CASE NO. 6471 CRB-6-22-4 : COMPENSATION REVIEW BOARD
CLAIM NO. 100179085

ELIZABETH HADDEN : WORKERS' COMPENSATION
CLAIMANT-APPELLEE COMMISSION

v. : APRIL 5, 2023

CAPITOL REGION EDUCATION COUNCIL
EMPLOYER
SELF-INSURED

and

WORKERS' COMPENSATION TRUST
THIRD-PARTY ADMINISTRATOR
RESPONDENTS-APPELLANTS

and

ENSTAR/PROSIGHT SPECIALTY INSURANCE GROUP
EXCESS INSURANCE CARRIER
RESPONDENT-APPELLEE

APPEARANCES:

The claimant was represented by Richard T. Stabnick, Esq., Strunk, Dodge, Aiken, Zovas, 200 Corporate Place, Suite 100, Rocky Hill, CT 06067.

Respondents Capitol Region Education Council and Workers' Compensation Trust were represented by Phyllis M. Pari, Esq., Letizia, Ambrose & Falls, P.C., 667-669 State Street, 2nd Floor, New Haven, CT 06511.

Respondent Enstar/ProSight Specialty Insurance Group was represented by Clayton J. Quinn, Esq., The Quinn Law Firm, L.L.C., 204 South Broad Street, Milford, CT 06460.

This Petition for Review from the March 30, 2022 Finding and Dismissal and April 8, 2022 Corrected Finding & Dismissal of Daniel E. Dilzer, Administrative Law Judge acting for the First District, was heard on September 30,

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]

OPINION

STEPHEN M. MORELLI, CHIEF ADMINISTRATIVE LAW JUDGE.

Respondent Capitol Region Education Council (CREC) has petitioned for review from the March 30, 2022 Finding and Dismissal and the April 8, 2022 Corrected Finding & Dismissal of Daniel E. Dilzer, Administrative Law Judge acting for the First District. We find no error and accordingly affirm the decisions.[2]

The administrative law judge identified the following issues for determination: (1) whether the claimant's October 8, 2010 compensable injury was a substantial contributing factor to her need for Aubagio medication; and (2) if the compensable injury was a substantial contributing factor to the claimant's need for Aubagio, whether the excess insurance carrier, Enstar/ProSight Specialty Insurance Group (ProSight), is obligated to reimburse CREC's group health administrator for the costs associated with the medication.[3]

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[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.

[2] We note that two motions for extension of time were granted during the pendency of this appeal.

[3] General Statutes § 31-284b (a) states: "In order to maintain, as nearly as possible, the income of employees who suffer employment-related injuries, any employer who provides accident and health insurance or life insurance coverage for any employee or makes payments or contributions at the regular hourly or weekly rate for full-time employees to an employee welfare plan, shall provide to the employee equivalent insurance coverage or welfare plan payments or contributions while the employee is eligible to receive or is receiving compensation pursuant to this chapter, or while the employee is receiving wages under a provision for sick leave payments for time lost due to an employment-related injury. As used in this section, 'income' means all forms of remuneration to an individual from his employment, including wages, accident and health insurance coverage, life insurance coverage and employee welfare plan contributions and 'employee welfare plan' means any plan established or maintained for employees or their families or dependents, or for both, for medical, surgical or hospital care benefits."

The administrative law judge made the following factual findings which are pertinent to our review. The claimant sustained a compensable traumatic brain injury (TBI) along with other compensable physical injuries on October 8, 2010, when she was assaulted in the course and scope of her employment with CREC. She was rendered temporarily totally disabled as a result of the work-related incident. At the time the claimant sustained her injuries, she was under the care of Peter B. Wade, a neurologist who specialized in the treatment of patients with multiple sclerosis (MS). The claimant's symptoms following the injury included dizziness, nausea, vomiting and headaches.

At a deposition, Wade testified that the only treatment currently available for a TBI is to address the symptoms, and explained that MS, which is an autoimmune disease, results when a patient's immune system attacks the myelin insulating the "wiring" in the spinal cord. When an attack, or exacerbation, occurs, it can cause damage to the area of the central nervous system beneath the myelin where the attack took place. The cause of MS exacerbations is unknown.

When the claimant began treating with Wade on August 5, 2009, for her previously-diagnosed MS, she was experiencing spasticity and rigidity; she was also taking Ambien and Klonopin for sedation along with Copaxone to decrease the chances of an exacerbation. She was subsequently switched from Copaxone to Tysabri to reduce the frequency of exacerbations. In March, 2010, the claimant experienced another exacerbation and returned to Wade, who prescribed a course of Achthar in addition to the Tysabri to shorten the duration of the exacerbation.

Wade testified that because every MS patient has a different clinical course, there is no "natural progression of the disease." Findings, ¶ 9, *quoting* Respondents' Exhibit 2,

pp. 12-13. He stated that the claimant's clinical course was "unique" because she experienced "incredibly disabling periods of spasticity" requiring hospitalization so she could be placed in a medical coma to reset her nervous system. Id., *quoting* Respondents' Exhibit 2, p. 22. Wade testified that he had placed the claimant in a coma on three separate occasions.

In 2013, Wade discontinued the Tysabri medication because the claimant had tested positive for exposure to the James Cunningham virus (JC virus) which could potentially lead to a life-threatening brain infection. The claimant transitioned from Tysabri to Aubagio because of the risks entailed in continuing the Tysabri. Like Tysabri, Aubagio is used for relapsing forms of MS to decrease the frequency of exacerbations. Aubagio is not used for the treatment of TBIs.

Wade testified that there is nothing in the medical literature documenting that a traumatic event can either provoke the onset of MS or exacerbate preexisting MS, although trauma "could further complicate the already established deficits from MS ...." Findings, ¶ 12, *quoting* Respondents' Exhibit 2, p. 16. Moreover, the clinical course of MS and the findings on an MRI are not necessarily correlated because "patients can have a clinically declining picture with an MRI scan which looks unchanged." Findings, ¶ 13, *quoting* Respondents' Exhibit 2, p. 26.

Wade indicated that prior to the work-related injury of October 8, 2010, the claimant was able to function independently without significant limitations. However, following the injury, the claimant never recovered to the point where she had been before sustaining the injury. As such, Wade opined that the claimant had experienced "a permanent decline in her level of function in association with that injury."

Findings, § 14, *quoting* Respondents' Exhibit 2, p. 28. Wade further testified that had the claimant not sustained the TBI, she would not "be in the state she's in today." Id., *quoting* Respondents' Exhibit 2, p. 30. In a report dated June 14, 2019, Wade stated that the claimant's "work-related injury on October 8th, 2010 and subsequent significant disabilities [were] a substantial factor in [his] clinical decision to prescribe ... Aubagio as part of her ongoing medical treatment." Respondents' Exhibit 1.

Stephen R. Conway, a neurologist, performed a respondents' medical examination (RME) of the claimant on October 22, 2020. Conway, who has been a practicing neurologist for thirty-four years, testified at formal proceedings that he began diagnosing and treating MS patients during his residency and he currently has "a large MS practice." July 15, 2021 Transcript, p. 70. Conway indicated that although he could not confirm the diagnosis of MS, the claimant had been diagnosed with relapsing and remitting MS and was taking medications for this condition prior to sustaining her work-related injury.

Conway also noted that the claimant had initially been prescribed Copaxone and was subsequently switched to Tysabri, testifying that although both medications are used for relapsing and remitting MS, Tysabri is "among the most potent medications that are used for the treatment of multiple sclerosis, and carries the greatest risk." Id., 55. He explained that both Copaxone and Tysabri are "immunomodulatory" medications, which are designed to prevent MS attacks and the resulting additional disability. However, the medications do not improve any deficits which may have already accrued from prior attacks. Aubagio, which Conway described as being in the "middle-to-lower" tier of efficacy, reached the market in 2012. Id., 98. Conway testified that Tysabri is generally reserved for the most aggressive forms of MS.

Conway opined that the claimant was already "on a downward trajectory with respect to her disease" before the October 8, 2010 injury, as evidenced by Wade's June 16, 2010 evaluation in which he indicated he was switching the claimant to Tysabri. Id., 57. Conway noted that "the claimant had a progressive neurological disorder which prompted aggressive treatment ... including intrathecal Baclofen and intravenous Tysabri ...."[4] Id., 58. Conway testified that because Wade's utilization of these two medications suggests that the claimant's MS was active prior to the date of injury, the immunomodulatory treatment prescribed after the date of injury could not be attributed to the TBI sustained at that time.

Conway further opined that the claimant's transition to Aubagio, which is also an immunomodulatory medication, was therefore not causally related to the work-related injury because the claimant would have needed the medication regardless of whether she sustained her injury. Given that MS is a lifelong autoimmune disease that warrants continuing treatment, and Aubagio is not used for any purpose other than preventing MS exacerbations, "an intervening work injury would make no difference, in terms of her requirement, for a medication like that." Id., 86.

CREC's group health plan administrator, Anthem Blue Cross and Blue Shield (Anthem), paid for the claimant's Aubagio prescriptions from April 29, 2013, through December 11, 2020. CREC continued to pay for the medication through the date of the formal hearing held on July 15, 2021. CREC is seeking full reimbursement from ProSight for all of the Aubagio prescriptions paid by the employer's health plan

[4] Conway explained that "Baclofen is used to treat spasticity, which is stiffness of muscles, typically due to involvement of certain areas of the nervous system." July 15, 2021 Transcript, p. 55.

administrator since April 29, 2013, as well as all future Aubagio prescriptions provided through the employer's group health plan administrator.

On the basis of the foregoing, the administrative law judge found persuasive Conway's opinion reflecting that Aubagio is prescribed solely for the treatment of MS and the claimant's work-related injury did not contribute to the progression of or worsen her MS. The trier stated that "[t]o the extent ProSight Specialty Insurance is required to directly provide medical treatment to the claimant due to her underlying workers' compensation claim, I find the need for Aubagio medication is unrelated to her workers' compensation claim." Conclusion, ¶ C. The trier also found persuasive Conway's opinion "that the medication is prescribed only for the treatment of multiple sclerosis, that the claimant's work-related injury played no part in the progression of her multiple sclerosis and that the claimant's work-related injury did not worsen her multiple sclerosis." Conclusion, ¶ D.

In addition, the trier concluded that he lacked the subject matter jurisdiction to address CREC's request for an order directing ProSight to reimburse CREC for the Aubagio prescriptions paid by their third-party health insurer.[5] The trier, in reliance upon our Supreme Court's analysis in Stickney v. Sunlight Construction, Inc., 248 Conn. 754 (1999), determined that the issue "sounds in contract law, and requires examination of applicable policies in order to adjudicate this claim." Conclusion, ¶ B.

The administrative law judge granted a motion to correct filed by the claimant and denied a motion to correct as well as an amended motion to correct filed by ProSight. On April 8, 2022, the trier issued a Corrected Finding & Dismissal (corrected finding) in

[5] Subject matter jurisdiction is defined as "[j]urisdiction over the nature of the case and the type of relief sought." Black's Law Dictionary (Pocket Ed. 1996).

which he deleted Conclusion, ¶ D, of the March 30, 2022 Finding and Dismissal (finding) and substituted the following: "I find Dr. Conway's opinion, that the claimant's October 8, 2010 compensable injury is not a substantial factor in her need for Aubagio medication, to be credible and persuasive." April 8, 2022 Corrected Finding & Dismissal, Conclusion, ¶ D.

A motion to correct was subsequently filed by CREC, which was denied in its entirety, and this appeal followed. In a wide-ranging appeal, CREC contends:

(1) the administrative law judge erroneously concluded that the claimant's need for the Aubagio medication is unrelated to her work-related injury;

(2) the administrative law judge erroneously concluded that the Workers' Compensation Commission (commission) lacked the jurisdiction to intervene in the dispute regarding CREC's right of reimbursement against ProSight for the Aubagio prescription payments made by its group health insurance administrator;

(3) the conclusions drawn by the administrative law judge "resulted from an incorrect application of the law to the subordinate facts of the case and/or from inferences illegally or unreasonable drawn from the subordinate facts," Appellant's Brief, p. 2;

(4) the administrative law judge erred in granting the motion to correct filed by the claimant;[6] and

(5) the administrative law judge failed to include in his findings certain admitted and undisputed facts and therefore erred in denying CREC's motion to correct.

We begin our analysis of this matter with a recitation of the well-settled standard of appellate review.

[6] CREC also claimed as error the granting of ProSight's amended motion to correct. Neither of ProSight's motions to correct were granted.

> [T]he role of this board on appeal is not to substitute its own findings for those of the trier of fact. Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 451 (2001). The trial commissioner's role as factfinder encompasses the authority to determine the credibility of the evidence, including the testimony of witnesses and the documents introduced into the record as exhibits. Burse v. American International Airways, Inc., 262 Conn. 31, 37 (2002); Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999). If there is evidence in the record to support the factual findings of the trial commissioner, the findings will be upheld on appeal. Duddy v. Filene's (May Department Stores Co.), 4484 CRB-7-02-1 (October 23, 2002); Phaiah v. Danielson Curtain (C.C. Industries), 4409 CRB-2-01-6 (June 7, 2002). This board may disturb only those findings that are found without evidence, and may also intervene where material facts that are admitted and undisputed have been omitted from the findings. Burse, supra; Duddy, supra. We will also overturn a trier's legal conclusions when they result from an incorrect application of the law to the subordinate facts, or where they are the product of an inference illegally or unreasonably drawn from the facts. Burse, supra; Pallotto v. Blakeslee Prestress, Inc., 3651 CRB-3-97-7 (July 17, 1998).

McMahon v. Emsar, Inc., 5049 CRB-4-06-1 (January 16, 2007).

We turn first to CREC's contention that the administrative law judge erroneously concluded that the claimant's compensable injury of October 8, 2010, did not constitute a substantial contributing factor to her need for the Aubagio medication.[7] CREC contends that this decision is inconsistent with conclusions drawn by the commissioner in the 2013 decision, pointing out that in that decision, the commissioner determined "that the work injury made the claimant's preexisting MS materially and substantially worse than it was." Appellant's Brief, p. 18. As such, CREC asserts that "[p]ursuant to doctrines of

[7] It may be reasonably inferred that the corollary to this conclusion would be that Aubagio also did not constitute reasonable or necessary medical treatment as contemplated by General Statutes § 31-294d (a) (1), which 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."

res judicata, collateral estoppel and law of the case, the findings of [the commissioner] regarding causation, as upheld by the CRB and the Connecticut Appellate Court, were binding on the parties, and therefore, the judge was powerless to change those conclusions." Appellant's Brief, p. 18. We find this claim of error unavailing, given that we are not persuaded that the findings of the administrative law judge in the present matter disturb the findings in the 2013 decision or that the specific issues presented in this appeal were implicated in the 2013 decision.

It is well-settled in our case law that:

> Claim preclusion (res judicata) and issue preclusion (collateral estoppel) have been described as related ideas on a continuum.... The doctrine of res judicata holds that an existing final judgment rendered upon the merits without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated as to the parties and their privies in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.... Res judicata bars not only subsequent relitigation of a claim previously asserted, but subsequent relitigation of any claims relating to the same cause of action ... which might have been made....
>
> Collateral estoppel, or issue preclusion, is that aspect of res judicata which prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties upon a different claim.... Collateral estoppel means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. (Citations omitted; internal quotation marks omitted.)

Oliveira v. Braga Painting, 5533 CRB-7-10-3 (April 7, 2011), *quoting* Berzins v. Berzins, 122 Conn. App. 674, 679-680 (2010).

Relative to the law of the case doctrine, we note that in Johnson v. Atkinson, 283 Conn. 243 (2007), *overruled in part on other grounds by* Jaiguay v. Vasquez, 287 Conn. 323 (2008), our Supreme Court explained that the theory:

> expresses the practice of judges generally to refuse to reopen what [already] has been decided .... New pleadings intended to raise again a question of law which has been already presented on the record and determined adversely to the pleader are not to be favored.... Where a matter has previously been ruled upon interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case, if it is of the opinion that the issue was correctly decided, in the absence of some new or overriding circumstance." (Citations omitted; internal quotation marks omitted.)

Id., 249, *quoting* Breen v. Phelps, 186 Conn. 86, 99 (1982).

In addition, our Supreme Court has stated that it had previously:

> determined that although a judge should be hesitant to rule contrary to another judge's ruling, he or she may do so "[n]evertheless, if the case comes before him [or her] regularly and [the judge] becomes convinced that the view of the law previously applied by [a] coordinate predecessor was clearly erroneous and would work a manifest injustice if followed...."

Johnson, supra, 249-50, *quoting* Breen, supra, 100.

In the present matter, CREC argues that the 2013 decision reflects the commissioner's conclusion "that the claimant suffered a traumatic brain injury as a result of the work incident that materially and substantially worsened her preexisting MS, thereby causing claimant's disability, inability to work and need for treatment." (Footnote omitted.) Appellant's Brief, p. 19. CREC therefore contends that the prior proceedings "are res judicata as to any further attempt to relitigate these claims of causation." Id.

With regard to the application of collateral estoppel, CREC points out that during the proceedings which resulted in the 2013 decision, the parties litigated the issues of (1) whether the claimant had been accurately diagnosed with MS; (2) whether she had suffered a work-related traumatic brain injury; and (3) if the claimant had sustained a

work-related injury, whether that injury was a substantial contributing factor to the claimant's disability after the date of injury. Given the conclusions reached by the commissioner in the 2013 decision, CREC contends that ProSight, by offering Conway's testimony, "impermissibly sought to relitigate the same issues decided in [the earlier proceedings." Id., 21. Similarly, in support of its contentions relative to the law of the case doctrine, CREC argues that the submission of Conway's testimony in its entirety also constituted an attempt by ProSight to relitigate issues which were decided in the prior proceedings. As such, CREC asserts that the administrative law judge's conclusion that the claimant's compensable injury did not constitute a substantial contributing factor to her need for Aubagio was erroneous in light of the 2013 decision, "which was upheld on appeal and established the causal relationship between the work incident and the aggravation of the claimant's underlying, preexisting condition of multiple sclerosis." Id.

There is no question that the 2013 decision established both the compensability of the claimant's work-related injury and her temporary total disability status. The commissioner concluded that the October 8, 2010 injury had "made the claimant's condition materially and substantially worse than it was and ... [had] prevented her from working at all since that time." May 3, 2013 Finding and Award, Conclusion, ¶ P. The commissioner also found that "the claimant's injuries of October 8, 2010 [have] aggravated, in a material and substantial manner, her physical condition and thus her *current* need for treatment is causally related to her injury of October 8, 2010." (Emphasis added.) Id., Conclusion, ¶ S.

It should be noted that in arriving at the findings in the 2013 decision, the commissioner relied on deposition testimony offered by Wade at that time, who testified

"that the injury caused a direct significant deterioration of [the claimant's] clinical picture possibly due to effects on the Baclofen pump." Claimant's Exhibit A, pp. 69-70. Wade also stated that "there was a sudden stepwise change in her clinical picture in association with the traumatic event. Her course over the year before had been one of slow deterioration. It was a significant decline. If it was just MS, then usually you don't see that kind of cataclysmic decline." Id., 71. Wade further opined that if the claimant "hadn't been injured and had the head injury, I think she'd be in a better place now." Id., 72. In addition, Wade indicated that the claimant was "[t]otally disabled from all forms of gainful employment," id., 80, and the work-related injury was "a substantial factor in her disability after October 8, 2010."[8] Id., 81.

It is clear that Wade's testimony provided an adequate basis for the commissioner's conclusions relative to compensability and disability status in the 2013 decision. As such, we agree with CREC that the portions of Conway's testimony expressing his opinion that the compensable injury did not materially or substantially worsen the claimant's preexisting condition went beyond the scope of the issues for determination in the proceedings giving rise to the instant appeal. However, we would also point out that although Conclusion, ¶ D, of the March 30, 2022 Finding and Dismissal appears to reflect Conway's opinion regarding causation, the corrected Conclusion, ¶ D, in the April 8, 2022 Corrected Finding & Dismissal properly limits the

[8] The commissioner in 2013 also found credible Raymond's testimony reflecting that the claimant's "deficits in terms of speech, cognitive issues and concentration became much more profound and much more significant after the October 8, 2010 incident," May 3, 2013 Finding and Award, Findings, ¶ 7.i, and that the October 8, 2010 injury was a substantial factor in the claimant's disability and inability to work. See id., Conclusion, ¶ N.

scope of the decision to the noticed issue of whether the claimant's compensable injury was a substantial factor in her need for Aubagio.[9]

Moreover, in order to properly evaluate the merits of CREC's contention that the conclusions reached by the administrative law judge in the present matter constituted a violation of res judicata, collateral estoppel, or the law of the case doctrine, it is necessary to distinguish between the issue of causation generally, in terms of whether the work-related injury worsened the claimant's condition, as opposed to the specific issue at bar of whether the work-related injury was a substantial contributing factor to the claimant's need for Aubagio. Our review of the evidentiary record in the present matter reveals that the expert testimony does not support CREC's contention that res judicata, collateral estoppel or the law of the case doctrine prohibited the administrative law judge from rendering findings addressing the effect of the compensable injury on the claimant's MS medication regimen.

At his 2012 deposition, Wade agreed that after sustaining the injury, the claimant was "being treated for conditions other than MS," Claimant's Exhibit A, p. 81, which conditions were "due, to a substantial degree, to the injury of October 8, 2010." Id., 81-82. He also testified that the progression of MS would have continued regardless of whether the claimant had sustained any physical trauma, and apart from a serious illness or infection, it is not possible to identify the cause of an MS exacerbation.

[9] CREC contends that although the administrative law judge corrected Conclusion, ¶ D, in his April 8, 2022 Corrected Finding & Dismissal, "the significance of his original conclusion is clear, as it reflects the judge's state of mind and intention to address issues that were already addressed in [the prior proceedings]." (Emphasis omitted.) Appellant's Brief, p. 22. We are not persuaded, and would point out that although the language of Conclusion, ¶ D, in the initial finding may have exceeded the scope of the formal proceedings, the administrative law judge also concluded in Conclusion, ¶ C, that the claimant's "need for Aubagio medication is unrelated to her workers' compensation claim." As such, both the initial and corrected decisions are consistent relative to the trier's ultimate conclusion that the claimant's need for Aubagio was not related to her work-related injury.

Wade indicated that after he began treating the claimant in August 2009, she "developed new symptoms of MS warranting more aggressive treatment," id., 26, and by the time she returned in November 2009, she had "developed increasing difficulty with the left side of her body with stiffness and weakness in her legs." Id., 27. Wade recommended that the claimant embark on a course of Acthar, a series of injections designed to reduce inflammation by encouraging the body's own adrenal glands to produce more steroids. See id., 27-28. Wade explained that by the time he saw the claimant in August 2009, she had already been placed on Copaxone, a medication that is used for treating MS and its associated disability by decreasing the chances of an exacerbation. See id., 28. The claimant was also on Baclofen, both orally and via an intrathecal pump, for control of spasticity, and Benicar.

Wade testified that because the claimant had experienced an exacerbation while taking Copaxone, he recommended she undergo an MRI scan and consider switching to Tysabri if she experienced another exacerbation while on the Copaxone. When the claimant presented to Wade's office on March 31, 2010, she was more symptomatic than she had been in November, "[describing] the left side of her body was 'melting,'" id., 32, *quoting* Respondents' Exhibit 1, and complaining of spasms, double vision, and balance issues. Wade diagnosed the claimant as suffering from another exacerbation.

The claimant next presented to Wade's office on May 12, 2010, at which time her vision had not improved and she was experiencing cognitive difficulties; by that time, the claimant had switched from Copaxone to Tysabri for the prevention of MS exacerbations. At his deposition, Wade explained that Tysabri, an infusion medication, is considered a more aggressive MS treatment because it carries the risk of causing a potentially fatal

brain infection. Wade indicated that the decision was made to put the claimant on Tysabri because she was "failing standard therapy." Id., 39.

The claimant was scheduled to see Wade in the fall; however, Wade testified that she presented on June 16, 2010, on an emergency basis complaining of "significant motor weakness and headaches," id., *quoting* Respondents' Exhibit 1, along with "heaviness and stiffness on the left side of her body, involving her arm and leg." Id. 41. Wade again thought she was experiencing a significant exacerbation and recommended that she undergo another MRI in addition to continuing with the Tysabri. On August 10, 2010, the claimant was seen by Amy Neal, Wade's physician's assistant, who reported that although the claimant was doing better, she was "still not back to normal. She was continuing to have the left-sided weakness and left eye is hazy and with floaters. She states she could not walk for ten days." Id., 45; see also Respondents' Exhibit 1. Wade attributed the claimant's ongoing physical and cognitive difficulties to the severe exacerbation she had experienced the preceding June and noted that the claimant was using a brace on her left leg.

When Wade saw the claimant after her work-related injury on October 8, 2010, he recommended that she continue with her current course of treatment, including the Tysabri medication. When queried regarding the effect of the TBI on the claimant's MS, Wade agreed that to a certain degree, her course of treatment both before and after the injury "was going to be the same or similar," id., 53, and "[f]rom an MS point of view, her treatment doesn't substantially change as a result of the work injury." Id., 69.

In addition, Wade testified that in his opinion, physical trauma does not cause the onset of MS; when queried as to whether physical trauma could cause an MS

exacerbation, he replied that he didn't "think there's support in the literature to argue that, no." Id., 61. When queried specifically regarding the effects of the October 8, 2010 injury, Wade opined that "[t]he physical trauma to her brain, in my opinion, would not provoke an exacerbation of MS following physical trauma to her brain." Id., 63. Wade also discussed the claimant's prior episodes when she required prolonged general anesthesia in order to control spasticity, and testified that the purpose of the treatment rendered to the claimant was to "maximize her function and quality of life." Id., 68.

Wade was again deposed for the proceedings giving rise to the present matter, at which time he essentially offered the same testimony he had previously provided relative to his treatment of the claimant between August 2009 and the date of his initial deposition on May 3, 2012. In addition, Wade explained that because every MS patient experiences a different clinical course, it is difficult to make predictions regarding the progression of the disease. Wade also reiterated his opinion that although physical trauma wouldn't cause an exacerbation of MS, "[i]t could further complicate the already established deficits from MS ...."[10] Respondents' Exhibit 2, p. 16.

With specific regard to the claimant's medication history, Wade stated:

> So in treating multiple sclerosis there's two approaches. One, medications like Copaxone or Tysabri which are used to treat the underlying disease to limit the possibility of another exacerbation. On the other hand, if someone has an exacerbation then what you'd like to do is to shorten the duration of that, and the treatments for that are either IV steroids, Solu-Medrol, or in patients that don't respond well or have side effects from Solu-Medrol then another option is a [medication] called Acthar.

Id., 20.

[10] At a deposition held on September 26, 2019, Wade testified that he had not reviewed any literature purporting to address the long-term or short-term effects of trauma on MS patients. See Respondents' Exhibit 2, p. 27.

Wade again explained that although Tysabri itself rarely causes side effects which would limit its use, if a Tysabri patient is exposed to the JC virus, which is a relatively common virus, such exposure can result in a potentially life-threatening brain infection. The claimant was routinely screened for exposure to this virus, and a February 21, 2013 office note authored by Wade's PA-C indicates that the claimant had tested positive for exposure to the virus. A subsequent office note dated February 28, 2013 reflects that the claimant had expressed an interest in switching from Tysabri to Aubagio.[11] Wade testified that Aubagio "is used to decrease the frequency of exacerbations in MS. It also delays disability and decreases the chances of new MRI lesions occurring." Id., 35. Wade explained that Aubagio is not used for the treatment of traumatic brain injuries, and that he transitioned the claimant from Tysabri to Aubagio because of the risks associated with continuing the Tysabri. See id., 44.

At his deposition, Wade was shown a copy of an undated letter over his signature in which he had stated that the claimant "was prescribed Aubagio per my recommendation on 3/25/2013." Respondents' Exhibit 1. Wade testified that he had no recollection of preparing the document, which was not on his letterhead, and he had no idea for whom the document was intended or where it was sent. Respondents' Exhibit 2, p. 37. Wade indicated that at the time he initially prescribed the Aubagio medication, he most likely would have completed an enrollment form which the claimant would have also been required to sign.[12] Wade could not recall preparing a report at that time

[11] Wade testified that he did not have an office note reflecting whether he had discussed Aubagio with the claimant prior to February 2013.

[12] We note that the evidentiary record contains a "One to One Start Form" for Aubagio signed by Wade on March 25, 2013.

explaining his rationale for switching the claimant's medication, and testified that he had no "recollection of why that medication was chosen six years ago." Id., 46.

At the continuance of Wade's deposition on February 26, 2020, the undated, unsigned document referencing the March 25, 2013 Aubagio prescription was again reintroduced, at which point Wade indicated that he had not attempted to locate a report which might have been generated contemporaneously with the document. Wade was also presented with a letter dated June 14, 2019, addressed "To Whom It May Concern" in which Wade had stated:

> Based on my treatment and knowledge of Ms. Hadden's medical condition, it is my opinion that to a reasonable degree of medical probability that her work-related injury on October 8th 2010 and subsequent significant disabilities are a substantial factor in my clinical decision to prescribe her Aubagio as part of her ongoing medical treatment.

Respondents' Exhibit 1.

However, Wade again indicated that he did not "recall the specific impetus that generated the production of this letter." Respondents' Exhibit 2, p. 66. When queried as to how he had arrived at his opinion, he replied "[b]ased on my experience and treatment of the patient and her medical situation." Id., 67. Wade testified that the consequences of the claimant's work-related TBI for which she was undergoing treatment included short-term memory difficulties and increased spasticity, and reiterated his opinion that the claimant would have required exacerbation-reducing medications even had she not sustained the TBI. Wade also reiterated that both Tysabri and Aubagio were administered in order to reduce the chance of another exacerbation. See id., 96.

Our review of the foregoing suggests that Wade's testimony relative to the effects of the work-related injury on the claimant as well as the rationale underlying his decision

to prescribe Aubagio was somewhat ambiguous. On the one hand, he opined that the claimant's clinical condition had worsened as a result of the work-related injury, which could ostensibly provide a reasonable basis for inferring that the claimant's subsequent transition to Aubagio was connected to the deterioration in her overall presentation.

However, his testimony also consistently linked Aubagio solely to the treatment of MS exacerbations, noted that the claimant was experiencing such exacerbations prior to the date of injury, and reflected that the claimant would have required medications to control her MS exacerbations regardless of whether she had ever sustained any physical trauma. It was therefore well within the discretion of the administrative law judge to disregard the portions of Wade's testimony he deemed less persuasive even if, in so doing, he did not rely upon this testimony to the degree urged by CREC. "It 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).

Moreover, as previously referenced herein, in addition to the testimony offered by Wade in 2012 and 2019-2020, the evidentiary record also contains a report issued by Stephen R. Conway, a neurologist, who performed a RME of the claimant on October 22, 2020, and testified live at the formal proceedings held on July 15, 2021. Conway explained that both Copaxone and Tysabri are utilized to treat relapsing and remitting MS patients, and echoed Wade's testimony that Tysabri is "among the most potent medications that are used for the treatment of multiple sclerosis, and carries the greatest risk." July 15, 2021 Transcript, p. 55. See also id., 57. Conway explained that

Aubagio, which is used exclusively for the treatment of MS, is an immunomodulatory medication, the point of which "is to interfere with the immune process so that the immune process can't work and cause damage to the nervous system." Id., 56.

Conway acknowledged that his report referenced medical records demonstrating "that the claimant had a progressive neurological disorder which prompted aggressive treatment measures ...." Id., 57. Conway opined that because the claimant's condition was active prior to the date of injury, her need for immunomodulatory medication after that date was not related to the injury. See id., 60, 87, 102. Rather, the claimant would have needed ongoing immunomodulatory medication, such as Aubagio, regardless of whether she had sustained the injury. As such, Conway did not believe that the work-related injury constituted a substantial contributing factor to the claimant's need for Aubagio. See id., 60, 77, 93, 101, 102.

Conway did agree that the claimant's condition was "clearly" worse following the date of injury but pointed out that the sole purpose of Aubagio was intended to prevent MS exacerbations. Id., 73. He stated:

> There is no data that [immunomodulatory medications] affect ... improvement, you know, in someone's condition, or in a disability someone already has. The studies demonstrate that they prevent attacks going forward and prevent the accrual of disability. They do not – there's no study that I'm aware of that says taking a medication makes someone better.

Id., 75-76.

Conway testified that both he and Wade disagreed with the assessment offered by Joseph B. Guarnaccia, a neurologist, in correspondence dated October 4, 2011, wherein Guarnaccia had opined:

> It is substantially probable that the trauma she experienced in October of 2010 triggered a relapse of her multiple sclerosis, similar to her previous relapses in terms of her neurological dysfunction. It is clear that this was superimposed on a worsening course of her multiple sclerosis for a least a year prior to her traumatic incident and this might, in part, account for the fact that she did not recover as well after her elective intubation and paralysis.[13]

Respondents' Exhibit 4, p. 5.

Conway stated that "there's no evidence that trauma worsens the course of multiple sclerosis, and Dr. Wade said that ... much in his deposition."[14] July 15, 2021 Transcript, p. 77. Conway reiterated that:

> MS is a lifelong ... autoimmune disease that warrants lifelong treatment, and an intervening injury would make no difference, in terms of her requirement, for a medication like that. It makes absolutely no sense to say that an intervening head injury, whatever you think that head injury caused, would be a reason to continue immunomodulatory therapy that was necessitated before. That makes no sense.

Id., 86.

When queried regarding Wade's correspondence of June 14, 2019, wherein Wade had indicated that the work-related injury was a substantial factor in his decision to prescribe Aubagio, Conway pointed out that "you can see it's 'a substantial factor' and not the – no statement that it's the only substantial factor. So, MS could be another

[13] It should be noted that in his October 4, 2011 correspondence, Guarnaccia also went on to state that "[w]hile the multiple sclerosis attack [the claimant] suffered after her trauma resulted in a new neurological baseline for her, her subsequent increasing neurological dysfunction is not necessarily attributable to the trauma she experienced, but rather to the progressive nature of her disease, which clearly had been active in the year prior to her trauma episode." Respondents' Exhibit 4, p. 5.

[14] Our review of Wade's testimony on this point reveals that although Wade believed that the course of the claimant's MS would have been essentially the same regardless of whether she had sustained the TBI, he disagreed with Guarnaccia's assessment that the claimant's worsened clinical condition following the date of injury could be solely attributed to the progression of her MS. Wade stated that Guarnaccia was "arguing that if she hadn't had the injury she'd be as she is now, and I think the consequences of the injury were more significant than that." Claimant's Exhibit A, p. 71.

factor, the reason for him to prescribe it." Id., 92-93. Conway also echoed Wade's testimony that "[t]here's no literature supporting the conclusion that a trauma worsens MS." Id., 97.

Ultimately, the administrative law judge found Conway's opinion more persuasive than Wade's on the issue of whether the claimant's work-related injury constituted a substantial contributing factor to her need for Aubagio. As previously noted herein, it is well-established in our case law that such a determination constituted the proper exercise of his discretion. See Tartaglino, supra. However, it is also worth noting that the expert testimony proffered by Wade and Conway was strikingly similar. Both doctors indicated that the claimant's condition had deteriorated following the work-related injury in that her spasticity had increased and she was experiencing cognitive difficulties. However, both doctors also noted that the claimant had experienced MS-related exacerbations prior to the work-related incident and testified that the claimant's treatment for her MS would have been the same regardless of whether she sustained the TBI. Moreover, although both physicians conceded that physical trauma could worsen preexisting MS-related deficits, they both opined that physical trauma neither causes nor exacerbates MS.[15]

With specific reference to the claimant's use of Aubagio, both doctors testified that Aubagio is not used for the treatment of TBI symptoms but, rather, is used solely for the prevention of exacerbations in MS patients. Both doctors noted that the claimant had

[15] We note that on January 30, 2012, Kimberly J. Sass, a neuropsychologist, issued a Neuropsychological Consultation Summary in this claim. While Sass' opinion as to the compensability of the work-related incident was ultimately rejected by the commissioner, we note that in his report, Sass stated that "[i]n accordance with the findings of the scientific literature, I conclude that it was improbable that any physical trauma that [the claimant] sustained during the subject accident transiently or permanently exacerbated her MS or increased the progression of that disease." Respondents' Exhibit 1 [Neuropsychological Consultation Summary, p. 37].

previously taken Copaxone and Tysabri for the prevention of MS exacerbations, and that Aubagio was substituted for Tysabri following the claimant's exposure to the JC virus.

We recognize that in his June 14, 2019 correspondence, Wade stated that the claimant's work-related injury and subsequent disabilities were a significant contributing factor to the claimant's need for Aubagio, and at his deposition, Wade confirmed that his opinion in that regard was unchanged. See Respondents' Exhibit 1; Respondents' Exhibit 2, pp. 105-6. However, when queried regarding this correspondence, Wade testified that he had no "recollection of why that medication was chosen six years ago," Respondents' Exhibit 2, p. 46, other than "the decision was based on the fact that she had to stop Tysabri because of the risks of developing a brain infection." Id., 48. Moreover, apart from the initial prescription request for Aubagio, the evidentiary record is devoid of a contemporaneous or subsequent report documenting a work-related rationale for the transition from Tysabri to Aubagio. Rather, Wade testified that his decision to place the claimant on Aubagio was "[b]ased on [his] experience and treatment of the patient and her medical situation." Id., 67.

Having reviewed the expert testimony offered in this matter, we do not find that the findings of the administrative law judge relative to the compensability of Aubagio were prohibited as a matter of law by res judicata, collateral estoppel, or the law of the case doctrine. The corrected decision leaves undisturbed the prior findings addressing the compensability of the work-related injury generally and the claimant's work status.[16]

[16] The claimant points out that the administrative law judge's "determination of credibility, namely that Dr. Conway was more credible on the issue of compensability that relates to the prescription of Aubagio ... must stand and be granted deference.... It should be noted and stated, however, that the decision by Judge Dilzer should not be taken or assumed to make any reference or conclusion as to the compensability of Ms. Hadden's injury and her present status as being totally disabled from all forms of gainful employment as a result of her compensable traumatic brain injuries and the aggravation of her preexisting multiple sclerosis." (Internal citation omitted.) Claimant-Appellee's Brief, p. 11.

Rather, the trier's examination of whether the work-related injury constituted a substantial contributing factor to the claimant's need for Aubagio required analysis of an issue and review of evidence which was either not previously submitted or not necessarily pertinent to the prior proceedings.

As such, we also reject the inference urged by CREC that the 2013 decision conferred automatic compensability on every subsequent treatment modality undertaken by the claimant. As ProSight accurately observed, "[j]ust because the injuries that the clamant suffered ... were considered compensable at that time, does not forever impose a requirement for a blanket acceptance of future medical treatment on the part of the respondent/insurer when presented with the claimant's need for said subsequent treatment."[17] Respondent-Appellee's Brief, p. 15.

Moreover, even had we determined that the administrative law judge erred in concluding that the Aubagio was non-compensable, we are not persuaded he erred in concluding that he lacked the subject matter jurisdiction to issue an order of reimbursement against ProSight for payments made by CREC's group health administrator for the medication. CREC concedes that the determination of whether the Aubagio represented "reasonable or necessary" medical care as contemplated by General Statutes § 31-294d (a)[18] was properly within the purview of the trier in this matter. However, CREC also asserts that "because ProSight has stepped into the shoes of the claimant's employer, ProSight is responsible for paying for any such medical treatment contemplated by ... [§ 31-294d (a) (1)] that is causally related to the work injury through

[17] It should also be noted that General Statutes § 31-315 grants an administrative law judge continuing jurisdiction "over claims for compensation, awards and voluntary agreements, for any proper action thereon, during the whole compensation period applicable to the injury in question."
[18] See footnote 7, supra.

its reimbursement of CREC's bills ...." Appellant's Brief, p. 9. The argument that an excess carrier steps into the shoes of an employer is an over-simplification of the contractual relationship between and insurer and an insured.

CREC points out that this board and other "Connecticut courts have concluded that the commission has jurisdiction over a wide range of disputes involving insurance carriers, including disputes that involve the application of the provisions of the [Workers' Compensation] Act, which is the case here." (Emphasis omitted.) Id., 10. CREC argues that:

> the present dispute between CREC and ProSight does not raise an insurance coverage issue, nor does it require the administrative law judge to interpret an insurance contract or address an issue of law outside of the act, nor was he asked to do so at the formal hearings. Instead, this dispute specifically addresses the claimant's right to benefits under the act, as evidenced by the expert testimony presented by both sides at the formal hearings and the conclusion reached by the judge in the Corrected Finding and Dismissal even after he concluded that he lacked jurisdiction.

Id., 13.

We are not persuaded by CREC's arguments in this regard, given that CREC appears to be conflating the issue of whether Aubagio constituted reasonable or necessary medical treatment pursuant to § 31-294d (a) (1), a determination which does fall squarely within the subject matter jurisdiction of the Workers' Compensation Act (act), with the issue of ProSight's obligation to reimburse CREC for the payments for this medication. General Statutes § 31-290 clearly states that "[n]o contract, expressed or implied, no rule, regulation or other device shall in any manner relieve any employer, in whole or in part, of any obligation created by this chapter, except as herein set forth."

Moreover, in Stickney v. Sunlight Construction, Inc., 248 Conn. 754 (1999), our Supreme Court noted that the Appellate Court, in its review of the matter, had begun it analysis "by recognizing that the commission's subject matter jurisdiction is limited to that which is expressly granted by statute, and that the Workers' Compensation Act ... '*involves the legal relationship between employers and employees*.'" (Emphasis added.) Id., 758-59, *quoting* Stickney v. Sunlight Construction, Inc., 48 Conn. App. 609, 616 (1998). Thus, while employers can and do enter into contractual arrangements with third parties in order to satisfy their financial obligations to injured claimants, the jurisdiction of this commission is first and foremost exercised over the claimant and the employer for whom the claimant was employed when the injury occurred.

The Supreme Court ultimately determined that the workers' compensation commissioner did not have the jurisdiction to open and modify a voluntary agreement in order to substitute one insurer for another following the discovery that the named insurer was not on the risk on the date of injury. The court observed that "[a]dministrative agencies are tribunals of limited jurisdiction and their jurisdiction is dependent entirely upon the validity of the statutes vesting them with power and they cannot confer jurisdiction upon themselves." Castro v. Viera, 207 Conn. 420, 428 (1988). The court stated that "[l]ong ago, we said that the jurisdiction of the commissioners 'is confined by the act and limited by its provisions. Unless the act gives the commissioner the right to take jurisdiction over a claim, it cannot be conferred upon [the commissioner] by the parties either by agreement, waiver or conduct.'" Id., 426, *quoting* Jester v. Thompson, 99 Conn. 236, 238 (1923).

The Supreme Court also pointed out that "[c]onsistent with our conclusion in Hunnihan [v. Mattatuck Mfg. Co., 243 Conn. 438 (1997)], in order for jurisdiction to be established ... the act explicitly must provide authority by which the coverage issue central to this appeal may be determined." Stickney, supra, 764. The court further observed that "[t]he subject matter jurisdiction of the commission in previous cases has encompassed the interpretation of statutory provisions codified outside the [act] when such interpretations have been *incidentally* necessary to the resolution of a case arising under the act." (Emphasis in the original.) Id., n.5, *quoting* Hunnihan, supra, 443 n.5.

Ultimately, the court, having rejected the applicability of several statutory provisions advanced by the appellant insurer in furtherance of its claim, concluded that the commissioner lacked the jurisdiction to open the voluntary agreement, holding that "the issue underlying [the insurer's] motion is an insurance coverage issue, requiring the evaluation of insurance policies and the application of contract law." Id., 762. The court also rejected the appellant's equitable arguments for conferring jurisdiction on this commission, noting that if its "argument were to be accepted, there would be no legal question that the commissioner, who has limited jurisdiction, could not reach under the guise of equity. Such a broad construction of subject matter jurisdiction under the act is simply untenable." Id., 766.

In the present matter, CREC, in support of its contention that the administrative law judge improperly relied on Stickney, supra, for his conclusion that he lacked the subject matter jurisdiction to issue an order of reimbursement against ProSight, relies on several cases, none of which we find persuasive. In Gill v. Brescome Barton, Inc., 317 Conn. 33 (2015), our Supreme Court held that this commission had jurisdiction over

a dispute between two insurance carriers because the underlying issue concerned the payment of temporary total disability benefits to a claimant who had sustained two separate compensable knee injuries while covered by the different carriers. The court, noting the "unique factual circumstances of [the] case," id., 45, remarked:

> We can think of no logical reason why, if the commissioner was authorized under the literal language of the relapse statute to order either of the insurance carriers to make 100 percent of the claimant's temporary total disability payments, he would not also be authorized to order each of the insurance carriers to make, in effect, only 50 percent of such payments.

Id., 44.

In Hunnihan, supra, our Supreme Court recognized the commissioner's authority over the Connecticut Insurance Guaranty Association (CIGA) on the basis that the Workers' Compensation Act (act) "specifically incorporates ... the obligations of CIGA to make payments on behalf of an insolvent insurer."[19] Appellant's Brief, p. 12. In DiBello v. Barnes Page Wire Products, 3970 CRB-7-99-2 (March 2, 2000), *aff'd*, 67 Conn. App. 361 (2001), *cert. granted*, 260 Conn. 915 (2002), *appeal withdrawn* (2002), this board concluded that the commissioner had the subject matter jurisdiction to determine whether the employer was covered by a workers' compensation insurance policy on the date of injury. However, we also pointed out that "the central issue in this action continues to be the claimant's entitlement to benefits ..." and "[b]y failing to identify a potentially responsible insurer, such an order would also increase the risk that the claimant would not receive the compensation due him in a timely manner." Id.

[19] In Hunnihan v. Mattatuck Mfg. Co., 243 Conn. 438 (1997), our Supreme Court stated: "The insertion in [General Statutes] § 31–355 (e) delineating the association's obligations under the Workers' Compensation Act reflects the legislature's intent for the commission to have jurisdiction to adjudicate claims against the association originating under that act. Otherwise, it would not have included instruction regarding the association's responsibilities under the Workers' Compensation Act at all." Id., 445.

We find that none of the cases cited by CREC are on point with the factual circumstances presented in instant appeal. Rather, the dispute is, as the administrative law judge correctly determined, more correctly governed by our Supreme Court's analysis in Stickney, supra. As such, we reject CREC's contention that the "present dispute between CREC and ProSight does not raise an insurance coverage issue ...." Appellant's Brief, p. 13. On the contrary, a determination as to whether an excess insurance carrier is contractually responsible for reimbursing its insured for costs associated with medical treatment would appear to constitute a quintessential insurance coverage issue. Moreover, while we recognize that § 31-284-10 (a)[20] of the Regulations of Connecticut State Agencies requires a self-insured employer to obtain excess workers' compensation insurance, we are aware of no authority, and CREC has provided none, which would provide an adequate basis for the reasonable inference that this statutory requirement in any way serves to confer jurisdiction upon an administrative law judge to resolve disputes which may arise between the self-insured employer and its excess insurance carrier.[21]

We also reject CREC's contention that the "remedial purpose" of the act necessitates finding that the commissioner has jurisdiction over the insurance coverage dispute, or that this dispute in any way compromises the claimant's interests. See Biasetti v. Stamford, 250 Conn. 65, 74 n.7 (1999). As the claimant herself notes, her eligibility

[20] Section 31-284-10 (a) of the Regulations of Connecticut State Agencies states: "(a) Excess insurance shall be maintained by each self-insurer unless waived by the Chairman or his designee. (b) Excess insurance shall be issued by an insurance carrier permitted to write workers' compensation insurance in the State of Connecticut. The Chairman shall approve the issuing carrier, coverage language, upper limits, and retained amounts of the policy. Thirty (30) days advance notice to the Chairman or his designee is required for cancellation. (c) Failure to maintain said coverage will be grounds for automatic revocation of a self-insurance certificate."

[21] The fact that no contracts between CREC and ProSight were introduced at trial does not serve to demonstrate that the dispute between the parties is not contractual in nature.

for the Aubagio medication is in no way affected by the contractual dispute between CREC and ProSight.

> [T]he claimant would be remiss if it was not pointed out that from her standpoint, the drug Aubagio will continue to be covered and paid for either through her accepted workers' compensation claim or her private insurance. The claimant continues to have coverage for Aubagio and, therefore, is not affected in a material degree as it relates to Judge Dilzer's finding.[22]

Claimant-Appellee's Brief, p. 11.

We are similarly unpersuaded by CREC's jurisdictional arguments relative to ProSight's prior appearance at formal proceedings for this claim held before this commission in 2015. Our review of the January 5, 2016 Finding and Award (2016 decision) indicates that the issue for determination at that time involved an inquiry into whether medical bills paid by Anthem, CREC's group health insurance carrier, for medical services provided to the claimant during the time period between October 8, 2010, and May 26, 2013, constituted reasonable or necessary health care which was causally related to the claimant's October 8, 2010 work-related injury.[23] The subject of this hearing tangentially touched upon on a lien filed with the commission pursuant to General Statutes § 31-299a (b).[24]

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[22] See footnote three, supra.

[23] Our authority to take judicial notice of the January 5, 2016 Finding and Award is predicated on our Supreme Court's observation in Moore v. Moore, 173 Conn. 120 (1977), wherein the court explained that "[n]otice to the parties is not always required when a court takes judicial notice. Our own cases have attempted to draw a line between matters susceptible of explanation or contradiction, of which notice should not be taken without giving the affected party an opportunity to be heard ... and matters of established fact, the accuracy of which cannot be questioned, such as court files, which may be judicially noticed without affording a hearing." (Internal citations omitted.) Id., 121-22.

[24] General Statutes § 31-299a (b) states: "Where an employer contests the compensability of an employee's claim for compensation, and the employee has also filed a claim for benefits or services under the employer's group health, medical, disability or hospitalization plan or policy, the employer's health insurer may not delay or deny payment of benefits due to the employee under the terms of the plan or policy by claiming that treatment for the employee's injury or disease is the responsibility of the employer's workers' compensation insurer. The health insurer may file a claim in its own right against the employer for the value of benefits paid by the insurer within two years from payment of the benefits. The health insurer

In the 2016 decision, the commissioner noted at the outset that another commissioner had issued a prior Finding and Award on May 3, 2013 (2013 decision) concluding that the claimant had sustained a compensable traumatic brain injury on October 8, 2010, which entitled her to workers' compensation benefits. As a result of this decision, Meridian Resource Company, L.L.C., asserted a group health lien on behalf of Anthem in the amount of $573,393.59, which CREC voluntarily chose to repay despite having filed an appeal from the 2013 finding.[25]

The commissioner noted that Matthew P. Raymond, the claimant's treating physiatrist, had:

> issued a report on December 11, 2014 confirming that at the time of her injury on October 8, 2010, the claimant ... suffered a traumatic brain injury as a result of the assault by two students and that injury is a substantial contributing factor in the dramatic change in the amount and intensity of her medical care that has been required since that date.

January 5, 2016 Finding and Award, Findings, ¶ 13.

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shall not have a lien on the proceeds of any award or approval of any compromise made by the administrative law judge pursuant to the employee's compensation claim, in accordance with the provisions of section 38a-470, unless the health insurer actually paid benefits to or on behalf of the employee."

[25] This board affirmed the 2013 decision on the issue of causation, stating that "[i] n reviewing the medical evidence we may reasonably conclude that while it may be difficult to ascertain precisely where the claimant's preexisting condition ends and the sequelae of the October 8, 2010 incident begins it is reasonable to conclude that someone in the claimant's condition would be more susceptible to being rendered disabled as the result of a physical assault than a healthier individual.... The claimant's treating physicians offered evidence, which the trial commissioner found persuasive, that the impact of the assault materially contributed to [the claimant's] present disability." (Footnote omitted; internal citations omitted.) Hadden v. Capitol Region Education Council, 5843 CRB-1-13-5 (May 20, 2014), *aff'd*, 164 Conn. App. 41 (2016). We also held that the costs associated with defending the claim could not be apportioned between the compensable injury and the claimant's preexisting MS pursuant to General Statutes § 31-275 (1) (D), stating that the issue had not been properly preserved on appeal and, even if it had been, our case law prohibits apportionment when the preexisting condition is nonoccupational in nature. The respondents appealed on the issue of apportionment, and the Appellate Court affirmed the opinion of this board, holding that "[b]ecause the defendant concedes that the plaintiff's preexisting multiple sclerosis was not occupational, we are bound by our Supreme Court's holding in Cashman [v. McTernan School, Inc., 130 Conn. 401 (1943)] that a nonoccupational preexisting disease does not entitle a defendant to apportionment under § 31–275 (1) (D)." Hadden v. Capitol Region Education Council, 164 Conn. App. 41, 49 (2016).

The commissioner found that neither CREC nor the Workers' Compensation Trust (trust), its third-party administrator, had challenged Raymond's opinion that the claimant's medical treatment since the date of injury constituted reasonable or necessary medical care as contemplated by § 31-294d. In light of Raymond's unchallenged opinion relative to causation, the commissioner concluded that the medical treatment received by the claimant during the time period in question was reasonable or necessary and, as such, found that CREC and the trust were entitled to reimbursement for the payments made in satisfaction of the Anthem lien. The commissioner also found that CREC and the trust were entitled to an additional $91,654.45 for medical bills for treatment that had not been included in the Anthem lien.[26]

In the present matter, CREC argues that because ProSight appeared at the 2015 proceedings, it "has previously invoked and submitted to the jurisdiction of the commission to address issues that were relevant to the claimant's entitlement to benefits under the act." Appellant's Brief, p. 16. Moreover, given that "ProSight has stepped into CREC's shoes and is solely responsible for the legal handling of [the] claimant's workers' compensation claim, it is even more important for the commission to exercise jurisdiction over ProSight ...." Id., 16-17.

We note at the outset that this board generally prefers to refrain from commenting on litigation strategy, believing that decisions regarding appropriate representation are best left to the parties actually involved in the litigation. Nevertheless, we would point

[26] It should be noted that the Stipulation of Facts submitted in the 2015 proceedings states: "The parties acknowledge and agree that this Stipulation of Facts is being entered into for the sole purpose of this formal hearing on this limited issue and does not constitute a waiver of any claims, issues or positions of the parties with respect to the pending appeal in this case." Joint Exhibit 1 (February 19, 2015). We further note that the Stipulation of Facts identifies the relevant time period as running from October 8, 2010, through May 9, 2013, while the January 5, 2016 Finding and Award defines the relevant time period as running from October 8, 2010, through May 26, 2013.

out that, as discussed previously herein, both § 31-290 and relevant precedent clearly contemplate that liability for workers' compensation injuries rests with the employer, regardless of any third-party contractual arrangements entered into by the employer.

Moreover, as previously noted herein, the proceedings in 2015 arose out of a dispute relative to the applicability of § 31-299a (b) which addresses inter alia the right of action for a group health insurer when it furnishes medical services to a claimant whose workers' compensation claim has been denied by the employer. Given ProSight's standing in this matter as an excess insurance carrier, it was entirely appropriate that it would appear as a party of interest in the 2015 proceedings, and that this commission would have jurisdiction over a dispute which quite clearly arose pursuant to § 31-299a (b) and required interpretation of those statutory provisions. However, the fact that this commission had the subject matter jurisdiction to resolve a prior dispute implicating a health insurer's lien does not mean that jurisdiction was somehow automatically conferred upon the commission to resolve a contractual dispute between CREC and ProSight involving the reimbursement of prescription payments. In addition, as previously noted herein, had the commission been unable to assist the parties in resolving the matter, the parties would have had to resort to proceeding in Superior Court pursuant to § 38a-470 (f).[27] We therefore affirm the administrative law judge's conclusion that he lacked the jurisdiction to issue an order of reimbursement against ProSight for these payments.

[27] General Statutes § 38a-470 (f) states: "The validity or amount of the lien may be contested by the workers' compensation carrier, the employer, if self-insured or the employee by bringing an action in the superior court for the judicial district of Hartford or in the judicial district in which the plaintiff resides." In the present matter, CREC reimbursed the Anthem lien on June 11, 2013. The evidentiary record does not reflect that another lien was ever filed.

In addition to the claims of error previously addressed herein, CREC has challenged the instant decision on various other grounds, none of which we find persuasive. For instance, CREC contends that Conway's opinion was "based on 'mere speculation and conjecture,'" Appellant's Brief, p. 23, *quoting* DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132, 142 (2009), and Conway "[lacked] the relevant knowledge and experience to render an opinion regarding whether the work injury ... is a substantial factor in the need for Aubagio." Id. We disagree; while the record clearly reflects that Conway showed professional deference to Wade's opinion, both Conway and Wade are well-known neurologists to this commission and, even if they were not, it is well-settled that the discretion for selecting the most persuasive medical opinion always rests with the trier. See Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999).

CREC also argues that the RME performed by Conway "was hardly sufficient to enable him to render any opinion regarding the claimant, let alone an opinion regarding the causal connection between claimant's work injury and the need for Aubagio in this complex case." Appellant's Brief, p. 24. Again, we disagree; the evidentiary record contains Conway's twenty-six page report in this matter detailing not only the results of his physical examination of the claimant but his familiarity with the claimant's complex symptomatology and voluminous medical history over the course of many years. See Respondents' Exhibit 7. At any rate, it is axiomatic that the ultimate responsibility "to assess the weight and credibility of medical reports and testimony" always rests with the trier. Gillis v. White Oak Corp., 49 Conn. App. 630, 637, *cert. denied*, 247 Conn. 919 (1998).

CREC also argues that the administrative law judge erred in granting the motions to correct filed by the claimant and ProSight, arguing that the trier's revision to his April 8, 2022 Corrected Finding & Dismissal, Conclusion, ¶ D, constituted a reversal of his "ultimate conclusions" as to causation. Again, we are not persuaded; as noted previously herein, both the initial finding and the corrected finding reflect that the administrative law judge rejected the argument that claimant's work-related injury constituted a substantial contributing factor to her need for Aubagio.

Finally, CREC also contends that the administrative law judge failed to include in his findings the undisputed findings and conclusions rendered in the 2013 decision, which established the compensability of the work-related injury as well as the claimant's total disability status. CREC points out that Wade indicated that the work-related incident worsened the claimant's condition and she subsequently suffered from increased spasticity and cognitive difficulties. As such, Wade testified "that the claimant's work injury and subsequent disabilities were a substantial factor in his decision to prescribe the medication as part of claimant's ongoing treatment." Appellant's Brief, p. 28. CREC also points out that "Conway acknowledged that the claimant's condition was 'significantly better' when he examined her in 2020 versus 2013, and 'that the Aubagio may have had a positive effect on [the claimant].'" Id., *quoting* July 15, 2021 Transcript, p. 67. CREC therefore asserts:

> By failing to include all of the admitted and/or undisputed evidence regarding the claimant's condition and symptoms after the work injury and the impact of the work injury on the claimant's underlying MS, the judge's findings contain an incomplete and inaccurate account of the facts relating to the central causation

> issue in this case, and the judge's conclusion regarding causation is based on unreasonable inferences from the subordinate facts.

Id., 29.

We disagree. Our review of the finding in this matter indicates that the administrative law judge specifically concluded that the claimant "sustained a compensable work-related injury on October 8, 2010 that has rendered her totally disabled." Conclusion ¶ A. Moreover, as our prior analysis herein indicates, a review of the totality of the expert testimony reflects that the administrative law judge's conclusions regarding the compensability of Aubagio required the consideration of additional evidence which was either not available or not implicated in the 2013 decision. The trier was certainly under no compunction to "cherry pick" the expert testimony in order to reach the result urged by the appellant in this matter. As such, in light of testimony of both Wade and Conway articulating the circumstances surrounding the decision to place the claimant on Aubagio, we affirm the trier's conclusion that the claimant's October 8, 2010 work-related injury did not constitute a substantial contributing factor to her requirement for the medication.

There is no error; the March 30, 2022 Finding and Dismissal and the April 8, 2022 Corrected Finding & Dismissal of Daniel E. Dilzer, Administrative Law Judge acting for the First District, are accordingly affirmed.

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