CASE NO. 6442 CRB-1-21-9 : COMPENSATION REVIEW BOARD
CLAIM NO. 300110567

EDWARD C. CAYE : WORKERS' COMPENSATION
CLAIMANT-APPELLEE COMMISSION

v. : SEPTEMBER 16, 2022

THYSSENKRUPP ELEVATOR
EMPLOYER

and

SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.
INSURER
RESPONDENTS-APPELLANTS

APPEARANCES:

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

The respondents were represented by Ryan C. Dacey, Esq., Mullen & McGourty, 2 Waterside Crossing, Suite 102A, Windsor, CT 06095.

This Petition for Review from the September 2, 2021 Finding and Order of Toni M. Fatone, Administrative Law Judge acting for the First District, was heard on January 28, 2022 before a Compensation Review Board panel consisting of Administrative Law Judges Carolyn M. Colangelo, Peter C. Mlynarczyk, and David W. Schoolcraft.[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

CAROLYN M. COLANGELO, ADMINISTRATIVE LAW JUDGE. The respondents have petitioned for review from the September 2, 2021 Finding and Order of Toni M. Fatone (finding), Administrative Law Judge acting for the First District. We affirm in part and remand in part for an articulation and additional proceedings consistent with this Opinion.[2]

The administrative law judge identified the following issues for determination: (1) whether the claimant should be authorized to continue treatment with his out-of-state prosthesis provider pursuant to General Statutes § 31-294d;[3] (2) whether repair of the claimant's primary and back-up prostheses constituted reasonable or necessary medical treatment such that the claimant was entitled to reimbursement for the shipping expenses associated with the repair; and (3) whether the claimant was "subject to deleterious undue delay" such that penalties and attorney's fees pursuant to General Statutes § 31-300[4] were warranted. Issues, ¶ (c).

The administrative law judge made the following factual findings which are pertinent to our review. On May 7, 2012, the claimant sustained a compensable,

[2] We note that on September 30, 2021, the respondents filed a motion to stay judgment pending appeal which was denied by Commission Chairman Stephen M. Morelli.

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

[4] 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 administrative law judge 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."

catastrophic injury during the course of his employment which ultimately resulted in amputation of his right lower extremity. The claimant's first prosthesis, which was made by a Connecticut-based company called NEOPS which is no longer in business, was ill-fitting and caused the claimant to fall, resulting in the need for several surgeries.[5]

The claimant worked with NEOPS for approximately one year before Michael P. Leslie, an orthopedic surgeon and the claimant's primary treater since the date of the accident, referred him to A Step Ahead Prosthetics (A Step) in Hicksville, New York, for his prosthetic care. The claimant testified that "[b]ecause of the length of my residual stump, it's very hard for prosthesis people, companies to fit me with a prosthesis." March 24, 2021 Transcript, p. 56. The claimant explained that the first step in fitting a patient for a prosthesis is to create a testing unit before the custom prosthetic is manufactured. NEOPS created only a testing unit for the claimant, as it was their practice to outsource the manufacturing of custom prosthetics. The claimant stated that A Step does not outsource its manufacturing of custom prostheses. Rather, the fitting lasts an entire day, in which "you try things on, you put it on, take it off, go walk back and forth, and by the end of the day, usually later on in the day, 6:00, 7:00 o'clock, I'm done." Id., 57-58. The claimant testified that he tried to find a prosthetic provider in Connecticut but every company he contacted informed him they outsourced the manufacturing of their prostheses and did not customize their products.

Eric Schaffer, head prosthetist at A Step, testified that the claimant, because of the length of his residual limb, requires the specialized care the A Step facility based in New York can provide. Schaffer noted "you can do so much damage to a person's

[5] At trial, counsel for the respondents indicated that NEOPS went bankrupt in 2017 and was no longer on the list of authorized prosthetics providers for Connecticut. See March 24, 2021 Transcript, pp. 67-68.

residual limb, body, the whole kinematics, the geometry behind it if the prosthesis is not properly fit." Claimant's Exhibit H, pp. 13-14.

At his deposition, Leslie testified that two types of companies provide prostheses. One type, which he described as "not dedicated to the prosthetic line," Claimant's Exhibit I, p. 33, provides an array of aids in addition to prostheses such as "neo mobilizers, wrist splints, Ace wraps, and compression stockings ...." Id. The other type specializes solely in prostheses. Leslie explained that the only options "in the state of Connecticut are prosthetic companies that provide wrist braces and prosthetics, and I wanted my patients to at least have access to prosthetic companies that are well beyond what other companies are doing, more locally." Id. Leslie opined that although any of the Connecticut companies can provide a prosthesis, they cannot provide the level of patient care A Step does, and described A Step as "eons beyond most prosthetic companies." Id., 52.

The respondents' medical examiner, Pietro A. Memmo, a physiatrist who is board-certified in pain management, and the commission examiner, Jerrold Kaplan, also a physiatrist, opined that the claimant could be seen by a prosthetist in Connecticut.[6] See Respondents' Exhibit 1. At a formal hearing held on April 15, 2021, Donna Welsh, the claims examiner for Sedgwick, testified that the respondents had authorized A Step as the claimant's prosthetics provider for over five years but, at the time of the formal, they wanted the claimant to see Thomas B. Miller, a physiatrist at St. Francis Hospital. Welsh further testified that she was not aware that Miller does not fit patients for prostheses.

[6] As discussed in greater detail, infra, although Kaplan agreed with Memmo that the claimant's care could be supervised by a physiatrist, he did not opine as to whether the claimant should be required to obtain his medical treatment in Connecticut.

In April 2020, the foot broke on both the claimant's primary and back-up prostheses. The claimant testified that he was supposed to rotate between primary and back-up legs in order to allow the amputation site to become accustomed to each socket so the prostheses fit better. Without either a primary or back-up leg, the claimant was forced to use crutches to ambulate. In correspondence to the Workers' Compensation Commission (commission) dated February 18, 2017, Leslie explained that the prolonged use of crutches can cause significant muscular atrophy in the affected limb, which will then require a new prosthetic socket. Leslie indicated the claimant had experienced this issue in 2016.

The necessity for repairs to the claimant's primary and back-up prostheses occurred during the COVID-19 pandemic. The claimant testified that when his prostheses broke, he "had no idea what to do," March 24, 2021 Transcript, p. 61, given that on prior occasions when his prostheses required repairs, he had simply driven to New York to get them fixed. However, because of the pandemic, "people were dying, I wasn't about to drive to the epicenter of New York where everybody was infected to bring legs." Id., 82.

The claimant indicated he contacted A Step for instructions and was told to ship both prostheses, which he did, utilizing United Parcel Service (UPS). The claimant acknowledged he neither investigated other shipping options nor sought authorization from the insurer to ship the prostheses to A Step. The claimant testified that over the course of the six- or seven-year period during which he had been working with A Step, whenever an issue had arisen with his prostheses, he had called A Step and arranged for the repairs without seeking prior authorization. He stated he would obtain approval from

Schaffer, drive down to A Step and get the prostheses fixed, and then submit the bill to the carrier, after which the bill would be paid. Welsh confirmed that throughout the history of the claim, the claimant had submitted reimbursement requests on a weekly basis. See April 15, 2021 Transcript, p. 7.

When the claimant brought the prostheses to UPS, he was told they would need to be insured for their cost, at $15,000 each. The claimant testified that he shipped the broken prostheses because he did not have any other back-up prostheses and without them, he could not go anywhere. The respondents asserted that because the prostheses were broken, the claimant should have insured them for a lesser amount, comparing the value of the broken prostheses to that of totaled cars. The respondents offered no evidence regarding the allegedly diminished value of the broken prostheses. Moreover, although Welsh testified that there were "many" other options for returning the broken prostheses to A Step which would have been cheaper, she provided no evidence regarding those alternatives or their costs. April 15, 2021 Transcript, p. 9.

The claimant ultimately paid $847.16 to ship the prostheses to A Step, for which expense the insurer has refused to reimburse the claimant on the basis that he failed to seek preauthorization for the cost of the shipping. The respondents have filed a form 43 disclaiming this cost.[7]

Regarding the issue of undue delay, the administrative law judge, specifically citing Leslie's reports, found that "the record before us is rife with an incessant pattern of undue delays and refusals by the Respondents to cover medically necessary products, treatments and services over the life of this claim." Findings, ¶ 26. The claimant was left

[7] A form 43 is entitled "Notice to Compensation Commissioner and Employee of Intention to Contest Employee's Right to Compensation Benefits."

without the use of both prostheses and was denied medically necessary care for most of 2020. Moreover, although the claimant was ultimately able to get one of his prostheses repaired, it took six months for him to get the prosthesis back.

In addition, at the time of the formal hearing of March 24, 2021, the claimant had been unable to wear his prosthesis for nearly two months because he had been unable to obtain a prosthetic adjustment. The claimant explained that because the rubber lining covering the residual limb site did not fit properly, it caused an infection, which developed into a cyst which needed to be surgically removed. The claimant testified that these complications were due to his prosthetic care not having been authorized for more than a year. As a result, the claimant was forced to use crutches for an extended period of time and needed to be refitted for his prostheses. Although the respondents had authorized the claimant's treatment with A Step for the prior six or seven years, they were unwilling to authorize the claimant to visit A Step for an adjustment. The claimant also testified that weeks or months had gone by before he received an answer from the respondents.

Welsh testified that on a monthly basis, the claimant has received automatic supplies recommended by A Step and processed by One Call Medical (One Call), a third-party vendor hired by the respondent in order "to arrive at some cost-savings according to the Connecticut Fee Schedule and their quote." March 24, 2021 Transcript, p. 124. Welsh indicated One Call had been involved with the claim for "quite some time" and A Step had agreed to work with One Call relative to some of the claimant's medical supplies. Id., 121.

In April 2020, the respondents received an invoice from A Step regarding the repair/replacement of the claimant's primary and back-up prostheses and forwarded the invoice to One Call for review. At trial, Welsh explained One Call's process for reviewing invoices relative to the Connecticut fee schedule, and testified that although A Step had indicated it was willing to accept the fee schedule for certain medical supplies, it had refused to do so for new prostheses or repairs to existing prostheses. The fee schedule reports those items as unlisted codes; Welsh testified that she was not aware that "unlisted codes in Connecticut are paid at an acquisition cost, including sales tax, plus 30 percent" or that the claimant's primary prosthetic was an unlisted code. April 15, 2021 Transcript, p. 12.

Welsh also indicated she was not aware the claimant had been without his prostheses for over a year. Welsh testified that she has been a claims adjuster for more than forty years, handled claims in Connecticut for approximately fifteen years, and was assigned to the instant claim for approximately five years. As such, the administrative law judge found that "Welsh is clearly an experienced adjuster." Findings, ¶ 38.

On the basis of the foregoing, the administrative law judge, having concluded the claim was subject to the provisions of chapter 568 of the General Statutes, found the testimony of the claimant both credible and persuasive. She also found persuasive Leslie's opinion that the claimant's treatment with A Step constituted reasonable or necessary medical care and A Step should continue as the claimant's prostheses provider. The trier indicated that the ongoing care with A Step should encompass repairs and adjustments to the claimant's prostheses, the provision of all supplies needed by the

claimant for utilization of his prostheses, and reimbursement for travel costs incurred by the claimant in traveling to A Step's facility in Hicksville, New York.

The trier concluded that Welsh's testimony was neither credible nor persuasive. She further concluded that Memmo's opinion regarding the selection of an alternate prostheses provider was not persuasive, given that Memmo is a pain management specialist and the respondents introduced no evidence demonstrating Memmo had experience in the area of prosthetics. She similarly found Kaplan's opinion unpersuasive, given that he is a physiatrist and the respondents likewise introduced no evidence demonstrating he has any experience in the area of prosthetics.

The trier found the claimant's utilization of UPS to ship the damaged prostheses to A Step for repairs reasonable "under the circumstances" and found the respondents' denial of reimbursement for this expense unreasonable. Order, ¶ II. As such, she ordered the respondents to reimburse to the claimant the shipping costs in the amount of $847.16, along with interest commencing on the date of the shipment to the date of issuance of the Finding and Order.

She also concluded that the respondents had unduly delayed the adjustment of the claim by failing to authorize and provide the claimant with necessary medical treatment, including the prostheses themselves, prostheses repairs and adjustments, and prosthetic supplies. The trier designated A Step as the claimant's prostheses provider and ordered the respondents to authorize ongoing prostheses fittings, repairs and other appointments as prescribed by Leslie. In addition, noting that the claimant had submitted an affidavit

for an attorney's fee in the amount of $16,862.50, she ordered the respondents to pay this fee pursuant to § 31-300.[8]

The respondents filed a motion to correct, to which the claimant objected and which the administrative law judge denied in its entirety, and this appeal followed.[9] On appeal, the respondents contend:

(1) the trier's decision to allow the claimant's evidentiary submissions into the record as full exhibits, despite respondents' objections on the basis, inter alia, that the exhibits constituted hearsay, violated respondents' right of due process in light of their inability to cross-examine the witnesses;

(2) the trier erred in authorizing the claimant to continue to treat with an out-of-state provider and in adopting the statutory "reasonable or necessary" standard, rather than conducting an analysis into the "availability of equally beneficial in-state treatment" as required by Cummings v. Twin Mfg., Inc., 29 Conn. App. 249 (1992);

(3) the trier erroneously awarded retroactive reimbursement of the unauthorized UPS shipping costs given that the claimant should have utilized a more cost-effective method;

[8] The affidavit stated that the attorney's fee sought by claimant's counsel represented 35.5 hours of time at the rate of $475 per hour.

[9] The claimant objected to the motion to correct on the basis, inter alia, that the motion was untimely filed. Our review of this motion indicates that although it was dated September 21, 2021, it was not filed with the Workers' Compensation Commission until September 30, 2021. Given that the Finding and Order in this matter was issued on September 2, 2021, the motion to correct would appear to have been both dated and filed beyond the fourteen-day deadline prescribed by Section 31-301-4 of the Regulations of Connecticut State Agencies.

(4) the trier erroneously permitted the claimant to continue treating with A Step without compelling A Step to comply with the Connecticut fee schedule, in violation of Section 31-280-3 of the Regulations of Connecticut State Agencies;[10] and

(5) the trier's decision to impose attorney's fees pursuant to § 31-300 constituted a due process violation, in that the claimant failed to provide any demonstrative evidence at trial that he was entitled to § 31-300 penalties. In addition, the administrative law judge relied on an affidavit setting forth the requested attorney's fees which had been submitted as an attachment to the claimant's post-formal brief, thereby depriving the respondents of the opportunity for cross-examination relative to the contents of the affidavit.

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

[10] Section 31-280-3 (b) (4) of the Regulations of Connecticut State Agencies states: "Except where the Practitioner and Payer have entered into a specific written agreement providing otherwise, Provider charges for medical services provided to employees under the Workers' Compensation System shall be recognized in accordance with these regulations and the Practitioner Billing and Payment Guidelines and payable up to the Practitioner Fee Schedule. Except as otherwise provided by contract, the Practitioner Fee Schedule shall be the maximum permissible payment amount."

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

In their first claim of error, the respondents contend the decision of the administrative law judge to allow the submission into the record of the claimant's exhibits constituted a due process violation because the records contained "impermissible" hearsay evidence about which the respondents were unable to cross-examine the witnesses. Appellants' Brief, p. 10. The respondents further allege the trier improperly relied upon testimony offered by Welsh regarding whether Miller fit patients for prostheses. The respondents point out that no evidence was adduced demonstrating Miller does not fit patients for prostheses; as such, the trier's "reliance on impermissible hearsay that Dr. Miller 'does not fit people for prosthetics' amounts to a reversible error of law." Id., 10-11.

Our review of the formal hearing transcripts suggests that the respondents' objections at trial primarily emanated from the fact that the various providers were not made available to testify live at formal proceedings in order to authenticate the documents being submitted. The respondents further contended that a number of the reports were irrelevant to the issues in dispute. In addition, the respondents also objected to the admission of the deposition transcripts for Schaffer and Leslie on the grounds that the attorney representing the claimant at formal proceedings was not the same attorney who had attended the depositions, and the doctors' deposition testimony went beyond the scope of the issues in dispute.

We find the claim of due process deprivation to be without merit, and confess at the outset that we are at a loss to understand how the administrative law judge could have been expected to render sustainable findings regarding the claimant's medical treatment in the absence of the providers' reports. Moreover, in the workers' compensation forum, it is well-settled that the provisions of General Statutes § 31-298 afford an administrative law judge a great deal of discretion in decisions involving evidentiary submissions. In fact, the statute specifically contemplates:

> In all cases and hearings under the provisions of this chapter, the administrative law judge shall proceed, so far as possible, in accordance with the rules of equity. He shall not be bound by the ordinary common law or statutory rules of evidence or procedure, but shall make inquiry, through oral testimony, deposition testimony or written and printed records, in a manner that is best calculated to ascertain the substantial rights of the parties and carry out the provisions and intent of this chapter.

General Statutes § 31-298.

It may be reasonably inferred that the latitude allowed the trier relative to evidentiary submissions is consistent with the underlying rationale of the workers' compensation scheme in general, in which the "statutes compromise an employee's right to a common law tort action for work-related injuries in return for relatively quick and certain compensation." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Dodd v. Middlesex Mutual Assurance Co., 242 Conn. 375, 381 (1997).

Consistent with these statutory provisions, determinations regarding the relevance of evidentiary submissions are well within the trier's discretion. Moreover, this board has previously observed that in the workers' compensation forum, it is well-settled that "questions about the proper weight to give medical reports that contain an arguably

tenuous diagnosis concern matters of credibility rather than admissibility." Bailey v. Stripling Auto Sales Inc., 4516 CRB-2-02-4 (May 8, 2003).

In addition, it is difficult the reconcile the respondents' contention that every witness involved in this litigation should have been compelled to appear at formal proceedings with the stated purpose of workers' compensation legislation. "The intention of the framers of the act was to establish a speedy, effective and inexpensive method for determining claims for compensation." Chieppo v. Robert E. McMichael, Inc., 169 Conn. 646, 653 (1975), *citing* Taylor v. St. Paul's Universalist Church, 109 Conn. 737 (1929). The record in the present matter is devoid of any indication that the respondents were in any fashion "ambushed" by the claimant's evidentiary submissions or unduly prejudiced by their admission. Moreover, any concerns harbored by the respondents relative to the authenticity of the claimant's medical records could have been resolved by way of depositions prior to the commencement of formal proceedings. We therefore sustain the decision of the administrative law judge to admit the claimant's exhibits in their entirety.[11]

We are similarly unpersuaded by the respondents' allegations of improper reliance upon the "hearsay" testimony offered by Welsh relative to her knowledge of whether Miller fitted patients for prostheses.[12] The finding does not reflect that the trier accepted "the truth of the matter asserted" by Welsh regarding Miller's expertise. State

[11] We consider the respondents' objections predicated on claimant's counsel's deposition attendance to be completely irrelevant.

[12] Under cross-examination, without objection, Welsh testified as follows:

Q: Do you know what Mr. (sic) Miller's specialty is? I said Mr. I meant Doctor Miller's specialty?
A: Prosthetics, I believe.
Q: Okay. And if I told you that he does not fit people for prosthetics, would that surprise you?
A. Yes.

April 15, 2021 Transcript, p. 14.

v. Foster, 293 Conn. 327, 333 (2009). Rather, the trier found more persuasive Leslie's opinion that because the services rendered by A Step were "both reasonable and medically necessary to the Claimant's health as an amputee," A Step should continue to provide the claimant's prosthetics care. Conclusion, ¶ C.

We further note that when the claimant was queried at trial regarding the referral to Miller in the respondent's medical examination (RME) report provided by Memmo, he stated that he called Miller's office in 2018 and was told by his secretary "that they don't deal with prosthetics. That's not his main thing." March 24, 2021 Transcript, p. 104. He also testified that the secretary said "Sir, we do not handle people like you with your degree and amputation." Id., 107.

Ultimately, the trier did not find any of Welsh's testimony credible or persuasive, including, presumably, the testimony relative to Welsh's apparent unfamiliarity with Miller's medical expertise. It may be reasonably inferred that the trier's findings relative to Welsh's lack of knowledge on a number of issues provide a possible rationale for why her testimony was deemed neither credible nor persuasive. At any rate, there is no error.

We turn next to the respondents' second claim of error, in which they contend the administrative law judge, in allowing the claimant to continue treating with A Step, erroneously applied the "reasonable or necessary standard" codified at § 31-294d (a) (1) rather than conducting an analysis into the "availability of equally beneficial in-state treatment" as required by Cummings v. Twin Mfg., Inc., 29 Conn. App. 249 (1992). The respondents assert that the claimant failed to satisfy his burden of proof that equally beneficial treatment was unavailable in Connecticut, whereas the respondents, in addition to adducing Welsh's testimony at trial regarding Miller's clinic at St. Francis Hospital,

submitted Memmo's RME report recommending a referral to Miller. The respondents also point out that Kaplan, in his commission examination report, opined that the claimant's "prosthetic care should be supervised by a physiatrist with expertise in prosthetics management." Respondents' Exhibit 1, p. 38 [November 1, 2018 Commission Examination, p. 6].

In Cummings, supra, our Appellate Court reviewed an appeal brought by the respondents, along with a cross-appeal brought by the claimant, in a matter arising from the decision of the administrative law judge to approve out-of-state medical treatment for the claimant without first having held an evidentiary hearing.[13] The court, noting that the provisions of § 31-294 were "not absolutely clear" regarding out-of-state treatment, ultimately affirmed the opinion of this board holding that an administrative law judge retains the discretion to order medical treatment outside Connecticut. Id., 255. The court considered this result to be consistent with both the general legislative purpose of the workers' compensation statutory scheme as well as its "remedial nature." Id., 257. It further observed that "[i]n an age of medical specialization in which technology is advancing at a pace almost beyond our ability to comprehend, any blanket prohibition against treatment out of state for Connecticut compensation claimants would constitute an unwise 'parochial view that adequate treatment is always available in this state.'" Id., 258, *quoting* Alcan Electrical & Engineering Co. v. Bringmann, 829 P.2d 1187, 1189 (Alaska 1992).

[13] The claimant cross-appealed the findings of the administrative law judge relative to the date of maximum medical improvement. This board affirmed the decision in its entirety and dismissed both appeals. The Appellate Court affirmed the dismissal of the claimant's cross-appeal.

However, the court also noted that although the provisions of § 31-294 allow an administrative law judge to "authorize or direct a change" in medical providers, such an order must be "reasonable."[14] The court held that this "reasonableness requirement" also applied to authorization for out-of-state medical treatment, stating that "[i]n this context, the reasonableness and necessity of such care hinges on whether equally beneficial treatment is available in Connecticut." Id., 259, *citing* 2 A. Larson, Workmen's Compensation Law (1989) § 61.13 (b) (2), pp. 937-941. The court, after concluding that an inquiry into "reasonableness" constituted a factual determination, reversed the decision of this board and remanded the matter in order to afford the administrative law judge the opportunity to "conduct an evidentiary hearing as to whether treatment out of state is *reasonable and necessary* in light of whether equally beneficial treatment is unavailable in Connecticut." (Emphasis added.) Id., 260.

Nine years later, in Melendez v. Home Depot, Inc., 61 Conn. App. 653 (2001), our Appellate Court revisited the issue of out-of-state medical care in an appeal involving a claimant who received such treatment after moving in with an out-of-state family member following her injury and then subsequently relocating to yet another state. The respondents appealed the decision of the administrative law judge holding the respondents liable for payment of the out-of-state medical care.

The court, after reviewing its prior analysis in Cummings, supra, stated that "[t]he test for determining whether the commissioner can order payment for out-of-state

[14] This statutory provision is currently codified at General Statutes § 31-294d (c) as follows: "The administrative law judge may, without hearing, at the request of the employer or the injured employee, when good reason exists, or on his own motion, authorize or direct a change of physician, surgeon, physician assistant or advanced practice registered nurse or hospital or nursing service provided pursuant to subsection (a) of this section."

medical treatment is whether the treatment is reasonable and necessary." Id., 657. The court also pointed out that the evidentiary hearing ordered by the Cummings court "was simply a means by which the commissioner could determine if the treatment was reasonable and necessary," id., and noted that it had "expressly stated that the hearing was required by 'the circumstances of [the] case.'" Id., *quoting* Cummings, 259. The Melendez court concluded that an evidentiary hearing was not required in that matter because the claimant's out-of-state care had been rendered while she resided outside of Connecticut, and the administrative law judge had already determined this care was reasonable and necessary.

In the present matter, our review of the evidentiary record indicates that in a letter of medical necessity dated February 10, 2017, Leslie, after noting the deficiencies with the claimant's first prosthesis furnished by NEOPS, reported:

> Since working with A Step Ahead Prosthetics, Mr. Caye's residual limb has matured and stabilized. Prosthetically, Mr. Caye is ready to regain his former lifestyle as a unilateral below the knee amputee, despite the daily challenges of relearning to do things differently. He has progressed towards being able to wear his prostheses all day and possesses the ability to ambulate at very high levels, as he desires. Given the nature of his injuries, utilizing prosthetics custom fabricated for his activities of rehabilitation is paramount to his success and safety.

Claimant's Exhibit E.

We also note that in Leslie's February 18, 2017 correspondence to the commission, he stated that the claimant "had fallen while walking in a substandard, incomplete prosthesis known as a 'test socket.' These are generally only meant for a patient to walk in for a few hours to determine the appropriate socket fit. Mr. Caye had been walking in his for nearly 8 months." Id. Leslie stated that after performing surgery

to repair the damage from the fall, he referred the claimant to A Step "because the damage caused to his residual limb by his former prosthetist made fitting him in a prosthesis significantly more difficult. It was clear that he required a skillset that could not be found locally." Id.

Moreover, in Leslie's September 4, 2018 correspondence to claimant's then-counsel prepared in response to Memmo's RME report, Leslie remarked:

> Memmo's assertion that there is a Physiatrist in Hartford who is willing and able to take on Mr. Caye's care is an agreeable suggestion and I believe that transition closer to home would be in the patient's best interest. The question remains as to who services and produces the prosthesis and this is a difficult question as local care was unsuccessful in the past.

Id.

In a deposition taken on May 23, 2017, Leslie testified that "I worked with the local prosthetic companies for a while and they just proved that they could not provide the level of care that's standard for a patient who ... [is] in this situation." Claimant's Exhibit P, p. 46.

The claimant also offered testimony on this issue, indicating he had tried several NEOPS prostheses but they were always "bulky" and uncomfortable. March 24, 2021 Transcript, p. 55. The claimant testified as follows:

> After about roughly a year, I was done with NEOPS, because I couldn't – I was – what happened was he set my leg at an angle. So, my leg was kicked out from – it was kicked out. So every time I walked – because all my back injuries, and everything, was making everything worse. So that's when Doctor Leslie pointed me in the direction of A Step Ahead Prosthetics.

Id., 56.

The claimant stated that the difference between the prosthesis from A Step versus the one from NEOPS was like "night and day. It was like, um – I don't know, it was just totally different." Id., 57. He explained that NEOPS had only ever provided him with a testing unit, which was not designed for everyday use, and he never progressed to a custom-made unit. He was never able to walk with the NEOPS unit, and because the unit was poorly fitted, he ended up falling and having to undergo additional surgery for a broken bone behind his knee. "And after that surgery, I was done with NEOPS. I was not going back to a company that made me fall." Id., 58. The claimant testified that at A Step, everything is manufactured in-house, so when he travels to the New York facility, by the end of the day, he has been fitted with a functional prosthesis. As a result, he has experienced less pain and more mobility, and owns a prosthesis that is easier to put on and remove.

Finally, we note that Schaffer, in a deposition taken on October 30, 2017, testified that the claimant requires a custom-fabricated prosthesis because of the length of the residual limb. In addition, Schaffer indicated that prior to the claimant visiting his facility, he had been provided with an ill-fitting prosthesis that had caused joint damage. Schaffer also stated that he believed there were "less than five" other prosthetics providers in the US which would be able to manufacture a prosthesis with A Step's level of customization, and none of those providers were in Connecticut. Id., 81.

Having reviewed the foregoing, we are not persuaded the administrative law judge's decision to designate A Step as the claimant's authorized prosthesis provider constituted error. There is no question that in Cummings, supra, our Supreme Court held that the determination of whether the out-of-state treatment sought by the claimant was

reasonable or necessary required an evidentiary hearing on the issue of whether equally beneficial treatment was available in Connecticut. However, in Melendez, supra, the court specifically limited Cummings to the particular circumstances of that case, and held that the appropriate standard for determining whether an administrative law judge retains the discretion to authorize out-of-state medical care depends on whether the treatment is reasonable or necessary as contemplated by § 31-294d (a) (1). In the matter at bar, the administrative law judge specifically found persuasive Leslie's opinion that the care provided by A Step was "both reasonable *and* medically necessary to the Claimant's health as an amputee," (emphasis added) Conclusion, ¶ C, and the evidentiary record provides a reasonable basis for this inference. As such, the trier's decision to designate A Step as the claimant's authorized prostheses provider both comports with our Appellate Court's holding in Melendez, supra, and satisfies the statutory requirements imposed by § 31-294d (a) (1).

We would further note that the trier was under no compunction to accept the RME report provided by Memmo, given that "[i]t is the quintessential function of the finder of fact to reject or accept evidence and to believe or disbelieve any expert testimony…. The trier may accept or reject, in whole or in part, the testimony of an expert." (Internal citations omitted.) Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999).

Relative to the administrative law judge's rejection of the Commission Medical Examination opinion provided by Kaplan, it is well-settled in our case law that:

> we will not encroach upon the fact-finding authority of a commissioner to decide which evidence is the most credible simply because the commissioner ordered one of the medical examinations. Although we have stressed that a commissioner

> should articulate the reasons behind a decision to disregard a § 31-294f examiner's opinion, the ultimate decision is always with the commissioner.

Nieves v. SCM Company, 3317 CRB-6-96-4 (July 9, 1997), *citing* Iannotti v. Amphenol/Spectra-Strip, 13 Conn. Workers' Comp. Rev. Op. 319, 1829 CRB-3-93-9 (April 25, 1995), *aff'd*, 40 Conn. App. 918 (1996) (per curiam).

Subsequently, in Figueiredo v. Barridon Corp., 4442 CRB-1-01-9 (August 16, 2002), we also noted that although "this board encourages commissioners to articulate their reasons for disregarding § 31-294f examiners' opinions, the law does not forbid them from doing otherwise, and a trier's decision may not be reversed based upon the absence of such an explanation." Id. See also Gillis v. White Oak Corp., 49 Conn. App. 630, *cert. denied,* 247 Conn. 919 (1998).

The administrative law judge in the present matter cited as her rationale for the rejection of Kaplan's opinion the fact that he is "a physiatrist, and there was no evidence introduced suggesting he has any experience in this area." Conclusion, ¶ G. We believe that when a commission examiner is selected, it is generally presumed that the administrative law judge has selected an examiner who possesses the necessary qualifications to render a relevant and, hopefully, useful report. In this case, for example, our review of the evidentiary record reflects that Kaplan is board-certified in both physical medicine and rehabilitation. However, Kaplan made no recommendations as to whether the claimant should be required to obtain his treatment in Connecticut; he merely opined that a physician with the appropriate training – in this case, a physiatrist – should supervise the claimant's care. See Respondents' Exhibit 1, p. 38 [November 1, 2018 Commission Examination, p. 6.]

Ultimately, the administrative law judge selected Leslie, an orthopedist with a specialty in orthopedic trauma, to supervise the claimant's prosthetic care rendered by A Step. Given that the selection of Leslie was, for all intents and purposes, largely consistent with Kaplan's recommendation, we decline to further address the trier's rejection of Kaplan's opinion on the basis that he lacked the necessary qualifications. We therefore affirm the trier's designation of A Step, subject to Leslie's supervision, as the claimant's authorized prostheses provider.[15]

We turn next to the respondents' claim of error relative to the administrative law judge's order of reimbursement for the charges incurred in shipping the broken prostheses to A Step via UPS. The respondents rely on Evensen v. Stamford, 5541 CRB-7-10-4 (March 31, 2011), for their contention that the claimant is ineligible for reimbursement as he neither sought prior authorization to ship the prostheses nor utilized "a more cost-effective method." Appellants' Brief, p. 9. The respondents further assert Welsh provided persuasive and credible testimony that the carrier could have returned the broken prostheses to A Step by a cheaper method. We are not persuaded.

In Evensen, supra, the respondents appealed an order for reimbursement of transportation expenses, pursuant to General Statutes § 31-312,[16] for a claimant residing

[15] We note that neither the respondents' expert nor the commission's examiner was deposed.

[16] General Statutes § 31-312 states in relevant part: "The employer shall furnish or pay for the transportation of the employee by ambulance or taxi where transportation is medically required from the point of departure for treatment and return. In all other cases, the employer shall furnish the employee transportation or reimbursement for the cost of transportation actually used, at a rate equal to the federal mileage reimbursement rate for use of a privately owned automobile set forth in 41 CFR Part 301-10.303, as from time to time amended, for a private motor vehicle or the cost incurred for public transportation, from the employee's point of departure, whether from the employee's home or place of employment, and return, if the employee is required to travel beyond a one-fare limit on an available common carrier from the point of departure to the place of treatment, examination or laboratory test. Where the medical attention or treatment is provided at a time other than during the employee's regular working hours and the employee is not otherwise receiving or eligible to receive weekly compensation, the employee shall be compensated for the time involved for the medical treatment as though it were time lost from the job at the rate of the

in Florida who, on three separate occasions, drove from Florida to Connecticut to attend medical appointments. The claimant neither sought prior authorization for the trips nor provided documentation regarding the medical care he received. This board, having observed "that § 31-312 does not stand in a vacuum," id., held that the provisions of § 31-312 were primarily intended to facilitate the employer's obligation inherent in § 31-294d (a) (1) to provide "reasonable or necessary" medical care. We stated:

> Read together, these statutes require the trial commissioner to conclude when considering a bid for travel reimbursement that the claimant received medical care as a result of the trip, that the medical care received was 'reasonable or necessary' and the manner in which the claimant traveled to the medical care was 'reasonable or necessary.'

Id.

This board also noted that because the provisions of the statute afford the employer the option to either furnish transportation or reimburse the injured employee for its cost, the implication is that the employer will be consulted before any transportation is undertaken. Thus, in light of the fact that the claimant had failed to seek preauthorization, and the commissioner had been unable to render a finding as to whether the medical treatment obtained in Connecticut was either reasonable or necessary, this board vacated the order for retrospective reimbursement.[17]

We note at the outset that Evensen can be factually distinguished from the present matter in that it implicated reimbursement for transportation expenses and the matter at

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employee's average hourly earnings and shall be paid for the cost of necessary transportation as provided in this subsection."

[17] This board affirmed the trier's order limiting the claimant's entitlement to any prospective travel expense reimbursements to trips for which the claimant provided documentation indicating he had received reasonable or necessary medical care. The claimant was also instructed "to use the most inexpensive method of travel available." Evensen v. Stamford, 5541 CRB-7-10-4 (March 31, 2011).

bar concerns reimbursement for shipping charges for a medical device. However, Evensen is instructive in that this board's assessment as to whether the trier appropriately ordered a retrospective travel reimbursement primarily revolved around the inquiry into whether the claimant had received necessary or reasonable medical care. In the present matter, there can be little question that the claimant's possession of fully functioning prostheses would be considered reasonable or necessary medical treatment.

With regard to the respondents' objection to the order to pay the reimbursement on the basis that the claimant failed to secure prior authorization for the shipping charges, we note the administrative law judge specifically found the claimant's actions reasonable "under the circumstances." Id. It may be inferred that by "circumstances," the trier was alluding at least in part to the fact that the claimant was required to ship the broken prostheses during the height of the pandemic, at which point many "standard operating procedures" had been suspended. Moreover, the evidentiary record contains correspondence dated April 10, 2020, from Amy Winters, the Director of Operations for A Step, stating that "[d]ue to the mandatory stay at home orders to fight COVID-19 in the United States, Mr. Edward Caye was advised to ship both prosthetics to our facility located in Hicksville, New York." Claimant's Exhibit A.

In addition, the claimant testified that he was unwilling to drive the broken prostheses to New York, and he was specifically instructed by Schaffer to ship the prostheses rather than doing so. The claimant also offered testimony, found credible by the trier, that prior to the pandemic, over the course of the preceding seven-year period during which he had worked with A Step, whenever an issue arose with his prostheses, he

would simply call Schaffer and make arrangements to drive down and get them repaired, after which he would submit the invoice to the carrier.[18]

We also note that in her testimony, Welsh confirmed that over the long life of the claim, the claimant had submitted reimbursement requests "on a weekly basis, more or less." April 15, 2021 Transcript, p. 7. However, although Welsh testified that she believed the claimant was aware he was supposed to seek preauthorization, and the carrier could have made alternate arrangements to ship the broken prostheses for far less than the price charged by UPS, the administrative law judge did not find Welsh's testimony credible or persuasive.[19] Thus, in light of the claimant's testimony, found credible by the trier, regarding past pattern and practice in the claim, and the fact that the claimant's testimony clearly reflected he had been compelled to make a difficult decision during the exigencies of the pandemic, we find no error in the trier's decision to hold the respondents liable for the costs associated with the shipment of the broken prostheses.

We turn next to the respondents' claim of error relative to the alleged failure of the administrative law judge, in the absence of a written agreement to the contrary, to compel A Step to adhere to the Connecticut fee schedule, in compliance with § 31-280-3.[20] The respondents argue that the trier erroneously admitted the

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[18] The claimant testified that he "[g]ot approval from Erik, went down, fixed it, came home, submitted the bill, you guys paid it, never an issue, for six years. Now all of a sudden, oh, we're not paying and you can't have your prosthetics, you can't walk." March 24, 2021 Transcript, p. 75.

[19] At trial, Welsh testified that "[w]e could have gotten an Uber; we could have used our SIU; we could have used transportation through One Call. There [were] numerous ways to do that that most likely would have been cheaper." April 15, 2021 Transcript, p. 9. Given that Welsh did not provide actual cost estimates for any of the referenced alternative delivery methods, it may be inferred that the administrative law judge found this testimony highly speculative, at best.

[20] Section 31-280-3 (b) (2) of the Regulations of Connecticut State Agencies is silent regarding the applicability of the Practitioner Fee Schedule to out-of-state medical providers, stating only that the schedule "shall be calculated from a data base consisting of current charge data (collected within the past year). Such data may be broadly based and may include health and accident claims as well as Workers' Compensation claims. Such data base shall include representative data from the entire State of Connecticut. Practitioner fees shall be uniform throughout the State. Separate conversion factors may be

September 25, 2020 "A Step Ahead Prosthetics & Orthotics Non-Contracted Provider Acknowledgement Form," given that the claimant failed to lay a proper foundation for its admission and the respondents were given no opportunity to cross-examine Winters, who had purportedly signed the document. See Claimant's Exhibit A. Moreover, the document itself was deficient in that it: (1) constituted hearsay; (2) did not qualify for the business records exception; (3) was not a medical report; and (4) was prepared in anticipation of trial. The respondents further point out that although the acknowledgment form indicated that A Step would agree to accept the Connecticut fee schedule, the issue in dispute continues to be payment for unlisted procedure codes, including prostheses repairs and new prostheses, which the A Step agreement contemplates will "be individually reviewed and paid at manufacturers invoice plus 50%."[21] Id. It is the respondents' position that A Step should be required to accept the Connecticut fee schedule in its entirety and work with One Call because "this would equate to a substantial cost savings to the Respondents ...." Appellant's Brief, p. 6.

The respondents' claim of hearsay relative to the totality of the claimant's evidentiary submissions has been addressed previously herein and requires no reiteration. However, we also note that although the fee schedule issue was presented to the administrative law judge at the commencement of formal proceedings, the finding in this matter is silent relative to A Step's obligation to accept the Connecticut fee schedule or to cooperate with One Call.[22] See March 24, 2021 Transcript, p. 7. At trial, counsel for the

established for surgical, medical, radiology; pathology, anesthesiology and other types of services or claims as determined by the chairman."

[21] At trial, claimant's counsel explained that according to the Connecticut fee schedule, any unlisted codes for durable equipment are to be paid at the acquisition fee, plus sales tax, plus 30 percent. See March 24, 2021 Transcript, p. 12.

[22] We note that the issue of medical bill payment pursuant to § 31-294d was listed on the notices for the formal hearings scheduled for both March 24, 2021 and April 15, 2021.

parties presented their respective arguments relative to whether a representative from A Step should be called as a witness to authenticate the acknowledgment form signed by Winters. Ultimately, the trier accepted the acknowledgment form into the record, stating that "it would be detrimental to this Formal to sustain your objection and block the document from coming in and while respecting what the cost would be to do the verification." Id., 17. Winters was never presented.

Our review of the record indicates that claimant's counsel, in his opening statement at the formal hearing held on March 24, 2021, stated that A Step "has acknowledged, in writing, that they're agreeable to accept the Connecticut Fee Schedule for their prosthetic services, with the exception of the unlisted code, which ... you will see in the report." Id., 44. At the formal hearing held on April 15, 2021, Welsh confirmed that A Step had agreed to accept the Connecticut fee schedule for some items but would not accept the fee schedule for prosthetic repairs or new prosthetics. At the close of formal proceedings, claimant's counsel continued to argue that the issue was resolved because A Step had indicated it would accept the Connecticut fee schedule, while respondents' counsel asserted they would allow the claimant to continue to treat with A Step only under the condition that A Step agree to accept One Call's reduced rates.

In light of the foregoing, it would appear that although the administrative law judge designated A Step as the claimant's authorized prostheses provider, the issue of A Step's adherence to the Connecticut fee schedule and the extent of its cooperation with One Call was not fully resolved. Although it could be argued that the provisions of Administrative Regulations § 31-280-3 (b) (4) lead inexorably to the conclusion that A Step will be required to abide by the Connecticut fee schedule, we are unwilling to

draw such an inference on the basis of the record as it currently exists.[23] As such, we are compelled to remand this issue for an articulation, if the parties have not since settled the dispute by agreement.[24]

However, we would point out that when a disagreement arises between an insurer and a medical provider, the appropriate course of action is to bring the disagreement to the attention of an administrative law judge for the commission. We can envision no set of circumstances under which a claimant's ongoing reasonable or necessary medical treatment should be interrupted or adversely affected because of a medical fee dispute. Accordingly, we would anticipate that any such treatment will continue to be authorized in the present matter while the parties attempt to resolve their dispute relative to the extent to which A Step will be obligated to adhere to the Connecticut fee schedule and/or coordinate with One Call.

Finally, we turn to the respondents' claim of error arising from the decision of the administrative law judge to impose a penalty against the respondents, pursuant to § 31-300, for undue delay in the adjustment of the claim. The trier ordered the respondents to pay attorney's fees to the claimant in the amount of $16,862.50 predicated on an affidavit which was attached to the claimant's post-formal brief. The respondents contend the claimant failed to provide any evidence which would support a claim for penalties or attorney's fees. The respondents also argue that the trier's reliance on the affidavit in determining the amount of the penalty constituted a due process violation because the affidavit was not properly submitted into the evidentiary record and the

[23] See footnote ten, supra.
[24] We leave it to the discretion of the administrative law judge to determine whether additional evidentiary proceedings on this issue are warranted.

respondents were not given the opportunity to cross-examine the affiant as to the affidavit's contents.

As previously referenced herein, § 31-300 allows for the imposition of a penalty in the form of a reasonable attorney's fee "[i]n cases where, through the fault or neglect of the employer or insurer, adjustments of compensation have been unduly delayed ...." In the matter at bar, the respondents challenge the administrative law judge's findings that the respondents unduly delayed the adjustment of the claim by failing to authorize, in a timely fashion, the claimant's prostheses, prosthetics repairs, or other necessary supplies. The respondents assert that the evidentiary record did not provide an adequate basis for these findings, because the claimant, in addition to his primary and back-up prostheses, has been provided with several prosthetic devices along with prosthetic supplies from A Step, despite A Step's refusal to work with One Call. The respondents also assert that they "are only responsible for authorizing reasonable and necessary medical care. The claimant is not entitled to the top of the line 'Cadillac' brand of treatment/medical supplies, only what is deemed reasonable and medically necessary." Appellants' Brief, p. 13.

Having reviewed the evidentiary submissions in their totality, we find, contrary to the representations of the respondents, that the record in the present matter provides a sufficient basis for the trier's conclusion that the respondents unduly delayed the adjustment of this claim. At trial, the claimant testified that he had received no prosthetic care for a year and he had not been able to wear any of his prostheses for the preceding two months because they didn't fit correctly. The claimant explained that because the rubber liner in his prosthesis was too loose, it had irritated his residual limb, forcing the

claimant to ambulate with crutches. When the claimant was asked during cross-examination whether he had contacted the respondents for authorization to return to A Step for a fitting, the claimant replied:

> Yeah. What do you think I've been doing? Excuse me, but do you think I like being on crutches, brother? No. I've gone to Doctor Bunick, who's a dermatologist. For the past three, four months, there was infection after infection after infection, with due respect, because you guys are stalling and won't get your butt in gear and let me go and get my prosthesis fixed –

March 24, 2021 Transcript, p. 70.

In addition, when queried during cross-examination as to why he had not contacted the respondents for authorization prior to shipping the broken prostheses to A Step via UPS, the claimant explained:

> When something's broken, you fix it.... You don't wait, you don't make calls. I can still be waiting at the UPS place for you guys to answer me yet. There's times when there's weeks, months go by and nobody gives me an answer. I needed these back to get back into physical therapy, to get back to my kids, to get back to my family ....

Id., 75.

We further note, and the trier so found, that the claimant had been without his primary and back-up prostheses for "over a year.... [and] the Claimant could be without his prostheses for upwards of 18 months by the time the decision is issued." Findings, ¶ 37.

Moreover, the administrative law judge specifically cited eleven medical evaluation notes from Leslie's chart referencing delays in the claimant's treatment. See Findings, ¶ 26; Claimant's Exhibit E. In addition, during his deposition, Leslie alluded at several points to the delays in treatment experienced by the claimant. He commented that

on the occasions when the claimant reported that his pain levels had increased, it was "typically due to [a] mechanical cause: not having liners for four months or being back on crutches. That's going to set someone back a year sometimes." Claimant's Exhibit I, p. 26. Leslie also testified that "each time [the claimant] has had an interruption in prosthetic wear, we're back to stage 1, and that was just last summer." Id., 27-28.

The record also reflects that although Leslie believed the claimant had a sedentary work capacity in May 2017, he opined that the claimant was once again temporarily totally disabled several months later. In explaining his change in opinion regarding the claimant's work capacity, Leslie stated that the time period "overlapped the time point when his liners wore out and he was not provided new liners for almost a month-and-a-half, I believe even longer than that, to be perfectly honest." Id., 42. Leslie further testified that he had personally called the claimant's nurse manager regarding the prosthetic liners but never received a call back.[25] He also stated that in his experience, it was "actually pretty rare" for a prosthesis patient to encounter delays in obtaining necessary supplies. Id., 57.

In correspondence to the commission on February 18, 2017, Leslie stated:

> I have gotten to know Mr. Caye very well during the time that he has been my patient and I can attest to the fact that Mr. Caye does everything within his power to improve his situation. The setbacks that he has experienced have been due to Sedgwick not providing the medically necessary equipment that he has needed in order to

[25] Leslie offered the following testimony regarding the claimant's prosthetic liners:

A: The bottom line is that I have called his nurse manager and given her my personal cell phone number. She has never called me. Ever. With an open invitation to do so. Maybe that's not her responsibility.

Q: I can't speak to that. I don't know directly.

A: But certainly, I don't give my cell phone to everyone. I probably give it to too many people. However, you know, if someone is bleeding to death, you would hope that someone would pick up a phone –

Q: Sure.

A: -- not just send a letter. Same difference.

Claimant's Exhibit I, pp. 42-43.

> walk and participate in physical therapy. For example, he faced a nearly two month delay this past summer in getting the prosthetic liners that he needed to be able to don his prosthesis. It was not until I called his adjuster, Wendy Teran, personally that the liners were finally shipped to Mr. Caye. Unfortunately, he experienced significant muscle atrophy while using crutches to ambulate during that extended period of time. He then required an entirely new prosthetic socket as his was much too large. While he waited for the approval for his new socket, Mr. Caye walked with crutches while wearing his prosthesis to begin to build up the muscle mass that was lost and to take pressure off his back, knee and left calcaneus that were all injured in the original accident and further damaged in his subsequent falls. In mid-October, Mr. Caye fell as his poorly fitting prosthesis broke completely in half. He had no backup leg at the time and was unable to walk at all until a new prosthesis was finally authorized and fabricated at the beginning of November, 2016.

Id.

Finally, in his September 11, 2018 correspondence to claimant's then-counsel, Leslie stated:

> Over the course of years, Mr. Caye has suffered from a lack of adequate prosthetic follow-up and care. This was rectified to a certain degree by transition to a prosthetist who could provide on-site fabrication and real time gait evaluation. During the course of this relationship Mr. Caye made significant strides with pain control and ambulation but had numerous setbacks related to lack of prosthetic liners and lack of approval for multiple prostheses. As a result, it would not be uncommon for him to appear in my office either on crutches or not, in a prosthesis or not.

Id.

The reports of Jonathan Kost, the claimant's pain management specialist, also repeatedly reference the difficulties experienced by the claimant due to delays by the insurance company. On December 7, 2015, Kost, noting that the claimant was awaiting authorization for a new prosthetic, stated that "[u]nfortunately, these delays in care are significantly worsening his pain and future prospects of rehabilitation." Claimant's

Exhibit D. Kost also stated that "[i]t is difficut to comprehend why this patient's medically indicated and necessary revised prosthetic is being delayed; this should be priority authorized; patient advised to follow [up] with his legal counsel [and] set up a Commissioner's meeting if and as necessary." Id.

Kost's intake notes for September 1, 2016, and September 23, 2016, state that the claimant was in need of new prostheses. On October 30, 2018, Kost noted that the claimant and his wife "expressed frustration with difficulty obtaining necessary services and medical interventions." Id. On May 8, 2020, Kost reported that the claimant's primary and back-up prostheses had broken and "WC is reportedly refusing to repair his equipment and his attorney is currently working on this issue." Id. Kost further noted that the claimant had been forced to wear his "high activity" prosthesis more often, which had exacerbated the claimant's pelvis and back pain. On May 22, 2020, Kost reported that the claimant's broken prostheses had still not been repaired, and a hearing on the issue had been scheduled for June 5, 2020.

On June 12, 2020, Kost reported that the June 5, 2020, hearing had not resolved the issues with the broken prostheses and the claimant was preparing for trial. Kost noted that the claimant "[expressed] feeling broken and done with the problems caused by WC.... [Patient] states every month he has problems getting his medications and is currently being denied socks and liners to wear with his prosthesis." Id. Kost opined that the claimant's "chronic pain condition has resulted in a significant functionally debilitating painful state." Id. On June 15, 2020, Kost indicated the claimant had received his new prosthesis, but no liners or socks. On October 26, 2020, Kost again reported the claimant was in need of a new prosthesis. On February 9, 2021, Kost

reported the claimant needed a revision of his prosthesis due to weight lost because of residual limb irritation.

Finally, the reports of the claimant's treating psychiatrist, Marvin Zelman, during the time period between August 17, 2018, and January 26, 2021, document the claimant's ongoing issues with anxiety, depression and post-traumatic stress disorder. On November 19, 2019, Zelman noted that approvals for treatment were slow. On June 8, 2020, Zelman indicated the claimant was experiencing "[o]ngoing anxiety about unavailable prosthesis" and he was "[u]nable to get his medication because of insurance issues." Claimant's Exhibit G. On June 22, 2020, Zelman reported the claimant's "[b]roken prosthesis has increased pain and reduced mobility," id.; in both that report and his report of July 6, 2020, Zelman again stated that the claimant had been "[u]nable to get his medication because of insurance issues," and the claimant continued to be "[a]nxious about getting a new prosthesis." Id.

On August 20, 2020, September 22, 2020, and October 6, 2020, Zelman stated that the claimant was "[u]nable to bathe or shower because of insurance payment issues," and he was experiencing "[m]arked anxiety because of hygiene issues."[26] Id. On October 20, 2020, November 3, 2020, November 17, 2020, November 30, 2020, and December 15, 2020, Zelman reported the claimant was "[w]orried about losing his prosthetic provider." Id. On December 28, 2020, Zelman, in addition to noting that the claimant continued to worry about losing his prosthesis provider, reported the claimant "[s]till had not gotten his prosthesis." Id. On January 11, 2021, and January 26, 2021, Zelman again referenced the claimant's concerns regarding his prosthesis provider,

[26] If he is not utilizing a "water leg," the claimant requires a protective sleeve for his prosthetic when he bathes.

indicated the claimant still had not received his prosthesis, and reported a "[l]ate payment from Workers' Compensation." Id. In his February 2, 2021 correspondence to respondents' counsel, Zelman stated that the claimant "is barely able to function." Id.

It is well-settled that "[t]he decision to award attorney's fees is within the commissioner's discretion and dependent on the findings of fact." McFarland v. Dept. of Developmental Services, 115 Conn. App. 306, 323, *cert. denied*, 293 Conn. 919 (2009). As such, our scope of review is limited to whether the decision of the administrative law judge 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 it based on improper or irrelevant factors." In re Shaquanna M., 61 Conn. App. 592, 603 (2001). This board has previously observed:

> The issue of unreasonable contest occupies an unconventional status in comparison to core claims for disability benefits and medical treatment, in the sense that a trial commissioner cannot determine whether grounds for such a finding exist until after the respondents have finished presenting their defenses. Where it seems likely either prior to the commencement of formal hearings or during trial that there will be justification for such a finding, a claimant should vocalize a request for § 31-300 sanctions as soon as possible. However, advance notice that unreasonable contest will be an issue is not always practical.

Blaha v. Logistec Connecticut, Inc., 4544 CRB-3-02-6 (July 9, 2003).

As such, "[t]here will occasionally be situations in which the trier will first realize that sanctions are warranted following the conclusion of trial. In such cases, the trier may raise the issue *sua sponte* during the proceedings, or after the record has been closed and the decision is being considered (assuming that a claim for sanctions has not been explicitly waived ...)." (Emphasis in the original.) Id.

In the present matter, we note that the issue of sanctions pursuant to § 31-300 was listed on the notice for the formal hearings held on March 24, 2021, and April 15, 2021. Moreover, at the hearing held on March 24, 2021, claimant's counsel confirmed that sanctions were among the issues for determination, and respondents' counsel made no objection. We therefore find no basis for the inference that the respondents were in any way "blindsided" by the imposition of sanctions for undue delay, or that the administrative law judge lacked the requisite factual predicate in the record to impose the sanctions. Moreover, although we recognize that the reports issued by the claimant's treating physicians were heavily "derivative of the claimant's narrative," Do v. Danaher Tool Group, 5029 CRB-6-05-12 (November 28, 2006), the administrative law judge, having found credible the claimant's testimony at trial, retained the discretion to afford those reports the evidentiary weight she deemed appropriate. It is axiomatic that the trier is the "sole arbiter of the weight of the evidence and the credibility of witnesses." Keenan v. Union Camp Corp., 49 Conn. App. 280, 286 (1998).

However, this board has also previously stated that although an administrative law judge retains the discretion to award sanctions in situations involving unreasonable contest and undue delay, "parties remain entitled to due process in the form of an opportunity to argue against any penalties that are to be imposed." Blaha, supra. In the present matter, the respondents have challenged the trier's reliance on an affidavit for attorney's fees which was submitted into the record along with the claimant's post-trial brief.[27]

[27] Although the respondents sought to correct the September 2, 2021 findings of the administrative law judge relative to the finding of undue delay, they did not file a motion to open the finding or otherwise challenge the administrative law judge's reliance on the affidavit in either their (untimely) motion to correct or in a request for articulation. However, the record reflects that on May 10, 2021, the respondents, in their

In Cirrito v. Resource Group Ltd. of Conn., 4248 CRB-1-00-6 (June 19, 2001), this board reviewed an appeal in which, inter alia, the commissioner had denied the respondents' request during the trial to put claimant's counsel on the stand to testify regarding the contents of a contingency fee agreement and two fee agreements which had been submitted into evidence. Noting that in LaPia v. Stratford, 47 Conn. App. 391 (1997), our Appellate Court had "discussed the importance of adhering to procedural due process in adjudicative administrative hearings," id., 399-401, we found error relative to the trier's failure to permit "respondents' counsel some opportunity to question his adversary regarding the representations contained in his petition for attorney's fees." Cirrito, supra.

> Though an attorney's fee petition is more similar to an affidavit than it is to a letter, the fact is that the respondents" counsel was in no position to challenge the representation of the claimant's counsel as to time spent on this case without being able to ask him questions about his fee petition. This casts a shadow of doubt over whether the respondents were afforded a meaningful right to respond to this item of evidence, given their articulated desire to cross-examine the preparer of the document.

Id.

Similarly, in Regan v. Torrington, 4456 CRB-5-01-11 (October 25, 2002), *appeal withdrawn*, A.C. 23628 (2003), this board reviewed an appeal involving inter alia the contents of an attorney's fee affidavit entered into the record as an attachment to a brief in a matter in which the parties had agreed to forego formal proceedings and have the

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post-trial brief, objected to the claimant's attachment of the affidavit to his post-trial brief filed on the same date. In addition, on September 30, 2021, the respondents challenged the trier's reliance on the affidavit in their reasons for appeal and in their motion to stay judgment pending appeal. In light of these submissions, we believe the respondents' objection to the trier's reliance on the affidavit was sufficiently timely such that their right to an evidentiary hearing on the issue was not jeopardized. See Smith v. Snyder, 267 Conn. 456 (2004); William Raveis Real Estate, Inc. v. Zajaczkowski, 172 Conn. App. 405, 425-26, *cert. denied*, 326 Conn. 906 (2017).

claim heard "on the papers." This board remanded the case for a formal hearing to afford the respondents the opportunity to cross-examine claimant's counsel regarding the itemization of his fees.

The claimant subsequently filed a motion to reargue, citing a Supreme Court decision handed down in the interim which the claimant interpreted as nullifying the rationale for the remand order. We were not persuaded, and in our subsequent denial of the motion to reargue, noted that when the parties had entered into their agreement to forego formal proceedings, "the claimant had not yet submitted [his] itemization of attorney's fees, and there were numerous other issues pending that were of more immediate concern to the parties." Regan v. Torrington, 4456 CRB-5-01-11 [Ruling on Motion to Reargue] (December 6, 2002). As such, we stated that "[w]e stand by our decision that due process favors a remand in this matter, so that the respondents may have an opportunity to address the fee request of claimant's counsel at a formal hearing." Id.

Thus, in light of this board's prior analysis in Blaha, supra, Cirrito, supra, and Regan, supra, we hereby remand this matter for additional proceedings in order to afford the respondents the opportunity to investigate the validity of the affidavit relative to the amount of attorney's fees awarded by the administrative law judge.[28]

[28] Given that the administrative law judge in the present matter indicated that the record was closed following the submission of the post-trial briefs, we find this matter can be distinguished from Previti v. Monro Muffler Brake, Inc., 154 Conn. App. 679 (2015), in which the claimant submitted no documentation in support of his request for attorney's fees either at trial or prior to the close of the record. In reviewing an appeal of the commissioner's decision to decrease the initial award following a motion to correct, the Appellate Court concluded that "the board properly affirmed the commissioner's correction because both the commissioner and the plaintiff concede that the factual predicate to sustain the $1481 attorney's fees award could not be found in the record," id., 685, and the correction "[fell] within the bounds of [the commissioner's] inherent authority." Id., 686.

The September 2, 2021 Finding and Order of Toni M. Fatone, Administrative Law Judge acting for the First District, is accordingly affirmed in part and remanded in part for an articulation and additional proceedings consistent with this Opinion.

Administrative Law Judges Peter C. Mlynarczyk and David W. Schoolcraft concur.