut Workers' Compensation Commission may be a court of limited jurisdiction, the Connecticut legislature has expressly and unambiguously granted it the statutory power to govern the distribution of *all* attorneys' fees arising from Workers' Compensation claims. [Emphasis in the original.]

Conclusion, ¶ B *quoting* § 31-327(b) C.G.S.

The trial Commissioner also observed that the issue of the division of attorneys' fees is addressed in the "pre-eminent" workers' compensation treatise in Connecticut, which provides that:

> When the claimant has been represented by more than one attorney or discharges his or her attorney and chooses to proceed *pro se*, the division of attorney's fees between the attorneys or to the attorney can be adjudicated by the workers' compensation commissioner if an agreement cannot be reached between the parties.
> Sec. 31-327(b) affords the commissioner the power to order a distribution of fees between two law firms or attorneys that represented the claimant throughout the duration of the case.

[4] Section 31-327(b) C.G.S. (Rev. to 1994) states: "All fees of attorneys, physicians, podiatrists or other persons for services under this chapter shall be subject to the approval of the commissioner."

Dilieto v. City of New Haven, 4709 CRB-3-03-8 (August 5, 2004) and Smith v. SRS Communications Corp., 4661 CRB-8-03-4 (March 31, 2004).

Conclusion, ¶ C, *quoting* Connecticut Workers' Compensation Law, Carter, Civitello, Dodge, Pomeranz, Strunk, Vol.19A, Sec. 24:8 (October 2013).

The trial Commissioner, noting that the fee in question arose from an award of workers' compensation benefits to the claimant rather than from a contract between the attorneys, concluded that the Commission had subject matter jurisdiction over the fee dispute. In addition, she remarked that:

> When the claimant hires successive attorneys, while they may add value in different ways (e.g., negotiation versus litigation or a combination of both), each attorney's contribution to the final result must be weighed and valued by the reviewing trial Commissioner in order to achieve a fair and just result. In addition, because it can take years to realize the benefit of settlement, it is manifestly unjust to ignore the contribution of prior attorneys simply because they were not the last to handle the file.

Conclusion, ¶ E.

The trier also pointed out that there is no legal requirement that a fee agreement be signed by a claimant.[5] The appellee submitted a "legitimate" fee agreement which not only allowed her to claim as a fee an amount equal to twenty-percent of any benefits collected on behalf of the claimant but to also claim a fee from any final settlement. As such, her "statement for time and charges relating to her representation of the claimant before the Commissioner during her six year tenure, as well as her supporting

[5] We note that while the current version of Rule 1.5 of the Rules of Professional Conduct does require that "a contingent fee agreement shall be in a writing signed by the client," the version in effect in March 1998, when Rosenberg's firm undertook representation of the claimant, had no such requirement.

documentation, establishes a significant contribution to the advancement of the claimant's interests." Conclusion, ¶ F.

The trial Commissioner also remarked that when the appellant agreed to represent the claimant in 2007, he knew, or should have known, that the claimant had been represented by two previous attorneys. As such, he also should have known that:

> an apportionment of attorneys' fees was foreseeable and that, under such circumstances, he would likely be called upon to substantiate his contribution to the file with contemporaneous time records. His failure to anticipate such a challenge is not fatal to his claim, but it deprives him of the ability to demonstrate that his representation of the claimant, by comparison to his predecessors, merited more than a 50/50 split of the attorneys' fees.

Conclusion, ¶ G.

The trial Commissioner determined that in light of the appellant's failure to substantiate his time and charges, a fifty/fifty split of the escrowed attorneys' fee was fair and reasonable and awarded both the appellant and the appellee Eighty-Five Thousand Dollars ($85,000.00) each.

The appellant has challenged the trial Commissioner's decision, arguing that the trier erred in concluding that the Commission, as "a tribunal of limited statutory authority," Appellant's Brief, p. 4, had subject matter jurisdiction over a dispute between counsel regarding allocation of an approved attorneys' fee. He also contends that the trier's decision to rule on the matter and allocate the fee constituted a deprivation of due process of law because the allocation was done in the absence of an evidentiary hearing.

We begin our analysis with a recitation of the well-settled standard of review we are obliged to apply to a trial commissioner's findings and legal conclusions. 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 note at the outset that the appellee has filed a Motion to Dismiss on grounds that the appellant failed to timely file his Reasons of Appeal in violation of Admin. Reg. § 31-301-2, which requires an appellant to file said Reasons of Appeal "within ten days after the filing of the appeal petition…." In Sager v. GAB Business Services, Inc., 11 Conn. App. 693 (1987), our Appellate Court stated that:

> the reasons of appeal required by § 31-301-2 of the state agency regulations serve an identical function as a preliminary statement of issues…. Where an appellant fails to file timely a preliminary statement of issues as required by Practice Book § 4013(a)(1), the appeal is voidable. The appellee may then move to dismiss the appeal in accordance with Practice Book § 4046, which provides in

> relevant part that … such motion shall be filed within ten days after the time when such paper was required to be filed. Where an appellee fails to move for dismissal within the ten day period, the motion dismiss comes too late and the defect is deemed waived.

Id., 697.

Our review of the record indicates that the Petition for Review in this matter was filed on February 24, 2015, and on February 27, 2015 the Commission received a Motion for Extension of Time to File Reasons for Appeal, which was granted until April 28, 2015. The appellee filed its Motion to Dismiss on May 5, 2015 and the appellant filed his Reasons for Appeal on May 19, 2015. There is no question that the appellant's document was filed three weeks after the granted deadline and the appellee's Motion to Dismiss was timely. However, we also note that the appellant's brief was timely filed on July 21, 2015, and on August 6, 2015, the appellee was granted a Motion for Extension of Time to File Briefs until August 26, 2015. Obviously, it would have been preferable had the appellant adhered to the filing deadline. However, we do not perceive that the appellee was particularly prejudiced by the three-week delay. This board does not generally favor dismissing appeals without considering their merits. See Chang v. Pizza Hut of America, Inc., [Ruling on Sua Sponte Motion to Dismiss] 4122 CRB-6-99-9 (November 28, 2000). Moreover, given that the instant dispute over escrowed funds cannot be resolved absent either an agreement of the parties, which strikes us as highly unlikely, or litigation, we fail to perceive how the interests of justice would be served by granting a Motion to Dismiss at this point. As such, the Motion to Dismiss is denied.

Turning to the merits of the appeal, as stated previously herein, the appellant contends that the trial commissioner erroneously determined that the Commission had subject matter jurisdiction to adjudicate a dispute between counsel over the division of an approved attorneys' fee. The appellant states that "[a] perusal of General Statute Section 31-327b [sic] establishes that it does not ***explicitly*** provide the commission with authority to adjudicate a dispute between former and current counsel as to the division, if any, of a previously approved attorneys' fee, as it must for the commission to have jurisdiction over this matter." Appellant's Brief, p. 9. Rather, a trial Commissioner's scope of authority is limited to ascertaining whether a proposed fee agreement is consistent with the fee guidelines. See, e.g., Day v. Middletown, 59 Conn. App. 816, *cert. denied*, 254 Conn. 945 (2000). We find no merit in the appellant's contentions.

It is of course axiomatic that the 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 (1963). The commission "must act strictly within its statutory authority, within constitutional limitations and in a lawful manner…. It cannot modify, abridge or otherwise change the statutory provisions, under which it acquires authority unless the statutes expressly grant it that power." Id., at 428, *quoting* Waterbury v. Commission on Human Rights & Opportunities, 160 Conn. 226, 230 (1971). As such, "once the question

of lack of jurisdiction of a court is raised, '[it] must be disposed of no matter in what form it is presented;' and the court must 'fully resolve it before proceeding further with the case.' Subject matter jurisdiction, unlike jurisdiction of the person, cannot be created through consent or waiver." (Internal citations omitted.) Id., at 429-430.

However, we also note that generally, inquiries relative to subject matter jurisdiction are associated with the "compensability of a type of injury, the existence of the employer-employee relationship and the proper initiation of a claim…., [which] 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). As such, we are inclined to agree with the appellee that this matter should be more properly characterized as an inquiry into "the scope of the Commission's authority" rather than a challenge to the Commission's subject matter jurisdiction. Appellee's Brief, p. 8.

As previously mentioned herein, § 31-327(b) C.G.S. states that "[a]ll fees of attorneys, physicians, podiatrists or other persons for services under this chapter shall be subject to the approval of the commissioner." Section 1-2z instructs us that "[t]he 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." We find nothing remotely ambiguous in the legislature's use of the word

"all" in § 31-327(b) C.G.S. [6] Moreover, this board has previously remarked that "[t]he trial commissioner who presides over a case has the authority under § 31-327(b) to approve all attorney's fees. Closely attendant to this authority is the trier's power to settle disputes between attorneys regarding entitlement to fees." Contreras v. Montana Bakery, 3819 CRB-7-98-5 (June 16, 1999).

The appellant also points out that in Stickney v. Sunlight Construction, Inc., 248 Conn. 754 (1999), our Supreme Court stated that a "commissioner's subject matter jurisdiction is limited to adjudicating claims arising under the act, that is, claims by an injured employee seeking compensation from his employer for injuries arising out of and in the course of employment." Id., 762. Thus, given that the instant "dispute does not involve Mr. Frantzen or Davenport Electric, and it has absolutely nothing to do with their employment relationship or any benefits or liabilities arising out of it," the trial Commissioner lacked the authority to adjudicate the instant fee dispute. Appellant's Brief, p. 8. We decline to read Stickney so narrowly. In addition, the appellant also relies upon Brick v. Cyr, 51 Conn. App. 662 (1999), wherein the court stated that "[n]o statute authorizes the commissioner to award attorney's fees to an employee's prior attorney payable by a subsequent attorney for the same employee." Id., 666. However, our review of Brick indicates that in that matter, the trial Commissioner had awarded

[6] We note that in Workers' Compensation Commission Memorandum No. 2001-03 entitled, "Claimant's Attorney's Fee Guidelines Memorandum - July 20, 2001," we stated that "[t]his provision does not limit the Commissioner from making *any* Finding or Order regarding attorney's fees referenced in any other part of Chapter 568, *including, but not limited to,* securing the payment of contested medical bills, contested indemnity payments, contested Section 31-290a claims and the prosecution or defense of an appeal taken on behalf of an injured worker." (Emphasis added.)

additional attorneys' fees to one lawyer as a sanction against another lawyer for his "inexcusable and unreasonable delay" in the release of disputed escrowed funds. Id., 664. The court concluded that "the question to be resolved is whether a workers' compensation commissioner may *sanction* a subsequent attorney for the employee for consultations concerning the payment of attorney's fees previously approved by the commissioner. We hold that the commissioner cannot." (Emphasis added.) Id., 666-667. We therefore find Brick inapposite and, contrary to the representations of the appellant, hold that the provisions of § 31-327(b) C.G.S. do explicitly provide the Commission with the authority necessary to adjudicate fee disputes between counsel.

The appellant has also raised as error the trial Commissioner's decision to proceed with the apportionment of the escrowed fee in the absence of a full evidentiary hearing, arguing that this decision deprived him of the due process of law. The appellant contends that although the notice for the formal hearing of September 30, 2014 stated that the issue for determination was "jurisdiction over fee dispute" and the trier indicated at trial that she was aware of the limited purpose of the hearing, in her Finding and Award, she proceeded with the allocation of the disputed fee once she had concluded that the Commission had subject matter jurisdiction over the fee dispute. Thus, "[a]s [the trier's] legal conclusions are totally devoid of factual findings supported by any evidence, her award must be set aside." Appellant's Brief, p. 14.

This board has previously remarked that "[g]enerally, a workers' compensation commissioner is afforded some latitude in determining which of the issues presented at a

formal hearing actually call for adjudication." Raphael v. Connecticut Ballet, Inc., 5985 CRB-7-15-2 (December 10, 2015). 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). Nevertheless, 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).

Our review of the instant record indicates that at the formal hearing of September 30, 2014, the trial Commissioner queried the parties as to the purpose of the hearing, and the appellee stated: "I believe the issue is the scope of 31-327b [sic] and whether the Commission has jurisdiction over the apportionment of the attorney's fees, when that request is made, in the same hearing but after the settlement was already approved for that, Commissioner." Transcript, p. 4. The trier replied, "[o]kay. So the scope of 31-327b [sic] and whether the Commission has jurisdiction over the apportionment of attorney's fees." Id. The trier then asked what would be the next issue if she found jurisdiction, and the appellee replied, "[t]hen we would have another hearing on the merits. I believe this is just on the narrow issue of subject matter – Commissioner Senich issued an order essentially when this dispute arose, during the hearing before him when a settlement was being approved." Id., 4-5. Later in the formal hearing, the trial commissioner stated, "[o]kay. And so we don't even need to take your respective

statements for services at this particular juncture. You just want me to determine whether or not I have jurisdiction to hear this claim." Id., 10. At the close of the hearing, the trier indicated that the court reporter would set a pro-forma formal date which would allow the appellant "to submit an additional brief or circumstances" that he deemed "appropriate." Id., 14-15.

In her Finding and Award, the trier noted that the formal hearing of September 30, 2014 had been convened not only to determine the distribution of fees but "to address Attorney Vaccaro's new found challenge to this tribunal's subject matter jurisdiction over the fee dispute." Findings, ¶ 8. The trier indicated that because no request had been made to bifurcate the issue of subject matter jurisdiction from the fee dispute, she would address both issues in her finding. The trier also stated that the record had been reopened on January 30, 2015 to allow the appellant the opportunity to submit into evidence his fee agreement and a statement of time and charges attributable to his representation of the claimant. However, the appellant filed only his fee agreement and, in light of his failure to file a statement of time and charges, the trial commissioner decided to split the fee fifty/fifty.

The trier found that when Commissioner Senich issued his Order of May 13, 2014 to escrow the disputed fee, "[t]here was no indication at the time … that a formal hearing was needed for anything other than a decision on the division of the escrowed attorneys' fees." Findings, ¶ 7. That may very well have been the case. However, once the appellant had filed his brief on June 13, 2014, it was clear that the Commission's

authority to adjudicate the fee dispute was also at issue. Moreover, the statements made by the Commissioner at the formal hearing of September 30, 2014 seem to suggest that, consistent with the hearing notice, her inquiry would be limited solely to a determination as to whether the Commission had authority to adjudicate the fee dispute. Thus, in light of the due process concerns raised by the issuance of findings which fell outside the stated scope of the inquiry, we have little choice but to vacate the trier's conclusions relative to the apportionment of the escrowed funds and remand this matter for a full evidentiary hearing on the issue. While additional proceedings are not necessarily in the best interests of judicial economy, we hold that under the particular circumstances of this matter, they are unavoidable. "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).

There is error; the February 19, 2015 Finding and Award of Michelle D. Truglia, Commissioner acting for the Seventh District is accordingly affirmed in part, reversed in part, and remanded for additional proceedings consistent with this Opinion.

Commissioners Stephen M. Morelli and Daniel E. Dilzer concur.