CASE NO. 6430 CRB-5-21-6 : COMPENSATION REVIEW BOARD
CLAIM NO. 500004999

JANET BRENNAN, EXECUTRIX OF THE ESTATE OF THOMAS BRENNAN : WORKERS' COMPENSATION COMMISSION
CLAIMANT-APPELLEE

v. : APRIL 11, 2022

CITY OF WATERBURY
SELF-INSURED
EMPLOYER
RESPONDENT-APPELLANT

APPEARANCES:

The claimant was represented by Robert C. Lubus, Jr., Esq., Grady & Riley, L.L.P., 86 Buckingham Street, Waterbury, CT 06710.

The respondent was represented by Daniel J. Foster, Esq., City of Waterbury, Office of Corporation Counsel, 235 Grand Street, Third Floor, Waterbury, CT 06702.

This Petition for Review from the May 21, 2021 Finding and Decision of Charles F. Senich, Administrative Law Judge acting for the Fifth District, was heard on October 29, 2021 before a Compensation Review Board panel consisting of Chief Administrative Law Judge Stephen M. Morelli and Administrative Law Judges Brenda D. Jannotta and Maureen E. Driscoll.[1]

[1] 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

STEPHEN M. MORELLI, CHIEF ADMINISTRATIVE LAW JUDGE. The respondent has petitioned for review from the May 21, 2021 Finding and Decision (finding) of Charles F. Senich, Administrative Law Judge acting for the Fifth District. We find error and accordingly affirm in part and remand the decision for additional proceedings consistent with this Opinion.[2]

We note at the outset that the administrative law judge heard this matter on remand from the decision of our Supreme Court in Brennan v. Waterbury, 331 Conn. 672 (2019). In Brennan, the court identified as the issue for determination "whether heart and hypertension benefits under General Statutes § 7-433c[3] for permanent partial disability properly are paid to a deceased claimant's estate if such benefits vested and were payable ('matured') during the claimant's lifetime but were not paid to the claimant before his

[2] We note that one motion for extension of time was granted during the pendency of this matter.

[3] General Statutes § 7-433c (a) states: "Notwithstanding any provision of chapter 568 or any other general statute, charter, special act or ordinance to the contrary, in the event a uniformed member of a paid municipal fire department or a regular member of a paid municipal police department who successfully passed a physical examination on entry into such service, which examination failed to reveal any evidence of hypertension or heart disease, suffers either off duty or on duty any condition or impairment of health caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability, he or his dependents, as the case may be, shall receive from his municipal employer compensation and medical care in the same amount and the same manner as that provided under chapter 568 if such death or disability was caused by a personal injury which arose out of and in the course of his employment and was suffered in the line of duty and within the scope of his employment, and from the municipal or state retirement system under which he is covered, he or his dependents, as the case may be, shall receive the same retirement or survivor benefits which would be paid under said system if such death or disability was caused by a personal injury which arose out of and in the course of his employment, and was suffered in the line of duty and within the scope of his employment. If successful passage of such a physical examination was, at the time of his employment, required as a condition for such employment, no proof or record of such examination shall be required as evidence in the maintenance of a claim under this section or under such municipal or state retirement systems. The benefits provided by this section shall be in lieu of any other benefits which such policeman or fireman or his dependents may be entitled to receive from his municipal employer under the provisions of chapter 568 or the municipal or state retirement system under which he is covered, except as provided by this section, as a result of any condition or impairment of health caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability. As used in this section, 'municipal employer' has the same meaning as provided in section 7-467."

death."[4] Id., 675. The court, noting this tribunal's reliance on Morgan v. East Haven, 208 Conn. 576 (1988), in reaching its decision in Brennan v. Waterbury, 6065 CRB-5-15-12 & 5996 CRB-5-15-3 (October 31, 2016), *aff'd* in part, *rev'd* in part, 331 Conn. 672 (May 14, 2019), conducted an extensive review of Morgan and other pertinent precedent, ultimately concluding that its prior "holding in Morgan was limited to the distribution of unmatured § 7-433c benefits, which pass to 'dependents.'" Id., 688. However, by contrast, the court held that "matured § 7-433c benefits – those that accrued during the claimant's lifetime – properly pass to the claimant's estate." Id., 693.

The court reversed the decision of this board relative to our "determination that the commissioner improperly granted the motion to substitute the executrix as a party claimant ...." Id., 700. As such, the court remanded the matter with instructions to affirm the decision of the administrative law judge granting the substitution motion and to set the claim down for additional proceedings to determine the proper beneficiary of any benefits due and owing.

The Brennan court then turned to an examination of whether the permanency benefits in the present matter matured before the death of the decedent. The respondent had contended:

> that the 1993 award was not definite enough to impose on the city an obligation to begin payment to the decedent during his lifetime

[4] In Brennan v. Waterbury, 6065 CRB-5-15-12 & 5996 CRB-5-15-3 (October 31, 2016), *aff'd* in part, *rev'd* in part, 331 Conn. 672 (May 14, 2019), this board reviewed a January 30, 2015 decision granting the claimant's motion to substitute the decedent's estate as the beneficiary rather than the decedent's dependent spouse, along with a December 7, 2015 Finding and Decision awarding permanent partial disability benefits to the decedent's estate. Noting that in Morgan v. East Haven, 208 Conn. 576 (1988), our Supreme Court had concluded that "General Statutes § 7-433c does not require the payment of benefits to the estate of a deceased recipient; compensation is restricted to the employee and that person's dependents," id., 589, this board affirmed the award of permanency benefits but vacated and remanded the matter for, inter alia, a determination of the proper beneficiary of the permanency benefits. The claimant appealed, and the Supreme Court transferred the appeal to itself pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

> because (1) his disability rating was not conclusively established until after his death, and (2) he chose to negotiate for a lump sum payment during his lifetime rather than obtain a final adjudication of the exact weekly compensation that the city would be obligated to pay.

Id., 694.

For her part, the claimant argued "that the amount of disability benefits due was certain, because the city and the decedent had reached a compromise disability rating of 77.5 percent in the course of their settlement negotiations." Id. The court observed that "our case law reflects that permanent partial disability benefits vest, or become due, when the claimant reaches maximum medical improvement." (Footnote omitted.) Id., 695. However, noting that "benefits are not owed until [the] degree of permanent impairment has been established by award or agreement," id., 696, *citing* A. Sevarino, Connecticut Workers' Compensation After Reforms (7th Ed. 2017) § 2.14.7, pp. 152-53, the court stated that "we are compelled to conclude that permanent disability benefits mature only after the degree of permanency has been fixed by way of an award or an agreement between the parties sufficient to establish a binding meeting of the minds."[5] Id., 697.

The court further determined that "on the basis of the record before this court, we cannot conclude that the decedent's § 7-433c disability benefits for his 80 percent impairment to his heart function matured before his death."[6] Id., 700. As such, the court remanded the matter for additional factual findings on this issue, remarking that "we

[5] It should be noted that this holding in Brennan v. Waterbury, 331 Conn. 672 (2019), appears to be in some tension with the court's earlier decision in Churchville v. Bruce R. Daly Mechanical Contractor, 299 Conn. 185 (2010), wherein the court held that a claimant or survivor's "right to permanent partial disability benefits ... vests when the [claimant] reaches maximum medical improvement, and does not depend on an affirmative request for such benefits." Id., 191.

[6] In the December 7, 2015 Finding and Award, the administrative law judge concluded that the decedent was entitled to a permanent partial disability award of 80 percent based on the opinion proffered by Joseph Robert Anthony, the claimant's cardiologist, at a deposition held on December 3, 2013. See Claimant's Exhibit N, p. 10.

therefore leave open the possibility that the commissioner, on remand, may find that some portion of the benefits matured before the decedent's death." Id., 694.

In the present matter, the administrative law judge, after reviewing the Supreme Court's holding in Brennan, supra, identified the issues in dispute as: (1) eligibility for permanent partial disability benefits; and (2) the proper beneficiary for any such payments. The trier made the following factual findings which are pertinent to our review. On December 1, 1993, a Finding and Award was issued by the Workers' Compensation Commission (commission) establishing that the decedent had an accepted workers' compensation claim subject to General Statutes § 7-433c. The parties agreed and stipulated that the decedent had reached maximum medical improvement on October 13, 1993, and returned to full duty for the respondent on that date.

At all relevant times herein, Douglas Rinaldi was the risk manager for the respondent municipality, and his job duties included the handling of all aspects of the city's workers' compensation claims. At trial, Rinaldi testified, after reviewing pertinent exhibits, that he and prior counsel for the decedent had agreed that the decedent's permanent partial disability rating was 77.5 percent of the heart.[7] See October 7, 2020 Transcript, pp. 21-23. Rinaldi also indicated that he had the authority to bind the city to such a rating when he entered into the agreement. See October 7, 2020 Transcript, p. 22. When queried as to whether the parties had reached a permanency agreement for 77.5 percent on or before May 28, 1998, Rinaldi replied in the affirmative.

[7] At the formal hearing on October 7, 2020, Rinaldi reviewed his correspondence of July 5, 1996, to Francis J. Grady, decedent's prior counsel, by which he had forwarded the June 3, 1996 respondent's medical examination report by Joel A. Sherman, a cardiologist. In that report, Sherman assigned the decedent a 75 percent rating of the whole person. Rinaldi testified that his intention in sending the report to Grady was to reach a compromised agreement of the claimant's permanency at the midpoint between 75 and 80 percent.

The administrative law judge also specifically identified numerous items of correspondence submitted into the evidentiary record between Rinaldi and Francis J. Grady, the decedent's prior counsel. This correspondence, which spanned a period of several years, reflected that the parties had agreed to a maximum medical improvement date of October 13, 1993, with a permanent partial disability rating of 77.5 percent of the heart and a compensation rate of $513.

The administrative law judge noted that, pursuant to General Statutes § 31-308 (b),[8] an agreement for a 77.5 percent permanent partial disability to the heart entitled the claimant to 403 weeks of benefits. On July 31, 1997, the respondent issued an advance to the decedent in the amount of $59,200.20 to be applied towards the permanency obligation. See Claimant's Exhibit K. On June 22, 1999, the city issued another advance payment of $17,982.12, also to be applied to the permanency obligation. See Claimant's Exhibit L. The administrative law judge further noted that the decedent's permanent partial disability payments were suspended by agreement of the parties and, as of February 19, 2003, the decedent began receiving temporary total disability benefits, which weekly payments continued until his death on April 20, 2006.

Having heard the foregoing, the trier concluded, on the basis of the court's analysis in Brennan, supra, as well as the evidentiary record compiled in this matter, that the decedent had sustained a 77.5 percent permanent partial disability to his heart with a maximum medical improvement date of October 13, 1993. The trier found Rinaldi's

[8] General Statutes § 31-308 (b) states in relevant part: "With respect to the following injuries, the compensation, in addition to the usual compensation for total incapacity but in lieu of all other payments for compensation, shall be seventy-five per cent of the average weekly earnings of the injured employee, calculated pursuant to section 31-310 .... All of the following injuries include the loss of the member or organ and the complete and permanent loss of use of the member or organ referred to ...."

testimony fully credible and persuasive, noting that Rinaldi had testified that the parties reached an agreement relative to the permanent partial disability and this agreement had been reached at some point prior to May 28, 1998.

The trier determined that the parties had stipulated to the date of maximum medical improvement and reached an agreement relative to permanent partial disability. As such, "there was a clear meeting of the minds that the claimant had sustained a 77.5% permanent partial disability of the heart and that this agreement matured and vested prior to the claimant's death on April 20, 2006." Conclusion, ¶ G. The trier also found the evidentiary record to be "replete with correspondence confirming the agreement in the amount of 77.5% permanent partial disability of the heart," Conclusion, ¶ J, and specifically referenced the following evidentiary items: Claimant's Exhibits K, U, D, L, M, W, CC, DD, S, and Y, and Respondent's Exhibits 11 and 17. In addition, the trier found that on July 31, 1997, the respondent issued an advance payment of $59,200.20 toward the permanent partial disability benefits, with a second advance payment issued in the amount of $17,982.12 on June 22, 1999.

The trier determined that the decedent's entitlement to permanent partial disability benefits "vested and was matured" as of the stipulated maximum medical improvement date of October 13, 1993. Conclusion, ¶ P. As such, the trier concluded that the decedent's estate was entitled to all unpaid benefits for a 77.5 percent permanent partial disability of the heart, less the advance payments made in the amounts of $59,200.20 and $17,982.12. The trier further concluded that the respondent was obligated to pay statutory interest pursuant to General Statutes § 31-295 (c)[9] for all benefits due and

[9] General Statutes § 31-295 (c) states in relevant part: "If the employee is entitled to receive compensation for permanent disability to an injured member in accordance with the provisions of subsection (b) of

owing from the date of maximum medical improvement of October 13, 1993. In addition, the trier stated that he found the respondent's "continued contest and arguments regarding the permanent partial disability issue unreasonable given the Supreme Court decision in this matter, and the evidence in this case, including the testimony of Mr. Rinaldi, which clearly establishes an agreement as to the permanent partial disability of 77.5%." Conclusion, ¶ T. The trier therefore concluded that the respondent has "unduly delayed and unreasonably contested this matter in violation of [General Statutes §§ 31-288[10] and 31-300[11]]." Conclusion, ¶ S.

The respondent filed a motion to correct and a motion for articulation, both of which were objected to by the claimant and denied in their entirety by the administrative law judge, and this appeal followed. On appeal, the respondent contends that the trier erroneously concluded that the estate's entitlement to permanent partial disability payments matured and vested during the decedent's lifetime "because no stipulation or agreement on this subject was approved by the commission, nor was any award issued, in the claimant's lifetime." Appellant's Brief, p. 5. The respondent further asserts that Rinaldi lacked the authority to enter into a binding agreement for the compromised permanency. The respondent also argues that the trier's award of statutory interest

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section 31-308, the compensation shall be paid to him beginning not later than thirty days following the date of the maximum improvement of the member or members and, if the compensation payments are not so paid, the employer shall, in addition to the compensation rate, pay interest at the rate of ten per cent per annum on such sum or sums from the date of maximum improvement."

[10] General Statutes § 31-288 (b) (1) states in relevant part: "Whenever through the fault or neglect of an employer or insurer, the adjustment or payment of compensation due under this chapter is unduly delayed, such employer or insurer may be assessed by the commissioner hearing the claim a civil penalty of not more than one thousand dollars for each such case of delay, to be paid to the claimant."

[11] General Statutes § 31-300 states in relevant part: "In cases where, through the fault or neglect of the employer or insurer, adjustments of compensation have been unduly delayed, or where through such fault or neglect, payments have been unduly delayed, the commissioner may include in the award interest at the rate prescribed in section 37-3a and a reasonable attorney's fee in the case of undue delay in adjustments of compensation and may include in the award in the case of undue delay in payments of compensation, interest at twelve per cent per annum and a reasonable attorney's fee."

constituted error, given that no benefits matured during the decedent's lifetime and the issue of whether any benefits are owed remains contested. Finally, the respondent asserts that the trier erred in "concluding that the respondent acted unreasonably, insofar as the respondent took the position that any putative agreement as to the claimant's [permanent partial disability] was not binding because no stipulation or agreement on this subject was ever approved by the commissioner." Id., 13.

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 of this appeal with the respondent's claim of error relative to the administrative law judge's conclusion that the estate's entitlement to the permanency payments matured in the decedent's lifetime. The respondent points out that

in Brennan, supra, the court stated that "permanent partial disability benefits mature only after the degree of permanency has been fixed by way of an award or an agreement between the parties sufficient to establish a binding meeting of the minds."[12] Id., 697. The respondent therefore contends that because the December 7, 2015 Finding and Decision awarding the decedent an 80 percent permanent partial disability to the heart was not issued until some nine years after his death, the issue for determination before the administrative law judge in the present matter was whether the parties had reached a binding agreement regarding the degree of permanency during the decedent's lifetime.

As the respondent accurately points out, it is well-settled in our case law that "[a]s in the case of a voluntary agreement, no stipulation is binding until it has been approved by the commissioner." Leonetti v. MacDermid, Inc., 310 Conn. 195, 207 (2013), *quoting* Muldoon v. Homestead Insulation Co., 231 Conn. 469, 480 (1994). "The provisions of the [act] make clear that it is the underlying scheme and purpose of the law to protect the employee, even to the extent of rendering nugatory his own agreement when it fails to assure him of the compensation which the law intends he should have." (Internal quotation marks omitted.) Welch v. Arthur A. Fogarty, Inc., 157 Conn. 538, 545 (1969).

We agree with the respondent's reasoning on this point, although we would point out that the issue in dispute in Leonetti, supra, involved an inquiry into whether the administrative law judge had properly refused to approve a severance agreement after

[12] The Brennan court did not define the terms "binding" or "meeting of the minds." We note that Black's Law Dictionary (11th Ed. 2019) defines "binding" as follows: "[B]inding *adj.* (14c) 1. (Of an agreement) having legal force to impose an obligation <a binding contract>. 2. (Of an order) requiring obedience <the temporary injunction was binding on the parties>." We further note that in Sicaras v. Hartford, 44 Conn. App. 771, *cert. denied*, 241 Conn. 916 (1997), our Appellate Court stated: "'Meeting of the minds' is defined as 'mutual agreement and assent of two parties to contract to substance and terms. It is an agreement reached by the parties to a contract and expressed therein, or as the equivalent of mutual assent or mutual obligation.'" Id., 784, *quoting* Black's Law Dictionary (6th Ed.1990).

concluding that the respondent employer had offered no consideration to the claimant for the release of his accepted workers' compensation claim. The Leonetti court observed that although "voluntary agreements or stipulations may be reached between employees and employers regarding the settlement of workers' compensation claims, such agreements are nonbinding until approved by a commissioner pursuant to the provisions of [General Statutes] § 31-296."[13] Id., 204. As such, the court held that "the [severance] agreement signed by the parties had no effect on the claimant's workers' compensation claim unless and until the commissioner approved the agreement." Id., 207.

However, it should also be noted that the Leonetti court, in a footnote, stated as follows:

> Because we conclude that the board properly affirmed the commissioner's finding that the claimant's release of his workers' compensation claim was unenforceable for lack of consideration, we need not address the respondent's claim that the commissioner refused to approve the agreement solely because the parties had not previously brought the agreement before the commissioner for approval.

Id., 209 n.7.

Moreover, we would point out that Leonetti can be distinguished from the present matter given that in Leonetti, the court's focus was upon the proper execution of settlement agreements, whereas the present matter involves a purported agreement as to permanency. Nevertheless, we concede that had the parties in the present matter

[13] General Statutes § 31-296 (a) states in relevant part: "If an employer and an injured employee, or in case of fatal injury the employee's legal representative or dependent, at a date not earlier than the expiration of the waiting period, reach an agreement in regard to compensation, such agreement shall be submitted in writing to the commissioner by the employer with a statement of the time, place and nature of the injury upon which it is based; and, if such commissioner finds such agreement to conform to the provisions of this chapter in every regard, the commissioner shall so approve it. A copy of the agreement, with a statement of the commissioner's approval, shall be delivered to each of the parties and thereafter it shall be as binding upon both parties as an award by the commissioner."

memorialized their permanency agreement by way of a voluntary agreement or stipulation, such a document would indeed have required the approval of an administrative law judge. However, the evidentiary record does not reflect that any such written memorialization of the permanency agreement ever occurred.

In addition, we are not persuaded that the Brennan court, in holding that "permanent partial disability benefits mature only after the degree of permanency has been fixed by way of an award or an agreement between the parties sufficient to establish a binding meeting of the minds," Brennan, supra, 697, necessarily contemplated that such a binding agreement would require written memorialization and approval by an administrative law judge. Rather, the court remarked that the administrative law judge's findings did not address whether "the degree of permanency was fixed prior to the decedent's death." Id.

More important, despite specifically noting that no voluntary agreement for permanency was ever submitted to the administrative law judge during the decedent's lifetime, and the parties never reached a stipulation as to full and final settlement, the court stated that "we leave open the possibility that the commissioner may conclude that some portion of the benefits matured during the decedent's lifetime." Id. The court also pointed out that although the evidentiary record supported the inference that there had been a meeting of the minds as to the date of maximum medical improvement, "the degree of the permanency [was] not the subject of any finding or final agreement." Id., 699.

The court did note that the claimant had relied on a draft settlement agreement which had adopted a compromised disability rating of 77.5 percent; however,

> the city did not draft the agreement, it did not sign the motion seeking to submit that agreement to the commissioner, and it did not state in any of its communications to the decedent (in the record) that it had agreed to that rating. Had the commissioner found that there was a meeting of the minds on this matter, he either would have adopted this rating or explained why he had rejected it.

Id., 699.

In fact, the administrative law judge presiding over the prior hearings had reviewed ratings proffered by respondent's experts in the amount of 50 percent and 75 percent, respectively, but ultimately adopted the claimant's expert's rating of 80 percent, which conclusion the Brennan court deemed "inconsistent with a finding that there had been a meeting of the minds as to permanency." Id. As such, the court pointed out that "[t]he record not only fails to establish that there was a meeting of the minds on the degree of permanency to be assigned to that disability, it provides a clear implication to the contrary." Id., 699. However, the court did allow for the possibility "that an argument could be made that there was a meeting of the minds that there was a permanent impairment of *at least* 50 percent," (emphasis in original), id., and saw "no impediment" to the administrative law judge considering such an argument on remand. Id.

As the foregoing indicates, the court specifically concluded that it was at least arguable that a "binding meeting of the minds" might have occurred for the 50 percent permanency rating assigned by the respondent's examiner, despite the fact that this rating was never memorialized by way of a stipulation or voluntary agreement. Contrary to the representations of the respondent, it would appear that the court's reservations relative to whether a binding meeting of the minds as to the degree of permanency had occurred had

far more to do with the court's perceived deficiencies in the record rather than the lack of memorialization of the purported agreement. This inference finds additional support in the precise language used by the court, which specifically noted that the respondent "did not state in any of its communications to the decedent *(in the record)* that it had agreed to that rating." Id., 699.

However, any perceived deficiencies in this regard would appear to have been resolved by the creation of the evidentiary record in the present appeal. As discussed previously herein, the record contains unambiguous testimony by Rinaldi indicating that he and claimant's prior counsel had agreed upon a 77.5 percent compromised permanency rating. See footnote 7, supra. Moreover, the administrative law judge, in his May 21, 2021 Finding and Decision, specifically referenced the following evidentiary items:

1. July 31, 1997 correspondence from Rinaldi to Grady, reflecting an entitlement to permanency benefits at the weekly rate of $513 with a maximum medical improvement date of October 13, 1993.[14] Claimant's Exhibit K;

2. August 4, 1997 correspondence from Grady to Rinaldi inquiring into whether the respondent would enter into a full and final stipulation for $400,000 or, in the alternative, requesting a voluntary agreement "for the 77.5% disability to Mr. Brennan's whole body by Stipulation to be drafted by this office for tax purposes." Claimant's Exhibit U;

3. May 28, 1998 correspondence from Grady to Rinaldi discussing the parties' inability to reach a full and final settlement and again requesting a voluntary agreement

[14] The existence of this correspondence was acknowledged by the court in Brennan v. Waterbury, 331 Conn. 672 (2019).

for permanency. "It is my understanding that we have agreed to 77.5% of the heart ...." Claimant's Exhibit D;

4. June 22, 1999 correspondence from Rinaldi to Grady enclosing payment for, inter alia, fifty-two weeks of permanent partial disability benefits. Claimant's Exhibit L;

5. February 15, 2000 correspondence from Rinaldi to Grady enclosing the earnings report for the position of Waterbury Fire Chief. Claimant's Exhibit M;

6. March 31, 2006 correspondence from Grady to Jan Dryden at Berkley Administrators stating, "Doug Rinaldi and I agreed to compromise the ratings at 77½%, but the [permanent partial disability] never went into effect, because Tom continues to be [temporarily totally disabled]." Claimant's Exhibit W;

7. A March 27, 2007 facsimile transmission from Grady's office to Dryden attaching a summary of benefits paid to the decedent which indicated: "Compromised Rating = 77 ½% per FJG & Doug" and an "MMI Date: 10/13/93." Respondent's Exhibit 11;

8. January 24, 2013 correspondence from Grady to Jessa Yanni, a staff attorney for the respondent's Office of the Corporation Counsel, advising Yanni that the decedent was still owed 300.60 weeks of permanency at $513 per week for a total of $154,207.80. "I make you aware that there was an agreement made with Doug Rinaldi to pay 77.5% (compromised rating) back in 1997 and of that, Mr. Brennan was paid 167.40 weeks (115.40 weeks in 1997 and another $17,982.73 in 1999)." Respondent's Exhibit 17.

9. January 25, 2013 correspondence from Yanni to Grady stating, "I will recommend that the prior agreement to pay 77.5% PPD be honored, to be paid to Mr. Brennan's wife." Claimant's Exhibit CC.

10. April 8, 2013 correspondence from Grady to Yanni stating, "[i]n Brennan, there was an agreement to pay 77.5%, which was interrupted by the initiation of [temporary total disability] benefits by agreement beginning February 19, 2003." Claimant's Exhibit DD;

11. April 10, 2013 correspondence from Yanni to Grady stating, "[t]he issue over the 77.5% PPD rating versus the 90% posthumous PPD rating may either be resolved, or a formal on the issue may be scheduled shortly after the legal issue is decided." Claimant's Exhibit S.

12. August 4, 2014 correspondence from Grady to Jessa Mirtle, f/k/a Jessa Yanni, stating, "[p]lease advise whether you will be withdrawing the claim for 12.5% PPD to the heart, given your concession that any portion of [permanency partial disability] above 77.5% would be payable to Mrs. Brennan, not the estate and thus would be offset." Claimant's Exhibit Y.

In light of the foregoing, we find the administrative law judge properly determined that the parties had reached a compromised permanency agreement prior to May 28, 1998. We also agree that "[t]he exhibits are replete with correspondence confirming the agreement in the amount of 77.5% permanent partial disability of the heart." Conclusion, ¶ J. We therefore affirm the decision of the administrative law judge in this regard, having concluded that the evidentiary record compiled in the present matter was more than sufficient to address the concerns of the Brennan court relative to the issue of whether the permanency agreement between the parties was "sufficient to establish a binding meeting of the minds." Brennan, supra, 697.

We further note that there is no language in Brennan or, to our knowledge, in any of our case law, suggesting that an administrative law judge would be obligated to approve a memorialized agreement purporting to represent a binding meeting of the minds if the trier, in the proper exercise of his or her discretion, deemed the agreement adverse to "the underlying scheme and purpose of the law to protect the employee ...." Welch, supra. However, the fact that even an agreement purporting to represent a "binding meeting of the minds" could ultimately be undone by an administrative law judge in no way negates the existence of that binding agreement prior to the point when such nullification occurs.[15]

The respondent also contends that Rinaldi lacked the authority to bind the city to the compromised permanent partial disability settlement, asserting that Rinaldi's claim of authority was "incorrect as a matter of law." Appellant's Brief, p. 9. The respondent cites Fennell v. Hartford, 238 Conn. 809 (1996), for the proposition that "a city's charter is the fountainhead of municipal powers.... Agents of a city ... have no source of authority beyond the charter...." (Citations omitted; internal quotation marks omitted.) Id., 813. The respondent points out that the claimant "has identified no source of actual authority in the City Charter that would have authorized Mr. Rinaldi to enter into a

[15] In a similar vein, we are unpersuaded by the respondent's assertions that the compromised permanency rating was not "fixed" because the claimant posthumously claimed a higher rating of 90 percent. General Statutes § 31-315 provides that "[t]he compensation commissioner shall retain jurisdiction over claims for compensation, awards and voluntary agreements, for any proper action thereon, during the whole compensation period applicable to the injury in question." In light of the continuing jurisdiction over open claims retained by the commission's administrative law judges, it is not infrequently the case that a claimant's permanency increases over time, resulting in a request for additional permanency benefits. The submission into the record of the November 28, 2012 report of Joseph Robert Anthony, a cardiologist, assigning to the decedent a posthumous 90 percent permanency rating, in no way negates the existence of the compromised permanency agreement reached prior to May 28, 1998.

contract or agreement that was binding on the City, and the City is not aware of any." Appellant's Brief, p. 9.

In addition, the respondent argues that Rinaldi lacked the apparent authority to enter into the compromised permanency agreement. In Gordon v. Tobias, 262 Conn. 844 (2003), our Supreme Court explained that "it is a general rule of agency law that the principal in an agency relationship is bound by, and liable for, the acts in which his agent engages with authority from the principal, and within the scope of the [agency relationship]." Id., 849, *quoting* Maharishi School of Vedic Sciences, Inc. (Connecticut) v. Connecticut Constitution Associates Ltd. Partnership, 260 Conn. 598, 606 (2002). The Gordon court defined "apparent authority" as follows:

> Apparent authority is that semblance of authority which a principal, through his own acts or inadvertences, causes or allows third persons to believe his agent possesses.... Consequently, apparent authority is to be determined, not by the agent's own acts, but by the acts of the agent's principal.... The issue of apparent authority is one of fact to be determined based on two criteria.... First, it must appear from the principal's conduct that the principal held the agent out as possessing sufficient authority to embrace the act in question, or knowingly permitted [the agent] to act as having such authority.... Second, the party dealing with the agent must have, acting in good faith, reasonably believed, under all the circumstances, that the agent had the necessary authority to bind the principal to the agent's action." (Citations omitted; internal quotation marks omitted.)

Id., 850-851, *quoting* Tomlinson v. Board of Education, 226 Conn. 704, 734–35 (1993).

In the present matter, the respondent contends that "[a]s a matter of law, a party contracting with a municipality cannot meet the second criterion ...." Appellant's Brief, p. 10. It again relies on Fennell, supra, for this proposition, pointing out that:

> All who contract with a municipal corporation are charged with notice of the extent of ... the powers of municipal officers and agents with whom they contract, and hence it follows that if the ...

> agent had in fact no power to bind the municipality, there is no liability on the express contract....

Fennell, supra, 814, *quoting* Norwalk v. Board of Labor Relations, 206 Conn. 449, 452 (1988).

We find this claim of error to be without merit. As previously discussed herein, the record contains unambiguous testimony from Rinaldi relative to his authority to enter into permanency agreements, which testimony the administrative law judge deemed fully credible and persuasive.[16] In addition, the record contains correspondence from Rinaldi, in his capacity as risk manager for the respondent, to decedent's prior counsel dating back to July 31, 1997, and Rinaldi testified at trial that he left the city's employ sometime in January or February of 2004. It may therefore be reasonably inferred that if Rinaldi did not possess the authority to enter the city into binding permanency agreements, that fact would have been brought to his attention long before he testified at a formal hearing on October 7, 2020.

We similarly find no merit in the respondent's assertion that the claimant's reliance on Rinaldi's actions was somehow misplaced because those actions were outside the scope of authority granted him by the city's charter. We are certainly not persuaded that it is the responsibility of claimants, or their attorneys, to parse a municipality's charter in order to ensure that the actions of the municipality's representative are consistent with the scope of authority afforded by that charter. In fact, such an expectation would be wildly inconsistent with "[t]he humanitarian and remedial purposes of the act ...." (Internal quotation marks omitted.) Gartrell v. Dept. of Correction, 259 Conn. 29, 41–42 (2002). As such, to the extent that there is any merit

[16] Rinaldi also testified relative to his lack of authority to enter into full and final settlements.

whatsoever in the respondent's assertions that Rinaldi exceeded his authority in entering into a compromised permanency agreement with the decedent, the resolution of that dispute is to be found in another forum.

The respondent also claims as error the administrative law judge's order for statutory interest payments pursuant to General Statutes 31-295 (c)[17] on the unpaid permanency as of October 13, 1993, the date of maximum medical improvement. The respondent argues that it cannot be held liable for interest payments because the estate is not currently entitled to any permanency benefits. The respondent also points out that the Brennan court cited Abrahamson v. State/Dept. of Public Works, 5280 CRB-2-07-10 (February 26, 2009), for the proposition that "payment of interest pursuant to § 31-295 (c) is mandatory *if* conditions enumerated by provisions are met, and that conditional language suggests 'that the provision is implicated only after the issue of permanent partial disability is no longer the subject of litigation.'" (Emphasis added.) Brennan, supra, 697, *quoting* Abrahamson, supra.

The statutory provisions of § 31-295 (c) state that the employer "shall" pay interest on any unpaid permanent partial disability benefits thirty days after the date of maximum improvement. This board has previously observed that the statute "makes the payment of interest mandatory rather than discretionary, and we have held that it obligates a commissioner to grant interest on any due and unpaid permanency benefits." Schenkel v. Richard Chevrolet, Inc., 4639 CRB-8-03-3 (March 12, 2004), *citing* Moxon

[17] General Statutes § 31-295 (c) states in relevant part: "If the employee is entitled to receive compensation for permanent disability to an injured member in accordance with the provisions of subsection (b) of section 31-308, the compensation shall be paid to him beginning not later than thirty days following the date of the maximum improvement of the member or members and, if the compensation payments are not so paid, the employer shall, in addition to the compensation rate, pay interest at the rate of ten per cent per annum on such sum or sums from the date of maximum improvement."

v. State/Board of Trustees, Regional Community Colleges, 12 Conn. Workers' Comp. Rev. Op. 246, 1485 CRB-1-92-8 (March 29, 1994), *aff'd*, 37 Conn. App. 648 (1995).

However, as the Brennan court noted, the mandatory interest payment pursuant to § 31-295 (c) is not triggered unless and until the determination has been made that the claimant is entitled to the permanency benefits and the issue is no longer the subject of litigation. With those caveats in mind, we find, having reviewed the evidentiary record in the present matter, that although circumstances would appear to dictate that an award of interest pursuant to § 31-295 (c) is mandatory, we are unable to identify the date upon which the entitlement to this interest would have commenced. The trier identified a maximum medical improvement date of October 13, 1993, and, as the Brennan court observed, our case law dictates that "[o]nce the degree of permanency is established, benefits are owed retroactive to the date of maximum medical improvement." Brennan, supra, 696 n.18, *citing* Marone v. Waterbury, 244 Conn. 1, 4 (1998). The record further indicates that a 77.5 percent rating of the heart entitled the decedent to 403 weekly payments at $513 per week. Had these payments been made on time, the respondent's obligations in this regard would have been satisfied on July 12, 2001. See October 7, 2020 Transcript, p. 10; Appellee's Brief, pp. 3, 11.

However, the record also reflects that as of October 13, 1993, and for some years thereafter, the parties were engaged in negotiations for a full and final settlement, and no request for interest on the outstanding permanency was made. See May 15, 2014 Transcript, pp. 21-23. Although these negotiations ultimately proved unavailing, due, at least in part, to the extreme financial difficulties experienced by the respondent, the record is ambiguous relative to the issue of whether the decedent voluntarily chose to

defer full payment of his permanency pending a full and final settlement of the claim. We also note that the evidentiary record indicates that the decedent was paid weekly permanency benefits from the date of maximum medical improvement until his retirement on December 30, 1995, in addition to the two advances against permanency previously referenced herein.[18] See October 7, 2020 Transcript, p. 14.

Moreover, in 2003, the decedent converted to temporary total disability status and was paid temporary total disability benefits until his death in 2006; no additional prosecution of the claim occurred until the claimant requested a hearing on November 14, 2012.[19] Following the issuance of the December 7, 2015 Finding and Decision, the claim remained pending until the Supreme Court issued its decision on May 14, 2019. At that point, the matter was remanded to this commission, resulting in a second Finding and Decision on May 21, 2021, which decision is the subject of this appeal.

In light of the somewhat convoluted procedural history of this claim, we are unable to determine, on the basis of either the evidentiary record or the trier's findings, the exact date on which the decedent's entitlement to mandatory interest pursuant to § 31-295 (c) was triggered. We therefore find error and are obligated to remand this matter for clarification relative to the commencement date for the statutory interest, given

[18] At trial, respondent's counsel explained that when the decedent retired in 1995, his earnings pursuant to his disability pension potentially became subject to the city's pension payment offset, which issue was still pending in Superior Court as of the date of the formal hearing held on October 7, 2020. See October 7, 2020 Transcript, pp. 14-15. The record also indicates that the assessment of whether the decedent's earnings were subject to the statutory "cap" pursuant to General Statutes § 7-433b (b) was reserved for additional proceedings. See October 7, 2020 Transcript, pp. 11, 38. Section § 7-433b (b) states in relevant part that "the cumulative payments, not including payments for medical care, for compensation and retirement or survivors benefits under section 7-433c shall be adjusted so that the total of such cumulative payments received by such member or his dependents or survivors shall not exceed one hundred per cent of the weekly compensation being paid, during their compensable period, to members of such department in the same position which was held by such member at the time of his death or retirement."

[19] At trial, the claimant explained that following the death of her husband, she moved to Florida, where she was contending with medical problems of her own and "was not in the frame of mind to pursue [the claim] at that point." May 15, 2014 Transcript, p. 66.

that we are "not authorized to make our own findings from conflicting facts." Russo v. Hartford, 4769 CRB-1-04-1 (December 15, 2004), *citing* Bowman v. Jack's Auto Sales, 13 Conn. Workers' Comp. Rev. Op. 192, 1721 CRB-1-93-5 (March 22, 1995), *aff'd*, 54 Conn. App. 296 (1999).

The respondent also challenges the administrative law judge's award of penalties and attorney's fees pursuant to General Statutes §§ 31-288[20] and 31-300,[21] arguing that "[t]here has been no evidence of any undue delay by the City in this case, including any undue delay due to the City's fault or neglect." Appellant's Brief, p. 13. Noting that it has made "good faith" efforts to resolve this claim, the respondent further asserts that it was within its rights to rely upon the court's analysis in Brennan, supra, while defending the claim on remand.

In reviewing this claim of error, we note at the outset that neither attorney's fees nor penalties pursuant to §§ 31-288 (b) (1) or 31-300 were identified as issues for determination in the formal proceedings giving rise to the instant appeal. We also note that the administrative law judge made no findings as to any amounts due the claimant pursuant to these statutes, instead ordering that future hearings "be held, if necessary, in regard to penalties and attorney's fees." Order, ¶ III.

[20] General Statutes § 31-288 (b) (1) states in relevant part: "Whenever through the fault or neglect of an employer or insurer, the adjustment or payment of compensation due under this chapter is unduly delayed, such employer or insurer may be assessed by the commissioner hearing the claim a civil penalty of not more than one thousand dollars for each such case of delay, to be paid to the claimant."

[21] General Statutes § 31-300 states in relevant part: "In cases where, through the fault or neglect of the employer or insurer, adjustments of compensation have been unduly delayed, or where through such fault or neglect, payments have been unduly delayed, the commissioner may include in the award interest at the rate prescribed in section 37-3a and a reasonable attorney's fee in the case of undue delay in adjustments of compensation and may include in the award in the case of undue delay in payments of compensation, interest at twelve per cent per annum and a reasonable attorney's fee."

It is well-settled that "whether to award attorney's fees and interest for unreasonable delay and/or unreasonable contest ... is a discretionary decision to be made by the trial commissioner." McMullen v. Haynes Construction Co., 3657 CRB-5-97-7 (November 12, 1998). As such:

> Our scope of review of such determinations is sharply constrained, limited as it is to whether the trial commissioner's decision constituted an abuse of discretion, which 'exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided based on improper or irrelevant factors.'

Abrahamson, supra, *quoting* In re Shaquanna M., 61 Conn. App. 592, 603 (2001).

Thus, in view of the wide degree of discretion afforded to the administrative law judge relative to the levying of sanctions, and the fact that, to date, no sanctions have actually been levied against the respondent, we decline to find error in this regard. Instead, consistent with the trier's Order, we remand this matter for additional proceedings on that issue, as well.

Finally, the respondent has claimed as error the administrative law judge's denial of its motion to correct.[22] Our review of the proposed corrections indicates that the respondent was merely reiterating arguments made at trial which ultimately proved unavailing. As such, we find no error in the administrative law judge's decision to deny the motion to correct. See D'Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003).

[22] It should be noted that the respondent did not claim as error the administrative law judge's denial of its motion for articulation.

There is error; the May 21, 2021 Finding and Decision of Charles F. Senich, Administrative Law Judge acting for the Fifth District, is accordingly affirmed in part and remanded for additional proceedings consistent with this Opinion.

Administrative Law Judges Brenda D. Jannotta and Maureen E. Driscoll concur.