CASE NO. 6434 CRB-5-21-6 : COMPENSATION REVIEW BOARD
CLAIM NO. 800194195

BEULAH GARDNER : WORKERS' COMPENSATION
CLAIMANT-APPELLANT COMMISSION

v. : JUNE 3, 2022

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

and

GALLAGHER-BASSETT SERVICES, INC.
THIRD-PARTY ADMINISTRATOR

APPEARANCES: The claimant was represented by Justin A. Raymond, 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 Marie Gallo-Hall, Esq., formerly Assistant Attorney General, Office of the Attorney General, 165 Capitol Avenue, Suite 4000, Hartford, CT 06106.[1] On appeal, 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.

This Petition for Review from the June 2, 2021 Finding and Orders of Scott A. Barton, Administrative Law Judge acting for the Fifth District, was heard on January 28, 2022 before a Compensation Review Board panel consisting of Administrative Law Judges Daniel E. Dilzer, Carolyn M. Colangelo and David W. Schoolcraft.[2]

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[1] In light of the fact that Attorney Marie 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

DANIEL E. DILZER, ADMINISTRATIVE LAW JUDGE. The claimant has petitioned for review from the June 2, 2021 Finding and Orders of Scott A. Barton (finding), Administrative Law Judge acting for the Fifth District. We find no error and accordingly affirm the decision.[3]

The administrative law judge identified the following issues for determination: (1) approval of a "Notice of Intention to Reduce or Discontinue Payments" (form 36) filed by the respondent on May 21, 2020, seeking to convert the claimant's indemnity payments from temporary partial disability benefits pursuant to General Statutes § 31-308 (a)[4] to permanent partial disability benefits pursuant to General Statutes § 31-308 (b);[5] and (2) the claimant's eligibility for ongoing temporary partial disability benefits pursuant to § 31-308 (a) in reliance upon the statutory provisions of § 31-308 (b).

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[3] We note that one motion for postponement was granted during the pendency of this matter.

[4] General Statutes § 31-308 (a) states in relevant part: "If any injury for which compensation is provided under the provisions of this chapter results in partial incapacity, the injured employee shall be paid a weekly compensation 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 the injured employee before his injury ... and the amount he is able to earn after the injury ... except that when (1) the physician, physician assistant or advanced practice registered nurse attending an injured employee certifies that the employee is unable to perform his usual work but is able to perform other work, (2) the employee is ready and willing to perform other work in the same locality and (3) no other work is available, the employee shall be paid his full weekly compensation subject to the provisions of this section. Compensation paid under this subsection shall ... continue during the period of partial incapacity, but no longer than five hundred twenty weeks. If the employer procures employment for an injured employee that is suitable to his capacity, the wages offered in such employment shall be taken as the earning capacity of the injured employee during the period of the employment."

[5] 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 ... but in no case more than one hundred per cent, raised to the next even dollar, of the average weekly earnings of production and related workers in manufacturing in the state, as determined in accordance with the provisions of section 31-309, or less than fifty dollars weekly. 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 .... If the injury consists of the loss of a substantial part of a member resulting in a permanent partial loss of the use of a member, or if the injury results in a permanent partial loss of function, the administrative law judge may, in the administrative law judge's discretion, in lieu of other compensation, award to the injured employee the proportion of the sum provided in this subsection

The administrative law judge made the following factual findings which are pertinent to our review. On April 19, 2016, the claimant suffered a compensable work-related injury to her left wrist while employed by the respondent, the Connecticut Department of Mental Health & Addiction Services. At the time the claimant sustained her injury, she was employed as a forensic treatment specialist at the Whiting Forensic Institute. The injury occurred while the claimant was restraining a patient and her hand was compressed, causing pain and inflammation. Pursuant to General Statutes § 5-142 (a),[6] the claimant is eligible to receive indemnity benefits at 100 percent for injuries resulting from the physical restraint of patients at the facility.

On May 8, 2018, Administrative Law Judge Charles F. Senich approved a voluntary agreement memorializing compensability of the April 19, 2016 injury. Stanley J. Foster, a hand surgeon, was listed as the authorized treating physician for an injury described as "[l]eft non-dominant wrist intersection syndrome and CTS." Respondent's Exhibit 1.

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for the total loss of, or the loss of the use of, the member or for incapacity or both that represents the proportion of total loss or loss of use found to exist, and any voluntary agreement submitted in which the basis of settlement is such proportionate payment may, if otherwise conformable to the provisions of this chapter, be approved by the administrative law judge in the administrative law judge's discretion. Notwithstanding the provisions of this subsection, the complete loss or loss of use of an organ which results in the death of an employee shall be compensable pursuant only to section 31-306."

[6] General Statutes § 5-142 (a) states in relevant part: "If any member of ... any institution or facility of the Department of Mental Health and Addiction Services giving care and treatment to persons afflicted with a mental disorder or disease, or any institution for the care and treatment of persons afflicted with any mental defect ... sustains any injury (1) while ... attending or restraining an inmate of any such institution or as a result of being assaulted in the performance of such person's duty ... (2) that is a direct result of the special hazards inherent in such duties, the state shall pay all necessary medical and hospital expenses resulting from such injury. If total incapacity results from such injury, such person shall be removed from the active payroll the first day of incapacity, exclusive of the day of injury, and placed on an inactive payroll. Such person shall continue to receive the full salary that such person was receiving at the time of injury subject to all salary benefits of active employees, including annual increments, and all salary adjustments, including salary deductions, required in the case of active employees, for a period of two hundred sixty weeks from the date of the beginning of such incapacity. Thereafter, such person shall be removed from the payroll and shall receive compensation at the rate of fifty per cent of the salary that such person was receiving at the expiration of said two hundred sixty weeks as long as such person remains so disabled ...."

Following the incident, the claimant was paid indemnity benefits and initially treated conservatively. On May 17, 2017, she underwent surgery for a left-hand trigger thumb release with Foster. The claimant continued to experience pain, and she subsequently came under the care of Duffield Ashmead, a hand surgeon, who performed a second surgical procedure on March 18, 2019, after which the claimant's symptoms improved.

On October 4, 2019, the respondent sent the claimant a separation letter pursuant to General Statutes § 5-244.[7] This correspondence stated that in light of the permanent restrictions assigned by Ashmead, the claimant was not able to continue her employment with Whiting Forensic Hospital; however, she was eligible for transfer to a "less arduous" position with another agency in the state of Connecticut. Respondent's Exhibit 4. The correspondence also indicated that the claimant could resign or seek a disability retirement.

On October 28, 2019, the claimant underwent a respondent's medical examination with Pavel Straznicky, a general surgeon, who diagnosed the claimant with post-traumatic chronic synovitis of the left wrist. Straznicky opined that the claimant had reached maximum medical improvement relative to the injury and associated surgical procedures. He further indicated that the claimant had a light-duty work capacity with a twenty-pound lifting restriction to her left hand and she could not restrain patients. On March 11, 2020, Ashmead opined that the claimant had reached maximum medical

[7] General Statutes § 5-244 states in relevant part: "When an employee has become physically or mentally incapable of, or unfit for, the efficient performance of the duties of his or her position, by reason of infirmities due to advanced age or other disability, the appointing authority shall recommend to the Commissioner of Administrative Services that the employee be transferred to less arduous duties or separated from state service in good standing...."

improvement and assigned a permanent partial disability rating of 8 percent to the left wrist. Relative to the claimant's work capacity, Ashmead stated that she was "capable of work at a light level of non-hand intensive or repetitive physical demand, lifting, pushing, pulling, not to exceed 20 lbs. She seems an ideal candidate for vocational redirection." Respondent's Exhibit 6, p. 3.

On May 21, 2020, the respondent filed a form 36 seeking to convert the claimant's indemnity payments from temporary partial disability to permanent partial disability on the basis of Ashmead's opinion that the claimant had reached maximum medical improvement and had a light-duty work capacity. In addition to filing the form 36, the respondent issued voluntary agreements memorializing Ashmead's 8 percent permanency rating and establishing March 11, 2020, as the date of maximum medical improvement.

At trial, the claimant asserted that pursuant to § 31-308 (b), the administrative law judge retains the discretion "to award ongoing wage loss disability benefits in lieu of permanent partial disability benefits after an injured worker has attained maximum medical improvement." Findings, ¶ 12. The claimant relied upon Osterlund v. State, 129 Conn. 591 (1943), for this contention, arguing that in that decision, our Supreme Court had held that once a claimant has reached maximum medical improvement and been assigned a permanent partial disability, the statutory provisions governing partial incapacity at that time permitted an administrative law judge to award ongoing wage loss benefits rather than permanency benefits. The claimant further argued that, consistent with Osterlund, any award for temporary partial disability benefits should be based upon

factors such as the claimant's "work limitations, concurrent employment, loss of function, and its disparate impact on her earning potential." Findings, ¶ 12.

In support of this argument, the claimant entered into evidence records of employment contacts demonstrating her inability to obtain new employment as a direct result of her compensable injury. These job search forms documented approximately fifty-one weeks of unsuccessful attempts on the part of the claimant to secure a new position consistent with her disability.

At trial, the respondent argued that, as a matter of law, the claimant was not eligible for ongoing § 31-308 (a) benefits. It contended that once an injured worker has reached maximum medical improvement, eligibility for partial wage loss benefits ceases and payment for permanent partial disability becomes due. The respondent pointed out that once a claimant's entitlement to permanency is exhausted, the claimant can seek additional discretionary wage loss benefits pursuant to General Statutes § 31-308a,[8] subject to statutory limitations. The respondent also argued that our Supreme Court's analysis in Osterlund is currently applicable only to a claimant's receipt of ongoing

[8] 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 administrative law judge, 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 administrative law judge 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 administrative law judge, 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."

temporary total disability benefits, because the enactment of § 31-308a after Osterlund rendered the decision moot relative to temporary partial disability benefits.

On the basis of the foregoing, the administrative law judge found credible the opinions proffered by Ashmead and Straznicky. He concluded that the claimant had reached maximum medical improvement and was subject to permanent work restrictions as a result of her compensable injury which had "rendered her incapable of returning to her job as a forensic treatment specialist." Conclusion, ¶ F.

In addition, the trier further concluded that the claimant had failed to sustain her burden of proof relative to her continued eligibility for § 31-308 (a) benefits, in lieu of permanent partial disability benefits, on the basis of the factual circumstances of the claim and current case law. He described the claimant's argument as "novel," Conclusion, ¶ I, and noted that although he had denied the claimant's request for temporary partial disability benefits, the claimant "retains her right to seek a finding that she has become totally disabled pursuant to the Osterlund doctrine due to the combination of her permanent medical work restrictions and her vocational ability."[9] Id.

The administrative law judge approved the form 36 effective as of May 21, 2020, thereby converting the claimant's benefit payments from temporary partial disability to permanent partial disability. Accordingly, he ordered the respondent to commence payments to the claimant, effective May 21, 2020, for an 8 percent permanent partial disability of the left wrist.

[9] See Osterlund v. State, 135 Conn. 498, 506-507 (1949).

The claimant filed a motion to correct which was granted in part, and this appeal followed.[10] On appeal, the claimant contends that the administrative law judge erred in approving the May 21, 2020 form 36 filed by the respondent and, as such, improperly converted the claimant's benefit payments from temporary partial incapacity to permanency. We are not persuaded.

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).

In support of her appeal, the claimant cites in part to the following statutory language in § 31-308 (b):

> If the injury consists of the loss of a substantial part of a member resulting in a permanent partial loss of the use of a member, or if

[10] The administrative law judge granted two proposed corrections addressing scrivener's errors in the finding relative to the effective date of the form 36 filed on May 21, 2020.

> the injury results in a permanent partial loss of function, the administrative law judge may, in the administrative law judge's discretion, in lieu of other compensation, award to the injured employee the proportion of the sum provided in this subsection for the total loss of, or the loss of the use of, the member or for incapacity or both that represents the proportion of total loss or loss of use found to exist, and any voluntary agreement submitted in which the basis of settlement is such proportionate payment may, if otherwise conformable to the provisions of this chapter, be approved by the administrative law judge in the administrative law judge's discretion. (Emphasis added.)

General Statutes § 31-308 (b).

In addition, the claimant relies on the following passage in Osterlund, supra, in which our Supreme Court stated:

> [W]here there is a total or partial incapacity followed by a permanent partial loss of function the situation is governed by the portion of the statute we have quoted, which provides that, in such a case, the commissioner "may, in his discretion, in lieu of other compensation" make an award of specific compensation. The thought back of this provision was evidently that there might be, in case of a partial loss of function, a great disproportion between the amount of specific compensation provided and the actual effect of the injury, either from the standpoint of the employee's earning capacity or the physical impairment he suffered. Thus, if a desk worker suffered such an injury as did the plaintiff in this case, it might not at all affect his earning capacity and might constitute a very slight permanent injury from the standpoint of physical impairment. In other instances the reverse of this might be true. In the case of a partial loss of function of one of the members specified in the statute, the commissioner is called upon, when the stage of maximum improvement has been reached, to exercise his sound judgment in deciding whether to award specific compensation upon the basis fixed in the statute or to permit the weekly compensation for incapacity to continue.....[11]

Id., 600.

[11] At the time Osterlund v. State, 129 Conn. 591 (1943) was decided, the statutory provisions governing partial incapacity were codified at General Statutes § 5237.

The claimant argues that the Osterlund court specifically overruled its prior rulings in Stapf v. Savin, 125 Conn. 563 (1939) and, by extension, Panico v. Sperry Engineering Co., 113 Conn. 707 (1931), wherein the court had concluded that "the period for the payment of weekly compensation continues only until the determination of the amount of specific compensation under these provisions and the right to have that awarded arises when nothing further remains to be done to improve or heal the member." Osterlund, supra, 598, *citing* Panico, supra, 714. With regard to its prior holding in Stapf, the court remarked that "[f]urther consideration has led us to the conclusion that the commissioner, and this court, went further than was necessary to meet the claim of the plaintiff in that case, and further than the statute justifies." Id., 600.

In the present matter, the claimant contends that Ashmead's opinion clearly indicates that she is unable to return to her previous employment and will require vocational rehabilitation. The evidentiary record also reflects that her search for new employment has thus far been unsuccessful. The 8 percent permanent partial disability rating assigned by Ashmead translates into 12.4 weeks of benefits, or $12,375.20; as such, even taking into consideration her potential eligibility for up to an additional 12.4 weeks of post-specific temporary partial disability benefits pursuant to § 31-308a, the claimant ultimately stands to collect only six months of disability benefits. It is her contention that an award of "less than 6 months of indemnity benefits for such a significant loss contradicts the humanitarian purpose of the Workers' Compensation Act." Appellant's Brief, p. 10.

We agree with the claimant's interpretation of Osterlund, supra, relative to its holding that the relevant provisions of General Statutes § 5237[12] served to confer upon an administrative law judge the discretion to award benefits for either ongoing temporary partial incapacity or permanent partial disability once maximum medical improvement had been attained.[13] We also recognize that the statutory language in § 31-308 (b) relied on by the claimant has been altered only slightly since that decision. Following Osterlund, a period of "legislative acquiescence" relative to this issue ensued and, in fact, the legislature passed a public act codifying the Osterlund holding in 1967. Number 67-832 of the 1967 Public Acts, § 15, amended § 31-308 as follows:

> In case of an injury to any portion of the body, referred to in subsections (a) to [(1)] (m), inclusive, or to a phalanx or phalanges of the thumb, finger or toe, the commissioner may, in his discretion, in the manner hereinbefore provided, award compensation for the proportionate loss or loss of use of the member of the body affected by such injury; *provided the commissioner shall, in his discretion, direct that the claimant, where the injury results in a loss of earnings and it is in the interests of the injured workman to be paid on that basis notwithstanding that the injured member may have attained maximum improvement, be paid partial compensation for loss of earnings, as provided above, and that such payments shall be made for as long as such loss of earnings shall continue; and if the injured workman's loss of earnings shall end, he shall be paid for such permanent injuries in accordance with subsections (a) to (m), inclusive, minus any payments by way of partial compensation, for weeks subsequent to the date on which maximum improvement in*

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[12] General Statutes § 5237 (Rev. to 1941) states in relevant part: "In case the injury shall consist of the loss of a substantial part of a member resulting in a permanent partial loss of the use of the member, or, in case the injury shall result in a permanent partial loss of function, the commissioner may, in his discretion, in lieu of other compensation, award to the injured person such a proportion of the sum herein provided for the total loss of, or loss of the use of, such member or for incapacity or both as shall represent the proportion of total loss or loss of use found to exist ...."

[13] It should be noted that in Wunsch v. Stanley Works, 137 Conn. 228 (1950), our Supreme Court again affirmed the discretion of an administrative law judge to award partial incapacity benefits to a claimant who had attained maximum medical improvement. However, it reversed the decision in part on the basis that the administrative law judge had awarded the claimant the full amount for partial incapacity, and remanded the matter for a recalculation based on the "the proportion of total loss or loss of use [of the plaintiff's hand] found to exist." Id., 234, *quoting* General Statutes § 7431 [now codified at General Statutes § 31-308 (a)].

> *the injured member had been attained. If there is no loss of earnings resulting from the injury, payments shall be made in accordance with subsections (a) to (m), inclusive.* (Emphasis added.)

Public Acts 1967, No. 67-842, § 15.

In discussing this amendment, Representative Paul Pawlak, Sr., explained: "[W]e propose where there is a partial loss of earning from the injury, the commissioner can direct payment of such partial loss of earnings until such loss of earnings has ended, and the commissioner can then require the payment of the specific due for permanent loss, minus such partial payments."[14] 12 H.R. Proc., Pt. 9, 1967 Sess., p. 4039.

This statutory language, which explicitly conferred upon an administrative law judge the discretion to award ongoing temporary partial disability benefits to a claimant who had reached maximum medical improvement, was carried forward, with few legislative changes, until 1993. By that time, the provision had been codified at § 31-308 (d). However, in 1993, Number 93-228 of the 1993 Public Acts "was enacted as part of a comprehensive scheme to reform the Workers Compensation Act." Rayhall v. Akim Co., 263 Conn. 328, 346 (2003). "[T]he principal thrust of these reforms was to

[14] Number 67-832 of the 1967 Public Acts, § 25, also introduced post-specific temporary partial disability benefits into the workers' compensation statutory scheme. "Section 31–308a was enacted in 1967 in order to provide workers' compensation commissioners the ability to grant supplemental benefits to certain claimants who required additional assistance.... 'This section gives the commissioners authority to provide additional payments to workers who have exhausted their specific benefits, based upon the employee's injury, the availability of work for persons with such disability and the employee's training, education, experience and age.... [T]he present law with its specific payments for injuries does not at all times take into account that each man is a separate being and no one formula can be applied to determine what his true damages have been. This section gives the commissioners leeway to apply equity to the case ....'" Starks v. University of Connecticut, 270 Conn. 1, 14 (2004), *quoting* 12 H.R. Proc., Pt. 9, 1967 Sess., p. 4043, remarks of Representative Paul Pawlak, Sr. We note that the respondent in the present matter has suggested that the implementation of § 31-308a in 1967 was somehow intended to offset the cessation of an administrative law judge's discretion to award ongoing partial incapacity benefits to a claimant who had reached maximum medical improvement. We find this interpretation to be inconsistent with § 15 of Number 67-832 of the 1967 Public Acts, which effectively codified this discretion. See Respondent's Exhibit 9.

cut costs in order to address the spiraling expenses required to maintain the system." Id. To that end, Number 93-228 of the 1993 Public Acts specifically repealed § 31-308 (d), effectively eliminating the discretion of an administrative law judge "to award partial compensation for lost earnings after an injury has achieved maximum medical improvement if it is in the injured worker's best interest ...."[15] 3 A. Severino, Connecticut Workers' Compensation After Reforms (7th Ed.2017) § 6.09, p. 1007. Although the rationale for the repeal of this particular provision was not addressed in the substantive legislative history of the act, the relevant portion of the "Bill Analysis," entitled "Partial Compensation for Lost Earnings," succinctly states that the act "[r]epeals a provision allowing commissioners to award partial compensation for lost earnings after an injury has achieved maximum medical improvement if it is in the claimant's best interest."

In light of the unambiguous legislative activity on this issue, we find unpersuasive the claimant's contention that the discretion of an administrative law judge to award

[15] The Connecticut Practice Series for Workers' Compensation authors reference the same provision of General Statutes § 31-308 (b) cited by the claimant for the proposition that "[d]espite the 1993 amendments to C.G.S. § 31-308 (b) reducing overall entitlement to permanent partial disability benefits, the legislature left in place a provision in Section 31-308 (b) which has been construed by the Connecticut Supreme Court to allow payment of Section 31-308 (a) benefits in lieu of permanent partial disability benefits under Section 31-308 (b), where the continuing wage loss benefits are of greater benefit to the claimant." R. Carter, D. Civitello, J. Dodge, J. Pomeranz, & L. Strunk, 19 Connecticut Practice Series: Workers' Compensation Law (2008) § 8:97, p. 386. The authors further point out that Osterlund v. State, 129 Conn. 591 (1943), was never overruled. However, it would appear that the statutory provision in question was initially adopted in order to extend to a workers' compensation commissioner the discretion to award benefits for permanent partial disability rather than limiting such awards to cases of "complete and permanent" loss or loss of use of a scheduled body part. It is true that the legislature has never altered this language, although in 1979, the legislature divided General Statutes § 31-308 into subsection (a), pertaining to benefits for temporary partial incapacity, and subsection (b), pertaining to benefits for permanent partial disability. The enabling legislation regarding awards for permanent partial disability remained in subsection (b), and in 1993, these provisions were again left unchanged, presumably because the legislature had no intention of eliminating awards for permanent partial disability. In light of the 1993 legislative enactments discussed herein, and their associated bill analysis, we believe the Osterlund court's interpretation of this provision, although codified by the legislature in 1967, was effectively abrogated by the 1993 amendments.

ongoing temporary partial disability benefits to a claimant who has reached maximum medical improvement, as contemplated by our Supreme Court in Osterlund, supra, persists to the present day. Despite the fact that the legislature has not amended in any significant fashion the relevant statutory language of § 31-308 (b) relied upon by the claimant, it is quite clear that the legislature abrogated this discretion. Well-settled principles of statutory construction instruct us that interpreting a provision in a manner inconsistent with the policy of another provision is to be avoided, and specific provisions addressing a particular issue should be applied rather than provisions which address the issue more generally.[16]

> Statutory construction ... is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme -- because the same terminology is used elsewhere in a context that makes its meaning clear ... or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law .... (Internal citation omitted.)

United Savings Assn. of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 369 (1988).

We therefore conclude that the interpretation of § 31-308 (b) urged by the claimant is inconsistent with the legislative activity relative to this issue. As such, we lack a reasonable basis for reversing the decision of the administrative law judge denying ongoing temporary partial disability benefits, given that the evidentiary record in this

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[16] See "The Rehnquist Court's Canons of Statutory Construction," derived from the Appendix to "Foreword: Law as Equilibrium," William N. Eskridge, Jr., Philip P. Frickey, 108 Harv. L. Rev. 26, November, 1994. (Format modified by Judge Russell E. Carparelli, Colorado Court of Appeals, September 2005.)

matter definitively establishes that the claimant has reached maximum medical improvement.[17]

We would note that our decision in this matter in no way conflicts with the holding in Rayhall, supra, wherein our Supreme Court affirmed the award of ongoing temporary partial disability payments to a claimant who had sustained injuries to both knees in the same incident. The court, in reviewing a cross-appeal filed by the respondents, rejected the assertion that the claimant, who had reached maximum medical improvement for one of his knee injuries, was required to convert to permanent partial disability payments even though he remained partially incapacitated with respect to the other knee injury.[18] The Rayhall respondents further contended that although an injured worker is potentially eligible for temporary total disability benefits prior to receiving a permanent partial disability award, "the statute does not apply similarly when a worker is entitled to temporary *partial* incapacity benefits." (Emphasis in the original.) Id., 355. The court was not persuaded, stating:

> In our view, the case law establishes that the phrase "in addition to the usual compensation for total incapacity but in lieu of all other payments for compensation" in § 31–308 (b) merely was intended to prohibit double payment of permanency awards and to address our case law precluding a claimant suffering incapacity following a

[17] The claimant contends that the respondent's reliance upon Testone v. C. R. Gibson Co., 114 Conn. App. 210, 222, *cert. denied*, 292 Conn. 914, 973 (2009) is misplaced, given that "the factual circumstances in Testone differ significantly from those [in the present matter] as the claimant in Testone was seeking to re-open a previously approved Form 36 after obtaining a subsequent opinion from a medical provider who opined that the claimant had not reached maximum medical improvement and required further treatment for another body part." Appellant's Brief, p. 10. While we agree that the underlying factual scenario in the appeal at bar is inconsistent with that in Testone, we would note that in Testone, our Appellate Court specifically stated that "[t]emporary partial disability benefits under General Statutes § 31-308 (a) are available '*until* the injured worker has reached maximum medical improvement...." (Emphasis added.) Id., 220, *quoting* 1 A. Severino, Connecticut Workers' Compensation After Reforms (3 Ed. 2006) § 6.06.3, p. 970.

[18] In Rayhall v. Akim Co., 263 Conn. 328 (2003), the appeal was prosecuted by the claimant, who argued that the social security offset, formerly codified at General Statutes § 31-307 (e), was discriminatory on the basis of age and disability status and, as such, was in violation, inter alia, of the equal protection clauses of both the Connecticut and United States constitutions. The Supreme Court was not persuaded.

> permanent disability from being able to thereafter collect total incapacity benefits. We find no evidence that the legislature intended, by adding the reference to total incapacity in the 1919 amendment, to address the issue before us in the present case, namely, where two distinct injuries both have not achieved maximum medical improvement, i.e., permanency.

Id., 356.

Following an analysis of the parties' arguments relative to the practical effect of General Statutes § 31-295 (c),[19] the Rayhall court concluded that the claimant was entitled to continue receiving temporary partial disability benefits for one injured member despite having reached maximum medical improvement for another.

> It is clear that if, as a result of the condition of his left leg, the plaintiff were temporarily *totally* incapacitated, in other words, unable to work at all, he would be entitled to receive incapacity benefits regardless of whether his right leg had achieved maximum medical improvement.... We see no logic in treating the plaintiff's temporary partial incapacity in a substantively different manner. Indeed, we have recognized that "[c]ompensation for the loss of the member will not compensate [a claimant] for the period of incapacity preceding the loss of the member. The just rule of compensation will give compensation for the period of total incapacity as well as for the loss of the member." Franko v. Schollhorn Co., 93 Conn. 13, 19 (1918). (Emphasis in the original; internal citation omitted.)

Id., 357.

There is no question that the Rayhall court's affirmation of the claimant's entitlement to ongoing temporary partial disability benefits following the attainment of maximum medical improvement was limited to the precise circumstances of that claim.

[19] 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...."

We therefore find the factual scenario in Rayhall can be sufficiently distinguished from the present matter such that the administrative law judge properly denied the payment of ongoing temporary partial disability benefits to the claimant.

Finally, we would note that our decision in this matter is also consistent with established case law relative to a claimant's eligibility for ongoing temporary *total* disability benefits after maximum medical improvement has been reached. Our Supreme Court has held that "[a] person may reach maximum medical improvement, have a *permanent* partial impairment, and be *temporarily* totally disabled from working, all at the same time." (Emphasis in the original.) McCurdy v. State, 227 Conn. 261, 267-268 (1993), *citing* Osterlund v. State, 135 Conn. 498, 506-507 (1949). Moreover, in Cappellino v. Cheshire, 226 Conn. 569 (1993), our Supreme Court observed:

> [Section] 31–308 specifically provides that compensation for permanent partial disability shall be "in addition to the usual compensation for total incapacity." While we have held that the act prohibits *concurrent* payment of benefits for permanent partial disability and temporary total disability ... it is clear that these two types of benefits compensate an employee for different types of loss ... and that the payment of § 31–307 temporary total disability benefits does not discharge the obligation to pay § 31-308 permanent partial disability benefits at some point in the future. (Emphasis in the original.)

Id., 577–78.

However, given that the evidentiary record in this appeal does not reflect that the claimant, at formal proceedings, demonstrated any entitlement to temporary total disability benefits, we find the foregoing remarks by our Supreme Court in this regard inapplicable to the present matter.[20]

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[20] As noted previously herein, the claimant filed a motion to correct which was granted in part. On appeal, she argues that the administrative law judge's failure to grant the balance of the proposed corrections constituted error. Our review of the proposed corrections denied by the administrative law judge indicates

There is no error; the June 2, 2021 Finding and Orders of Scott A. Barton, Administrative Law Judge acting for the Fifth District, are accordingly affirmed.

Administrative Law Judges Carolyn M. Colangelo and David W. Schoolcraft concur in this Opinion.

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that the claimant was merely reiterating arguments made at trial which ultimately proved unavailing. We therefore find no error in the 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).