CASE NO. 6425 CRB-3-21-5 : COMPENSATION REVIEW BOARD
CLAIM NO. 500014950

STEPHEN T. COCHRAN : WORKERS' COMPENSATION
CLAIMANT-APPELLEE COMMISSION

v. : MAY 6, 2022

STATE OF CONNECTICUT/
DEPARTMENT OF TRANSPORTATION
SELF-INSURED
EMPLOYER
RESPONDENT-APPELLANT

and

GALLAGHER BASSETT SERVICES, INC.
ADMINISTRATOR

APPEARANCES:

The claimant was represented by James H. McColl, Jr., Esq., The Dodd Law Firm, L.L.C., Ten Corporate Center, 1781 Highland Avenue, Suite 105, Cheshire, CT 06410.

At proceedings below, the respondent was represented by Donna H. Summers, Esq., Assistant Attorney General, Office of the Attorney General, 165 Capitol Avenue, Suite 4000, Hartford, CT 06106. At oral argument, the respondent was represented by Lisa Guttenberg Weiss, Esq., Assistant Attorney General, Office of the Attorney General, 165 Capitol Avenue, Suite 4000, Hartford, CT 06106.[1]

This Petition for Review from the April 23, 2021 Finding and Decision of Carolyn M. Colangelo, Administrative Law Judge acting for the Third District, was heard on September 24, 2021 before a Compensation Review Board panel consisting of Administrative Law Judges Brenda D. Jannotta, David W. Schoolcraft and William J. Watson III.[2]

[1] It should be noted that Attorney Marie Gallo-Hall, in her former position as Assistant Attorney General for the State of Connecticut, authored the appellant brief in this matter. In view of the fact that Attorney Gallo-Hall accepted the position of Agency Legal Director for the Workers' Compensation Commission on July 17, 2021, she has recused herself from any and all appellate review of this matter.

[2] Effective October 21, 2021, the Connecticut legislature directed that the phrase "administrative law judge" be substituted when referencing a workers' compensation commissioner. See Public Acts 2021, No. 18, § 1.

# OPINION

BRENDA D. JANNOTTA, ADMINISTRATIVE LAW JUDGE. The respondent has petitioned for review from the April 23, 2021 Finding and Decision of Carolyn M. Colangelo, Administrative Law Judge acting for the Third District. We find no error and accordingly affirm the decision.[3]

The administrative law judge made the following factual findings which are pertinent to our review of this matter. The claimant began working for the respondent on November 9, 1967; at that time, he was hired as a "Grade Two" entry-level employee whose duties included roadway and general maintenance as well as snowplowing. Findings, ¶ 3. At some point prior to June 1993, the claimant was promoted to a transportation general supervisor and placed in charge of one garage with a thirty-member crew.

In June 1993, the claimant underwent non-compensable surgery to his lumbar spine, after which he returned to work for the respondent. In October 1993, the claimant underwent a second non-compensable surgery to his lumbar spine, after which he again returned to work for the respondent. On or about January 2, 1994, the claimant, while in the course and scope of his employment, sustained a compensable injury to his lumbar spine when he fell over a Jersey barrier while attempting to remove a tire which had

[3] At the outset of the formal hearing held on October 31, 2019, the parties stipulated that in addition to the issues recited on the hearing notice, they were requesting that the administrative law judge address the issue of medical treatment pursuant to General Statutes § 31-294d. The administrative law judge noted that the issues in dispute were as follows: General Statutes §§ 31-275 (1) [compensability/causal connection]; 31-288 (b) [penalties for undue delay]; 31-294d [medical and surgical aid]; 31-294e [employee's option to obtain medical care]; 31-294f [medical examination of injured worker]; 31-298 [conduct of hearings]; 31-300 [award of interest and attorney's fees]; 31-307 [total incapacity benefits]; 31-307 (e) [social security retirement offset]; 31-308 (a) [temporary partial benefits]; 31-308 (b) [permanent partial disability benefits/date of maximum medical improvement]; and 31-308a [wage loss differential (post specific)].

fallen onto the highway.[4] He filed an accident report that evening and subsequently sought medical treatment at the industrial health center. The claimant returned to work after this injury but experienced an onset of severe back pain in June 1994. At that time, he underwent a compensable surgery to his lumbar spine with Glenn G. Taylor, an orthopedic surgeon, assisted by Michael E. Karnasiewicz, a neurosurgeon. The respondent paid for this surgery and for the associated period of disability.

The claimant returned to work for the respondent but underwent another compensable surgery to his lumbar spine with Taylor in April 1995.[5] The respondent again paid for the surgery and for the associated period of disability. The claimant returned to work following this surgery. In 1995, the respondent issued a voluntary agreement accepting the January 1994 injury as compensable and acknowledging that the claimant was entitled to a permanent partial disability award of 29.5 percent to the lumber spine.

On April 1, 2003, the claimant opted to take a regular retirement. At trial, he testified that his back symptoms had impacted his job duties such that "[i]t just got to a point where I was in pain all day and I was taking these medications. Eventually, it

[4] There appears to be some confusion regarding the claimant's actual date of injury. Most of the Workers' Compensation Commission file documents and medical reports in the record reflect a date of injury of January 1, 1994; however, the claimant testified that although the accident occurred in January 1994, it was not on January 1. See October 31, 2019 Transcript, p. 24; February 27, 2020 Transcript, p. 30. Handwritten hearing requests filed by the claimant on June 21, 1999, and March 15, 2015, reflect a date of injury of January 24, 1994, as does a form 43 filed on July 6, 1998. Karnasiewicz' April 18, 2016 respondent's medical examination report references a date of injury of January 24, 1994. See Claimant's Exhibit U [Claimant's Sub-Exhibit 2, p. 1]. Sella's March 3, 1995 respondent's medical examination report also references a date of injury of January 24, 1994. See Claimant's Exhibit K, p.1.

[5] The reports for this procedure do not appear to have been entered into the record. The claimant testified that in April 1995, he underwent surgery at St. Mary's Hospital to remove hardware which had been implanted in his back. See October 31, 2019 Transcript, p. 27. The claimant's wife also testified that she thought the 1995 surgery was for removal of a battery/stimulator. See July 22, 2020 Transcript, p. 16. A January 10, 1995 office note from Taylor states that he had "advised [the claimant] that he can have his battery pack removed at any time as an elective minor procedure." Claimant's Exhibit H.

would have got me in big trouble, you know, taking all this medication on company time." October 31, 2019 Transcript, p. 33. A year or two after retiring, the claimant attended a workers' compensation hearing seeking medical treatment. Eventually, the claimant began processing his medical bills through his group health insurance.

At some point, the claimant began treating with Mark Thimineur, a pain management specialist; on October 9, 2003, Thimineur opined that the claimant was "unable to do work-related activities due to the severity of the nerve damage in both feet and legs as well as the persistent low back pain secondary to an anatomical derangement of the spine as well as bone graft harvest site pain and sacroiliac dysfunction on the right side." Claimant's Exhibit D. At some point in 2003, the claimant was awarded social security disability benefits. In September 2005, Thimineur reported that the claimant was "doing well with his current medication regimen, with improved level of activities and quality of life." Id.

On March 14, 2012, the claimant came under the care of Federico P. Girardi, a spinal surgeon at The Hospital for Special Surgery in Manhattan. The claimant scheduled surgery for June 21, 2012, which he later cancelled. In January 2013, the claimant returned to Girardi for another surgical consult, reporting that his pain had returned; on April 2, 2013, the claimant underwent back surgery with Girardi, his third since the January 1994 injury and fifth, overall.[6]

On December 15, 2014, the claimant returned to Girardi, who reported that he:

> experiences intermittent low back pain … that improves with movement…. He continues to feel unsteady with gait and he uses a cane when at home and outdoors. He finds it difficult and painful to stand up straight…. The patient experiences pain at night. [He] goes to the gym and he walks for approximately one

[6] It should be noted that the claimant did not file a request for indemnity benefits at this time.

> hour on a treadmill and uses a stationary bicycle every other day. He is driving short distances and is not working. [He] continues to take Oxycodone 5 mg almost five times daily as well as OxyContin 30 mg up to three times daily. He also takes Lyrica.

Claimant's Exhibit C.

Following the surgery with Girardi, the claimant continued pain management with Thimineur and Sandeep Johar. On June 22, 2015, Girardi opined that the claimant was "totally, permanently disabled" due to his "initial, job-related injury." Id. On September 28, 2015, the claimant underwent an evaluation with Liqun Song, an endocrinologist, for a thyroid nodule. Song reported that the claimant had a normal gait and was "[n]egative for back pain, joint stiffness and myalgias," as well as "[n]egative for … sleep disturbance." Claimant's Exhibit L. On December 21, 2015, the claimant completed a functional capacity self-assessment in which he indicated he could sit or drive in a car for thirty minutes, sit for an hour, and lift twenty-five pounds at certain heights.

On April 18, 2016, Karnasiewicz evaluated the claimant. At his deposition, Karnasiewicz, noting that the claimant had sustained "a compensable injury to his low back in [the] early '90s, which necessitated a lumbar fusion," Claimant's Exhibit U, p. 8, opined that the 1994 injury was a substantial factor in the development of the claimant's current low back condition. See id., 9.

On October 5, 2016, the claimant underwent a respondent's medical examination with Stephen F. Calderon, a neurosurgeon. At his deposition, Calderon opined that the incident of January 1, 1994, had not been a contributing factor to the claimant's need for surgery in June 1994, liability for which the respondent had previously accepted and paid. Calderon also opined that the claimant would have been temporarily totally

disabled for approximately three months following the surgery performed in 2013 by Girardi. In addition, Calderon opined that when he examined the claimant in 2016, the claimant had a work capacity.

On February 11, 2017, Michael A. Dane, a physical therapist, performed a functional capacity evaluation of the claimant. Dane concluded that the claimant lacked a functional work capacity and deemed him disabled in light of his limited mobility and low tolerance for weight-bearing activity.

On July 24, 2017, the claimant underwent a Commission Medical Examination with Phillip S. Dickey, a neurosurgeon. At his deposition, Dickey opined that the January 1994 work incident was a substantial contributing factor to the herniation that led to the June 1994 surgery and its associated treatment and periods of disability. Dickey explained that:

> the fact that he had an injury and continued to complain of some pain about it means that there was some injury to the back, perhaps to the disk, at the time of his injury of 1/1/94. The piece of disk that pushed out … certainly didn't happen until after the MRI scan occurred…. It seems most likely that the injury of 1/1/94 did injure the L5-S1 disk and was a substantial contributing factor in the need for the surgery.

Respondent's Exhibit 1, p. 21.

Dickey also testified that the injury of January 1994 was a substantial contributing factor to the treatment required by the claimant following the fusion in June 1994. In addition, although Dickey stated in his July 24, 2017 report that the claimant had "the lightest work capacity," Respondent's Exhibit 1 [Respondent's Sub-Exhibit 2, p. 5], he also indicated in his October 24, 2017 correspondence to the Workers' Compensation Commission (commission) that "[i]t would be inappropriate for [him] to comment" on

the issue of whether the claimant had a work capacity in 2003. Respondent's Exhibit 1 [Respondent's Sub-Exhibit 3]. Dickey assigned the claimant a 40 percent permanent partial disability to the lumbar spine "based upon extensive fusion and restriction of motion with residual radiculopathy." Respondent's Exhibit 1 [Respondent's Sub-Exhibit 2, p. 5].

On December 12, 2017, the claimant underwent an assessment with Albert J. Sabella, a vocational rehabilitation counselor, who concluded that the claimant was "unemployable for any practical vocational purpose." Claimant's Exhibit T, p. 9. In his report of December 30, 2017, Sabella noted that the claimant "lies down periodically during the day to help reduce and relieve exacerbations of severe pain," id., 5, and was unable to "carry any weight because of use of his cane and balance issues." Id.

Sabella also indicated that the claimant had no formal education beyond that of a high school graduate, apart from some in-service management courses which the claimant had taken one day a week for approximately two years. Sabella further noted that the claimant reported having "very limited computer ability," id., and stated:

> Based on my review of the medical record, assessment interview, occupational and labor market analysis, it is my opinion that [the claimant] has formidable employment barriers including substantial physical restrictions, age, prolonged absence from the workforce, no useful transferable or marketable vocational ability and ongoing chronic pain. He continues to take narcotic medication and would not pass a drug screen.

Id., 8.

Sabella concluded it was "more likely than not, that based on [the claimant's] vocational profile, he is unable to compete for appropriate work within his physical capabilities, find an employer who will hire him, or to maintain employment on a

sustainable basis." Id., 9. Sabella reiterated this opinion at his deposition, maintaining that the claimant "had no practical employment potential and ... he was unemployable." Claimant's Exhibit Z, p. 13.

The claimant also testified at trial. When queried regarding how the January 1994 injury had affected his life, the claimant replied, "I believe it ruined my life." October 31, 2019 Transcript, p. 49. The claimant explained that he didn't "have any enjoyment" with his younger grandchildren because he was afraid of losing his balance and falling when around them. Id., 50. The claimant contrasted this circumstance with his experiences with his oldest grandchild, who was approximately eighteen years old at the time of the October 31, 2019 formal hearing and with whom the claimant had "had a lot of fun … because [he] was able to do things back then prior to the injury or whatever. Now I just exist with them. I don't enjoy them." Id. The claimant's wife, Marion, also testified at trial, indicating that when the claimant initially retired in 2003, "he was still pretty functional." July 22, 2020 Transcript, p. 13. However, she stated that since the claimant's retirement, "[o]ver time his body just deteriorated." Id., 17.

On the basis of the foregoing, the administrative law judge determined that the claimant's testimony was "in large part" credible and persuasive, although she deemed him "a poor historian." Conclusion, ¶ C. She likewise found credible and persuasive the testimony offered by the claimant's wife. In addition, the trier found "fully persuasive" the opinion proffered by Dickey that the claimant had "the lightest work capacity," Conclusion, ¶ E, *quoting* Respondent's Exhibit 1 [Respondent's Sub-Exhibit 2, p. 5], and that the work-related incident of January 1, 1994, was a substantial contributing factor to the herniation which led to the claimant's June 1994 surgery and its associated disability

and treatment, including the 2013 surgery. In addition, the trier found persuasive Dickey's opinion that the claimant had sustained an increased permanent partial disability to his lumbar spine.

The trier also found persuasive Calderon's opinion that the claimant would have been disabled for approximately three months following the 2013 surgery. She did not find the balance of Calderon's opinion persuasive; nor did she find persuasive Karnasiewicz' opinion that the claimant was disabled as of April 2016. The trier declined to award benefits pursuant to General Statutes § 31-308a[7] given that the claimant had failed to establish that he was either willing or able to perform work in the state. However, the trier found that the claimant was entitled to temporary total disability benefits for the three-month period following the 2013 surgery, in view of the fact that the claimant had "demonstrated through medical testimony that he was totally disabled during this time, and that the surgery was related to his 1994 date of injury." Conclusion, ¶ J.

[7] General Statutes § 31-308a states in relevant part: "(a) In addition to the compensation benefits provided by section 31-308 for specific loss of a member or use of the function of a member of the body, or any personal injury covered by this chapter, the commissioner, after such payments provided by said section 31-308 have been paid for the period set forth in said section, may award additional compensation benefits for such partial permanent disability equal to seventy-five per cent of the difference between the wages currently earned by an employee in a position comparable to the position held by such injured employee prior to his injury ... and the weekly amount which such employee will probably be able to earn thereafter ... to be determined by the commissioner based upon the nature and extent of the injury, the training, education and experience of the employee, the availability of work for persons with such physical condition and at the employee's age .... If evidence of exact loss of earnings is not available, such loss may be computed from the proportionate loss of physical ability or earning power caused by the injury. The duration of such additional compensation shall be determined upon a similar basis by the commissioner, but in no event shall the duration of such additional compensation exceed the lesser of (1) the duration of the employee's permanent partial disability benefits, or (2) five hundred twenty weeks. Additional benefits provided under this section shall be available only to employees who are willing and able to perform work in this state.

(b) Notwithstanding the provisions of subsection (a) of this section, additional benefits provided under this section shall be available only when the nature of the injury and its effect on the earning capacity of an employee warrant additional compensation."

The trier concluded that the claimant had "exercised his statutory right to obtain medical treatment at his own expense pursuant to the provisions of General Statutes § 31-294e (a),"[8] Conclusion, ¶ K, and he "did not refuse to accept or fail to obtain reasonable medical care" such that his entitlement to benefits was compromised pursuant to the provisions of General Statutes § 31-294e (b).[9] Conclusion, ¶ L. The trier further determined that from April 1, 2003, until December 30, 2017, the claimant did not meet his burden of proving entitlement to temporary total disability benefits in that he neither demonstrated that he sought employment and was unable to secure same, or demonstrated through persuasive medical and/or vocational testimony that he was unemployable during this time period.

The trier found persuasive the 2017 opinion proffered by Sabella "because his opinion … that claimant is without a work capacity is consistent with the balance of the record, including the [functional capacity evaluation] in evidence, and Dr. Dickey's opinion that claimant has 'the lightest of work capacities.'"[10] Conclusion, ¶ P, *citing* Respondent's Exhibit 1 [Respondent's Sub-Exhibit 2, p. 5]. The trier concluded that the claimant had demonstrated that his condition had deteriorated since 2003 and he was therefore entitled to temporary total benefits as of December 30, 2017, having established through persuasive vocational expert testimony that he was unemployable as of that date.

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[8] General Statutes § 31-294e (a) states: "At his option, the injured employee may refuse the medical and surgical aid or hospital and nursing service provided by his employer and obtain the same at his own expense."

[9] General Statutes § 31-294e (b) states: "If it appears to the commissioner that an injured employee has refused to accept and failed to obtain reasonable medical and surgical aid or hospital and nursing service, all rights of compensation under the provisions of this chapter shall be suspended during such refusal and failure."

[10] On January 15, 2019, Jeffrey Joy, a vocational rehabilitation specialist and earnings analyst, also performed a vocational assessment of the claimant and concluded that he was employable. See Respondent's Exhibit 3. The administrative law judge did not find this opinion persuasive.

The trier also concluded that the claimant had met his burden of proof in establishing that the permanent partial disability to his lumbar spine increased to 40 percent as of July 24, 2017.

The trier declined to award interest, attorney's fees or penalties, having determined that the delay in the payment of temporary total disability and permanent partial disability benefits did not occur through the fault or neglect of the respondent. The trier ordered the respondent to pay to the claimant temporary total disability benefits for the three-month period following the 2013 surgery as well as ongoing temporary total disability benefits commencing on December 30, 2017. However, noting that the date of the claimant's injury implicated the provisions of General Statutes § 31-307 (e),[11] the trier ordered the respondent to make payment twenty business days after the claimant had provided information regarding his social security retirement benefits for the relevant time periods. The respondent was also ordered to pay additional benefits relative to the increased permanent partial disability to the claimant's lumbar spine commencing as of July 24, 2017, the date of Dickey's evaluation.[12]

[11] While in effect, General Statutes § 31–307 (e) provided: "Notwithstanding any provision of the general statutes to the contrary, compensation paid to an employee for an employee's total incapacity shall be reduced while the employee is entitled to receive old age insurance benefits pursuant to the federal Social Security Act. The amount of each reduced workers' compensation payment shall equal the excess, if any, of the workers' compensation payment over the old age insurance benefits." Section 31-307 (e) was repealed on May 30, 2006. See Public Acts 2006, No. 84, § 1.

[12] We note that in its motion to correct, the respondent requested that the administrative law judge add a finding reflecting that although the increased permanency award translated into an additional 39.27 weeks of benefits, only 22.7 weeks would be due and payable before December 30, 2017. The administrative law judge denied the correction on the basis that the claimant had no objection. As such, it appears that the parties were cognizant of the well-settled prohibition against double recovery which prevents a claimant from collecting ongoing permanency benefits following the commencement of payments for temporary total disability. See Paternostro v. Edward Coon Co., 217 Conn. 42, 49 (1991)("the rule against double compensation prohibits concurrent payment of specific indemnity benefits for permanent partial impairment under § 31–308 (b) and benefits for total incapacity under § 31–307 as a result of the same incident.")

The respondent filed a motion to correct, which was granted in part to correct a scrivener's error relative to the date of the claimant's second compensable surgery in April 1995, and denied as to the balance of the proposed corrections, and this appeal followed. On appeal, the respondent argues that the administrative law judge erred in awarding temporary total disability benefits given that the claimant: (1) received unauthorized medical treatment from an out-of-state, out-of-network provider; and (2) participated in a voluntary incentive retirement program in 2003 without experiencing any loss of earning capacity. The respondent also contends that the trier's denial of several of its proposed corrections constituted error.

The standard of review we are obliged to apply to a trier'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 [trier] 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 our analysis with the claim of error pertaining to the administrative law judge's award of temporary total disability benefits for the three-month period following the claimant's surgery at the Hospital for Special Surgery in New York in 2013. The respondent asserts that in 2005, it authorized additional diagnostic studies and medical treatment with the claimant's then-treating physician, but the claimant did not pursue that treatment. "Instead, eight years later, without contacting the appellants and/or requesting a hearing before the Workers' Compensation Commission, the appellee underwent surgery with an out-of-state, out-of-network physician." Appellant's Brief, p. 5. The respondent points out that the claimant then waited another two years before returning to the commission seeking indemnity benefits. The respondent argues that "[b]y acting in this manner, the appellee deprived the appellants of an appropriate and timely investigation into the reasonableness and necessity of such surgery and/or the ability to have any treatment be rendered by the authorized physician." Id.

It should be noted that the respondent does not dispute that an administrative law judge generally retains the discretion to retroactively designate medical treatment as reasonable and/or necessary. However, it is the respondent's position that the trier erred in ordering three months of temporary total benefits following the 2013 surgery because she "declined to rule on the reasonableness and necessity of the 2013 surgery and did not retroactively authorize that procedure. As such, the order for payment of benefits … was without a sufficient basis."[13] Appellant's Brief, p. 6.

[13] We recognize that in Sellers v. Sellers Garage, 5755 CRB-5-12-5 (June 12, 2013), *aff'd*, 155 Conn. App. 635 (2015), this board also used the phrase "retroactively authorize." In the interests of clarity, we interpret this language to signify a subsequent determination by an administrative law judge that the treatment in dispute constituted reasonable or necessary medical care.

We note at the outset that the issue of whether the out-of-state surgery with Girardi constituted reasonable or necessary medical treatment, as contemplated by General Statutes § 31-294d,[14] was not directly addressed by either party during the proceedings which are the subject of this appeal. Rather, as the claimant accurately points out, the respondent's arguments during trial were primarily directed at challenging the compensability of the surgery on the basis of whether it constituted a sequela of the claimant's 1994 injury.

It is well-settled that the appropriate scope of review for an appellate tribunal is generally limited to claims of error arising from arguments actually presented at trial.[15] However, in the present matter, our review of the evidentiary record indicates that at the first formal hearing held on October 31, 2019, both parties specifically requested that General Statutes § 31-294d be included among the issues for determination, although the rationale for that inclusion was not articulated. We also note that at the same hearing, respondent's counsel objected to the introduction of Girardi's reports into the record, stating that Girardi, as a New York-based physician, was "out of the chain of referrals. His records were not provided contemporaneously to the state so that we had an opportunity to address the need for that surgery and the relatedness to the state's 1994 injury." October 31, 2019 Transcript, p. 13.

[14] General Statutes § 31-294d (a) (1) states in relevant part: "The employer, as soon as the employer has knowledge of an injury, shall provide a competent physician, surgeon, physician assistant or advanced practice registered nurse to attend the injured employee and, in addition, shall furnish any medical and surgical aid or hospital and nursing service, including medical rehabilitation services and prescription drugs, as the physician, surgeon, physician assistant or advanced practice registered nurse deems reasonable or necessary."

[15] We further note that the respondent did not seek to correct the findings relative to the issue of whether the 2013 surgery with Girardi constituted reasonable or necessary medical treatment.

As such, in light of the comments made by respondent's counsel at trial, and the fact that § 31-294d was specifically identified by the parties as an issue for determination, we will address the respondent's arguments relative to the reasonableness and/or necessity of the 2013 surgery with Girardi and the administrative law judge's decision to award three months of temporary total disability benefits following this surgery.

It is axiomatic that the determination of what constitutes "reasonable or necessary" medical care is a factual determination [which] … is squarely within the purview of the trial commissioner." Beaudry, supra, *citing* Pagliarulo v. Bridgeport Machines, Inc., 20 Conn. App. 154 (1989). Moreover:

> This question is not necessarily a medical matter only, on which expert testimony would be necessary, but may also be affected by a consideration of the surrounding circumstances as the trier of fact finds them…. Such circumstances may include the plaintiff's age, medical history, previous course of treatment and its success or failure, and whether the proposed medical procedure "involves real danger and suffering without fair assurance of effecting an improvement or restoration of health." (Internal citation omitted.)

Pagliarulo, supra, 159, *quoting* Acquarulo v. Botwinik Bros., Inc., 139 Conn. App. 684, 690 (1953) (Baldwin, J., concurring).

In the present appeal, the respondent relies on several cases for its claim that the administrative law judge erroneously failed to state that the claimant's 2013 surgery with Girardi constituted reasonable or necessary medical treatment. The respondent points out that in Cummings v. Twin Mfg., Inc., 29 Conn. App. 249 (1992), our Appellate Court, in reviewing a matter in which this board had affirmed the decision of the administrative law judge authorizing out-of-state medical treatment for the claimant without having first conducted a hearing, held "that under the circumstances of this case, the review division correctly determined that a compensation commissioner may order treatment outside

Connecticut." Id., 256-257. However, the court ordered the matter remanded, stating that "the commissioner should conduct an evidentiary hearing as to whether treatment out of state is reasonable and necessary in light of whether equally beneficial treatment is unavailable in Connecticut." Id., 260. The court also added the following caveat:

> Although a commissioner may order out-of-state treatment in appropriate circumstances, our holding is not to be interpreted as meaning that such treatment must be ordered in all circumstances. We reiterate that such treatment should be reasonable and necessary, and permitted only when equally beneficial treatment is unavailable in Connecticut.

Id.

The respondent also relies on Beaudry v. Uniroyal, 4505 CRB-5-02-3 (March 5, 2003), *appeal dismissed*, A.C. 24046 (June 6, 2003), in which a decedent's widow brought a claim for survivor's benefits following the death of her husband, who had suffered a pulmonary embolism after undergoing surgery which was related to his compensable back injury but had not been recommended by his treating physicians. This board, noting that "[w]hether the decedent's surgery was reasonable or necessary is a factual determination and as such it is squarely within the purview of the trial commissioner," id., affirmed the administrative law judge's dismissal of the claim.

In addition, the respondent relies upon Sellers v. Sellers Garage, 5755 CRB-5-12-5 (June 12, 2013), *aff'd*, 155 Conn. App. 635 (2015), and Bond v. The Monroe Group, LLC, 5093 CRB-3-06-5 (May 3, 2007), wherein the administrative law judge declined to retroactively deem reasonable or necessary medical treatment obtained by the claimants. Given that the findings were supported by the evidentiary record, this tribunal affirmed the decisions, observing in both cases "that a claimant who initiates treatment with a new physician without obtaining a referral from a treating physician or prior authorization

from the [Workers' Compensation] Commission assumes the risk the trial commissioner will not retroactively authorize such treatment at a later date." Sellers, supra, *citing* Anderson v. R&K Spero Company, 4965 CRB-3-05-6 (February 21, 2007), *aff'd*, 107 Conn. App. 608 (2008); Bond, supra, *citing* Anderson, supra.

Finally, the respondent points to Jurado v. New Milford Nursing Home, 5089 CRB-7-06-5 (May 10, 2007), wherein the respondents challenged a retroactive decision by the administrative law judge concluding that the out-of-network psychiatric care obtained by the claimant had been reasonable and necessary. The Jurado respondents contended "that once an injury is accepted by the respondents, there is no discretion on the part of the trial commissioner to authorize any treatment outside the medical care plan established by the respondent's insurance carrier." Id. We rejected this argument, noting that the statutory prohibition against receiving out-of-network care codified at General Statutes § 31-279 (c) (2)[16] is "subject to the order of the commissioner" and, as such, "provides authority under the statute for a trial commissioner to authorize an 'out of network' medical provider upon the presentation of competent evidence justifying such an order." Id.

Our review of the foregoing precedent does not persuade us that the administrative law judge erred in awarding three months of temporary total disability benefits following the claimant's 2013 surgery. We agree with the claimant that Cummings, supra, can be factually distinguished from the present matter given that the court's analysis in Cummings primarily involved an examination of the relevant factors

[16] General Statutes § 31-279 (c) (2) states: "The election by an employee covered by a plan established under this subsection to obtain medical care and treatment from a provider of medical services who is not listed in the plan shall suspend the employee's right to compensation, subject to the order of the commissioner."

which should be taken into consideration by an administrative law judge when requested to prospectively authorize out-of-state medical treatment, whereas the dispute in the present matter implicates a retrospective assessment of whether unauthorized out-of-state medical treatment already received by the claimant constituted reasonable or necessary medical care.[17] However, in either case, Cummings would appear to stand for the undisputed proposition that an administrative law judge generally retains the discretion to determine what constitutes reasonable or necessary medical care. More to the point, absolutely no evidence was adduced at trial which could be considered remotely relevant to the issue of whether equally beneficial treatment within the state of Connecticut was available to the claimant.

In addition, we note that this board affirmed the decision in Beaudry, supra, because the evidentiary record supported the trier's retrospective finding that the medical care in dispute was neither reasonable nor necessary given that the procedure contravened the recommendations of two of the decedent's treating physicians. Similarly, the decisions in Sellers, supra, Bond, supra, and Jurado, supra, were affirmed on the basis that the trier's determination of whether the medical care in question was reasonable or necessary comported with the evidentiary record.[18]

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[17] In Cummings v. Twin Mfg., Inc., 29 Conn. App. 249 (1992), the court also examined the issue of whether General Statutes § 31-294d permitted out-of-state medical treatment under any circumstances. The court concluded that: "In an age of medical specialization in which technology is advancing at a pace almost beyond our ability to comprehend, any blanket prohibition against treatment out of state for Connecticut compensation claimants would constitute an unwise 'parochial view that adequate treatment is always available in this state.'" Id., 258, *quoting* Alcan Electrical & Engineering Co. v. Bringmann, 829 P.2d 1187, 1189 (Alaska 1992).

[18] The respondent also referenced Gonzalez v. Coca-Cola Bottling Co. of New York, 4284 CRB-8-00-8 (September 13, 2001). However, that case stood for a slightly different proposition, in that the claimant sought out-of-network medical care after the respondents refused to authorize medical treatment because the claimant had reported his injury in a telephone call to his supervisor rather than via the submission of a completed injury report. The administrative law judge ordered the payment of the medical expenses, and this board affirmed that decision.

We recognize that the findings of the administrative law judge do not specifically state that the claimant's surgery with Girardi was reasonable or necessary, which is understandable, given that the issue was not contested at trial. What the trier did do, however, is conclude that the claimant had established his eligibility for three months of post-surgery temporary total disability benefits by way of persuasive medical testimony demonstrating that he was totally disabled during this time period and that "the surgery was related to his 1994 date of injury." Conclusion, ¶ J. As such, we believe it may be reasonably inferred that the decision of the administrative law judge to award temporary total disability benefits for this time period was logically predicated on her conclusion that the 2013 surgery constituted reasonable or necessary medical treatment.

Moreover, we note that the trier specifically found persuasive Dickey's opinion "that the January 1, 1994 incident was a substantial contributing factor to the herniation that resulted in the June 1994 surgery and its related treatment, including the 2013 surgery, and disability thereafter ...."[19] Conclusion, ¶ E. The trier also found persuasive Calderon's deposition testimony that the claimant would have been totally disabled from employment for "approximately three months." Respondent's Exhibit 2, p. 25. These medical opinions provided a more than adequate basis for the trier's conclusion that the claimant's 1994 injury was a substantial contributing factor to the need for the 2013 surgery. We therefore conclude that it was well within the trier's discretion to award temporary total benefits for the three-month period following this surgery, and we accordingly affirm the award.[20]

[19] Dickey also noted that the claimant "continued to have symptoms that whole time." March 25, 2019 Transcript, p. 27.

[20] We note that the claimant testified that when he attended an informal hearing a year or two after his retirement seeking reimbursement for prescription copayments and authorization for additional treatment

The respondent also contends that the administrative law judge misapplied the law by ordering the payment of ongoing total disability benefits commencing on December 30, 2017, "despite the claimant's … having taken a voluntary incentive retirement pension fifteen years earlier while still at a full-duty work capacity." Appellant's Brief, p. 6. The respondent points out that this decision runs counter to the "original intent" of the temporary total disability statute, which was formulated in 1913 in order to "readjust the [injured claimant] to a changed position by substituting an economic benefit in place of the personal loss suffered in an amount necessary to carry the claimant until he could again re-enter productive industry without lowering his standard of living." Id., 6-7, *citing* February 20, 1913 Joint Labor and Judiciary Committee Hearing Relating to the Workmen's Compensation Act, remarks of The Honorable Howard Cheney, p. 70.

The respondent further points out that by the time formal proceedings commenced in the present matter, "the claimant had not worked in fifteen years and was not losing any money nor was he at any financial disadvantage because of his accepted claim." Appellant's Brief, p. 7. The respondent also notes that "[t]he claimant acknowledged that, upon retirement, he had no intention of returning to the workforce and had not taken any steps to further his employability in the fourteen years since his retirement." Id., 8.

Currently, General Statutes § 31-307 provides as follows:

> (a) If any injury for which compensation is provided under the provisions of this chapter results in total incapacity to work, the

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with Taylor or Karnasiewicz, he was told by respondent's counsel that "there's nothing more we can do for you" and "[y]ou're all done with us." October 31, 2019 Transcript, p. 39. See also February 27, 2020 Transcript, p. 47. The claimant stated that he had interpreted counsel's remarks to signify "[t]hat I was all done with workers' comp and that I was on my own," id., and indicated that after that hearing, he submitted his medical bills to his private health insurance. It may be reasonably inferred that this exchange with respondent's counsel may have "disincentivized" the claimant from seeking prospective authorization from the respondent for the 2013 surgery with Girardi.

> injured employee shall be paid a weekly compensation equal to seventy-five per cent of the injured employee's average weekly earnings as of the date of the injury, calculated pursuant to section 31-310, after such earnings have been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act made from such employee's total wages received during the period of calculation of the employee's average weekly wage pursuant to section 31-310; but the compensation shall not be more than the maximum weekly benefit rate set forth in section 31-309 for the year in which the injury occurred. No employee entitled to compensation under this section shall receive less than twenty per cent of the maximum weekly compensation rate, as provided in section 31-309, provided the minimum payment shall not exceed seventy-five per cent of the employee's average weekly wage, as determined under section 31-310, and the compensation shall not continue longer than the period of total incapacity.

As a cursory review will reveal, the statute in its current form imposes no constraints on a claimant's ability to collect temporary total disability benefits due to age or retirement status; rather, it mandates that the injured claimant "*shall* be paid a weekly compensation equal to seventy-five per cent of the injured employee's average weekly earnings as of the date of the injury." (Emphasis added.) Given that we do not consider this statutory language in any way ambiguous, we are therefore compelled by the provisions of General Statutes § 1-2z[21] to give the "plain language" of the statute its full force and effect.

We further conclude that the evidentiary record in this matter provided an adequate basis for an award of ongoing temporary total disability benefits commencing on December 30, 2017, given that the administrative law judge found persuasive Sabella's report of that date stating that "the combined and compounded effect of [the

[21] General Statutes § 1-2z states: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

claimant's] employment barriers manifest to an extent that renders him unemployable for any practical vocational purpose." Claimant's Exhibit T, p. 9. Sabella reiterated this opinion at his deposition, testifying that when he evaluated the claimant on December 12, 2017, the claimant "had no practical employment potential and ... he was unemployable." Claimant's Exhibit Z, p. 13. The trier therefore concluded that the claimant had "met his burden that he [was] entitled to temporary total benefits as of December 30, 2017 because he established through persuasive non-physician vocational rehabilitation expert testimony that he was unemployable as of that date." Conclusion, ¶ R.

In addition, both the claimant and his wife testified extensively regarding the ways in which the effects of the January 1994 injury and subsequent years of treatment had limited the claimant's ability to perform routine daily activities. See October 31, 2019 Transcript, pp. 31-33, 49-50; February 27, 2020, pp. 34-39; July 22, 2020 Transcript, pp. 7-13, 17-19, 20. The administrative law judge found this testimony credible, and it was well within her discretion to rely upon the testimony in determining the claimant's eligibility for temporary total disability benefits. In O'Connor v. Med-Center Home Health Care, Inc., 140 Conn. App. 542, *cert. denied*, 308 Conn. 942 (2013), our Appellate Court observed that this board "has concluded that wide latitude is afforded to commissioners with respect to the evidence they may consider in evaluating whether a claimant is totally disabled." Id., 554. As such, the court held that when attempting to establish whether a claimant is eligible for temporary total disability benefits, the fact-finder must engage in "a holistic determination of work capacity ...." Id.

We recognize that the evidentiary file in the present matter contains expert medical opinion indicating that the claimant's work-related injury was not a substantial contributing factor to the claimant's post-retirement incapacity. However, "[i]t is 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).

The respondent also challenges the claimant's reliance on Laliberte v. United Security, Inc., 261 Conn. 181 (2002), in prosecuting his claim for post-retirement temporary total disability benefits. In that matter, the respondent Second Injury Fund sought to discontinue the temporary total disability benefits of an incarcerated claimant, arguing that it was the claimant's incarceration, rather than his disability, which prevented him from working. The Supreme Court rejected this contention, noting that "§ 31-307 (a) contains no provision permitting the discontinuance of the total disability benefits of an injured employee based on his incarceration." Id., 186. The court also pointed out that the fund "has provided us with no legislative history, and we are aware of none, suggesting that the legislature intended to permit the discontinuance of total disability benefits for totally disabled recipients who are also unable to work as a result of incarceration." Id. Ultimately, the justices held that "it is not the court's role to acknowledge an exclusion when the legislature painstakingly has created such a complex statute…. The complex nature of the workers' compensation system requires that policy determinations should be left to the legislature, not the judiciary." Id., 187.

We agree with the respondent that the factual circumstances in Laliberte are not on point with those in the present matter. However, our review of § 31-307 indicates that the statute likewise "contains no provision permitting the discontinuance of the total disability benefits of an injured employee," id., because the employee has retired from gainful employment. This interpretation is consistent with a 1998 Supreme Court decision wherein the court upheld the award of survivor's benefits to the widow of a retired decedent who died from mesothelioma contracted in the course of his employment. The court "[concluded] that the employee's complete retirement under the circumstances, at the time of his incapacity, does not bar weekly death benefits for a permanent loss of earning capacity. This is in keeping with the purpose of our act." Green v. General Dynamics Corp., 245 Conn. 66, 79 (1998).

Finally, it is worth noting that in 2006, four years after our Supreme Court's decision in Laliberte, the Connecticut legislature repealed the social security offset codified at § 31-307 (e). In remarks to the Senate Labor Committee, Senator Prague, after asserting that "in our workers' comp system, there is a very unfair situation that no other New England state has," 49 S. Proc., Pt. 9, 2006 Sess., p. 2617, remarks of Senator Edith Prague, explained the mechanics of § 31-307 (e), queried why other retirement account payments were not treated in a similar manner, and then stated that "we must do something to right this wrong." Id.

Senator Guglielmo agreed, stating that the bill repealing the offset "makes common sense," id., 2618, remarks of Senator Tony Guglielmo, while Senator Gomes commented that "[f]or somebody to have 100% of their social security ... discounted because they're injured on the job is completely ridiculous." Id., 2619, remarks of Edwin

Gomes. The Senate defeated an amendment introduced by Senator Andrew Roraback which would have preserved the offset for workers between the ages of sixty-two and sixty-five and eight months, and § 31-307 (e) was repealed by a vote of thirty-three to two, with one abstention.[22] The social security offset has never been re-enacted and we are unaware of any other legislation having been enacted which would curtail the right of retirees to collect temporary total disability benefits.

As such, in light of Supreme Court precedent on this issue, as well as long-standing legislative acquiescence, we find no error on the part of the administrative law judge in awarding ongoing temporary total disability benefits to the claimant consistent with the evidentiary record submitted in this matter.[23]

There is no error; the April 23, 2021 Finding and Decision of Carolyn M. Colangelo, Administrative Law Judge acting for the Third District, is accordingly affirmed.

Administrative Law Judges David W. Schoolcraft and William J. Watson III concur in this opinion.

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[22] It should be noted that General Statutes § 31-307 (e) was not repealed retroactively and is therefore still applicable to relevant claims in which the date of injury falls between July 1, 1993, and May 30, 2006.

[23] The respondent has also claimed as error the administrative law judge's denial of two of its proposed corrections in its motion to correct. (Although the respondent, in its Reasons of Appeal, also cited error relative to a third proposed correction, this particular claim was not addressed in its brief.) Our review indicates that the purpose of these corrections was to establish that the respondent was not responsible for the medical expenses or "costs" associated with the 2013 surgery. The administrative law judge denied the proposed corrections on the basis that they were "unnecessary" because the claimant was not seeking reimbursement of medical expenses at that juncture. There is no error; however, we note that in its brief, respondent argued that the denial constituted error because the proposed corrections "went to the heart of whether total disability benefits should be paid following the claimant's 2013 surgery." Appellant's Brief, p. 8. To the extent the respondent may be suggesting it bears no liability for indemnity payments in a matter in which medical treatment, subsequently deemed reasonable or necessary, was obtained through a claimant's private insurance policy, we would point out that such a position is inconsistent with both pattern and practice as well as General Statutes 31-299a (b).