CASE NO. 6511 CRB-1-23-8 : COMPENSATION REVIEW BOARD
CLAIM NO. 300123008

SAM SAVVAS : WORKERS' COMPENSATION
CLAIMANT-APPELLEE COMMISSION

v. : MAY 10, 2024

ALLEGIS GROUP/MAXIM HEALTH
EMPLOYER

and

ESIS NORTHEAST WORKERS' COMPENSATION CLAIMS
INSURER
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by James M. Quinn, Esq., Quinn & Quinn, L.L.C., 248 Hudson Street, Hartford, CT 06106.

The respondents were represented by Jennifer A. Hock, Esq., Montstream Law Group, L.L.P., 175 Capital Boulevard, Suite 204, Rocky Hill, CT 06067.

This Petition for Review from the July 19, 2023 Finding and Award of Toni M. Fatone, Administrative Law Judge acting for the First District, was heard on December 15, 2023 before a Compensation Review Board panel consisting of Chief Administrative Law Judge Stephen M. Morelli and Administrative Law Judges Soline M. Oslena and Daniel E. Dilzer.

OPINION

STEPHEN M. MORELLI, CHIEF ADMINISTRATIVE LAW JUDGE. The respondents have petitioned for review from the July 19, 2023 Finding and Award of Toni M. Fatone, Administrative Law Judge acting for the First District (2023 finding). We find error and accordingly affirm in part, reverse in part, and remand the matter for additional findings consistent with this Opinion.[1]

At trial, the administrative law judge identified the following issues for determination: (1) whether the respondents' failure to pay indemnity benefits awarded to the claimant pursuant to a September 7, 2022 Finding and Award constituted undue delay as contemplated by General Statutes § 31-300[2] such that the claimant was entitled to interest on the unpaid benefits at the rate of 12 percent per annum and attorney's fees; and (2) whether the respondents' failure to pay said indemnity benefits constituted "a willful failure to conform" with the provisions of the Workers' Compensation Act (act) such that the respondents were liable for the payment of penalties to the claimant pursuant to General Statutes § 31-288 (b).[3] Issues, ¶ (b).

The administrative law judge made the following factual findings which are pertinent to our review. The claimant sustained a compensable injury on May 2, 2019;

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

[2] General Statutes § 31-300 provides in relevant part: "In cases where, through the fault or neglect of the employer or insurer, adjustments of compensation have been unduly delayed, or where through such fault or neglect, payments have been unduly delayed, the administrative law judge may include in the award interest at the rate prescribed in section 37-3a and a reasonable attorney's fee in the case of undue delay in adjustments of compensation and may include in the award in the case of undue delay in payments of compensation, interest at twelve per cent per annum and a reasonable attorney's fee."

[3] General Statutes § 31-288 (b) provides in relevant part: "(1) Whenever through the fault or neglect of an employer or insurer, the adjustment or payment of compensation due under this chapter is unduly delayed, such employer or insurer may be assessed by the administrative law judge hearing the claim a civil penalty of not more than one thousand dollars for each such case of delay, to be paid to the claimant…. Any appeal of a penalty assessed pursuant to this subsection shall be taken in accordance with the provisions of section 31-301."

on September 7, 2022, the trier, who also issued the decision which is the subject of the instant appeal, issued a Finding and Award (2022 award) concluding that the claimant had met his burden of proof in establishing that his need for surgery to his neck/cervical spine was causally related to the injury of May 2, 2019.[4] The respondents were found liable for the expenses associated with an anterior cervical discectomy and fusion along with any post-surgical treatment; they were also found liable for the payment of "any claim for indemnity, and/or other medical benefits related to the injury …." Findings, ¶ 2.

Neither the respondents nor the claimant filed a motion for articulation or motion to correct the 2022 award, and the decision was not appealed by either party. Although the respondents authorized the cervical surgery on September 22, 2022, no indemnity benefits had been paid in association with the cervical spine injury as of the formal proceedings held on January 31, 2023 (2023 hearing). See Transcript, p. 15. At that hearing, the respondents indicated they were seeking "an articulation on the indemnity benefits," Findings, ¶ 5, and requested that the trier take administrative notice of the exhibits submitted into evidence during the proceedings which resulted in the 2022 award. It was the respondents' position "that such evidence was needed in order for the [2022 award] to be rewritten and all periods of indemnity mapped out for the [respondents], or they would continue to be unable to pay any indemnity benefits to the claimant." Id. The respondents further asserted that without such a "rewrite" of the award, they were likewise unable to determine the correct amount of interest, penalties, or attorney's fees due to the claimant. Id.

[4] The record indicates that an injury to the claimant's thoracic/lumbar spine was accepted by the respondents.

The trier found that as of the 2023 hearing, the respondents had "not paid the claimant ANY indemnity benefits authorized in the Finding and Award of September 7, 2022," including benefits for the time period when job searches were waived by an executive order of the governor due to the pandemic. (Emphasis in the original.) Findings, ¶ 6. The trier further found that because neither party had filed a motion for articulation, a motion to correct, or an appeal of the 2022 award, the issues of medical treatment and indemnity benefits owed to the claimant were res judicata and the respondents were therefore collaterally estopped from relitigating those issues.[5] The trier stated that "[m]edical treatment must be authorized, and all indemnity related to the claim must be paid." Findings, ¶ 7.

The trier noted that informal hearings had been held on November 1, 2022, and December 19, 2022, and an emergency pre-formal hearing had been held on January 4, 2023; however, none of those hearings resulted in a resolution of the outstanding issues pertaining to the enforcement of the 2022 award.[6] At the 2023

[5] "Claim preclusion (res judicata) and issue preclusion (collateral estoppel) have been described as related ideas on a continuum.... The judicial doctrines of res judicata and collateral estoppel are based on the public policy that a party should not be able to relitigate a matter which it already has had an opportunity to litigate.... 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.... Issue preclusion arises when an issue is actually litigated and determined by a valid and final judgment, and that determination is essential to the judgment." (Citations omitted; internal quotation marks omitted.) Massey v. Branford, 119 Conn. App. 453, 464–65, *cert. denied*, 295 Conn. 921 (2010).

[6] Although the administrative law judge took administrative notice of the judge's notes for these hearings, their submission into the record was for the sole purpose of documenting the specific issues which had been noticed. See Administrative Notice Exhibits 4-6; see also January 31, 2023 Transcript, p. 42. The evidentiary record does not provide an explanation as to why these hearings proved to be unproductive.

hearing, counsel for the claimant submitted into evidence an affidavit indicating that subsequent to the issuance of the 2022 award, he was required to draft email correspondence to respondents' counsel, communicate with the claimant's treating physician on three separate occasions, and attend the three additional hearings. The affidavit indicated that counsel had "expended approximately fifteen (15) hours attempting to enforce the [2022 award]." Findings, ¶ 9, *citing* Claimant's Exhibit A. Counsel further attested that his hourly billing rate was $400.

Although the respondents presented evidence that indemnity benefits had been paid to the claimant for the thoracic/lumbar spine injury, no evidence was presented that the respondents had made any indemnity payments for the injury to the claimant's cervical spine. The claimant submitted into evidence several items of correspondence addressed to respondents' counsel setting forth the time periods for which the claimant was seeking indemnity benefits. The trier noted that "[t]he only response respondents' counsel provided was that 'the adjuster was out on an unexpected medical leave.'" Findings, ¶ 12, *citing* Claimant's Exhibit A.

The administrative law judge found that the respondents' failure to pay any indemnity benefits in accordance with the 2022 award constituted undue delay pursuant to § 31-300 and the claimant was therefore entitled to interest at the annual rate of 12 percent on the original award and an attorney's fee. The trier further found that the failure to pay indemnity benefits constituted a "willful failure to conform with the Workers' Compensation Act for which the respondent is liable to pay penalties to the claimant pursuant to [§ 31-288 (b)]." Findings, ¶ 14.

On the basis of the foregoing, the administrative law judge concluded that the claimant was entitled to temporary partial disability (light-duty) benefits pursuant to General Statutes § 31-308 (a)[7] commencing on August 7, 2019, and continuing until the claimant became eligible for temporary total disability benefits in association with the surgery for the compensable injury to his cervical spine. The trier stated that the payments for temporary total disability "will not cease until a valid Form 36 is approved" and payments for light-duty benefits would resume thereafter, which payments would continue until such time as a form 36 was approved. (Emphasis in the original.) Conclusion, ¶ C. The trier determined that all light-duty benefits paid retroactive to August 7, 2019, should include statutory interest at the annual rate of 12 percent.

The trier also concluded that the permanent partial disability (PPD) benefits previously paid to the claimant for his thoracic/lumbar spine injury should be reclassified as light-duty benefits given that the claimant had not reached maximum medical improvement for all the injuries sustained on May 2, 2019.[8] The trier determined that, pursuant to § 31-300, claimant's counsel was entitled to an attorney's fee in the amount of $10,400, representing fifteen hours of work at the hourly rate of $400, "plus the additional 11 hours of work required to prepare for and undertake the formal hearing."

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[7] General Statutes § 31-308 (a) states in relevant part: "If any injury for which compensation is provided under the provisions of this chapter results in partial incapacity, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of the difference between the wages currently earned by an employee in a position comparable to the position held by the injured employee before his injury … and the amount he is able to earn after the injury … except that when (1) the physician, physician assistant or advanced practice registered nurse attending an injured employee certifies that the employee is unable to perform his usual work but is able to perform other work, (2) the employee is ready and willing to perform other work in the same locality and (3) no other work is available, the employee shall be paid his full weekly compensation subject to the provisions of this section. Compensation paid under this subsection … shall continue during the period of partial incapacity, but no longer than five hundred twenty weeks…."

[8] See Rayhall v. Akim Co., 263 Conn. 328 (2003), wherein our Supreme Court held that "an employee sustaining an injury to more than one body part may delay permanency benefits [pursuant to General Statutes § 31-308 (b)] until all injured members achieve maximum medical improvement." Id., 332.

Conclusion, ¶ E. The trier ordered the respondents to pay the attorney's fee within fourteen days of the issuance of the finding. Finally, the trier concluded that the respondents were subject to penalties pursuant to § 31-288 (b) "for unduly and willfully violating the Finding and Award of September 7, 2022." Conclusion, ¶ F. The trier ordered the respondents to make payments of $500 per day commencing on September 22, 2022, the date of the approval of the cervical surgery, and continuing until the date the claimant received the light-duty benefits.

The respondents filed a timely motion to correct which was denied in its entirety. On August 24, 2023, the respondents filed with this board a motion to submit additional evidence requesting "certification of the underlying record to the decision of July 19, 2023 and the decision of September 7, 2022, including all evidence submitted in the hearings that formed the basis of the September 7, 2022 decision." The motion was granted on August 31, 2023, and this appeal followed. On appeal, the respondents contend that the administrative law judge erroneously:

(1) admitted into the record transcripts for the formal hearings associated with the 2022 award without allowing into evidence or taking administrative notice of the documentary evidence also submitted into evidence at those hearings;[9]

(2) ordered penalties and fines in her 2023 decision without having delineated the payments for which the respondents were liable pursuant to the 2022 award;

(3) awarded continuing benefits for a time period subsequent to the 2023 decision; and

(4) denied the respondents' motion to correct in its entirety.

[9] The admitted transcripts were from formal proceedings held on September 14, 2021, October 20, 2021, and November 30, 2021. See Administrative Notice Exhibits 10-12.

We begin our analysis of this matter with a recitation of the well-settled standard for appellate review we are obliged to apply to a trier's findings and legal conclusions. A trier's "factual findings and conclusions must stand unless they are without evidence, contrary to law or based on unreasonable or impermissible factual inferences." Russo v. Hartford, 4769 CRB-1-04-1 (December 15, 2004), *citing* Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Moreover, "[a]s with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial court could have reasonably concluded as it did." Burton v. Mottolese, 267 Conn. 1, 54 (2003), *quoting* Thalheim v. Greenwich, 256 Conn. 628, 656 (2001). "This presumption, however, can be challenged 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 turn to the respondents' first claim of error concerning the administrative law judge's refusal to admit into the record, or take administrative notice of, the documentary evidence associated with the proceedings which led to the 2022 award. The respondents contend that this denial "resulted in an incomplete review of the evidence herein, as evidenced by the additional evidence before this tribunal by virtue of the granting of the motion to submit additional evidence …." Appellants' Brief, p. 11. The trier's "conclusory statements" regarding the claimant's entitlement to light-duty benefits therefore lacked a foundation, as did the order for sanctions stemming from the respondents' failure to pay these benefits. Id., 12.

In reviewing this claim of error, we note at the outset that our statutory framework affords an administrative law judge a considerable degree of discretion regarding the submission of evidence.

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

General Statutes § 31-298.

It is also axiomatic that the trier is the "sole arbiter of the weight of the evidence and the credibility of witnesses in workers' compensation cases …." Keenan v. Union Camp Corp., 49 Conn. App. 280, 286 (1998). As such, the administrative law judge in the present matter trier certainly retained the authority to allow the documentary evidence pertaining to the formal proceedings associated with the 2022 award into the record at the 2023 hearing and accord that evidence whatever weight she deemed appropriate.

However, as the trier indicated at the commencement of the 2023 proceedings, the only issues noticed for that hearing were for interest and attorney's fees pursuant to § 31-300 and penalties pursuant to § 31-288. See January 31, 2023 Transcript, p. 4. In refusing to admit or take administrative notice of the prior exhibits, the trier stated that she was "happy to take notice of all of the records as they address the issues that are noticed for today's hearing." Id., 44. When respondents' counsel again queried whether the trier intended to take administrative notice of the prior exhibits, the trier replied, "No. Actually, I think I'm not going to. I don't think I need to. We have the decision, and I

don't think – I've already looked at those and made my decision based on those, and we're here today." Id.

At the 2023 proceedings, counsel for the respondents made an opening statement in which she asserted that the 2022 award "[lacked] specificity as to what was being claimed" and contained no findings relative to light-duty benefits. Id., 15. Counsel also stated that "we wouldn't be here if the award was clear, it would have been resolved and paid already, but the fact of the matter is it does not spell out –" Id., 27. When queried by the trier as to why no motion to correct or motion for articulation was filed against the 2022 award, counsel replied that it was not "my job to request that clarification, it's the claimant's attorney's job to request the clarification." Id., 28.

The trier remarked that she believed it was customary for litigants to "sit down and work out those time periods. It is not up to the administrative law judge to sit down and map out specific time periods." Id. Respondents' counsel disagreed, stating that "there [was] no way for us to tell from that order what [was] being claimed, and [claimant's counsel] has expanded what was claimed to a period that the claimant and his own office assistant advised they were not claiming, and he in a letter advised they were not claiming." Id. Respondents' counsel also asserted that although "[s]ome period may be due," id., it was necessary for the trier "to articulate what period is due," id., as the respondents did not have job searches or sufficient medical evidence for the time period(s) claimed.

When queried by the trier as to why the 2022 award was never appealed, respondents' counsel replied, "I don't know why [claimant's counsel] didn't appeal, Your Honor. It would not be my job to appeal an award that was unclear. I'm not looking for

the benefits." Id., 29. At that juncture, the trier inquired: "the precedent that you're asking for is any time a respondent isn't clear they do not need to pay indemnity benefits unless or until a judge specifically spells out the time period that indemnity awards are due and owed?" Id. The trier then continued: "So, that is what you're asking for today; that the new precedent should be a respondent does not need to pay any indemnity benefits, not any advance, not any award, not anything unless it is specifically mapped out for them?"[10] Id., 29-30.

It is evident from the foregoing exchange that the administrative law judge and respondents' counsel were debating at cross purposes. It may be reasonably inferred that the respondents' sought the introduction of the prior evidentiary exhibits into the record for the purposes of calculating the time period(s) for which light-duty benefits were due. However, as the trier stated in her 2023 decision, she had deemed the issues of compensability and eligibility for light-duty benefits res judicata and concluded the respondents were collaterally estopped from relitigating those issues. See Findings, ¶ 7.

As such, it may also be reasonably inferred that the trier's refusal to take administrative notice of the evidentiary submissions from the prior proceedings reflected her belief that the respondents were not entitled to "a second bite of the apple." Klass v. Liberty Mutual Ins. Co., 341 Conn. 735, 741 (2022). In light of the respondents' failure to advance any payments to the claimant during the time period between the issuance of the 2022 award and the commencement of the 2023 hearing, the reluctance of the trier to

[10] Respondents' counsel replied to these inquiries as follows: "Are you saying if you were to clear that up today I would have an opportunity to object? I would. I mean, payment would have to be made pending an appeal, but I would [have] the right to appeal it, yes." January 31, 2023 Transcript, p. 30.

admit the prior exhibits into the record for proceedings specifically limited to attorney's fees, interest, and penalties is not without foundation.

It is well-settled in our forum that a finding of compensability in a contested claim imposes upon the respondent liability for the payment of any benefits due and owing to the clamant which may have gone unpaid while compensability was the subject of litigation. This board has previously observed that a "claimant's potential entitlement to disability benefits represents yet another logical corollary to a finding of compensability/causation." Nordby v. Watertown, 6445 CRB-5-21-9 (September 2, 2022). We agree with the administrative law judge that, once compensability has been established either by way of an agreement or an award, it is incumbent upon the parties to review the file with an eye towards identifying the amounts, types, and time periods for any benefits due the claimant. Moreover, it is our belief that in the vast majority of cases, this is exactly the process that occurs. For reasons which are not entirely clear, that process appears to have broken down in this case.

Regrettable as that may be, we are not persuaded that the breakdown of customary negotiations afforded the respondents the right to appear at another formal hearing four months after a compensability determination had been rendered and assert that the reason they had failed to issue any benefit payments in the interim was because the initial order, which they had not appealed and for which they had not filed a motion to correct or a motion for articulation, was vague and unenforceable. Moreover, the breakdown of the negotiations as to the exact amount of benefits due did not afford the respondents the opportunity to question, some four months after the fact, the sufficiency of the

evidentiary record upon which the unchallenged decision regarding compensability and eligibility for benefits had been based.[11]

Nevertheless, as of the date of oral argument before this tribunal held on December 15, 2023, the time frame(s) during which the claimant was eligible to collect light-duty benefits remained unresolved. In his proposed findings submitted on February 24, 2022, claimant requested that light-duty benefits be paid commencing on May 5, 2019, three days after the date of injury, and continuing "through the date of this decision and going forward." Administrative Notice Exhibit 2, Proposed Order, ¶ a. As previously noted herein, the evidentiary record for the 2023 hearing contains an affidavit from claimant's counsel to which was attached a copy of his October 6, 2022 correspondence to respondents' counsel seeking light-duty benefits commencing August 1, 2019, and continuing until the date of the claimant's cervical surgery, with a credit for the indemnity payments made during the time period between June 28, 2019, and October 29, 2019.[12] See Claimant's Exhibit A.

In this correspondence, counsel also noted that payment of PPD benefits for the claimant's thoracic/lumbar spine injury had commenced on July 19, 2021, and he indicated that those payments should be reclassified as temporary partial disability benefits given that the claimant had not yet attained maximum medical improvement for all injuries sustained on May 2, 2019.[13] Accordingly, counsel requested payment of

[11] We also note that the appellants' brief to this board devoted a considerable portion of its narrative to the issue of the compensability of the cervical spine injury.

[12] A payment print-out provided by the respondents indicates that the claimant was issued checks for temporary total disability benefits on May 28, 2019, May 29, 2019, June 5, 2019, June 12, 2019, June 19, 2019, June 26, 2019, and July 3, 2019. See Respondents' Exhibit 1. The claimant was also issued a check for temporary partial benefits on September 20, 2019. See id.

[13] The payment print-out provided by the respondents indicates that payments for PPD benefits pursuant to a voluntary agreement documenting a disability rating of 18 percent to the claimant's "spine," commenced on September 13, 2021 (retroactive to July 19, 2021) and were paid until May 11, 2022. Administrative

light-duty benefits for the period of August 1, 2019, through July 19, 2021. In subsequent email correspondence sent to the respondents on November 1, 2022, claimant's counsel sought light-duty benefits commencing on August 6, 2019, and continuing through June 10, 2021. At that time, he requested a lump-sum payment of those benefits for at least "a minimum of 52 weeks." Claimant's Exhibit A.

As previously referenced herein, eligibility for light-duty benefits pursuant to § 31-308 (a) requires inter alia a credible medical opinion attesting to partial incapacity which prevents the claimant's return to his/her previous employment. In examining the medical evidence proffered in support of the claim for light-duty benefits in the present matter, we note that in his report of August 1, 2019, Hanbing Zhou, the claimant's treating orthopedist, stated that the claimant "has underlying severe cervical stenosis at C5-6, as well as C6-7 and, in my medical opinion, the patient's work-related injury on May 2, 2019 is contributing to his current left hand numbness and tingling, as well as weakness." Claimant's Exhibit B [2022 award]. This statement represented an unambiguous opinion as to compensability. However, after recommending that the claimant undergo an EMG of his bilateral upper extremities, Zhou also released the claimant to "full duty without restrictions."[14] Id.

The claimant again saw Zhou on November 26, 2019, and February 12, 2020; in the reports for these encounters, Zhou addressed the claimant's continuing symptomatology but did not comment on his work status. However, in his report of

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Notice Exhibit 4; see also Respondents' Exhibit 1. In her findings, the administrative law judge noted that a delay had occurred during the payment of those benefits, see Findings, ¶ 11; the print-out reflects that the PPD payments lapsed between December 2, 2021, and April 6, 2022. See Respondents' Exhibit 1.

[14] The trier took administrative notice of the commission note approving the October 29, 2019 form 36 releasing the claimant to full duty as of August 2, 2019. This document contains a notation by the presiding administrative law judge indicating that the form 36 had been "approved by agreement of the parties as of 10/29/19." Administrative Notice Exhibit 3 [2022 award].

February 12, 2020, Zhou opined that the claimant was "a candidate for a 2-level anterior cervical diskectomy and fusion." Id. In his office note of March 24, 2020, Zhou stated that the claimant "will have the same duty restriction." Id.

In correspondence to claimant's counsel dated May 4, 2020, Zhou reiterated his opinion that the claimant's work-related injury was a substantial contributing factor to his cervical symptoms; he also opined that "[g]iven his weakness in the left hand, I do not think patient is capable of performing full duty as a carpenter going forward. Patient can be light duty with no lifting more than 25 pounds." Id. Zhou reiterated his "request [for] a repeat MRI of the cervical spine for preoperative evaluation purposes." Id. In his report of May 15, 2020, Zhou indicated that the claimant "can continue light-duty with no lifting more than 25 pounds." Id. On May 28, 2020, Zhou stated that "I … again formally recommend him to undergo surgical intervention to prevent any further neurological damage that may be permanent." Id. On July 8, 2020, Zhou indicated that he had "recommended [the claimant] to be light duty with no lifting more than 5 pounds going forward and patient unfortunately needs to have surgery at this point." Id.

The medical reports in evidence would seem to suggest that the claimant's work status underwent a change at some point between his full-duty release on August 1, 2019, and his office visit with Zhou on March 24, 2020.[15] Unfortunately, none of the reports serve to establish the definitive date on which the apparent transition from a full-duty to a light-duty work capacity occurred.

The appropriate date for the cessation of the light-duty benefits is similarly problematic. It may be reasonably inferred from the tenor of Zhou's correspondence

[15] We acknowledge the claimant's argument that he had not attained actual full-duty status as of August 1, 2019, due to his ongoing cervical symptoms.

dated May 28, 2020, and July 8, 2020, that he anticipated the claimant's incapacity would continue until the date of his surgery, which did not occur until May 26, 2023. See Appellant's Brief, p. 13. However, although Zhou's opinion satisfies the medical requirement for eligibility for light-duty benefits, eligibility also requires that a claimant "is ready and willing to perform other work in the same locality" and a showing that "no other work is available." General Statutes § 31-308 (a).

Historically, a claimant's readiness to work has been demonstrated via the completion of a form entitled "Weekly Record of Employment Contacts" (job searches). This board has previously observed that:

> [N]either the statute nor any administrative regulation requires a work search. The work search practice … was borrowed from the procedure employed in administering unemployment compensation law…. Our own § 31-308 (a) never specifically included the requirement of reasonable efforts to find work as did the unemployment law. However, the work search procedure was informally accepted as an evidentiary basis to demonstrate a willingness to work, and when no work was found, a further basis to demonstrate the unavailability of such work. However, there are other evidentiary means by which those requirements may be demonstrated.

Goncalves v. Cornwall & Patterson, 10 Conn. Workers' Comp. Rev. Op. 43, 45, 1111 CRD-4-90-9 (January 28, 1992).

Our case law has established that "[w]hether a claimant has satisfied [the statutory criteria for § 31-308 (a) benefits] is a factual determination to be made by the trial commissioner." Wright v. Institute of Professional Practice, 13 Conn. Workers' Comp. Rev. Op. 262, 264, 1790 CRB-3-93-8 (April 18, 1995). It is also well-settled that an administrative law judge retains the discretion to waive job searches; "the specific circumstances of each case govern whether it was reasonable for a claimant to perform job searches, and the vigor and thoroughness of such job searches is an issue to be

considered by the trial commissioner." Jamieson v. State/Military Department, 5888 CRB-1-13-9 (August 15, 2014).

The evidentiary record in the present matter contains job searches reflecting regular weekly inquiries commencing on September 2, 2019, and continuing through February 28, 2020. See Claimant's Exhibit F [2022 award]. These dates dovetail with the timing of the directive contained in Governor Ned Lamont's March 20, 2020 Executive Order No. 7K, § 2, entitled "Suspension of Non-Critical Workers' Compensation Commission Operations and Associated Requirements." This executive order prompted the issuance of commission Memorandum 2020-02 wherein the chairperson announced a waiver of job searches commencing March 16, 2020, and continuing "until further notice."

On May 20, 2021, Governor Ned Lamont issued Executive Order No. 12B extending Executive Order No. 7K, Section 2, until June 1, 2021. On that same date, the chairperson issued commission Memorandum 2021-04 entitled "Guidance on Extension of Section 2 of Executive Order 7K through June 1, 2021" extending the job search waiver until June 2, 2021, at which time the commissioners could once again require job searches "at their discretion."[16] The chairperson also stated that "[n]o benefits shall be terminated for lack of job searches on any temporary partial and/or C.G.S. 31-308a benefits already being paid as of June 2, 2021." As such, the job search requirement was essentially waived for the time period between March 16, 2020, and June 2, 2021.

[16] 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.

The June 10, 2021 benefits cessation date referenced in claimant's counsel's correspondence of November 1, 2022, is consistent with the June 2, 2021 reinstatement of the job search requirement. In addition, at formal proceedings held on September 14, 2021, the claimant testified that he had not gone back to work since the date of injury and had not applied for unemployment insurance because he did not feel he was ready to return to work. See Administrative Notice Exhibit 10, pp. 49, 57. At formal proceedings held on October 20, 2021, he testified that he had looked for work in the "late summer of 2019 going forward," Administrative Notice Exhibit 11, p. 25, but stopped looking for work "right about when the pandemic started." Id., 28. He also testified that since he stopped looking for work, he had been taking care of his mother. See Administrative Notice Exhibit 11, p. 30; see also Respondents' Exhibit 6 [2022 award], pp. 60-63.

At the formal hearing held on November 30, 2021, the claimant testified that he had stopped filling out job searches in March 2020 and had not done any job searches since the formal hearing held on October 20, 2021. See Administrative Notice Exhibit 12, p. 24. Ultimately, in her 2022 award, the administrative law judge found that the claimant had looked for work within his limitations during the fall of 2019 and winter of 2020 but had been unable to secure employment and "recently has been caring for his elderly mother and has not sought work." September 7, 2022 Finding and Award, Findings, ¶ 27.

The foregoing suggests that the parameters for determining the time periods during which the claimant was eligible for light-duty benefits were far from straightforward. The appropriate commencement date for the receipt of light-duty

benefits is unclear given that the medical reports provide little guidance regarding the operative date on which the claimant's work capacity transitioned from full duty to light duty. Moreover, although the requested June 2021 cessation date for the claimed light-duty benefits is consistent with Zhou's opinion regarding the claimant's ongoing symptomatology and with the commission memorandums relative to the job search requirement predicated on the governor's executive orders, the claimant testified that he stopped looking for employment when the pandemic began in March 2020.

In light of the litigants' inability to reach an agreement as to the time period(s) for which the claimant was entitled to light-duty benefits following the issuance of the 2022 award, we believe it fell to the administrative law judge to render a determination as to these time frame(s) when the parties again appeared before her at the 2023 hearing. In her 2023 decision, the trier found that the correspondence contained in Claimant's Exhibit A constituted "an outline for the respondent of the time periods the claimant was seeking indemnity benefits. The emails cited the timeframes being requested, and the dollar amount owed." Findings, ¶ 12. The trier concluded that the claimant was "entitled to be paid temporary partial compensation benefits at the base compensation rate retroactive to August 7, 2019, to the present and until such time as the claimant becomes eligible for temporary total benefits related to his compensable cervical surgery." Conclusion, ¶ C.

In light of this conclusion, it is possible to infer that the administrative law judge deemed the claimant eligible for benefits during this period as a result of: (1) his ongoing cervical symptomatology as documented by Zhou; (2) the job search suspension resulting from the governor's executive orders; and (3) the disruptive effect of the pandemic on the

employment landscape generally. However, the 2023 decision is devoid of any explicit findings in this regard apart from the reference to the correspondence contained in the affidavit submitted by claimant's counsel. As such, while we are able to identify a factual basis for the trier's conclusion that the claimant was entitled to light-duty benefits for a cervical spine injury as a result of the injury which occurred on May 2, 2019, we are compelled to remand this matter for additional subordinate findings in order to identify the appropriate time period(s) along with the evidentiary and/or discretionary bases for the award.[17] Moreover, to the extent that the identification of the time period(s) during which the claimant was eligible for light-duty benefits required some degree of reliance on the underlying documentation submitted in association with the formal proceedings held on September 14, 2021, October 20, 2021, and November 30, 2021, we find the trier's decision to neither admit nor take administrative notice of those exhibits into the record constituted error.

The respondents also contend that the administrative law judge "incorrectly made an award of benefits into the future." Appellants' Brief, p. 12. Our review of the 2023 finding indicates that the trier ordered ongoing light-duty benefits until the claimant became eligible for temporary total disability benefits as a result of his anticipated cervical surgery. The trier also stated that temporary total disability benefits "will not cease until a valid Form 36 is approved." (Emphasis in the original.) Order, ¶ I. This statement merely acknowledges that General Statutes § 31-296 (b)[18] prohibits the

[17] It is anticipated that these calculations will incorporate the various benefit payments that were issued by the respondents during the time period between May 28, 2019, and May 11, 2022.

[18] General Statutes § 31-296 (b) states in relevant part: "Before discontinuing or reducing payment on account of total or partial incapacity under any such agreement, the employer or the employer's insurer, if it is claimed by or on behalf of the injured employee that such employee's incapacity still continues, shall notify the administrative law judge and the employee, in accordance with section 31-321, of the proposed discontinuance or reduction of such payments…. No discontinuance or reduction shall become effective

cessation of payments for total or partial incapacity without prior authorization from an administrative law judge.

However, the trier also stated that "[t]hereafter, temporary partial benefits will resume until such time as a valid Form 36 is approved." Id. Although the respondents did not provide any specific examples illustrating this claim of error, it may be reasonably inferred that they were referring to this sentence. It is quite clear that, as of the date of the 2023 hearing, all parties were well aware that the claimant had not yet established a post-surgical entitlement to temporary partial disability benefits. We are therefore compelled to strike this portion of the order given that it traveled well beyond the limits of the evidentiary record.

In their third claim of error, the respondents argue that the trier erroneously awarded penalties and fines in the absence of a clear delineation of the respondents' liabilities pursuant to the 2022 decision. The respondents contend that "[w]ithout reliable findings upon which to base the award, a finding of penalties naturally cannot follow, and is without backing or evidentiary findings." Appellants' Brief, p. 12. The respondents further assert that the trier "erred in adding specific findings of dates of eligibility [for] temporary partial disability benefits not made in the original decision of September 7, 2022 … so as to justify a penalty of interest against said benefits." Id., 15. As a result, the trier erroneously: (1) awarded interest on the light-duty benefits;

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unless specifically approved in writing by the administrative law judge…. In any case where the administrative law judge finds that an employer has discontinued or reduced any payments made in accordance with this section without the approval of the administrative law judge, such employer shall be required to pay to the employee the total amount of all payments so discontinued or the total amount by which such payments were reduced, as the case may be, and shall be required to pay interest to the employee, at a rate of one and one-quarter per cent per month or portion of a month, on any payments so discontinued or on the total amount by which such payments were reduced, as the case may be, plus reasonable attorney's fees incurred by the employee in relation to such discontinuance or reduction."

(2) awarded an attorney's fee to claimant's counsel "where no unreasonable contest has been made, and where the hearing on said issue was necessitated by failure of the underlying decision to adequately identify payments to be made," id., 15-16; and (3) "[ordered] penalties in excess of those permitted by statute or justified by the underlying findings." Id., 16.

As noted previously herein, in her 2023 decision, the administrative law judge found that the respondents' failure to pay indemnity benefits following the issuance of the 2022 award constituted "undue delay" as contemplated by the provisions of both §§ 31-288 (b) and 31-300. As a result, pursuant to § 31-300, the trier ordered that the respondents pay the claimant interest on the unpaid light-duty benefits at the annual rate of 12 percent. She also ordered the respondents to pay claimant's counsel an attorney's fee in the amount of $10,400 predicated in part on the fee affidavit submitted into evidence. In addition, the trier, having determined that the respondents had "unduly and willfully [violated] the Finding and Award of September 7, 2022," Conclusion, ¶ F, ordered the respondents to pay to the claimant a penalty pursuant to § 31-288 (b) in the amount of $500 per day commencing on September 22, 2022, the date of the authorization for the cervical surgery, and continuing until such time as the light-duty benefits were received by the claimant.

This board has previously observed that the provisions of § 31-300 allow for the imposition of interest and a reasonable attorney's fee in situations "[w]here adjustments or payments of compensation have been unduly delayed due to the fault or neglect of the employer or insurer …." Abrahamson v. State/Department of Public Works, 5054 CRB-2-06-1 (January 9, 2007). Moreover, "[w]e have repeatedly held that whether to

award attorney's fees and interest for [undue] delay and unreasonable contest pursuant to § 31-300 is a discretionary decision to be made by the trial commissioner." Regan v. Torrington, 4456 CRB-5-01-11 (October 25, 2002), *appeal withdrawn*, A.C. 23628 (September 11, 2003), *quoting* Sharkey v. Stamford, 4068 CRB-7-99-6 (November 17, 2000). See also McMullen v. Haynes Construction Co., 3657 CRB-5-97-7 (November 12, 1998). "Our scope of review of such determinations is therefore sharply constrained, limited as it is to whether the trial commissioner's decision constituted an abuse of discretion, which 'exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided based on improper or irrelevant factors.'" Lamothe v. Citibank, N.A., 5550 CRB-8-10-5 (October 12, 2011), *quoting* In re Shaquanna M., 61 Conn. App. 592, 603 (2001).

In the present matter, the record reflects that the respondents appeared at formal proceedings more than four months after issuance of the 2022 compensability finding without having made any interim payments of the benefits contemplated by that decision. It is readily apparent that this course of events constituted the "factual predicate" for the trier's decision to levy interest and attorney's fees pursuant to § 31-300. McFarland v. Dept. of Developmental Services, 115 Conn. App. 306, 323, *cert. denied*, 293 Conn. 919 (2009). It is undisputed that "administrative hearings must be conducted in a fundamentally fair manner so as not to violate the rules of due process.... A fundamental principle of due process is that each party has the right to receive notice of a hearing, and the opportunity to be heard at a meaningful time and in a meaningful manner." (Citations omitted.) Flamenco v. Independent Refuse Service, Inc., 130 Conn. App. 280, 283 (2011), *quoting* Bryan v. Sheraton–Hartford Hotel, 62 Conn. App. 733, 740 (2001).

However, given that sanctions were specifically noticed for the 2023 hearing, the respondents cannot claim to have been "ambushed" by the trier's decision to award interest on the unpaid benefits ordered in a prior decision which was never appealed and for which neither a motion to correct nor a motion for articulation was ever filed.

Having reviewed the circumstances of this matter, we are not persuaded that the trier's award of interest on the unpaid light-duty benefits constituted an abuse of discretion such that a reversal is warranted. However, in light of our remand of this matter for additional findings on the issue of the time period(s) for which light-duty benefits are due and owing, we also remand for concomitant clarification relative to the specific time period(s) for which the respondents are responsible for the payment of interest.[19]

With regard to the attorney's fee assessed in this matter, we note at the outset that in Imbrogno v. Stamford Hospital, 28 Conn. App. 113, *cert. denied*, 223 Conn. 920 (1992), our Appellate Court held that:

> Because the commissioner found that there was a delay due to the fault or neglect of the defendants that warranted a discretionary award of attorney's fees, an award of interest should also have been made. We read the words of § 31–300, "may include in his award interest ... and a reasonable attorney's fee," to allow a discretionary award of both interest and attorney's fees or neither, but not to allow an award of one and not the other.

Id., 125.

The court's interpretation of § 31-300 indicates that when a fact-finder determines that an undue delay in the payment of compensation has occurred which warrants an interest assessment, the trier is likewise compelled to issue an award for a reasonable

[19] This calculation will obviously exclude the time periods during which the respondents were paying benefits.

attorney's fee. Our statutory framework provides that "[a]ll fees of attorneys, physicians, podiatrists or other persons for services under this chapter shall be subject to the approval of the administrative law judge." General Statutes § 31-327 (b). This board has previously observed that:

> The reasonableness of an attorney's fee depends on many factors, including the preparation required, the novelty and intricacy of the case, the results obtained, and the customary cost of similar services in the area…. Though the trier has relatively broad discretion to set the actual amount of an attorney's fee, a party may still appeal such an award, and attempt to show that this discretion was abused…. This requires that the trier's decision be detailed enough to enable this board to ascertain the method of calculation that he used in setting counsel's fee, particularly where the fee differs significantly from the fee regulations that this commission has promulgated. This requirement applies even in cases of unreasonable contest, where we have held that a commissioner may award more than the guidelines normally contemplate. (Internal citations omitted.)

Cirrito v. Resource Group Ltd. of Conn., 4248 CRB-1-00-6 (June 19, 2001).

As previously discussed herein, the record in the present matter contains an affidavit provided by claimant's counsel attesting to the performance of fifteen hours of work in attempting to secure the light-duty benefits for his client following the issuance of the 2022 award. The respondents do not appear to be challenging the amount of the attorney's fee awarded but, rather, the fact that a fee was awarded at all given that the claimant's appearance at the 2023 proceedings was "necessitated by [the] failure of the underlying decision to adequately identify payments to be made." Appellants' Brief, p. 16. In light of the fact that we were not persuaded by this argument relative to the imposition of interest on the unpaid light-duty benefits, we are likewise not persuaded that the award of an attorney's fee constituted an abuse of discretion, particularly as the

provisions of § 31-300 mandate that an attorney's fee must also be awarded when interest is assessed.

Moreover, our review of the record indicates that when the affidavit was admitted into evidence, respondents objected solely on the grounds that no contemporaneous time sheets were attached. See January 31, 2023 Transcript, pp. 13-14. The trier overruled this objection on the basis of the representation made by the claimant's attorney that he is generally employed on a contingency basis and therefore does not maintain contemporaneous time sheets. The respondents did not request that they be permitted to cross-examine claimant's counsel as to the contents of his affidavit. As such, the trier's reliance on the contents of the affidavit does not implicate the "fundamental fairness" concerns addressed in Cirrito, supra, wherein the trier denied respondents' counsel's request to canvas claimant's counsel regarding his fee petition. We therefore affirm the award of a $6,000 attorney's fee predicated on claimant's counsel's affidavit.

However, in the 2023 finding, the trier also awarded attorney's fees for eleven hours of "work required to prepare for and undertake the formal hearing." Conclusion, ¶ E. Given that we are unable to discern the evidentiary basis for the augmented attorney's fee, we are compelled to remand this portion of the award back to the trier for additional findings and/or proceedings. It is envisioned that, should additional proceedings be necessary, the respondents will be afforded the opportunity to cross-examine claimant's counsel on the augmented fee should they desire to do so, in accordance with this board's analysis in Cirrito, supra.[20]

[20] We note that the trier also ordered that this fee be paid within fourteen days of the issuance of the July 19, 2023 finding. According to claimant's counsel, the attorney's fee had not been paid as of the date of oral argument before this tribunal held on December 15, 2023. See Transcript, p. 12.

The respondents also contend that the trier's order of "penalties in excess of those permitted by statute" constituted error. Appellant's Brief, p. 16. In her 2023 finding, the administrative law judge ordered the respondents "to pay to the Claimant $500.00 per day for each day from the approval of the surgery on September 22, 2022, until the day that the indemnity benefits are received by the claimant for unduly and willfully violating the Finding and Award of September 7, 2022." Order, ¶ III. The administrative law judge ostensibly awarded this penalty in accordance with § 31-288 (b) (1), which states inter alia:

> Whenever through the fault or neglect of an employer or insurer, the adjustment or payment of compensation due under this chapter is unduly delayed, such employer or insurer may be assessed by the administrative law judge hearing the claim a civil penalty of not more than one thousand dollars for each case of delay, to be paid to the claimant.

General Statutes § 31-288 (b) (1).

As is the case with penalties awarded pursuant to § 31-300, fines awarded in accordance with § 31-288 (b) (1) are highly discretionary and subject to reversal solely on the basis that an abuse of discretion has occurred. Nevertheless, while we recognize, and perhaps even sympathize with, the trier's frustration in this matter, we are not persuaded that the legislature intended the phrase "each case of delay" to translate into an open-ended fine that accumulates on a per diem basis. As such, although we do not find that the trier's decision to impose a penalty pursuant to § 31-288 (b) (1) constituted an abuse of discretion, the penalty levied by the trier "is in excess of the statutory limit … and must be reversed." Syphers v. Dedicated Logistic Services, 3711 CRB-1-97-10 (November 16, 1998). We therefore reverse and remand this issue to the administrative

law judge "to determine the amount to be levied in accordance with the statutory limits of § 31-288 (b)." Id.

Finally, the respondents have claimed as error the trier's denial of their motion to correct.[21] Insofar as the trier's denial of the proposed corrections was inconsistent with the board's analysis presented herein, we find the denial constituted error. However, we find no error in the trier's denial of the balance of the proposed corrections which merely reiterated the arguments made at trial that ultimately proved unavailing. See D'Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003).

Having examined the evidentiary record in this matter in its entirety, we acknowledge that the 2022 award lacked precision. This tribunal has previously remarked that "[w]ithout any findings regarding the amount of compensation due or the length of disability, the trier's order to pay temporary total and partial disability benefits can have little effect." Vargas v. King-Conn Enterprises d/b/a Burger King Corporation, 3333 CRB-4-96-4 (October 24, 1997). Had the decision been subject to review by this tribunal, it is quite likely that such considerations would have factored heavily into our analysis. However, no such appeal was ever taken.

At oral argument before this tribunal and, as previously noted herein, at the 2023 hearing, the respondents asserted that it was the claimant's responsibility to either seek clarification of the decision and/or appeal the award. See January 31, 2023 Transcript, pp. 28-29. While it certainly would have been within the claimant's power to do so, it is the respondents, not the claimant, who are prosecuting the instant appeal on the grounds that the 2022 award, for which no motion to correct or motion for articulation was filed,

[21] For some reason, the respondents' motion to correct was incorporated verbatim into both their reasons for appeal and their brief. We do not consider these documents interchangeable.

and which was never appealed, was so vague and unenforceable that they were justified in refusing to advance even a partial payment to the claimant. We find this position untenable, and sharply at odds with the "humanitarian and remedial purposes of the act …." Gartrell v. Dept. of Correction, 259 Conn. 29, 41-42 (2002), *quoting* Herman v. Sherwood Industries, Inc., 244 Conn. 502, 511 (1998).

There is error; the July 19, 2023 Finding and Award of Toni M. Fatone, Administrative Law Judge acting for the First District, is accordingly affirmed in part, reversed in part, and remanded for additional factual findings consistent with this Opinion.[22]

Administrative Law Judges Soline M. Oslena and Daniel E. Dilzer concur.

[22] On December 7, 2023, the claimant filed a motion for payment of benefits pending appeal. We declined to rule on this motion pending a full review of the merits of the appeal.