CASE NO. 6458 CRB-6-21-12 CLAIM NO. 601093615	:	COMPENSATION REVIEW BOARD
LIZZETTE TORRES CLAIMANT-APPELLANT	:	WORKERS' COMPENSATION COMMISSION
v.	:	MAY 31, 2022

CITY OF HARTFORD
EMPLOYER
SELF-INSURED

and

PMA MANAGEMENT CORPORATION
OF NEW ENGLAND
THIRD-PARTY ADMINISTRATOR
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Kevin C. Ferry, Esq., and Monique S. Foley, Esq., Law Office of Kevin C. Ferry, LLC, 77 Lexington Street, New Britain, CT 06052.

The respondents were represented by Jennifer Hock, Esq., and James L. Pomeranz, Esq., Pomeranz, Drayton & Stabnick, LLC, 95 Glastonbury Boulevard, Suite 216, Glastonbury, CT 06033.

This Petition for Review from the November 15, 2021 Finding Re: C.G.S. § 31-293 by Daniel E. Dilzer, the Administrative Law Judge acting for the Sixth District, was heard April 22, 2022 before a Compensation Review Board panel consisting of Chief Administrative Law Judge Stephen M. Morelli and Administrative Law Judges Carolyn M. Colangelo and Peter C. Mlynarczyk.[1]

[1] Effective October 1, 2021, the Connecticut Legislature directed that the phrase "Administrative Law Judge" be substituted when referencing a workers' compensation commissioner. See Public Acts 2021, No. 18, § 1.

OPINION

STEPHEN M. MORELLI, CHIEF ADMINISTRATIVE LAW JUDGE. The claimant has appealed from the November 15, 2021 Finding Re: C.G.S. § 31-293 (finding) of Daniel E. Dilzer, Administrative Law Judge acting for the Sixth District, which found, pursuant to General Statutes § 31-293 (a)[2], a third-party settlement that the

[2] General Statutes § 31-293 reads as follows: "(a) When any injury for which compensation is payable under the provisions of this chapter has been sustained under circumstances creating in a person other than an employer who has complied with the requirements of subsection (b) of section 31-284, a legal liability to pay damages for the injury, the injured employee may claim compensation under the provisions of this chapter, but the payment or award of compensation shall not affect the claim or right of action of the injured employee against such person, but the injured employee may proceed at law against such person to recover damages for the injury; and any employer or the custodian of the Second Injury Fund, having paid, or having become obligated to pay, compensation under the provisions of this chapter may bring an action against such person to recover any amount that he has paid or has become obligated to pay as compensation to the injured employee. If the employee, the employer or the custodian of the Second Injury Fund brings an action against such person, he shall immediately notify the others, in writing, by personal presentation or by registered or certified mail, of the action and of the name of the court to which the writ is returnable, and the others may join as parties plaintiff in the action within thirty days after such notification, and, if the others fail to join as parties plaintiff, their right of action against such person shall abate unless the employer, insurance carrier or Second Injury Fund gives written notice of a lien in accordance with this subsection. In any case in which an employee brings an action against a party other than an employer who failed to comply with the requirements of subsection (b) of section 31-284, in accordance with the provisions of this section, and the employer is a party defendant in the action, the employer may join as a party plaintiff in the action. The bringing of any action against an employer shall not constitute notice to the employer within the meaning of this section. If the employer and the employee join as parties plaintiff in the action and any damages are recovered, the damages shall be so apportioned that the claim of the employer, as defined in this section, shall take precedence over that of the injured employee in the proceeds of the recovery, after the deduction of reasonable and necessary expenditures, including attorneys' fees, incurred by the employee in effecting the recovery. If the action has been brought by the employee, the claim of the employer shall be reduced by one-third of the amount of the benefits to be reimbursed to the employer, unless otherwise agreed upon by the parties, which reduction shall inure solely to the benefit of the employee, except that such reduction shall not apply if the reimbursement is to the state of Connecticut or a political subdivision of the state including a local public agency, as the employer, or the custodian of the Second Injury Fund. The rendition of a judgment in favor of the employee or the employer against the party shall not terminate the employer's obligation to make further compensation which the commissioner thereafter deems payable to the injured employee. If the damages, after deducting the employee's expenses as provided in this subsection, are more than sufficient to reimburse the employer, damages shall be assessed in his favor in a sum sufficient to reimburse him for his claim, and the excess shall be assessed in favor of the injured employee. No compromise with the person by either the employer or the employee shall be binding upon or affect the rights of the other, unless assented to by him. For the purposes of this section, the claim of the employer shall consist of (1) the amount of any compensation which he has paid on account of the injury which is the subject of the suit, and (2) an amount equal to the present worth of any probable future payments which he has by award become obligated to pay on account of the injury. The word "compensation", as used in this section, shall be construed to include incapacity payments to an injured employee, payments to the dependents of a deceased employee, sums paid out for surgical, medical and hospital services to an injured employee, the burial fee provided by subdivision (1) of subsection (a) of section 31-306, payments made under the provisions of sections 31-312 and 31-313, and payments made

claimant received from a tortfeasor was not subject to a statutory one-third reduction of the respondents' lien for Chapter 568 benefits. The administrative law judge concluded that, as the claimant was employed by a political subdivision of the State of Connecticut, the lien reduction provision in the statute did not apply to her settlement. The claimant appealed and argued that this decision was an abuse of the administrative law judge's discretion. After review, we disagree. We find the administrative law judge had no discretion under these circumstances as the statute unambiguously bars the relief sought by the claimant. Therefore, we affirm the finding.

Judge Dilzer found the following facts in the finding.[3] The claimant sustained compensable injuries as the result of a July 11, 2020 motor vehicle accident. A third-party had liability for this incident and the tortfeasor had an automobile liability insurance policy with $25,000 of coverage. The claimant's own insurance policy had $25,000 in uninsured/underinsured liability coverage. As of the date of the formal hearing, the respondent paid to, or on behalf of the claimant a total of $17,215.95. See

---

under the provisions of section 31-284b in the case of an action brought under this section by the employer or an action brought under this section by the employee in which the employee has alleged and been awarded such payments as damages. Each employee who brings an action against a party in accordance with the provisions of this subsection shall include in his complaint (A) the amount of any compensation paid by the employer or the Second Injury Fund on account of the injury which is the subject of the suit, and (B) the amount equal to the present worth of any probable future payments which the employer or the Second Injury Fund has, by award, become obligated to pay on account of the injury. Notwithstanding the provisions of this subsection, when any injury for which compensation is payable under the provisions of this chapter has been sustained under circumstances creating in a person other than an employer who has complied with the requirements of subsection (b) of section 31-284, a legal liability to pay damages for the injury and the injured employee has received compensation for the injury from such employer, its workers' compensation insurance carrier or the Second Injury Fund pursuant to the provisions of this chapter, the employer, insurance carrier or Second Injury Fund shall have a lien upon any judgment received by the employee against the party or any settlement received by the employee from the party, provided the employer, insurance carrier or Second Injury Fund shall give written notice of the lien to the party prior to such judgment or settlement."

[3] We note the claimant did not file a motion to correct in this matter. Therefore, we may give these facts conclusive effect and our inquiry is limited to whether the administrative law judge properly applied the law. See Stevens v. Raymark Industries, Inc., 5215 CRB-4-07-4 (March 26, 2008), *appeal dismissed*, A.C. 29795 (June 26, 2008).

Joint Exhibit 1. This sum represented $9134.10 for medical benefits and $8081.85 for indemnity benefits. See Respondents' Exhibit 4. The claimant argued that this sum was inflated as the medical care she received should be valued at a group health insurance fee schedule, not the workers' compensation fee schedule.[4] The claimant settled her claim against the third-party tortfeasor for the policy limit of $25,000 without commencing suit. See Joint Exhibit 1. The claimant's uninsured/underinsured policy limits provided in her own policy did not exceed the tortfeasor's policy limits and, therefore, she was unable to seek additional compensation from her own insurance policy.

The administrative law judge found the respondents sought repayment of their entire lien of $17,215.95 from the settlement proceeds of the claimant's claim against the alleged tortfeasor. The claimant received a gross settlement of $25,000 and an attorney's fee of $8333.33 and costs of $75 were deducted from that gross settlement amount. There were also two medical liens of $502 and $295. See Claimant's Exhibit C. The claimant argued that, after the reduction of attorney's fees, costs and allowable expenses, and repayment of the workers' compensation lien from the gross amount of $25,000, she would have a negative net recovery of -$1421.28 from her third-party action. As a result, her counsel sought to have the respondents reduce their lien to $10,000, which they declined. The administrative law judge noted that the claimant was continuing to work at her job and that her workers' compensation claim remained open, which continued to entitle her to ongoing indemnity, medical and permanent partial disability benefits.

[4] The claimant did not seek a correction on this issue via a motion to correct nor did she address this issue in her brief, therefore, we may deem this abandoned on appeal. See Christy v. Ken's Beverage, Incorporated, 5157 CRB-8-06-11 (December 7, 2007). In any event, we perceive possible undesirable consequences if respondents could benefit from encouraging claimants to seek treatment through group health insurance instead of utilizing the medical treatment protocols under General Statutes § 31-294 (d) and (e).

Based on these findings, the administrative law judge determined "the Claimant is not entitled to a one-third reduction of the Respondent's lien because she did not commence suit for the recovery and because, even if she did commence suit, the one-third reduction does not apply because the Respondent is a political subdivision of the State of Connecticut pursuant to C.G.S. §31-293." Conclusion, ¶ B. He ordered the claimant to reimburse the respondents the sum of $16,591.67 based on her gross settlement amount minus attorney's fees and costs. The administrative law judge also made any medical liens or bills the responsibility of the respondents. The respondents filed a motion to correct, which sought two corrections, only one of which was granted, which required the claimant to submit their medical bills on HCFA compliant forms. The claimant appealed to this tribunal and argued the result herein was absurd and an abuse of discretion. After consideration we are not persuaded that we can provide relief to the claimant on this issue.

It is black-letter law that "[b]ecause of the statutory nature of our workers' compensation system, policy determinations as to what injuries are compensable and what jurisdictional limitations apply thereto are for the legislature, not the judiciary or the board, to make." Stickney v. Sunlight Construction, Inc., 248 Conn. 754, 761 (1999), *quoting* Discuillo v. Stone & Webster, 242 Conn. 570, 577 (1997). The ability of respondents to place liens against third-party recoveries, and the manner in which these liens are administered, are a statutory creation of the General Assembly. Our role as an administrative tribunal is to carry out the direction the legislature has set forth in creating these provisions.

In the present case, we note that the claimant is employed by a political subdivision of the State of Connecticut. Had she been employed by any type of insured or self-insured private employer, we would find the precedent in Callaghan v. Car Parts International, LLC, 329 Conn. 564 (2018), governs this case and that the claimant was entitled to retain one-third of any third-party recovery notwithstanding the respondents' Chapter 568 lien.[5] However, it is uncontroverted that the claimant was employed by the City of Hartford when she was injured and, therefore, the General Assembly has deemed her injury to be outside the scope of the lien exemption under the statute.[6]

The claimant argues that a literal reading of this statute produces "absurd legal conclusions" and "[t]he intent of this recovery statute could not have been to deprive an Appellant of the fair, just and reasonable compensation for damages not recognized by the workers' compensation statutory scheme." Claimant's Brief, pp. 7, 12.[7] We note a similar argument as to the unjust and absurd result of application of our statutes was raised by the claimant in Muniz v. Allied Community Resources, Inc.,

[5] The administrative law judge in the finding concluded that the claimant needed to actually commence a lawsuit in order to obtain the one-third setoff for a third-party award available under § 31-293 (a). See Conclusion, ¶ B. We do not agree with this position as this appears to be a matter of elevating form over substance; nor did the administrative law judge or the respondents cite any precedent for this conclusion. It is apparent under the facts of this case the tortfeasor paid the sum of settlement proceeds to the claimant to resolve anticipated litigation, and requiring the claimant to advance the cost of commencing suit rather than accepting a settlement would appear adverse to the remedial purpose of our statutes. However, as the express terms of this statute preclude the relief sought by the claimant this element of the finding constitutes harmless error.

[6] In her reasons of appeal, the claimant argued that the real party of interest herein was not the City of Hartford, but their third-party administrator, PMA, and therefore the statutory carveout under General Statutes § 31-293 (a) for political subdivisions was inapplicable. We are not persuaded as we have frequently noted our statutes "have presumed an identity of interest exists between the insured employer and the insurance carrier" and it is clear PMA acted solely as the city's agent. Verrinder v. Matthew's Tru Colors Painting & Restoration, 4936 CRB-4-05-4 (December 6, 2006).

[7] We note the claimant has also argued that she was denied constitutional due process and equal protection protections as a result of the application of General Statutes § 31-293 (a) in this case. See Claimant's Brief, p. 12. As an administrative tribunal, we cannot consider the merits of a constitutional argument which would need to be addressed by the Appellate or Supreme Court. See Giaimo v. New Haven, 4034 CRB-3-99-4 (May 22, 2000), *rev'd*, 257 Conn. 481 (2001).

5025 CRB-5-05-11 (November 1, 2006), *aff'd*, 108 Conn. App. 581 (2008), *cert. denied*, 289 Conn. 927 (2008). In Muniz, the claimant was a home health aide paid via a state program who was contracted for less than the minimum number of weekly hours under General Statutes § 31-275 (9) (B) (iv), in order for a domestic employee to qualify for compensation coverage. The claimant argued that to deny her workers' compensation benefits for her injury led to an absurd result. We concluded, notwithstanding the equitable merits of her argument, that we were unable to offer the claimant relief, as "[w]hen construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . ." Cogan v. Chase Manhattan Auto Finance Corp., 276 Conn. 1, 7 (2005), *quoting* Parrot v. Guardian Life Ins. Co. of America, 273 Conn. 12, 18 (2005) and "[g]iven the jurisdictional limitation of our statute, we must conclude that leaving such employees outside the workers' compensation system was in fact the intent of the General Assembly."[8] Muniz, supra.

The statute herein is unambiguous. The statutory one-third exemption to a claimant from a lien for advanced Chapter 568 benefits does not apply if "the reimbursement is to the state of Connecticut or a political subdivision of the state including a local public agency, as the employer." General Statutes § 31-293 (a). As we held in Thorn v. UTZ Quality Foods, Inc., 6253 CRB-5-18-3 (July 18, 2019), *appeal withdrawn*, A.C. 43264 (November 30, 2020), we cannot find authority for "the notion that this board is empowered to reopen a commissioner's findings based on our own

[8] In her brief, the claimant argues that this outcome would create a "chilling effect" against injured claimants commencing litigation against tortfeasors. Claimant's Brief, p. 11. Whatever the merits of this argument, it is a policy argument which as cases such as Muniz v. Allied Community Resources, Inc., 5025 CRB-5-05-11 (November 1, 2006), *aff'd*, 108 Conn. App. 581 (2008), *cert. denied*, 289 Conn. 927 (2008), point out, are issues reserved for the General Assembly to address.

sense of what constitutes an equitable result."[9] While an administrative agency such as ours may decide to apply its own policy assessment in a matter where a lacuna or ambiguity exists in the statute, this is an instance where the General Assembly has made an unequivocal policy determination to treat two forms of employers in a different fashion. See Gill v. Brescome Barton, Inc., 5659 CRB-8-11-6 (June 1, 2012), *aff'd*, 142 Conn. App. 279 (2013), *aff'd*, 317 Conn. 33 (2015).

We do not believe that the administrative law judge in this matter had any discretion to exempt the claimant's third-party settlement from the respondents' statutory lien. There is no error; the November 15, 2021 Finding Re: C.G.S. § 31-293 of Daniel E. Dilzer, Administrative Law Judge acting for the Sixth District, is accordingly affirmed.

Administrative Law Judges Carolyn M. Colangelo and Peter C. Mlynarczyk concur in this opinion.

[9] The claimant argues that precedent exists where an administrative law judge's discretion under General Statutes § 31-278 can prevail over the specific terms of General Statutes § 31-293. She cites Rudy's Limousine Service v. Aspinwall, 44 Conn. L. Rptr. 122 (2007), for this proposition. We do not find this case relevant to our inquiries as it concerns a conversion action in Superior Court brought by the respondent-employer against the injured claimant to recover against a third-party settlement. As a result, it does not address the manner in which we conduct our proceedings, nor does it support the claimant's position in this case against enforcing a lien for advanced workers' compensation benefits. Finally, as this precedent is from a trial court and not the Appellate or Superior Court, it is not binding upon this tribunal.