CASE NO. 6186 CRB-5-17-4 CLAIM NO. 700150477	: COMPENSATION REVIEW BOARD
SHKELQIM LETAJ CLAIMANT-APPELLEE	: WORKERS' COMPENSATION COMMISSION
v.	: JANUARY 11, 2019

ATMI, INCORPORATED
EMPLOYER

and

LIBERTY MUTUAL INSURANCE GROUP
INSURER
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by Patrick D. Skuret, Esq., The Law Offices of Daniel D. Skuret, P.C., P.O. Box 158, 215 Division Street, Ansonia, CT 06401-0128.

The respondents were represented by William J. Shea, Esq., Law Offices of Meehan, Roberts, Turret & Rosenbaum, 108 Leigus Road, First Floor, Wallingford, CT 06492.

This Petition for Review from the March 24, 2017 Finding and Dismissal of Thomas J. Mullins, the Commissioner acting for the Fifth District, was heard May 25, 2018 before a Compensation Review Board panel consisting of Commission Chairman Stephen M. Morelli and Commissioners Jodi M. Gregg and David W. Schoolcraft.[1]

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

OPINION

STEPHEN M. MORELLI, CHAIRMAN. In this appeal, we are being asked to determine whether, in a third-party action as contemplated by the provisions of General Statutes § 31-293, a respondent's written notice of lien must be sent directly to the named defendant in the third-party lawsuit, or whether sending such notice to legal counsel representing the interests of the third-party defendant is also valid. [2] In the Finding and

[2] General Statutes § 31-293 states (as of all dates relevant to this claim): "(a) When any injury for which compensation is payable under the provisions of this chapter has been sustained under circumstances creating in a person other than an employer who has complied with the requirements of subsection (b) of section 31-284, a legal liability to pay damages for the injury, the injured employee may claim compensation under the provisions of this chapter, but the payment or award of compensation shall not affect the claim or right of action of the injured employee against such person, but the injured employee may proceed at law against such person to recover damages for the injury; and any employer or the custodian of the Second Injury Fund, having paid, or having become obligated to pay, compensation under the provisions of this chapter may bring an action against such person to recover any amount that he has paid or has become obligated to pay as compensation to the injured employee. If the employee, the employer or the custodian of the Second Injury Fund brings an action against such person, he shall immediately notify the others, in writing, by personal presentation or by registered or certified mail, of the action and of the name of the court to which the writ is returnable, and the others may join as parties plaintiff in the action within thirty days after such notification, and, if the others fail to join as parties plaintiff, their right of action against such person shall abate. In any case in which an employee brings an action against a party other than an employer who failed to comply with the requirements of subsection (b) of section 31-284, in accordance with the provisions of this section, and the employer is a party defendant in the action, the employer may join as a party plaintiff in the action. The bringing of any action against an employer shall not constitute notice to the employer within the meaning of this section. If the employer and the employee join as parties plaintiff in the action and any damages are recovered, the damages shall be so apportioned that the claim of the employer, as defined in this section, shall take precedence over that of the injured employee in the proceeds of the recovery, after the deduction of reasonable and necessary expenditures, including attorneys' fees, incurred by the employee in effecting the recovery. The rendition of a judgment in favor of the employee or the employer against the party shall not terminate the employer's obligation to make further compensation which the commissioner thereafter deems payable to the injured employee. If the damages, after deducting the employee's expenses as provided in this subsection, are more than sufficient to reimburse the employer, damages shall be assessed in his favor in a sum sufficient to reimburse him for his claim, and the excess shall be assessed in favor of the injured employee. No compromise with the person by either the employer or the employee shall be binding upon or affect the rights of the other, unless assented to by him. For the purposes of this section, the claim of the employer shall consist of (1) the amount of any compensation which he has paid on account of the injury which is the subject of the suit and (2) an amount equal to the present worth of any probable future payments which he has by award become obligated to pay on account of the injury. The word 'compensation,' as used in this section, shall be construed to include incapacity payments to an injured employee, payments to the dependents of a deceased employee, sums paid out for surgical, medical and hospital services to an injured employee, the burial fee provided by subdivision (1) of subsection (a) of section 31-306, payments made under the provisions of sections 31-312 and 31-313, and payments made under the provisions of section 31-284b in the case of an action brought under this section by the employer or an action brought under this section by the employee in which the employee has alleged and been awarded such payments as damages. Each employee who brings an action against a party in accordance with the provisions of this subsection

Dismissal (finding) issued by Commissioner Thomas J. Mullins (commissioner), the commissioner determined that the respondent-insurer, Liberty Mutual (Liberty) never mailed its notice of lien directly to the named defendant. From that, the commissioner concluded Liberty had never perfected its lien on the proceeds of the third-party settlement and dismissed its bid for reimbursement.

Liberty argues that it provided the defendant (tortfeasor) proper and timely notice by mailing the notice of lien to the attorney representing her in that third-party action, and that this notice was sufficient to preserve its claim for reimbursement. Liberty also contends that the provisions of General Statutes § 31-321 do not apply to third-party defendants.[3] Liberty also notes that in Schreck v. Stamford, 250 Conn. 592 (1999), our Supreme Court held that notice to a party's attorney is sufficient to serve as notice to the party. Finally, Liberty points to our policy against double recovery, and contends that such a double recovery would occur if the claimant were to retain the entire amount of the settlement. We find Liberty's arguments persuasive and we therefore reverse and vacate the finding.

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shall include in his complaint (A) the amount of any compensation paid by the employer or the Second Injury Fund on account of the injury which is the subject of the suit and (B) the amount equal to the present worth of any probable future payments which the employer or the Second Injury Fund has, by award, become obligated to pay on account of the injury. Notwithstanding the provisions of this subsection, when any injury for which compensation is payable under the provisions of this chapter has been sustained under circumstances creating in a person other than an employer who has complied with the requirements of subsection (b) of section 31-284, a legal liability to pay damages for the injury and the injured employee has received compensation for the injury from such employer, its workers' compensation insurance carrier or the Second Injury Fund pursuant to the provisions of this chapter, the employer, insurance carrier or Second Injury Fund shall have a lien upon any judgment received by the employee against the party or any settlement received by the employee from the party, provided the employer, insurance carrier or Second Injury Fund shall give written notice of the lien to the party prior to such judgment or settlement."

[3] General Statutes § 31-321 states: "Unless otherwise specifically provided, or unless the circumstances of the case or the rules of the commission direct otherwise, any notice required under this chapter to be served upon an employer, employee or commissioner shall be by written or printed notice, service personally or by registered or certified mail addressed to the person upon whom it is to be served at the person's last-known residence or place of business. Notices on behalf of a minor shall be given by or to such minor's parent or guardian or, if there is no parent or guardian, then by or to such minor."

The commissioner reached the following findings of fact at the conclusion of the formal hearing. He found that the claimant had been injured in a work-related motor vehicle collision on August 5, 2008, and filed a form 30C on September 17, 2008. Both the claimant's employer and Liberty obtained police reports for the August 5, 2008 incident. The claimant's injuries to his neck and lower back were accepted as compensable by the respondents and a jurisdictional voluntary agreement was approved for this claim on February 14, 2011.

On October 26, 2009, the claimant brought a lawsuit in the third-party action entitled Shkelqim Letaj v. Ann Denny, UWY-CV-09-5015530-S. On November 9, 2009, the claimant, pursuant to the provisions of § 31-293, sent a certified letter to the respondent-employer, ATMI, Incorporated, which correspondence was received on November 13, 2009. The respondents did not intervene in the third-party action. On February 8, 2010, Liberty sent, via certified mail, correspondence asserting a lien to Denny's counsel, James McKenna.[4] See Findings, ¶ 13. The return receipt for the certified mail was signed for on February 9, 2010. On April 29, 2015, the third-party action brought by the claimant against Denny settled for the sum of $125,000. See Joint Exhibit 1, ¶ 8.

At the time of the third-party settlement, Liberty had paid workers' compensation insurance benefits on behalf of the claimant in the total amount of $46,088.41, consisting of $15,537.94 in medical benefits and $30,550.47 in indemnity benefits. See Joint

[4] Although the commissioner's award did not so state, the February 8, 2010 letter in which the respondents asserted their statutory lien rights was sent to the tortfeasor's counsel, James McKenna, Esq., Law Office of Mark Gilcreast, 2319 Whitney Avenue, Suite 3A, Hamden, CT 06518-3509. See Respondents' Exhibit 2. The respondents sought corrections to add this fact to the findings but the proposed corrections were denied without explanation. Since this fact was not disputed, and since it was essential to the respondents' argument that it sent proper notice of lien, the correction ought to have been granted.

Exhibit 1, ¶ 12; Respondents' Exhibits 4, 5. The respondents acknowledged that the November 9, 2009 letter from the claimant complied with the requirements of § 31-293 and put them on notice of the third-party lawsuit. Liberty also sent two letters by regular mail to Allstate Insurance Company before the claimant brought the third-party lawsuit on October 26, 2009, but never sent any letters directly to Denny, although it had actual knowledge of her address information in the police report.

Based on the foregoing, the commissioner concluded as follows:

> A. The Respondents did not send a perfected lien letter to the tortfeasor, intervene in the third party case, or file its own third party case per Connecticut General Statutes § 31-293.
>
> B. The Respondents' claim for a lien on the third party settlement is **DENIED** and **DISMISSED.** (Emphasis in the original.)

Conclusion, ¶¶ A, B.

The respondents filed a motion for articulation and a motion to correct, both of which were denied. The respondents then filed this appeal, asserting that the commissioner erred in concluding that the respondents' correspondence to the tortfeasor's attorney did not comply with the notice provisions of § 31-293. The claimant contends that the commissioner's conclusions were not erroneous because the plain language of the statute references only "parties" and the respondents never sent a notice directly to the tortfeasor. Having reviewed the record in this matter, we find the respondents' arguments more persuasive.

The factual findings in this matter are not the subject of a substantive dispute. We will therefore focus our review on whether the commissioner appropriately applied the law. "As with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the

trial court could have reasonably concluded as it did." Burton v. Mottolese, 267 Conn. 1, 54 (2003), *quoting* Thalheim v. Greenwich, 256 Conn. 628, 656 (2001). "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); see also Neville v. Baran Institute of Technology, 5383 CRB-8-08-10 (September 24, 2009).

We note that at oral argument before our tribunal, the applicability of § 31-321 was raised as an issue. Having reviewed the relevant case law on this statute, in particular Verrinder v. Matthew's Tru Colors Painting & Restoration, 4936 CRB-4-05-4 (December 6, 2006), *appeal dismissed*, A.C. 28367 (July 25, 2007), and Walter v. State, 63 Conn. App. 1 (2001), we do not believe that statute applies here. In Walter, the appellant argued that a disclaimer was inadequate when it was addressed to the deceased employee and not the surviving dependent claimants. However, the Appellate Court held that "[t]he statutes at issue do not expressly provide for notice to 'claimants.'" Id., 8. In addition, since § 31-321 mandates only the manner of serving notice to "an employer, employee or commissioner," and since the tortfeasor was none of these enumerated individuals, we reject the claimant's reliance on a Superior Court case, 3 Brothers Services, LLC v. Spa Associates, LLC, Superior Court, judicial district of New Haven, Docket No. CV-13-6043552-S (May 2, 2014), and deem § 31-321 inapplicable to these facts.[5]

[5] In 3 Brothers Services, LLC v. Spa Associates, LLC, Superior Court, judicial district of New Haven, Docket No. CV-13-6043552-S (May 2, 2014), the judge determined that the employer, who had commenced a suit against a third-party defendant for recovery of advanced compensation payments, had failed to properly notice the employee. As "employee" is among the individuals enumerated under General

The respondents note that in order to perfect a lien, the provisions of § 31-293 require that a written lien notice must be served upon "the party" of a third-party action prior to such judgment or settlement; however, they also contend that service upon the party's counsel is sufficient to comply with this statute. They rely upon Schreck, supra, in support of this position and we agree. In Schreck, the trial commissioner, after issuing his finding, sent a copy of the finding to the claimant's attorney. The claimant argued that pursuant to the provisions of General Statutes §§ 31-300 and 31-301 (a), mailing a notice to a party's attorney did not trigger the statute of limitations for filing an appeal. Our Supreme Court stated that:

> Section 31-300 provides that "the commissioner shall send to each *party* a written copy of his findings and award"; (emphasis added) and § 31-301 (a) provides that "either *party* may appeal"; (emphasis added) from an adverse decision of the commissioner. The defendant contends, however, that a literal construction of these statutory provisions … is inconsistent with the overarching purpose of the Workers' Compensation Act…. (Emphasis in the original.)

Schreck, supra, 596.

The court determined that "[a]lthough §§ 31-300 and 31-301 (a) speak in terms of parties, that fact alone is not dispositive." Id., 597. The court further concluded that:

> Because the consequences of the strict construction of § 31-301 (a) advanced by the plaintiff would be contrary to the overriding purpose of the act -- to promote the efficient and speedy resolution of claims involving employment-related injuries -- we reject such a construction and conclude that, in cases in which a party is represented by counsel, the ten day appeal period commences when notice of the commissioner's decision is sent to the party's counsel, rather than to the party.

Id., 597-598.

Statues § 31-321, and the third-party defendant is not among those individuals, we may therefore distinguish 3 Brothers from the case at bar on both the law and on the facts.

The Supreme Court "rejected" the prior conclusion of the Appellate Court, which had held that notice to a party, and not counsel, was required to commence the appeal period. Id., 601.

The claimant argues that, notwithstanding the holding of Schreck, supra, we are bound by the plain meaning of the provisions of § 31-293 and must hold that only notice to "a party" constitutes compliance with the statute sufficient to preserve the respondents' lien. We find this argument is inconsistent with our Supreme Court's reasoning in Hummel v. Marten Transport, Ltd., 282 Conn. 477 (2007), in which the court held that the enactment of the "plain meaning" statute for statutory interpretation, General Statutes § 1-2z, was not "intended to overrule every other case in which our courts, prior to the passage of § 1-2z, had interpreted a statute in a manner inconsistent with the plain meaning rule, as that rule is articulated in § 1-2z." Id., 501.

The Finding and Dismissal in this matter clearly violates long-standing public policy prohibiting double recovery in compensation cases. The claimant, in reliance upon Libby v. Goodwin Pontiac, 13 Conn. Workers' Comp. Rev. Op. 182, 1637 CRB-2-93-2 (March 21, 1995), *aff'd*, 241 Conn. 170 (1997), argues that absent strict compliance with the lien statute, a respondent loses its ability to assert a lien against the proceeds obtained in a judgment or a settlement against a third-party tortfeasor. However, we find that the facts in this matter are not congruent with the factual circumstances in Libby, supra, in which "the employer never attempted to avail itself of its rights under § 31-293."[6] Id., 184.

[6] Further arguing against reliance on the precedent in Libby v. Goodwin Pontiac, supra, is the fact that our decision was based on the version of General Statutes § 31-293 (a) in effect as of the date of injury in that case, which predated the version enacted by the General Assembly in 1993 in force as of the date of the claimant's injury in this case. As our Supreme Court noted in Libby v. Goodwin Pontiac-GMC Truck Inc.,

In the matter at bar, Liberty attempted to protect its interests, and the issue for determination is whether the actions taken were adequate to protect its interests. In considering that issue, we note that our Supreme Court has recently and forcefully restated the public policy argument against double recovery. In Gill v. Brescome Barton, Inc., 317 Conn. 33 (2015), the court affirmed a decision that a claimant rendered disabled by separate contemporaneous surgeries should not receive two separate indemnity benefits.

> The parties do not dispute, however, that such an approach would have violated our state's long-standing general prohibition on double recoveries for claimants. See, e.g., Enquist v. General Datacom, 218 Conn. 19, 26, 587 A.2d 1029 (1991) ("[o]ne of the purposes of the workers' compensation statute is the avoidance of two independent compensations for the injury" [internal quotation marks omitted]); see also id., 26 n.6 ("[t]he policy of avoiding double recovery is a strong one, and has on occasion been invoked to override a result that might be thought required by a literal or technical interpretation of statutes" [internal quotation marks omitted]).

Id., 44-45.

The notice of lien required by the statute is not notice to the claimant (who already knows of the employer's payments and recovery rights), but notice to the tortfeasor. Absent such notice, the tortfeasor has no way of knowing that it must, when settling its liability with the claimant, consider the interests of another party or face additional liability. Once it is agreed how much the tortfeasor should pay for the injury it caused the claimant, the allocation of that sum is dictated by statute. So long as the tortfeasor is notified as to what it must do to protect its interests, the claimant is in no way affected by the manner in which the tortfeasor was given that notice.

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241 Conn. 170 (1997), the statute at that time required a respondent to actually intervene in a third-party lawsuit to protect its interests. Id. n.6. The revisions to § 31-293 (a) enacted in 1993 enable a respondent to protect its lien by providing written notice to the third party. Id. n.7.

In light of the circumstances in the present matter, we believe that the decision to send a lien letter pursuant to § 31-293 to counsel for the third-party defendant was "reasonably calculated" to notify the defendant that Liberty was asserting its statutory lien rights. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318 (1950). In fact, once an action is filed and counsel for the tortfeasor has appeared, all uncertainty is eliminated by directing the notice to counsel -- the person in the best position to recognize the import of the notice and to act accordingly.

We are not persuaded by the proposition that any other statute mandated a different form of notice when asserting statutory lien rights. Schreck, supra, clearly indicates that mailing a notice to a party's counsel is sufficient to serve as notice to the party itself. Were this board to conclude that Liberty failed to perfect its lien rights in this matter by sending notice to the tortfeasor's counsel, such a decision would result in a double recovery for the claimant, which in turn would contravene the well-established policy under Chapter 568 of avoiding double recovery. Given that the commissioner's decision results in an outcome which is hostile to public policy and inconsistent with statutory authority, we vacate the Finding and Dismissal.

Commissioners Jodi M. Gregg and David W. Schoolcraft concur in this opinion.