CASE NO. 6332 CRB-7-19-5 : COMPENSATION REVIEW BOARD
CLAIM NO. 700161795

ANGEL TUBA SAQUIPAY : WORKERS' COMPENSATION
CLAIMANT-APPELLANT COMMISSION

v. : JANUARY 31, 2020

ALL SEASONS LANDSCAPING OF RIDGEFIELD, LLC
NO RECORD OF INSURANCE
EMPLOYER
RESPONDENT-APPELLEE

and

SECOND INJURY FUND
RESPONDENT-APPELLANT

APPEARANCES:

The claimant was represented by Meghan M. Lyon, Esq., and Philip F. Spillane, Esq., Hoekenga & Machado, L.L.C., 30 Bridge Street, Suite 102, New Milford, CT 06776.

Respondent All Seasons Landscaping of Ridgefield, L.L.C., did not appear at oral argument or at proceedings below. Respondent Second Injury Fund was represented by Marie E. Gallo-Hall, Esq., Assistant Attorney General, Office of the Attorney General, 165 Capitol Avenue, Suite 4000, Hartford, CT 06106-1668.

This Petition for Review from the May 17, 2019 Finding of Michelle D. Truglia, Commissioner acting for the Seventh District, was heard on November 22, 2019 before a Compensation Review Board panel consisting of Commission Chairman Stephen M. Morelli and Commissioners Peter C. Mlynarczyk and David W. Schoolcraft.[1]

[1] We note that a motion for extension of time was granted during the pendency of this appeal.

OPINION

STEPHEN M. MORELLI, CHAIRMAN. The claimant has petitioned for review from the May 17, 2019 Finding (finding) of Michelle D. Truglia, Commissioner acting for the Seventh District (commissioner). We find error and accordingly affirm in part and reverse in part the decision of the commissioner.

The commissioner identified as the issues for analysis the claimant's entitlement to: (1) temporary total disability benefits for the period of May 14, 2012 to January 23, 2014; (2) ongoing temporary total disability benefits commencing on January 24, 2014 pursuant to the Osterlund doctrine; (3) mileage reimbursement; and (4) additional medical treatment with Michael E. Karnasiewicz, M.D.[2]

The commissioner made the following factual findings which are pertinent to our review of this matter. An investigative report by the Office of the State Treasurer, which was admitted into evidence, identified the respondent employer as an active, ongoing business entity in the state of Connecticut and indicated that the respondent employer did not carry workers' compensation insurance. The respondent employer did not appear at any formal or informal proceedings before the Workers' Compensation Commission (commission), including the proceedings which were the subject of the May 17, 2019 finding, despite having been served via certified mail at its last known address. The Second Injury Fund appeared pursuant to the provisions of General Statutes § 31-355 as a

[2] See Osterlund v. State, 135 Conn. 498 (1949), in which our Supreme Court stated: "A finding that an employee is able to work at some gainful occupation within his reasonable capacities is not in all cases conclusive that he is not totally incapacitated. If, though he can do such work, his physical condition due to his injury is such that he cannot in the exercise of reasonable diligence find an employer who will employ him, he is just as much totally incapacitated as though he could not work at all." Id., 506-507. [N.B. In the interests of simplicity, we will use the terms employed by the parties; i.e., "Osterlund claim" and "Osterlund benefits."]

"derivative obligor."[3] Findings, ¶ 4. The claimant has been represented by counsel since commencing his claim.

At the request of the parties, the commissioner took administrative notice of a November 23, 2012 Finding and Award by Commissioner Jodi Murray Gregg in which Commissioner Gregg concluded that injuries sustained by the claimant on December 16, 2011 were compensable.[4] She ordered the respondent to pay temporary total disability benefits for the period of December 16, 2011, through May 14, 2012, the date of the formal hearing, and to pay the claimant's medical bills, which at that time totaled $103,884.68.[5]

At the formal hearing held on January 15, 2019, the parties submitted a "Stipulated Findings of Fact and Proposed Conclusions of Law." The representative for the fund declined to cross-examine the claimant, indicating that the fund supported an Osterlund claim.[6] The commissioner found that the claimant was an undocumented

[3] General Statutes § 31-355 (b) states in relevant part: "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."

[4] In her November 23, 2012 Finding and Award, Commissioner Gregg found that on December 16, 2011, the claimant injured his back, head, ribs and right shoulder when, while in the scope of his employment as a landscaper, he fell from a ladder approximately twenty-four feet to the ground. See Findings, ¶ 5.

[5] Although the commissioner initially found that the commission data base did not reflect that a supplemental order had ever issued against the Second Injury Fund for payment of the claimant's medical bills, see Findings, ¶ 6.b., on September 25, 2019, the commissioner sent Chairman Morelli follow-up correspondence amending her finding and indicating that a representative from the fund had provided her with a copy of a supplemental order and accounting of benefits reflecting that indemnity and medical benefits due the claimant as a result of the November 23, 2012 Finding and Award were paid by the fund during the period between April 3, 2013 and December 9, 2016.

[6] At the formal hearing held on January 15, 2019, the representative for the Second Injury Fund stated that the fund would not contest the claim because "[t]o do so would be a waste of the court's time and might subject us to sanctions, if we were contesting it when even our own evidence supported an Osterlund claim based on the [vocational] assessment…." Transcript, p. 26. He also explained that he was declining the opportunity to cross-examine the claimant because the "vocational report pretty much puts us in a box in this file." Id., 37.

worker who had resided illegally in the United States for almost fourteen years. The claimant testified that he had not looked for employment since the date of his injury, and no medical charts or office notes relative to the claimant's work capacity for the period between May 14, 2012, and August 7, 2012, were entered into evidence.

On August 7, 2012, Frank U. Hernantin, M.D., the claimant's then-treating physician, issued a report indicating that the claimant was not currently able to return to work as a manual laborer and would require a functional capacity evaluation in order to determine his work capacity for other types of jobs. Hernantin did not believe the claimant was a surgical candidate for either his shoulder or his spine, and opined that possible future shoulder surgery to address the claimant's capsulitis ("frozen shoulder") would depend on how the claimant responded to a physical therapy regimen.

The claimant subsequently sought authorization to change his treating physician, which was granted by Commissioner Gregg, and the claimant presented for an examination with Karnasiewicz on December 11, 2013. At that visit, the doctor noted that the claimant had suffered a burst facture at L1 and undergone a lumbar decompression/reduction of fracture and fusion at T12 to L2. Karnasiewicz indicated that he had not been provided with any diagnostic studies which could assist him in determining whether the claimant was at maximum medical improvement at that time. Karnasiewicz again examined the claimant on January 23, 2014; in the absence of a CAT scan, the doctor was still unable to determine whether the claimant's fusion was solid. He opined that the claimant had a sedentary work capacity but could not determine whether the claimant was at maximum medical improvement.

The claimant returned to Karnasiewicz on September 27, 2016, at which time the doctor opined "that the claimant had a stable compression fracture at L1 with no evidence of hardware failure on motion and extension." Findings, ¶ 15, *quoting* Claimant's Exhibit M. Karnasiewicz opined that the claimant was at maximum medical improvement, assigned a 25-percent permanent partial disability to the lumbar spine, and did not recommend pain management or additional treatment. He also indicated that the claimant had a light-to-sedentary work capacity with a lifting restriction of ten pounds.

On December 12, 2017, the claimant underwent a Vocational Evaluation and Employability Assessment conducted at his attorney's office by Albert J. Sabella, a vocational rehabilitation counselor.[7] The claimant's nephew acted as an interpreter. Sabella reviewed several medical records, not all of which were entered into evidence.[8] In his report dated December 18, 2017, Sabella noted that Karnasiewicz had limited the claimant to light-to-sedentary work with a lifting restriction of ten pounds, and indicated that these restrictions "would place him primarily at a Sedentary category as defined by the Department of Labor." Claimant's Exhibit O, p. 4. Sabella administered several assessment tests in English and concluded that the claimant was illiterate. Sabella also performed a traditional labor market analysis, but not a labor market survey, ultimately concluding that the claimant was unemployable due to, inter alia, his lack of physical ability, skill/experience, and education; his age; his six-year absence from the workforce; and his lack of job-seeking skills, such as the ability to use a computer.

On April 19, 2018, the claimant underwent an Employability Assessment with Renee B. Jubrey, a Certified Vocational Evaluator. Jubrey reviewed a package of

[7] At the time, the claimant was represented by Leslie Gold McPadden, Esq.
[8] The commissioner specifically noted that because the claimant had never undergone the recommended functional capacity examination, the records reviewed by Sabella did not include such a report.

medical records, not all of which were provided to Sabella for his evaluation or subsequently entered into evidence at trial; however, Jubrey's medical package did contain Sabella's assessment report. Victor Perez, an independent Spanish language interpreter, acted as an interpreter for the claimant during Jubrey's examination. Jubrey, noting that Sabella had administered the "Wide Range Aptitude Test" in English, administered instead the "Raven Standard Progressive Matrice" test and reported that the claimant "fell within the Grade V level which [meant] he was 'intellectually impaired' as compared to other 59-year-old norms." Findings, ¶ 18.g, *quoting* Claimant's Exhibit P, p. 8.

Jubrey also administered a number of other aptitude tests in order to assess the claimant's dexterity, ultimately concluding that the claimant was unemployable because she was unable to find a light-duty position for the claimant within fifty miles of his home. Jubrey further noted that the claimant "is not fluent in the English language, all previous employment was found via relatives as opposed to the usual route of application/interview and he was unable to maintain the physical stamina for a six hour clinical interview testing session." Id., 12.

On November 18, 2018, Karnasiewicz reviewed correspondence from claimant's counsel dated October 29, 2018, and reported that the work restrictions he had assigned on January 23, 2014, were permanent. He further indicated that "based on the information [Spillane] supplied to me, [the claimant] does not have a functional work capacity." Findings, ¶ 16, *quoting* Claimant's Exhibit N.

On the basis of the foregoing, the commissioner concluded that the parties' attempt to resolve the claim by way of a joint submission of stipulated findings "avoided

many critical issues necessary to arrive at a proper resolution." Conclusion, ¶ A. The commissioner then stated that in accordance with the provisions of General Statutes §§ 31-278 and 31-298, she had "*sua sponte*, undertaken an effort in this case to focus a light on immigration issues which should have been more carefully addressed in this trial by the parties."[9] Id. The commissioner acknowledged that in Dowling v. Slotnik, 244 Conn. 781 (1998), our Supreme Court had held that a claimant's immigration status could not, in and of itself, act as a bar to receiving temporary total disability benefits pursuant to the Workers' Compensation Act. However, the commissioner also referenced the statutory provisions of the Immigration Reform and Control Act and observed that "any award of benefits under the Act that requires an undocumented claimant to seek out work as a prerequisite to receipt of benefits involves a violation of Federal law and must be denied."[10] Conclusion, ¶ B.

The commissioner noted that the claimant had made two separate claims for temporary total disability benefits. For the time period between May 14, 2012, and January 23, 2014, the claimant was seeking temporary total disability benefits on the basis of a medical substantiation of his inability to work. The commissioner denied this claim, concluding that the two medical reports entered into evidence for that time period

[9] General Statutes § 31-278 states in relevant part: "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."

General Statutes § 31-298 states in relevant part: "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."

[10] See 8 U.S. Code Sec. 1324a, et. seq.

did not support a claim for temporary total disability.[11] For the time period commencing January 24, 2014, the claimant was seeking ongoing temporary total disability benefits pursuant to the Osterlund doctrine. The commissioner also denied this claim, concluding that undocumented workers are "legally precluded," Conclusion, ¶ C.2., from prosecuting an Osterlund claim in light of the requirement that a claimant "must exercise reasonable diligence to obtain employment." Osterlund, supra, 506. The commissioner further indicated that because any attempt by the claimant to use "reasonable diligence" in securing employment would "put the claimant in the position of illegally soliciting employment," Conclusion, ¶ C.2., and cause any putative employer to violate the provisions of the Immigration Reform and Control Act, the claimant "has not, and cannot, meet the parameters set forth in the Osterlund case." Id.

The commissioner also deemed both vocational assessments unpersuasive on the merits. She found that Sabella had "set the claimant up for failure from the outset," Conclusion, ¶ F.1., by administering an English language test to a claimant who was fluent only in Spanish; allowing the claimant's nephew to serve as translator; relying too heavily on the claimant's self-reported limitations rather than medical opinion; failing to mention in his report that the claimant had reported to Karnasiewicz that his pain was resolved through the use of Tramadol; and limiting his labor market research to "Indeed.com" rather than looking for unskilled jobs in local Spanish-speaking businesses and elsewhere. The commissioner found that because Sabella was neither deposed nor examined at trial, "many questions surrounding the credibility of his report remain unanswered." Id.

[11] The commissioner was referring to Hermantin's August 7, 2012 correspondence and Karnasiewicz' December 11, 2013 medical report.

The commissioner also discounted Jubrey's assessment, noting that although Jubrey did utilize "proper protocols in employing a certified Spanish interpreter for the testing," Conclusion, ¶ F.2., she failed to adequately consider "the delays occasioned by translation from English to Spanish," id., in concluding that the claimant's performance was slow "compared to certain testing norms." Id. The commissioner also found Jubrey's results questionable due to the claimant's admission that he was physically uncomfortable during the evaluation and had not received medical treatment or medication for four or five years. In addition, the commissioner noted that although the claimant had previously reported that Tramadol resolved his symptoms, he had not taken any pain medication before undergoing the assessment. The commissioner further noted that "from a credibility standpoint, it was inappropriate for the Fund to provide Ms. Jubrey with a copy of Mr. Sabella's report in advance of Ms. Jubrey having rendered her own report. As a result, Ms. Jubrey's objectivity is called into question." Id. As such, the commissioner again concluded, as had been the case with Sabella's assessment, that "many questions surrounding the credibility of [the] report remain unanswered." Id.

The commissioner determined that the claimant retained the right to return to his treating physicians for examinations and medication as well as the right to receive reimbursement for any mileage claim "properly supported by medical notes and reports." Conclusion, ¶ H. She authorized the claimant to return to Karnasiewicz for an updated evaluation, but noted that any claims for additional temporary total disability benefits would be analyzed "under the principles set forth in Besade v. Interstate Security Services, 212 Conn. 441, 444-445 (1989), and Neurath v. UTC/Pratt & Whitney, 7 Conn.

Workers' Comp. Rev. Op. 99, 725 CRD-6-88-4 (10/20/89)."[12] Orders, ¶ 3. The commissioner also awarded payment of the claimant's mileage claim in the amount of $185.

The claimant filed a comprehensive motion to correct, which was denied in its entirety, and this appeal followed. On appeal, the claimant contends that the commissioner's decision to reject the stipulated findings of fact constituted error. The claimant further avers that the commissioner erred as a matter of law in concluding that the claimant's immigration status precluded him from receiving Osterlund benefits and that the receipt of temporary total disability benefits pursuant to an Osterlund claim entails a job search requirement. The claimant also argued that the commissioner drew unreasonable inferences from the facts and erred in denying the claimant temporary total disability benefits for the period running from May 14, 2012 through January 23, 2014.

The standard of review we are obliged to apply to a trial commissioner's findings and legal conclusions is well-settled. The trial commissioner's factual findings and conclusions must stand unless they are without evidence, contrary to law or based on unreasonable or impermissible factual inferences." Russo v. Hartford, 4769 CRB-1-04-1 (December 15, 2004), *citing* Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Moreover, "[a]s with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial court could have reasonably concluded as it did." Burton v. Mottolese, 267 Conn. 1, 54 (2003), *quoting* Thalheim v. Greenwich, 256 Conn. 628, 656 (2001). "This presumption, however, can be challenged by the argument that the trial

[12] In Besade v. Interstate Security Services, 212 Conn. 441 (1989), our Supreme Court observed that "any workers' compensation award, although a final judgment as to benefits through the date of the hearing, is always subject to further proceedings … to determine whether the award should be modified." Id., 445.

commissioner did not properly apply the law or has reached a finding of fact inconsistent with the evidence presented at the formal hearing." Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

We begin with the claimant's contentions relative to the commissioner's rejection of the stipulated findings of fact entered into by the parties. It is generally accepted that "[a] stipulation of facts is a useful tool in the administration of a workers' compensation case. It prevents a trial commissioner from needlessly considering issues that the parties have been able to negotiate an agreement on, and allows the limited resources of this agency to be marshaled toward resolving disputed matters." Wonacott v. Bartlett Nuclear, Inc., 15 Conn. Workers' Comp. Rev. Op. 334, 2237 CRB-4-94-12 (June 25, 1996). Our Supreme Court has held that "[a]bsent a clearly expressed intention of the parties, the construction of a stipulation is a question of fact committed to the sound discretion of the trial court." Rosenfield v. Metals Selling Corp., 229 Conn. 771, 780 (1994). The commissioner's role is not limited to "rubberstamping" such agreements; even in situations in which both parties have agreed to the stipulated findings, the commissioner always retains the discretion to reject stipulated findings if they are deemed inconsistent with the evidentiary record or in contravention of pertinent case law.[13]

In her finding, the commissioner raised several issues with the proposed stipulation. She noted that not all of the exhibits referenced by the stipulation were

[13] The claimant points out that in Dominguez v. New York Sports Club, 6210 CRB-7-17-8 (August 28, 2018), *appeal pending*, A.C. 42089 (September 12, 2018), this board stated that the facts of that matter were not in dispute because the parties had submitted a joint stipulation of facts, and our review on appeal was therefore "not bound by our customary deference to the factfinding prerogative of the trial commissioner," id., but, rather, was limited to an analysis of whether the commissioner had properly applied the law. We would simply reiterate that it is not within a commissioner's discretion to accept factual findings which are inconsistent with the evidentiary record or in contravention of our case law.

submitted into evidence, and also found that several of the stipulated findings were not supported by citations to the evidentiary record. The commissioner also paid particular attention to Karnasiewicz' medical report of December 11, 2013. Noting that the claimant had submitted this report for the purposes of establishing that he had not reached maximum medical improvement and was still disabled, she pointed out that the report had indicated the claimant was able to achieve "full resolution" of his pain through the use of Tramadol. Findings, ¶ 8.a., *quoting* Claimant's Exhibit K.

The commissioner also noted that Karnasiewicz had stated in this report that the claimant "appears to have [a] successful fusion," id., and she admitted that this conclusion was not verified until September 27, 2016. However, the commissioner went on to conclude that because the claimant did not undergo any additional surgeries during the time period between the December 11, 2013 report and Karnasiewicz' September 27, 2016 correspondence, "a logical deduction would be that the fusion was solid when [the claimant] was originally examined by Dr. Karnasiewicz on December 11, 2013." Findings, ¶ 8.a.

Despite these misgivings cited by the commissioner, our review of the stipulation in the present matter indicates that the factual findings jointly proposed by the parties accurately reflected the underlying evidentiary record. As such, the commissioner's stated reason for rejecting the stipulated factual findings was incorrect. Although a commissioner is not generally bound to accept any given factual stipulation presented by the parties, under the circumstances of this case, the commissioner's blanket rejection of the factual stipulations of the parties was therefore improper.

With regard to the claim for temporary total disability benefits for the period between May 14, 2012, and January 23, 2014, we note at the outset that the parties stipulated that the claimant was totally disabled for this time period and the fund conceded liability for the payment of temporary total disability benefits. The parties agreed that the claimant had been prevented from seeking medical treatment due to the uninsured status of his employer, and the claimant accurately pointed out that "no physician made any finding of work capacity until Dr. Karnasiewicz did so on January 23, 2014." Appellant's Brief, p. 15. We also note that on December 11, 2013, Karnasiewicz indicated that the claimant's lower back pain was "constant", "severe" and "pulsating," Claimant's Exhibit K, and the doctor did not release the claimant to sedentary duty until January 23, 2014. Moreover, at the doctor's visit of December11, 2013, the claimant reported, inter alia, that he was experiencing weakness when the pain was severe as well as numbness and tingling in his right thigh and calf.

It is of course axiomatic that a claimant bears the ongoing burden of proof in establishing a claim for temporary total disability benefits. See Dengler v. Special Attention Health Services, Inc., 62 Conn. App 440, 447 (2001). However, it is important to understand the circumstances under which the claim for benefits from May 14, 2012 forward came before the commissioner. By finding and award of another commissioner, the claimant had already been determined to be totally incapacitated through May 14, 2012. It is not the commissioner's role to second-guess the prior commissioner's assessment of the claimant's level of incapacity. Rather, the question presented in the second formal was whether the evidence available after that date supported continuation of those benefits.

Given that the claimant was found to have been totally incapacitated as of May 14, 2012, it may be reasonably inferred that his period of incapacity continued for at least some period of time beyond that date, and the first report assigning any work capacity was Karnasiewicz' January 23, 2014 note. The commissioner, at least in part, based her conclusions on work capacity for this period on her "logical deduction" that the claimant's fusion was solid in 2013. We are not persuaded. In light of the severity and extent of the claimant's injuries, we do not believe that whether the claimant had a solid fusion is necessarily dispositive of the issue of whether the claimant was temporarily totally disabled. Given the absence of definitive medical evidence that the claimant's work capacity had changed during the period between May 14, 2012, and January 23, 2014, we believe the commissioner's conclusion that the claimant's work capacity improved during that time period was not supported by the record, and the commissioner drew an improper inference from the evidentiary submissions.

Furthermore, the employer had no insurance. It is clear from the record that the employer was unwilling or unable to pay medical bills and, as a result, the claimant had very limited access to medical care after his initial hospitalization. Therefore, while we share the commissioner's concerns regarding the paucity of medical reports in the record, we are troubled by the notion that this claimant's entitlement to continuation of his total incapacity benefits should be jeopardized because of a circumstance over which he had no control, particularly in view of the fact that the fund agreed to stipulate to the claimant's eligibility for the requested benefits. Even more significant, in light of the commissioner's stated rationale for her findings in this matter, it appears that rather than conducting an objective, impartial review of the medical reports which were submitted,

she chose to disregard the evidence that was available and instead substitute her own subjective inferences. We therefore find that the commissioner erred in concluding that the evidence failed to substantiate a claim for temporary total disability benefits, and reverse the commissioner's denial of temporary total benefits for the time period between May 14, 2012, and January 23, 2014.[14]

We turn next to the claim for ongoing Osterlund benefits commencing on January 24, 2014. As previously discussed herein, the commissioner deemed unpersuasive the vocational evaluations submitted by both the claimant and the fund. The commissioner expressed concerns regarding the methodology employed by both evaluators, particularly with regard to the effect of the claimant's limited English language ability on the test results, and ultimately chose not to rely on either of the evaluations because of concerns regarding their credibility. Conclusion, ¶¶ F.1., F.2.

It is of course "the quintessential function of the finder of fact to reject or accept evidence and to believe or disbelieve any expert testimony…. The trier may accept or reject, in whole or in part, the testimony of an expert." (Internal citations omitted.) Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999). However, a commissioner's decision to disregard expert opinion cannot be arbitrary. Under the particular circumstances of this matter, we believe the commissioner acted arbitrarily in rejecting the assessments provided by the vocational experts for both the claimant and the respondent: assessments that were essentially in agreement regarding the claimant's lack of an earning capacity, consistent with the

[14] We note that in his report of December 11, 2013, Karnaseiwicz indicated that the claimant reported that the use of Tramadol resolved his symptoms. However, Tramadol is a prescription opioid to which the claimant did not have ready access due to the lack of workers' compensation insurance in this matter.

opinion of the claimant's treating physician, and fully consistent with the claimant's uncontroverted testimony regarding his limitations.[15]

For example, the perceived deficiencies in the assessment methodology which the commissioner cited in discrediting Sabella's opinion were rectified during Jubrey's evaluation, and yet Jubrey reached the same conclusion as Sabella. We also question the commissioner's stated grounds for rejecting the validity of Jubrey's opinion, criticisms which seem based on assumptions not supported by the record. For example, we do not share the commissioner's concern that Jubrey's objectivity was in any way tainted by her receipt of Sabella's report before she performed her own evaluation. When one party hires an expert to try to refute the opinion of an opposing party's expert, it is standard practice to provide the expert with a copy of the report she is expected to refute. The commissioner's three-page, single-spaced summary of Jubrey's detailed assessment and the various tests Jubrey administered reveal nothing to support the suggestion she was simply following the lead of Sabella. Indeed, the commissioner expressly concludes that Jubrey utilized proper protocols. Conclusion, ¶ F.2.

Regarding the commissioner's statement that "it is not apparent from the report that [Jubrey] took into account the delays occasioned by translation from English to Spanish," we are quite convinced that an experienced vocational expert such as Jubrey would make appropriate allowance for the claimant's limited grasp of the English language, and the extra time needed for the translation of his answers, in formulating her conclusions. There is no foundation for this stated concern. Finally, we deem the commissioner's remarks regarding the fact the claimant did not eat lunch on the day of

[15] At the formal hearing held on January 15, 2019, when the claimant was asked, "what activities are you limited [to] or can you no longer perform because of these injuries?", the claimant replied, "I cannot do anything." Transcript, pp. 36-37.

testing, and the theoretical effect of Tramadol on the claimant's test results, to be speculative in the extreme. Certainly, the commissioner's opinion as to the effects of a prescribed pharmaceutical strikes us as a conclusion beyond common knowledge and not in accord with ordinary human experience. Such a conclusion cannot stand without expert medical opinion. See Dengler, supra, 449-50**.**

Perhaps most troubling is that these various concerns were first raised in the commissioner's decision. If, while reviewing the reports during the writing of her decision, the commissioner felt there were defects in the methodology of the experts that would incline her to reject them – despite the belief and stipulation of the parties that the opinions were sound and compelled an award of total incapacity – the commissioner had the power to open the record to give the parties an opportunity to address her concerns. Instead, she chose not to give the parties an opportunity to address these concerns. As was the case with the medical reports submitted into the record, we believe that the commissioner's review of the vocational assessments was neither impartial nor objective. Her decision to reject both assessments without affording the parties the opportunity to address the perceived defects constituted a deprivation of due process.

We believe the commissioner's zealous critique of the vocational assessments after the closing of the record cannot be viewed in a vacuum, but must be considered in conjunction with her *sua sponte* introduction of the claimant's immigration status as a bar to his claim. In her decision, the commissioner also concluded that the claimant, by virtue of his immigration status, was ineligible for Osterlund benefits as a matter of law because he was unable to "exercise reasonable diligence to obtain employment," Osterlund, supra, 506, and "[a]nalyzing [the claimant's] language skills and education

level is simply a subterfuge." Conclusion, ¶ E. The commissioner noted that the vocational assessments did not reflect whether the evaluators were aware of the claimant's immigration status, and stated that "[n]either an academic labor market analysis, nor an actual telephonic labor market survey of prospective employers can be valid where a prospective employer in this country is being asked whether he/she would employ an undocumented worker in violation of federal law." Conclusion, ¶ F.

The commissioner also wrote that the claimant's attempt to buttress his claim with vocational expert opinion was "untenable" given that in cases such as Czeplicki v. Fafnir Bearing Co., 137 Conn. 454 (1951), Marandino v. Prometheus Pharmacy, 105 Conn. App. 669, *rev'd on other grounds*, 286 Conn. 916 (2008), and Bode v. Connecticut Mason Contractors, The Learning Corridor, 130 Conn. App. 672, *cert. denied*, 302 Conn. 942 (2011), "none of the claimants … who were found to be 'otherwise unemployable' were identified as an undocumented worker; their immigration status did not appear to be an issue." Conclusion, ¶ D.

Before addressing the commissioner's assertion that an undocumented worker cannot make a claim for total incapacity under the Osterlund doctrine, we should comment on the commissioner's concern that the vocational experts did not take into account the claimant's undocumented status. We agree with the commissioner that the claimant's "illegal" status was not addressed by the vocational experts; it was likely not known to them, given that the question of his immigration status was first raised by the commissioner, *sua sponte*, during her brief questioning of the claimant at the formal hearing and after the vocational reports were already in evidence.

In this case, both vocational experts determined that the claimant was unemployable *without* even considering his immigration status. In other words, even if the claimant had been legally free to seek sedentary employment, both experts are convinced he would not have been able to find such work, given his restrictions, age, education, skills and limited knowledge of English. If a work injury renders a claimant totally incapacitated, the fact that other limiting factors may thereafter be discovered, or come into existence, does not automatically end his/her entitlement. *See, e.g.,* Laliberte v. United Security, Inc., 261 Conn. 181, 183 (2002) (a claimant who was collecting total incapacity benefits and subsequently became incarcerated was still entitled to collect total incapacity benefits). Therefore, given the vocational opinions, the question of whether the claimant was able to legally seek employment was irrelevant.

We turn now to the commissioner's assertion that the claimant's inability to be legally employed bars an award of benefits under the Osterlund doctrine. We recognize that in Czeplicki, supra, our Supreme Court upheld an award of temporary total disability benefits after having affirmed a finding by the commissioner that the claimant had "made a diligent effort to work but cannot find a job particularly in view of his history of injury…." Id., 456. However, in Marandino, supra, our Appellate Court expanded the parameters by which a claimant could establish eligibility for Osterlund benefits, holding that:

> Whether the plaintiff makes [a] showing of unemployability by demonstrating that she actively sought employment but could not secure any, or by demonstrating through a nonphysician vocational rehabilitation expert or medical testimony that she is unemployable … as long as there is sufficient evidence before the commissioner that the plaintiff is unemployable, the plaintiff has met her burden.

Id., 684-685.

In Bode, supra, our Appellate Court further refined the Osterlund standard, stating that:

> Whether a claimant is realistically employable requires an analysis of the effects of the compensable injury upon the claimant, in combination with his pre-existing talents, deficiencies, education and intelligence levels, vocational background, age, and any other factors which might prove relevant.

Id., 681, *quoting* R. Carter et al., 19 Connecticut Practice Series: Workers' Compensation Law (2008 Ed.) §8:40, p. 301.

Subsequently, in O'Connor v. Med-Center Home Health Care, Inc., 140 Conn. App. 542 (2013), our Appellate Court observed that Bode, supra:

> highlighted that the evaluation of whether a claimant is totally disabled is a holistic determination of work capacity, rather than a medical determination. Moreover, Bode categorically rejected the notion that claimants must present a particular kind of evidence to meet their burden of proving their total disability.

Id., 554.

In light of these Appellate Court decisions, it is readily apparent that in today's legal landscape, a claimant seeking Osterlund benefits is not limited to establishing eligibility by proving that he or she is actively seeking employment.[16] As such, it was error for the commissioner to conclude that the claimant in the instant matter was ineligible for Osterlund benefits as a matter of law solely because of his immigration status.[17] We therefore reverse the commissioner's denial of ongoing Osterlund benefits commencing on January 24, 2014.

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[16] Eligibility for Osterlund benefits can therefore be distinguished from eligibility for temporary partial disability benefits pursuant to the provisions of General Statutes § 31-308 (a), which require, inter alia, that a claimant be "ready and willing to perform other work in the same locality," and the provisions of General Statutes § 31-308a, which state that additional temporary partial disability benefits "shall be available only to employees who are willing and able to perform work in this state."

[17] In her memorandum, the commissioner appears to conflate total disability status pursuant to an Osterlund claim with that of statutory permanent total disability as set forth in the provisions of General Statutes § 31-307 (c). Section 31-307 (c) allows for the payment of compensation for: "(1) Total and permanent

In her finding, the commissioner expressly acknowledged that pursuant to Dowling v. Slotnik, 244 Conn. 781 (1998), the claimant's "undocumented status does not work to exclude him from receipt of benefits for temporary total disability under the Connecticut Workers' Compensation Act…." Conclusion, ¶ B. However, the commissioner then drew a sharp distinction between temporary total disability claims involving medical disability and Osterlund claims, stating that "any award of benefits under the Act that requires an undocumented claimant to seek out work as a pre-requisite to receipt of benefits involves a violation of Federal law and must be denied." Id. In light of the evolution of the law relative to Osterlund claims, we believe the distinction drawn by the commissioner is inconsistent with the reasoning of the Appellate Court in cases such as Marandino, supra, Bode, supra, and O'Connor, supra.

We also believe the commissioner's conclusions in this matter are directly contrary to the letter and spirit of the Dowling decision. In both her finding and her Memorandum of Decision (memorandum), the commissioner devotes a considerable portion of her analysis to the various ills which she believes will befall the Connecticut workers' compensation system if undocumented workers are permitted to receive temporary total disability benefits pursuant to Osterlund claims. The commissioner alludes, inter alia, to the "catastrophic burden" on the business community which will arise if it is compelled to subsidize the disability claims of undocumented workers against uninsured employers.

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loss of sight of both eyes, or the reduction to one-tenth or less of normal vision; (2) the loss of both feet at or above the ankle; (3) the loss of both hands at or above the wrist; (4) the loss of one foot at or above the ankle and one hand at or above the wrist; (5) any injury resulting in permanent and permanent and complete paralysis of the legs or arms or of one leg and one arm; (6) any injury resulting in incurable imbecility or mental illness." While the practical effect of an award pursuant to the Osterlund doctrine may, in certain situations, result in a long-term payout of temporary total disability benefits, a recipient of Osterlund benefits retains the same burden to prove ongoing eligibility as any other recipient of temporary total disability benefits.

However, our review of the Dowling decision indicates quite clearly that the court's preoccupation in that decision was not with the potential for "bad acting" on the part of undocumented workers but, rather, with the potential harm to those workers on the part of "unscrupulous employers." Dowling, supra, 796. The court, having noted that "[t]he primary purpose of the Immigration Reform Act was to establish procedures that make it more difficult to employ undocumented workers and to punish employers who knowingly offer jobs to those workers," Dowling, supra, 795, then went on to observe that:

> excluding such workers from the pool of eligible employees would relieve employers from the obligation of obtaining workers' compensation coverage for such employees and thereby contravene the purpose of the Immigration Reform Act by creating a financial incentive for unscrupulous employers to hire undocumented workers.

Id., 796.

The Dowling court engaged in an exercise in statutory construction of the Immigration Reform and Control Act, ultimately concluding that "the legislature intended to include illegal aliens in the group of 'persons' who, in order to obtain compensation for work-related injuries, are not only eligible, but also required, to invoke the remedy provided by the Workers' Compensation Act…." Id., 806.

The court also soundly rejected the argument propounded by the Dowling respondents contending that "the illegal taint attached to the employment agreement between the respondents and the claimant by virtue of the claimant's immigration status precludes that agreement from constituting a 'contract of service' under § 31-275 (9) (A) (i)." Id., 809. The court remarked that "[i]n relying on the doctrine against judicial enforcement of 'illegal' contracts, the respondents, in effect, urge us to

recognize an exception to the Workers' Compensation Act for reasons of public policy." Id., 811. However, the court declined to do so, pointing out that "[b]ecause of the statutory nature of our workers' compensation system, policy determinations as to what … jurisdictional limitations apply … *are for the legislature, not the judiciary* . . . to make." (Emphasis in the original.) Id., *quoting* Discuillo v. Stone & Webster, 242 Conn. 570, 577 (1997).

Despite this clear prohibition against public policy formulation articulated by our higher courts, the commissioner in the present matter chose, of her own volition, to introduce issues associated with the claimant's immigration status which by their very nature implicated public policy concerns. We are of course in complete agreement that the provisions of §§ 31-278 and 31-298 grant a commissioner the prerogative to expand the scope of analysis in order to consider issues which may have been insufficiently addressed by the litigants. However, in the present matter, we believe that the commissioner's improper decision to view the issues through a public policy lens and her subsequent failure to afford the parties the opportunity to provide supplemental briefs on the issues raised *sua sponte,* served to deprive the litigants of due process.

The commissioner also stated in her memorandum that she hoped that the public policy concerns raised in her finding "will be raised and debated by the parties in any appeal … in order to provide further guidance to the Commission." We firmly decline to pursue this avenue of inquiry. Since the issuance of Dowling in 1998, the legislature has made no changes to the Workers' Compensation Act which would impede the ability of undocumented workers to collect temporary total disability benefits. It is well-settled that the Workers' Compensation Commission is a creature of statute, and "a court which

exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation." Castro v. Viera, 207 Conn. 420, 427-428 (1988), *quoting* Heiser v. Morgan Guaranty Trust Co., 150 Conn. 563, 565 (1963). A commissioner's role is to impartially review the evidence presented by the parties and then apply the facts to the law *as given to us* by the legislature and the courts. We believe the commissioner in this matter took an overly adversarial approach to both the evidentiary record and the language of the controlling case law in order to issue a finding consistent with her personal convictions regarding appropriate public policy. The decision to do so constituted a clear abuse of discretion.

There is error; the May 17, 2019 Finding of Michelle D. Truglia, Commissioner acting for the Seventh District, is accordingly affirmed in part and reversed in part. The matter is remanded with instructions that the commissioner issue an Order awarding the claimant ongoing temporary total disability benefits commencing as of May 14, 2012. These benefits are to continue until such time as a change in circumstances occurs which would warrant a ruling by the commission discontinuing the payment of these benefits.

Commissioners Peter C. Mlynarczyk and David W. Schoolcraft concur in this Opinion.