CASE NO. 6404 CRB-8-20-9 CLAIM NO. 800198600	:	COMPENSATION REVIEW BOARD
GEORGE KELLY, M.D. CLAIMANT-APPELLANT	:	WORKERS' COMPENSATION COMMISSION
v.	:	SEPTEMBER 8, 2021

STATE OF CONNECTICUT/
DEPARTMENT OF MENTAL HEALTH &
ADDICTION SERVICES
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLEE

and

GALLAGHER BASSETT SERVICES, INC.
ADMINISTRATOR

APPEARANCES:

The claimant was represented by John J. D'Elia, Esq., D'Elia Gillooly DePalma, L.L.C., 700 State Street, 4th Floor, New Haven, CT 06511.

The respondent was represented by Lawrence G. Widem, Esq., Assistant Attorney General, Office of the Attorney General, 165 Capitol Avenue, Suite 4000, Hartford, CT 06106.

This Petition for Review from the September 17, 2020 Finding and Order by David W. Schoolcraft, the Commissioner acting for the Eighth District, was heard February 26, 2021 before a Compensation Review Board panel consisting of Commission Chairman Stephen M. Morelli and Commissioners Brenda D. Jannotta and Maureen E. Driscoll.[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 September 17, 2020 Finding and Order (finding) by David W. Schoolcraft, the Commissioner acting for the Eighth District (commissioner). We find no error and accordingly affirm the decision.

Formal hearings were held on November 14, 2019, January 8, 2020, February 6, 2020, and March 11, 2020.[2] At the close of these proceedings, the commissioner identified two issues for determination: (1) whether the claimant was an employee protected by the Workers' Compensation Act; and (2) whether the claimant was entitled to have his total incapacity benefits paid at 100 percent of his salary, pursuant to the provisions of General Statutes § 5-142 (a).[3]

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[2] Formal hearings were also held on October 18, 2018, and February 14, 2019, after which the commissioner denied a motion to preclude.

[3] General Statutes § 5-142 (a) states in relevant part: "If any member of the Division of State Police within the Department of Emergency Services and Public Protection or of any correctional institution, or any institution or facility of the Department of Mental Health and Addiction Services giving care and treatment to persons afflicted with a mental disorder or disease, or any institution for the care and treatment of persons afflicted with any mental defect . . . sustains any injury (1) while making an arrest or in the actual performance of such police duties or guard duties or fire duties or inspection duties, or prosecution or public defender or courthouse duties, or while attending or restraining an inmate of any such institution or as a result of being assaulted in the performance of such person's duty, or while responding to an emergency or code at a correctional institution, and (2) that is a direct result of the special hazards inherent in such duties, the state shall pay all necessary medical and hospital expenses resulting from such injury. If total incapacity results from such injury, such person shall be removed from the active payroll the first day of incapacity, exclusive of the day of injury, and placed on an inactive payroll. Such person shall continue to receive the full salary that such person was receiving at the time of injury subject to all salary benefits of active employees, including annual increments, and all salary adjustments, including salary deductions, required in the case of active employees, for a period of two hundred sixty weeks from the date of the beginning of such incapacity. Thereafter, such person shall be removed from the payroll and shall receive compensation at the rate of fifty per cent of the salary that such person was receiving at the expiration of said two hundred sixty weeks as long as such person remains so disabled, except that any such person who is a member of the Division of State Police within the Department of Emergency Services and Public Protection shall receive compensation at the rate of sixty-five per cent of such salary as long as such person remains so disabled.… All other provisions of the workers' compensation law not inconsistent with this subsection, including the specific indemnities and provisions for hearing and appeal, shall be available to any such state employee or the dependents of such a deceased employee…."

The commissioner made the following factual findings which are pertinent to our review. The respondent, an employer subject to the provisions of the Workers' Compensation Act, operates Connecticut Valley Hospital (CVH), a psychiatric institution for the care and treatment of individuals with mental health diseases. The medical staff is represented by the New England Health Care Employees Union District 1199 – AFL-CIO (union).

In December 1989, the State of Connecticut (state) and the union negotiated a Memorandum of Agreement (MOA) whereby the state could hire per diem nurses to fill gaps in coverage. The agreement contemplated that the per diem nurses would be paid significantly more than permanent nurses but would not be eligible for retirement or other benefits. In presenting that agreement to the legislature for approval, the Office of Policy and Management included a fiscal statement indicating that "[t]he State will be responsible for Social Security and Workers' Compensation." Findings, ¶ 4, *quoting* Claimant's Exhibit K.

The December 1989 amendment to the 1989 Collective Bargaining Agreement (CBA) was submitted to the General Assembly along with a supersedence appendix indicating that the amendment would affect, inter alia, General Statutes §§ 5-142 through 5-144.[4] By 1993, the state was having difficulty hiring medical staff and began hiring

[4] It should be noted that General Statues § 5-278 (e) (1) states in relevant part: "Except as provided in subdivision (2) of this subsection, where there is a conflict between any agreement or arbitration award approved in accordance with the provisions of sections 5-270 to 5-280, inclusive, on matters appropriate to collective bargaining, as defined in said sections, and any general statute or special act, or regulations adopted by any state agency, the terms of such agreement or arbitration award shall prevail …." Consistent with this statutory provision, Article 44 of 1993 Contract between the State of Connecticut and the New England Health Care Employees Union District 1199, AFL-CIO, states that "[t]he Employer shall prepare a Supersedence Appendix listing any provisions of the Agreement which are in conflict with any existing statute or regulation for submission to the Legislature. The Union shall be consulted in the preparation of the Supersedence Appendix." Claimant's Exhibit G, p. 130. See also Respondent's Exhibit 2, p. 103; Respondent's Exhibit 5, p. 105.

per diem psychiatrists to fill in. However, the CBA per diem provisions were only applicable to nurses. In December 1993, the state and the union negotiated a new provision in the CBA that permitted the state to hire additional per diem medical staff, including psychiatrists. That agreement, incorporated into the 1993 CBA as Article 9, § 21, provided that per diem psychiatrists would be paid an hourly rate equal to 150 percent of the rate paid to a permanent employee with the title "Psychiatrist-4."[5] The new provisions specifically stated that per diem medical staff "shall not be entitled to retirement benefits, health insurance, life insurance, paid leave, longevity or other economic benefits." Findings, ¶ 8, *quoting* Claimant's Exhibit G, p. 27; see also Claimant's Exhibit I. No supersedence appendix was submitted to the legislature relative to these 1993 changes regarding per diem workers.

In January 2013, the claimant, a licensed psychiatrist, was retained by the state to work at CVH. In correspondence dated January 2, 2013, Doreen Clemson, a Human Resource Associate, wrote to the claimant confirming his acceptance of "re-employment" [sic] with CVH and specifying that his official job title was "Psychiatrist ~ Per Diem …." Claimant's Exhibit O. Clemson indicated that the claimant's schedule would be "determined by Chief of Professional Services but not to exceed 40 hours weekly" and his rate of pay would be $180.56 per hour. Id.

At CVH, the claimant worked in the Young Adult Services lock-down unit. On February 25, 2016, Helen Vartelas, then-CEO of CVH, wrote to the claimant informing him that the CVH credentialing committee had recommended he be reappointed "as an Active Member of the Medical Staff with Core Privileges in Psychiatry for a period of

[5] That job title is now classified as "Principal Psychiatrist." See Respondent's Exhibit 1.

two years (March 11, 2016 – March 10, 2018)." Findings, ¶ 11, *quoting* Claimant's Exhibit N. (Emphasis omitted.) This correspondence was sent to the claimant at his CVH address.

Although the claimant's job title was classified as a per diem psychiatrist, his job duties were the same as those for a full-time, permanent attending psychiatrist. The application process and qualifications were the same for both a per diem psychiatrist and a permanent staff physician. The claimant generally worked full time, Monday through Friday, from 8:30 a.m. until 4:30 p.m., and was "fully incorporated into the daily operations of the hospital, working side-by-side with permanent employees and doing the same work." Findings, ¶ 13. The claimant was responsible for evaluating patients for admission and discharge, providing direct patient care, and conducting rounds and group therapy sessions. He also was head of the treatment team, and supervised the psychologists, clinical social workers, APRNs, and other nursing staff.

On July 10, 2017, the claimant was attending to patients when one of the patients assaulted him. He sustained injuries, including a concussion, and was rendered temporarily totally disabled. At the time of this injury, the claimant was being paid $197.40 per hour and typically worked a forty-hour work week, yielding a gross weekly wage of $7,896.00. His average weekly wage for the fifty-weeks preceding the date of injury was $7,039.63. In accordance with a directive from the Department of Mental Health and Addiction Services (DMHAS), the state's third-party administrator for workers' compensation claims, Gallagher Bassett Services (Gallagher), began paying the claimant weekly temporary total disability benefits in the amount of $7,896.00, representing the "100 percent" rate as calculated by DMHAS.

On August 2, 2017, the claimant filed a notice of claim for workers' compensation. On August 11, 2017, the respondent filed a form 43 acknowledging that a workplace event had occurred but reserving its right to challenge the extent of the claimant's disability. The respondent continued to pay the temporary total disability benefits. In April 2018, Gallagher sent the claimant proposed voluntary agreements acknowledging the compensability of his "post-concussive syndrome/post traumatic headaches" and setting his weekly total incapacity compensation rate at $7,896.00 pursuant to the provisions of § 5-142 (a). Claimant's Exhibit A. The claimant did not sign the agreements at that time but the respondent continued to pay him.

On July 18, 2018, the respondent issued a second form 43 contesting the claimant's eligibility for enhanced temporary total disability benefits pursuant to § 5-142 (a) "insofar as [he] was a per diem employee at the time of his alleged injury." Administrative Notice Exhibit 4. The disclaimer also stated that "[t]he claimant bears the burden of proving that he was a 'member' of the facility in which he was working on the claimed date of injury and there is insufficient evidence to prove that he qualifies for enhanced TTD benefits pursuant to Sec. 5-142(a)." Id.

The Workers' Compensation Commission (commission) held informal hearings on the issue of the claimant's eligibility for § 5-142 (a) benefits. The respondent argued that the claimant was only entitled to temporary total disability benefits pursuant to General Statutes § 31-310.[6] The respondent requested a formal hearing on this issue but

[6] General Statutes § 31-310 states in relevant part: "For the purposes of this chapter, the average weekly wage shall be ascertained by dividing the total wages received by the injured employee from the employer in whose service the employee is injured during the fifty-two calendar weeks immediately preceding the week during which the employee was injured, by the number of calendar weeks during which, or any portion of which, the employee was actually employed by the employer …." It should be noted that on September 29, 2016, Commission Chairman John A. Mastropietro issued Memorandum Number 2016-04 stating, inter alia, that "the maximum compensation rate for total disability and decedents' dependents will

continued, in the interim, to pay the claimant pursuant to § 5-142 (a) pending resolution of the matter.

At the start of the formal hearing on October 18, 2018, the claimant filed a motion to preclude. A hearing on the merits relative to the claimant's entitlement to enhanced temporary total disability benefits pursuant to § 5-142 (a) was placed on hold and the motion to preclude proceeded to a formal hearing. Following the filing of several motions and objections thereto, the motion to preclude was subsequently addressed in a formal hearing on February 14, 2019. The motion was denied in an August 14, 2019 ruling, and the matter was again assigned to a formal hearing on the merits.

Formal hearings were held on November 14, 2019; January 8, 2020; February 6, 2020; and March 11, 2020. During the course of these proceedings, the respondent did not contest the claimant's disability status but, rather, his legal entitlement to benefits. The respondent contended that the claimant was not only ineligible for benefits pursuant to § 5-142 (a) but was outside the jurisdiction of the commission and therefore "ineligible for *any* benefits under the Workers' Compensation Act." (Emphasis in the original.) Findings, ¶ 23. The respondent produced testimony of Linda Yelmini, a former state official who was involved in the negotiation of state labor contracts, including the 1993 provisions under which the claimant was hired. Yelmini testified that per diem physicians were state employees but were ineligible for benefits pursuant to both the Workers' Compensation Act and § 5-142 (a).

Having heard the foregoing, the commissioner, noting that "[a]ssaults by patients are a special hazard inherent in the duties of clinicians working on [a lockdown ward],"

… be $1,292.00 for injuries occurring on or after October 1, 2016." This rate remained in effect until October 1, 2017. See Workers' Compensation Commission Memorandum Number 2017-05.

concluded that the injuries sustained by the claimant on July 10, 2017, arose out of and in the course of his employment as a per diem psychiatrist and resulted in a period of temporary total disability. Conclusion, ¶ B. The commissioner further stated that "there is no dispute that the claimant is totally incapacitated from gainful employment he might reasonably pursue. Conclusion, ¶ D. The commissioner determined that "[t]he respondent's defense that the claimant was an independent contractor is meritless, and without support in law or fact." Conclusion, ¶ E. The commissioner also found "wholly unpersuasive and inconsistent with the evidence" the respondent's contention that the claimant was disqualified from claiming workers' compensation benefits under the terms of the collective bargaining agreement. Conclusion, ¶ F. Rather, the commissioner concluded that:

> At the time of the assault the claimant was an employee of the respondent, as defined by C.G.S. § 31-275. No other legislation, nor any provision of the collective bargaining agreement under which he worked, had the effect of removing him from the scope of protections afforded by chapter 568. He is entitled to claim workers' compensation benefits in accordance with that chapter.[7]

Conclusion, ¶ G.

Relative to the claimant's eligibility for § 5-142 (a) benefits, the commissioner concluded that although the claimant was a "member" of the hospital on the date of injury, "the claimant, as a per diem psychiatrist, was not eligible for enhanced benefits under C.G.S. § 5-142(a)." Conclusion, ¶ I. As such, the commissioner found the respondent was obligated to pay the claimant temporary total disability benefits in

[7] General Statutes § 31-275 (1) states: "'Arising out of and in the course of his employment' means an accidental injury happening to an employee or an occupational disease of an employee originating while the employee has been engaged in the line of the employee's duty in the business or affairs of the employer upon the employer's premises, or while engaged elsewhere upon the employer's business or affairs by the direction, express or implied, of the employer …."

accordance with the provisions of § 31-310. The commissioner determined that the claimant's average weekly wage on the date of his injury entitled him to the payment of temporary total disability benefits at the maximum rate of $1,292.00 and authorized the respondent to reduce the claimant's weekly compensation checks to that amount.

In a memorandum accompanying his Finding and Order, the commissioner elaborated on the rationale for his decision.[8] The commissioner noted that by December 1989, the contract between the state and the union had been amended to provide for the hiring of per diem nurses; however, because the prevailing CBA between the state and the union was already in place, the MOA allowing for the hiring of per diem nurses required legislative approval, consistent with the provisions of General Statutes § 5-278 (b) (1).[9] The commissioner noted that when this agreement was provided to the legislature, a supersedence appendix was attached which included a cost sheet showing that per diem nurses would be eligible for workers' compensation benefits along with a sheet indicating, under the heading "Statute or Regulation Amended," that §§ 5-142 through 5-144 would be affected by the agreement.[10] See Claimant's Exhibit K

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[8] Administrative Regulations § 31-301-3 states: "The finding of the commissioner should contain only the ultimate relevant and material facts essential to the case in hand and found by him, together with a statement of his conclusions and the claims of law made by the parties. It should not contain excerpts from evidence or merely evidential facts, nor the reasons for his conclusions. The opinions, beliefs, reasons and argument of the commissioner should be expressed in the memorandum of decision, if any be filed, so far as they may be helpful in the decision of the case."

[9] General Statutes § 5-278 (b) (1) states: "Any agreement reached by the negotiators shall be reduced to writing. The agreement, together with a request for funds necessary to fully implement such agreement and for approval of any provisions of the agreement which are in conflict with any statute or any regulation of any state agency, and any arbitration award, issued in accordance with section 5-276a, together with a statement setting forth the amount of funds necessary to implement such award, shall be filed by the bargaining representative of the employer with the clerks of the House of Representatives and the Senate within ten days after the date on which such agreement is reached or such award is distributed. The General Assembly may approve any such agreement as a whole by a majority vote of each house or may reject such agreement as a whole by a majority vote of either house. The General Assembly may reject any such award as a whole by a two-thirds vote of either house if it determines that there are insufficient funds for full implementation of the award."

[10] General Statutes § 5-142a concerns the injury or death of a sheriff. General Statutes § 5-43 provides that injured state workers would be paid 100 percent of their salary for the first seven days of disability and

(Exhibit K). It was therefore the commissioner's conclusion that "it is impossible to read this as anything but complete exclusion of per diem nurses from coverage under § 5-142(a)." Memorandum, p. 16.

The commissioner then stated that the 1993 CBA was not intended to create a new class of per diem workers "because the class already existed." Id. Rather, the purpose of the changes to the 1993 agreement "was merely to expand the types of clinical staff that could be hired under the heading per diem." Id., 17. In addition, if the legislature had already denied per diem workers eligibility for benefits pursuant to § 5-142 (a), "the only way the 1993 changes could have reversed that decision would be if there had been an express intent to do so…. No such appendix was sent to the legislature." Id. The commissioner stated:

> It is clear … that when the State and the Union first agreed to create a special class of per diem employees, this class of workers was expressly excluded from the economic benefit of C.G.S. § 5-142(a). Subsequent changes to the collective bargaining agreement have done nothing to change that, and no action or inaction on the part of the legislature can be deemed to have returned to such workers a right they never had.

Id.

The claimant filed a motion to correct, to which the respondent objected and which the commissioner granted in part following another formal hearing on November 18, 2020.[11] In his ruling on the motion to correct, the commissioner added Finding, ¶ 4.a, noting that the July 1, 1989 CBA contained no provisions regarding per

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could subsequently use sick time to supplement workers' compensation benefits. General Statutes § 5-144 provides a monthly death benefit to surviving spouses or children. See September 17, 2020 Memorandum, p. 16, fn. 14.

[11] In addition to its Objection to Motion to Correct filed on October 7, 2020, the respondent filed a "Judgment Lien and Motion for Repayment Rate Determination" and a proposed "Alternative Grounds to Affirm Judgment" on October 19, 2020. On October 30, 2020, the respondent filed an "Offer of Proof in Support of Objection to Motion to Correct."

diem psychiatrists, and that Article 43 of the July 1, 1993 CBA contained an "Entire Agreement" clause which provided in relevant part:

> This agreement, upon ratification, supersedes and cancels all prior practices and agreements, whether written or oral, unless expressly stated to the contrary herein, and constitutes the complete and entire agreement between the parties and concludes collective bargaining for its term.

Claimant's Exhibit G, p. 128.

The commissioner also added Findings, ¶ 5.a, reflecting that the December 1989 MOA regarding per diem nurses was reached after the effective date of the 1989 CBA and the details of that agreement were not incorporated into the published version of the CBA. The commissioner indicated that a copy of the 1989 MOA was not submitted into evidence, and Yelmini testified that she did not negotiate the 1989 CBA or the MOA regarding per diem nurses and was not familiar with either of those agreements.

The clamant filed a voluminous appeal from which several distinct claims of error can be distilled. The claimant contends that the commissioner: (1) erred in relying upon the 1989 MOA and Exhibit K in reaching his conclusion that the claimant was ineligible for enhanced temporary total disability benefits; (2) misapplied and/or misinterpreted several key provisions of the various CBA contracts in evidence and misapplied the provisions of § 5-278; (4) failed to find the respondent was unsuccessful in carrying the burden of proof cited in its form 43; and (5) based his decision on facts not in evidence and failed to correct his findings "even after they were shown to be without evidence." Appellant's Brief, p. 64. We find none of these claims of error persuasive.

The standard of review we are obliged to apply to a 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). Thus, "it is … immaterial that the facts permit the drawing of diverse inferences. The [commissioner] alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court." Fair v. People's Savings Bank, 207 Conn. 535, 540 (1988), *quoting* Del Vecchio v. Bowers, 296 U.S. 280, 287 (1935).

We begin with the claimant's contentions relative to the commissioner's inferences relative to the 1989 MOA. The claimant asserts that the "Commissioner decided that a 1989 'Memorandum of Agreement,' not offered by any party, never placed in evidence, created for the first time any per diem positions and that it took away the C.G.S. §5-142 rights of per diem employees." (Emphasis in the original.] Appellant's Brief, p. 6. The commissioner then "ruled that the 1993 changes adding Per Diem Psychiatrists' job description to the contract, were merely an expansion of the jobs for which C.G.S. § 5-142 rights had been made unavailable in 1989." Id. As such, the commissioner improperly inferred "that the 1989 language taking away full pay total disability rights for nurses in 1989, then became applicable to Per Diem Psychiatrists when they were included in an entirely new provision of the 1993 contract." Id.

The claimant argues that this inference was erroneous because the provisions of § 5-278 dictate that the changes to the 1993 CBA would have required their own supersedence process, and the record contains no evidence that the supersedence process was followed in either 1989 or 1993. Moreover, the claimant also argues that the commissioner "has completely avoided explaining how the 1989 changes required a supersedence submission but the 1993 changes did not." Id., 9. According to the claimant:

> It is clear [the] Commissioner did not account for the fact that the changes in the 1993 contract were not expansions of existing rights but complete new provisions that would have required legislative approval of their own because the new provisions conflicted with the law allowing full pay by taking away those rights for the new job classes.

Id., 33.

We recognize that neither litigant in this appeal ever submitted the 1989 MOA into evidence. Indeed, the commissioner's frustration with this gap in the evidentiary record was palpable at the November 18, 2020 formal hearing, at which he stated:

> The information, this is not – this is really a question of law – and this is one of the things I'm struggling with here, so I don't necessarily know the answer as I ask this question. The question before me is a question of interpretation of law. And the missing information, if you will, is all public record. These are all contracts. I'm being asked to interpret the law and a collective bargaining agreement, which as I said is public record not necessarily available to me, but certainly available to some of the parties anyway.[12]

Transcript, p. 32.

[12] In his Memorandum Re: Motion to Correct, the commissioner noted that at oral argument, the claimant had indicated that he was never provided a copy of the MOA, and the respondent reported that "efforts by the State to find a copy of that particular MOA have been unsuccessful." Id., p. 2, fn. 1. The commissioner stated: "I accept both assertions as true. The actual document is unavailable." Id.

However, despite the fact that the MOA was never presented, the commissioner did have the benefit of the testimony of Linda Yelmini, a former chief negotiator for the Office of Labor Relations who negotiated the 1993 CBA between the state and the union.[13] Yelmini testified that the language contained in Article 9, § 21, of the 1993 CBA, which set forth the job classifications for which the state could use per diem employees and listed the benefits to which they were entitled, "was all new."[14] November 14, 2019 Transcript, p. 70. Yelmini indicated that even though the state was already utilizing per diem employees prior to that point in time, there had not previously been "a separate section of the contract that governed per diem employees," id., and "this contract established a formalized per diem psychiatrist position." Id., 71.

Under cross-examination, Yelmini testified that the MOA to which Exhibit K had purportedly been attached appeared to be a new agreement and was not "part of a normal contract negotiation," January 8, 2020 Transcript, p. 40. Yelmini indicated that although she was not personally familiar with the document, she believed someone in the Office of Policy Management would have been involved in its preparation. It was brought to her attention that the supersedence appendix in Exhibit K specifically listed § 5-142 (a) and

[13] It should be noted that Yelmini was deposed on October 28, 2019, and the state attempted to introduce the transcript into evidence at the formal hearing held on January 8, 2020. The claimant objected and the objection was sustained. See Transcript, pp. 66-67. It should also be noted that the commissioner stated at several times throughout the proceedings in this matter that he considered Yelmini to be a fact witness rather than an expert witness. See November 14, 2019 Transcript, p. 28; November 18, 2020 Transcript, pp. 17, 35.

[14] Article 9, § 21, of the 1993 CBA contract states, inter alia, that "[i]ndividuals in per diem classifications will work on an intermittent basis. These classifications may be used by the State to provide coverage on a daily basis where an agency has been unable to recruit enough non per diem employees in the applicable classification series or due to absences of current staff. Individuals in per diem classifications shall not be entitled to retirement benefits, health insurance or life insurance benefits, paid leave, longevity, or other economic benefits …." Claimant's Exhibit G, p. 27. We share the commissioner's perplexity relative to the issue of how an employee who is employed on an "intermittent basis" can be deemed eligible for an enhanced benefit which requires as the basis for its calculation the identification of the "full salary" being paid to the employee at the time of the injury.

Yelmini indicated that she believed per diem nurses would not have been eligible for those benefits. Yelmini also agreed that language contained in paragraph (2) of the cost sheet in Exhibit K was "substantively, if not identically, the same" as the language in Article 9, § 21, of the 1993 CBA.[15] Id., 47.

In light of the foregoing, we are not persuaded that the commissioner erred in concluding that the language of the 1989 MOA creating a per diem classification for nurses was subsequently incorporated into Article 9, § 21, of the 1993 CBA. As the commissioner pointed out:

> It is reasonable to presume that – at least as to any material changes – the text of an MOA reached after the printing of any given CBA will either be included as a separate item in the printed version of the next CBA, as if often done, or that it will be incorporated into the body of that subsequent CBA as one of the enumerated articles. The December 7, 1989 MOA was not reprinted as a separate item in the published version of the 1993 CBA. However, if one reads the OPM budget estimate that was attached to the 1989 MOA [Exh. K], and then reads Article 9, section 21 of the 1993 CBA [Exh. G, page 27-29], it would require willful blindness not to recognize that the content of the 1989 MOA was fully incorporated into the 1993 CBA (albeit expanded to include other medical professionals such as the claimant).

Memorandum Re: Motion to Correct, p. 6.

Consistent with this reasoning, we find nothing unreasonable or illogical relative to the commissioner's inference that the supersedence process, specifically with regard to the provisions of § 5-142 (a), was not required again in 1993 because the only change to the contract provisions which had been established by the 1989 MOA was the addition of

[15] Paragraph (2) of the cost sheet purportedly attached to the 1989 MOA states: "Registered Professional and Licensed Practical Nurses hired on a per diem basis shall not be entitled to retirement benefits, health or life insurance benefits, paid leave, longevity or other economic benefits." Claimant's Exhibit K. However, the next sentence in this paragraph, indicating that "[t]he State will be responsible for Social Security and Workers' Compensation," was not reproduced in the 1993 CBA.

several job classifications, including that of psychiatrist, to the list of permitted per diem employees. The claimant asserts that the provisions of § 5-278 (b) (3) "would have required the parties to use the supersedence process again in 1993, as set out there and in the contract by specifically mentioning the new provisions and how they conflicted with C.G.S. §5-142, and by obtaining legislative approval of the amendment." Appellant's Brief, p. 20. We disagree; the commissioner concluded that the 1993 CBA did not operate to eliminate the per diem employees' entitlement to § 5-142 (a) benefits, because the 1989 MOA had already done so, and there is nothing in the record to suggest that the 1993 CBA intended to restore that entitlement.

We also note that in Cox v. Aiken, 278 Conn. 204 (2006), our Supreme Court clearly stated that "once the legislature has approved a collective bargaining provision that conflicts with a statute or regulation, that approval remains effective with respect to future agreements between the state and a particular bargaining unit, and the conflicting provision need not be resubmitted for approval." Id., 216-17.[16] In light of this directive, we agree with the commissioner that the addition of several job classifications eligible for per diem employees did not materially change the statutory provisions governing these employees which had already been put into place by virtue of the prior MOA and its accompanying supersedence appendix.[17]

[16] See General Statutes § 5–278 (b) (3), which states in relevant part that "[o]nce approved by the General Assembly, any provision of an agreement or award need not be resubmitted by the parties to such agreement or award as part of a future contract approval process unless changes in the language of such provision are negotiated by such parties…."

[17] In light of these comments by our Supreme Court in Cox v. Aiken, 278 Conn. 204 (2006), relative to the provisions of General Statutes § 5-278 (b) (3), we find unpersuasive the claimant's argument that the "Entire Agreement" clause contained in the various CBAs submitted into evidence would in some way serve to nullify a prior supersedence process. See Respondent's Exhibit 2, pp. 101-102; Claimant's Exhibit G, pp. 128-129; Respondent's Exhibit 5, p. 104. We are similarly unpersuaded that the "Duration of Agreement" article, which merely serves to set forth the applicable time period and expiration dates for the CBAs, would nullify a prior supersedence process. See Respondent's Exhibit 2, p. 103; Claimant's Exhibit

The claimant has also claimed as error the commissioner's decision to rely upon Exhibit K as substantive evidence. The claimant contends that Yelmini "testified incorrectly that the reason no supersedence appendix was submitted with the 1993 changed provisions was because arbitration decisions are not subject to this submission."[18] Appellant's Brief, p. 45. See January 8, 2020 Transcript, pp. 31, 34-36. The claimant therefore offered the documents comprising Exhibit K, entitled "New Supersedence Appendix" and "Estimated Budget Requirement," which were purportedly appended to the 1989 MOA, pointing out that the Estimated Budget Requirement reflected a per diem adjustment of $1.00 with the designation "(Arbitrator)." Claimant's Exhibit K. The claimant asserts that because the information on this budget sheet reflects that supersedence appendices can be submitted with arbitrated agreements, "[i]t should be evident that Exhibit K was offered for the limited purpose of testing the credibility of Linda Yelmini." Appellant's Brief, p. 60.

Our review of the record indicates Exhibit K came in as a full exhibit, with no objection from the respondent. See January 8, 2020 Transcript, pp. 39-40. As the claimant correctly points out, the record reflects that Yelmini testified that she did not negotiate the 1989 MOA and had "no recollection" of the document. January 8, 2020

G, p. 130; Respondent's Exhibit 5, p. 105. In his September 17, 2020 Memorandum, the commissioner noted that the most current version of the CBA in evidence was that covering the time period between July 1, 2009 and June 30, 2012, which predated the claimant's date of hire and date of injury. However, the commissioner also indicated that "the parties do not claim any subsequent changes that would be material to the matter before me," and noted that "the material provisions are no different than those agreed upon in December 1993." Memorandum, p. 4, fn. 2.

[18] At the formal hearing held on January 8, 2020, Yelmini testified that the law governing the submission of arbitration agreements to the legislature had changed over the years, in that "[t]here was a time when they were only submitted to the Labor Committee, to the Appropriations Committee and then they were never voted on for the full legislature. They went in based on the recommendation of either one of those committees. Now the entire legislature has to vote on, or not vote, because sometimes contracts or Arbitration Awards go in without any action by the Legislature." Transcript, pp. 34-35.

Transcript, p. 41. Moreover, none of the other witnesses who appeared at the formal proceedings testified that they had any familiarity with this document. Nevertheless, the commissioner observed that "[i]mplicit in claimant's offer [was] the representation that it was an official record that had been presented to the legislature." Ruling on Motion to Correct, p. 2. The commissioner stated that he "[found] no justification for allowing the claimant to make favorable use of this public document and then ignore its other implications simply because they may be harmful to the claimant's case." Memorandum Re: Motion to Correct, p. 3. He also pointed out that "it would have been improper for either party, knowing of the existence of this supersedence appendix, to withhold it from me." Id.

The claimant disputes the inferences drawn by the commissioner, contending that the "Claimant made no representations about the authenticity of Exhibit K," Appellant's Brief, p. 59, and that the commissioner's reliance on the exhibit was misplaced because it did not constitute the complete supersedence package. The claimant is essentially contending that the admission of the exhibit into evidence was inconsistent with various provisions of the Code of Evidence. However, in the workers' compensation forum, it is well-settled that:

> 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.

General Statutes § 31-298.

Moreover, the commissioner also retains the discretion to "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 …." General Statutes § 31-278. Finally, the commissioner is the "sole arbiter of the weight of the evidence and the credibility of witnesses …." Keenan v. Union Camp Corp., 49 Conn. App. 280, 286 (1998). As such, in light of the considerable discretion afforded to a workers' compensation commissioner relative to evidentiary submissions, we find no error in the commissioner's decision to admit and rely on the information contained in Exhibit K in reaching his conclusions in this matter.

The claimant also argues that the respondent, in challenging the claimant's entitlement to § 5-142 (a), failed to meet its burden of proof.[19] It is the claimant's position that because the respondent was the moving party in its attempts to curtail the payment of enhanced benefits, and failed to demonstrate "that any contract had taken away Claimant's full pay total disability rights," Appellant's Brief, p. 37, "[t]he correct result now is a simple reversal." Id., 28. The claimant further asserts that although the commissioner, at the first formal hearing, recognized that the respondent carried the burden of proof, in his Memorandum Re: Motion to Correct, the "Commissioner inexplicably reverses his decision regarding the burden of proof …." Id., 34. See also November 14, 2020 Transcript, p. 18.

[19] In addition to the form 43 filed on July 18, 2020, giving rise to the instant proceedings, the respondent filed a form 43 on August 11, 2017 acknowledging "the event of the injury on 7/10/17 for head contusion with post traumatic headaches" but reserving its right to challenge the extent of the claimant's disability without prejudice. Administrative Notice Exhibit 2. The respondent also filed a form 36 on October 23, 2017, which was denied on January 2, 2018, along with another form 43 citing a lack of "current sustainable or credible medical documentation to support ongoing benefits." Administrative Notice Exhibit 3.

We agree that the commissioner's decision in this matter did not adopt any of the respondent's arguments, which essentially attempted to challenge the claimant's status as a CVH employee and/or member of the class intended to receive § 5-142 (a) benefits.[20] The respondent also argued that the language in Article 9, § 21, of the 1993 CBA contract, which listed the benefits to which per diem employees would not be entitled and included the phrase "other economic benefits," operated to bar the receipt of both workers' compensation and § 5-142 (a) benefits. Claimant's Exhibit G, p. 27.

The commissioner rejected this proposition, stating that had the drafters of the 1993 CBA:

> intended to exclude per diem employees from coverage under the Workers' Compensation Act they could easily have made that intent manifest by simply adding the words "workers' compensation." They did not do so. Frankly, the notion that the drafters would have done something so drastic as to deny a class of employees access to the workers' compensation rights all other employees have by lumping in into a catch-all category seems most improbable.

Memorandum, p. 13.

We agree. Moreover, as previously discussed herein, the commissioner concluded that it was the 1989 MOA, and not the 1993 CBA, that served to bar per diem employees' entitlement to § 5-142 (a) benefits, and the reference to "other economic benefits" in the MOA merely reflected that change in the law.

However, we also note that at trial, the respondent raised a jurisdictional challenge implicating the "threshold question … [of] whether the Claimant is covered

[20] The respondent again raised these same arguments on appeal, in the form of "alternative grounds upon which the judgment may be affirmed." Respondent's Brief, pp. 12, 16. However, given that none of the respondent's arguments were raised in the context of a cross-appeal, we decline to enter into an examination of their merits at this juncture.

under workers' compensation at all." March 11, 2020 Transcript, pp. 19-20. With regard to this issue, the commissioner stated:

> The question of whether any individual falls within the class of people covered by a legislatively created compensation program is a question of fact for which the burden of proof may properly be assigned to one side or the other. However, the question of whether the *class* to which an individual belongs is covered by a legislatively created compensation program is a question of law and is quintessentially jurisdictional. Whatever the equities may be, the fact that the respondent paid Dr. Kelly under § 5-142(a) for some time before deciding he was not entitled to such payment does not give me the right to ignore the jurisdictional question once it has been raised, and it does not place a burden of proof on the respondent. (Emphasis in the original.)

Memorandum Re: Motion to Correct, p. 3.

We would also point out that in the workers' compensation forum, when an injured employee is seeking temporary total disability benefits, it is the claimant who "[bears] the burden of proving an incapacity to work, and 'total incapacity becomes a matter of continuing proof for the period claimed.'" Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 454 (2001), *quoting* Cummings v. Twin Tool Mfg. Co., 40 Conn. App. 36, 42 (1996). This is particularly so in matters involving "bonus legislation" such as § 5-142 (a), for which "the eligibility requirements set out in the statute must be strictly construed." Genesky v. East Lyme, 4600 CRB-8-02-12 (December 8, 2003), *aff'd*, 275 Conn. 246 (2005). See also Grover v. Manchester, 168 Conn. 84 (1975). While we recognize that the claimant's medical status was not in dispute during the formal proceedings, we are not persuaded that the burden of proof in this claim rested solely with the respondent.

Thus, while we would concede that it is unusual for a commissioner to reach a result that does not reflect the arguments made by either party, we are not persuaded that

the commissioner abused his discretion by doing so in light of the unusual circumstances of this matter. This is particularly so given that the commissioner, upon review of the claimant's correspondence and motion to correct of September 29, 2020, scheduled another formal hearing session at which both parties appeared and were given the opportunity for additional argument on the issues presented in this appeal.

Finally, the claimant contends that because the record is devoid of any evidence suggesting that the supersedence process was followed for either the 1989 MOA or the 1993 CBA, the commissioner's conclusions in that regard therefore constitute error. In support of this claim, the claimant cites several Supreme Court cases which, according to the claimant, serve to demonstrate that the failure of a moving party to establish that the proper supersedence process was followed results in nullification of the contract provisions at issue. We are not persuaded that any of the cases cited by the claimant have any bearing on the issues presented in this matter.

For instance, in Board of Trustees v. Federation of Technical College Teachers, 179 Conn. 184 (1979), our Supreme Court examined an appeal involving the calculation of sick time for full-time faculty at the Connecticut technical colleges. The board challenged an arbitration agreement concluding that full-time faculty were entitled to fifteen sick days per year, rather than the statutory twelve and one-half days. The court noted that the letter of transmittal to the legislature which had accompanied the relevant CBA "was silent as to a conflict in the sick leave provision of the agreement, erroneously indicating that a conflict existed only in relation to vacation leave." Id., 191. As such, the court, not surprisingly, concluded that when a supersedence request has not been

properly transmitted, "it cannot be said that such a request is 'approve(d) or reject(ed)' in accordance with § 5-278 (b)."[21] Id.

Similarly, in State College AAUP v. State Board of Labor Relations, 197 Conn. 91 (1985), the court reviewed an appeal involving the supersedence process for a CBA which failed to alert the legislature that the CBA would be impacted by a statutory amendment that had already been passed by the legislature and was due to become effective during the contract period. The court held that "[t]he legislature unquestionably should be made aware of a conflict with a statute that is scheduled to come into force a short time after a collective bargaining agreement has been approved." Id., 100.

> The requirement that such a conflict be pointed out to the legislature prior to its approval of a collective bargaining agreement assures that a vote of approval, suspending for purposes of the contract any conflicting statutes or regulations, will be had with full knowledge of the consequences.

Id.

The claimant also cited Nagy v. Employees' Review Board, 249 Conn. 693 (1999), in which the court reviewed an appeal of an order by a commissioner for the Department of Administrative Services involving the calculation of accrued sick and vacation leave for some of the unionized departmental employees. The defendants argued that the provisions of the "P-5 agreement" superseded the relevant statutory provisions governing the calculation of these items, an argument which the union, as an amicus curiae in the case, rejected.

[21] The court also noted that the arbitrator had "disavowed any attempt to construe state statutes and regulations, and expressly stated that he was not empowered to determine whether the collective bargaining sick leave provision was in conflict with statute or regulation." Board of Trustees v. Federation of Technical College Teachers, 179 Conn. 184, 193 (1979).

In its decision, the court noted that "no factual finding was made with respect to whether the P-5 agreement either expressly or implicitly addresses the treatment of union members' previously accrued sick and vacation leave." Id., 706. The court also remarked that "General Statutes § 5-278(b) implicitly requires that, in order for the legislature to 'approve or reject' a collective bargaining agreement term in conflict with the law, the particular contract term must be stated *distinctly* and *correctly* by the employer in the transmittal of the contract to the legislature." Id., 706-707. (Emphasis in the original.) Given that the record did not support the conclusion that the provisions in question had ever been submitted to or approved by the legislature, the court could not conclude that the commissioner's order had superseded the relevant statutory provisions.

There is no question that all three of these cases illustrate the logical proposition that the courts will not validate claims implicating the supersedence process if the record does not provide an adequate basis for the inference that the process was executed correctly. However, none of the cases cited by the claimant are on point with the matter at bar, given that in this case, the evidentiary record contains the supersedence appendix associated with the 1989 MOA which specifically states that § 5-142 (a) was one of the provisions affected by the MOA. The commissioner concluded that the provisions contained in the 1989 MOA were essentially incorporated into the Article 9, § 21 of the 1993 CBA; having done so, we believe it was also within his prerogative to conclude, on the basis of the supersedence appendix contained in Exhibit K, that the correct supersedence process for the MOA was followed.[22]

[22] We note that in his Memorandum, the commissioner stated that "[a] workers' compensation commissioner does not have the power to invalidate an action of either the legislature or the executive. The steps taken, or not taken, by the executive and the legislature may be material to deciding what was intended, but the effectiveness of their action is a matter for the courts." Id., 13. We agree. However, as

We recognize that the claimant disagrees with the inferences drawn by the fact-finder in this matter. We concede that a different fact-finder might have drawn different inferences from the evidentiary record. However, the fact that such a possibility exists does not provide an adequate basis for reversal by an appellate tribunal. "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).

There is no error; the September 17, 2020 Finding and Order by David W. Schoolcraft, the Commissioner acting for the Eighth District, is accordingly affirmed.

Commissioners Brenda D. Jannotta and Maureen E. Driscoll concur in this Opinion.

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the cases cited by the claimant illustrate, in claims implicating the supersedence process, the courts may require that the moving party provide proof that the process was followed correctly. In the matter at bar, the incorporation of the language of the 1989 MOA into Article 9, § 21 of the 1993 CBA, along with the supersedence appendix contained in Exhibit K, allowed for the reasonable inference that the process was adhered to with respect to the provisions of § 5-142 (a) in 1989. Having concluded that the changes to the 1993 CBA relative to per diem employees did not require supersedence, the commissioner was under no compunction to seek additional evidence on that issue.