CASE NO. 6050 CRB-3-15-10 CLAIM NO. 300092837	: COMPENSATION REVIEW BOARD
SIMON P. WILLIAMS CLAIMANT-APPELLEE	: WORKERS' COMPENSATION COMMISSION
v.	: OCTOBER 18, 2016
CITY OF NEW HAVEN EMPLOYER SELF-INSURED	
and	
CONNECTICUT INTERLOCAL RISK MANAGEMENT AGENCY ADMINISTRATOR RESPONDENTS-APPELLANTS	

APPEARANCES:

The claimant was represented by William J. Ward, Esq., 336 Torrington Road, P.O. Box 430, Litchfield, CT 06759.

The respondents were represented by Anne Kelly Zovas, Esq., Strunk, Dodge, Aiken, & Zovas, LLC, 100 Corporate Place, Suite 300, Rocky Hill, CT 06067.

This Petition for Review from the July 30, 2015 Finding and Award of Jack R. Goldberg, Commissioner acting for the Third District, was heard on April 29, 2016 before a Compensation Review Board panel consisting of Chairman John A. Mastropietro and Commissioners Ernie R. Walker and Nancy E. Salerno.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondents have petitioned for review from the July 30, 2015 Finding and Award of Jack R. Goldberg, Commissioner acting for the Third District. We find no reversible error and accordingly affirm the decision of the trial commissioner.[1]

The trial commissioner identified as the sole issue for determination the question of whether the Workers' Compensation Commission "has jurisdiction to hear a CGS 31-290a claim despite the earlier dismissal of an arbitration by the Labor Board that was followed by a denial of a motion to vacate the Labor Board's decision at the Superior Court."[2] Findings, ¶ 1. The parties agreed to the following joint stipulation of facts.

1. The claimant was employed as a refuse worker for the respondent-employer from 1993 until his termination on November 1, 2012.

2. The claimant issued a notice of claim for wrongful termination on or around November 5, 2012.

3. The parties agreed that the formal hearing would proceed solely on the issue of jurisdiction.

4. The respondents moved to dismiss the claim on the basis that the issue had been decided by way of a grievance heard at the state labor board, followed by the denial of a

[1] We note that two Motions for Extension of Time were granted during the pendency of this appeal.
[2] Section 31-290a C.G.S. (Rev. to 2011) states: "(a) No employer who is subject to the provisions of this chapter shall discharge, or cause to be discharged, or in any manner discriminate against any employee because the employee has filed a claim for workers' compensation benefits or otherwise exercised the rights afforded to him pursuant to the provisions of this chapter."

motion to vacate at the Superior Court. The respondents maintain that the issue of the claimant's termination has been fully and finally adjudicated.

5. The respondents argue that the claimant is not entitled to pursue a separate claim of wrongful termination in the workers' compensation forum after having pursued the matter at the state labor board and Superior Court.

6. The claimant contends that the state labor board decision does not have preclusive effect in the workers' compensation forum and he is therefore entitled to pursue his wrongful termination claim.

7. On November 2, 2012, the claimant's union filed a grievance on his behalf contending that the respondent-employer had discharged the claimant without just cause and in violation of the collective bargaining agreement.[3]

8. On August 8, 2013, a written arbitration decision in favor of the respondent-employer was issued finding that the city had just cause to terminate the claimant's employment.

9. On September 5, 2013, the claimant moved to vacate the arbitration award in the Superior Court, Judicial District of New Haven at New Haven, pursuant to the provisions of § 52-418(a)(4) C.G.S.[4]

---

[3] The claimant was a member of UPSEU, Local 424, Unit 34.

[4] Section 52-418 C.G.S. (Rev. to 2011) states: "(a) Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated or, when the court is not in session, any judge thereof, shall make an order vacating the award if it finds any of the following defects: (1) If the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality or corruption on the part of any arbitrator; (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

10. Superior Court Judge Richard E. Burke denied the claimant's motion to vacate the arbitration award on July 23, 2014.

11. The respondents maintain that the Superior Court decision was the final and conclusive ruling on the issue of the claimant's termination.

12. The claimant contends that the Superior Court ruling does not have preclusive effect in the workers' compensation forum and he is entitled to pursue his claim pursuant to § 31-290a C.G.S.

13. The claimant also asserts that Connecticut preclusion law principles, the limited jurisdiction of the Connecticut court to hear applications to vacate arbitration awards, and the policy of arbitral preclusions evinced by § 31-51bb C.G.S. do not bar the claimant from litigating his statutory wrongful termination claim before the Workers' Compensation Commission.[5]

In addition to the foregoing findings set forth in the joint stipulation of facts, the trier found that the city's termination of the claimant was predicated on a violation of § 31-290c C.G.S., while the claimant asserts that he was terminated for exercising his rights under the Workers' Compensation Act in violation of § 31-290a C.G.S.[6] It is also

[5] Section 31-51bb C.G.S. (Rev. to 2011) states: "No employee shall be denied the right to pursue, in a court of competent jurisdiction, a cause of action arising under the state or federal Constitution or under a state statute solely because the employee is covered by a collective bargaining agreement. Nothing in this section shall be construed to give an employee the right to pursue a cause of action in a court of competent jurisdiction for breach of any provision of a collective bargaining agreement or other claims dependent upon the provisions of a collective bargaining agreement."

[6] Section 31-290c(a) C.G.S. (Rev. to 2011) states: "Any person or his representative who makes or attempts to make any claim for benefits, receives or attempts to receive benefits, prevents or attempts to prevent the receipt of benefits or reduces or attempts to reduce the amount of benefits under this chapter based in whole or in part upon (1) the intentional misrepresentation of any material fact including, but not limited to, the existence, time, date, place, location, circumstances or symptoms of the claimed injury or illness or (2) the intentional nondisclosure of any material fact affecting such claim or the collection of such benefits, shall be guilty of a class C felony if the amount of benefits claimed or received, including but not

the claimant's contention that although the state labor board panel found the respondent-employer had proved by a preponderance of the evidence that workers' compensation fraud was committed, the panel relied on a dictionary definition of workers' compensation fraud rather than the definition provided in § 31-290c(a) C.G.S. The claimant argues that had the arbitration panel utilized the proper legal definition, it would have failed to find a prima facie case of workers' compensation fraud.

The trial commissioner noted that in Genovese v. Gallo Wine Merchants, Inc., 226 Conn. 465 (1993), our Supreme Court, in a majority decision, stated that § 31-51bb C.G.S. was enacted to ensure that employees who are covered by a collective bargaining agreement have the same opportunity to litigate their statutory claims as employees who are not covered by a collective bargaining agreement. However, the Genovese majority went further, also holding that an employee may pursue a statutory cause of action despite the prior voluntary submission of a related claim to final arbitration under a collective bargaining agreement. The trial commissioner found that:

> It is clear from a reading of Genovese that the General Assembly intended a claim under CGS 31-290a to proceed despite a separate action elsewhere under a collective bargaining agreement. And while the precise language of Genovese discussed the statutory cause of action proceeding in Superior Court and CGS 31-51bb discusses the cause of action proceeding in a court of competent jurisdiction, the policy behind that language extends to the cause of action proceeding in this Workers' Compensation forum.

Conclusion, ¶ e.

---

limited to, the value of medical services, is less than two thousand dollars, or shall be guilty of a class B felony if the amount of such benefits exceeds two thousand dollars. Such person shall also be liable for treble damages in a civil proceeding under section 52-564."

The trier also determined that "the showing required under CGS 31-290a by the claimant, upon whom the burden of production falls under Ford v. Blue Cross & Blue Shield of Connecticut, Inc., 216 Conn. 40 (1990), is separate and distinct from the proof showing under CGS 31-290c(a) by the respondent, under whom the burden of production falls." Conclusion, ¶ f. The trial commissioner observed that:

> [t]he [Superior] Court, in refusing to vacate the state labor board decision, was not responsible to consider and did not consider the legal questions involved in CGS 31-290a. The Court under CGS 52-418a had to ensure only that the award was not the result of corrupt procurement, evident partiality of the arbitrators, arbitrator misconduct, arbitrator's expansion of their powers, and failure to render a mutual finite and definite award.

Conclusion, ¶ g.

The trial commissioner concluded that because the legal issues considered in a § 31-290a C.G.S. claim differ from the issues considered in the state labor board proceeding, claim preclusion did not lie. As such, the trier determined that the Workers' Compensation Commission has jurisdiction to hear the claimant's wrongful termination claim despite the prior state labor board decision upholding the claimant's termination for just cause and the Superior Court decision declining to vacate the arbitration panel ruling.

The respondents filed a Motion to Correct which was denied in its entirety, and this appeal followed.[7] On appeal, the respondents contend that the trial commissioner erroneously concluded that the Workers' Compensation Commission has jurisdiction to

[7] The respondents filed a Motion to Correct on September 11, 2015, and the claimant filed an objection to the Motion to Correct on September 23, 2015. On October 26, 2015, the motion was deemed denied by operation of law as the trial commissioner had not ruled upon it within a twenty-day time period. Following a request for reconsideration filed by the respondents on October 29, 2015, the trier reopened the Motion to Correct on November 3, 2015 and denied the motion on the merits. On November 5, 2015, the claimant filed an objection to the request for reconsideration.

hear the claimant's wrongful termination claim in light of the state labor board's decision holding that there was a legitimate basis to terminate the claimant's employment. The respondents also argue that the trier erred in finding that the issues considered in the proceedings before the state labor board differed from the issues considered in a wrongful termination claim. In addition, the respondents assert that the trier erroneously concluded that the claimant's termination was predicated upon a violation of § 31-290c C.G.S. given that § 31-290c C.G.S. was not the basis for either the claim brought before the labor board or the claim brought pursuant to § 31-290a C.G.S. Finally, the respondents maintain that the trier's denial of their Motion to Correct constituted error.[8]

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

[8] The respondents also claim as error the trial commissioner's Order that "[t]he claimant is entitled to proceed to a hearing before this commission on the statutory basis of 31-290a and will be left to his proof." Order, ¶ 1. As this statement merely represents a logical extension of the trier's conclusion that the Workers' Compensation Commission retains jurisdiction over the wrongful termination action, we see no need to consider this claim of error separately.

the formal hearing." Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

In the matter at bar, the respondents contend that the commissioner erroneously concluded that the Workers' Compensation Commission has jurisdiction to hear the claimant's wrongful termination claim in light of the state labor board's decision holding that the City of New Haven had a legitimate basis to terminate the claimant's employment. The respondents point out that the Superior Court denied the claimant's Motion to Vacate pursuant to § 52-420 C.G.S.[9] and the claimant did not choose to avail himself of the appeal rights provided by § 52-423 C.G.S.[10] The respondents assert that "the issue of whether claimant was terminated for just cause had been fully and finally adjudicated. As such, the claimant is collaterally estopped from re-litigating the issue here in the workers' compensation forum. To hold otherwise would conflict with the well-established doctrines of res judicata and collateral estoppel." Appellants' Brief, pp. 8-9.

Before proceeding, we deem it useful to discuss the legal principles underlying the doctrines of collateral estoppel and res judicata generally.

---

[9] Section 52-420 C.G.S. (Rev. to 2011) states: "(a) Any application under section 52-417, 52-418 or 52-419 shall be heard in the manner provided by law for hearing written motions at a short calendar session, or otherwise as the court or judge may direct, in order to dispose of the case with the least possible delay.
(b) No motion to vacate, modify or correct an award may be made after thirty days from the notice of the award to the party to the arbitration who makes the motion.
(c) For the purpose of a motion to vacate, modify or correct an award, such an order staying any proceedings of the adverse party to enforce the award shall be made as may be deemed necessary. Upon the granting of an order confirming, modifying or correcting an award, a judgment or decree shall be entered in conformity therewith by the court or judge granting the order."

[10] Section 52-423 C.G.S. states: "An appeal may be taken from an order confirming, vacating, modifying or correcting an award, or from a judgment or decree upon an award, as in ordinary civil actions."

> Claim preclusion (res judicata) and issue preclusion (collateral estoppel) have been described as related ideas on a continuum…. The doctrine of res judicata holds that an existing final judgment rendered upon the merits without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated as to the parties and their privies in all other actions in the same or any other judicial tribunal of concurrent jurisdiction…. Res judicata bars not only subsequent relitigation of a claim previously asserted, but subsequent relitigation of any claims relating to the same cause of action …which might have been made….
>
> Collateral estoppel, or issue preclusion, is that aspect of res judicata which prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties upon a different claim…. Collateral estoppel means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. (Citations omitted; internal quotation marks omitted.)

Berzins v. Berzins, 122 Conn. App. 674, 679-680 (2010), *quoting* Massey v. Branford, 119 Conn. App. 453, 464-65, *cert. denied*, 295 Conn. 921 (2010).

In addition:

> For an issue to be subject to collateral estoppel, it must have been fully and fairly litigated in the first action. It also must have been actually decided and the decision must have been necessary to the judgment....
>
> An issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined.... An issue is necessarily determined if, in the absence of a determination of the issue, the judgment could not have been validly rendered.... If an issue has been determined, but the judgment is not dependent upon the determination of the issue, the parties may relitigate the issue in a subsequent action. Findings on nonessential issues usually have the characteristics of dicta....

Birnie v. Electric Boat Corp., 288 Conn. 392, 405-406 (2008).

It is also well-settled that "[b]efore collateral estoppel applies there must be an identity of issues between the prior and subsequent proceedings. To invoke collateral

estoppel the issues sought to be litigated in the new proceeding must be identical to those considered in the prior proceeding." Crochiere v. Board of Education, 227 Conn. 333, 345 (1993). Thus,

> for res judicata to apply, four elements must be met: (1) the judgment must have been rendered on the merits by a court of competent jurisdiction; (2) the parties to the prior and subsequent actions must be the same or in privity; (3) there must have been an adequate opportunity to litigate the matter fully; and (4) the same underlying claim must be at issue.

Wheeler v. Beachcroft, LLC, 320 Conn. 146, 156–57 (2016).

Our Supreme Court has held that the doctrines of res judicata and collateral estoppel can be applied to decisions by administrative agencies.

> Despite frequent statements which indicate acceptance of the proposition that the doctrine of res judicata is not applicable where the earlier decision was made, not by a court, but by an administrative agency, or that the doctrine does not ordinarily apply to decisions of administrative tribunals, there is a wealth of reason and authority for the application of that doctrine, or a similar doctrine, to the determinations of an administrative agency in a proper case, generally where the determinations are made for a purpose similar to those of a court and in proceedings similar to judicial proceedings.

Corey v. Avco-Lycoming Division, Avco Corporation, 163 Conn. 309, 317-318 (1972), *citing* 46 Am.Jur.2d, Judgments, s 455.

Returning to the matter at bar, the claimant asserts, and the trier so found, that the disposition of the wrongful termination claim is governed by our Supreme Court's majority holding in Genovese v. Gallo Wine Merchants, Inc., 226 Conn. 475 (1993). In Genovese, the court was called upon to decide whether an employee's wrongful termination claim pursuant to § 31-290a C.G.S. was "precluded by virtue of the doctrine of collateral estoppel, because of the employee's prior unsuccessful submission of a

related claim to final arbitration under a collective bargaining agreement." Id., 476. The majority, having reviewed the provisions of § 31-51bb C.G.S., first held that "an employee who does *not* exhaust the grievance procedures established in a collective bargaining agreement may pursue a cause of action in the Superior Court if the cause of action is premised on an independent statutory claim."[11] (Emphasis in the original). Id., 481. Noting that the Genovese claimant had initially litigated his claim in arbitration, the majority also remarked that "ordinarily a factual determination made in final and binding arbitration is entitled to preclusive effect." Id., 483. Nevertheless, after examining the legislative history behind the enactment of § 31-55bb C.G.S., the majority concluded that § 31-55bb C.G.S. in fact does allow "an employee to assert statutory rights in a court action despite a prior adverse determination of the same or similar claim in an arbitration proceeding brought pursuant to a collective bargaining agreement." Id., 486.

In explaining its decision, the Genovese majority discussed a number of public policy considerations, noting *inter alia* that the "arbitrator's frame of reference … may be narrower than is necessary to resolve the dispute because the arbitrator's power is both derived from, and limited by, the collective bargaining agreement and the submission of the parties." Id., 486-487. The majority also remarked that § 31-290a C.G.S. "provides broad remedies to an employee improperly discharged for filing for workers' compensation benefits, including reinstatement, back wages, compensatory damages, attorney's fees, costs and punitive damages." Id., 487. As such, "[t]he creation of the substantive rights and remedies in § 31-290a, therefore, reflects a legislative preference

[11] See footnote five, supra.

for a full *judicial* determination of an employee's § 31-290a claim." (Emphasis in the original.) Id., 487-488. In addition, the majority observed that "reliance on an employee's union to vindicate adequately the employee's statutory rights may not be justified," id., 488, in light of the potential discrepancies between the objectives of the union and the individual employee and the possibility that "a union weighing individual and collective interests might validly allow some employee's statutory rights to be sacrificed…." Id., 488. Finally, the majority indicated "that arbitration may be a less effective forum for the final resolution of statutory claims," id., 489, stating:

> The fact-finding process is not equivalent to judicial fact-finding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and the rights and procedures common to civil trial, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable.

Id.

The majority did postulate that "[i]n deciding to afford a judicial remedy despite the employee's coverage by a collective bargaining agreement, the legislature unquestionably swept more broadly than was required to overrule our decision in Kolenberg v. Board of Education [206 Conn. 113, *cert. denied*, 487 U.S. 1236 (1988)]."[12] Id., 491. The majority also pointed out that § 31-55bb C.G.S. "runs contrary to the established judicial principle that voluntary recourse to arbitration proceedings allows the

[12] In Kolenberg v. Board of Education, 206 Conn. 113, *cert. denied*, 487 U.S. 1236 (1988), a lawsuit was brought by a mathematics teacher who lost his entitlement to reemployment following a leave of absence because his notification to the board of his intent to return occurred after the deadline established by the collective bargaining agreement. Our Supreme Court held that the failure of the claimant to exhaust the grievance and arbitration procedures available to him had deprived the trial court of subject matter jurisdiction. We note that in his concurrence/dissent in Genovese v. Gallo Wine Merchants, Inc., 226 Conn. 475 (1993), Justice Berdon observed that the "sweep" alluded to by the majority "was not accomplished by the precise language of § 31-51bb but only by the judicial gloss placed upon it by the majority." Id., 495.

prevailing party, after a final arbitral judgment, to raise a defense of collateral estoppel or res judicata if the losing party thereafter initiates a judicial cause of action." Id. The majority further remarked that "[o]utlawing the defense of collateral estoppel also runs counter to the established legislative policy favoring alternate methods of dispute resolution as economical and efficient alternatives, in the days of crowded court calendars, to judicial disposition of civil cases." Id., 492. Nevertheless, the majority ultimately held that "the legislature intended to permit an employee, despite his prior voluntary submission of a related claim to final arbitration under a collective bargaining agreement, to pursue a statutory cause of action in the Superior Court."[13] Id., 493.

The respondents attempt to distinguish the matter at bar from Genovese on several grounds. First, they assert that Genovese is not dispositive given that the claimant did not pursue his wrongful termination claim "in a court of competent jurisdiction" pursuant to § 31-55bb C.G.S. but, rather, filed his claim with the Workers' Compensation Commission. "Genovese does not support the proposition that when a party's cause of action has been fully adjudicated in one administrative agency a claimant should be allowed to move to a second agency to retry his claim." Appellants' Brief, p. 12. We find this argument to be without merit: the interpretation of the provisions of § 31-55bb by the Genovese majority appears to give the claimant the right to do exactly that, and it

[13] Justice Berdon dissented in part and concurred in part, writing that the majority had incorrectly interpreted the plain language of § 31-51bb C.G.S. He pointed out that the statute "merely states that the employee is not bound by a collective bargaining grievance procedure, but may pursue his constitutional or statutory claims directly in court. The statute does *not* give the employee the right to elect to pursue a collective bargaining remedy such as the arbitration in the present action, and then ignore the outcome." (Emphasis in the original.) Genovese v. Gallo Wine Merchants, Inc., 226 Conn. 475, 494 (1993) (J. Berdon, dissenting in part and concurring in part). Justice Berdon was also concerned that "[t]he majority, through statutory construction, has tipped that delicate procedural balance for resolving grievances between organized labor and management, by giving the employee an advantage not envisioned by the clear mandate of the legislation." Id., 496.

is well-settled that both the trial commissioner and this board are obliged to defer to a decision rendered by a higher court. Moreover, the provisions of § 31-290a(b) C.G.S. clearly give a claimant the right to pursue a claim for wrongful termination in *either* the Superior Court or the Workers' Compensation Commission; as such, we find the narrow reading of the statute urged by the respondents to be completely inconsistent with the letter and spirit of the Genovese majority decision and the explicit provisions of § 31-290a C.G.S. [14]

The respondents also argue that the matter at bar can be distinguished from Genovese on the basis that when the Genovese claimant filed his claim with the trial court, the claim had only been heard at the administrative level. In the present matter, however, the claim was not only heard by the labor board but was also brought to the Superior Court pursuant to a Motion to Vacate. As such, the respondents assert that the claimant has had a full review of his case in a court of competent jurisdiction. That assertion is simply not accurate. As the presiding trial commissioner correctly pointed

[14] Section 31-290a(b) C.G.S. (Rev. to 2011) states: "Any employee who is so discharged or discriminated against may either: (1) Bring a civil action in the superior court for the judicial district where the employer has its principal office for the reinstatement of his previous job, payment of back wages and reestablishment of employee benefits to which he would have otherwise been entitled if he had not been discriminated against or discharged and any other damages caused by such discrimination or discharge. The court may also award punitive damages. Any employee who prevails in such a civil action shall be awarded reasonable attorney's fees and costs to be taxed by the court; or (2) file a complaint with the chairman of the Workers' Compensation Commission alleging violation of the provisions of subsection (a) of this section. Upon receipt of any such complaint, the chairman shall select a commissioner to hear the complaint, provided any commissioner who has previously rendered any decision concerning the claim shall be excluded. The hearing shall be held in the workers' compensation district where the employer has its principal office. After the hearing, the commissioner shall send each party a written copy of his decision. The commissioner may award the employee the reinstatement of his previous job, payment of back wages and reestablishment of employee benefits to which he otherwise would have been eligible if he had not been discriminated against or discharged. Any employee who prevails in such a complaint shall be awarded reasonable attorney's fees. Any party aggrieved by the decision of the commissioner may appeal the decision to the Appellate Court."

out, the scope of review for a Motion to Vacate brought pursuant to § 52-418(a) is limited to an analysis of the following factors:

> (1) If the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality or corruption on the part of any arbitrator; (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

The scope of the standard of review for a Motion to Vacate an arbitration award is therefore far more narrow than the standard of review for appeals brought either before this board or directly to the Appellate Court, which standard requires an analysis of whether the trial commissioner's factual findings and conclusions are "without evidence, contrary to law or based on unreasonable or impermissible factual inferences." Russo, supra, *citing* Fair, supra, 539. In light of the lack of similarity between the scope of review for administrative Motions to Vacate and judicial appellate analysis generally, we are far from convinced that the issue of whether the Genovese claimant had filed an appeal with Superior Court would have influenced the court's reasoning one way or another. Moreover, even were we not persuaded that the trier was correct in finding that Genovese controls, it is readily apparent that the differences in the scope of the two review standards only serve to further undercut the respondents' argument for invoking collateral estoppel in this matter.

The respondents also argue that the trier erred in finding that the issues considered in the proceedings before the state labor board differed from the issues considered in a

wrongful termination claim. Rather, the respondents assert that "the issue the claimant seeks to bring before the commission is the same issue that has already been presented before the Labor Board and reviewed by the Superior Court; namely, whether or not the respondents terminated the claimant for just cause. The judgment was dependent on the determination of this issue and therefore may not be relitigated." Appellants' Brief, p. 9. We do not find this claim of error meritorious. In its review of the claimant's Motion to Vacate, the Superior Court observed that "the unrestricted submission in this case required the arbitrator to decide whether the city had just cause to terminate the employment of Williams and if not, what the remedy shall be." UPSEU, Local 424, Unit 34 v. New Haven, Superior Court, JD of New Haven at New Haven, DN 6041445 (July 23, 2014) (Burke, J.).[15] However, when called upon to review the merits of a claim for wrongful termination brought pursuant to § 31-290a C.G.S., a trier is expected to apply the following burden-shifting analysis as set forth in Ford v. Blue Cross & Blue Shield of Connecticut, Inc., 216 Conn. 40 (1990):

> The plaintiff bears the initial burden of proving by the preponderance of the evidence a prima facie case of discrimination.... In order to meet this burden, the plaintiff must present evidence that gives rise to an inference of unlawful discrimination.... If the plaintiff meets this initial burden, the burden then shifts to the defendant to rebut the presumption of discrimination by producing evidence of a legitimate, nondiscriminatory reason for its actions.... If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity.... The plaintiff then must satisfy her burden of persuading the factfinder that she was the victim of discrimination either directly by persuading the court [or jury] that a

[15] In reviewing the claimant's Motion to Vacate, the Superior Court defined an "unrestricted submission" as meaning that "there was no restriction on the breadth of issues, reserving explicit rights, or conditioning an award on review by the court." Appellants' Brief, p. 15.

> discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. (Citations omitted; internal quotation marks omitted.)

Cable v. Bic Corp., 270 Conn. 433, 435, fn. 2, (2004), *citing* Ford, supra, 53-54.

Based on the Superior Court's description of the purpose underlying the labor board hearing as contrasted with the Ford burden-shifting analysis required when assessing wrongful termination claims, it is clear on its face that the considerations implicated in the labor board's hearing would not be consistent with the parameters of the inquiry into whether the claimant was terminated for bringing a workers' compensation claim pursuant to § 31-290a C.G.S. In fact, we have reviewed the August 8, 2013 Arbitration Award of the State Board of Mediation and Arbitration and find it devoid of the burden-shifting analysis required by Ford in wrongful termination actions. *See* Joint Exhibit 1, Exhibit C. In light of the court's admonition in Birnie, supra, that "[t]he application of the collateral estoppel doctrine may not be proper when the burden of proof or legal standards differ between the first and subsequent actions," id., 406, we therefore affirm the trier's finding that jurisdiction lies to hear the § 31-290a C.G.S. claim on the basis that "the legal issues to be considered in a CGS 31-290a proceeding [are] different from those that were considered in the state labor board proceeding."[16] Conclusion, ¶ h.

---

[16] It is also entirely possible that the trial commissioner was influenced by the public policy discussion in Genovese v. Gallo Wine Merchants, Inc., 226 Conn. 465 (1993), relative to how the considerations which attend a matter brought by a union collectively may differ from those implicated in an action brought by a union member individually. In light of the axiom that for collateral estoppel to lie, "the parties to the prior and subsequent actions must be the same or in privity," it strikes us as rather problematic that in the matter at bar, it was not the claimant but the union who was the named party in the arbitration. Wheeler v. Beachcroft, LLC, 320 Conn. 146, 156 (2016). The record before us does not reflect that the respondents

The respondents also contend that the trier erred in finding that "[t]he city's termination of the claimant was premised on a violation of C.G.S. 31-290c." Findings, ¶ 16. The respondents point out that § 31-290c C.G.S., which provides for criminal and civil penalties when a fraudulent claim is made for workers' compensation benefits, "is simply inapplicable to the case at hand, both in the context of the Labor Board proceeding as well as any proceeding pursuant to C.G.S. § 31-290a, whether in Superior Court or in the workers' compensation forum." Appellants' Brief, pp. 17-18.

As discussed previously herein, § 31-290c(a) C.G.S. states:

> Any person or his representative who makes or attempts to make any claim for benefits, receives or attempts to receive benefits, prevents or attempts to prevent the receipt of benefits or reduces or attempts to reduce the amount of benefits under this chapter based in whole or in part upon (1) the intentional misrepresentation of any material fact including, but not limited to, the existence, time, date, place, location, circumstances or symptoms of the claimed injury or illness or (2) the intentional nondisclosure of any material fact affecting such claim or the collection of such benefits, shall be guilty of a class C felony if the amount of benefits claimed or received, including but not limited to, the value of medical services, is less than two thousand dollars, or shall be guilty of a class B felony if the amount of such benefits exceeds two thousand dollars. Such person shall also be liable for treble damages in a civil proceeding under section 52-564.

Given that § 31-290c C.G.S. provides for a cause of action which lies outside the jurisdiction of the Workers' Compensation Commission, we concede that the wording of the trier's finding on this point was somewhat inartful. However, we note that in its August 8, 2013 arbitration award, the labor board stated that "[o]n September 17, 2012, the City notified the grievant by certified mail of a pretermination hearing scheduled …

---

demonstrated that the claimant's interests are in privity with those of the union.

for September 24, 2012. The basis for the hearing related to workers' compensation fraud." Joint Exhibit 1, Exhibit C, p. 6. The labor board also pointed out that it was the City's position that "[t]he grievant's receipt over five months of workers' compensation benefits based upon a four hour work capacity when there was no medical reason for the reduced hours constitutes fraud," id., 8, and the claimant's "conduct essentially amounts to theft and demands the penalty of discharge." Id., 9. Ultimately, the labor board concluded that:

> [b]y [the claimant's] actions, he was able to work part time and receive full time pay, knowing full well that he was not entitled to receive those benefits without working a full eight hours…. There can be no dispute that the grievant successfully manipulated his doctor to change his hours and received a benefit over a substantial period of time which he knew or should have known that he was not entitled to by law. The grievant's conduct amounted to theft, a very serious violation, which breaches the fundamental principles of the employer-employee relationship.

Id., 26, *citing* Brand and Biren, Editors, 2d. Ed., Discipline and Discharge in Arbitration, p. 294, 2008.

Based on the foregoing, there can be little doubt that the justification for the City's termination of the claimant's employment was based on allegations of workers' compensation fraud. [17] Thus, while the drafting of the trial commissioner's finding relative to § 31-290c C.G.S. was not entirely accurate in light of the articulated purpose of the statute, we do not believe the finding constitutes reversible error given that the matter before the arbitration board clearly implicated the claimant's alleged fraudulent receipt of benefits. See D'Amico v. Dept. of Correction, 73 Conn. App. 718, 729 (2002),

[17] In view of our affirmance of the trial commissioner's conclusion that Genovese v. Gallo Wine Merchants, Inc., 226 Conn. 475 (1993) is dispositive of the jurisdictional inquiry, we decline to enter into a discussion of whether the labor board used the "correct" definition of workers' compensation fraud.

cert. denied, 262 Conn. 933 (2003). Moreover, we consider somewhat disingenuous the respondents' assertion that "[t]his statute is simply inapplicable to the case at hand, both in the context of the Labor Board proceeding as well as any proceeding pursuant to C.G.S. § 31-290a, whether in Superior Court of in the workers' compensation forum." Appellants' Brief, pp. 17-18. In fact, the record indicates that the City did refer the matter to the workers' compensation fraud unit and the request was denied. Appellee's Brief, p. 13. Obviously the statute would not have been the least bit "irrelevant" had the state's attorney in fact chosen to pursue § 31-290c C.G.S. penalties. For our purposes, however, while we do find the trier's reference to the statute constituted harmless error, it also strikes us that the trier's review of the analysis undertaken by the labor board as set forth in its August 8, 2013 finding merely serves to buttress his ultimate conclusion, which we affirm herein, that in light of the interpretation of § 31-55bb C.G.S. as set forth in the Genovese majority decision, the doctrine of collateral estoppel does not preclude the claimant from moving forward with his wrongful termination claim.

Finally, the respondents contend that the trial commissioner's denial of their Motion to Correct constituted error. The respondents state that "[t]he Motion to Correct sought to have the trial commissioner find that the legal issues to be considered in a C.G.S. § 31-290a proceeding to be identical to those that were considered in the state Labor Board proceeding and make a determination that preclusion of issues lies in this matter." Appellants' Brief, p. 20. Our review of the proposed corrections indicates that the respondents are merely reiterating the arguments made at trial which ultimately proved unavailing. This is particularly so given that the lion's share of the factual

findings found by the trial commissioner were provided by way of a Joint Stipulation of Facts and his analysis therefore primarily focused on a question of law. As such, we find no error in the trier's decision to deny the Motion to Correct. D'Amico, supra, 728.

There is no error; the July 30, 2015 Finding and Award of Jack R. Goldberg, Commissioner acting for the Third District, is accordingly affirmed.

Commissioners Ernie R. Walker and Nancy E. Salerno concur in this opinion.