CASE NO. 6324 CRB-2-19-5 CLAIM NO. 200189088	:	COMPENSATION REVIEW BOARD
JOSÉ DEJESUS CLAIMANT-APPELLEE	:	WORKERS' COMPENSATION COMMISSION
v.	:	APRIL 29, 2020

R.P.M. ENTERPRISES, INC. AND/OR
ROBERT M. MARION, SR.
EMPLOYERS
NO RECORD OF INSURANCE
RESPONDENTS-APPELLANTS

and

SECOND INJURY FUND
RESPONDENT-APPELLEE

APPEARANCES:

The claimant was represented by Lori M. Comforti, Esq., Law Office of Lori M. Comforti, L.L.C., 108 Sachem Street, Norwich, CT 06360.

Respondents R.P.M Enterprises, Inc. and/or Robert M. Marion, Sr., were represented by Robert M. Fitzgerald, Esq., Robert M. Fitzgerald Attorney at Law, 22 North Street, Willimantic, CT 06226.

Respondent Second Injury Fund was represented by Patrick G. Finley, Esq., Assistant Attorney General, Office of the Attorney General, 165 Capitol Avenue, Suite 4000, Hartford, CT 06106-1668.

This Petition for Review from the April 23, 2019 Finding and Award by Peter C. Mlynarczyk, the Commissioner acting for the Second District, was heard January 31, 2020 before a Compensation Review Board panel consisting of Commission Chairman Stephen M. Morelli and Commissioners Randy L. Cohen and William J. Watson III.

OPINION

STEPHEN M. MORELLI, CHAIRMAN. The respondent-employers petitioned for review from the April 23, 2019 Finding and Award [hereafter "Finding"] issued by Commissioner Peter C. Mlynarczyk acting for the Second District. In that Finding, the trial commissioner concluded, inter alia, that the claimant sustained a compensable injury on December 9, 2013, for which he was entitled to temporary total disability benefits and payment for medical bills. The trier held that R.P.M. Enterprises, Inc. and/or Robert M. Marion, Sr. were uninsured employers on the date of the injury and were "jointly and severally" liable for the benefits awarded in the Finding. Conclusion, ¶ B. The trier also imposed a civil penalty pursuant to General Statutes § 31-288 (c) based on the employers' failure to carry workers' compensation insurance as required under the Act.[1]

Before reviewing the issues presented in this appeal, we note that issues relating to this claim were previously considered by this board in DeJesus v. R.P.M. Enterprises, Inc., 6201 CRB-1-17-7 (November 8, 2018) [hereafter "DeJesus I"]. The appeal in DeJesus I sought review of Commissioner Ernie R. Walker's[2] June 16, 2017 Finding Re: Subject Matter Jurisdiction[3] [hereafter "2017 Finding"]. In that decision, Commissioner Walker was presented with a number of issues and ultimately decided that the issues should be bifurcated. Chief among the issues raised was that the claim should be

[1] In the Finding, the commissioner ordered the respondent-employers to pay a civil penalty of Fifty Thousand Dollars.
[2] Commissioner Ernie R. Walker has since retired from the Workers' Compensation Commission.
[3] There were a number of other issues that were before Commissioner Walker. However, those issues were bifurcated and Commissioner Walker's conclusion in DeJesus I was limited to whether the claimant satisfied the medical care exception pursuant to General Statutes § 31-294c (a), thereby obviating the requirement to file a timely written notice of claim.

time-barred as the claimant failed to comply with the written notice requirements or the constructive notice provisions of General Statutes § 31-294c (a).[4]

Commissioner Walker concluded the claimant satisfied the medical care exception to the requirement of written notice. He also decided the claimant was an employee and "not an independent contractor because he was subject to the control and direction of R.P.M and/or Marion, Sr." DeJesus I, p. 7. Having concluded the jurisdictional concerns as to the timeliness of the claim in the claimant's favor, Commissioner Walker "ordered additional proceedings to discuss issues pertaining to the merits of the underlying claim." Id.

Although, the respondent-employers took a timely appeal from the 2017 Finding, they did not file a motion to correct as part of their appellate prosecution in DeJesus I.[5]

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[4] General Statutes § 31-294c (a) states: "No proceedings for compensation under the provisions of this chapter shall be maintained unless a written notice of claim for compensation is given within one year from the date of the accident or within three years from the first manifestation of a symptom of the occupational disease, as the case may be, which caused the personal injury, provided, if death has resulted within two years from the date of the accident or first manifestation of a symptom of the occupational disease, a dependent or dependents, or the legal representative of the deceased employee, may make claim for compensation within the two-year period or within one year from the date of death, whichever is later. Notice of claim for compensation may be given to the employer or any commissioner and shall state, in simple language, the date and place of the accident and the nature of the injury resulting from the accident, or the date of the first manifestation of a symptom of the occupational disease and the nature of the disease, as the case may be, and the name and address of the employee and of the person in whose interest compensation is claimed. An employee of the state shall send a copy of the notice to the Commissioner of Administrative Services. An employee of a municipality shall send a copy of the notice to the town clerk of the municipality in which he or she is employed. An employer, other than the state or a municipality, may opt to post a copy of where notice of a claim for compensation shall be sent by an employee in the workplace location where other labor law posters required by the Labor Department are prominently displayed. In addition, an employer, opting to post where notice of a claim for compensation by an employee shall be sent, shall forward the address of where notice of a claim for compensation shall be sent to the Workers' Compensation Commission and the commission shall post such address on its Internet web site. An employer shall be responsible for verifying that information posted at a workplace location is consistent with the information posted on the commission's Internet web site. If an employee, other than an employee of the state or a municipality, opts to mail to his or her employer the written notice of a claim for compensation required under the provisions of this section, such written notice shall be sent by the employee to the employer by certified mail. As used in this section, "manifestation of a symptom" means manifestation to an employee claiming compensation, or to some other person standing in such relation to him that the knowledge of the person would be imputed to him, in a manner that is or should be recognized by him as symptomatic of the occupational disease for which compensation is claimed."

[5] The DeJesus I reasons for appeal, filed July 17, 2017, sought review of the following:

In its opinion in DeJesus I, the Compensation Review Board affirmed Commissioner Walker's conclusion that the claimant satisfied the medical care exception to a written notice of claim.

Many of the same issues for which the appellants sought review in DeJesus I have been re-articulated for consideration here.[6] In response to the respondent-employers' reasons for appeal filed in this matter, the claimant filed a motion to dismiss reasons for appeal.[7] We agree that a number of issues presented here are merely the substantive

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1. [Whether] "the trial Commissioner erred in concluding that the evidence supported that the claimant was an employee of respondent R.P.M. Enterprises, Inc. on the date of the alleged injury.
2. [Whether] the trial Commissioner erred in concluding that the evidence supported that the claimant was an employee of Robert Marion, on the date of the alleged injury.
3. [Whether] Robert Marion was denied procedural due process in violation of the state and federal constitutions by the Commissioner's decision to find against him personally without proper notice.
4. [Whether] the trial Commissioner erred in concluding that the claimant's claim against the respondent R.P.M. Enterprises, Inc. was not barred by the statute of non-claim.
5. [Whether] the trial Commissioner erred in concluding that, in the event that the claimant was an employee of Robert Marion, that his claim was not barred by the statute of non-claim.
6. [Whether] the trial Commissioner erred in bifurcating the formal hearing when neither the question of non-claim nor the question of employment relationship could not be resolved without considering the compensability of the claimant's claim.
7. [Whether] the trial Commissioner erred in holding, on the basis of the evidence, that the claimant was not an independent contractor but that he was rather the employee of either or both of R.P.M. Enterprises, Inc. and/or Robert Marion."

[6] The reasons for appeal dated and filed May 7, 2019, with the Compensation Review Board for the instant matter, sought review of the following:
1. [Whether] "the Commissioner erred in finding that the claimant was an employee of all RPM.
2. [Whether] the Commissioner erred in finding that the claimant was an employee of Marion.
3. [Whether] the Commissioner erred in finding that RPM and Marion were alter egos.
4. [Whether] the Commissioner erred in finding that RPM furnished medical care to the claimant so as to excuse his failure to file a timely Notice of Claim.
5. [Whether] the Commissioner erred in finding that Marion furnished medical care to the claimant so as to excuse his failure to file a timely Notice of Claim.
6. [Whether] the Commissioner erred in finding that the claimant sustained an injury arising out of and in the course of employment with RPM.
7. [Whether] the Commissioner erred in finding that the claimant sustained an injury arising out of and in the course of employment with Marion.
8. [Whether] the Commissioner erred in entering an order that RPM pay a $50,000 penalty.
9. [Whether] the Commissioner erred in entering an order that Marion pay a $50,000 penalty.
10. [Whether] in the event that the Commissioner denies the motion to correct in all or in part, Marion and RPM assign that as a reason for appeal as well."

[7] The motion to dismiss reasons for appeal filed by the claimant on May 13, 2019, was heard and the subject of the board's October 22, 2019 ruling re: motion to dismiss respondents' reasons for appeal. The essence of the board's ruling was "whether the issues raised by the appellant, and to which the appellee objects to the board's consideration, are subject to principles of res judicata/collateral estoppel are more appropriately considered when the appeal is heard as a whole."

re-articulation of issues that were heard and decided in DeJesus I. We believe that one through five and seven set out in the respondent-employers' reasons for appeal filed May 7, 2019 (see footnote 6) are, for all intents and purposes, a re-utterance of issues raised in DeJesus I. In DeJesus I, this board held that there was sufficient evidence to affirm Commissioner Walker's 2017 Finding. Our opinion in DeJesus I held that Commissioner Walker did not err in finding and concluding; the claimant was an employee who suffered a compensable injury, the claim was not time-barred and, liability also attached to Robert Marion Sr., in addition to R.P.M. under what was, in effect, a piercing of the corporate veil.[8]

The board also concluded the proceedings before Commissioner Walker did not violate the respondent-employers' due process rights as "both R.P.M. and Marion, Sr., were on notice regarding the possible remedies under consideration." Id. It was not improper for the Commissioner to bifurcate the proceedings. Nor was it improper to

[8] In DeJesus I, the board considered whether there was a sufficient evidentiary basis for the commissioner to, in effect, "pierce the corporate veil' and find Marion, Sr., responsible in an individual capacity."

Although we concede that specific findings by the trial commissioner with regard to piercing the corporate veil would have been beneficial, we deem their absence harmless error, particularly as there was no motion to correct. (Citations omitted.) As such, we will review the appropriate legal standard to ascertain if the evidence in the record supports the commissioner's decision.

"In Naples v. Keystone Building & Development Corp., 295 Conn. 214 (2010), our Supreme Court observed that '[c]ourts will ... disregard the fiction of a separate legal entity to pierce the shield of immunity afforded by the corporate structure in a situation in which the corporate entity has been so controlled and dominated that justice requires liability to be imposed on the real actor....' Id., 231, *quoting* Angelo Tomasso Inc. v. Armor Construction & Paving, Inc., 187 Conn 544, 552 (1982). 'Whether the circumstances of a particular case justify the piercing of the corporate veil "presents a question of fact. Id., 234, *quoting* Angelo Tomasso Inc., supra, 561.'"

DeJesus I, supra.

permit the Second Injury Fund to fully participate and litigate its interests in advance of an order of payment pursuant to General Statutes § 31-355.[9]

The claimant argues that the theories of claim preclusion and issue preclusion (res judicata and collateral estoppel, respectively) bar the respondent-employers from challenging the issues that were heard and decided by Commissioner Walker in the 2017 Finding and considered by this tribunal in DeJesus I. We agree.

In Sellers v. Work Force One, Inc., 92 Conn. App. 683 (2005), the claimant sought to reassert a claim for symptoms stemming from an alleged injury that was previously heard and dismissed. Our Appellate Court stated that the doctrines of res judicata and collateral estoppel are closely related and,

> based on the public policy that a party should not be able to relitigate a matter that it already has had a fair and full opportunity to litigate." In re Application for Writ of Habeas Corpus by Dan Ross, 272 Conn. 653, 661, 866 A.2d 542 (2005). Despite being close cousins, those doctrines "are not alternate expressions of the same.... [C]ollateral estoppel operates to bar the reassertion of an issue already fully litigated, [while] res judicata precludes one from raising causes of action, facts or issues that either already

[9] General Statutes § 31-355 provides in pertinent part: "(a) The commissioner shall give notice to the Treasurer of all hearing of matters that may involve payment from the Second Injury Fund and may make an award directing the Treasurer to make payment from the fund.
(b) When an award of compensation has been made under the provisions of this chapter against an employer who failed, neglected, refused or is unable to pay any type of benefit coming due as a consequence of such award or any adjustment in compensation required by this chapter, and whose insurer failed, neglected, refused or is unable to pay the compensation, such compensation shall be paid from the Second Injury Fund. The commissioner, on a finding of failure or inability to pay compensation, shall give notice to the Treasurer of the award, directing the Treasurer to make payment from the fund. Whenever liability to pay compensation is contested by the Treasurer, the Treasurer shall file with the commissioner, on or before the twenty-eighth day after the Treasurer has received an order of payment from the commissioner, a notice in accordance 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. A copy of the notice shall be sent to the employee. The commissioner shall hold a hearing on such contested liability at the request of the Treasurer or the employee in accordance with the provisions of this chapter. If the Treasurer fails to file the notice contesting liability within the time prescribed in this section, the Treasurer shall be conclusively presumed to have accepted the compensability of such alleged injury or death from the Second Injury Fund and shall have no right thereafter to contest the employee's right to receive compensation on any grounds or contest the extent of the employee's disability."

> were adjudicated or could have been litigated fully in a prior action between the same parties or those in privity with them." Trinity United Methodist Church of Springfield, Massachusetts v. Levesque, 88 Conn. App. 661, 671, 870 A.2d 1116, *cert. denied*, 274 Conn. 907, 908 (2005).

Id., 685-687.

Given the respondent-employers' defense that the claim was time-barred, the 2017 Finding required the trial commissioner to determine if the respondent-employers provided medical care within one year from the date of the injury, thereby obviating the need for written notice as required pursuant to General Statutes § 31-294c (c). Again, the 2017 Finding found that the claim was not time-barred.

As to the appropriateness of applying the doctrine of collateral estoppel, we note that:

> [C]ollateral estoppel, or issue preclusion, is that aspect of res judicata that prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties or those in privity with them upon a different claim.... 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. (Citations omitted; emphasis in original; internal quotation marks omitted.)

Efthimiou v. Smith, 268 Conn. 499, 506–507 (2004).

We, therefore, must determine; if the determinations in the prior proceedings were the result of litigation "between the same parties or those in privity with them….", whether the litigation in the prior proceedings concerned issues submitted for determination, and whether the conclusion (judgment) reached in that litigation would not be valid without determination of the issue(s) to which issue preclusion may be applied in the matter at hand. Id. Each of these elements were satisfied. The respondent-employers

are therefore precluded from the review of issue(s) that were determined in the 2017 Finding and appealed to this board, and were the subject of review in DeJesus I.

It should be noted that Commissioner Mlynarczyk stated in his finding, "[n]o additional evidence or testimony was entered into the record on March 13, 2019. The parties agreed that the record in the prior proceedings before Commissioner Walker would be the record for purposes of the findings made herein and would be incorporated by reference."[10] In the matter at hand, the respondent-employers filed a motion to correct which in part asks that Commissioner Mlynarczyk's finding, referenced above, be corrected to read, "[t]here was no testimony at the March 13, 2019 hearing but the parties stipulated that the claimant had an injury which, if compensable, fell within CGS section

[10] Our review of the transcript reflects the following colloquy. March 13, 2019 Transcript, pp. 5-6.

COMMISSIONER MLYNARCZYK: "And then compensability, which has not yet been found. I refer back to a Formal hearing and an appeal to the CRB of a Formal hearing held by Commissioner Walker, wherein he made findings of employer/employee relationship and jurisdiction, but did not continue on to the issue of compensability.

We also have the issue of medical treatment and medical bills, as well as, total incapacity benefits and uninsured employer; is that a correct recitation of the issues before me today?

MS. COMFORTI: Yes, Commissioner.
MR. FITZGERALD: Yes.
MR. FINLEY: Yes, Commissioner.

COMMISSIONER MLYNARCZYK: Thank you. Now, with respect to the issue of whether there were other employees during the uninsured period of time on the civil penalty that attaches, thereto, I'm bifurcating that issue. I'm not dealing or addressing that today that would require additional evidence and an additional hearing. So, I believe we're all on board with that.

As to the remaining issues, given that there was extensive evidence and testimony in the prior proceeding, it's my understanding that the parties stipulate to the fact that I may adopt the record of the prior proceeding for purposes of evidence and testimonial, I'm sorry, testimony and evidence with regard to the issues before me today; is that correct?

MS. COMFORTI: Yes, Commissioner.
MR. FITZGERALD: Yes, Commissioner.
MR. FINLEY: Yes, Commissioner

COMMISSIONER MLYNARCZYK: Thank you. And Attorney Fitzgerald, we had a discussion off the record as to the Claimant's extent of injury and with specific reference to the Connecticut General Statute Section 31-307 (c) (5). I believe, you stated that you were in agreement that the Claimant has paralysis in his legs and falls within the definition of that.

Mr. Fitzgerald: That's correct, Commissioner."

31-307(c) (5) (Hearing of March 13, 2019)." Respondent-Employers' Motion to Correct, dated and filed May 7, 2019, p. 1. We fail to see how the finding, even were it to accord with that change suggested by the respondent-employers, would compel a different outcome. The remaining corrections sought to cite from "transcripts of all sessions of the formal hearings and the exhibits received therein" for support of their position. Respondent-Employers' motion to correct, p. 1.[11]

Our review of the motion to correct; (i) indicates it is nothing more than the preferred findings of the respondent-employers, (ii) seeks corrections which procedurally should have been requested following Commissioner Walker's 2017 Finding[12], (iii) fails to provide a specific citation to where in the record support for the requested finding is found, and/or, (iv) the adoption of the suggested correction would not compel a different outcome. See e.g. Diaz v. Dept. of Social Services, 184 Conn. App. 538 (2018), *cert. denied*, 330 Conn. 971 (2019); Ayna v. Graebel Movers, Inc., 133 Conn. App 65 (2012), *cert. denied*, 304 Conn. 905 (2012); and Ayna v. Graebel/CT Movers, Inc., 6214 CRB 7-17-8 (March 6, 2019). We therefore conclude that the commissioner did not err in his denial of the motion to correct.

The respondent-employers also argue that they should not be collaterally estopped from raising issues heard and decided by the board in DeJesus I. Under their theory,

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[11] The respondent-employers' motion to correct filed May 7, 2019, is not paginated. The page numbers referenced were supplied by the board.

[12] See Administrative Regulations § 31-301-4.
"If the appellant desires to have the finding of the commissioner corrected he must, within two weeks after such finding has been filed, unless the time is extended for cause by the commissioner, file with the commissioner his motion for the correction of the finding and with it such portions of the evidence as he deems relevant and material to the corrections asked for, certified by the stenographer who took it, but if the appellant claims that substantially all the evidence is relevant and material to the correction sought, he may file all of it so certified, indicating in his motion so far as possible the portion applicable to each correction sought. The commissioner shall forthwith, upon the filing of the motion and of the transcript of the evidence, give notice to the adverse party or parties."

DeJesus I was not a final judgment. In the objection and brief with regard to their motion to dismiss reasons for appeal, the employer-respondents argue that they were under no obligation to appeal the board's ruling in DeJesus I. They also argue that General Statutes § 31-301b states, "Any party aggrieved by the decision of the Compensation Review Board upon any question or questions of law arising in the proceedings may appeal the decision of the Compensation Review Board to the Appellate Court, whether or not the decision is a final decision within the meaning of section 4-183 or a final judgment within the meaning of section 52-263." Respondent-employers then posit that as the statute uses the term "may" the action of filing an appeal is discretionary and not mandatory, i.e., an aggrieved party may file an appeal with the Appellate Court but is under no obligation to do so.

The respondent-employers concede that language changes to § 31-301b as a result of Public Act 09-178[13] settled the question that appeals of the Compensation Review Board opinions to our Appellate Court were not dependent on the board reaching a final judgment. Therefore, it would seem the construction accorded to the term "may appeal" was not modified by the amending language of Public Act 09-178. Additionally, General Statutes § 31-301a states, "[a]ny decision of the Compensation Review Board, in the absence of an appeal therefrom, shall become final after a period of twenty days has expired from the issuance of notice of the rendition of the judgment or decision." (Emphasis ours.)

Our courts' have counseled:

[13] In fact, the only language Public Act 09-178 amended was to add "whether or not the decision is a final decision within the meaning of section 4-183 or a final judgment within the meaning of section 52-263" to the end of the Act.

> General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) Sena v. American Medical Response of Connecticut, Inc., 333 Conn. 30, 45–46, 213 A.3d 1110 (2019).

Rutter v. Janis, 334 Conn. 722, 730 (2020). See also Dechio v. Raymark Industries, Inc., 299 Conn. 376 (2010).

We believe the permissive use of "may" indicates that a party aggrieved by a decision of the Compensation Review Board is permitted to file an appeal. We also think General Statutes § 31-301b should be read together with § 31-301a.

> It … is well established that, [i]n cases in which more than one [statutory provision] is involved, we presume that the legislature intended [those provisions] to be read together to create a harmonious body of law ... and we construe the [provisions], if possible, to avoid conflict between them. (Internal quotation marks omitted.) State v. Victor O., 320 Conn. 239, 248–49, 128 A.3d 940 (2016).

Ives v. Commissioner of Motor Vehicles, 192 Conn. App. 587, 596 (2019).

Thus, the two statutes when read together indicate that an aggrieved party has the right to file an appeal but, if an appeal is not taken, the decision of the Compensation Review Board is final within twenty days. Any issues heard and decided in DeJesus I, for which the respondent-employers believed appellate review was appropriate, should have been appealed and presented to our Appellate Court. Therefore, the respondent-employers are collaterally estopped from review of any issues previously heard and decided in DeJesus I.[14]

[14] See footnotes 5 and 6, supra.

Assuming for the sake of argument that the doctrine of issue preclusion is not appropriate, and we make no such concession here, we believe that the doctrine of the law of the case applies to the findings and conclusions set out in the 2017 finding and relied on in the findings and conclusions at issue here. We assert that the doctrine of the law of the case is especially pertinent to the trier's conclusion that the claimant sustained a compensable injury while in the employ of the respondent-employers. As the Appellate Court stated in Bowman v. Jack's Auto Sales, 54 Conn. App. 289, 293–94 (1999):

> [The] [l]aw of the case should ... apply unless there are unusual circumstances, or a compelling reason ... that would render the doctrine inapplicable. These include (1) substantial new evidence introduced after the first review, (2) a decision of the Supreme Court after the first review that is inconsistent with the decision on that review, and (3) a conviction on the part of the second reviewing court that the decision of the first was clearly erroneous. (Citation omitted; internal quotation marks omitted.) Pagano v. Board of Education, 4 Conn. App. 1, 11, 492 A.2d 197, cert. denied, 197 Conn. 809, 499 A.2d 60 (1985). Accordingly, [w]here a matter has previously been ruled upon interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case, if it is of the opinion that the issue was correctly decided, in the absence of some new or overriding circumstance. (Internal quotation marks omitted.) Westbrook v. Savin Rock Condominiums Assn., Inc., 50 Conn. App. 236, 240, 717 A.2d 789 (1998).

Id.

We again reference Commissioner Mlynarczyk's statement in the April 2019 finding, "[n]o additional evidence or testimony was entered into the record on March 13, 2019. The parties agreed that the record in the prior proceedings before Commissioner Walker would be the record for purposes of the findings made herein and would be incorporated by reference." Id., p. 2.

In DeJesus I, we affirmed the trier's decision that the claimant was in the employ of the respondent-employers R.P.M. and/or Robert Marion on December 9, 2013. On that date the claimant was doing some mechanical work on a car. The car had been propped on its side. While removing an auto part from the car, the car became dislodged and fell on the claimant. Two co-workers of the claimant lifted the car off the claimant. Immediately the claimant reported he could not feel his legs. The co-workers then obtained a "wet old mattress, placed the claimant on the mattress, and drove him to a local hospital." Id., p. 5.

Whether the claimant sustained an injury that arose out of and in the course of employment, is a factual determination. As such, the conclusion derived will stand unless the facts as found are based on unreasonable or impermissible inferences, or without evidentiary support or contrary to applicable law. See Fair v People's Savings Bank, 207 Conn. 535 (1988). Our review of the evidentiary record before Commissioner Walker and upon which Commissioner Mlynarczyk relied, reflects that there is evidence supporting his conclusion that the claimant sustained a compensable injury. Specifically, the claimant, his spouse, and Robert Marion Sr., testified and the commissioner relied upon such testimony in reaching his conclusion. See Transcripts of April 12, 2016, September 27, 2016 and November 22, 2016. The weight accorded to the evidence in this case, and the testimony of these witnesses, is a matter within the purview of the commissioner and a conclusion drawn therefrom will be undisturbed unless it results in an abuse of discretion. We find no error.

The respondent-employers also seek review of whether the commissioner's imposition of a $50,000 penalty on the respondent-employers was in error. They argue

that the commissioner's imposition of the penalty did not comply with the procedure set out in § 31-288 (c).[15] The respondent-employers contend that § 31-288 (c) provides in pertinent part:

> Whenever an investigator in the investigations unit of the office of the State Treasurer, whether initiating an investigation at the request of the custodian of the Second Injury Fund, the Workers' Compensation Commission, or a commissioner, finds that an employer is not in compliance with the insurance and self-insurance requirements of subsection (b) of section 31-284, such investigator shall issue a citation to such employer requiring him to obtain insurance and fulfill the requirements of said section and notifying him of the requirement of a hearing before the commissioner and the penalties required under this subsection.

(Emphasis ours.) Brief of the Respondents/Appellants dated and filed November 29, 2019, p. 17.

In support of the contention the respondent-employers argue:

> There is no finding that the investigator filed an affidavit requesting a hearing no[r] that the Commissioner held a hearing within 30 days thereof. In addition, the notice of hearing did not list this as a possible matter to be considered. Further, the amount of the order of $50,000 is excessive in light of the lack of findings as to how many employees Marion and RPM allegedly employed both in the past and at the present time. These orders must be rescinded.

Id.

[15] General Statutes § 31-288 (c) provides: "Whenever an investigator in the investigations unit of the office of the State Treasurer, whether initiating an investigation at the request of the custodian of the Second Injury Fund, the Workers' Compensation Commission, or a commissioner, finds that an employer is not in compliance with the insurance and self-insurance requirements of subsection (b) of section 31-284, such investigator shall issue a citation to such employer requiring him to obtain insurance and fulfill the requirements of said section and notifying him of the requirement of a hearing before the commissioner and the penalties required under this subsection. The investigator shall also file an affidavit advising the commissioner of the citation and requesting a hearing on such violation. The commissioner shall conduct a hearing, after sufficient notice to the employer and within thirty days of the citation, wherein the employer shall be required to present sufficient evidence of his compliance with said requirements. Whenever the commissioner finds that the employer is not in compliance with said requirements he shall assess a civil penalty of not less than five hundred dollars per employee or five thousand dollars, whichever is less and not more than fifty thousand dollars against the employer."

We are not persuaded by this argument. Again, determining whether the employer has failed to comply with the mandatory workers' compensation insurance obligations set out in § 31-284(b) is a matter that is both a question of law and fact. While the provision of the statute upon which the respondent-employers rely does set out a procedure by which an investigation and employer's noncompliance may be initiated, we do not think the procedure is the only circumstance under which the factual predicate of noncompliance may be established. We note that at the November 22, 2016 session of the formal hearing the respondent-employer Robert Marion was asked whether he has workers' compensation insurance. His answer was, he does not know. See November 22, 2016 Transcript, p. 17. At one point in his testimony Marion is asked, "[s]o, you made the decision not to obtain Workers' Compensation Insurance on that day [December 9, 2013]; correct?" Mr. Marion replied, "[t]hat's correct." Id., p. 58.

We note that Mr. Marion's statement was made under oath. It would seem that the process outlined in § 31-288 (c), requiring a certified statement (affidavit) from an investigator, is to provide some greater indicia of the truth and veracity of the facts underlying the complaint. As to the complaint that the hearing was not conducted within thirty days as stated in § 31-288 (c), it is very clear that the bifurcation of matters has been reviewed and upheld in DeJesus I. Therefore, any aggrievement claimed as to the failure to have a hearing within thirty days is a non-issue. It strikes us that the respondent-employer's own words stated under oath, coupled with the earlier written statement of Second Injury Fund Special Investigator George Petropoulos, substantially complies with due process safeguards intended by the process outlined in § 31-288 (c) and supports the appropriateness of imposing a fine.

An overall review of the notices and the transcripts reflect that the respondent-employer should have been well aware that he was at jeopardy for the imposition of fines and sanctions for failing to carry workers' compensation insurance. Reviewing Marion Sr.'s participation in the formal hearing process we noted in DeJesus I that,

> Marion, Sr., was in attendance at the initial session of the formal hearing on April 12, 2016, and his company had retained legal counsel for this hearing. At that formal hearing, counsel for the Fund specially moved to add Marion, Sr., to the case in his "individual, personal capacity." See April 12, 2016 Transcript, pp. 13-14. Counsel for R.P.M. offered no objection.
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> We further note that at the September 27, 2016 session of the formal hearing, the trial commissioner indicated on the record that hearing notices had been sent to Marion, Sr., in his personal capacity, the Fund had served Marion, Sr., with a subpoena, counsel for R.P.M. had withdrawn from the case, and Marion, Sr., (or someone else on his behalf) had sent a text message to the Commission acknowledging the scheduling of the hearing but stating that medical issues would preclude his attendance. See September 27, 2016 Transcript, pp. 4-8. Marion, Sr., attended and extensively testified at the November 22, 2016 hearing, at which the inquiry largely focused on the manner in which Marion, Sr., managed the finances of R.P.M.

DeJesus I, p. 12.

The DeJesus I panel then stated:

> Under the totality of the circumstances, we are persuaded that Marion, Sr., had ample reason to believe he was potentially facing personal liability. The present matter is therefore consistent with Valiante v. Burns Construction Company, 5393 CRB-4-08-11 (October 15, 2009), in which "[a]ny confusion as to the scope of the issues and the remedy under consideration by the tribunal was clearly resolved on the record prior to the conclusion of the formal hearing." Id. As a result, we do not find that the trial commissioner's decision to attribute personal liability to Marion, Sr., constituted a due process violation.

Id.

Thus, R.P.M. and Marion either were or should have been aware of their exposure to fines and sanctions pursuant to § 31-288 (c). However, having said that, we are troubled by comments made by Commissioner Mlynarczyk at the hearing held March 13, 2019, Commissioner Mlynarczyk stated,

> Now, with respect to the issue of whether there were other employees during the uninsured period of time on the civil penalty that attaches, thereto, I'm bifurcating that issue. I'm not dealing or addressing that today that would require additional evidence and an additional hearing. So, I believe we're all on board with that.

March 13, 2019 Transcript, p. 5.

This comment by the trial commissioner might reasonably lead the respondent-employers to infer that the issue of the amount of the sanction to be imposed pursuant to § 31-288 (c) would be considered at another time. Therefore, we remand this matter so as to give the respondent-employers an opportunity to be heard on the issue of the amount imposed as a sanction for failure to carry workers' compensation insurance. See State of Connecticut v. Champagne, 3269 CRB-7-96-2 (June 24, 1997).

We therefore affirm and remand in part the April 23, 2019 Finding and Award by Peter C. Mlynarczyk, the Commissioner acting for the Second District. Our remand is limited to the question of the amount of the fine to be assessed pursuant to § 31-288 (c) for the failure of the respondent-employers to comply with the obligation to carry workers' compensation insurance.

Commissioners Randy L. Cohen and William J. Watson III concur.