CASE NO. 6109 CRB-2-16-6 : COMPENSATION REVIEW BOARD
CLAIM NO. 200185106

CHARLES L. WILSON
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

CAPITOL GARAGE, INC. : MAY 16, 2017
EMPLOYER

and

QBE INSURANCE
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by G. Randal Hornaday, Esq., Law Offices of Howard B. Schiller, 55 Church Street, P.O. Box 699, Willimantic, CT 06226.

The respondents were represented by Samantha K. Levasseur, Esq., Morrison Mahoney, LLP, One Constitution Plaza, 10th Floor, Hartford, CT 06103-4500.

This Petition for Review[1] from the June 6, 2016 Finding & Dismissal of Daniel E. Dilzer, the Commissioner acting for the Second District, was heard December 16, 2016 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Nancy E. Salerno and Stephen M. Morelli.

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

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The Supreme Court's decisions in Donahue v. Veridiem, Inc., 291 Conn. 537 (2009) and Harpaz v. Laidlaw Transit, Inc., 86 Conn. 102 (2008) resulted in a certain level of uncertainty as to how a trial commissioner should conduct proceedings subsequent to granting a claimant preclusion. This murkiness pervades the present case, where a claimant obtained preclusion pursuant to § 31-294c(b) C.G.S.,[2] the trial commissioner ordered a Commissioner's Examination pursuant to § 31-294f C.G.S.,[3] and then, after reviewing the claimant's medical evidence

[2] Section 31-294c(b) C.G.S. (Rev. to 2013) states: "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."

[3] Section 31-294f C.G.S. (Rev. to 2013) states: "(a) An injured employee shall submit himself to examination by a reputable practicing physician or surgeon, at any time while claiming or receiving compensation, upon the reasonable request of the employer or at the direction of the commissioner. The examination shall be performed to determine the nature of the injury and the incapacity resulting from the injury. The physician or surgeon shall be selected by the employer from an approved list of physicians and

and the Commissioner's Examiner's report, the commissioner determined that the claimant was not entitled to benefits. The claimant has appealed, arguing that the trial commissioner's decision was inconsistent with the conclusive presumption of compensability under preclusion. As the claimant views the circumstances, he presented a *prima facie* case and should be awarded benefits for his claim. He believes it was error for the commissioner to seek a Commissioner's Examination under these circumstances. He also claims that to the extent the commissioner expressed concerns with this claim, they were directed at the duration of benefits to be paid, and not the claimant's entitlement to benefits.

We have reviewed the June 6, 2016 Finding & Dismissal and the record of the proceedings leading up to this decision. We have also reviewed the applicable precedent governing preclusion. We reject the claimant's argument that the commissioner in this case erred by ordering a Commissioner's Examination. The ability of a trial commissioner to conduct his own inquiry is provided for under § 31-278 C.G.S. and the express terms of Donahue, supra, 550-555.[4] The commissioner had the right to test the

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surgeons prepared by the chairman of the Workers' Compensation Commission and shall be paid by the employer. At any examination requested by the employer or directed by the commissioner under this section, the injured employee shall be allowed to have in attendance any reputable practicing physician or surgeon that the employee obtains and pays for himself. The employee shall submit to all other physical examinations as required by this chapter. The refusal of an injured employee to submit himself to a reasonable examination under this section shall suspend his right to compensation during such refusal."

[4] Section 31-278 C.G.S. (Rev. to 2013) states: "Each commissioner shall, for the purposes of this chapter, have power to summon and examine under oath such witnesses, and may direct the production of, and examine or cause to be produced or examined, such books, records, vouchers, memoranda, documents, letters, contracts or other papers in relation to any matter at issue as he may find proper, and shall have the same powers in reference thereto as are vested in magistrates taking depositions and shall have the power to order depositions pursuant to section 52-148. He shall have power to certify to official acts and shall have all powers necessary to enable him to perform the duties imposed upon him by the provisions of this chapter. Each commissioner shall hear all claims and questions arising under this chapter in the district to which the commissioner is assigned and all such claims shall be filed in the district in which the claim arises, provided, if it is uncertain in which district a claim arises, or if a claim arises out of several injuries or occupational diseases which occurred in one or more districts, the commissioner to whom the first request for hearing is made shall hear and determine such claim to the same extent as if it arose solely

claimant's *prima facie* case if he found it to be initially unpersuasive, as Donahue limits preclusion solely to "bona fide claims." Id., fn. 10.

Nonetheless, we find that due to the murkiness of the state of the law and the nature of the commissioner's representations at the formal hearing, the claimant might have erroneously believed that he needed to take no further action. This constitutes an issue of fundamental fairness to the litigants, Passalugo v. Guida-Seibert Dairy Co., 149 Conn. App. 478 (2014), and it is possible that had the claimant properly understood the role of the Commissioner's Examiner in this matter, he would have prosecuted his claim in a different manner so as to address the opinions raised by the Commissioner's Examiner. Out of concern for due process under these circumstances, we determine that this specific matter should be remanded for additional proceedings.

The following facts are pertinent to our inquiry. The claimant worked as an auto body technician whose duties included painting and sanding in the respondent's auto body shop for over seventeen (17) years until he was let go on December 23, 2013. He testified that on that date, he was mandated by his employer to undertake a spirometric lung capacity function test which he failed, and was thereafter fired. Subsequent to this event, the claimant was examined by Margaret Woznica, M.D., a board-certified pulmonologist, on January 16, 2014 because the Med East Clinic test mandated by his employer had disclosed an obstruction. The claimant had first been diagnosed with

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within his own district. If a commissioner is disqualified or temporarily incapacitated from hearing any matter, or if the parties shall so request and the chairman of the Workers' Compensation Commission finds that it will facilitate a speedier disposition of the claim, he shall designate some other commissioner to hear and decide such matter. The Superior Court, on application of a commissioner or the chairman or the Attorney General, may enforce, by appropriate decree or process, any provision of this chapter or any proper order of a commissioner or the chairman rendered pursuant to any such provision. Any compensation commissioner, after ceasing to hold office as such compensation commissioner, may settle and dispose of all matters relating to appealed cases, including correcting findings and certifying records, as well as any other unfinished matters pertaining to causes theretofore tried by him, to the same extent as if he were still such compensation commissioner."

Chronic Obstructive Pulmonary Disorder (COPD) two years before. He told Dr. Woznica he performed the same work at the auto body shop for many years without difficulties "using a dust mask for an 8-hour work day. He states he was indirectly exposed to paints and metal dust in the general area … [h]e denies exposure to asbestos." Findings, ¶ 3. Dr. Woznica examined the claimant again on April 7, 2014, when she noted that the claimant, who recently quit smoking, had a 120-pack-a-year smoking history. Dr. Woznica later wrote to claimant's counsel on October 1, 2014, stating that she believed within a reasonable medical probability that the claimant's COPD and emphysema were aggravated and worsened by the claimant's longstanding occupational exposure to workplace pollutants. The doctor assigned a twenty-percent (20%) permanent partial disability rating to his lungs. She indicates in that letter that the claimant's substantial loss of pulmonary function indicates irreversibility and permanence and she expects continued loss of function.

On October 15, 2014, a formal hearing was held to determine whether the respondents were precluded from contesting the claimant's claim that he sustained an injury to his lungs in the course and scope of his employment with the respondent. It was found that the claimant filed a timely claim seeking compensability for an injury to his lungs by filing a Form 30C claiming his last date of injurious exposure was on December 23, 2013. The Motion to Preclude was granted, as the respondents neither disclaimed the claim nor commenced payment of benefits within twenty-eight (28) days of the claim being filed.

The claimant was not subsequently evaluated by Dr. Woznica but, rather, was examined by Michael Conway, M.D., on February 19, 2015. Dr. Conway noted the

claimant's cigarette usage and his prior diagnosis of COPD, and further noted the claimant was receiving Social Security Disability and had gained forty pounds since he left employment with the respondent. Dr. Conway summarized his findings in a letter to claimant's counsel in which he said the claimant's "primary lung disease is COPD secondary to cigarette smoking, he also has a less severe but still significant element of occupational lung disease secondary to the exposure to isocyanates in the 2 part paint used in the body shop," and "his airway disease is therefore a mix of non occupational (80%) and occupational (20%) etiology." Findings, ¶ 8. Dr. Conway noted that it was difficult to judge the claimant's work restrictions because he became debilitated due to obesity and deconditioning, but noted that he would not be able to work in a body shop since he needed a dust–free environment. The doctor also opined that there would be no significant restrictions to sedentary work in a non-body shop environment. In addition, Dr. Conway suggested that anti-inflammatory medicine might potentially reverse the claimant's airway blockage.

The claimant testified at the formal hearing for this claim. In 2015, he was sixty-six (66) years old and had smoked for about forty (40) years. The claimant testified that he was active and through the years his level of activity gradually diminished. The claimant testified he first became aware of having COPD in 2000 or 2001when he went to the emergency room for severe bronchitis, although he continued to smoke until 2013. The commissioner noted that medical records indicated the claimant had told his doctors various dates at which he had stopped smoking at some point in 2014. Since leaving work, the claimant described his inability to continue hunting and hiking, which he previously enjoyed, because he can only walk a short distance without losing his breath.

He also is only able to climb three or four stairs at a time without losing his breath. The claimant continues to use an e-cigarette vaporizer. The claimant's pay records reflect that in the final year on the job, he worked forty (40) hours per week, but since his termination the claimant has not looked for work. He testified that had he not been terminated, he still would be working.

The trial commissioner ordered a Commissioner's Examination with Daniel Gerardi, M.D., Director of St. Francis Occupational Lung Diseases, Pulmonary/Critical Care Medicine, to determine "the nature of the patient's illness and if any workplace exposure was related either temporarily or permanently to any respiratory injury … the need for treatment, point of maximum medical improvement, if appropriate, and rating of respiratory impairment if applicable." Findings, ¶ 16. Dr. Gerardi agreed that the claimant suffers from COPD and commented that the claimant's cigarette smoking history is notable and quite extensive and very sufficient to cause COPD. Dr. Gerardi said the component of occupational disease in the claimant's condition was less clear. While the claimant's exposure to body paints and isocyanates in his employment can produce either an aggravation of the underlying COPD in respiratory disease or occupational asthma, Dr. Gerardi opined that this exposure, as well as the claimant's exposure to dust, "is very significantly less than any component related to cigarette smoking." Findings, ¶ 18. Moreover, Dr. Gerardi notes, the claimant did not provide symptoms in the workplace that would suggest occupational asthma. He does believe it is likely the claimant had some component of occupational-related respiratory disease as suggested by Dr. Conway, but opines that it is relatively minor and would estimate only

ten (10%) percent of the claimant's respiratory impairment could be related to occupational exposures.

Based on these subordinate facts, the commissioner concluded that Dr. Gerardi offered a persuasive opinion that the occupational component of the claimant's respiratory ailment was relatively minor. In reliance on that opinion, the trial commissioner dismissed the claimant's bid for benefits. The claimant filed a Motion to Correct seeking to add findings supportive of compensating the claimant for his asserted occupational injuries. The trial commissioner denied this motion in its entirety and the claimant has pursued this appeal. His argument is that the evidence on the record established that as a matter of law, his employment was a substantial factor in his current respiratory condition. The claimant also argues that the manner in which the commissioner handled the hearing was in error for two reasons. He argues that the commissioner indicated, on the record and prior to issuing the Finding & Dismissal, that the claimant had a compensable injury, and cannot now reverse course on this issue. Secondly, the claimant argues that the commissioner's reliance on Dr. Gerardi's opinions was improper as the claimant had established that he had a "bona fide claim" and it was unnecessary for the commissioner to seek additional evidence. The respondents argue that there is no error in this case. After reviewing this case, we are concerned as to the procedural manner in which this case progressed and focus our inquiry on those issues.

We recently considered some of the unresolved issues concerning preclusion subsequent to Harpaz, supra, and Donahue, supra, in Geraldino v. Oxford Academy of Hair Design, 5968 CRB-5-14-10 (January 20, 2016), *appeal pending*, AC 38881. Although the primary focus of the controversy in Geraldino concerned whether the

respondents retained appellate rights subsequent to preclusion, we also had the opportunity to explore the role of a trial commissioner in a preclusion case and the general due process concerns present in any proceeding before this Commission. We find this discussion relevant to the issues presented herein.

> 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.

We concluded in Geraldino that these due process protections included the right to raise alleged error on the part of the trial commissioner to an appellate tribunal. We also reviewed how a trial commissioner considered medical evidence presented by the claimant. The trial commissioner in that case found the evidence presented by the claimant inconclusive and ordered a Commissioner's Examination to clarify the record. We approved of this practice, and rejected the respondents' argument that the trial commissioner should have dismissed the claim *in toto* were he or she to find the claimant's evidence not fully persuasive in all regards.

> 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., pp 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.

Id.

We further explained that in our review, the precedent governing preclusion did not change the obligations of a claimant to prove that the current medical condition was the result of the compensable injury the claimant sustained at work.

> As the precedent 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).
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> 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.

Geraldino, supra.

The claimant argues that the evidence presented to the commissioner in support of his claim by Dr. Conway and Dr. Woznica was sufficient to establish a *prima facie* case

and therefore he should have been awarded *some* benefits. We disagree. If a trial commissioner is not persuaded by medical evidence, we are not in a position to second-guess his decision and usurp his role to ascertain the validity of a claim. See DiNuzzo, supra, and O'Reilly v. General Dynamics Corp., 52 Conn. App. 813, 818-819 (1999). In addition, we note, after reviewing the transcript of the March 23, 2015 formal hearing, that the commissioner clearly expressed concern with the adequacy of the claimant's medical evidence.

> Again, the problem is he doesn't really answer the question I have. I mean, I have no doubt he had exposure to irritants at work that could have, that did, I think both doctors think it did aggravate his underlying Emphysema and Chronic Obstructive Pulmonary issues.
>
> The question is, when they talk about permanency, I'm not sure whether these are substantial factors in his permanency, I'm not sure if it was temporary and self-limiting, I'm not sure of any of that because these don't tell me that.

March 23, 2015 Transcript, pp. 10-11.

Therefore, the commissioner clearly articulated grounds for seeking a Commissioner's Examination in this case. We note that our precedent has granted wide discretion to trial commissioners to determine whether to order an examination under § 31-294f C.G.S. See Jodlowski v. Stanley Works, 5976 CRB-6-15-1 (August 12, 2015), *aff'd,* 169 Conn. App. 103, 111 (2016). As the Appellate Court pointed out, a trial commissioner is under no statutory duty to order a Commissioner's Examination when presented with conflicting evidence. Consequently, we cannot find any statutory bar to a trial commissioner deciding to order such an examination when he or she is not satisfied with the evidence the claimant has presented. Such a decision is consistent with the broad powers a commissioner has pursuant to § 31-278 C.G.S. and § 31-298 C.G.S. to

obtain the evidence he or she deems necessary to fairly adjudicate the issues presented to the Commission.[5] See Valiante v. Burns Construction Company, 5393 CRB-4-08-11 (October 15, 2009).

While the trial commissioner clearly has the power to order a Commissioner's Examination and to rely on its opinions, the question we face in this case is whether the trial commissioner made any inadvertent representations to the parties that would lead them to believe he had already reached a decision inconsistent with the ultimate outcome in this case. Had a reasonable person believed that the scope of the Commissioner's Examination would not include whether the claimant established a link of proximate cause between work and injury, one could anticipate pursuing a different and less robust litigation strategy. Upon review, we believe that is the case herein.

As we noted in Geraldino, supra, the Supreme Court's decision in Donahue, supra, vested great power in a trial commissioner in cases where preclusion has been ordered to protect the due process rights of the litigants. The conclusive presumption of compensability for failing to present a timely disclaimer is binding on the employer, but "[h]ad the legislature intended not to allow the commissioner to probe the plaintiff's

[5] The text of § 31-278 C.G.S. (Rev. to 2013) is recited at footnote 4, supra. Section 31-298 C.G.S. (Rev. to 2013) states: "Both parties may appear at any hearing, either in person or by attorney or other accredited representative, and no formal pleadings shall be required, beyond any informal notices that the commission approves. In all cases and hearings under the provisions of this chapter, the commissioner shall proceed, so far as possible, in accordance with the rules of equity. He shall not be bound by the ordinary common law or statutory rules of evidence or procedure, but shall make inquiry, through oral testimony, deposition testimony or written and printed records, in a manner that is best calculated to ascertain the substantial rights of the parties and carry out the provisions and intent of this chapter. No fees shall be charged to either party by the commissioner in connection with any hearing or other procedure, but the commissioner shall furnish at cost (1) certified copies of any testimony, award or other matter which may be of record in his office, and (2) duplicates of audio cassette recordings of any formal hearings. Witnesses subpoenaed by the commissioner shall be allowed the fees and traveling expenses that are allowed in civil actions, to be paid by the party in whose interest the witnesses are subpoenaed. When liability or extent of disability is contested by formal hearing before the commissioner, the claimant shall be entitled, if he prevails on final judgment, to payment for oral testimony or deposition testimony rendered on his behalf by a competent physician, surgeon or other medical provider, including the stenographic and videotape recording costs thereof, in connection with the claim, the commissioner to determine the reasonableness of such charges."

proof, it readily could have stated that the compensability of the injury shall be conclusively presumed, rather than that the employer is conclusively presumed to have accepted the compensability of the claim." Donahue, supra, 553-554. As footnote 10 of Donahue clearly states, a trial commissioner must be satisfied that a claim is "bona fide" to award benefits.

At oral argument before this tribunal, however, the claimant argued that during the formal hearing, the trial commissioner made representations suggesting that he had already concluded the claim was "bona fide" and the Commissioner's Examination was being sought only to clarify the nature of the benefits the claimant would receive. We therefore have reviewed the transcript of the March 23, 2015 formal hearing to ascertain if a reasonable person could have reached that conclusion.

Counsel for the claimant discussed the issue of whether his client was at maximum medical improvement and the commissioner stated that this would be an issue for the Commissioner's Examiner to consider.

> Commissioner: But the question is, is whether he was at Maximum Medical Improvement or not?
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> Counsel: At that time.
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> Commissioner: Right. And I don't know, that would be borne out by all the medical records.
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> So, why don't we get all the stuff together. I'm going to do a Commissioner's Exam. You're going to get a letter from me where and when to go and what to bring, okay. The purpose of it is just to find out, you know, if it's worsened your overall condition. If so, what rating do you have; was it a substantial factor in that rating; in which case, you weren't paid by anybody else. You'd be paid by the whole amount if that's the case. If you have permanent restrictions what are they and what the future treatment holds for you, okay?

March 23, 2015 Transcript, pp. 22-23.

At one point near the conclusion of the formal hearing, the trial commissioner made other representations to the claimant regarding the role of the Commissioner's Examiner which appear contradictory.

> Commissioner: Well, quite frankly, I found they've been precluded. I think the *compensability of this is presumptive, I mean, it's done.* (Emphasis added.)
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> I believe you sustained exposure at work to irritants. I think your doctor says you have … I'm looking, right here at the reports, but the problem is, you know, in a Motion to Preclude there's two parts: (1) Whether precluded and (2) what's owed, and what's related and not related. I'm not quite sure that these reports establish that your current condition is…your exposure at work is a substantial factor in your current condition now. It may have temporarily aggravated it, but it doesn't mean that it made you worse, and I have to find that out, okay. All right, thank you.

Id., 27.

We believe a reasonable person might have concluded, after this colloquy, that the trial commissioner had reached a decision based on the record already presented that the claimant would receive *some* benefits for a compensable injury, perhaps limited to the period immediately subsequent to the date of injury, but that the trial commissioner was not persuaded as to the claimant's current extent of injury or whether the compensable injury was permanent. In this case, after reviewing Dr. Gerardi's report, the trial commissioner determined that the claimant's work injury was self-limiting and had no substantial impact at all on his current medical condition, and consequently dismissed the claim.[6] We note that after Dr. Gerardi issued his report, the claimant did not depose the

[6] The claimant argues that as the report of Dr. Gerardi said it was "fair to estimate that perhaps 10% of [the claimant's] respiratory ailment could be related to occupational exposures…," see Commissioner's Exhibit, p. 5, the claimant should receive a "directed verdict" as each of the experts who examined the claimant ascribed some element of occupational causation to his respiratory condition. He cites Hadden v. Capitol

Commissioner's Examiner or have an expert witness offer a report challenging his conclusions. Had the claimant appreciated that the outcome that occurred in this case was a possibility, we believe he may well have availed himself of these opportunities.

We note that because cases subject to preclusion are no longer adversarial proceedings, the obligation of the trial commissioner to protect the due process rights of the litigants may indeed be greater than in the usual contested hearing. We note parallels between the facts in this case and another case where a decision was reached which appeared to be outside the scope of what the parties anticipated at the hearing. In Henry v. Ansonia, 5674 CRB-4-11-8 (August 8, 2012), the trial commissioner informed the parties that he would rule on a Motion to Preclude, and then subsequently ruled on the merits on the claim. We remanded that matter as we believed that the claimant should have been heard on the merits.

> After consideration of the issues herein, we agree with the claimant that this matter should be remanded for a new hearing on the question of eligibility for hypertension benefits. Due process requires that both parties be properly advised as to the relief under consideration at the formal hearing so that they may prepare their most persuasive arguments. The trial commissioner's decision in this case prejudiced the claimant who had not prepared arguments on the heart and hypertension issue.

Id.

The facts herein are not exactly congruent with Henry, as in this case the claimant was granted a separate hearing on the merits of the case after preclusion was granted.

Region Education Council, 5843 CRB-1-13-5 (May 20, 2014), *aff'd,* 164 Conn. App. 41 (2016) and Wilson v. Maefair Health Care Centers, 5773 CRB-4-12-8 (August 8, 2013), *aff'd,* 155 Conn. App. 345 (2015) in support of this argument. We disagree. Weir v. Transportation North Haven, 5226 CRB-1-07-5 (April 16, 2008) stands for the proposition that it is up to the trial commissioner to determine what percentage of causation attributable to employment is enough of a "substantial factor" to justify the award of benefits. We believe a commissioner who found Dr. Gerardi the most persuasive expert could find his opinion inadequate to justify the award of permanency benefits or additional medical treatment. As this matter will be remanded for further proceedings, we defer to the judgment of the trier of fact to determine whether the causation evidence on the record is of sufficient weight to award benefits to the claimant.

However, we find the precedent in Summers v. R R Donnelley Printing Company, 5914 CRB-1-14-2 (February 26, 2015) relevant to this discussion. In Summers, the trial commissioner early in the proceedings made representations relative to the merits of the claimant's bid to sanction the respondent, and we remanded the matter for a *de novo* determination as to whether the claimant would be permitted additional discovery and whether sanctions were warranted. "In this case, once an opinion as to the underlying issue was offered by the fact finder, we believe the claimant was entitled to some additional latitude to offer substantive evidence to challenge this opinion." Id. In the present case, a reasonable person could misconstrue the trial commissioner's March 23, 2015 statements as constituting a final opinion as to the compensability of his injuries.[7] We believe due process in this case should permit additional latitude to the claimant to enable him to challenge the evidence the commissioner relied upon to dismiss this claim.

We note that in another ambiguous case, Hubbard v. University of Connecticut Health Center, 5705 CRB-6-11-12 (November 30, 2012), we remanded the matter to the trial commissioner for additional proceedings, stating that "[n]o 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). In the present matter, we believe a *de novo* hearing is required to determine whether the claimant is entitled to any benefits as a result of the compensable injury of December 23, 2013. The

[7] We compare this case to Valiante v. Burns Construction Company, 5393 CRB-4-08-11 (October 15, 2009), wherein the trial commissioner clearly put the parties on notice at the commencement of the hearing that he was considering ordering the respondents to produce a witness to be deposed. When the parties are properly on notice regarding the scope of relief under consideration, we will generally affirm the decisions of a trial commissioner if a party raises a due process argument on appeal. Here, the record was sufficiently equivocal to raise a legitimate concern.

commissioner shall determine the optimal manner to conclude this hearing consistent with judicial economy and the due process rights of the parties.

Having found error, the June 6, 2016 Finding & Dismissal of Daniel E. Dilzer, the Commissioner acting for the Second District, is hereby remanded for additional proceedings consistent with this Opinion.

Commissioners Nancy E. Salerno and Stephen M. Morelli concur in this Opinion.

CERTIFICATION

THIS IS TO CERTIFY THAT a copy of the foregoing was mailed this 16th day of May 2017 to the following parties:

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