REVIEW OF CONNECTICUT WORKERS' COMPENSATION CASE LAW AT THE CRB, APPELLATE COURT, AND SUPREME COURT

2020-2021

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CASE LAW REVIEW

I. *MEDICAL TREATMENT*

Caye v. Thyssenkrupp Elevator, 6296 CRB-1-18-11 (Oct. 29, 2019)

The CRB affirmed the trial commissioner's Finding that the respondents were required to pay for medical marijuana for a claimant with serious back and leg injuries. Both the treating doctor and the respondents' examiner agreed that medical marijuana was appropriate. The sole issue in the case was whether the trial commissioner or CRB could order the respondents to pay for the marijuana. The respondents contended that federal law under the Controlled Substances Act, 21 U.S.C., Section 801 *et. seq.*, barred the sale or distribution of medical marijuana as a Schedule I drug. The respondents asserted that the U.S. Constitution Supremacy Clause, Article VI, Section 2, Clause 2, preempted state statutes where there was a conflict. The respondents claimed they might be subject to criminal prosecution including racketeering charges under the RICO statute if they were to aid the purchase of marijuana.

The CRB, in a split 2-1 decision, ordered the respondents to reimburse the claimant for the marijuana (but not pay the pharmacy for it). The majority felt the respondents did not face "material" risk of federal prosecution and that the chances of criminal charges were speculative. In reaching their conclusion the CRB cited the venerable case of Marbury v. Madison, 5 U. S. 137 (1803) (a case which is usually the first decision students read in law school), for the proposition that if a person has a right they must be provided a remedy to obtain that right. Commissioner Schoolcraft in a well-written dissent disagreed that prosecution is speculative against the respondents and concluded that the trial commissioner and CRB did not have the power to order what they did since it is in direct conflict with federal legislation.

You will recall that there was a prior medical marijuana case that had made its way to the Connecticut Supreme Court but it was settled before a decision was issued. *See* Petrini v. Marcus Dairy, Inc., 6021 CRB-7-15-7 (May 12, 2016), *appeal withdrawn*, SC 19973 (March 29, 2018). An interesting fact in the Caye case is that the workers' compensation carrier was willingly reimbursing the claimant for the medical marijuana and it only became an issue when the excess carrier coverage was reached and the excess carrier balked at payment for the marijuana. Also, the CRB's order that the respondents reimburse the claimant but not pay the pharmacy is completely inconsistent with the manner that normal workers' compensation claims are handled and bars the respondents from negotiating with the provider, thereby inflating the costs. An appeal was taken to the Connecticut Appellate Court but was withdrawn; *see* AC43616.

Prairie v. UTC/UTAS/Hamilton Sundstrand, 6303 CRB-1-19-1 (Nov. 21, 2019)

The claimant sustained compensable left shoulder and left elbow injuries as a result of a 2015 accident at work. In the course of treatment the claimant was referred by the treating doctor for a cervical MRI scan, EMG study and x-rays of the cervical spine to determine

whether his left upper extremity symptomatology was due to the accepted shoulder condition or unrelated neck condition. The claimant was also referred for physical therapy for the neck and underwent that treatment. At the Formal Hearing the issue was whether the diagnostic studies and the physical therapy should be paid for by the respondents. The trial commissioner concluded and the CRB affirmed that the respondents were responsible for the MRI, EMG and x-rays of the cervical spine since they "were reasonable and necessary diagnostic tests undertaken to rule out a recurrent rotator cuff tear." On the other hand, the trial commissioner and CRB found that the respondents were not liable for the physical therapy as there was no medical report establishing the neck condition as related to the compensable accident. The CRB disagreed with the claimant's contention that the physical therapy was diagnostic in nature as well.

II. ***TOTAL AND PARTIAL DISABILITY/OSTERLUND CLAIMS***

Lopez v. First Group America, Inc., 6305 CRB-3-19-1 (Dec. 11, 2019)

The claimant sustained a compensable left shoulder injury on August 7, 2016. The treating physician was Dr. Redler, an orthopedic surgeon. The claimant worked as a diesel technician performing oil changes and maintenance for the employer, a bus company. The claimant underwent surgery in March 2017. In June 2017, while on workers' compensation, the claimant was terminated by the employer. The claimant contended that he was under the impression that if he was given a full duty release to work the employer might hire him back. At a July 7, 2017 medical examination with Dr. Redler the claimant requested and was given a release to full duty by Dr. Redler. The respondents filed a Form 36 based on the full duty release and it was approved since it was uncontested. Following the full duty release, however, the claimant was not rehired by the employer. At a subsequent examination on September 29, 2017, Dr. Redler acknowledged that he released the claimant to full duty work on July 7, 2017, but that this was done "with the understanding that he would go back but have any kind of help he needed for overhead heavy lifting greater than 20 pounds." The claimant was placed at maximum medical improvement on September 29, 2017. The claimant sought temporary partial ("TP") benefits from July through September 2017.

The trial commissioner and CRB awarded TP benefits, notwithstanding the full duty release to work in July 2017 and the approved and initially uncontested Form 36. The trial commissioner found Dr. Redler credible and noted that he "provided a detailed explanation of his understanding and experience with employers who were willing to accommodate employee restrictions in exchange for full duty releases due to insurance requirements." Moral of the story: a full duty release may not necessarily relieve the obligation to pay TP benefits if the release was given by the treating doctor in an effort to get the claimant back to his job. Note: the CRB made clear that the informal ruling regarding a Form 36 has no bearing on the Form 36 approval at a Formal Hearing and that it is a trial de novo on the issue at a Formal Hearing.

Saquipay v. All Seasons Landscaping of Ridgefield, LLC, 6332 CRB-7-19-5 (Jan. 31, 2020)

In this much anticipated decision, the CRB reversed a Finding by the trial commissioner which had dismissed the claim for total disability benefits for an undocumented worker with limited ability to speak English. The claimant had a compensable back injury; the claimant had a burst fracture at L1 and had undergone a lumbar decompression of fracture and fusion at T12-L2. The employer did not have workers' compensation coverage and therefore the Second Injury Fund ("Fund") had made payments pursuant to General Statutes Section 31-355. The claimant came under the care of Dr. Karnasiewicz, a respected neurosurgeon, who determined that the claimant had a permanent impairment of 25% of the back and a light to sedentary work capacity. Vocational assessments were performed by two experts who both concluded that the claimant was unemployable. At the time of the Formal Hearing the issue was entitlement to total disability benefits and the parties stipulated that the claimant was unemployable pursuant to the case of Osterlund v. State, 135 Conn. 498 (1949). Presumably, the Fund could not voluntarily place the claimant on total disability benefits without a Finding given that it was a no insurance situation.

The trial commissioner was unwilling to accept the parties' Stipulation of Facts that the claimant was unemployable. The trial commissioner determined that pursuant to the federal Immigration Reform and Control Act a claimant was legally precluded from pursuing a claim for total disability benefits which required him to perform a work search. The trial commissioner noted that the statute stated "any award of benefits under the act that requires an undocumented claimant to seek out work as a prerequisite to receipt of benefits involves a violation of federal law must be denied." The CRB in a lengthy decision rejected the trial commissioner's analysis and ordered total disability benefits to be paid. The CRB acknowledged that a trial commissioner always has the right to reject a Stipulation of Facts but that a blanket rejection without any basis is improper. The CRB also stated that the trial commissioner's decision to disregard expert testimony cannot be arbitrary. The CRB noted that the trial commissioner on her own raised the issue of the claimant's immigration status. In an analysis of the Osterlund decision the CRB determined that a claimant does not have to prove eligibility for total disability benefits solely through proving that they are actively seeking employment. The CRB noted that determination as to whether the claimant is entitled to total disability benefits under Osterlund involves analysis of how the injury has affected the claimant, education and intelligence levels, vocational background, age and other factors. The CRB clearly rejected the trial commissioner's determination that the status as an undocumented worker who cannot seek work in the state is a bar to a claim for total disability benefits under the Osterlund doctrine.

Tedesco v. City of Bridgeport, 6312 CRB-4-19-3 (March 3, 2020)

The CRB reversed a decision by the trial commissioner finding that the claimant was permanently disabled. In a prior 2015 decision before the trial commissioner the issue was what permanent impairment the claimant was entitled to receive and not whether the

claimant was totally disabled. In the 2015 decision the trial commissioner had awarded a permanent impairment award of 60% of the back; at that time the trial commissioner also referenced an opinion by one of the doctors that the claimant was permanently and totally disabled. The trial commissioner did not find in 2015 that in fact the claimant was permanently and totally disabled, however. In a subsequent 2018 decision a new trial commissioner had to address a claim for total disability benefits; no new evidence was presented that was different in 2018 from the evidence presented in 2015. The trial commissioner in 2018 determined that the claimant in fact was totally disabled and that benefits were due under General Statutes Section 31-307. The CRB noted that the earlier decision dealt solely with permanency and not total disability issues and therefore it was wrong for the trial commissioner to rely on the earlier decision to establish entitlement to total disability benefits. Additionally, the CRB correctly pointed out that in order to be entitled to benefits for total disability post payment of permanent impairment the claimant must prove that the present disability "is distinct from and due to a condition that is not a normal and immediate incident of the loss for which the claimant received disability benefits for loss of use." Marandino v. Prometheus Pharmacy, 294 Conn. 564, 582 (2010). The CRB, citing the Marandino decision as well as Gustafson v. SNET/Southern New England Telecommunications, et al., 6191 CRB-2-17-4 (April 13, 2018), reversed the trial commissioner's Finding and ordered a new trial pointing out that the new trial commissioner should address the Marandino test.

Dickerson v. City of Stamford, 334 Conn. 870 (March 10, 2020)

In this case the CRB reversed a Finding of the trial commissioner which had dismissed a claim for a heart attack since no claim for benefits was filed within one year of the heart attack. The CRB determined that the myocardial infarction ("MI") was due to an underlying hypertension injury that had been accepted under General Statutes Section 7-433c while the claimant was employed as a police officer. Notwithstanding that the MI occurred after the claimant's retirement the CRB held that he could pursue the claim. The CRB refused to agree with the respondents' contention that the case of Holston v. New Haven Police Dept., 323 Conn. 607 (2016), should apply to the claim (in Holston the Connecticut Supreme Court had allowed a heart attack claim to be pursued under Section 7-433c despite the fact it was substantially related to an underlying, untimely filed hypertension claim). The Supreme Court in this case determined that if in fact the hypertension was a substantial factor in the MI then the claim for the MI would be compensable under Section 7-433c. The case was remanded by the Court to the CRB and then to the trial commissioner for a determination of whether the hypertension was a substantial factor in the MI.

Connors v. American Frozen Foods, Inc., 6326 CRB-4-19-5 (April 3, 2020)

In this case the CRB affirmed the trial commissioner's dismissal of a temporary total ("TT") claim. The claimant had a compensable injury to his lumbar spine and was placed on light duty restrictions by his treating physician on June 23, 2016. On July 21, 2016, the treater changed the claimant's work status to temporarily and totally disabled. The respondents denied the TT claim noting that there was no change in objective findings

and questioned why there was a change in work status. The treater was deposed and acknowledged the absence of objective findings and stated that where there are subjective complaints there can be secondary gain issues. The treater also stated that he could not comment on how the claimant's family illnesses may have affected him. Despite no medical evidence indicating that the claimant had a work capacity, the trial commissioner dismissed the TT claim, holding that the report changing the claimant to TT status was not credible or persuasive. The appeal to the Connecticut Appellate Court was dismissed on procedural grounds; *see* AC 44087.

Gfeller v. Big Y Foods, 6322 CRB-2-19-5 (April 8, 2020)

The claimant sustained a compensable shoulder injury and was placed on light duty. The employer offered the claimant a position within her work capacity and she returned to work. Thereafter the claimant was terminated for cause by the employer unrelated to the work injury. The claimant did not claim temporary partial ("TP") benefits after her termination. The claimant subsequently underwent surgery and was paid temporary total benefits while out of work. When the claimant was released to work the employer denied her TP claim contending that the claimant would have been accommodated in a light duty position but for the fact that she had been previously terminated for cause. The CRB affirmed the trial commissioner's Finding that TP was owed; the CRB held that it was within the trial commissioner's discretion to award the TP notwithstanding the termination.

Goulbourne v. State of Connecticut/Department of Correction, 6329 CRB-1-19-5 (June 10, 2020)

The CRB reversed a trial commissioner's dismissal of a total disability claim and remanded the case back to the trial commissioner to seek clarification from a Commissioner's examiner regarding his opinion on work capacity. The claimant had a compensable heart claim and alleged he was totally disabled. Competing vocational expert testimony was introduced regarding the issue. Also, there was a Commissioner's Medical Examination with a cardiologist, Dr. Anthony, who in a cryptic note found that the claimant was "unable to perform any gainful work capacity." The trial commissioner found the respondents' vocational testimony credible that the claimant could work and dismissed the total incapacity claim. In doing so, the trial commissioner determined that Dr. Anthony's opinion was a "vocational" opinion and because he was not a vocational expert the trial commissioner was not bound to follow it. The CRB reversed stating that the trial commissioner should have sought further clarification of Dr. Anthony's opinion.

Fortin v. Southern Connecticut Gas Company, 6387 CRB-3-20-4 (March 31, 2021)

The CRB in this case affirmed a finding of compensability of a right knee surgery as well as a denial of a total disability claim; both the claimant and respondent Liberty Mutual had appealed the trial commissioner's Finding. The claimant was hired in 1967 for the employer as a pipefitter. He had documented injuries to the right knee on October 22, 1977 and August 24, 1983 while Hartford Insurance was on the risk. For the 1977 accident the claimant underwent right knee surgery; the Commission file reflected an

unsigned Voluntary Agreement documenting compensability of a torn meniscus. There was also a Voluntary Agreement in the file for the 1983 claim reflecting a permanent impairment award of 5% of the right knee. The claimant apparently also sustained a left knee injury at work on July 7, 1986. Finally, the claimant sustained an injury to his bilateral knees on September 8, 1997. For the 1997 claim Liberty Mutual was on the risk and a Voluntary Agreement for 45% of both knees was approved for that claim.

The claimant was treating with Dr. Lynch and in December 2015 he rated the patient at 50% bilaterally. Liberty Mutual had a Respondent's Medical Examination with Dr. Brittis on February 16, 2016. Dr. Brittis rendered an opinion regarding causation that stated "Mr. Fortin's knees are the result of multiple work related injuries that have occurred during the course of his employment. He relates clearly surgical procedures that were completed under workers' compensation oversight in the 1970s and 1980s. . . . There is no history of knee injury that predated his employment or with other outside activities." Subsequently the claimant began treating with Dr. Lahav for his knee injuries. In a 2018 report Dr. Lahav referenced three different work injuries in 1977, 1983 and 1997 and stated "it does appear with the records provided that he did have work related injuries which has led to his posttraumatic arthritis. I do concur that the need for knee replacement stems up from injuries to the knees years ago." Liberty Mutual denied liability for right knee surgery contending the injury was due to pre-existing problems, notwithstanding their prior agreement to pay a 45% rating.

The claimant retired at age 64 in March 2010. His primary care physician, Dr. Parker, rendered an opinion that the claimant was totally disabled as of May 9, 2016. The claimant sought benefits for total disability based on this.

Based on the medical evidence the trial commissioner concluded that Liberty Mutual as a carrier for the last accident on September 8, 1997 was liable for right knee surgery. The CRB on appeal affirmed that Finding, noting that Liberty Mutual had agreed to Voluntary Agreement which substantially increased the permanent impairment, and that the opinions of Dr. Brittis and Dr. Lahav included the 1997 knee injury among the injuries causing the need for surgery. The CRB stated "a reasonable inference to draw from this evidence in our opinion was that these witnesses opined that each of the multiple compensable injuries claimant sustained contributed to his need for knee replacements." Interestingly, there does not appear to be any medical evidence that the 1997 claim was a substantial factor in the need for surgery.

The CRB denied the claim for total disability benefits. In support of their denial the CRB noted that Dr. Parker stated that the claimant had several orthopedic conditions which precluded employment (some of which were unrelated to work), that the claimant at trial was able to testify without pain or distress and that the claimant in testimony confirmed an ability to perform several household tasks. The CRB suggested that Dr. Parker's opinion was that the claimant could not perform his old job but this was not "conclusive proof that the claimant could not have performed some other form of remunerative work." The CRB noted that undisputed evidence of disability does not require the trial commissioner to adopt that evidence if he/she is not persuaded by it.

Carey v. State of Connecticut/UConn Health Center, 6376 CRB-1-20-1
(April 30, 2021)

In this complicated factual decision the claimant sustained two injuries at work. The first injury resulted in a low back injury and two surgeries at L5-S1, the last surgery being a fusion. On July 13, 2008 the claimant sustained a further back and knee injury at work. He underwent knee replacement surgery and was paid 40% impairment of the lower extremity. The claimant had ongoing low back problems and eventually in July 2013 underwent an L4-5 caged procedure under the care of the treating physician, Dr. Krompinger. The respondents questioned whether the L4-5 surgery was related to either of the two compensable back injuries. There was a Commissioner's Medical Examination with Dr. Jambor who rated the claimant at 30% of the back and provided a sedentary work capacity.

The respondents had two Respondent's Medical Examinations; the last was with Dr. Kruger who suggested the claimant was totally disabled but asserted that the L4-5 procedure was not due to either work accident. The respondents filed a number of Form 36s including two in 2015. The respondents produced surveillance of the claimant in 2018 which revealed him doing construction work at his home; apparently the claimant took out a building permit himself.

The parties litigated the issue of indemnity benefits and the trial commissioner approved in his 2020 decision a Form 36 filed on June 1, 2015. The trial commissioner found the claimant to not be credible. The trial commissioner found the claimant was totally disabled during the limited period of April 4, 2013 to October 1, 2013; he also accepted Dr. Krompinger's rating of 37% of the lumbar spine. The trial commissioner did not rule regarding compensability of a subsequent 2019 surgery to the back.

On appeal, the claimant alleged that the trial commissioner, based on the doctrine of laches, could not address the Form 36s which were filed in 2015 in his 2020 decision. The claimant also contended on appeal that the trial commissioner improperly concluded based on the reports and testimony of Dr. Krompinger that there was a work capacity. The CRB determined that there was sufficient evidence in the record to support a work capacity and the Form 36 was properly approved. The CRB stated that the claimant raised for the first time the issue of laches on appeal and the CRB therefore refused to consider it. The CRB did not make reference to a prior Connecticut Appellate Court case, Wiblyi v. McDonald's Corp, 168 Conn. App. 92, 105 (2016), which raised questions concerning the applicability of the laches doctrine to workers' compensation claims. The CRB did state that the issue of the 2019 surgery had not been litigated at the Formal Hearing below and the claimant had the opportunity at a further hearing to seek to establish compensability of that surgery.

III. ***MOTION TO REOPEN SETTLEMENT***

Dombrowski v. City of New Haven, 194 Conn. App. 739 (Dec. 10, 2019), *cert. denied*, 335 Conn. 908 (March 18, 2020)

A pro se claimant sought to open a Stipulation which was approved by the workers' compensation commissioner. On the date of the settlement approval, the claimant was requested by defense counsel to sign the Full and Final Stipulation, another agreement entitled "Settlement Agreement, General Release and Covenant Not to Sue," a Stipulation and What it Means form, and a Stipulation Questionnaire form. The General Release signed by the claimant on the date of the Stipulation approval included language that the claimant had 21 days to consider the settlement agreement and had a revocation period of seven days following the Stipulation approval. The insurance carrier promptly issued a settlement check; however, the claimant returned the check to the carrier and sought to open the Stipulation approval, citing the numerous potential claims that were closed out by the General Release. The trial commissioner, CRB, and Connecticut Appellate Court all denied the claimant's motion to open the Stipulation. The Appellate Court noted that the claimant's main argument as to why the settlement agreement should be opened was based on the General Release which had been signed. Since the General Release dealt with issues unrelated to the workers' compensation claim, the Court found that the trial commissioner did not have jurisdiction to consider the claimant's arguments in that regard. Notwithstanding the Court's refusal to open the settlement agreement, the Court in Footnote 9 expressed concern that the claimant had received the settlement documents on the same morning as the Stipulation approval and did not have opportunity to fully review them. If a General Release is part of a workers' compensation settlement then the parties should make sure that the claimant has ample time to review the document before the accompanying Stipulation is approved by the workers' compensation commissioner.

IV. ***HEART AND HYPERTENSION: GENERAL STATUTES SECTION 7-433c***

Wilson v. City of Stamford, 6309 CRB-7-19-2 (Dec. 13, 2019)

The decedent police officer had sustained a compensable heart condition for which he had been paid permanent impairment under General Statutes Section 7-433c. After his retirement the claimant died; the cause of death on the death certificate included fatal cardiac dysrhythmia, acute coronary syndrome, and atherosclerotic heart disease. The respondents questioned whether they had liability for widow's benefits under Section 7-433c based on their contention that no death benefits could be paid since the claimant was not a police officer at the time of death and death was not causally related to the underlying accepted heart condition. The CRB concluded that the death was causally related to the heart condition; the CRB also determined that the decedent did not have to be an employee at the time of death so long as there was a causal relationship

to the underlying accepted heart claim. Appeal of this decision to the Connecticut Appellate Court was withdrawn; *see* AC 43718.

Coughlin v. Stamford Fire Department, 334 Conn. 857 (March 10, 2020)

The firefighter in this case had a compensable hypertension claim under General Statutes Section 7-433c. He retired and later developed coronary artery disease ("CAD") that was substantially related to the hypertension. The trial commissioner dismissed the case due to the fact that CAD was not diagnosed until after retirement. The CRB reversed stating that since there was a causal relationship between the accepted hypertension condition and CAD the claimant was entitled to coverage for CAD. The Connecticut Supreme Court agreed with the CRB and determined that the heart disease claim was substantially related to the accepted hypertensive condition and therefore CAD was also a compensable injury notwithstanding that it became manifest after retirement. This decision distinguished the Connecticut Supreme Court's ruling in Holston v. New Haven Police Dep't, 323 Conn. 607 (2016), which found that causation issues do not apply in Section 7-433c cases. In Holston, the claimant had failed to file a timely hypertension claim and thereafter sustained a heart attack before retirement. The Supreme Court found that the heart attack claim was a new and separate injury in that case and the heart claim could be pursued even though the heart claim was substantially caused by the untimely filed hypertensive condition. This decision will impact municipalities significantly since new conditions that may occur to claimants post retirement will be considered compensable so long as they are substantially related to previously accepted injuries under Section 7-433c.

Diaz v. City of Bridgeport, 6333 CRB-4-19-6 (April 29, 2020), *pending appeal*, AC 44104

The claimant was awarded permanent partial disability award under General Statutes Section 7-433c for his heart condition; the award called for a payment of 245 weeks at a rate of $551.13 per week beginning in February 2020. The claimant sought a "commutation" or lump sum payment of the last 123 weeks of the award to pay his property taxes and credit card debt. The trial commissioner approved the award commutation at a discount of 3%. The municipality objected claiming the claimant received a double recovery, was being paid at higher than the maximum rate allowed in view of the commutation, and that it violated the cap provisions of the hypertension statute. The CRB affirmed the commutation. This case is on appeal to the Connecticut Appellate Court; *see* AC 44104.

Krevis v. City of Bridgeport, 6321 CRB-4-19-4 (May 28, 2020)

The claimant had a compensable hypertension claim under General Statutes Section 7-433c and was paid a total of 35% of the heart. After retirement he needed a pacemaker but the medical evidence and respondents' examiner's testimony suggested that the accepted hypertension claim was not a substantial factor in causing the need for the pacemaker. The trial commissioner and the CRB concluded that the claimant's need

for the pacemaker was unrelated to the accepted condition and dismissed the pacemaker claim. In doing so, the CRB cited the Connecticut Supreme Court decision of Coughlin v. Stamford Fire Department, 334 Conn. 857 (2020), noting that in Section 7-433c claims injuries that develop post retirement must be causally related back to accepted claims that occurred during the period of employment in order to be compensable.

Clark v. Town of Waterford Cohanzie Fire Department, 6339 CRB-2-19-7 (July 15, 2020), *pending appeal*, AC 44170

The claimant was a part-time firefighter for the Town hired before the Heart and Hypertension Act, Connecticut General Statutes Section 7-433c was ended on July 1, 1996. The claimant suffered a myocardial infarction on June 24, 2017 while he was still a firefighter and he sought benefits under Section 7-433c. The trial commissioner and the CRB both held that the claimant was entitled to benefits under the statute notwithstanding the defense raised by the Town that the claimant did not qualify for benefits since General Statutes Section 7-425(5) defined a member of the fire department to be someone who works more than 20 hours per week. The CRB essentially concluded that there is no difference for purposes of Section 7-433c whether the claimant is a full or part-time member of the fire department. The decision is noteworthy for the well-written dissent issued by Commissioner Watson; it is rare at the CRB level to have dissents issued in the decisions. This case is on appeal to the Connecticut Appellate Court; *see* AC 44170.

Vitti v. City of Milford, SC 20350 (Aug. 24, 2020)

In this General Statutes Section 7-433c accepted heart claim the claimant police officer underwent a heart transplant. After the surgery he recovered and did well and was given a 23% rating for the heart. The claimant sought a 100% rating on the theory that his entire heart had to be replaced. Both the trial commissioner and the CRB concluded that the claimant was entitled to the amount of impairment that existed at the time of maximum improvement (23%) and not a 100% rating. The case was appealed to the Connecticut Supreme Court which determined that the claimant was not entitled to a 100% rating and that the 23% rating was appropriate. In reaching their decision the Court determined that the transplanted heart was more akin to an actual human organ than a prosthetic device.

V. *PRINCIPAL EMPLOYER: GENERAL STATUTES SECTION 31-291*

Dunkling v. Lawrence Brunoli, Inc., 195 Conn. App. 513 (Feb. 4, 2020)

The Connecticut Appellate Court affirmed a finding that a principal employer had liability under General Statutes Section 31-291. At issue in this case was whether Lawrence Brunoli, Inc. ("Brunoli") had served as "principal employer" pursuant to Section 31-291 at the worksite where the claimant's injury occurred. Brunoli contended that it did not have control over the job site as required under Section 31-291 for a principal employer relationship to exist. The State of Connecticut DOT had entered into a contract with

Brunoli to act as general contractor for work on a project and permitted Brunoli to subcontract with Mid-State Metal Building Company, LLC and the claimant's employer, Connecticut Metal Structures, LLC. The injury to the claimant occurred while he was fixing gutters that had not been installed correctly; by the time the work had been performed Brunoli had left the construction site but the work was performed at the request of Brunoli. The Court held that Brunoli was the "principal employer" of the claimant pursuant to Section 31-291 notwithstanding that the injury occurred when Brunoli no longer had a presence at the job site; the Court noted that Brunoli had the ability to make the repairs itself or supervise the repairs. The Court's ruling is an expansive interpretation of Section 31-291 since it does not require the principal employer to actually be at the job site in order to be in "control" of it.

Barker v. All Roofs by Dominic et al., 336 Conn. 592 (Aug. 13, 2020)

The Connecticut Supreme Court, in a 4-3 decision where Chief Justice Robinson wrote the dissent, affirmed a finding that the City of Bridgeport had liability for a workers' compensation claim under General Statutes Section 31-291 as principal employer. The claimant was injured from a fall off a roof of one of the City's buildings; the actual employer was uninsured, and the City had control of the property. The City's argument that repair of one of its roofs was not part of trade or business of the City was not accepted by the Court; in reaching its decision the Court held that the City had responsibility under General Statutes Section 7-148(c)(6)(A)(i) to manage, maintain and repair its public buildings. Accordingly, the Court held that the City met the requirement of Section 31-291 that the employer be in the "trade or business" of the work being performed by the injured employee. The dissent concluded that the City should not have been liable since it was not in the business of roofing, did not have a roofer on its payroll, and no employee of the City was on the project. This case started off with five Justices on the panel, but the panel was expanded to seven Justices after oral argument, presumably because there was no consensus on the Court.

VI. *PRECLUSION PURSUANT TO GENERAL STATUTES SECTION 31-294c(b)*

Lefevre v. TPC Associates, Inc., 6297 CRB-4-18-11 (Jan. 17, 2020)

The respondents were precluded from contesting liability in a death claim caused by cardiac arrest. The widow asserted that the claimant's brief period lifting boxes at work (which was shown on video) had caused the cardiac arrest and death. The treating cardiologist confirmed causation and the trial commissioner issued a Finding in behalf of the widow. The respondents appealed questioning if the medical opinion was persuasive and credible; the respondents also objected to the trial commissioner's findings which completely adopted the claimant's proposed findings. The CRB affirmed the Finding, determining that there was sufficient medical evidence to support same. Appeal of this decision to the Connecticut Appellate Court was withdrawn; *see* AC 42802.

Dominguez v. New York Sports Club, 198 Conn. App. 854 (July 14, 2020)

In this case the Connecticut Appellate Court affirmed a finding of preclusion for failure to file a timely disclaimer pursuant to General Statutes Section 31-294c(b). The CRB had reversed a trial commissioner's decision that had denied preclusion. The Court concluded that the carrier had failed to file a timely disclaimer; when the disclaimer was finally filed the carrier maintained that the injury was not compensable. At the Formal Hearing the carrier contended that they had not been asked to pay any medical bills or indemnity during the 28 day period after the notice of claim was filed and therefore the so-called "safe-harbor" provisions of Section 31-294c that allow for denial to be issued up to one year after notice is issued should apply. The carrier cited Dubrosky v. Boehringer Ingelheim Corp., 145 Conn. App. 261 (2013), *cert. denied*, 310 Conn. 935 (2013), in support of its position. The Court concluded that after the notice was issued the carrier failed to take any action indicating that they accepted compensability of the claim and therefore they could not claim the "safe harbor" provisions applied to them. The Court determined that it is the employer's obligation to timely investigate and pay a claim if it wants to avail itself of the "safe harbor" provisions of the statute.

Salerno v. Lowe's Home Improvement Center et al., AC 42344 (July 14, 2020)

In this case the carrier failed to file a Form 43 until more than one year after Form 30C was filed in a repetitive trauma claim. The carrier objected to a Motion to Preclude that was filed, contending it was "impossible" to pay the claim because the claimant had processed his bills and lost time through personal insurance. The Connecticut Appellate Court indicated they were not willing to extend the "safe harbor" provision, as contemplated by General Statutes Section 31-294c(b), to cases in which there is no evidence that the respondents ever accepted compensability of the claim based on their conduct or written filings. The carrier never issued a Voluntary Agreement or through their conduct agreed that the matter was compensable and therefore the Court upheld the decision that the employer was precluded. The so-called "safe harbor" provision of the statute allows a contest to be filed up to a year after the notice if the employer pays all benefits owed within 28 days of the notice. The Court refused to extend the limited exception to preclusion based on "impossibility" to pay a claim found in the decision in Dubrosky v. Boehringer Ingelheim Corp., 145 Conn. App. 261 (2013)*, cert. denied*, 310 Conn. 935 (2013), to this set of facts.

Beel v. Ernst & Young, LLC, 6352 CRB-7-19-10 (Dec. 16, 2020)

In this case a Motion to Preclude was granted by the trial commissioner and that ruling was affirmed on appeal. The respondents' appeal of preclusion was based on two defenses: that the Notice of Claim Form 30C was defective since it did not properly list the place of the accident and that respondents' payments before the issuance of the Form 30C should allow them the so-called "safe-harbor" protection that had been found in Dubrosky v. Boehringer Ingelheim Corp., 145 Conn. App. 261 (2013), *cert. denied*, 310 Conn. 935 (2013). The CRB agreed with the trial commissioner that the Form 30C was valid and the issue of the location of the injury was a "minor defect." The CRB found that

short term disability payments made to the claimant did not bar preclusion as well and that the respondents did not meet the qualifications for the "safe harbor" defense. The appeal of this case to the Connecticut Appellate Court has been withdrawn; *see* AC 44482.

VII. ***CAUSATION***

Orzech v. Giacco Oil Company, 6307 CRB-8-19-2, 6308 CRB-8-19-2 (Jan. 30, 2020), *pending appeal*, AC 43941

In this interesting and sad case the claimant's death by suicide was found to be compensable and widow's benefits were ordered to be paid. The claimant alleged injuries to his back, shoulder and knee due to an accident at work on November 1, 2016. While he had a serious pre-existing knee condition he claimed it became much worse after the accident and that he needed a knee replacement. That claim was denied; the claimant did not have health coverage to pay for the knee replacement while he waited for the workers' compensation claim to be resolved. The claimant died on July 23, 2017; he was found to have alcohol in his system as well as many other drugs. A pathologist from the Chief Medical Examiner's office determined that the death was a suicide. The claimant's attorney presented psychiatric expert testimony that the claimant's suicide was substantially related to depression due to the work injuries. The respondents' examiner questioned if there was sufficient evidence to determine that the claimant did commit suicide as opposed to accidentally overdosing on medication. The CRB affirmed the trial commissioner's finding of compensable death and cited Wilder v. Russell Library Co., 107 Conn. 56 (1927), in support of its ruling. The CRB rejected the respondents' contention that the death was due to intervening and superseding events unrelated to the work accident. The CRB disagreed with the respondents' argument that Sapko v. State, 305 Conn. 360 (2012), applied; in Sapko a death due to drug overdose was found to be not compensable since it was in part due to ingestion of medication unrelated to the work accident. Also, in Sapko there was no determination that the claimant had committed suicide, unlike in this case. This case is on appeal to the Connecticut Appellate Court; *see* AC 43941.

Secula v. SBC/SNET, 6314 CRB-5-19-3 (March 10, 2020)

At issue in this case was the trial commissioner's Finding that the Commissioner's examiner's opinion with regard to causation was unpersuasive. The claimant sustained a compensable work injury in 2011 and sought authorization for a right total knee replacement. The claimant sustained at least two injuries prior to 2011 as well as a re-injury to the right knee following the work injury in 2011 that prompted him to return to the treater after a three year gap in treatment. The respondents contended that the work injury was not a substantial factor in causing the claimant's right knee condition and need for surgery based upon opinions of their examiners as well as the Commissioner's examiner that the claimant had pre-existing degenerative changes to the knee. The claimant contended that the need for right knee replacement was causally related to the

2011 work injury based upon opinion of the treater. The trial commissioner found credible the treater's opinion that the claimant's need for right knee replacement was causally related to the work injury and found the Commissioner's examiner's opinion unpersuasive because his "opinion that the claimant's condition was a 'self-limited issue' is inconsistent with both the claimant's testimony and the claimant's medical records."

The CRB in affirming the trial commissioner's decision that the claimant's right knee condition and need for surgery were the result of the compensable injury in 2011 specifically noted that although the respondents' examiners as well as the Commissioner's examiner proffered medical opinions which sought to limit the scope of the injury which occurred in 2011, the trial commissioner retained the discretion to determine, based on her review of the totality of the evidence presented, whether that injury constituted a substantial contributing factor to the claimant's knee condition and need for a right knee arthroplasty. The CRB additionally noted that the trial commissioner was under no requirement to offer additional elaboration regarding her reasons for disregarding the Commissioner's examiner's opinion.

Smith v. Regalcare at Waterbury, LLC, 6316 CRB 5-19-3 (March 10, 2020)

This case also involved the trial commissioner's decision not to rely on the opinion of the Commissioner's examiner. The claimant testified that she was taking a seat on a couch at her place of employment when she felt and heard a pop. The respondents contended that the claimant did not sustain a compensable injury at work based upon opinion of the Commissioner's examiner, who did not believe the mechanism of injury described by the claimant would cause a torn meniscus. In finding that the claimant suffered a compensable injury at work which directly led to or accelerated her need for right knee surgery, the trial commissioner found the claimant's testimony credible at the Formal Hearing. The trial commissioner further found the opinions of the claimant's treaters credible and persuasive. The trial commissioner did not find the respondents' examiner persuasive and she did not find the Commissioner's examiner's opinion as to causation persuasive, as it relied in part on finding the claimant had not sustained a torsional injury to her knee and the trial commissioner found that the claimant had offered credible testimony as to how she injured her knee.

The CRB in affirming the trial commissioner's decision determined that the trial commissioner had a proper basis supporting her conclusion and the trial commissioner was not obligated to give the Commissioner's examiner's opinion greater weight. Additionally, the CRB found that the trial commissioner clearly provided her rationale for finding the treating physicians' opinions as to causation more persuasive than the Commissioner's examiner's opinion. The CRB found that having observed the claimant's testimony, the trial commissioner was in the best position to determine whether the mechanism of injury described and/or demonstrated by the claimant was "torsional."

Dipisa v. Bethel Health & Rehabilitation Center, 6334 CRB-7-19-6 (Sept. 23, 2020)

The claimant sustained a compensable back injury on April 4, 2010 and was placed at maximum medical improvement on June 8, 2017 by the treating orthopedist. On that same date, the pain management specialist diagnosed the claimant with bilateral trochanteric bursitis. The respondents' examiner opined that the claimant's trochanteric bursitis was not related to the April 4, 2010 injury and that the claimant did not require any additional treatment for the lumbar spine. The Commissioner's examiner concurred that the trochanteric bursitis was not related to the compensable injury and opined that the claimant did not require additional surgery or injections for her back.

The trial commissioner dismissed the claim for trochanteric bursitis. In affirming the trial commissioner's decision, the CRB noted that the trial commissioner had incorrectly stated that the respondents' examiner had opined that the claimant's trochanteric bursitis was not related to the claimant's work injury. The respondents' examiner never mentioned trochanteric bursitis in his report, nor did he have an opinion relative to causation for same at the time of his deposition. The CRB held that the trial commissioner's inaccurate Finding was harmless error as the trial commissioner also relied on the opinions of the Commissioner's examiner in dismissing the trochanteric bursitis claim.

The trial commissioner also denied any additional medical treatment for the claimant's back injury based on the opinion of the Commissioner's examiner. The CRB, however, held that the trial commissioner improperly denied all future treatment since the Commissioner's examiner's opinion was limited to the need for additional surgery and injections only. As such, the CRB limited the scope of the trial commissioner's Finding to only include those treatment modalities specifically referenced in the Commissioner's examiner's report and left the claimant to her proof in the future for other medical treatment.

Arrico v. City of Stamford, 6345 CRB-7-19-9 (Nov. 17, 2020), ***pending appeal*, AC 44409/44488**

The claimant had two compensable back injuries. The claimant also had pre-existing conditions including colitis, acid reflux and a seizure disorder. The claimant was awarded 16% of the back for the first injury. After the second injury the trial commissioner found that the claimant had achieved maximum medical improvement ("MMI") and granted a Form 36 awarding an additional 5% rating for a total of 21%. The trial commissioner also determined that the claimant's present condition was not due to the compensable injuries and that additional medical treatment was not the responsibility of the respondents. On appeal the CRB determined that the issue of medical treatment was not an issue for the Formal Hearing and remanded the case to address ongoing medical treatment. The CRB affirmed the Finding regarding MMI and the rating but remanded the case to the trial commissioner to address causation issues and whether or not the claimant was totally disabled. The CRB found that the trial commissioner's handling of the evidence in the case was "unorthodox" and stated that the substantial factor test should be applied on the

issue of causation. This case is on appeal to the Connecticut Appellate Court; *see* AC 44409/44488.

Reed v. Asbestos Management Company, L.L.C., 6370 CRB-6-20-1 (Jan. 27, 2021)

The CRB reversed a dismissal that was based on a defense of intoxication under General Statutes Section 31-284(a). The claimant fell at work and lost consciousness. At the hospital following the accident the claimant tested positive for amphetamines and cocaine. A history was taken of using cocaine two days before and drinking alcohol five to six days per week. The hospital record included a statement that the diagnosis of syncope and loss of consciousness "likely" was secondary to alcohol and substance abuse. The trial commissioner dismissed the claim concluding that the claimant had an idiopathic event unrelated to work. On appeal the CRB performed a thorough review of the respondents' burden to prove that intoxication had caused the injury under Section 31-284(a). The CRB stated that this burden was a two-pronged inquiry: the respondents needed to show the claimant was intoxicated at the time of the injury and that the intoxication was a substantial factor in the injury. The CRB concluded that there was no expert testimony presented by the respondents in this regard and therefore reversed the trial commissioner on the intoxication issue. The CRB determined that the statement in the medical records that the injuries were "likely" due to substance abuse was not the same as the required burden to show that the injury was "more likely than not" due to the abuse (a reader of this decision may question if there is a significant distinction between the two). Going forward it is clear that respondents need to provide strong expert testimony to present a successful intoxication defense.

The CRB also determined that this case was analogous to Clements v. Aramark Corp., 182 Conn. App. 224 (2018), *cert. granted*, 330 Conn. 904 (Sept. 12, 2018), where the Connecticut Appellate Court determined that injuries were compensable notwithstanding that the claimant's fall at work may have been due to underlying cardiac issues. Therefore, the CRB here determined based on Clements that the case was compensable. It should be noted that the Clements case was argued before the Connecticut Supreme Court quite some time ago but no decision has been released; the Clements case may settle. A reversal of Clements at the Supreme Court likely would affect the CRB's decision in this case, but that result probably will not occur as Clements appears to be in the process of settling.

Rousseau v. Acranom Masonry, Inc., 6366 CRB-5-19-12 (Feb. 3, 2021)

The CRB affirmed a trial commissioner's Finding that the respondents were liable for a right hip replacement procedure. On October 26, 2015 the claimant lifted a large beam at work and felt pain in his right side. He came under the care of Dr. Duffy. Dr. Duffy was of the opinion that the work episode had aggravated an underlying condition and hastened the need for hip surgery. A Respondent's Medical Examination was held with Dr. Brittis who opined that the right hip condition was not substantially related to the 2015 incident. A Commissioner's Medical Examination was performed by Dr. Lena who determined that there may have been a small aggravation as a result of the work incident

but he did not think it was "a significant material contributor to the progression of his arthritic changes." Notwithstanding the Commissioner examiner's opinion, the trial commissioner found the claim compensable. She did not find the opinion of Dr. Lena persuasive and ultimately concluded that Dr. Duffy's opinion was credible and persuasive. The trial commissioner found the claimant credible regarding his claim that he had not suffered from hip pain prior to the work accident. The respondents contended that the trial commissioner did not apply the proper causation standard and that the trial commissioner did not have to address the claimant's credibility in a case of medical causation. The CRB affirmed the trial commissioner's opinion. The CRB stated "we believe that sufficient medical evidence was presented to establish that a workplace injury exacerbated the claimant's pre-existing hip ailments and accelerated his need for hip replacement surgery."

Blakey v. US Laboratories, 6384 CRB-5-20-3 (March 11, 2021)

The claimant was involved in a compensable motor vehicle accident on August 17, 2017 when her car hit debris in the road and flipped over on Interstate 84. The claimant developed cervical spine complaints and ultimately underwent C4-C5 osteotomies, laminectomy, facetectomy, and foramininotomy on March 2, 2018 under the care of Dr. Kolb. Importantly, the claimant had two prior cervical fusions in 1994 and 2000; at issue in the case was whether the need for the 2018 surgery was due to the work accident or degeneration and adjacent disc disease caused by the prior fusion surgeries. Dr. Kolb issued a report stating that he could not opine that the motor vehicle accident was a substantial factor in the need for the 2018 surgery. A Respondent's Medical Examination was performed by Dr. Taylor who suggested that the diagnostic studies following the 2017 accident were similar to findings before the compensable incident. Dr. Taylor also could not establish causation of the 2017 motor vehicle accident to the 2018 cervical surgery. The claimant sought her own expert opinion with Dr. Mastroianni, a neurosurgeon, who testified that the motor vehicle accident was the cause for the need for surgery. The trial commissioner found Dr. Mastroianni's testimony regarding causation not credible or persuasive. The trial commissioner determined that the claimant's testimony was not persuasive and that her burden of proof had not been met; accordingly, the claim for cervical spine surgery was dismissed. The CRB concluded that there was sufficient evidence in the record to support the trial commissioner's Finding and affirmed the dismissal.

Fortin v. Southern Connecticut Gas Company, 6387 CRB-3-20-4 (March 31, 2021)

See case summary in Section II, *supra*.

Baldino v. Rondo of America, Inc., 6365 CRB-5-19-12 (April 7, 2021)

The CRB again affirmed a case where, on a causation issue, the trial commissioner had accepted the opinion of the treating doctor and rejected the opinion of the Commissioner's examiner. The claimant was a pressman with date of hire in 1982. He alleged repetitive trauma in the course of his work lifting stacks of paper and buckets as well as bending all

day long; he contended this work had caused a back injury. The treating physician, Dr. Forshaw, opined that the work was a substantial factor in the back degeneration and his need for surgery. Dr. Becker performed a Respondent's Medical Examination and concluded the claimant's back condition was due to daily living and genetics. Dr. Wakefield performed a Commissioner's Medical Examination and determined that the back injury was the natural progression of degeneration in the back and not due to work. The respondents submitted evidence that the claimant had prior discrete injuries both inside and outside of work and contended that the back injury was due to those prior accidents (for which workers' compensation had not previously been claimed apparently). The CRB found that it was within the trial commissioner's discretion to accept Dr. Forshaw's opinion over the opinions of the respondents' examiners and the Commissioner's examiner; the trial commissioner had determined that Dr. Forshaw's opinion was more "convincing and compelling." The CRB held that the trial commissioner's failure to "explicitly state" the reason why he favored Dr. Forshaw's opinion over the Commissioner's examiner's doctor was not error since there was expert testimony to support his decision. The CRB went on, in dicta, to state that where there was credible and persuasive evidence of repetitive trauma based on the claimant's testimony, as in this case, "we are not necessarily persuaded that the Commissioner was required to rely upon any expert opinion for his conclusions" (citing Lee v. Standard Oil of Connecticut, Inc., 5284 CRB-7-07-10 (Feb. 25, 2009)).

VIII. *HEALTH COVERAGE: GENERAL STATUTES SECTION 31-284b*

Petrone v. Town of Ridgefield/Board of Education, 6313 CRB-4-19-3 (Feb. 27, 2020), *pending appeal*, AC 44046

The CRB reversed a trial commissioner's opinion regarding application of General Statutes Section 31-284b in a dispute regarding life insurance coverage. The claimant sustained a compensable injury while working for a municipality. Since the claimant was working for a Town, the employer had continued liability for equivalent life insurance coverage which she had at the time of the injury while she was receiving indemnity payments. Eventually, while the claimant was on indemnity benefits, she died and a request was made for payment of life insurance proceeds. Notwithstanding that the Town had continued to pay life insurance premiums, the life insurance carrier denied liability for the lump sum life insurance payment since by the terms of the life insurance contract the claimant had to be an "active employee" at the time of death in order for the benefit to be due. Since the claimant was on workers' compensation benefits and deemed by the life insurance carrier not to be an "active employee" the life insurer denied liability for the life insurance payout. The trial commissioner had determined that by paying the premiums while the claimant was living, the Town had fulfilled its obligation under Section 31-284b and that she did not have any jurisdiction to address the coverage dispute raised by the life insurance carrier.

The CRB reversed the case contending that the trial commissioner incorrectly interpreted the law; the CRB determined that the purpose of the statute was to put the claimant in the

same financial position she was in at the time of the injury as she was while receiving workers' compensation benefits. Since prior to the time of the injury the claimant's beneficiaries would have been entitled to the life insurance payout had she died, the CRB determined that continuing the life insurance that would not pay her any benefit if she died while she was on workers' compensation benefits did not place her in the same financial position. The CRB concluded that essentially the Town had to act as a self-insurer and pay whatever the life insurance lump sum payout that would have been owed if the claimant was an active employee. Therefore, assuming that the life insurance was $50,000 the Town will have to pay that in a lump sum to the beneficiaries notwithstanding the fact that the Town also had in good faith been paying the premium for the coverage right up until the death of the claimant. We suspect that the municipality will appeal this decision to the Connecticut Appellate Court. In the interim, all municipalities should check their employees' life insurance coverage to make sure that it applies and will pay out in the same manner if the claimant dies while on workers' compensation; doing so will avoid potential liability of the Town to act as self-insurer for the life insurance proceeds. This case is on appeal to the Connecticut Appellate Court; *see* AC 44046.

IX. ***COST OF LIVING ADJUSTMENTS***

Austin v. Coin Depot Corporation, 6318 CRB-4-19-4 (May 26, 2020), *pending appeal*, AC 44225

The claimant, Howard Austin, Jr., was entitled to a Cost of Living Adjustment ("COLA") in the amount of $27,059.46 and the respondent Connecticut Guaranty Fund issued a payment in that amount to the claimant care of his counsel. The check was payable to "Howard Austin." The claimant's attorney inadvertently gave the check to the claimant's father, Howard Austin, Sr., who was also a client. More than a year later, Howard Austin, Jr., sought payment of the COLA that he was not paid, contending that the check should have been issued to "Howard Austin, Jr." and not just "Howard Austin." The Voluntary Agreement in the case listed the claimant as "Howard Austin." The trial commissioner and the CRB found that the respondent had fulfilled its obligation to pay the COLA. The case is on appeal to the Connecticut Appellate Court; *see* AC 44135.

X. ***TIMELINESS OF CLAIM***

Fieldhouse v. Regency Coachworks, Inc., 6344 CRB-2-19-8 (Aug. 12, 2020), *pending appeal*, AC 44225

The CRB reversed a dismissal and found that the claimant based on the "totality of circumstances" had filed a timely claim for workers' compensation benefits. The claimant fell at work on November 27, 2015 and was assisted up by her supervisor from the floor. She was given permission by the supervisor to leave work early and obtain medical treatment but she was not directed to go to any particular medical facility. No bills were paid by the employer within one year of the accident. No hearings were requested within

one year of the incident and no written Notice of Claim was filed until 2017. The claimant did reach out to the insurance agent for the employer and asked to file the claim; the agent completed a First Report of Injury for the claimant before the one year anniversary of the accident and told the claimant she had two years to file a claim. The carrier for the employer on November 22, 2016 took a statement from the claimant and issued a prescription card to her, and the carrier assigned a file number within one year of the accident. Also, the carrier in March 2017 advised the claimant they were arranging a Respondent's Medical Examination for her. The trial commissioner dismissed the claim but on appeal to the CRB the decision was reversed. The CRB held that under the "totality of the circumstances" the claimant substantially complied with the notice of claim requirements of General Statutes Section 31-294c. In reaching their decision the CRB cited the case of Hayden-Leblanc v. New London Broadcasting, 12 Conn. Workers' Comp. Rev. Op. 3, 1373 CRD-2-92-1 (Jan. 5, 1994). This case is on appeal to the Connecticut Appellate Court; *see* AC 44225.

XI. ***APPEALS AND FINES/PENALTIES***

Szyszka v. Rose City Taxi, LLC, 6371 CRB-3-20-1 (April 28, 2021)

The trial commissioner issued a Finding on December 19, 2019 dismissing the claim for benefits and concluding that the claimant was an independent contractor. An appeal was not filed until January 9, 2020, more than twenty days from the date of the Finding and outside of the 20 day appeal period in General Statutes Section 31-301(a). The alleged employer filed a Motion to Dismiss the appeal; claimant's counsel objected to the Motion to Dismiss and contended that his law office had been closed at the time of mailing of the appeal and he was on an out-of-state family vacation. Claimant's attorney contended that the Supreme Court case of Kudlacz v. Lindberg Heat Treating Co., 250 Conn. 581 (1999), should apply and that the appeal should be allowed to proceed. In Kudlacz, the Connecticut Supreme Court in a late appeal case caused by delayed mail stated that ". . . it is another matter entirely, however, to deprive a party of the right to appeal solely because of a failure of notice for which that party bears no responsibility." *Id.* at 589. In Kudlacz, on remand it was determined that the delay in the appeal was due to tardy mail service and not the claimant's fault. In this case, however, the CRB determined that the delay in the appeal was "due to circumstances within the control of claimant's counsel" and therefore granted the Motion to Dismiss the appeal. The CRB indicated that delays in appeals due to "natural disaster, law enforcement activity, or regulatory response to a public health crisis wherein a party could not access their post office box or law office for a prolonged period of time" might excuse a late appeal but that had not occurred in this case.

DeJesus v. R.P.M. Enterprises, Inc., AC 44111 (May 18, 2021)

At issue in this case ("DeJesus II") was whether the trial commissioner erred 1) in finding that the claimant sustained a compensable injury for which he was entitled to indemnity benefits and payment for medical bills, 2) in finding R.P.M. Enterprises, Inc. ("R.P.M.")

and/or Robert M. Marion, Sr. were uninsured employers on the date of the injury and jointly and severally liable for the benefits awarded by the trial commissioner, 3) in determining that the claim was timely filed, and 4) in imposing a civil penalty of $50,000 pursuant to General Statutes Section 31-288(c) based on the employers' failure to carry workers' compensation insurance as required under the Act ("2019 Finding").

Issues relating to the claim were first considered by the CRB in DeJesus v. R.P.M. Enterprises, Inc., 6201 CRB-1-17-7 (Nov. 8, 2018) ("DeJesus I"). The appeal in DeJesus I sought review of the trial commissioner's finding regarding subject matter jurisdiction ("2017 Finding"). The trial commissioner decided to bifurcate the number of issues that were presented and ordered additional proceedings to discuss issues pertaining to the merits of the underlying claim. The CRB in DeJesus I affirmed the trial commissioner's finding that the claimant was an employee who suffered a compensable injury, the claim was not time-barred as the claimant had satisfied the medical care exception to the requirement of written notice, and liability also attached to Robert Marion Sr. in addition to R.P.M. under what was in effect a piercing of the corporate veil.

The respondents at the CRB in DeJesus II argued that DeJesus I was not a final judgment and therefore they should not be collaterally estopped from raising issues heard and decided by the CRB in DeJesus I. The CRB reviewed General Statutes Section 31-301(a) and Section 31-301(b) and held that the two statutes when read together indicate that an aggrieved party has the right to file an appeal, but if an appeal is not taken then the decision of the CRB is final within twenty days. The CRB held collateral estoppel applied and that any issues heard and decided in DeJesus I for which the respondents believed appellate review was appropriate should have been appealed and presented to the Connecticut Appellate Court.

The CRB went on to indicate that the doctrine of law of the case also applied to the findings and conclusions set out in the trial commissioner's 2017 Finding and relied on in the findings and conclusions at issue in DeJesus II. The CRB also found that the trial commissioner's imposition of a fine pursuant to Section 31-288(c) was appropriate, indicating that an overall review of the notices and the transcripts reflected that the respondent-employers were or should have been aware of their exposure to fines and sanctions for failing to carry workers' compensation insurance. However, the CRB decided to remand the matter to give the respondent-employers an opportunity to be heard on the issue of the amount imposed as a sanction for failure to carry workers' compensation insurance.

The Appellate Court disagreed with the CRB that the doctrine of collateral estoppel barred the respondents from contesting the findings in DeJesus I. The Court concluded that collateral estoppel did not apply in this case since that involves issue preclusion "when that issue was actually litigated and necessarily determined in a prior action between the same parties." The Court determined that since the initial decision was in the same action collateral estoppel could not apply. On the other hand, the Court found that the "law of the case doctrine" applied to the case and it was proper to rely on the initial findings of the trial commissioner.

The Court affirmed the finding that the medical care exception in General Statutes Section 31-294c(c) had been met. The Court found that the claimant being driven to the hospital by the agent of the employer after the injury was sufficient to toll the written notice requirement. The Court noted that the employer was aware that the claimant had sustained a compensable injury since it provided money to the claimant to purchase an electric wheelchair and paid $500 per week indemnity after the injury.

The Court also determined that the there was sufficient evidence in the record to support the finding that the claimant was the employee of the named employer R.P.M. Importantly, the Court noted that the respondents had failed to file a motion to correct the decision regarding employment relationship and therefore could not attack the factual findings of the trial commissioner on appeal.

The Court reversed the CRB regarding the determination that the corporate veil could be pierced and that the owner of R.P.M. was personally liable for the judgment. The Court noted that the claimant had only pursued a claim against R.P.M. The Court held that there was no statutory basis to find personally against the owner "when the employee has not identified that person or entity as his or her employer." The Court noted that the Second Injury Fund could potentially bring its own civil claim under General Statutes Section 31-355(c) in Superior Court and contend that the corporate structure of R.P.M. is a fiction allowing for piercing the corporate veil. The Court stated that under those circumstances the owner would have the right to a jury trial. The Court directed that the case be remanded to the trial commissioner and that the finding against the owner of R.P.M. individually be vacated.

XII. ***CANCELLATION OF INSURANCE POLICY: GENERAL STATUTES SECTION 31-348***

Bellerive v. The Grotto, Inc., 6335 CRB-5-19-6 (June 10, 2020), *pending appeal*, AC 44138

In this case the CRB held that a workers' compensation policy was cancelled under General Statutes Section 31-348, reversing the trial commissioner's decision. Liberty Mutual filed electronic cancellation through NCCI in accordance with Section 31-348. The employer contended that notice should have been sent certified mail per General Statutes Section 31-321. The CRB disagreed and found that electronic notification was the protocol of the Commission and satisfied the statute. The CRB also concluded that the fact there was communication between the employer and the carrier post the termination and actual premium paid was not sufficient to void the cancellation. In reaching their decision the CRB cited the Connecticut Appellate Court case of Yelunin v. Royal Ride Transportation, 121 Conn. App. 144 (2010). This case is on appeal to the Connecticut Appellate Court; *see* AC 44138.

XIII. ***REBUTTABLE AND IRREBUTTABLE PRESUMPTIONS***

Ducharme v. City of Putnam, 161 Conn. 135 (April 20, 1971)

Governor Lamont has now issued Executive Order 7JJJ that there is a rebuttable presumption of compensability for certain Covid-19 claims. The Governor may have decided to make this a rebuttable presumption since prior attempts to have an irrebuttable presumption in Connecticut workers' compensation claims have been found unconstitutional. In Ducharme, the Connecticut Supreme Court determined that the conclusive presumption established under General Statutes Section 7-433a for police and firefighters regarding heart and hypertension claims was unconstitutional since it was a "denial of equal protection of the laws and because the conclusive presumption contained in that statute results in a denial to the defendants of equal protection of the laws and deprives them of property without due process of law." The applicable statute provided benefits under the workers' compensation statutes and barred the employer from defending the claim based on causation issues. The legislature ultimately worked around this decision by enacting Connecticut General Statutes Section 7-433c; this was NOT a workers' compensation statute but rather an outright bonus to police and firefighters. While benefits under Section 7-433c are paid through the Workers' Compensation Commission they are taxable since they are not considered a workers' compensation benefit.

XIV. ***EXCLUSIVE REMEDY: GENERAL STATUTES SECTION 31-284(a)***

Feliciano v. State of Connecticut, et al., SC 20373 (Aug. 24, 2020)

At issue in this case was whether the State of Connecticut's Motion to Dismiss was properly granted by the trial court. The plaintiff, a state employee, was a passenger in a motor vehicle owned and insured by the state; said vehicle was being operated by another state employee, William Texidor ("Texidor"). Both the plaintiff and Texidor were acting in the course of their employment when they were struck by another vehicle that was uninsured. The plaintiff suffered various injuries that required medical treatment and she also lost wages. The plaintiff conceded in her responses to the state's request for admissions that she applied for and received workers' compensation benefits. The plaintiff also brought a civil action against the state of Connecticut and Metropolitan Casualty Company, alleging that Texidor's operation of the vehicle was negligent and caused the collision. The state filed a Motion to Dismiss for lack of subject matter jurisdiction on the grounds of sovereign immunity which the trial court granted.

On appeal, the Connecticut Supreme Court held that the waiver of sovereign immunity from suit in General Statutes Section 52-556 for claims arising from a state employee's negligent operation of a state owned and insured motor vehicle extends to persons who are state employees and, therefore, the court had jurisdiction over the action. However, the Court found that the waiver of sovereign immunity pursuant to Section 52-556 does

not preclude the state from asserting a defense to liability under the workers' compensation exclusivity provision set forth in General Statutes Section 31-284(a).

The Court concluded that Section 31-284(a) precluded the plaintiff's claim and the state was entitled to judgment as a matter of law. The Court noted that while the trial court correctly concluded that the plaintiff's action against the state was barred by Section 31-284(a), the form of the judgment was improper because the trial court had jurisdiction over the plaintiff's complaint. As such, the trial court's judgment of dismissal was reversed and the case was remanded with direction to render judgment in favor of the state.

XV. ***COMMISSIONER MEDICAL EXAMINATIONS (CMEs)***

Smith v. Regalcare at Waterbury, LLC, 6316 CRB 5-19-3 (March 10, 2020)

See case summary in Section VII, *supra.*

Secula v. SBC/SNET, 6314 CRB-5-19-3 (March 10, 2020)

See case summary in Section VII, *supra.*

Goulbourne v. State of Connecticut/Department of Correction, 6329 CRB-1-19-5 (June 10, 2020)

See case summary in Section II, *supra.*

Reveron v. Compass Group, 6358 CRB-5-19-11 (Sept. 16, 2020)

The CRB upheld a dismissal of a claim for back injury. The CRB found that the trial commissioner's dismissal was appropriate in that she found the claimant not credible and determined that the respondents' examiner was credible and persuasive. The trial commissioner did not rely on the Commissioner's examiner's opinion that she concluded vacillated. The appeal to the Connecticut Appellate Court was withdrawn; *see* AC 44276.

Dipisa v. Bethel Health & Rehabilitation Center, 6334 CRB-7-19-6 (Sept. 23, 2020)

See case summary in Section VII, *supra.*

Rousseau v. Acranom Masonry, Inc., 6366 CRB-5-19-12 (Feb. 3, 2021)

See case summary in Section VII, *supra.*

Baldino v. Rondo of America, Inc., 6365 CRB-5-19-12 (April 7, 2021)

See case summary in Section VII, *supra.*

XVI. *ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT*

Clements v. Aramark Corporation, 182 Conn. App. 224 (May 29, 2018), *cert. granted*, 330 Conn. 904 (Sept. 12, 2018)

The Connecticut Supreme Court heard oral argument on this important appeal on October 25, 2019. The claimant was injured while on the campus of the employer walking to her job as a mess attendant for a vendor at the Coast Guard Academy. While going between one building to another early in the morning the claimant fainted due to "cardiogenic syncope"; she hit her head on the ground and sustained a concussion. The trial commissioner and CRB had dismissed the claim because the fall was due to underlying, non-occupational causes. The Connecticut Appellate Court reversed concluding that this was an issue of law that must be construed in accordance with the "remedial purpose of the Act." The Supreme Court has been considering the claim since argument in fall 2019. We have learned that the parties to the appeal are considering settlement; in view of this a decision in the case has been stayed. If the case does settle before the Supreme Court issues a decision then we will be left with the Appellate Court ruling which finds compensable the injuries flowing from this type of non-occupational syncopal episode.

Smith v. Sedgewick Claims Management Systems, 6351 CRB-1-19-10 (Nov. 5, 2020)

This is a case that every adjuster who works at home should read. The claimant was an insurance adjuster who worked at home. Her office was upstairs in her home. During the day, while she was still logged on to her computer, she got a drink downstairs. The claimant alleged that she fell on the stairs and hurt her shoulder. She did not immediately report this to her supervisor. In fact, the claimant went to the company picnic the next day and did not mention her injury to anyone. She reported the injury on the Monday following the alleged accident. The trial commissioner, without commenting on the relative credibility of the witnesses, dismissed the claim. The CRB noted that the trial commissioner did not explain why the claim was dismissed; the CRB described the trial commissioner's decision as "opaque." The CRB remanded the case back to the trial commissioner for a detailed articulation of his decision.

Reed v. Asbestos Management Company, L.L.C., 6370 CRB-6-20-1 (Jan. 27, 2021)

See case summary in Section VII, *supra.*

Ahern v. ADP TotalSource/Z-Medica, L.L.C., 6390 CRB-8-20-5 (April 28, 2021)

The CRB affirmed a finding of compensability in a case which involved the social/recreational statute General Statutes Section 31-275(16)(B)(i). That statute states that an injury will not be compensable if it results from "the employee's voluntary participation in any activity the major purpose of which is social or recreational, including, but not limited to, athletic events, parties and picnics, whether or not the employer pays some or all of the cost of such activity." The claimant, an Assistant Marketing Director, sustained a knee injury while playing volleyball at a company field day held away from

the premises of the employer. The employer's office was closed at noon; employees did not have to attend the field day but they had to use PTO time if they did not attend. The Human Resource Manager for the employer testified that attendance at the field day was not mandatory. The trial commissioner found the claimant credible; the claimant testified that she thought her attendance at the event was important to her employment. The trial commissioner determined that attendance by employees at the field day was incidental to the employment and it was a benefit to the employer for the employees to participate. While the trial commissioner did not directly address the issue, the CRB determined that it could be reasonably inferred from the trial commissioner's Finding that he did not believe the claimant's activities at the field day to be voluntary. The CRB upheld the Finding stating that the case was more akin to the case of Anderton v. WasteAway Services, L.L.C., 91 Conn. App. 345 (2005) (injury during basketball game organized by employer compensable), as opposed to Brown v. United Technologies Corp., 112 Conn. App. 492 (2009), *appeal dismissed*, *cert. improvidently granted*, 297 Conn. 54 (2010) (employee injury while power-walking during lunch on employer's premises not compensable).

XVII. *INTOXICATION DEFENSE: GENERAL STATUTES SECTION 31-284(a)*

Galinski v. Beaver Tree Service, L.L.C., 6361 CRB-1-19-12 (Dec. 9, 2020), *pending appeal*, AC 44442

The claimant worked for a tree service which was owned by his father. The company was cutting down a large tree. While doing so they established a "drop zone"; employees were not to enter the "drop zone" while limbs were being cut up above. Notwithstanding the fact that this was communicated to the claimant he entered the "drop zone" and was hit by a limb that had been cut. The claimant sustained serious injuries and was rendered a quadriplegic. The respondents denied the claim contending that the claimant entered the "drop zone" because he was intoxicated in violation of General Statutes Section 31-284(a). The respondents presented testimony of a toxicologist who indicated that the metabolite score of 695 revealed that the claimant was a heavy marijuana user and that his long-term use of marijuana had impaired his ability and likely caused him to enter the drop zone when he should not have. The claimant presented testimony that there was no evidence that he had used marijuana on the date of the injury and that there was no evidence of acute influence of marijuana. The trial commissioner dismissed the claim citing Section 31-284(a).

On appeal, the CRB reversed stating that the defense of intoxication must be proven by the respondents and they must show that the claimant was actively under the influence at the time of the accident. The CRB concluded that there was no evidence to support that conclusion and therefore reversed the dismissal. It is likely the respondents will take an appeal in this case arguing that the CRB usurped the trial commissioner's discretion; the claimant will continue to contend that there was no evidence to show acute intoxication as of the date of the injury. It is interesting that the respondents apparently

did not raise the issue as to whether the claimant's actions constituted willful and serious misconduct by entering the drop zone notwithstanding the fact that he was aware that he was not supposed to enter the zone. On appeal the respondents may also argue that General Statutes Section 31-275(1)(C) bars a compensable claim if the injury is due to the use of narcotic drugs. The case is on appeal to the Connecticut Appellate Court; *see* AC 44442.

Reed v. Asbestos Management Company, L.L.C., 6370 CRB-6-20-1 (Jan. 27, 2021)

See case summary in Section VII, *supra.*

XVIII. *DETERMINATION OF COVERAGE AND BANKRUPTCY*

Beers, Deceased, Allison Beers-Jacheo, Administratrix v. Raymark Industries, Inc., 6347 CRB-8-19-9 (Feb. 24, 2021)

In a lengthy decision the CRB affirmed the trial commissioner's Finding that the administratrix of the estate of the claimant was due to be paid total disability benefits as well as out of pocket medical expenses, and that medical bills should be paid. The decedent worked for Raybestos on the production side of the company during the period 1961 to 1969; during this period of time he was exposed to asbestos used in the production of brake linings. After the decedent left the company the name of the employer was changed from Raybestos to Raymark Corporation in 1982. In 1998 Raymark filed for bankruptcy protection and apparently went out of business.

In 2016, while working for a different company, the claimant was diagnosed with mesothelioma. He pursued a timely workers' compensation claim against Raymark Corporation. Formal Hearings were held at which the claimant testified. However, the claimant died in 2018 before the record was concluded. The administratrix of the estate of the decedent was allowed by the trial commissioner to be substituted for the decedent before the record was closed. There was unopposed expert testimony presented by the administratrix that the decedent's lung condition was due to his work at Raybestos/Raymark. The trial commissioner awarded total disability benefits and ordered medical bills to be paid.

Although notice was sent to the employer no representative of the employer appeared. The Second Injury Fund ("Fund") and Hartford Insurance were cited to the hearings. Hartford Insurance acknowledged a policy of workers' compensation coverage from 1958 to 1969 for the employer but contended it was limited to coverage for non-production workers. Hartford Insurance did not present its workers' compensation policies into evidence but did offer deposition testimony and voluminous exhibits from prior claims that showed that the employer was self-insured for production workers during the period in question. The Fund had been a party to the prior claims and therefore the trial commissioner allowed the documentary evidence into the record. Part of the evidence was testimony of the Commission's record keeper that claims filed by other production

employees while working at Raybestos in the 1960s were all paid by the company directly; this evidence supported Hartford Insurance's position that their coverage was limited and did not extend to the production side of the employer. Ultimately, the trial commissioner found that the employer had ceased to exist and was self-insured; the trial commissioner concluded that the Fund was liable for award under General Statutes Section 31-355(b).

The Fund appealed the decision contending that the trial commissioner could not award benefits since the employer had declared bankruptcy, that it was improper to make an award directly against the Fund, that the administratrix did not have a proper claim for disability benefits, and that the decedent should have pursued a claim against a trust that had been established by the employer for asbestos claims. The CRB determined that the bankruptcy did not "shield" the Fund from liability under Section 31-355(b). The CRB held that the decedent had properly pursued the disability claim before his demise and that the death of the worker should not act as a bar to the claim by the administratrix. Moreover, the CRB found that the trust that was established by the employer was not for workers' compensation claims. Finally, the CRB found that the Finding against the Fund directly was appropriate in the context where all parties agreed that the employer was no longer in business and that service of the Finding to the employer would be nothing more than a "procedural pantomime."

Both the trial commissioner and the CRB had to make difficult decisions in this case regarding coverage based on evidence that was not clear and certainly not complete. In the end, the correct decision appears to have been made.

XIX. ***PERMANENT PARTIAL DISABILITY: GENERAL STATUTES SECTION 31-308(b)***

Vitti v. City of Milford, SC 20350 (Aug. 24, 2020)

See case summary in Section IV, *supra.*