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CONNECTICUT WORKERS' COMP UPDATE

The law firm of **Strunk Dodge Aiken Zovas (SDAZ)** provides you with our Summer 2021 **WORKERS' COMPENSATION UPDATE**. Please feel free to share this update with your colleagues. If someone inadvertently has been left off our email list and would like to receive future updates they can contact **Jason Dodge** at jdodge@ctworkcomp.com or 860-785-4503.

The Connecticut Workers' Compensation Commission through the leadership of Chairman Morelli has remained open for business during the Covid-19 pandemic. At this time all hearings are being held in person. In general, masks are being required to be worn at the Commission offices.

STRUNK DODGE AIKEN ZOVAS NEWS

Attorneys Lucas Strunk and Jason Dodge of SDAZ were presenters at the Annual Connecticut Legal Conference for the Connecticut Bar Association (CBA) on June 15, 2021. Attorney Strunk provided a legislative report to the Workers' Compensation Section of the CBA; Attorney Dodge provided a review of significant case law in the area of workers' compensation during the period 2020-2021. Also speaking at the presentation were Chairman Morelli and Dr. David Banach. Dr. Banach is a Hospital Epidemiologist at UConn Health; he provided an update regarded Covid-19 in the context of workers' compensation claims. Attorney Colette Griffin was the moderator for the presentation.

Senior partner Anne Zovas of SDAZ was recently the subject of a "CACT member highlight" in a June 2021 publication from the Connecticut Association for Community Transportation (CACT). CACT is an organization "committed to promoting and improving public transportation in Connecticut." The publication reviewed Attorney Zovas' educational background at Boston College where she graduated, cum laude, and her education at the University of Connecticut School Of Law. It noted that Attorney Zovas "has been named a Super Lawyer in New England Super Lawyers magazine for her skill and expertise" and that she is an active member of the Hartford County Bar Association and past President of the Hartford County Bar Foundation.

The 2021 Edition of the *U.S. News – Best Lawyers* "Best Law Firms" rankings were publicly announced. **Strunk Dodge Aiken Zovas has been recognized as a Tier 1 "Best Law Firm" for the 2021 edition.**

Attorneys Lucas Strunk, Richard Aiken, and Jason Dodge of SDAZ have been named *Best Lawyers 2021* in New England and Connecticut. Best Lawyers is the oldest and most respected lawyer ranking service in the world. For 40 years, *Best Lawyers* has assisted those in need of legal services to identify the lawyers best qualified to represent them in distant jurisdictions or unfamiliar specialties.

Attorney Philip Markuszka of SDAZ was accepted to the Board of Directors of the Hartford County Bar Association on May 18, 2021 for a three year term. Attorney Markuszka has also been appointed to serve on the Glastonbury Zoning Board of Appeals until November 21, 2021. He will be running in this upcoming November election to continue serving on the Board.

Partners Anne Zovas, Richard Aiken, Jason Dodge, and Lucas Strunk of SDAZ have been named to Connecticut Super Lawyers for 2020. **Attorneys Philip Markuszka and Christopher D'Angelo of SDAZ** have again been named Connecticut 'Rising Stars' for Super Lawyers 2020.

Attorney Christopher Buccini of SDAZ has been named to the Connecticut Bar Association's Workers' Compensation Section Executive Committee. **Attorneys Aiken, Strunk and Dodge of SDAZ** are already on the Committee.

Attorney Richard Aiken of SDAZ is again in charge of the Verrilli-Belkin Workers' Compensation Charity Golf Event to be held on September 9, 2021; this event is sponsored by the CBA. This event is only for attorneys.

Attorney Katherine Dudack has left SDAZ as of June 25, 2021. Attorney Dudack has taken a position at Travelers house counsel. Best wishes to Katie in her new endeavor.

SDAZ is a sponsor of **Kids' Chance of Connecticut.** Kids' Chance of Connecticut provides educational scholarships to the children of Connecticut workers who have been seriously or fatally injured in a work-related accident. If you are aware of a child who may qualify for a scholarship to a college or technical school please go to the following website for an application www.kidschanceofct.org. For the academic year 2021-2022 Kids' Chance of Connecticut awarded ten scholarships to students going to college. If you have any questions about Kids' Chance of Connecticut or would like to become part of our organization please contact **Jason Dodge or Phil Markuszka of SDAZ. Kids' Chance of Connecticut will hold its annual golf outing at Wampanoag Country Club in West Hartford on September 27, 2021.**

You can now follow us on Facebook at https://www.facebook.com/Strunk-Dodge-Aiken-Zovas-709895565750751/

SDAZ can provide your company with free seminars regarding Connecticut Workers' Compensation issues. Please contact us about tailoring a seminar to address your particular needs.

We do appreciate referrals for workers' compensation defense work. When referring new files to SDAZ for workers' compensation defense please send them to one of the partners' email: azovas@ctworkcomp.com, raiken@ctworkcomp.com, lstrunk@ctworkcomp.com,

jdodge@ctworkcomp.com, HPorto@ctworkcomp.com or by regular mail. We will respond acknowledging receipt of the file and provide you with our recommendations for defense strategy.

Please contact us if you would like a copy of our laminated "Connecticut Workers' Compensation at a glance" that gives a good summary of Connecticut Workers' Compensation law to keep at your desk.

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LEGISLATIVE UPDATE

2021 LEGISLATIVE REPORT

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The 2021 legislative session came to a close July 9, 2021 with a flurry of activity related to the Workers' Compensation Act in the closing days and then again during the special session that addressed the implementer bill. As a result, there are a number of new public acts which the practitioner will certainly want to review whether representing the claimant or a respondent.

PUBLIC ACT 21-107 (SENATE BILL 660) "An Act Expanding Workers' Compensation Benefits for Certain Mental or Emotional Impairments Suffered by Health Care Providers in Connecticut with COVID-19" was effective upon passage June 30, 2021. The new law redefines post-traumatic stress disorder as post-traumatic stress injury, notwithstanding that the diagnosis must still meet the criteria for PTSD as specified in the most recent addition of the "Diagnostic and Statistical Manual for Mental Disorders."

Despite the title of the new law, the now "eligible individuals" qualifying for coverage for an event on or after July 1, 2019 has been expanded beyond police officer, parole officer or firefighter to include emergency medical services personnel, Department of Correction employees and telecommunicators. Health care providers join the eligible group when encountering a qualifying event on or after March 10, 2020.

The new law primarily addresses Subsection 16 of Section 31-275 and rewrites Section 31-294k. The workings of and the benefits available pursuant to Section 31-294k remain the same. In the case of a telecommunicator, however, the term "witnesses" will mean that the dispatcher hears by telephone or radio while directly responding to an emergency call that which constitutes a qualifying event under the established law and while providing a dispatch assignment.

Health care providers as defined means:

> (A) a person employed at a doctor's office, hospital, health care center, clinic, medical school, local health department or agency, nursing facility, retirement facility, nursing home, group home, home health care provider, any facility that performs laboratory or medical testing, pharmacy or any similar institution, or (B) a person employed to provide personal care assistance as defined in Section 17b-706 in or about a private dwelling provided such person is regularly employed by the owner or occupier of the dwelling for more than twenty-six hours per week.

The Act also references that a health care provider must be engaged in activity substantially dedicated to mitigating or responding to the public health and civil preparedness emergencies declared by the Governor on March 10, 2020 or any extension thereof.

As such, the health care provider will qualify for benefits in the event he or she:

(i) Witnesses the death of a person due to COVID-19 or due to symptoms that were later diagnosed as COVID-19;

(ii) Witnesses an injury to a person who subsequently dies as a result of COVID-19 or due to symptoms that were later diagnosed as COVID-19;

(iii) Has physical contact with and treats or provides care for a person who subsequently dies as a result of COVID-19 or due to symptoms that were later diagnosed as COVID-19; or

(iv) Witnesses a traumatic physical injury that results in the loss of a vital body function of a person due to COVID-19 or due to symptoms that were later diagnosed as COVID-19.

As noted above, the indemnity provisions of Section 31-294k remain the same to the extent that there is a 52 week cap on benefits and a bar to awarding benefits beyond four years after the qualifying event. The practitioner will also recollect that this section prohibits payment of benefits pursuant to Section 31-308(b) and Section 31-308(a).

PUBLIC ACT 21-18 "An Act Concerning Minor and Technical Changes to the Workers' Compensation Act." (SENATE BILL 907) was the joint bill submitted by the Chairman and the Executive Committee's Legislative Subcommittee as guided by Attorney Bud Drapeau. The Public Act has been signed by the Governor and is effective October 1, 2021.

Section 1 substitutes the term "administrative law judge" for any reference to the commissioners not only in the current statute but with respect to all pending legislation.

Section 2 amends Section 31-280a(c) by reducing the number of meetings of the Advisory Board to once each calendar quarter (rather than twice).

Section 3 repeals Section 31-283f regarding the Statistical Division and substitutes language which eliminates the full-time salaried director appointed by the Chairman to administer the division.

Section 4, the final request of the Chairman's office, substitutes new language to Section 31-298 eliminating the term "cassettes" relative to the release of audio recordings.

Section 5 begins those changes suggested by the Legislative Sub-Committee of the Executive Committee (except as noted below). Section 31-349 is subject of substantive language which eliminates references to transfer of liability and the notice provisions, making for a much shorter statute. The law continues to reference that the amount of disability paid is less any compensation payable or paid with respect to the previous disability. The existing language defining that which is payable or paid remains.

Section 6 and Section 7 make technical changes to conform Sections 31-354 and 31-355 by eliminating references to 31-349(f) and Section 31-349(c) transfer references.

Section 8 of the new law repeals three obsolete provisions eliminating (at the Chairman's request) Section 31-276a which transferred the Workers' Compensation Commission to the Labor Department for administrative purposes only. Section 31-298, the medical

panel provision which per the historians in our section, has not been used since the 1980s is eliminated. The anachronistic 31-304 allowing Superior Court judges to destroy VAs filed with the Clerk of Superior Court greater than ten years in age is also eliminated. That particular procedure was associated with appeals prior to the establishment of the Compensation Review Division.

SPECIAL ACT 21-35 "An Act Establishing a Task Force to Study Cancer Relief Benefits for Firefighters" was effective on passage July 12, 2021. The new law results from a modification of an earlier pending bill at the legislature that sought to establish presumptions for cancers contracted by firefighters. The new law will establish a task force to study cancer relief benefits for firefighters. This study is to include, but is not limited to, an examination of the adequacy of the cancer relief program established pursuant to Section 7-313j and the feasibility and implications of providing workers' compensation and other benefits including death benefits to firefighters who are diagnosed with cancer acquired as a result of occupational exposure to noxious fumes and poisonous gases. Among the members of the task force will be an individual with expertise in the state's workers' compensation program, one with expertise in cancer research, as well as a representative of the Firefighters Labor Organization. Both municipal paid and volunteer fire departments will be represented by a member as well. The twelve member task force is to report its findings and recommendations to the Labor Committee not later than January 1, 2022, at which time the task force will terminate.

As has been noted at the time of prior reports and presentations, the legislative session is truly not over until the budget implementer is reviewed and passed in both chambers. This year's implementer, **SSPA21-2 (Senate Bill 1202)** added a number of changes to the Act by way of a simple exercise of power by the Democratic majority which sought to preserve proposed changes that it may have viewed as lost by Republican efforts to delay or filibuster. As a result, vestiges of House Bill 6478 appeared in the special session's implementer. At Section 290, effective upon passage June 15, 2021, Section 31-290a is expanded to prohibit employers from discharging or disciplining an employee for exercising his or her rights under the Act. The amendment to 31-290a will also provide relief in the event an employer deliberately misinforms or deliberately dissuades an employee from filing a workers' compensation claim for benefits or, on or after October 1, 2021, a claim for payment of benefits from the Connecticut Essential Workers' COVID-19 Assistance Fund. (See herein.)

Section 291 of the special session law substitutes new language in Section 31-306 as of June 15, 2021 increasing the amount to be paid for burial expenses to $12,000.00 for an employee that dies on or after the effective date of the law. Thereafter, on January 1, 2022 and each January thereafter the compensation for burial benefits will be adjusted by the percentage increase in the consumer price index for urban wage earners and clerical workers in the northeast as defined in the United States Department of Labor's Bureau of Labor Statistics.

Practitioners will remember that House Bill 6478 had proposed an increase to $20,000.00 in addition to the adjustment under the consumer price index. The Workers'

Compensation Executive Committee had expressed support for the sum of $7,500.00. Whether the $12,000.00 figure was ever the subject of public hearing discussion will need to be reviewed.

SECTION 289 of **SSPA21-2** establishes the **"Essential Workers COVID-19 Assistance Program."** The program becomes effective October 1, 2021. The program, which this writer believes is funded by federal monies from the American Recovery Act, will provide benefits on a first-come, first-served basis through June 30, 2024. The program will provide benefits to essential workers for lost wages, out-of-pocket medical expenses and/or burial expenses. Compensation is provided without the need to prove that the illness arose from employment.

Under the new law, an "affected person" who is an "essential employee" will qualify for relief if he or she died or could not work due to contracting COVID-19 or symptoms later diagnosed as COVID-19 between March 10, 2020 and July 20, 2021.

Applying for benefits requires proof by way of a positive laboratory test or a diagnosis documented by a licensed physician, physician's assistant or APRN. During the 14 consecutive days immediately before death or inability to work, the applicant must not have worked solely from home with no physical interaction with other employees or have received an individualized written offer or directive to work solely from home. "Affected person" does not include federal employees who qualify for benefits under the COVID-19 presumptions included in the American Rescue Plan of 2021. Essential employees able to apply for relief from the program are those employed in a category that the Centers for Disease Control and Prevention's Advisory Committee on Immunization Practices as of February 20, 2021 recommended to receive a COVID-19 vaccination in phase 1a or 1b of the program. The legislative commissioner's office noted that these individuals would include health care personnel, firefighters, police officers, corrections officer, food and agricultural workers, manufacturing workers, grocery store workers, public transit workers, education sector workers and child care workers.

The program's administrator is to be the Office of the Comptroller or a third party administrator yet to be appointed. The bill authorizes the administrator to establish the program and provides a manner in which to consider evidence that does not require strict rules but rather representations under oath. The administrator has a number of obligations that include controlling administrative costs not to exceed 5% and as of January 1, 2022, to submit monthly reports. The practitioner who seeks to assist an applicant to this program should review procedures outlined within the new special act.

The program will provide weekly benefits for all uncompensated leave calculated at 75% of the claimant's net average weekly earnings but not to exceed the average weekly earnings of all workers in the state. The earnings relevant for purposes of calculating the average weekly wage are those earned in the 8 weeks immediately preceding the date unable to work. The program will provide a $3,000.00 burial expense.

Of note is that a pending workers' compensation claim will not prevent the administrator from approving the person's claim for benefits. Any subsequent workers' compensation benefits, however, will be offset by the assistance received from the program. The administrator is to notify the Workers' Compensation Commission of any available offsets.

An affected person who seeks to have his or her application reconsidered can file an appeal with said review being conducted by the administrator's designee who will conduct a de novo review and from which there is no further appeal. On balance, this program provides an alternative to workers who contracted COVID-19 who may have difficulty proving their case by more traditional methods under the Workers' Compensation Act.

Practitioners who are reviewing the legislative website should also be aware that **PUBLIC ACT 21-110 is entitled "An Act Concerning the Office of the Correction Ombuds, the Use of Isolated Confinement, Seclusion and Restraints, Social Contacts for Incarcerated Persons and Training and Workers' Compensation Benefits for Correction."** This public act is the former Senate Bill 1059 which contained a provision to include Department of Corrections employees as protected workers for purposes of post-traumatic stress injury. With the passing of Senate Bill 660, however, that language was stricken. The assumption is that the title of the Act may be corrected before the final legislative record is created.

PUBLIC ACT 21-157 "An Act Concerning the Insurance Department's Recommendations Regarding the General Statutes" contains a provision that eliminates the Insurance Commissioner's requirement to submit reports to the Joint Standing Committee of the General Assembly relative to Section 31-290d. In addition to workers' compensation fraud claims, the commissioner need no longer provide reports relative to health insurance fraud or fires by arson.

Please note that Commissioner Barton's reappointment was confirmed and congratulations to him are in order. As all are aware, Chairman Morelli reinstated all timelines and filing requirements as of June 2, 2021. In person hearings recommenced effective July 1, 2021.

On a final note, please be aware that the implementer also contains a provision that instructs the Governor to establish the second week of February each year as "Kindness Week" so as to promote special acts of kindness. The Governor will be required to formulate suitable exercises to be held in the state capitol or elsewhere in recognition and observance of the week so as to promote it with residents of the state. Given some of the acrimony caused during this year's special session over the implementer bill, I remain hopeful that the legislators will recognize the second week of February as well.

As always, the status and the full text of proposed legislation and the new public acts can be viewed on the General Assembly website, cga.ct.gov.

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CONNECTICUT WORKERS' COMPENSATION COMMISSION NEWS

At the Connecticut legal conference on June 15, 2021 Chairman Morelli provided an update regarding issues concerning Connecticut Workers' Compensation. Previously we had reported to you that the Commission was attempting to upgrade its computer system. Apparently the commission has terminated the company that was working on the computer upgrade. It is hoped that the computer system will be improved in the future to allow for such things as e-filing, however, for now, that is not available. It is uncertain when an upgrade will occur. The Chairman did advise that by September 2021 it is hoped that there will be a new Middletown workers' compensation office with convenient parking for litigants.

VOLUNTARY AGREEMENTS

This information has been received regarding voluntary agreements and their submission to the Commission.

1. VA's are <u>not required</u> to be submitted on green paper.
2. Verifiable electronic signatures (Docusign, Adobe, etc.) are permitted for <u>adjusters or respondent counsel only</u>.
3. The claimant's signature **MUST** be <u>original</u>. Scanned copies, photocopies, e-signatures, etc. are **NOT PERMITTED** from the claimant.

Chairman Morelli's Memorandum 2021-04:

Chairman Morelli has issued Memorandum 2021-04 which orders that the statutory deadlines that previously were waived by Governor Lamont's Executive Order 7K shall begin anew on June 2, 2021.

The 20 day deadline for payment of an award pursuant to Connecticut General Statutes Section 31–303 will begin to run as of June 2, 2021 for any award issued prior to June 2, 2001. Therefore, it is crucial that carriers and self-insurer's make sure that any awards are paid timely in order to avoid a claim for 20% penalty. The Memorandum gives this example: "a 20-day deadline for payment of an award *pursuant to Section 31-303* dated prior to June 2, 2021 must commence on the 20th day following June 2, 2021."

Any Form 36 that is filed after June 2, 2021 will be automatically approved if no objection is filed within 15 days.

As of June 2, 2021 the Commissioners, at their discretion, can require job searches for temporary partial or Section 31–308a benefits. There is no blanket requirement as of June 2, 2021 for job searches to be performed. We recommend that carriers and self-insurers provide to claimants who are on temporary partial benefits a copy of the Chairman's memorandum and job-search forms.

Beginning June 2, 2021 all Connecticut Workers' Compensation Commission policies, procedures and deadlines will be put back in place as they were prior to March 16, 2020.

The link to the Commissioner's memorandum is

https://wcc.state.ct.us/memos/2021/2021-04.htm

Per Chairman Morelli's Memorandum 2021-03 the Workers' Compensation Commission has ordered that:

> Effective July 1, 2021, all WCC hearings will be held in-person. The pandemic forced all hearings to be held remotely out of necessity as a means of continuing to serve the people of Connecticut. Overall, it has successfully served that purpose. However, we believe that to *best* serve our mission to adjudicate the claims of Connecticut's injured workers, we need to return to in person hearings. Additionally, WCC does not currently have the technological capacity to manage a hybrid docket of both remote and in-person hearings. WCC's IT Department will continue to work on solutions which allow for the potential to institute dockets which can accommodate requests for both remote and in-person hearings in the future.

The Connecticut Law Tribune has named Chairman Stephen Morelli of the Connecticut Workers' Compensation Commission the "Best Officiator" in their annual legal awards.

The Workers' Compensation Commission has issued handouts and hung posters in their offices advising that "we all pay for workers' compensation fraud." The posters and handouts provide the number of the Division of Criminal Justice, 860-258-5829, and asks for leads regarding workers' compensation fraud. The posters state that "all information will be kept confidential." SDAZ has worked successfully on numerous cases with the State Workers' Compensation Fraud Unit to provide information to assist in the prosecution of fraud cases.

The Commission has updated the medical guidelines for physician assistants in Memorandum 2021-02. A physician assistant may not see a workers' compensation patient on more than two consecutive visits and may not assign a permanency rating.

The mileage reimbursement rate for travel expenses as of January 1, 2021 has fallen to 56 cents per mile.

For 2021 the panel members on appeals to the Compensation Review Board will be Chairman Stephen M. Morelli and Commissioners Maureen E. Driscoll and Brenda D. Jannotta.

Memorandum 2020-18 has been issued by Chairman Morelli as of October 1, 2020 regarding maximum compensation rates. The Chairman has ordered that the maximum total disability rate for injuries occurring after October 1, 2020 is $1,373 (based on the estimated average weekly wage of all employees in Connecticut). The maximum temporary partial/permanent partial disability rate for accidents after October 1, 2020 is $1,174 (based on the average weekly earnings of production and related workers in manufacturing in Connecticut).

Exam Charges: Commissioner Medical Exam (CME) fee has increased to $900; Respondent Medical Exam (RME) fee is still $750.

The Commission does have a website where you can look up such information as to whether a hearing is assigned, list of all claims for an employee, status of a Form 36, and interested parties. This is quite a useful site and is a different website than the Commission's main site. It can be found at:

http://stg-pars.wcc.ct.gov/Default.aspx

WORKERS' COMPENSATION PRACTICE TIP

When a claimant is light duty in order to receive temporary partial (TP) benefits under Section 31-308(a) (pre-specific benefits) the claimant must be ready willing and able to work in the same locality as his prior employment. It has always been past practice that the claimant must look for work within their restrictions and submit job searches if the employer was unable to accommodate the claimant. During the pandemic, the Chairman waived the job search requirement. However in the Chairman's May 20, 2021 Memorandum No. 2021-04 he noted that effective June 2, 2021, the Commissioners, at their discretion, can require job searches when appropriate for temporary partial and/or C.G.S. 31-308a benefits. No 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.

Thus, the Chairman's memo did not dictate that claimant's must begin job searches to receive temporary partial benefits after June 2, 2021. We believe it would be best practice to send a letter to the claimant with the job search forms requesting that 5 searches per week be performed and submitted to receive temporary partial benefits. If job searches are not submitted then a hearing should be requested and the formal request for searches should be made with the commissioner.

As a reminder post specific or Section 31-308a should also only be paid with an order from a commissioner and job searches should also be requested in order to receive this benefit.

CASE LAW

Clements v. Aramark Corporation, ____Conn.____, SC 20167 (June 24, 2021)

In probably the most important workers' compensation decision in the last 10 years the Connecticut Supreme Court reversed a finding of compensability in this fall-down claim and dismissed the matter. 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 oral argument in the Fall of 2019. Based on this set of facts where the claimant has an idiopathic fall on a level ground the Supreme Court determined that the injuries resulting from hitting the ground were not compensable. The Court defined "idiopathic fall" as a "fall that is brought about by a purely personal medical condition, such as a seizure or heart attack, and not by any condition or risk of employment." Footnote 1. The decision is an exhaustive review of the history of Connecticut Supreme Court cases involving falls at work. In reaching its conclusion, the Supreme Court overruled the case of *Savage v. St. Aeden's Church, 122 Conn. 343 (1937),* which concluded that injuries "sustained by an employee as a result of an idiopathic fall onto a level surface are compensable as a matter of law." The Supreme Court reviewed Professor Larson's treatise on Workers' Compensation and noted that the majority of states found these types of claims not to be compensable. The Court did state that in the future other similar types of injuries could potentially be found compensable if "an employee may be able to establish, in any given case, that, as a factual matter, the hardness of the floor increased the risk of harm from the fall so as to render the resulting injuries compensable under the increased risk rule." In Clements, the claimant had not argued that the cement floor that the claimant fell on was an "increased risk" in the employment which made the claim compensable; the Court noted that the claimant had not filed a Motion to Correct on the issue of the hardness of the floor. We predict that there will be much discussion regarding this case and perhaps seminars to review the consequences of this decision. For now, respondents should deny injuries resulting from idiopathic falls on level ground. The Connecticut workers' compensation treatise, *Workers' Compensation Law (2008*), co-authored by **Attorneys Strunk and Dodge of SDAZ**, was quoted in the decision.

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 twenty 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. Linberg Heat Treating Co., 250 Conn. 581 (1999),* should apply and that the appeal should be allowed to proceed. In *Kudlacz*, the 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." 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 Board 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.

AHERN V ADP TOTALSOURCE/Z-MEDICA, LLC, 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 commissioner found the claimant credible; she testified that she thought her attendance at the event was important to her employment. The 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 Commissioner did not directly address the issue the

CRB determined that it could be reasonably inferred from the 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, LLC, 91 Conn. App. 345 (2005)* (injury during basketball game organized by employer compensable) as opposed to *Brown v. UTC, 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).

CAREY V. STATE OF CONNECTICUT, 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 CME with Dr. Jambor who rated the claimant at 30% of the back and provided a sedentary work capacity. The respondents had two RMEs, 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 accidents. The respondents filed a number of Form 36's 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 Commissioner approved in his 2020 decision a Form 36 filed on June 1, 2015. The Commissioner found the claimant to be not credible. The 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 Commissioner did not rule regarding compensability of a subsequent 2019 surgery to the back. On appeal, the claimant alleged that the Commissioner based on the doctrine of laches could not address the Form 36's which were filed in 2015 in his 2020 decision. The claimant also contended on appeal that the 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 Board stated that the claimant raised for the first time the issue of laches on appeal and the Board therefore refused to consider it. The CRB did not make reference to a prior 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.

DEJESUS V. R.P.M. ENTERPRISES, INC., ___Conn. App. ___ , AC 44111 (May 18, 2021)

At issue in this case 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. 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 Section 31-288(c) based on the employers' failure to carry worker's 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 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 estoppell 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 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-employer 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 worker's 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 Commissioner.

The Appellate Court affirmed the finding that the medical care exception in 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 Appellate 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 Commissioner on appeal.

The Appellate 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 judgement. 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 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 Appellate 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 Commissioner and that the finding against the owner of R.P.M. individually be vacated.

HLOBIK V. DATTCO BUS COMPANY, 800208477 (May 18, 2021)

In this formal hearing decision the claim for right shoulder injury was dismissed by the Eighth District Commissioner based on a credibility issue. The claimant alleged a right shoulder injury while pushing up a roof mounted escape hatch in a bus that she drove during the week of November 11, 2019, however, the injury was not reported until December 18, 2019. The claimant's supervisor reviewed video from the bus in an effort to confirm the injury but could not see any video to confirm the accident. The claimant did not seek medical treatment with her PCP until December 17, 2019. The claimant did have a prior right shoulder injury when she fell at home in January 2018 and had obtained an x-ray for the shoulder at that time which was negative. When the claimant initially saw her treating orthopedic doctor on April 6, 2020 the claimant denied any prior right shoulder injury. The claimant did undergo surgery. Evidence was presented that the claimant's employee handbook and union contract required immediate reporting of any work accident. The Commissioner concluded that the claimant "failed to explain in a credible and persuasive manner why she failed to report the alleged injury for five or six weeks." Due to the claimant's lack of credibility the Commissioner determined that the claimant had failed to meet her burden of proof. The claim for benefits was completely dismissed. **Attorney Jason Dodge of SDAZ successfully defended this case on behalf of the employer.**

BRITTO V. BIMBO BAKERIES, 6397 CRB-4-20-7 (July 2, 2021)

In this case, the CRB affirmed the Commissioner's denial of a Motion to Preclude a bilateral knee injury case. The claimant alleged an injury to his left and right knee on January 21, 2017. Initially the claimant filed a Form 30C for a specific injury to the left knee; this was filed with the Commission on February 21, 2017 and a timely responsive Form 43 was issued by the respondents. Subsequently, the claimant chose to file a further Form 30C for bilateral knee injuries based on a repetitive trauma theory. The claimant filed the notice with the commission in December 2017 and attempted to send certified mail directly to the employer at 328 Selleck Street #A (the correct address of the employer). The claimant asserted that the postal service attempted to serve the mail on three occasions, December 14, 2017, December 15, 2017 and December 30, 2017. Eventually, claimant's counsel received from the post office the envelope with the Form 30C marked "undeliverable as addressed and unable to forward." The employer contended that they did not receive the new notice of claim until their counsel was hand-delivered the notice at a hearing on January 18, 2018; immediately thereafter a Form 43 was filed. Testimony was provided by the employer as to how certified mail was received generally; the testimony indicated that there was a buzzer to be rung and an

employee would meet the carrier at an exterior door. The Commissioner determined that there was a "very noticeable sign on the building" pointing to where the office of the employer was. The Commissioner determined that the second Form 30C was not properly served until it was hand-delivered to the respondent's attorney on January 18, 2018. The Compensation Review Board affirmed noting that General Statutes Section 31–321 requires notice to be served by registered or certified mail or in person. In affirming the Commissioner's decision, the Board distinguished the case of *Morgan v. Hot Tomato's, 4377 CRB-3-01-3 (January 30, 2002)*. In that case, the notice was returned as "unclaimed mail" and evidence was presented that the Postal Service had attempted to deliver the mail on five occasions.

AMBROSE V. CITY OF BRIDGEPORT, 6401 CRB-7-20-9 (July 23, 2021)

In this case the CRB reversed the Commissioner's dismissal and remanded the case for further findings. The claimant worked as mason for the City employer and drove a City van to jobs. He had two fifteen-minute breaks that he could take during the day along with a half-hour lunch. There was testimony that the employer vans would sometimes be used by employees for short personal errands. The claimant began work at 7 a.m. and left the main facility and headed to a bank 3 miles away to pay a personal loan. After making a brief transaction at the bank and heading to his designated job he was involved in a motor vehicle accident, and he sustained injuries. He was about a mile from his destination at the time of the accident. The CRB suggests that the deviation to the bank was about 3 miles and took ten minutes. The Commissioner in dismissing the claim concluded that the claimant deviated from his direct route to his assigned location. In reversing the decision, the Board determined that the Commissioner failed to address whether the deviation was minor or substantial. The CRB stated that if the deviation was not substantial then the injury may be compensable; if the deviation was substantial the CRB held that the case still may be compensable it the employer had acquiesced to such personal errands during work. In reaching its decision the Board cited *Kish v. Nursing & Home Care, Inc., 248 Conn. 379 (1999).*

CLARK V. TOWN OF WATERFORD COHANZIE FIRE DEPARTMENT ET AL, 206 Conn. App. 223 (July 27, 2021)

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 Appellate Court affirmed the Board decision. The Appellate Court rejected the Town's argument that the definition of a member of the fire department was found in General Statutes Section 7-425(5) when determining if a firefighter qualified for benefits under Section 7-433c. The Court determined that Section 7-425(5) dealt with a pension plan and did not control who was or was not entitled to Section 7-433c benefits. Accordingly, part-time firefighters or police officers may be entitled to Section 7-433c benefits based on this case.