
**SUPREME COURT
OF THE
STATE OF CONNECTICUT**

S.C. 19201

RONALD F. GILL, JR.

v.

BRESCOME BARTON, INC., ET AL.

**APPENDIX TO
BRIEF OF RESPONDENT-APPELLANT
LIBERTY MUTUAL INSURANCE GROUP**

**MARIAN H. YUN, ESQ.
LAW OFFICES OF LOCCISANO, TURRET &
ROSENBAUM
101 BARNES ROAD, 3RD FLOOR
WALLINGFORD, CT 06492
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JURIS NO.: 408308**

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CN

1W001100135

State of Connecticut

WORKERS' COMPENSATION SYSTEM

Commissioner's Notes - Informal

Commissioner: Walker

Scheduled Time:

Case: Ronald F Gill Jr vs.

Brescome Barton

SS#:

Injury Date: DOA 7/2/97 | DOA 4/3/02

Nature of Injury: Lft knee | R KNEE

Cause of Injury: Twist | Fall down

Claim Body Part(s): Bilat knees

VA Comp Rate:

Awarded Body Part(s)

Agreement 3/10/10

Issue(s)

Recommendation / Decision

Respondent Chubb (DOI 4/3/02) agrees to authorize and administer bilateral total knee surgery. Respondent Liberty Mutual (DOI 7/2/97) agrees to reimburse Chubb 50% of bilateral knee surgical costs, at rates not to exceed WC fee Schedule if they apply, including incidental expenses related to surgery and prescription medications.

Claimant's Representative:

Respondent's Representative:

[Signature]

[Signature] Marian Yan

[Signature] Michael J. Linn

[Signature] Ronald F. Gill Jr.

(If Claimant's Rep. or Respondent's Rep. not as printed above, please use reverse side of this form to specify name & address)

CONFIDENTIAL NOTE:

REASSIGN: ISSUE:

- Informal
Pre-formal
Formal

SPECIAL INSTRUCTIONS:

AI



State of Connecticut Workers' Compensation Commission
90 Court Street, 3rd Floor
Middletown, CT 06457
Telephone 860-344-7453 Fax 860-344-7487

WCC File #: 800111997

Notice of a FORMAL Hearing

Ronald F. Gill, Jr.
vs.
Brescome Barton

Date of Injury: 07/02/1997
Body Part(s): Left Knee

Hearing Information

TO: Liberty Mutual Insurance Group
95 Glastonbury Boulevard
Glastonbury, CT 06033

A claim for compensation having been made in the above-entitled matter, you and each of you are hereby notified that Commissioner Daniel E. Ditzer will be held a hearing to address the following issue(s):

- 31-299b - Apportionment of Liability
- 31-307b - Recurrence of Prior Injury
- 31-310 - Compensation Rate / Average Weekly Wage

JR
390-030861
McBinn 12-29-10

Workers' Compensation Commission has requested this hearing and it is scheduled as follows:

Date: 01/10/2011 Time: 11:15 AM

Commissioner presiding: Daniel E. Ditzer

This hearing will be held at the following location:

Middletown District Office
90 Court Street, 3rd Floor
Middletown, CT 06457

Interested Parties

Claimant

Ronald F. Gill, Jr.

18th Madison Road Durham, CT 06422-2970 Phone (860) 349-9716

Respondent(s)

Brescome Barton

< Not Notified >

Liberty Mutual Group

< Not Notified >

Liberty Mutual Insurance Group

95 Glastonbury Boulevard Glastonbury, CT 06033 Phone (800) 245-5658

Law Offices of Loceano, Turrel & Rosenthal

101 Barre Road, 3rd Floor Wallingford, CT 06492 Phone: (203) 294-7800

Special Instructions

Formal Hearing ...Time allotted is 1 hour...dm

TO THE
EMPLOYER:

If you are insured or have a claims servicing carrier for Workers' Compensation liability, it is imperative that you forward this notice immediately to your insurer/carrier.

Notice Issued: 12/15/2010

A2

1 RONALD F. GILL, JR. :CORAM.
2 CLAIMANT

3 :WORKERS' COMPENSATION
4 COMMISSION
5 HON. DANIEL E. DILZER
6 COMMISSIONER

4 VS.

6 BRESCOME BARTON :STATE OF CONNECTICUT
7 EMPLOYER

8 :EIGHTH DISTRICT OFFICE

9 LIBERTY MUTUAL/CHUBB :WCC 400049574
10 INSURER 800111997

11 RESPONDENTS :January 10, 2011

12
13 A P P E A R A N C E S

Office Number _____
Claim Number _____
EDM Commercial Market WC
EDM Commercial Market PAL

JAN 14 2011

15 FOR THE CLAIMANT:
16 RONALD F. GILL, JR., PRO SE
17 181 Madison Road
Durham, Connecticut 06422

LDM - Personal Market / LMAC
Priority - High -
Priority - Normal -
Retain Original

18 FOR THE RESPONDENTS BRESCOME BARTON AND LIBERTY MUTUAL
19 INSURANCE COMPANY:

20 LAW OFFICES OF LOCISANO, TURRET & ROSENBAUM
101 Barnes Road, 3rd Floor
Wallingford, CT 06492
BY: MARIAN YUN, ESQ

21 FOR THE RESPONDENTS BRESCOME BARTON AND CHUBB & SON:
22 MONTSTREAM & MAY

23 655 Winding Brook Drive
Glastonbury, CT 06033
BY: MICHAEL FINN, ESQ.

24
25 DEBORAH L. MILLS
26 HEARING REPORTER I
27 EIGHTH DISTRICT OFFICE

A3

1 COMMISSIONER DILZER: Good morning, my
2 name is Commissioner Dilzer. We are here in the
3 matter of, matters of Ronald Gill versus Brescome
4 Barton, file numbers 800111997 and 400049574. Present
5 are Mr. Finn, who represents?

6 MR. FINN: Chubb.

7 COMMISSIONER DILZER: Chubb, and Ms. Volpe
8 from Chubb, she's the adjuster on the injury date of
9 4/3/2002 file number ending 574, and Ms. Yun who
10 represents Liberty Insurance and Brescome Barton on a
11 file ending 997 with a date of injury of 7/2/1997.
12 This involves Mr. Gill needing knee replacements to
13 his right and his left knee, is that correct?

14 MR. FINN: Yes.

15 COMMISSIONER DILZER: And he is going to
16 have both procedures done at the same time, correct?

17 MR. FINN: Yes.

18 COMMISSIONER DILZER: And there is no
19 dispute as to the medical necessity or the
20 reasonableness of the surgeries, correct?

21 MS. YUN: Correct, Commissioner, I believe
22 there is even an agreement in your file.

23 COMMISSIONER DILZER: Right. And Mr. Gill
24 is going to have that done when, sir?

25 MR. GILL: February 24th.

26 COMMISSIONER DILZER: And that will be
27 administered by the last carrier, which is Chubb,

1 correct, Mr. Finn?

2 MR. FINN: Yes, Commissioner, pursuant to
3 an agreement entered into by the parties at an
4 informal hearing with a writing on 3/10/2010. Chubb
5 will administer the bilateral total knee replacements
6 and seek reimbursement from the Liberty for 50 percent
7 of all expenses related to the surgery and
8 prescription meds.

9 COMMISSIONER DILZER: My understanding is
10 the issue had to do with the rate for which Mr. Gill
11 will be paid. I know Chubb is, will do the relapse
12 rate of, and you have the amount?

13 MR. FINN: Let me just, for the record,
14 the argument of Chubb is that as each one of these
15 surgeries are from separate and distinct injuries and
16 each one of these surgeries in and of itself could
17 make the Claimant temporarily totally disabled
18 medically, that any other law other than a 50/50
19 apportionment between Liberty and the Chubb is
20 inappropriate because they aren't, they aren't melding
21 together to make the Claimant temporarily totally
22 disabled, the surgeries aren't melding together, they
23 are separate and distinct, and each one could make the
24 Claimant temporarily totally disabled. So it is the
25 Chubb's argument that the hat doesn't apply, that Malz
26 doesn't apply, M-A-L-Z, and that common law
27 apportionment is appropriate pursuant to Mund,

1 M-U-N-D, and we would seek 50 percent of the temporary
2 total disability payments from the Chubb as it would
3 pertain to Mr. Gill's recuperative period. Now, as to
4 what appropriate rate to pay, the temporary total
5 disability rate for the 2002 injury, which is the
6 Chubb's, is \$483.63; Liberty's '97 injury is \$302.43.
7 I am prepared to make an offer to Mr. Gill based on a
8 relapse and recovery pursuant to 31-307(b) indicating
9 that his current average weekly wage at least up to
10 January 1st is \$1,148.00 based on a person filing
11 married joint two exemptions, which is his 2002 rate.
12 That brings him to a compensation rate of \$692.75. If
13 the Commission should so find that the relapse rate is
14 the appropriate rate in this case, I would ask that
15 that relapse rate of \$692.75 be apportioned 50/50
16 between the Chubb and Liberty. Obviously, if the
17 Commission chooses no relapse rate and reverts to the
18 prior temporary total disability rate, based on law or
19 legal argument, I would argue 50 percent of whatever
20 rate is chosen by the Commissioner.

21 COMMISSIONER DILZER: At this point you
22 are prepared to offer the relapse rate?

23 MR. FINN: Yes, the relapse rate as
24 indicated. I do not have a yes or no from Mr. Gill as
25 to those numbers, and I would ask that you inquire of
26 him.

27 COMMISSIONER DILZER: Mr. Gill, do those

1 numbers sound accurate to you?

2 MR. GILL: The present offer, the rate?

3 COMMISSIONER DILZER: The relapse rate,
4 correct.

5 MR. GILL: Yes, that is.

6 COMMISSIONER DILZER: And that is
7 acceptable to you?

8 MR. GILL: Yes.

9 COMMISSIONER DILZER: Okay. So the only
10 issue I need to sort out is what if any amount Liberty
11 will have to pay.

12 MR. FINN: Yes.

13 COMMISSIONER DILZER: I understand your
14 position. And Ms. Yun, I am sure you have a position
15 for Liberty?

16 MS. YUN: Commissioner, as you know,
17 Liberty previously voluntarily offered a reimbursement
18 rate of 181.36, and this was calculated based on a
19 proportionate apportionment between Chubb's higher
20 comp. rate of 483.63 and Liberty's lower comp. rate of
21 302.43. That was flatly rejected, and as it stands
22 even today Chubb's is requesting 50 percent of their
23 relapse rate. Their 50 percent of their relapse rate
24 would be the \$346, whereas Liberty's base rate is
25 \$302.43. It makes absolutely no sense for Liberty to
26 be reimbursed 50 percent of their comp. rate. We have
27 a different date of injury, therefore a different

1 rate. I'll have to stick to my position that Liberty
2 would offer 37 and a half percent of Chubb's comp.
3 rate, which comes out to 181.36.

4 COMMISSIONER DILZER: Okay. And this is
5 the gentleman, if I am not mistaken, that a year ago
6 he was to have the surgery and it was delayed at the
7 last minute and he had to wait another year because of
8 issues at work, is that correct, Mr. Gill?

9 MR. GILL: Yes.

10 COMMISSIONER DILZER: Mr. Gill, you are
11 going to have the surgery and have it at the relapse
12 rate. The insurance companies are going to submit
13 briefs to me. How long do you need, Mr. Finn and Ms.
14 Yun?

15 MR. FINN: Honestly, I would prefer to
16 have a transcript. I don't need it expedited. I
17 would like 30 days after receipt of the transcript.

18 COMMISSIONER DILZER: Is that acceptable
19 to you?

20 MS. YUN: Yes.

21 COMMISSIONER DILZER: You are going to
22 have the surgery, Mr. Gill, and you're going to have
23 it at the relapse rate that Mr. Finn described. The
24 issue of who is paying what, Chubb is going to pay for
25 the surgery and authorize the surgery, Chubb is going
26 to administer the claim and I will determine what
27 amount if any Liberty has to pay back Chubb in regards

1 to the weekly paycheck, the indemnity portion but not
2 the medical portion they already worked out, okay?

3 MR. FINN: And you will get a letter from
4 us saying that we are paying the six hundred some odd
5 dollars on a without prejudice basis to a ruling by
6 the Commissioner or an appellate body. So you will
7 get that number, you will get whatever number the
8 Commissioner so chooses, and then I will maintain my
9 legal arguments as to Liberty in the future, so you
10 are not left high and dry.

11 MR. GILL: Okay.

12 COMMISSIONER DILZER: Okay? All right,
13 good luck with the surgery, sir.

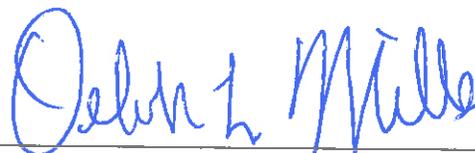
14 MR. GILL: Thank you.

15 COMMISSIONER DILZER: Thank you.

16 (Hearing adjourned at 11:40 a.m.)
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C E R T I F I C A T I O N

I, DEBORAH L. MILLS, do hereby certify that
the foregoing pages are a complete and accurate
transcription of my original stenographic notes in the
matter of RONALD F. GILL, JR. Vs. BRESCOME BARTON,
held before the Honorable DANIEL E. DILZER,
Commissioner, Workers' Compensation Commission, Eighth
District, 90 Court Street, Middletown, Connecticut on
January 10th, 2011.



Deborah L. Mills
Hearing Reporter I
Eighth District



RONALD GILL
CLAIMANT

: CORAM

WORKERS' COMPENSATION
COMMISSION

BRESCOME BARTON
EMPLOYER-RESPONDENT

: EIGHTH DISTRICT

: WCC# 400049574 & 800111997

CHUBB INSURANCE CO.
INSURER-RESPONDENT

LIBERTY MUTUAL INSURANCE CO.
INSURER-RESPONDENT

: JUNE 2, 2011

MOTION TO CORRECT

The respondent, Liberty Mutual Insurance Company moves to correct the Finding and Award dated May 19, 2011 as follows:

1. Page 2, First paragraph: DELETE "...exhibits were introduced".

Reason for correction: to correct the record as no exhibits were introduced at the Formal Hearing on January 10, 2011.

2. Page 3, paragraph 6: DELETE "The carrier on the risk for the first injury argues that they are not responsible for 50% of the relapse rate and instead argue they are only required to pay 37% of the second carrier's base rate which equals \$181.36."

Reason for correction: The Formal Hearing transcript indicates that "Liberty previously *voluntarily offered* a reimbursement rate of 181.36...That was flatly rejected..." Because Chubb did not accept Liberty's offer, Liberty's position as outlined in their Proposed Findings is that "apportionment is not available to Chubb from Liberty Mutual for any

All

temporary total or temporary partial benefits paid following claimant's bilateral knee surgery." (LM Proposed Findings, p. 5).

3. Page 3, paragraph 7: DELETE "This is a unique situation where neither knee injury affects the other injury. The combination of the two surgeries does not result in the Claimant being totally disabled – either knee replacement would totally disable the Claimant following surgery. The two injuries are separate and distinct injuries that do not in concert totally disable the Claimant. Instead, they are concurrent to each other." SUBSTITUTE "This is a unique situation where claimant has opted to undergo bilateral knee surgery following which he will be totally disabled."

Reason for correction: The claimant *is* undergoing bilateral knee surgery which will render him totally disabled.

4. Page 4, paragraph E: DELETE "and find C.G.S. Sec. 31-307b applies to either injury."

Reason for correction: Chubb agreed to the relapse rate at the Formal Hearing on January 10, 2011.

5. Page 4, paragraph G: DELETE "I find the Claimant is entitled to indemnity payments at the relapse rate of \$692.75 to be administered by Chubb Insurance and order Liberty Insurance to reimburse Chubb 50% of indemnity payments in addition to the 50% of the medical costs already agreed upon."

SUBSTITUTE "Chubb has agreed to pay Claimant at the rate of \$692.75 which they calculate to be the relapse rate pursuant to C.G.S. 31-307b. I find that Chubb is not entitled to reimbursement from Liberty Mutual for temporary total or temporary partial benefits following claimant's bilateral knee surgery because they have not met their burden of proof. I find that *Mund* and common law apportionment is not applicable or permissible to this case."

Reason for correction: Chubb relied upon *Mund* and common law apportionment to

pursue the requested reimbursement order in this case. *Hatt* and *Malz* both support Liberty Mutual's position that Chubb has no legal basis to seek reimbursement or apportionment.

THE RESPONDENT,
Liberty Mutual Insurance Co.

BY _____
Marian H. Yun
Law Offices of Loccisano, Turret & Rosenbaum
101 Barnes Road, Third Floor
Wallingford, Connecticut 06492
Tel. Ph. No. (203) 294-7800
Juris No. 408308

A13

CERTIFICATION

This is to certify that a copy of the foregoing was mailed, postage pre-paid, on June 2, 2011
to all counsel of record and pro se parties:

Montstream & May, LLP
655 Winding Brook Drive
Glastonbury, CT 06033

Ronald Gill
181 Madison Road
Durham, CT 06422-2910

Marian Yun

A 14

RONALD F. GILL, JR.
CLAIMANT

: CORAM

: WORKERS' COMPENSATION
COMMISSIONER
HON. DANIEL E. DILZER
COMMISSIONER

VS.

BRESCOME BARTON, INC.

: STATE OF CONNECTICUT

RESPONDENT-EMPLOYER

CHUBB & SON

: EIGHTH DISTRICT OFFICE

RESPONDENT-INSURER

AND

: FILE # 400049574/800111997

LIBERTY MUTUAL INS. CO.

: June 7, 2011

RESPONDENT-INSURER

APPEARANCES:

The Claimant Ronald F. Gill appeared Pro Se.

Attorney Marion Yun, c/o Law Offices of Loccisano, Turret & Rosenbaum, 101 Barnes Road, 3rd Floor, Wallingford, Connecticut 06492 represented the Respondent-Insurer Liberty Mutual Insurance Company.

Attorney Michael Finn, c/o Monstream & May, 655 Winding Brook Drive, P.O. Box 1087, Glastonbury, Connecticut 06033-6087 represented the Respondent-Insurer Chubb & Son.

LOO 0182 - Wallingford Legal

JUN 08 2011

Claim/Defense # 911020000

1

WC390-030261-00
Retain Original: YES NO

A15

FINDING AND AWARD

Pursuant to statutory notice to all parties, a Formal hearing was held on January 10, 2011 at the Workers' Compensation Commission, Eighth District, Middletown, Connecticut. At the hearings no testimony was offered, no exhibits were introduced, and the record was closed on February 14, 2011 when the Respondents filed briefs and memoranda of law.

ISSUES:

What amount are the respective Respondent-Insurance carriers obligated to pay the Claimant for periods of total and temporary partial disability following bi-lateral knee replacement where each surgery concurrently disables the Claimant?

BASED ON THE EVIDENCE PRESENTED, AND A REVIEW OF ALL THE EXHIBITS INTRODUCED, THE FOLLOWING FACTS ARE FOUND:

1. It is undisputed that Ronald Gill (hereinafter "Claimant") sustained an injury to his left knee in the course and scope of employment with Brescome Barton on or about July 2, 1997. (hereinafter "first injury") Administrative notice is taken of a Voluntary Agreement between the Claimant and Respondent received by this Commission on July 22, 2000 wherein the Respondent accepts an injury to the Claimant's left knee. The Respondent's Workers' Compensation Carrier on the risk at that time was Liberty Mutual Insurance Company. Id. The Claimant's temporary total disability rate for that injury was \$302.43. Id.
2. The July 2, 1997 injury resulted in a permanent partial disability rating totaling 25%. Administrative notice is taken of a Voluntary Agreement received by this Commission on March 5, 2009 and the attached office note from Dr. Kaplan, M.D. dated April 10, 2008. In that attached note Dr. Kaplan noted the Claimant's condition had worsened since 2003 and that the Claimant "will definitely need a total knee replacement," opining that it would need to be done within three to five years. Id.
3. It is also undisputed that the Claimant sustained an injury to his right knee while in the course and scope of his employment with the Respondent on or about April 3, 2002 (hereinafter "second injury") which claim was accepted

by the Respondent. The carrier on the risk at the time of the injury was Chubb and Son. The temporary total disability rate applicable at the time of the Claimant's April 3, 2002 injury was \$483.63. (Formal Hearing transcript February 10, 2011 (hereinafter "T") page 4) Chubb & Son have treated this second injury as an accepted case, though no Voluntary Agreement between the parties was executed. Administrative Notice is taken of correspondence from Linda Volpe, Claims Adjuster from Chubb Group Insurance, dated September 2010 wherein the Respondents provided copies to the Claimant of payments made to the Claimant for lost time and permanency benefits under the second injury.

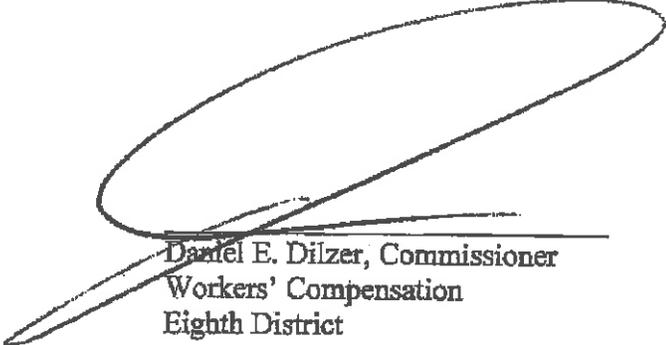
4. On February 24, 2011 the Claimant was scheduled for bi-lateral knee replacement upon the recommendation of his physician and neither carrier disputes that the surgeries are reasonable and medically necessary. (T page 2)
5. Pursuant to an agreement dated March 10, 2010, the parties agreed that the carrier on the risk for the second injury would authorize and administer bi-lateral knee replacement surgery and that the carrier on the risk for the first injury would reimburse 50% of the surgical costs, incidental expenses and prescriptions related to the surgery not to exceed the Workers' Compensation fee schedule. Administrative notice is taken of an Agreement executed by the parties dated March 10, 2010. The Agreement between the parties did not address what rate the Claimant would be paid indemnity benefits and the contribution of each carrier towards indemnity resulting from the surgery.
6. The Claimant accepted the offer of the carrier on the risk for the second injury to pay the Claimant, without prejudice, at his relapse rate pursuant to C.G.S. 31-307(b) of \$692.75 for his disability period following the surgery. (T pages 4-5) The carrier on the risk for the first injury argues that they are not responsible for 50% of the relapse rate and instead offered to pay 37% of the second carrier's base rate which equals \$181.36, which was rejected.
7. This is a unique situation where neither knee injury affects the other injury. The combination of the two surgeries does not result in the Claimant being totally disabled - either knee replacement would totally disable the Claimant following surgery. The two injuries are separate and distinct injuries that do not in concert totally disable the Claimant. Instead, they are concurrent to each other. The decision to undergo both knee replacements simultaneously benefits the Claimant in that he has only one period of recovery and also benefits both insurance carriers in that they are able to split many of the

surgical and post-surgical costs that would be duplicative had the Claimant opted for two separate surgeries.

WHEREFORE, BASED UPON ALL THE EVIDENCE BEFORE ME, I FIND THE FOLLOWING:

- A) The Claimant sustained a compensable work-related injury to his left knee on or about July 2, 1997 which resulted in a permanency rating to his knee which was paid by the Respondent Insurer Liberty Mutual.
- B) The Claimant sustained a compensable separate work-related injury to his right knee on or about April 3, 2002 while in the employment of the Respondent Employer with a different insurance carrier, Chubb, on the risk at the time of the injury. This injury also resulted in the Claimant sustaining a permanency rating which was paid by the Respondent Insurer Chubb Insurance.
- C) The Claimant had reached maximum medical improvement for both injuries and now needs a total knee replacement for both knees. The need for both of the surgeries is medically necessary and reasonable.
- D) Total knee replacement for either knee would result in a period of disability following surgery.
- E) I find the Claimant had reached maximum medical improvement for both injuries but now his condition has worsened, necessitating knee replacement for both knees, and find C.G.S. Sec. 31-307b applies to either injury.
- F) I find that the two knee injuries are separate and distinct and the Claimant could have elected to undergo separate surgeries resulting in duplicative medical costs. I further find that each knee replacement surgery concurrently disables the Claimant.
- G) I find the Claimant is entitled to indemnity payments at the relapse rate of \$692.75 to be administered by Chubb Insurance and order Liberty Insurance to reimburse Chubb 50% of indemnity payments in addition to the 50% of the medical costs already agreed upon.

IT IS SO ORDERED.



Daniel E. Dilzer, Commissioner
Workers' Compensation
Eighth District



State of Connecticut
**WORKERS' COMPENSATION
COMMISSION**

Eighth District Office
90 Court Street, 3rd Floor
Middletown, CT 06457

(860) 344-7453

Commissioners
John A. Mastropietro, Chairman
Amado J. Vargas
Stephen B. DeJaney
Ernie R. Walker
Charles F. Senich
Michelle D. Truglia
Nancy E. Salerno
Scott A. Barton
Peter Mlynarczyk
Jack R. Goldberg
Randy L. Cohen
Jodi Murray Gregg
Christine L. Engel
Daniel E. Dilzer
David W. Schoolcraft
Clifton E. Thompson

CERTIFICATION

STATE OF CONNECTICUT)

MIDDLETOWN, CONNECTICUT

MIDDLESEX COUNTY)

I hereby certify that the within and foregoing FINDING AND AWARD has been sent via certified mail to the parties listed on this 7th day of June, 2011.

Ronald Gill (Pro Se)
181 Madison Road
Durham, Connecticut 06422

Law Offices of Loccisano, Turret & Rosenbaum
101 Barnes Road, 3rd Floor
Wallingford, Connecticut 06482

Monstream & May
655 Winding Brook Drive, P.O. Box 1087
Glastonbury, Connecticut 06033-6087

Deborah L. Mills
Hearing Reporter I
Eighth District



Gill v. Brescome Barton, Inc.

CASE NO. 5659 CRB-8-11-6

COMPENSATION REVIEW BOARD
WORKERS' COMPENSATION COMMISSION

JUNE 1, 2012

RONALD F. GILL, JR.
CLAIMANT-APPELLEE

v.

BRESCOME BARTON, INC.
EMPLOYER

and

CHUBB & SON
INSURER
RESPONDENTS-APPELLEES

and

LIBERTY MUTUAL INSURANCE GROUP
INSURER
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant appeared without legal representation.

ISA

A-2 20

The respondents-appellees, Brescome Barton, Inc., and Chubb & Son, were represented by Michael J. Finn, Esq., Montstream & May, 655 Winding Brook Drive, P.O. Box 1087, Glastonbury, CT 06033-6087.

The respondents-appellants, Brescome Barton, Inc., and Liberty Mutual Insurance Group, were represented by Marion H. Yun, Esq., Law Offices of Loccisano, Turret & Rosenbaum, 101 Barnes Road, 3rd Floor, Wallingford, CT 06492.

This Petition for Review from the May 19, 2011 Finding and Award of the Commissioner acting for the Eighth District was heard November 18, 2011 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Scott A. Barton and Christine L. Engel.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. This appeal deals with whether a trial commissioner failed to follow appropriate precedent in determining that two insurance carriers should apportion the temporary total disability resulting from the claimant's bilateral knee replacement surgery. The appellant, Liberty Mutual, has appealed arguing that the precedent in Hatt v. Burlington Coat Factory, 263 Conn. 279 (2003) and Malz v. State/University of Connecticut Health Center, 4701 CRB-6-03-7 (August 20, 2004) prevents the trial commissioner from allocating liability in the manner implemented in this case. The appellee, Chubb and Son ("Chubb"), argues that Mund v. Farmers' Cooperative, Inc., 139 Conn. 338 (1952) authorizes the trial commissioner to proceed in this manner. Upon review, we are not persuaded that any of the precedent brought to our attention governs what appears to be a *sui generis* fact pattern. We believe that the trial commissioner properly exercised his powers pursuant to § 31-278 C.G.S. to equitably resolve the dispute between the insurance carriers in this instance. The June 7, 2011 Finding and Award is consistent with the agreement reached between the carriers on other issues to resolve this dispute. Moreover, we believe the appeal of Liberty Mutual may be premature as it is impossible at this juncture to know which of the claimant's knees will heal faster and which carrier will be ultimately responsible for the claimant's inability to return to the work force. We affirm the decision of the trial commissioner.

The trial commissioner reached the following factual findings in his Finding and Award. He found it was undisputed that Ronald Gill (hereinafter "Claimant") sustained an injury to his left knee in the course and scope of employment with Brescome Barton on or about July 2, 1997, and that on July 22, 2000 a Voluntary Agreement was reached accepting this injury as compensable.

Liberty Mutual was the carrier responsible for this first injury and a compensation rate was set at \$302.43 for this injury. The July 2, 1997 injury resulted in a permanent partial disability rating totaling 25 percent. The trial commissioner also noted that a 2009 Voluntary Agreement and a 2008 office note from Dr. Norman Kaplan opining that the claimant would need a total knee replacement within three to five years.

The trial commissioner also noted that it was undisputed that the claimant sustained an injury to his right knee while in the course and scope of his employment with the respondent on or about April 3, 2002, and that the respondent-employer had accepted this injury. The carrier on the risk at the time of the second injury was Chubb and the temporary total disability rate applicable at the time of the claimant's April 3, 2002 injury was \$483.63.

The trial commissioner took administrative notice of an agreement dated March 10, 2010, in which the parties agreed that the carrier on the risk for the second injury would authorize and administer bi-lateral knee replacement surgery and that the carrier on the risk for the first injury would reimburse 50 percent of the surgical costs, incidental expenses and prescriptions related to the surgery not to exceed the workers' compensation fee schedule. This agreement did not address what rate the claimant would be paid indemnity benefits or address the contribution of each carrier towards indemnity resulting from the surgery. The claimant subsequently accepted the offer of the carrier on the risk for the second injury to pay the claimant, without prejudice, at his relapse rate of \$692.75 pursuant to § 31-307(b) C.G.S. for his disability period following the surgery.

The carrier on the risk for the first injury argues that they are not responsible for 50 percent of the relapse rate and instead offered to pay 37 percent of the second carrier's base rate which equals \$181.36, which was rejected. The claimant was scheduled for bi-lateral knee replacement on February 24, 2011, upon the recommendation of his physician and neither carrier disputes that the surgeries are reasonable and medically necessary.

The trial commissioner found this was a unique situation where neither knee injury affects the other injury. The combination of the two surgeries does not result in the claimant being totally disabled - either knee replacement would totally disable the claimant following surgery. The two injuries are separate and distinct injuries that do not in concert totally disable the claimant, and instead, the injuries were concurrent to each other. The decision to undergo both knee replacements simultaneously benefits the claimant in that he has only one period of recovery and also benefits both insurance carriers in that they are able to split many of the surgical and post-surgical costs that would be duplicative had the claimant opted for two separate surgeries.

As a result, the trial commissioner found that bilateral knee replacement was medically necessary and reasonable and that total knee replacement for either knee would result in a period

of disability following surgery. While the claimant had reached maximum medical improvement for both injuries his condition has worsened, necessitating knee replacement for both knees and § 31-307b C.G.S. applied to either injury. The trial commissioner found the two knee injuries are separate and distinct injuries and the claimant could have elected to undergo separate surgeries resulting in duplicative medical costs. The commissioner further found that each knee replacement surgery concurrently disables the claimant. Therefore, the commissioner ordered indemnity payments at the relapse rate of \$692.75 to be administered by Chubb and ordered Liberty Mutual to reimburse Chubb 50 percent of indemnity payments in addition to the 50 percent of the medical costs already agreed upon.

Liberty Mutual filed a Motion to Correct. The trial commissioner granted corrections which did not materially change the relief approved in the initial Finding and Award. Therefore, Liberty Mutual has taken the instant appeal arguing the relief granted contravenes the precedent in Hatt, supra, and Malz, supra. Liberty Mutual points out that the trial commissioner failed to cite any statutory authority or appellate precedent in his Finding and Award. As the appellant views the law, the Malz precedent is *stare decisis* over the issues herein. Appellant's Brief, p. 3. We have reviewed this case and simply find too many factual distinctions between that case and the present case to agree with the appellant's reasoning.

In Malz, the trial commissioner was presented with two sequential injuries to the claimant's spine. The first injury was a 1990 injury that resulted in decompression surgery to the claimant's lumbar spine at the L4-L5 level. The second injury was a 1994 lifting injury to the claimant's cervical spine that eventually necessitated a discectomy and fusion at the C6-C7 level. Based on those facts the trial commissioner concluded that "Hatt v. Burlington Coat Factory, 263 Conn. 279 (2003), firmly establishes that apportionment is not available where two separate compensable injuries contribute to subsequent disability." Id. The carrier on the risk for the more recent injury appealed, arguing that Mund, supra, would require an apportionment of liability between the carriers. This tribunal disagreed, for the following reasons.

Where two separate injuries involving different body parts (such as the lower back and cervical spines) *combine* to render a claimant totally disabled, the employer or insurer on the risk at the time of the second injury does not have a right to apportion liability under a theory of concurrent or shared responsibility. This is demonstrated by cases as venerable as Mages v. Alfred Brown, Inc., 123 Conn. 188 (1937), in which a claimant suffered a compensable spine injury in January 1935 and then a compensable left shoulder and back injury one year later. Both injuries were substantial factors in the claimant's final incapacity. Our Supreme Court held that, where an initial injury has caused partial

incapacity, and a second injury then occurs that leaves a claimant totally disabled, the second employer and its insurer are responsible to pay full compensation for the disability. *Id.*, 194-95.

Malz, *supra*. (Emphasis added.)

We note that in the present case there are no factual findings that the two separate knee injuries “combined” to render the claimant disabled. The trial commissioner found that either knee injury would have been sufficient to independently render the claimant totally disabled at the time he underwent a knee replacement. There is no medical evidence reflecting any “combined” impact of the two injuries.¹ Had the claimant never sustained the more recent injury on his right knee, Liberty Mutual would have been obligated to pay the entire amount due for temporary total disability attributed to the original left knee injury.

We also note that in Malz *supra*, this tribunal discussed the statutory underpinnings for apportionment of benefits between injuries. We noted that the Supreme Court in Hatt, *supra*, had evaluated the scope of the two relevant apportionment statutes, § 31-299b C.G.S.² and § 31-349 C.G.S.³ In Malz, we pointed out the Supreme Court determined that ““common-law apportionment between employers and insurers simply did not exist [historically] in a case of separate and distinct second injuries . . . [and] no such apportionment is available in the present case.” Hatt, *supra*, 306; see also, Kelly v. Dunkin’ Donuts, 4621 CRB-4-03-2 (April 5, 2004)(CRB discussed holding in Hatt). The court also *cited* Fimiani v. Star Gallo Distributors, Inc., 248 Conn. 635 (1999), in which it held that a first employer or insurer bears no responsibility for the consequences of a second injury under § 31-349 C.G.S. Hatt, *supra*, 307-308.” *Id.*

A further review of Hatt, *supra*, distinguishes that case from the facts in the present case. The Hatt decision drew a parallel with the fact pattern in Mages, *supra*, where the claimant’s disability was “caused solely by the second accident.” Hatt, *supra*, 300. The Supreme Court in Hatt pointed out that Mages distinguished itself from a prior case on apportionment, Plecity v. McLachlan Hat Co., 116 Conn. 216 (1933) as in Mages there had been “two separate compensable injuries sustained on different occasions at issue in that case” unlike “the single injury sustained over an extended period of time in Plecity.” *Id.* The Hatt decision, which endorsed the approach utilized in Mages, *supra*, barring apportionment, distinguished the facts in that case from the case relied on by the appellees herein, Mund, *supra*. The Supreme Court concluded “Mund did not contemplate two separate and distinct injuries; rather it was decided in a context involving aggravation of a *single preexisting* injury.” *Id.*, 306 (Emphasis in original).⁴

The ultimate result of Hatt was that the insurer on the risk for the more recent injury was responsible for the entire subsequent liability, as the Supreme Court concluded that neither case

law nor statute permitted apportionment under those factual circumstances. In particular, the Supreme Court in Hatt concluded that apportionment under § 31-299b C.G.S. was applicable only to cases of ongoing repetitive trauma or occupational disease. *Id.*, 312-317.

Upon review of all the cases cited by the litigants as authority for their position we are left with the unambiguous conclusion that none of the precedent advanced is truly applicable to the facts at hand. The claimant's injuries were sustained in two separate incidents and the trial commissioner's Findings provide no basis for concluding either incident could be deemed a repetitive trauma injury or the result of an occupational disease. Therefore, we agree with the appellant that the precedent in Mund, *supra*, is inapplicable to the facts at hand. However, we are left equally certain that neither Hatt nor Malz governs the unique facts of this case. Those cases deal with serial or combined disabling injuries. The claimant's knee injuries herein are totally unrelated based on the facts in the record. The injuries described in Hatt and Malz were clearly interrelated in nature. We do not define a "second injury" as encompassing a subsequent but unrelated accidental injury.

We fully understand that "the workers' compensation system in Connecticut is derived exclusively from statute A commissioner may exercise jurisdiction to hear a claim only under the precise circumstances and in the manner particularly prescribed by the enabling legislation." Cantoni v. Xerox Corp., 251 Conn. 153, 160 (1999). In the present case we find the apportionment statutes and the case law do not address the "precise circumstances" herein. The dispute herein is one of apparent first impression and requires this tribunal to look at the expressed intent of the parties and the statutory approach to compensating total disability injuries in the absence of multiple liable parties. As we noted in Goulbourne v. State/Department of Correction, 5192 CRB-1-07-1 (January 17, 2008), there are lacuna present in Chapter 568 and when they present themselves it is our obligation to reach a reasoned outcome consistent with the totality of the Workers' Compensation Act.

The trial commissioner in this matter cited an agreement between the parties to share the cost of the bilateral knee replacement. Findings, ¶ 5. The file represents that this agreement was reached on March 10, 2010, before Commissioner Ernie R. Walker and was approved by Commissioner Walker and signed by legal representatives of both parties. In this agreement, the parties agreed to share equally the "surgical costs" and "incidental expenses" of bilateral knee surgery. Given the nature of bilateral knee surgery, it seems self-evident that the claimant would face a period of post-surgical total disability. The agreement in question does not define the term "surgical costs" or "incidental expenses." We believe in this instance "incidental expenses" would include the unavoidable expense of § 31-307 C.G.S. benefits due the claimant post surgery. The trial commissioner's June 7, 2011 Finding and Award simply implements the expressed intent of what the parties agreed to in the March 10, 2010 agreement.

We also note that in Chapter 568 there is long appellate precedent against double recoveries. See Nichols v. The Lighthouse Restaurant, Inc., 246 Conn. 156, 164 (1998) and Pokorny v. Getta's Garage, 219 Conn. 439, 454 (1991). Clearly, any decision that paid the claimant a full disability benefit simultaneously for each separate knee injury would be void as violating public policy. In addition, as the trial commissioner appropriately pointed out in Findings, ¶ 7, it would be irrational to force the claimant to undergo separate knee surgeries and incur a longer period of disability. Clearly, Chapter 568 cannot be interpreted in such a fashion that it creates such an "absurd or unworkable result" First Union Natl. v. Hi Ho Shopping Ventures, 273 Conn. 287, 291 (2005).

At oral argument before this panel, counsel for the appellant argued that applying the Hatt precedent to the facts of this case would be "an equitable outcome." In light of the agreement her client had previously ratified, we are unpersuaded by this argument. However, we do see a potential for inequity going forward as the claimant recovers post-surgery. The trial commissioner's decision is operative only as long as both of the claimant's knees are still in a condition that renders him totally disabled. It is certainly foreseeable that one of the two knees will recover its function following surgery in a more expeditious manner than the other knee. At that juncture, the carrier on the risk for the "healthy knee" will be forced to pay half the cost of § 31-307 C.G.S. benefits and the carrier on the risk for the "injured knee" will reap a windfall. We believe that post-surgery apportionment of disability benefits must be based on contemporaneous medical evidence. Once it is possible to ascertain which body part is responsible for disabling the claimant; the burden of continuing temporary total disability benefits should rest on the insurance carrier responsible for this body part.

We would anticipate that at that juncture either counsel for Liberty Mutual or Chubb will file an appropriate motion under § 31-315 C.G.S. asserting that due to a change in circumstances the other carrier should absorb all or most of the claimant's continuing § 31-307 C.G.S. benefits. At that point the trial commissioner can consider arguments based on the claimant's medical condition. Any argument on this issue at this point in time is premature and would be based on conjecture.

We are satisfied that the trial commissioner's June 7, 2011 Finding and Award did not violate any statutory provision of Chapter 568. We are also satisfied the appellate precedent governing this Commission did not prevent the trial commissioner from implementing this Finding and Award. As we find the Finding and Award consistent with the contractual agreements between the appellant and appellee; as well as the public policy enunciated in Chapter 568, we affirm the trial commissioner's decision.

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Commissioners Scott A. Barton and Christine L. Engel concur in this opinion.

¹ In the absence of any probative medical evidence cited in the record, it would be conjecture to determine that the two knee injuries in this case are somehow interdependent as to causation for the claimant's disability. DiNuzzo v. Dan Perkins Chevrolet Geo. Inc., 294 Conn. 132 (2009).

² The text of § 31-299 C.G.S. reads as follows:

Sec. 31-299b. Initial liability of last employer. Reimbursement. If an employee suffers an injury or disease for which compensation is found by the commissioner to be payable according to the provisions of this chapter, the employer who last employed the claimant prior to the filing of the claim, or the employer's insurer, shall be initially liable for the payment of such compensation. The commissioner shall, within a reasonable period of time after issuing an award, on the basis of the record of the hearing, determine whether prior employers, or their insurers, are liable for a portion of such compensation and the extent of their liability. If prior employers are found to be so liable, the commissioner shall order such employers or their insurers to reimburse the initially liable employer or insurer according to the proportion of their liability. Reimbursement shall be made within ten days of the commissioner's order with interest, from the date of the initial payment, at twelve percent per annum. If no appeal from the commissioner's order is taken by any employer or insurer within twenty days, the order shall be final and may be enforced in the same manner as a judgment of the Superior Court. For purposes of this section, the Second Injury Fund shall not be deemed an employer or an insurer and shall be exempt from any liability. The amount of any compensation for which the Second Injury Fund would be liable except for the exemption provided under this section shall be reallocated among any other employers, or their insurers, who are liable for such compensation according to a ratio, the numerator of which is the percentage of the total compensation for which an employer, or its insurer, is liable and the denominator of which is the total percentage of liability of all employers, or their insurers, excluding the percentage that would have been attributable to the Second Injury Fund, for such compensation.

³ The text of § 31-349(a) and (d) C.G.S. read as follows:

Sec. 31-349. Compensation for second disability. Payment of insurance coverage. Second Injury Fund closed July 1, 1995, to new claims. Procedure. (a) The fact that an employee has suffered a previous disability, shall not preclude him from compensation for a second injury, nor preclude compensation for death resulting from the second injury. If an employee having a previous disability incurs a second disability from a second injury resulting in a permanent disability caused by both the previous disability and the second injury which is materially and substantially greater than the disability that would have resulted from the second injury alone, he shall receive compensation for (1) the entire amount of disability, including total disability, less any compensation payable or paid with respect to the previous disability, and (2) necessary medical care, as provided in this chapter, notwithstanding the fact that part of the disability was due to a previous disability. For purposes of this subsection, "compensation payable or paid with respect to the previous disability" includes compensation payable or paid pursuant to the provisions of this chapter, as well as any other compensation payable or paid in connection with the previous disability, regardless of the source of such compensation.

(d) Notwithstanding the provisions of this section, no injury which occurs on or after July 1, 1995, shall serve as a basis for transfer of a claim to the Second Injury Fund under this section. All such claims shall remain the responsibility of the employer or its insurer under the provisions of this section.

⁴ In Mund v. Farmers' Cooperative, Inc., 139 Conn. 338 (1952), the Supreme Court found the claimant had sustained a compensable injury to his L4-5 lumbar spine in 1946 and then sustained a subsequent compensable injury at the L4-5 disc in 1950. The court further stated "[t]he two accidents were, concurring and contributing causes of the plaintiff's disability since that date, the second injury being superimposed upon and an aggravation of the condition remaining from the first injury." *Id.*, 341.

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RONALD F. GILL, JR. v. BRESCOME
BARTON, INC., ET AL.
(AC 34749)

Lavine, Alvord and Harper, Js.

Argued January 22—officially released April 30, 2013

(Appeal from the workers' compensation review
board.)

Marian H. Yun, for the appellant (defendant Liberty
Mutual Insurance Group).

Michael J. Finn, with whom was *Philip Markuszka*,
for the appellee (defendant Chubb & Son).

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Opinion

LAVINE, J. In this workers' compensation action, the defendant insurance carriers (insurers) for the named defendant, Brescome Barton, Inc. (employer), contest their rights of apportionment, if any, for indemnity benefits paid to the plaintiff, Ronald F. Gill, Jr.¹ The defendant Liberty Mutual Insurance Group (Liberty Mutual) appeals from the decision of the workers' compensation review board (board) affirming the finding and award of the compensation commissioner that it reimburse the defendant Chubb & Son (Chubb) 50 percent of the temporary total disability payments (indemnity) paid to the plaintiff following his bilateral knee replacement surgery. On appeal, Liberty Mutual claims that the board (1) applied an incorrect standard of review, (2) drew illegal or unreasonable inferences from the commissioner's findings of fact regarding an agreement between the insurers, (3) substituted its inferences for those drawn by the commissioner, (4) exceeded its authority by retrying the facts, (5) failed to adhere to the doctrine of stare decisis and (6) improperly affirmed the commissioner's finding and award that it pay 50 percent of the plaintiff's indemnity (a) on the basis of the facts and (b) as a matter of law. We affirm the decision of the board.

The commissioner found the following facts concerning the plaintiff's injuries, which the insurers do not dispute. The plaintiff sustained an injury to his left knee that arose out of and in the course of his employment on July 2, 1997 (first injury). The plaintiff, employer and Liberty Mutual entered into a voluntary agreement as to the plaintiff's permanent partial disability rating. Attached to the voluntary agreement is an office note dated April 10, 2008, from Norman R. Kaplan, the plaintiff's treating orthopedic surgeon. Kaplan stated in the note that the plaintiff's condition had worsened since 2003 and that he "will definitely need a total knee replacement" within the next three to five years. On April 3, 2002, the plaintiff sustained an injury to his right knee that arose out of and in the course of his employment (second injury). The employer, who was then insured by Chubb, accepted the second injury.

The commissioner found that the plaintiff was scheduled for bilateral knee replacement surgery (surgeries) pursuant to the recommendation of his physician and that the insurers agreed that the surgeries were reasonable and medically necessary. Pursuant to an agreement dated March 10, 2010 (2010 agreement), the insurers agreed that Chubb would authorize and administer the surgeries and that Liberty Mutual would reimburse Chubb 50 percent of the surgical costs, incidental expenses and prescriptions related to the surgeries.

The commissioner also found that the plaintiff had accepted, without prejudice, Chubb's offer to pay him

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indemnity at the relapse rate of \$692.75 for his disability period following the surgeries pursuant to General Statutes § 31-307b, commonly known as the relapse statute. Liberty Mutual, however, contended that it is not responsible for 50 percent of the indemnity and offered to pay 37 percent of Chubb's base rate, or \$181.36. Chubb rejected the offer.²

A formal hearing was held before the commissioner on January 10, 2011, and the record was closed on February 14, 2011. The commissioner framed the hearing issue as what amount are the insurers, respectively, obligated to pay the plaintiff for periods of total and temporary partial disability following the bilateral knee surgeries, where each surgery concurrently disables the plaintiff.³ The commissioner found the situation unique in that one knee injury does not affect the other knee injury. "The two injuries are separate and distinct injuries that do not, in concert, totally disable the plaintiff. Instead, they are concurrent to each other." Moreover, the plaintiff's decision to have both knees replaced at the same time benefits him in that he will have only one period of recovery and also benefits both insurers in that they are able to divide many of the surgical and postsurgical costs that would have been duplicative had the plaintiff opted to have his knees replaced at separate times.⁴

The commissioner's findings and award is dated May 19, 2011. In it he found that the plaintiff had reached maximum medical improvement for both injuries, but his conditions had worsened, necessitating that both of his knees be replaced and that § 31-307b applied to each injury. He further found that the injuries were separate and distinct, and that the plaintiff could have elected to undergo separate surgeries resulting in duplicative medical costs. Each knee replacement surgery concurrently disabled the plaintiff, who was entitled to indemnity at the relapse rate of \$692.75. Chubb was to administer the surgeries and payments. Liberty Mutual was to reimburse Chubb 50 percent of the indemnity it paid the plaintiff in addition to 50 percent of the medical costs agreed upon by the insurers.⁵

Liberty Mutual appealed from the corrected finding and award to the board, primarily claiming that the commissioner erred by requiring Liberty Mutual to reimburse Chubb 50 percent of indemnity paid the plaintiff postsurgery.⁶ The board issued a decision dated June 1, 2012, in which it identified the issue before it as "whether a trial commissioner failed to follow appropriate precedent in determining that two insurance carriers should apportion the temporary total disability resulting from the [plaintiff's] bilateral knee replacement surgery." The board found that Liberty Mutual relied on *Hatt v. Burlington Coat Factory*, 263 Conn. 279, 819 A.2d 260 (2003), and *Malz v. State/University of Connecticut Health Center*, No. 4701 CRB-6-03-7

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(August 20, 2004), to support its position that the commissioner had no authority to apportion liability in the manner implemented in this case; and that Chubb relied on *Mund v. Farmers' Cooperative, Inc.*, 139 Conn. 338, 94 A.2d 119 (1952), as authority supporting the commissioner's finding and award. The board found, however, that none of the cases cited by the insurers pertained to the facts of this case, which it determined was *sui generis*. Nonetheless, the board concluded that the commissioner properly had exercised his powers pursuant to General Statutes § 31-278⁷ to resolve the dispute between the insurers equitably, and that his finding and award were consistent with the 2010 agreement.

In affirming the commissioner's finding and award, the board reasoned that if the plaintiff had not sustained the second injury, Liberty Mutual would have been obligated to pay the entire cost and indemnity attributable to knee replacement surgery resulting from the first injury. The board noted that double recoveries are disfavored under the Workers' Compensation Act (act); see *Nichols v. Lighthouse Restaurant, Inc.*, 246 Conn. 156, 164, 716 A.2d 71 (1998); *Pokorny v. Getta's Garage*, 219 Conn. 439, 454, 594 A.2d 446 (1991); and that any award that paid the plaintiff a full disability benefit simultaneously for each knee injury would be void as against public policy. The board agreed with the commissioner that it would be irrational to force the plaintiff to undergo two knee replacement surgeries at different times and noted that the act cannot be construed in a manner that creates an "absurd or unworkable result." See *First Union National Bank v. Hi Ho Mall Shopping Ventures, Inc.*, 273 Conn. 287, 291, 869 A.2d 1193 (2005).

The board, however, foresaw a potential for inequity in the award during the period of the plaintiff's recovery. The board found that the commissioner's award operates only as long as each of the plaintiff's knees renders him totally disabled, but the board recognized that one of the plaintiff's knees may recover its function before the other. At that time, the insurer on the risk for the "healthy knee" will be forced to pay one half of the cost of § 31-307b benefits and the insurer on the risk for the "injured knee" will reap a windfall. The board stated that postsurgical apportionment of disability benefits must be based on contemporaneous medical evidence: "Once it is possible to ascertain which body part is responsible for disabling the [plaintiff], the burden of continuing temporary total disability benefits should rest on the [insurer] responsible for [that] body part." For this reason, the board found that any challenge to the commissioner's award regarding indemnity apportionment was premature. The board stated that when one of the plaintiff's knees is responsible for disabling the plaintiff, the insurer responsible for that injury may file a motion pursuant to General Statutes § 31-315. The board affirmed the commissioner's finding and award. Thereafter, Liberty Mutual appealed to this court.

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Our resolution of the claims on appeal begins with the applicable standard of review. “The principles that govern our standard of review in workers’ compensation appeals are well established. The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . It is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers’ compensation statutes by the commissioner and review board. . . . A state agency is not entitled, however, to special deference when its determination of a question of law has not previously been subject to judicial scrutiny. . . . Where [a workers’ compensation] appeal involves an issue of statutory construction that has not yet been subjected to judicial scrutiny, this court has plenary power to review the administrative decision.” (Internal quotation marks omitted.) *Hardt v. Watertown*, 95 Conn. App. 52, 55–56, 895 A.2d 846 (2006), *aff’d*, 281 Conn. 600, 917 A.2d 26 (2007). Because we conclude that the facts of this case present an issue of first impression; see part I of this opinion; our review of the claims on appeal is plenary.

I

Liberty Mutual claims that the board failed to adhere to the doctrine of stare decisis when resolving Liberty Mutual’s appeal. Liberty Mutual claims that under appellate decisions concerning General Statutes § 31-299b,⁸ Chubb is not entitled to an apportionment of the indemnity paid the plaintiff when he is temporarily totally disabled. We disagree as we are unaware of any precedent, and the insurers have not identified any, that is on point with the facts presented here.

“The doctrine of stare decisis counsels that a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it. . . . Stare decisis is justified because it allows for predictability in the ordering of conduct, it promotes the necessary perception that the law is relatively unchanging, it saves resources and it promotes judicial efficiency.” (Internal quotation marks omitted.) *Commission on Human Rights & Opportunities v. Sullivan*, 285 Conn. 208, 216, 939 A.2d 541 (2008).

“It is a rare case in which a court will reverse an administrative body because of its failure to apply the doctrine of stare decisis, or because in a particular case it has departed from the policy expressed in earlier cases. . . . In those cases where reversal is justified, the administrative decision must be palpably arbitrary, unreasonable or discriminatory. . . . Reconsideration of a previously stated policy is a prerogative of administrative agencies, which are ordinarily not restrained under the doctrine of stare decisis or on the grounds

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of equitable estoppel." (Citation omitted; internal quotation marks omitted.) *Germain v. Manchester*, 135 Conn. App. 202, 213-14, 41 A.3d 1100 (2012). "If a reviewing court is satisfied that the administrative agency has provided a reasoned analysis for departing from its own established policy indicating that prior policies and standards are being deliberately changed and not casually ignored, so that agency's path may reasonably be discerned, the court will affirm the agency's decision." 73A C.J.S. 165, Public Administrative Law & Procedure § 292 (2004); see *Germain v. Manchester*, supra, 214.

Liberty Mutual claims that the board failed to follow the precedent established by *Hatt v. Burlington Coat Factory*, supra, 263 Conn. 279, *Mages v. Alfred Brown, Inc.*, 123 Conn. 188, 193 A. 780 (1937), *Marroquin v. F. Monarca Masonry*, 121 Conn. App. 400, 994 A.2d 727 (2010), and *Malz v. State/University of Connecticut Health Center*, supra, No. 4701 CRB-6-03-07. Our review of each of those cases discloses that the facts regarding the injuries therein are distinguishable from the present case.

In *Hatt*, the issue with respect to § 31-299b was whether the statute "permits apportionment only in cases of repetitive trauma or occupational disease and, therefore, does not provide a basis for apportionment of liability among insurers when the claimant has suffered two separate and distinct injuries" *Hatt v. Burlington Coat Factory*, supra, 263 Conn. 282-83. The plaintiff, Mary Ann Hatt, suffered an injury to her left foot in 1988. *Id.*, 284. Despite medical treatment, the pain progressively worsened and the appearance of her foot changed, which resulted in an increased disability rating in 1999. *Id.*, 284-86. The first insurer contested liability, claiming that Hatt's ongoing treatment was unrelated to the 1988 injury. *Id.*, 285. In 1998, Hatt's employer was insured by another carrier, which also contested liability. *Id.*, 286. Following a formal hearing, the commissioner found that Hatt's condition was a *cumulative injury* resulting from work activities following the 1988 injury and apportioned liability between the two insurers pursuant to § 31-299b. *Id.*, 286-87. The first carrier appealed to the board, which reversed the commissioner's award finding that Hatt had suffered two separate injuries to her left foot. *Id.*, 287. The board concluded that "the apportionment scheme under § 31-299b was inapplicable because the statute addresses single injuries such as occupational diseases or repetitive traumas" *Id.* Apportionment under § 31-299b is permitted only in instances of a single injury caused by multiple exposures such as repetitive injuries or occupational diseases. *Id.*, 315. Therefore, pursuant to General Statutes § 31-349, the second insurer was solely liable for all expenses stemming from the 1998 injury. *Id.*, 288. Our Supreme Court agreed with the board's conclusions regarding §§ 31-299b and 31-349. *Id.*, 312-

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13. The facts of the case before us now are distinguishable from *Hatt*, not because there were two separate injuries, but because each injury is independent of the other in rendering the plaintiff disabled.⁹

Here, the commissioner found that the plaintiff's knee injuries were separate and concurrent, not cumulative. Liberty Mutual has not disputed that finding. On the basis of our review of the record, the briefs of the parties, and the cases that they claim have precedential value, we conclude that the board properly found the facts of this case *sui generis*. The board's decision therefore does not violate the doctrine of *stare decisis*. Because we are called upon to construe § 31-299b under a unique fact pattern, our review is plenary.

II

The essence of Liberty Mutual's claims on appeal is that the board (a) failed to adhere to the applicable standard of review because it found facts with regard to the 2010 agreement not found by the commissioner and (b) improperly affirmed the commissioner's finding and award as a matter of law. We conclude that the facts found by the board were gratuitous and unnecessary to the resolution of the legal issue before it, but that the board's error, if any, was harmless. See *Testone v. C. R. Gibson Co.*, 114 Conn. App. 210, 219, 969 A.2d 179 (error harmless if record reveals sufficient independent evidence to support decision), cert. denied, 292 Conn. 914, 973 A.2d 663 (2009). The findings of the commissioner are sufficient to support his award, which is grounded in the remedial purpose of the act.

A

Liberty Mutual claims that the board improperly found facts concerning the 2010 agreement that were not found by the commissioner. Assuming, without deciding; see footnote 10 of this opinion; that the board violated the standard of review by finding facts with respect to the 2010 agreement, we conclude that any error was harmless.

We begin our analysis by setting forth the scope of our review on which Liberty Mutual relies.¹⁰ "The commissioner is the sole trier of fact and [t]he conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . The review [board's] hearing of an appeal from the commissioner is not a *de novo* hearing of the facts. . . . [I]t is [obligated] to hear the appeal on the record and not retry the facts. . . . On appeal, the board must determine whether there is any evidence in the record to support the commissioner's finding and award. . . . Our scope of review of [the] actions of the [board] is [similarly] . . . limited. . . . [However,] [t]he decision of the [board] must be correct in law, and it must

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not include facts found without evidence or fail to include material facts which are admitted or undisputed. . . . Put another way, the board is precluded from substituting its judgment for that of the commissioner with respect to factual determinations." (Citations omitted; internal quotation marks omitted.) *Brown v. Dept. of Correction*, 89 Conn. App. 47, 53, 871 A.2d 1094, cert. denied, 274 Conn. 914, 879 A.2d 892 (2005).

The following facts are relevant to Liberty Mutual's claims. In its finding and award, the commissioner found that, pursuant to the 2010 agreement, Chubb was to administer the plaintiff's knee replacement surgeries and pay the surgical costs, incidental expenses, and prescriptions related to the surgery, and that Liberty Mutual would reimburse Chubb 50 percent of those costs. The commissioner specifically found that the 2010 agreement did not address the rate of indemnity benefits to be paid the plaintiff nor the insurers' respective contributions toward indemnity. During the formal hearing, the commissioner stated that the purpose of the hearing was to determine the respective amount each of the insurers was obligated to pay the plaintiff for indemnity. See footnote 3 of this opinion. The commissioner's award set the plaintiff a relapse rate at \$692.75 per week and directed Liberty Mutual to reimburse Chubb 50 percent of the indemnity in addition to 50 percent of the costs agreed upon by the parties.

In its decision, the board noted the commissioner's finding that the 2010 agreement did not address the plaintiff's relapse rate or the contribution each insurer was obligated to pay for indemnity. The board noted that workers' compensation benefits derive exclusively from the act and that "[a] commissioner may exercise jurisdiction to hear a claim only under the precise circumstances and in the manner particularly prescribed by the enabling legislation." *Cantoni v. Xerox Corp.*, 251 Conn. 153, 160, [740 A.2d 796] (1999)." The board found, however, that "the apportionment statutes and case law do not address the 'precise circumstances' " of this case. It concluded that because the present dispute is one of first impression, it was required "to look at the expressed intent of the parties and the statutory approach to compensating total disability injuries in the absence of multiple liable parties."

The board stated that lacunae are present in the act, and, that when issues are presented to it, the board has an obligation to reach a reasoned outcome consistent with the act. It found that the commissioner's finding and award simply implemented the expressed intent of the parties' 2010 agreement. Although the 2010 agreement does not define surgical costs or incidental expenses, in this instance, the board found that incidental expenses would include the unavoidable expense of § 31-307b benefits due the plaintiff for the period of

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temporary total disability he would experience following his surgeries. It is these findings to which Liberty Mutual takes exception on appeal.

Our Supreme Court has noted that “[o]ver the course of the last 100 years, [it] frequently has interpreted the provisions of our workers’ compensation statutory scheme by looking at the purpose and the legislative history of the act.” *Marandino v. Prometheus Pharmacy*, 294 Conn. 564, 577, 986 A.2d 1023 (2010). As discussed in part II B of this opinion, the commissioner analyzed the plaintiff’s injuries as being independent of one another, concluded that the replacement of either knee would involve a period of temporary total disability, determined that having simultaneous bilateral knee surgery benefitted the plaintiff as well as the insurers in that the plaintiff incurred only one period of recovery and decided that it made sense for the insurers to share equally the cost of indemnity. The board concluded that the commissioner’s award falls within the remedial purpose of the act. To require the plaintiff to undergo two surgeries at different times would constitute an absurd result under the act. See *Linden Condominium Assn., Inc. v. McKenna*, 247 Conn. 575, 583–84, 726 A.2d 502 (1999) (statutes cannot be construed to yield absurd result).

On the basis of this analysis, we conclude that the commissioner’s findings are sufficient to support his award. If the board’s findings with respect to the insurer’s intent regarding incidental expenses deviated from the standard of review, we conclude that any error was harmless. See *State v. Burney*, 288 Conn. 548, 560, 954 A.2d 793 (2008) (court may rely on any ground supported by record to affirm judgment).

B

Liberty Mutual also claims that the board’s decision is not supported by competent evidence and that the order to reimburse Chubb 50 percent of the indemnity it pays to the plaintiff is erroneous as a matter of law. We disagree.

The commissioner found that neither insurer disputed that the plaintiff’s need for bilateral knee surgery was reasonable and medically necessary. He also found that knee replacement surgery for either knee would result in a period of disability. Moreover, the plaintiff’s “decision to undergo both knee replacements simultaneously benefits [him] in that he has only one period of recovery and also benefits both insurance carriers in that they are able to split many of the surgical and postsurgical costs that would be duplicative had the [plaintiff] opted for two separate surgeries.” In reviewing the commissioner’s analysis, the board found that forcing the plaintiff to undergo separate knee replacement at different times and to incur a longer period of disability would be irrational. We agree.

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In deciding the claim, we are mindful of the act's remedial purpose. "[T]he act indisputably is a remedial statute that should be construed generously to accomplish its purpose. . . . The humanitarian and remedial purposes of the act counsel against an overly narrow construction that unduly limits eligibility for workers' compensation. . . . Accordingly, [i]n construing workers' compensation law, we must resolve statutory ambiguities or lacunae in a manner that will further the remedial purpose of the act. . . . [T]he purposes of the act itself are best served by allowing the remedial legislation a reasonable sphere of operation considering those purposes." (Citations omitted; internal quotation marks omitted.) *Pizzuto v. Commissioner of Mental Retardation*, 283 Conn. 257, 265, 927 A.2d 811 (2007).

On appeal to this court, Liberty Mutual contends that the commissioner's finding and award is erroneous as a matter of law because enforcement of the 2010 agreement pursuant to General Statutes § 31-303 was not identified in the notice of the formal hearing as an issue to be resolved.¹¹ Enforcement of the agreement was not the issue decided by the commissioner. Rather, the commissioner decided how to apportion the indemnity paid to the plaintiff during his temporary total disability following bilateral knee replacement surgery. The commissioner therefore did not enforce the 2010 agreement, which it found did not address the rate of the plaintiff's indemnity or the contribution from each of the insurers.

Liberty Mutual argues that *Hatt v. Burlington Coat Factory*, supra, 263 Conn. 279, controls because the plaintiff's "single period of disability following his simultaneous surgeries will be a result of the inextricable combination of the two injuries. Therefore, inasmuch as it is necessary for the two injuries to combine to reach the same conclusions found in the *Hatt* case, the same would be applicable to the instant case." (Internal quotation marks omitted.) This argument ignores the commissioner's finding that the plaintiff's first and second injuries are separate and distinct and that neither injury affects the other. In fact, Liberty Mutual has acknowledged, as it must, that it would be liable for any temporary total disability the plaintiff would incur if he had knee replacement surgery for the first injury independent of the surgery for the second injury.¹² See *Costello v. Seamless Rubber Co.*, 99 Conn. 545, 549, 122 A. 79 (1923) (injuries involving the loss of member ordinarily involve period of incapacity). Liberty Mutual argues, however, that because the concurrent surgeries will render the plaintiff disabled for a period of time, Chubb, as the insurer on the second injury, is liable for all of the plaintiff's indemnity and that it is irrelevant that the plaintiff elected to undergo contemporaneous bilateral knee replacement surgeries. By agreeing to pay 50 percent of the medical costs of

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the plaintiff's bilateral knee replacement surgeries, it disavows the validity of its argument that only Chubb as the insurer for the plaintiff's second injury is liable for the whole.

We also disagree with Liberty Mutual's claim that the board's decision cites no law to support it. The board relied upon § 31-278, which provides in relevant part that "[e]ach commissioner . . . shall have all powers necessary to enable him to perform the duties imposed upon him by the provisions of" the act. "The purpose of the [act] is to compensate the worker for injuries arising out of and in the course of employment, without regard to fault, by imposing a form of strict liability on the employer [The act] compromise[s] an employee's right to a common law tort action for work related injuries in return for relatively quick and certain compensation. . . . The act indisputably is a remedial statute that should be construed generously to accomplish its purpose. . . . The humanitarian and remedial purposes of the act counsel against an overly narrow construction that unduly limits eligibility for workers' compensation. . . . Further, our Supreme Court has recognized that the state of Connecticut has an interest in compensating injured employees to the fullest extent possible" (Internal quotation marks omitted.) *Jones v. Connecticut Children's Medical Center Faculty Practice Plan*, 131 Conn. App. 415, 422-23, 28 A.3d 347 (2011). "The purposes of the act itself are best served by allowing the remedial legislation a reasonable sphere of operation considering those purposes." *Mingachos v. CBS, Inc.*, 196 Conn. 91, 97, 491 A.2d 368 (1985). In appeals arising under the act, "we must resolve statutory ambiguities or lacunae in a manner that will further the remedial purpose of the act." *Doe v. Stamford*, 241 Conn. 692, 698, 699 A.2d 52 (1997).

We agree with the reasoning of the commissioner and the board that the remedial purposes of the act are fostered by the plaintiff's undergoing bilateral knee replacement surgery with one period of recovery. The act is to provide for "relatively quick and certain compensation." *Mingachos v. CBS, Inc.*, supra, 196 Conn. 97. Moreover, the commissioner's finding and award benefits the insurers in that they are able to share in the costs of the plaintiff's temporary total disability postsurgery. Although the commissioner ordered each insurer to pay 50 percent of the indemnity owed the plaintiff, he did not order the parties to apportion a percentage of the indemnity for a single injury or combination of injuries. The commissioner directed the insurers to pay 50 percent of the plaintiff's indemnity for a period of disability he elected to incur by having the separate first and second injuries treated by means of simultaneous bilateral knee replacement surgeries. Liberty Mutual acknowledges it is responsible for the plaintiff's first injury and that it would be liable for all costs if the plaintiff had knee replacement surgery for the

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first injury at a time other than when the second injury knee replacement surgery took place. As noted, we wholly agree with the commissioner and the board that it is not reasonable to expect the plaintiff to undergo two periods of recovery. We therefore conclude that the board properly affirmed the commissioner's finding and award in which it reached a reasoned decision consistent with the act.

The decision of the workers' compensation review board is affirmed.

In this opinion the other judges concurred.

¹ Neither the plaintiff nor the employer is a party to this appeal.

² On appeal, Liberty Mutual has not contested the commissioner's finding and award as to the plaintiff's relapse rate.

³ In its brief on appeal, Liberty Mutual cites a colloquy among the commissioner and counsel for the insurers during the formal hearing. The relevant portions of the transcript reveal the following exchange:

"[Commissioner]: And there is no dispute as to the medical necessity or the reasonableness of the surgeries, correct?"

"[Counsel for Liberty Mutual]: Correct, commissioner, I believe there is even an agreement in your file. . . ."

"[Commissioner]: And that will be administered by the last carrier, which is Chubb, correct . . . ?"

"[Counsel for Chubb]: Yes, commissioner, pursuant to an agreement entered into by the parties at an informal hearing with a writing on March 10, 2010. Chubb will administer the bilateral total knee replacements and seek reimbursement from the Liberty for 50 percent of all expenses related to the surgery and prescription meds.

"[Commissioner]: My understanding is the issue had to do with the rate for which [the plaintiff] will be paid. I know Chubb is, will do the relapse rate of, and you have the amount?"

"[Counsel for Chubb]: Let me just, for the record, the argument of Chubb is that as each one of these surgeries are from separate and distinct injuries and each one of these surgeries in and of itself could make the [plaintiff] temporarily totally disabled medically, that any other law other than a 50/50 apportionment between Liberty and the Chubb is inappropriate because they aren't, they aren't melding together to make the [plaintiff] temporarily totally disabled, the surgeries aren't melding together, they are separate and distinct, and each one could make the claimant temporarily totally disabled.

. . . We would seek 50 percent of the temporary total disability payments from the Chubb as it would pertain to [the plaintiff's] recuperative period.

. . . If the commission should so find that the relapse rate is the appropriate rate in this case, I would ask that that relapse rate of \$692.75 be apportioned 50/50 between the Chubb and Liberty. Obviously, if the commission chooses no relapse rate and reverts to the prior temporary total disability rate . . . I would argue 50 percent of whatever rate is chosen by the commissioner. . . .

"[Commissioner]: Okay. So the only issue I need to sort out is what, if any, amount Liberty will have to pay.

"[Commissioner]: You are going to have the surgery, [plaintiff], and you're going to have it at the relapse rate that [Chubb's counsel] described. The issue of who is to pay what, Chubb is going to pay for the surgery and authorize the surgery, Chubb is going to administer the claim, and I will determine what amount if any Liberty has to pay back Chubb in regards to the weekly paycheck, the indemnity portion but not the medical portion, they already worked out, okay?"

⁴ The plaintiff had bilateral knee replacement surgery on February 24, 2011.

⁵ Liberty Mutual filed a motion to correct the finding and award. The commissioner accepted two corrections that do not affect the issues on appeal.

⁶ Liberty Mutual gave the following reasons for its appeal to the board: (1) the commissioner erred in ordering it to reimburse Chubb 50 percent of the indemnity paid to the plaintiff postsurgery, (2) the finding and award fails to cite any statute or case law that provides a legal basis for reimbursement, (3) there is no legal basis for the reimbursement ordered, (4) Chubb's reliance on common law apportionment and *Mund v. Farmers' Cooperative*,

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Inc., 139 Conn. 338, 94 A.2d 119 (1952), to seek reimbursement from it is legally incorrect, and (5) the commissioner erred in denying Liberty Mutual's motion to correct in its entirety.

⁷ General Statutes § 31-278 provides in relevant part: "Each commissioner shall . . . have the power to certify official acts and shall have all powers necessary to enable him to perform the duties imposed upon him by the provisions of this chapter. . . ."

⁸ General Statutes § 31-299b provides in relevant part: "If an employee suffers an injury or disease for which compensation is found by the commissioner to be payable according to the provisions of this chapter, the employer who last employed the claimant prior to the filing of the claim, or the employer's insurer, shall be initially liable for the payment of such compensation. The commissioner shall, within a reasonable period of time after issuing an award, on the basis of the record of the hearing, determine whether prior employers, or their insurers, are liable for a portion of such compensation and the extent of their liability. If prior employers are found to be so liable, the commissioner shall order such employers or their insurers to reimburse the initially liable employer or insurer according to the proportion of their liability. . . ."

⁹ The board concluded that none of the following cases relied upon by the parties controlled the issue in this case. We agree.

In *Mages v. Alfred Brown, Inc.*, supra, 123 Conn. 188, Gabriel Mages injured his spine while in the employ of one employer who accepted the injury. *Id.*, 190. Mages was later employed by a second employer when he fell and reinjured his spine and was no longer able to work. *Id.* Our Supreme Court held that the insurer for the second employer was liable for the disability because there were two injuries and Mages' prior injury had no effect on the liability of the second employer, as Mages probably would have been able to continue to work save for the second injury. *Id.*, 194. *Mages* is distinguishable from the facts of the present case where there are two separate injuries, each of which independently renders the plaintiff disabled.

The case of *Marroquin v. F. Monarca Masonry*, supra, 121 Conn. App. 400, is distinguishable, as well. This court determined that *Hatt* did not control *Marroquin* because it was factually distinct. In contrast to *Hatt*, which involved "successive insurers for the same employer and a claimant with two separate and distinct injuries, each of which was suffered during a different insurer's policy coverage, we are presented [here] with multiple insurers and a claimant with a single injury. We do find highly significant the Supreme Court's statement in *Hatt* that in enacting § 31-299b, the legislature explicitly provided for an apportionment scheme in the single injury and multiple employer or insurer scenario . . . and we conclude that under § 31-299b, the commissioner had the authority to apportion liability to the responsible employer-insurer in this single injury and multiple employer or insurer scenario." (Citation omitted; emphasis added; internal quotation marks omitted.) *Id.*, 411-12. Because *Marroquin* concerned a single injury, it is inapposite to the present case.

Malz v. State/University, Connecticut Health Center, supra, No. 4701 CRB-6-03-07, also is distinguishable. In that case, Stephania Malz suffered an injury to her lumbar spine and cervical spine in 1990. She suffered a second injury to her cervical spine in 1994. The commissioner concluded that the insurance carrier for the 1994 injury was not entitled to apportionment pursuant to *Hatt v. Burlington Coat Factory*, supra, 263 Conn. 279, "where two separate compensable injuries contribute to subsequent disability." In the present case, two separate injuries do not contribute to the plaintiff's disability.

Before the board, Chubb relied on *Mund v. Farmers' Cooperative, Inc.*, supra, 139 Conn. 338, for its apportionment claim. The board distinguished *Mund* in its opinion. Chubb does not rely on *Mund* on appeal before this court. We agree with the board that the facts of *Mund* are distinguishable from the present facts. In *Mund*, the claimant suffered a ruptured disc in 1946, but eventually was able to return to work, and subsequently reopened the disc in an accident in 1950. *Id.*, 340-41. The commissioner found that the two ruptures of the disc were "equal, concurrent and contributing causes" of the claimant's resulting disability. *Id.*, 341. The injury was apportioned between the two carriers. *Id.*

¹⁰ We note that the general principles governing the construction of a contract are well established. "If a contract is unambiguous within its four corners, intent of the parties is a question of law requiring plenary review. . . . When the language of a contract is ambiguous, the determination of the parties' intent is a question of fact, and the trial court's interpretation is subject to reversal on appeal only if it is clearly erroneous." (Internal quotation marks omitted.) *Sagalyn v. Pederson*, 140 Conn. App. 792, 795,

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60 A.3d 367 (2013). Whether the 2010 agreement is ambiguous was not briefed by the insurers. Although that issue would affect the board's standard of review, we need not decide the question of ambiguity to resolve Liberty Mutual's claim.

¹¹ The formal hearing notice listed three issues: "§ 31-299b—Apportionment of Liability; § 31-307b—Recurrence of Prior Injury; [General Statutes] § 31-310—Compensate Rate/Average Weekly Wage."

¹² The corollary to this acknowledgement is that Liberty Mutual is liable to pay the plaintiff indemnity for the disability resulting from knee replacement surgery due to the first injury whether it is done separately or in combination with the second injury knee replacement surgery. If both Liberty Mutual and Chubb paid the plaintiff temporary total disability for the same period of time, the plaintiff would receive a double recovery. The board properly noted that double recoveries under the act are disfavored. See *Enquist v. General Datacom*, 218 Conn. 19, 26, 587 A.2d 1029 (1991); see also 6 A. Larson & L. Larson, *Workers' Compensation Law* (2012) § 110.02, p. 110-3—110-6.

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CONNECTICUT GENERAL STATUTES

General Statutes § 31-278.

Each commissioner shall, for the purposes of this chapter, have power to summon and examine under oath such witnesses, and may direct the production of, and examine or cause to be produced or examined, such books, records, vouchers, memoranda, documents, letters, contracts or other papers in relation to any matter at issue as he may find proper, and shall have the same powers in reference thereto as are vested in magistrates taking depositions and shall have the power to order depositions pursuant to section 52-148. He shall have power to certify to official acts and shall have all powers necessary to enable him to perform the duties imposed upon him by the provisions of this chapter. Each commissioner shall hear all claims and questions arising under this chapter in the district to which the commissioner is assigned and all such claims shall be filed in the district in which the claim arises, provided, if it is uncertain in which district a claim arises, or if a claim arises out of several injuries or occupational diseases which occurred in one or more districts, the commissioner to whom the first request for hearing is made shall hear and determine such claim to the same extent as if it arose solely within his own district. If a commissioner is disqualified or temporarily incapacitated from hearing any matter, or if the parties shall so request and the chairman of the Workers' Compensation Commission finds that it will facilitate a speedier disposition of the claim, he shall designate some other commissioner to hear and decide such matter. The Superior Court, on application of a commissioner or the chairman or the Attorney General, may enforce, by appropriate decree or process, any provision of this chapter or any proper order of a commissioner or the chairman rendered pursuant to any such provision. Any compensation commissioner, after ceasing to hold office as such compensation commissioner, may settle and dispose of all matters relating to appealed cases, including correcting findings and certifying records, as well as any other unfinished matters pertaining to causes theretofore tried by him, to the same extent as if he were still such compensation commissioner.

General Statutes § 31-299b.

If an employee suffers an injury or disease for which compensation is found by the commissioner to be payable according to the provisions of this chapter, the employer who last employed the claimant prior to the filing of the claim, or the employer's insurer, shall be initially liable for the payment of such compensation. The commissioner shall, within a reasonable period of time after issuing an award, on the basis of the record of the hearing, determine whether prior employers, or their insurers, are liable for a portion of such compensation and the extent of their liability. If prior employers are found to be so liable, the commissioner shall order such employers or their insurers to reimburse the initially liable employer or insurer according to the proportion of their liability. Reimbursement shall be made within ten days of the commissioner's order with interest, from the date of the

initial payment, at twelve per cent per annum. If no appeal from the commissioner's order is taken by any employer or insurer within twenty days, the order shall be final and may be enforced in the same manner as a judgment of the Superior Court. For purposes of this section, the Second Injury Fund shall not be deemed an employer or an insurer and shall be exempt from any liability. The amount of any compensation for which the Second Injury Fund would be liable except for the exemption provided under this section shall be reallocated among any other employers, or their insurers, who are liable for such compensation according to a ratio, the numerator of which is the percentage of the total compensation for which an employer, or its insurer, is liable and the denominator of which is the total percentage of liability of all employers, or their insurers, excluding the percentage that would have been attributable to the Second Injury Fund, for such compensation.

General Statutes § 31-303.

Payments agreed to under a voluntary agreement shall commence on or before the twentieth day from the date of agreement. Payments due under an award shall commence on or before the twentieth day from the date of such award. Payments due from the Second Injury Fund shall be payable on or before the twentieth business day after receipt of a fully executed agreement. Any employer who fails to pay within the prescribed time limitations of this section shall pay a penalty for each late payment, in the amount of twenty per cent of such payment, in addition to any other interest or penalty imposed pursuant to the provisions of this chapter

General Statutes § 31-307b.

If any employee who receives compensation under section 31-307 returns to work after recovery from his or her injury and subsequently suffers total or partial incapacity caused by a relapse from the recovery from, or a recurrence of, the injury, the employee shall be paid a weekly compensation equal to seventy-five per cent of his or her average weekly earnings as of the date of the original injury or at the time of his or her relapse or at the time of the recurrence of the injury, whichever is the greater sum, calculated pursuant to section 31-310, after such earnings have been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act made from such employee's total wages received during the period of calculation of the employee's average weekly wage pursuant to said section 31-310, but not more than (1) the maximum compensation rate set pursuant to section 31-309 if the employee suffers total incapacity, or (2) one hundred per cent, raised to the next even dollar, of the average weekly earnings of production and related workers in manufacturing in the state, as determined in accordance with the provisions of section 31-309, if the employee suffers partial incapacity, for the year in which the employee suffered the relapse or recurrent injury and the minimum rate under this chapter for that year, and provided (A) the compensation shall not continue longer than the period of total or partial incapacity following the relapse or recurrent injury and (B) no employee eligible for compensation for specific injuries set forth in section 31-308 shall receive compensation under this section. The employee shall also be entitled to receive the cost-of-living adjustment provided in accordance with the provisions of section 31-307a

commencing on October first following the relapse or recurrent injury which disables him or her. If the injury occurred originally prior to October 1, 1969, the difference between the employee's original weekly compensation rate and the rate required by this section and the cost-of-living adjustment, if any, thereafter due shall be paid initially by the employer or the employer's insurance carrier who shall be reimbursed for such payment from the Second Injury Fund as provided by section 31-354 upon presentation of any vouchers and information that the Treasurer shall require. No claim for payment of retroactive benefits may be made to the Second Injury Fund more than two years after the date on which the employer or its insurance carrier paid such benefits in accordance with this section. In no event shall the employee receive more than the prevailing maximum compensation.