CASE NO. 6490 CRB-8-22-11 CLAIM NO. 800171972	: COMPENSATION REVIEW BOARD
JEROME ROSENSTEIN CLAIMANT-APPELLANT	: WORKERS' COMPENSATION COMMISSION
v.	: OCTOBER 20, 2023
HARTFORD DISTRIBUTORS EMPLOYER	
and	
FUTURECOMP INSURER RESPONDENTS-APPELLEES	

APPEARANCES:

The claimant was represented by David J. Scully, Esq., Kernan & Scully, L.L.P., 207 Bank Street, P.O. Box 2156, Waterbury, CT 06722.

The respondents were represented by Elycia D. Solimene, Esq., and Jessica P. Doughty, Esq., Solimene & Secondo, L.L.P., 1501 East Main Street, Suite 204, Meriden, CT 06450.

This Petition for Review from the October 19, 2022 Finding and Dismissal of Peter C. Mlynarczyk, Administrative Law Judge acting for the Eighth District, was heard on March 31, 2023 before a Compensation Review Board panel consisting of Chief Administrative Law Judge Stephen M. Morelli and Administrative Law Judges Toni M. Fatone and Soline M. Oslena.

OPINION

STEPHEN M. MORELLI, CHIEF ADMINISTRATIVE LAW JUDGE. The claimant has petitioned for review from the October 19, 2022 Finding and Dismissal of Peter C. Mlynarczyk, Administrative Law Judge acting for the Eighth District (finding). We affirm the result reached by the administrative law judge, albeit on alternative grounds.[1]

The administrative law judge identified two issues for determination: (1) whether the claimant is entitled to temporary total disability benefits pursuant to General Statutes § 31-307[2]; and (2) if the claimant is not so entitled, whether he is eligible for post-specific temporary partial disability benefits pursuant to General Statutes § 31-308a.[3] In his finding, the trier noted that the claimant testified to the following: he

---

[1] "An appellate court is authorized to rely upon alternative grounds supported by the record to sustain a judgment." (Internal quotation marks omitted.) Martinez v. Empire Fire & Marine Ins. Co., 151 Conn. App. 213, 226 (2014), *aff'd*, 322 Conn. 47 (2016), *quoting* Mortgage Electronic Registration Systems, Inc. v. Goduto, 110 Conn. App. 367, 372, *cert. denied*, 289 Conn. 956 (2008).

[2] General Statutes § 31-307 (a) states in relevant part: "If any injury for which compensation is provided under the provisions of this chapter results in total incapacity to work, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of the injured employee's average weekly earnings as of the date of the injury, calculated pursuant to section 31-310 …. No employee entitled to compensation under this section shall receive less than twenty per cent of the maximum weekly compensation rate, as provided in section 31-309, provided the minimum payment shall not exceed seventy-five per cent of the employee's average weekly wage, as determined under section 31-310, and the compensation shall not continue longer than the period of total incapacity."

[3] General Statutes § 31-308a states in relevant part: "(a) In addition to the compensation benefits provided by section 31-308 for specific loss of a member or use of the function of a member of the body, or any personal injury covered by this chapter, the administrative law judge, after such payments provided by said section 31-308 have been paid for the period set forth in said section, may award additional compensation benefits for such partial permanent disability equal to seventy-five per cent of the difference between the wages currently earned by an employee in a position comparable to the position held by such injured employee prior to his injury … and the weekly amount which such employee will probably be able to earn thereafter … to be determined by the administrative law judge based upon the nature and extent of the injury, the training, education and experience of the employee, the availability of work for persons with such physical condition and at the employee's age, but not more than one hundred per cent, raised to the next even dollar, of the average weekly earnings of production and related workers in manufacturing in the state, as determined in accordance with the provisions of section 31-309. If evidence of exact loss of earnings is not available, such loss may be computed from the proportionate loss of physical ability or earning power caused by the injury. The duration of such additional compensation shall be determined upon a similar basis by the administrative law judge, but in no event shall the duration of such additional compensation exceed the lesser of (1) the duration of the employee's permanent partial disability benefits,

was born on June 20, 1933, and began working for the respondent employer (HDI) in 2002 at its warehouse in Manchester, Connecticut. He was responsible for providing the employer's sales representatives with merchandising materials from the warehouse. He enjoyed his job with HDI and had no plans to retire before August 3, 2010. On that date, he returned to the workplace after having been out for a week due to arthroscopic knee surgery. At the suggestion of his boss, Ross Hollander (Hollander), the claimant was using a golf cart to move around the facility in order to stay off his leg as much as possible. He testified that at 7:24 a.m., he heard a "popping" sound and saw people running. Findings, ¶ 1.f, *citing* May 17, 2022 Transcript, p. 16. The dock foreman told him that someone was shooting and he should go outside and head north. However, the claimant's first impulse was to stop the shooting, so he turned the golf cart south, hoping to knock the shooter down. He missed the shooter and then drove past him, at which time the shooter shot him. Eight coworkers died in the incident, and Steve Hollander, one of the owners, was wounded along with the claimant.

The claimant, having suffered wounds to one leg, his abdomen and his left arm, was transferred to Hartford Hospital by ambulance. His spleen and a portion of his intestines were removed; in addition, he underwent multiple surgeries and a skin graft to his left ulnar nerve and elbow along with an iliac artery repair to his leg. He was out of work due to his injuries for approximately two years and returned to work in 2012. The claimant subsequently developed an incisional hernia; Ramon E. Jimenez, a surgical

---

or (2) five hundred twenty weeks. Additional benefits provided under this section shall be available only to employees who are willing and able to perform work in this state.

(b) Notwithstanding the provisions of subsection (a) of this section, additional benefits provided under this section shall be available only when the nature of the injury and its effect on the earning capacity of an employee warrant additional compensation."

oncologist, repaired the hernia and reported seeing a significant amount of scar tissue. See Claimant's Exhibit D [September 14, 2011 Operative Note, p. 1].

As a result of his abdominal injuries, the claimant takes laxatives every day to prevent severe discomfort and the possibility of an intestinal blockage. He often experiences pain and bloating due to his intestinal issues. After taking the laxatives, he occasionally has to run to the bathroom very quickly, and he usually suffers from abdominal pain and cramping all day. His response to the laxatives is currently less predictable than when he was working at HDI, and he has had quite a few "accidents" as a result of his condition, some of which occurred while he was still employed at HDI. His condition is very emergent, such that when he goes to a public venue, he looks for the location of the restrooms.

In June 2018, when the claimant was 85 years old, he reached a point where he felt he could no longer "do the job one hundred percent, like he did before … [as] [h]e was either constantly running to the bathroom or worrying about running to the bathroom." Findings, ¶ 1.q, *citing* May 17, 2022 Transcript, p. 28. He submitted a letter of voluntary resignation to HDI indicating that his last day of work would be June 29, 2018. At trial, he explained that the reason for his resignation was because he felt that "[i]f he cannot give his employer 110 percent, then he's not doing his job." Findings, ¶ 1.y, *citing* May 17, 2022 Transcript, p. 33. The claimant testified that on some occasions when he did have to use the restroom, he would be in "there for a period of time that took him away from his duties, especially when he had to go home and change and shower, so he resigned from his job." Findings, ¶ 1.q, *citing* May 17, 2022 Transcript, pp. 28-29. Moreover, although his desk was located approximately three feet

from a restroom, if he happened to be working on the other side of the factory, he would not always make it to the bathroom in time. He indicated that his gastrointestinal issues were very embarrassing for him, and he did not confide in any of his any coworkers regarding his condition.

The claimant testified that the scar tissue in his abdomen has worsened, as have his overall symptoms since leaving his employment in 2018. However, he indicated that were it not for his gastrointestinal issues, he would still be working for HDI. He has not worked anywhere else since resigning from HDI; nor does he feel capable of working elsewhere. Following his resignation, HDI gave him a check equivalent to six months' pay; HDI also provided him with a company cell phone and, although it did not continue to pay for his cell phone service, allowed him to keep his company car when he retired. In addition, at some point after his retirement, he needed to replace the furnace in his home, and was subsequently informed by the owner of the furnace company that Hollander had paid the bill.

Following his resignation, the claimant continued to visit the premises of HDI "a couple of times a week, or three times a month, sometimes," usually for about a half-hour at a time. Findings, ¶ 1.v., *quoting* May 17, 2022 Transcript, p. 30. He indicated that he never asked anyone at HDI for more money after his resignation, and no one at HDI offered him any employment accommodations after he left the company. However, under cross-examination, the claimant agreed with respondents' counsel that because he had visited so often, HDI "kept [his] desk open for two years because they thought [he was] going to come back to work." Findings, ¶ 1.dd, *citing* May 17, 2022 Transcript, p. 45. He testified that he is aware that HDI "would welcome him back to work and

would accommodate any restrictions, but he would not go back because he wouldn't be a good employee." Findings, ¶ 1.gg, *citing* id. He has not explored the possibility of returning to work with restrictions such as time limitations or a more flexible schedule.

The claimant acknowledged that when he returned to HDI following the workplace incident in which he had sustained his injuries, HDI hired someone to assist him in carrying out some of his responsibilities because of his physical limitations. Although he has numerous health issues, none of his other conditions are preventing him from working; rather, it is the gastrointestinal issues which prevent him from returning to work.[4] He testified that even if HDI offered him a position requiring him to work only a variable number of hours per day, or days per week, or even just when he felt well, he would reject that offer "[b]ecause even if I was working for an hour, I couldn't give one hundred percent for that hour. I would be shortchanging my employer." May 17, 2022 Transcript, p. 56. He does not want to be paid "for something [he's] not doing." Id., 57.

The claimant admitted that when he saw his doctors following his retirement, "he told them he was happily retired, taking ballroom dancing lessons, going to baseball games, and playing golf." Findings, ¶ 1.cc, *citing* May 17, 2022 Transcript, p. 44. On January 28, 2020, he underwent a triple bypass procedure due to a cardiac issue.

In addition to the testimony offered by the claimant, the administrative law judge noted that Mark Holmes, HDI's Chief Financial Officer, testified to the following: he has worked for HDI since 2014 handling day-to-day operations such as insurance, banking, financials, and taxes. The human resources department also reports to him. Although he and the claimant worked together for several years, his interactions with the claimant

[4] The claimant suffers from knee, cardiac, pulmonary and prostate issues, toe fungus, bursitis, and plantar fasciitis. See Findings, ¶ 1.kk.

were limited. The claimant was responsible for providing the sales representatives with merchandising materials. The claimant's desk was located approximately four steps from a bathroom, and HDI hired a man named "Doc" to assist the claimant in carrying out his responsibilities. The claimant also had a golf cart available to him to use while moving around the warehouse. Hollander subsequently offered the cart to the claimant but he declined the offer. Holmes testified that Hollander had told him the company would be paying for the claimant's new furnace. According to HDI's technology contact person, the company is also still paying for the claimant's cell phone service.[5] Holmes indicated that 155 employees work for HDI and, to the best of his knowledge, only one other employee in addition to the claimant was ever given a company car upon retirement.

Holmes testified that the claimant's desk had been "left untouched and available to the claimant for at least two years because everyone thought that he would return to work." Findings, ¶ 2.i, *citing* May 17, 2022 Transcript, p. 70. Holmes stated that:

> If the claimant wanted to return to work, HDI would take him back. If he needed any kind of accommodation, HDI would provide it. If the claimant could only work one hour per day, or sporadically throughout the day, factoring in bathroom breaks, he would have a job. The claimant would be paid for bathroom breaks as well as any trips to go home.

Findings, ¶ 2.j, *citing* May 17, 2022 Transcript, pp. 70-71.

Holmes testified that although HDI's warehouse occupies 150,000 square feet, HDI would allow the claimant to work at his desk so he could always be close to a bathroom. HDI would also allow the claimant to come in for as many or as few hours as he chose. Holmes indicated that the claimant has not told anyone at HDI that he is ready,

[5] Holmes indicated that he would investigate the possibility that the claimant's account was still included in the company-wide cell phone plan. See May 17, 2022 Transcript, p. 74.

willing or able to work; nor has he requested any accommodations in order to resume employment. Holmes confirmed that he was aware of the vocational expert's report concluding that the claimant is not employable. Holmes stated that while he himself would not hire the claimant, Hollander would, and "would have no problem in changing the claimant's job to accommodate his restrictions." Findings, ¶ 2.n, *citing* May 17, 2022 Transcript, pp. 76-77.

In addition to the findings relative to the testimony offered by the claimant and Holmes, the administrative law judge noted that the issue of § 31-308a benefits [Wage Loss Differential – (Post Specific)] was also listed on the hearing notice.[6]

On the basis of the foregoing, the administrative law judge found that "[t]he claimant's actions on August 3, 2010, were incredibly heroic, and nothing herein is meant to detract from that." Conclusion, ¶ A. Moreover, "HDI's actions in its treatment of the claimant have been incredibly generous and accommodating." Conclusion, ¶ B. The trier determined that the "evidence and testimony pertaining to HDI's willingness to provide work for the claimant with accommodation of virtually any limitations is credible and persuasive, especially given its actions to date." Conclusion, ¶ C. The trier also determined that the claimant's testimony relative to his readiness and willingness to work was "rather clear," and concluded that the claimant was neither ready nor willing to work. Conclusion, ¶ D.

However, the trier found less persuasive the claimant's testimony regarding his ability to work. Noting that the claimant "essentially takes the position that he feels it

[6] At trial, claimant's counsel stated that an award of § 31-308a benefits was "up to the judge, if he feels it falls in that category. I don't believe it does. It's our position that this is a straight TT claim." May 17, 2022 Transcript, p. 7.

would be unfair to [the employer] if he were to return to work because he would be unable to give '110%,'" Conclusion, ¶ E, the trier found this position to be "inconsistent with [the claimant's] willingness and desire to collect temporary total disability benefits for no work." Id. In addition, the trier determined that although the claimant had discussed playing golf with his coworkers and several of his physicians, the claimant also testified that "he does not feel comfortable sitting at a desk just a few feet from a restroom. This also makes his presentation less persuasive." Conclusion, ¶ F. The trier concluded that "HDI is willing to accommodate the claimant's restrictions and provide work to the claimant;" Conclusion, ¶ G; however, the claimant has neither demonstrated a "credible effort to return to work, nor … requested any specific accommodation from HDI." Conclusion, ¶ H. Finally, the trier found that the claimant has "not shown that he has a diminution in his earning capacity as a result of the compensable injuries." Conclusion, ¶ I.

In light of the foregoing, the administrative law judge denied and dismissed the claimant's request for temporary total disability benefits. Noting that "work is readily available to the claimant within his physical limitations, and he has failed to demonstrate his willingness to work," Order, ¶ 2, the trier also denied § 31-308a benefits.[7]

The claimant filed a motion to correct which was denied in its entirety. The claimant also filed a motion to open the formal hearing to allow for the opportunity to introduce Hollander's testimony regarding the extent to which he would be willing to provide employment accommodations for the claimant.[8] The respondents objected to the

[7] The claimant has not appealed the denial of benefits pursuant to General Statutes § 31-308a.

[8] Although the parties referred to this filing as a "motion to reopen," we would note that our Appellate Court has previously observed that when the decision of an administrative law judge has "never … been opened after having been rendered, the appropriate term is a motion to open." Krol v. A.V. Tuchy, Inc.,

motion to open, contending inter alia that the testimony contained in the record from the claimant and Holmes was "sufficient" vis-à-vis the issue of potential accommodations and Hollander's testimony would therefore "not provide any additional material [or] relevant information as to the undisputed evidence of the employer's past and present willingness to provide the claimant with accommodated work." November 4, 2022 Respondents' Objection to Claimant's Motion to Reopen, p. 1. The administrative law judge denied the motion on the basis of untimeliness, noting that the case had already been heard and the decision issued.

The claimant has filed an appeal, contending that the administrative law judge erred in concluding that the claimant was not medically disabled from employment. The claimant also argues that the administrative law judge erroneously concluded, in light of the vocational evidence provided, that the claimant was ineligible for either temporary or permanent total disability benefits. In addition, the claimant challenges the trier's credibility findings relative to the claimant's testimony on the issue of his "willingness," to accept temporary total disability benefits but not "charity" from the employer. Appellant's Brief, p. 13. The claimant avers that the trier erroneously relied on "the potential and speculative actions of a respondent owner who did not testify at the hearing while ignoring the testimony of three live witnesses, the claimant and the respondent CFO, Mark Holmes, and Vocational Specialist Kerry Skillen." Id. Finally, the claimant contends that the trier's denial of his motions to correct and to open the formal hearing constituted error.

---

135 Conn. App. 854, 858 n.8, *cert. denied*, 305 Conn. 923 (2012). See also Rodriguez v. State, 76 Conn. App. 614, 617 n.5 (2003).

The standard of review we are obliged to apply to a trier's findings and legal conclusions is well-settled. Such "factual findings and conclusions must stand unless they are without evidence, contrary to law or based on unreasonable or impermissible factual inferences." Russo v. Hartford, 4769 CRB-1-04-1 (December 15, 2004), *citing* Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Moreover, "[a]s with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial court could have reasonably concluded as it did." Burton v. Mottolese, 267 Conn. 1, 54 (2003), *quoting* Thalheim v. Greenwich, 256 Conn. 628, 656 (2001). "This presumption, however, can be challenged by the argument that the [trier] did not properly apply the law or has reached a finding of fact inconsistent with the evidence presented at the formal hearing." Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

We begin our analysis with the claim of error relative to the administrative law judge's denial of temporary total disability benefits pursuant to § 31-307. It is axiomatic that a claimant "[bears] the burden of proving an incapacity to work, and 'total incapacity becomes a matter of continuing proof for the period claimed."' (Internal quotation marks omitted.) Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 454 (2001), *quoting* Cummings v. Twin Tool Mfg. Co., 40 Conn. App. 36, 42 (1996). In Osterlund v. State, 135 Conn. 498 (1949), our Supreme Court held that:

> A finding that an employee is able to work at some gainful occupation within his reasonable capacities is not in all cases conclusive that he is not totally incapacitated. If, though he can do such work, his physical condition due to his injury is such that he cannot in the exercise of reasonable diligence find an employer

> who will employ him, he is just as much totally incapacitated as though he could not work at all.

Id., 506-507.

Subsequently, our Supreme Court defined "total incapacity to work" as "the inability of the employee, because of his injuries, to work at his customary calling or at any other occupation which he might reasonably follow." Czeplicki v. Fafnir Bearing Co., 137 Conn. 454, 456 (1951). In a decision of more recent vintage, our Appellate Court observed:

> Whether a claimant is realistically employable requires an analysis of the effects of the compensable injury upon the claimant, in combination with his preexisting talents, deficiencies, education and intelligence levels, vocational background, age, and any other factors which might prove relevant. This is of course the analysis that commissioners regularly undertake in total disability claims.... A commissioner always must examine the impact of the compensable injury upon the particular claimant before him.[9]

Bode v. Connecticut Mason Contractors, The Learning Corridor, 130 Conn. App. 672, 681, *cert. denied*, 302 Conn. 942 (2011), *quoting* R. Carter et al., 19 Connecticut Practice Series: Workers' Compensation Law (2008 Ed.) § 8:40, p. 301.

The assessment of a claimant's work capacity is fundamentally a factual determination. As such, this board has previously stated that although "a claimant must present 'sufficient evidence before the commissioner that the plaintiff is unemployable' … we have generally deferred to the trier of fact as to the sufficiency of this evidence." Pereira v. State/Department of Developmental Services, 6204 CRB-3-17-6 (August 1, 2018), *quoting* Bode, supra, 680. This is particularly so given that "[i]t is the quintessential function of the finder of fact to reject or accept

[9] 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.

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).

In the present matter, the claimant, in support of his claim of error that the administrative law judge erroneously failed to credit medical evidence attesting to his disability status, contends that the reports entered into evidence from Jimenez and Jeffrey S. Gelwan, the claimant's gastroenterologist, document the claimant's "worsening abdomen conditions and symptoms and the inability to perform employment tasks." Appellant's Brief, p. 10. In addition, the claimant argues that the trier "ignored" the report and testimony of Kerry A. Skillin, a vocational expert who concluded that the claimant was unemployable due to his ongoing symptoms.[10] Id., 11. The claimant points out that his own testimony reflected that his condition had deteriorated over time and his symptoms eventually reached the point where he no longer felt capable of working. The claimant also notes that the respondents did not offer medical evidence attesting to the claimant's ability to work; nor was an expert opinion offered refuting Skillen's vocational report. The claimant therefore avers that in disregarding the expert opinions proffered in this matter, particularly in "the absence of any evidence to the contrary," the trier erred in denying temporary total disability benefits to the claimant. Id., 10.

[10] In her October 14, 2021 Vocational Assessment Report, Skillin concluded that "[i]n my vocational opinion, based upon a reasonable degree of vocational certainty, considering an analysis of the records supplied to date, my vocational interview, labor market analysis and my clinical vocational experience and judgment, Mr. Rosenstein is unemployable with no earning capacity at the present time and into the foreseeable future." Claimant's Exhibit R, p. 9.

We note at the outset that the instant appeal appears to share a fact pattern very similar to the factual circumstances in Bode, supra, wherein the claimant asserted a claim for ongoing temporary total disability benefits primarily on the basis of vocational, rather than medical, evidence. In Bode, the Appellate Court noted that the evidentiary record contained several medical reports which did not, in and of themselves, necessarily provide an adequate basis for the inference that the claimant lacked a work capacity.[11] However, the record also contained live testimony by the claimant attesting to his difficulties in securing employment along with "proof that he attempted to secure employment and two timely vocational reports in which the experts opined he was completely unemployable." Bode, supra, 687. Ultimately, the court concluded that, in light of the totality of the evidence presented, the trier's "determination that the plaintiff was not temporarily totally disabled resulted from an incorrect application of the law to the subordinate facts and from inferences unreasonably drawn from those facts." Id.

In the present matter, although the claimant submitted numerous medical reports attesting to his ongoing gastrointestinal difficulties, only one of these reports appears to address his work capacity. In correspondence dated February 22, 2021, Gelwan stated that "[w]hen [the claimant's] symptoms are particularly bothersome it is difficult for him to work in his normal capacity." Claimant's Exhibit P. However, the claimant also submitted the results of the vocational study, along with Skillin's deposition testimony, attesting to his lack of work capacity. As was the case in Bode, supra, the merits of the vocational evidence were not addressed by the trier in his finding.

[11] The Appellate Court did observe that "the medical records alone show that, at the very least, the plaintiff was disabled on the day the surgery was performed." Bode v. Connecticut Mason Contractors, The Learning Corridor, 130 Conn. App. 672, 687 (2011), *cert. denied*, 302 Conn. 942 (2011).

In light of the similarities between Bode, and the present matter, our Appellate Court's reasoning in Bode might have been instructive in this board's analysis of the instant appeal. However, our Appellate Court recently addressed another issue implicated in this appeal – i.e., the eligibility of a retired claimant for temporary total disability benefits – and ultimately held that a claimant "who elected to retire from employment and thereby received an incentivized early retirement benefits package and affirmatively conceded that he has no intention of returning to the workforce, was not entitled to temporary total disability benefits pursuant to the statute." Cochran v. Dept. of Transportation, 220 Conn. App. 855, 868 (2023), *cert. pending*, S.C. 230146 (August 28, 2023).

The Cochran court noted at the outset that our Superior Court has long "recognized a distinction between benefits awarded under the act to compensate for wage loss and those awarded to compensate for the loss, or loss of use, of a body part." Pizzuto v. Commissioner of Mental Retardation, 283 Conn. 257, 267 (2007). As such, the Cochran court determined that an award of temporary total disability benefits to a claimant who "elects to retire with no intention of returning to the workforce [and] fails to pursue any employment," Cochran, supra, 870, would be inconsistent with the plain language of § 31-307 given that such a claimant has not experienced an actual loss of wages or earning power.

The Cochran claimant argued "that the plain and unambiguous language of § 31-307 (a) mandates an award for temporary total disability benefits," id., 871, given that the statute clearly states that "the injured worker shall be paid a weekly compensation." (Emphasis omitted.) Id., *quoting* § 31-307 (a). However, the court

characterized this interpretation as "unreasonable," id., pointing out that the claimant's "singular focus on that phrase of the statute ignores the prefatory language of § 31-307 (a) [requiring that] 'the claimant's injury … results in total incapacity to work.'" Id., *quoting* § 31-307 (a). Accordingly, the court concluded that, pursuant to the plain language of the statute, the claimant was not entitled to temporary total disability benefits "because it cannot be said that [the claimant's] injury *resulted* in his total incapacity to work." (Emphasis in the original.) Id., 869.

The Cochran claimant also relied on our Supreme Court's analysis in Laliberte v. United Security Inc., 261 Conn. 181 (2002), wherein the court affirmed the award of ongoing temporary total disability benefits to a claimant who was incarcerated after sustaining a workplace injury rendering him temporarily totally disabled. The Laliberte court held that:

> It is evident that § 31–307 (a) contains no provision permitting the discontinuance of the total disability benefits of an injured employee based on his incarceration. Section 31–307 (a) requires the payment of benefits for "total incapacity to work...." The plaintiff has been found to be, and remains, totally incapable of working due to his disability. The statute does not address inability to work because of incarceration. As a result, no intent concerning discontinuance of benefits because of incarceration can be inferred from the statute itself. The defendant, moreover, has provided us with no legislative history, and we are aware of none, suggesting that the legislature intended to permit the discontinuance of total disability benefits for totally disabled recipients who are also unable to work as a result of incarceration.

Id., 186.

The Laliberte court went on to state that "[i]n the absence of any indication of the legislature's intent concerning this issue, we cannot engraft language onto the statute."

Id., 186. It also remarked that "[i]t is not the function of the courts to enhance or supplement a statute containing clearly expressed language." Id.

In its review of Cochran, however, our Appellate Court was not persuaded by the claimant's reliance upon this language in support of the claim for temporary total disability benefits. Rather, the court contrasted the factual scenario in Laliberte, under which the claimant had been deemed temporarily totally disabled prior to his incarceration and would have remained out of the workforce due to his compensable injury regardless of his incarceration, with the claimant's circumstances in Cochran, wherein the evidentiary record clearly demonstrated that the claimant had elected to retire and draw pension and social security retirement benefits rather than continuing with his employment.

The Cochran court also found significant the claimant's testimony indicating that when he retired on April 1, 2003, he accepted an incentivized early retirement benefits package from the state and "had no intention of returning to the workforce upon leaving state service and taking his retirement."[12] Cochran, supra, 859. As such, the court stated that it could not "conclude that the plaintiff is entitled to § 31-307 (a) benefits when he removed himself from the workforce with no intention of returning." Id., 873. The court did note that:

> During the hearings, when asked by his counsel whether his "back symptomology" impacted his job duties prior to his retirement, the plaintiff testified that "[i]t just got to a point where I was in pain all day and I was taking these medications. Eventually, it would have

[12] At trial, the claimant conceded that the retirement package he had accepted provided him with "more money." Cochran v. Dept. of Transportation, 220 Conn. App. 855, 860 (2023).

> got me in big trouble, you know, taking all this medication on company time.

Id., 860. See April 23, 2021 Finding and Decision, Findings, ¶ 22, *quoting* October 31, 2019 Transcript, p. 33.

However, despite this testimony suggesting that the aftereffects of the claimant's work-related disability might have influenced his decision to retire, the court found more persuasive the respondent's assertion that "the 'plain and unambiguous' meaning of ... § 31-307 denies [temporary total disability] benefits to voluntary retirees, like [the plaintiff], who have no wages to replace and whose departure from the workforce initially resulted from their own choice, not their disability." Id., 865.

The present matter presents us with a fact pattern which is similar to the scenario in Cochran.[13] Apart from a three-month post-surgery time period during which the Cochran claimant's eligibility for temporary total disability benefits was predicated on medical evidence, both claimants sought to establish their eligibility for ongoing post-retirement temporary total disability benefits primarily on the basis of vocational expert opinion pursuant to the standard articulated in Osterlund, supra. Moreover, in both cases, the claim for temporary total disability benefits was brought after the claimants had retired from the workforce.

As referenced previously herein, the evidentiary record in the present matter contains correspondence dated June 20, 2018, signed by the claimant and addressed to Maria Demilio, the human resources director, stating that June 29, 2018, would be the last day the claimant would be working for the respondent employer. See Respondents' Exhibit 1. Under cross-examination, the claimant conceded that this letter represented his

[13] Unlike the claimant in the present matter, the Cochran claimant testified that he had no contact with his former employer after his retirement.

voluntary resignation. The claimant also testified that upon his resignation, the employer advanced him his salary for the remainder of the calendar year and he was allowed to keep the company car he had been using.[14]

The claimant also consistently testified that his gastrointestinal issues had worsened to the point that he felt he was no longer capable of working for the respondent employer or any other employer. He repeatedly stated that if he could not give a job his full effort, he would not be entitled to the paycheck. See May 17, 2022 Transcript, pp. 28, 33, 45, 48, 56. He also repeatedly testified that but for his gastrointestinal issues, he would still be working. See id., 29, 33, 52, 59. The claimant indicated that he had never been comfortable discussing his symptoms with his coworkers; as such, when he retired, rather than explaining the actual reason, he told his coworkers that he was leaving in order to care for his wife, attend more of his grandson's ballgames, and take ballroom and golf lessons. Under cross-examination, he also conceded that he had told his doctors he was "happily retired." Id., 44.

As previously noted herein, the Cochran claimant offered testimony suggesting that his decision to retire was based at least in part on the necessity for him to take pain medication during the workday as a result of the injuries he had sustained throughout his career. In the present matter, when queried, the claimant responded that he didn't feel he was "capable of working anywhere else," May 17, 2022 Transcript, pp. 29-30, as he "would have the same issue no matter where [he] worked." Id., 29. We believe the testimony offered by the claimants in both Cochran and the instant appeal provides a reasonable basis for the inference that both of these individuals "chose" to retire at least

[14] The claimant indicated that he was not seeking temporary total disability benefits for the time period covered by the salary advance.

in part because they no longer felt capable of performing the duties associated with their employment due to the lingering effects of their workplace injuries.

Nevertheless, in Cochran, the Appellate Court reversed the commissioner's award of benefits along with this board's affirmance of same. The Appellate Court also held that a retired claimant who had expressed no intention of returning to the workforce was ineligible for temporary total disability benefits given that such an individual has not experienced a loss of wages or earning power. Thus, in light of the factual circumstances surrounding the instant claimant's voluntary retirement from HDI, along with his testimony reflecting his unwillingness to return to work for the respondent employer or seek employment elsewhere, we are compelled to apply the analysis provided by the Appellate Court in Cochran to this appeal and affirm the decision of the administrative law judge denying temporary total disability benefits.

The claimant has also claimed as error the administrative law judge's denial of his motion to correct. It is well-settled that when proposed corrections merely reflect arguments made at trial which ultimately proved unavailing, this board would find no error in the trier's denial of the motion to correct. See D'Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003). In the present matter, the claimant points out that the trier did not acknowledge the medical or vocational evidence in his finding; the trier also failed to note that the respondents provided no evidence refuting either the medical or vocational opinions submitted by the claimant. This purported lacuna in the record is not in and of itself dispositive, given that a trier retains "the sole authority to decide which, if any, of the evidence is reliable, and he is always free to decide that he does not trust a particular medical opinion or a

particular witness' testimony, even if there does not appear to be any evidence that directly contradicts it." Duddy v. Filene's (May Department Stores Co.), 4484 CRB-7-02-1 (October 23, 2002), *citing* Pallotto v. Blakeslee Prestress, Inc., 3651 CRB-3-97-7 (July 17, 1998). See also Jusiewicz v. Reliance Automotive, 3140 CRB-6-95-8 (January 24, 1997). However, in light of our affirmance of the denial of temporary total disability benefits on alternative grounds, we decline to reach this claim of error.

The claimant also avers that the administrative law judge erroneously failed to grant the claimant's motion to open for the purposes of introducing testimony from Hollander relative to the accommodations HDI was prepared to provide to the claimant. The claimant asserts as grounds for opening the finding the fact that the administrative law judge "relied on speculative comments about a person that did not testify." Appellant's Brief, p. 14. We note at the outset that an administrative law judge retains a great deal of discretion relative to the introduction of evidence at formal proceedings. General Statutes § 31-298 provides in relevant part:

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

It is also well-settled that, pursuant to General Statutes § 31-315, the Workers' Compensation Act allows for modification of an award:

> whenever it appears to the administrative law judge, after notice and hearing thereon, that the incapacity of an injured employee has increased, decreased or ceased, or that the measure of dependence

> on account of which the compensation is paid has changed, or that changed conditions of fact have arisen which necessitate a change of such agreement, award or transfer in order properly to carry out the spirit of this chapter. The administrative law judge shall also have the same power to open and modify an award as any court of the state has to open and modify a judgment of such court.

In Bergin v. Dept. of Correction, 75 Conn. App. 591, *cert. denied*, 264 Conn. 903 (2003), our Appellate Court determined "that § 31–315 is applicable in cases in which the commissioner has denied benefits to a claimant." Id., 597. The Bergin court, having also noted that "[t]he decision to open an award is within the discretion of the commissioner," id., 598, *citing* Tutsky v. YMCA of Greenwich, 28 Conn. App. 536, 541 (1992), explained that the third prong of § 31-315 "extends the commission's power to open and modify judgments to cases of accident ... to mistakes of fact ... and to fraud ... but not to mistakes of law.... This provision, however, does not independently confer authority to modify awards for reasons not otherwise enumerated in § 31–315." (Citations omitted; internal quotation marks omitted.) Id., *quoting* Marone v. Waterbury, 244 Conn. 1, 16-17 (1998).

In addition, to the extent that the instant claimant's motion to open could be construed as a request for equitable relief, we would further note that in O'Neil v. Honeywell, Inc., 66 Conn. App. 332 (2001), *cert. denied*, 259 Conn. 914 (2002), our Appellate Court stated:

> Fraud, accident, mistake, and surprise are recognized grounds for equitable interference, when one, without his [or her] own negligence, has lost an opportunity to present a meritorious defense to an action, and the enforcement of the judgment so obtained against him [or her] would be against equity and good conscience, and there is no adequate remedy at law.... Equity will not, save in rare and extreme cases, relieve against a judgment rendered as the result of a mistake on the part of a party or his [or her] counsel, unless the mistake is unmixed with negligence .... [T]he rule is

> founded on the necessity of the case; for if it was otherwise, petitions to set aside or enjoin judgments at law would become too common, and a court of equity be compelled generally to revise decisions at law which on legal principles should be final. (Citations omitted; internal quotation marks omitted.)

Id., 338–39.

Given that the purpose of the motion to open in the present matter was to allow for additional testimony on an issue introduced at trial, it does not appear that the motion would satisfy any of the requirements pursuant to § 31-315. Theoretically, the motion to open could be characterized as a motion to submit additional evidence to this board pursuant to § 31-301-9 of the Regulations of Connecticut State Agencies, which contemplates in pertinent part that:

> If any party to an appeal shall allege that additional evidence or testimony is material and that there were good reasons for failure to present it in the proceedings before the commissioner, he shall by written motion request an opportunity to present such evidence or testimony to the compensation review division, indicating in such motion the nature of such evidence or testimony, the basis of the claim of materiality, and the reasons why it was not presented in the proceedings before the commissioner….

Regs., Conn. State Agencies § 31-301-9.

However, our Appellate Court has previously remarked that:

> It also is well established that a party to a workers' compensation case "is not entitled to try his case piecemeal, to present a part of the evidence reasonably available to him and then, if he loses, have a rehearing to offer testimony he might as well have presented at the original hearing.... Where an issue has been fairly litigated, with proof offered by both parties, a claimant should not be entitled to a further hearing to introduce cumulative evidence, unless its character or force be such that it would be likely to produce a different result." (Internal quotation marks omitted.)

Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 456 (2001), *quoting* Tutsky v. YMCA of Greenwich, 28 Conn. App. 536, 542 (1992).

Consistent with Dengler, supra, this board has also held that in order to proceed pursuant to § 31-301-9 of the Regulations of Connecticut State Agencies:

> a party must allege that additional evidence is material and that there was a good reason for failing to admit it during the trial stage of the proceedings in order to prevail on a motion to submit additional evidence. The failure of a party to anticipate the need for further medical testimony is not generally considered a "good reason."

Pallotto, supra, *quoting* Lesczynski v. New Britain Memorial Hospital, 10 Conn. Workers' Comp. Rev. Op. 205, 208-209, 1289 CRD-6-91-9 (December 2, 1992).

In light of the foregoing, we are not persuaded that the claimant has satisfied any of the conditions required for either opening a finding pursuant to § 31-315 or submitting additional evidence pursuant to § 31-301-9 of the Regulations of Connecticut State Agencies. Moreover, given the claimant's unambiguous testimony at trial relative to his unwillingness to accept any accommodations in order to return to work for the respondent employer, we are not persuaded that Hollander's testimony would have been material to the ultimate outcome.[15] We therefore find no error in the trier's denial of the motion to open.

[15] As the claimant correctly points out, "[t]emporary total disability benefits based on a medical disability are not subject to a consideration of accommodations. When a claimant is totally disabled, he is not required to perform job searches." Appellant's Brief, p. 10. However, we would also note that the Osterlund standard for vocational disability requires that a claimant demonstrate through "the exercise of reasonable diligence" that he has been unable to "find an employer who will employ him …." Osterlund v. State, 135 Conn. 498, 506 (1949). Under the particular circumstances of this matter, it may be reasonably inferred that the trier predicated his denial of temporary total disability benefits on the claimant's refusal to accept *any* of the employment accommodations which the employer was ostensibly prepared to extend to the claimant. Although the level of accommodation described by Holmes could perhaps be construed as going "well beyond what would be considered reasonable from an employer's perspective," it may be reasonably inferred that the claimant's categorical, albeit understandable, rejection of any employment accommodations provided a basis for the trier to conclude that the Osterlund standard was not satisfied. Devanney v. Woodcock Refrigeration Co., 4403 CRB-8-01-6 (July 29, 2002).

The October 19, 2022 Finding and Dismissal of Peter C. Mlynarczyk, Administrative Law Judge acting for the Eighth District, is accordingly affirmed, albeit on alternative grounds.[16]

Administrative Law Judges Toni M. Fatone and Soline M. Oslena concur in this Opinion.

[16] We note that in his Finding and Dismissal, the administrative law judge deemed unpersuasive the claimant's testimony that "it would be unfair to HDI if he were to return to work because he would be unable to give '110%,'" on the basis that this testimony was "inconsistent with [the claimant's] willingness and desire to collect temporary total benefits for no work." Conclusion, ¶ E. It is of course well-settled that the assessment of the credibility of witnesses is "uniquely and exclusively the province of the trial commissioner," and such assessments are not generally subject to reversal on review. Smith v. Salamander Designs, Ltd, 5205 CRB-1-07-3 (March 13, 2008), *citing* Berube v. Tim's Painting, 5068 CRB-3-06-3 (March 13, 2007). However, in this instance, we believe the trier utilized an incorrect standard for assessing credibility. As the claimant accurately points out, "[c]laiming a legally entitled Workers' Compensation insurance benefit pursuant to the Connecticut General Statutes is not charity and is not a gift. It is a legal right every employee possesses…. A claimant's credibility should not be based on his pursuit of legal benefits under the workers' compensation statute." Appellant's Brief, p. 13. We agree.