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GEORGE KELLY *v.* DEPARTMENT OF MENTAL HEALTH AND ADDICTION SERVICES ET AL.
(AC 44991)

Alvord, Moll and Harper, Js.

Syllabus

Pursuant to statute (§ 5-142 (a)), a member of any institution or facility of the Department of Mental Health and Addiction Services who sustains an injury as a result of being assaulted in the performance of his duties and is a direct result of the special hazards inherent in such duties shall continue to receive the full salary that he was receiving at the time of the assault for a specified period.

The plaintiff employee appealed to this court from the decision of the Compensation Review Board affirming the corrected decision of the Workers' Compensation Commissioner determining that he was not entitled to the enhanced, full salary disability benefits of § 5-142 (a). The plaintiff was employed as a per diem psychiatrist at a facility operated by the defendant department when he sustained workplace injuries that rendered him temporarily totally incapacitated from work. The plaintiff filed a notice of claim for workers' compensation benefits, and the defendant filed a form 43 contesting the plaintiff's eligibility for enhanced benefits, claiming, inter alia, that a 1993 collective bargaining agreement between the plaintiff's union and the state had eliminated any right of the plaintiff, as a per diem employee, to receive compensation. The commissioner concluded that the plaintiff was entitled to receive temporary total disability benefits pursuant to a provision (§ 31-310) of the Workers' Compensation Act (§ 31-275 et seq.) but that, although the plaintiff met the requirements of § 5-142 (a), he was not entitled to receive enhanced, full salary benefits pursuant to § 5-142 (a). The commissioner based his findings on a 1989 memorandum of agreement between the plaintiff's union and the state, which was not independently introduced into evidence but was referenced in an exhibit that the plaintiff submitted. The exhibit consisted of a cost sheet for the 1989 memorandum of agreement, which stated that per diem nurses would not be entitled to certain economic benefits but that the state would be responsible for Social Security and workers' compensation, and a sheet labeled a "new supersedence appendix," relating to the creation of the per diem nursing positions. The supersedence appendix listed § 5-142 as one of the statutes that was amended by the agreement. The supersedence agreement was sent to the legislature for approval, as required pursuant to statute (§ 5-278 (b) (1)), because its provision that per diem classifications shall not be entitled to, inter alia, retirement benefits "and other economic benefits," conflicted with various state statutes, including § 5-142 (a). The commissioner noted that a subsequent 1993 collective bargaining agreement, which merely expanded the types of clinical staff, such as the position of psychiatrist, that could be hired under the heading of "per diem" workers, did not create a new class of workers, constituting a change to existing law. The 1993 agreement was not required, therefore, to be sent to the legislature with a supersedence appendix as the supersedence of § 5-142 (a) had already taken place. The commissioner concluded that per diem employees of the department were never intended to access the enhanced benefits of § 5-142 (a). The commissioner thereafter granted in part the plaintiff's motion to correct, making additional findings but not correcting his determination that the plaintiff was not entitled to enhanced, full salary disability benefits. On appeal, the board affirmed the commissioner's decision. *Held*:

1. Contrary to the plaintiff's claim, the board properly upheld the commissioner's substantive use of the exhibit containing the cost sheet and the supersedence appendix: the plaintiff's counsel offered the exhibit into evidence during his cross-examination of a department witness and never indicated that he was offering the document only for a limited purpose; moreover, the commissioner explicitly stated that he was

admitting the document as a full exhibit, with no objection from the department.

2. This court declined to review the plaintiff's claim that the commissioner failed to allocate to the department the burden of proving that he was not entitled to the enhanced benefits of § 5-142 (a), as, regardless of which party bore the burden of proof, the commissioner had before him evidence from which he reasonably could have concluded that the plaintiff's ability to receive § 5-142 benefits had been superseded by a 1989 memorandum of agreement between the plaintiff's union and the state, thus, the allocation of the burden of proof was not dispositive of the commissioner's decision.
3. The board properly upheld the commissioner's conclusion that the plaintiff's right to the enhanced, full salary benefits of § 5-142 (a) was superseded by the 1989 memorandum of agreement between the state and the plaintiff's union: the exhibit and its comparison to the 1993 collective bargaining agreement provided a sufficient basis from which the commissioner could infer that the 1989 memorandum of agreement existed between the state and the plaintiff's union and that that agreement had been submitted to and approved by the legislature along with the documents in the exhibit, as the language reflected in the exhibit and the collective bargaining agreement was phrased in almost exactly the same manner and such a provision had not been contained in the prior collective bargaining agreement; moreover, the supersedence appendix in the exhibit specifically referred to the provision of the agreement governing the per diem nursing positions and listed § 5-142 as one of the statutes that would be amended by that provision, thus, the commissioner reasonably could conclude that the citation to § 5-142 in the appendix would have alerted the legislature that the referenced agreement term conflicted with that statute and, more specifically, that the enhanced, full salary benefits set forth in § 5-142 (a) were among the "other economic benefits" to which per diem employees were not entitled.
4. The plaintiff could not prevail on his claim that the commissioner's analysis was inconsistent as to whether the enhanced benefits of § 5-142 (a) were included among the "other economic benefits" denied to per diem employees as that language was used in the 1993 collective bargaining agreement; in the commissioner's original decision, he concluded that the plaintiff was entitled to regular workers' compensation benefits but not to enhanced, full salary benefits, and he likewise concluded in his memorandum of decision on the plaintiff's motion to correct that § 5-142 (a) was one of the other economic benefits denied to per diem employees.
5. The plaintiff could not prevail on his claim that the board improperly upheld the commissioner's decision because the commissioner improperly concluded that the 1993 collective bargaining agreement did not need to go through a new supersedence process pursuant to § 5-278: the commissioner reasonably inferred that the legislature already had approved the provision of the 1993 agreement that conflicted with § 5-142 (a) by way of the 1989 memorandum of agreement and that that provision subsequently was incorporated into the 1993 collective bargaining agreement; moreover, the inclusion of additional per diem positions in the 1993 collective bargaining agreement did not impact the language of the conflicting provision but merely expanded the class of per diem employees that already existed.

Argued October 5, 2022—officially released April 4, 2023

Procedural History

Appeal from the corrected decision of the Workers' Compensation Commissioner for the Eighth District determining that the plaintiff was not entitled to certain disability benefits, brought to the Compensation Review Board, which affirmed the commissioner's decision, and the plaintiff appealed to this court. *Affirmed.*

John D'Elia, for the appellant (plaintiff).

Patrick G. Finley, assistant attorney general, with whom, on the brief, were *William Tong*, attorney gen-

eral, and *Michael K. Skold*, deputy solicitor general, for the appellees (defendants).

Opinion

HARPER, J. The plaintiff, George Kelly, who was employed as a per diem psychiatrist by the defendant Department of Mental Health and Addiction Services (department), appeals from the decision of the Compensation Review Board (board), upholding the determination by the Workers' Compensation Commissioner for the Eighth District (commissioner) that he was not entitled to enhanced, full salary disability benefits pursuant to General Statutes § 5-142 (a).[1] On appeal, the plaintiff claims that the board erred in upholding the commissioner's decision because the commissioner (1) improperly relied on a supersedence appendix and cost sheet, which the plaintiff had offered into evidence, for substantive purposes; (2) failed to allocate to the department the burden of proving that the plaintiff was not entitled to the enhanced benefits of § 5-142 (a); (3) improperly concluded that a 1989 memorandum of agreement between the plaintiff's union and the state operated to supersede § 5-142 (a) for per diem employees such as the plaintiff; (4) set forth inconsistent conclusions in his original decision and his subsequent decision on the plaintiff's motion to correct; and (5) improperly concluded that a 1993 collective bargaining agreement, which added psychiatrists to the class of per diem employees, was not required to go through "a new supersedence process."[2] We affirm the decision of the board.

The following facts, as found by the commissioner, and procedural history are relevant to our resolution of this appeal. In January, 2013, the plaintiff was hired as a per diem psychiatrist at Connecticut Valley Hospital, a facility operated by the department. Although the plaintiff was per diem and was hired to work on an "intermittent" basis, he routinely worked full-time and performed the same duties as permanent psychiatrists. As a per diem psychiatrist, the plaintiff was not entitled to "retirement benefits, health insurance or life insurance benefits, paid leave, longevity or other economic benefits," but, in lieu of those benefits, he was paid at an hourly rate 50 percent higher than that paid to a psychiatrist on the permanent staff.

On July 10, 2017, while the plaintiff was working, he was struck multiple times in the head by a patient. The plaintiff sustained injuries that included a concussion, rendering him temporarily totally incapacitated from work. At the time of the plaintiff's injuries, he was being paid at a rate of $197.40 per hour and typically worked a forty hour workweek. In accordance with a directive from the department, the defendant Gallagher Bassett Services, Inc., the state's third-party administrator for workers' compensation claims, began to pay the plaintiff weekly temporary total disability benefits in the amount of $7896, representing 100 percent of his pay rate, pursuant to § 5-142 (a).[3]

The plaintiff filed a formal notice of his claim for workers' compensation benefits on August 2, 2017. On August 11, 2017, the department filed a notice contesting liability (form 43). The department acknowledged that the workplace incident had occurred, but it reserved the right to challenge and contest the extent of the plaintiff's injuries and disability. The department, through Gallagher Bassett Services, Inc., continued to pay the plaintiff disability benefits in the amount of $7896 per week.[4]

On July 18, 2018, the department filed another form 43, contesting the plaintiff's eligibility for the enhanced benefits pursuant to § 5-142 (a) "insofar as [he] was a per diem employee at the time of his alleged injury." The department contended that "[the plaintiff] bears the burden of proving that he was a 'member' of the facility in which he was working on the claimed date of injury and there is insufficient evidence to prove that he qualifies for [enhanced temporary total disability] benefits pursuant to [§] 5-142 (a)."

The commissioner held a formal hearing on various dates between October 18, 2018,[5] and March 11, 2020. At the hearing, the department did not contest the manner in which the plaintiff was injured or the extent of the plaintiff's disability. Instead, the department's position was that, because of the plaintiff's per diem status, he was not an "employee" of the department as required to qualify for *any* workers' compensation benefits pursuant to the Workers' Compensation Act, General Statutes § 31-275 et seq.,[6] and he was not a "member" of the department as required to qualify for the enhanced benefits set forth in § 5-142 (a). In addition, the department argued that, pursuant to General Statutes § 5-278 (e),[7] the 1993 collective bargaining agreement between the plaintiff's union and the state had eliminated any right of the plaintiff to receive compensation pursuant to the Workers' Compensation Act and § 5-142 (a), by way of the agreement's provision that "[i]ndividuals in per diem classifications shall not be entitled to retirement benefits, health insurance or life insurance benefits, paid leave, longevity or *other economic benefits*."[8] (Emphasis added.)

Also at the hearing, the plaintiff presented testimony from several witnesses, employed by either the department or Gallagher Bassett Services, Inc., regarding his schedule and duties as a per diem psychiatrist in addition to the department's initial decision to compensate him with full pay benefits in accordance with § 5-142 (a).

The department presented testimony from Linda Yelmini, who previously held several positions with the Office of Labor Relations between 1987 and 2015 and had been the chief negotiator for the state in negotiations for the 1993 collective bargaining agreement. Yelmini testified, among other things, about her back-

ground knowledge of the process of negotiating and ratifying the state labor contracts. Yelmini also testified regarding her understanding of the 1993 collective bargaining agreement, specifically, the provision of the agreement that excludes per diem employees from receiving "retirement benefits, health insurance or life insurance benefits, paid leave, longevity or other economic benefits," and her view that workers' compensation is included among the "other economic benefits" referenced in that provision.[9]

Throughout the hearing, the plaintiff's counsel questioned whether the provisions of the 1993 collective bargaining agreement could supersede § 5-142 (a) given that the agreement was not accompanied by a supersedence appendix in accordance with § 5-278[10] and the terms of the collective bargaining agreement.[11] Yelmini testified that a supersedence appendix had not been submitted with that agreement because the agreement was reached through arbitration, and her office's position was that a supersedence appendix was not necessary under such circumstances.

During his cross-examination of Yelmini, the plaintiff's counsel offered into evidence, among other things, a two page document associated with a December 7, 1989 memorandum of agreement between the plaintiff's union and the state (exhibit K), which was admitted as a full exhibit without objection. The 1989 memorandum of agreement was not offered into evidence.

The first page of exhibit K is an estimated budget requirement (cost sheet) for a "Memorandum of Agreement dated 12/7/89," prepared by the Office of Policy and Management. That page states in relevant part: "Registered Professional and Licensed Practical Nurses hired on a per diem basis shall not be entitled to retirement benefits, health or life insurance benefits, paid leave, longevity or other economic benefits. The State will be responsible for Social Security and Workers' Compensation." The second page of exhibit K is labeled a "new supersedence appendix," relating to the creation of the per diem nursing positions. Under the heading "statute or regulation amended," the document lists, among others, General Statutes §§ 5-142 through 5-144. The plaintiff's counsel directed Yelmini's attention to certain notations on the cost sheet referencing arbitration and asked her whether there was an arbitration award associated with those supersedence documents, but Yelmini stated that she could not recall and that she was not familiar with those documents.

On September 17, 2020, the commissioner issued his written findings and order, accompanied by a memorandum of decision, concluding that the plaintiff was entitled to receive temporary total disability benefits under the Workers' Compensation Act, pursuant to General Statutes § 31-310, but that he was not entitled to the enhanced, full salary benefits pursuant to § 5-142 (a).

First, the commissioner rejected the department's argument that the plaintiff was an independent contractor, rather than an "employee," for purposes of the Workers' Compensation Act. The commissioner also concluded that the terms of the 1993 collective bargaining agreement did not express a manifest intent to exclude per diem employees from coverage under the Workers' Compensation Act. The commissioner reasoned, in part, that the cost sheet that he found had been submitted with the 1989 memorandum of agreement, as reflected in exhibit K, explicitly stated that "[t]he State will be responsible for Social Security and Workers' Compensation," and he found it "inconceivable that in [the 1993 collective bargaining agreement] the parties [had] negotiated away the right of per diem nurses to claim workers' compensation without specifically stating so."

Next, the commissioner rejected the department's argument that the plaintiff was not a "member" of the department, as required to qualify for the enhanced, full salary benefits set forth in § 5-142 (a). He concluded that "the term 'member' [pursuant to § 5-142 (a)] is synonymous with the term 'employee,' " and, therefore, "absent some other provision or legislative act, a per diem psychiatrist such as [the plaintiff] would meet the definition of [a] 'member' of [the department] for purposes of § 5-142 (a)."[12]

Finally, the commissioner concluded that, although the plaintiff met the requirements of § 5-142 (a), the 1989 memorandum of agreement between the plaintiff's union and the state, which was referenced in exhibit K but not independently introduced into evidence, superseded his right to the enhanced, full salary benefits pursuant to that statute. The commissioner rejected the department's argument regarding the 1993 collective bargaining agreement, explaining: "Given the absence of a supersedence appendix from [the 1993 collective bargaining agreement], I would not conclude that the language of [that agreement] was meant to make any change to the existing law as to whether per diem employees should fall outside the scope of § 5-142 (a)." Nevertheless, the commissioner proceeded to explain: "As noted [previously], in December, 1989, the contract between the union and the state had already been amended to expressly provide for the hiring of per diem nurses. I have already addressed the cost sheet that made it clear that those per diem nurses were entitled to workers' compensation benefits. However, the 1989 contract was already in place when the December, 1989 agreement for the hiring of per diem nurses was reached. Therefore, when the subsequent agreement was reached it had to go to the legislature—and it went to the legislature with a 'new supersedence appendix.' (Exhibit K.) While the heading uses the word 'amended,' it is impossible to read this as anything but complete

exclusion of per diem nurses from coverage under § 5-142 (a)."

The commissioner explained that the 1993 collective bargaining agreement did not impact the supersedence of § 5-142 (a) that already had taken place, pursuant to the 1989 memorandum of agreement, because the 1993 collective bargaining agreement had not been sent to the legislature with a supersedence appendix, and "[t]he purpose of the 1993 agreement was not the creation of a new class of workers, i.e., per diem workers, because the class already existed. The purpose of the 1993 changes was merely to expand the types of clinical staff that could be hired under the heading per diem." Thus, the commissioner concluded that "per diem employees of [the department] were never intended to have access to the enhanced benefits of § 5-142 (a)." (Footnote omitted.) On the basis of his findings, the commissioner authorized the department to reduce the amount of the plaintiff's compensation benefits to $1292 per week, the amount of temporary total disability benefits that he was entitled to receive under § 31-310.

On September 29, 2020, the plaintiff filed a motion to correct the commissioner's September 17, 2020 ruling and memorandum of decision, and the department subsequently filed an objection to that motion. In his motion, the plaintiff requested that the commissioner correct numerous findings related to the 1989 memorandum of agreement and his reliance on the supersedence documents admitted as exhibit K. The commissioner held a hearing on the plaintiff's motion on November 18, 2020.

On November 30, 2020, the commissioner issued his ruling granting in part the plaintiff's motion to correct. The commissioner explained that his original findings would remain unchanged, but he made certain additional findings at the plaintiff's request, including the following: "The December, 1989 agreement regarding per diem nurses was reached after the effective date of the [collective bargaining agreement] and the details of the agreement were not incorporated in the published version of that [collective bargaining agreement]. A copy of the memorandum of agreement is not in evidence. The [department's] witness, Linda Yelmini, did not negotiate the 1989 [collective bargaining agreement] nor the December, 1989 memorandum of agreement regarding per diem nurses, and she was not familiar with either." The commissioner declined to correct his determination, as set forth in his original decision, that the plaintiff was not entitled to the enhanced, full salary disability benefits set forth in § 5-142 (a). In a memorandum accompanying his ruling on the motion to correct, the commissioner further set forth his reasoning for the decision.

The plaintiff filed a petition for review of the commissioner's decision with the board. On September 8, 2021,

after a hearing, the board issued a written decision affirming the commissioner's decision that the plaintiff was not entitled to the enhanced, full salary disability benefits set forth in § 5-142 (a). This appeal followed. Additional facts and procedural history will be set forth as necessary.

Before reviewing the plaintiff's claims, we set forth the applicable standard of review. "The principles that govern our standard of review in workers' compensation appeals are well established. . . . The board sits as an appellate tribunal reviewing the decision of the commissioner. . . . [T]he review [board's] hearing of an appeal from the commissioner is not a de novo hearing of the facts. . . . [T]he power and duty of determining the facts rests on the commissioner . . . . [T]he commissioner is the sole arbiter of the weight of the evidence and the credibility of witnesses . . . . Where the subordinate facts allow for diverse inferences, the commissioner's selection of the inference to be drawn must stand unless it is based on an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . .

"This court's review of decisions of the board is similarly limited. . . . 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. . . . [W]e must interpret [the commissioner's finding] with the goal of sustaining that conclusion in light of all of the other supporting evidence. . . . Once the commissioner makes a factual finding, [we are] bound by that finding if there is evidence in the record to support it. . . . In the context of an administrative appeal, the sufficiency of the evidence to support a finding . . . clearly presents a question of law that we examine . . . under the plenary standard of review." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Frantzen* v. *Davenport Electric*, 206 Conn. App. 359, 367, 261 A.3d 41, cert. denied, 339 Conn. 914, 262 A.3d 134 (2021).

I

The plaintiff first claims that the board erred in upholding the commissioner's decision because the commissioner improperly relied on exhibit K, the cost sheet and supersedence appendix associated with a 1989 memorandum of agreement, as substantive evidence.[13] The department responds that the commissioner was entitled to rely on exhibit K because it was admitted as a full exhibit and had not been offered or admitted for a limited purpose. We agree with the department and, accordingly, reject the plaintiff's claim.

The following additional facts are relevant to our analysis. The plaintiff's counsel offered exhibit K into

evidence during his cross-examination of Yelmini, and, with no objection from the department, the commissioner explicitly stated that he was admitting the document as a full exhibit. The commissioner, in his original decision, cited exhibit K in support of his conclusion that § 5-142 (a) had been superseded for per diem employees through a 1989 memorandum of agreement between the state and the plaintiff's union.

The plaintiff first raised concerns about exhibit K in his motion to correct. At the hearing on the motion, the plaintiff's counsel expressed his disagreement with the commissioner's substantive use of exhibit K, particularly given that the department's argument regarding supersedence had been based on the 1993 collective bargaining agreement, not the 1989 memorandum of agreement. He argued, among other things, that that evidence "was offered for a completely different reason. . . . Yelmini testified that, in the case of an arbitration, you don't need a supersedence appendix, and the only purpose of exhibit K was to show that here is an example of a time when a supersedence appendix is offered which mentions arbitration. . . . The limited and only offer of exhibit K was to say, as a credibility matter, here is an occasion where it appears as if a supersedence appendix listing arbitration was submitted to the legislature."

In the commissioner's ruling on the motion to correct, he disagreed with the plaintiff's characterization of the limited purpose of exhibit K, explaining: "The [plaintiff] proffered exhibit K to show that per diem workers were intended to be covered by [the Workers' Compensation Act], *and* to refute a statement by Yelmini that supersedence appendices are not required in certain circumstances." (Emphasis added.) In his memorandum of decision accompanying that ruling, the commissioner further maintained his reliance on that evidence: "As for the argument that exhibit K was offered by the [plaintiff] for the limited purpose of disproving Yelmini's assertion about the necessity of supersedence appendices and that the [department] should not benefit from it, I cannot agree. . . . [The cost sheet] provided valuable evidence for my determination that the [department] was wrong in its assertion that the [plaintiff] was not entitled to workers' compensation under [the Workers' Compensation Act], so if disproving that assertion were not part of the [plaintiff's] motivation for offering exhibit K, it certainly ought to have been. . . . I find no justification for allowing the [plaintiff] to make favorable use of this public document and then ignore its other implications simply because they may be harmful to [his] case. Regardless of why the [plaintiff] offered this evidence, it is a full exhibit. Indeed, given my duty to make a correct determination of this question of law, I think it would have been improper for either party, knowing of the existence of this supersedence appendix, to withhold it from me." On review, the

board also rejected the plaintiff's argument that exhibit K had been admitted for a limited purpose, noting that "[o]ur review of the record indicates that exhibit K came in as a full exhibit, with no objection from the [department]."

On appeal, the plaintiff claims that the commissioner improperly relied on exhibit K as substantive evidence because that exhibit was offered for the limited purpose of testing Yelmini's credibility, and "[e]vidence which is offered and admitted for a limited purpose only, and the facts found from such evidence, cannot be used for another and totally different purpose." *O'Hara* v. *Hartford Oil Heating Co.*, 106 Conn. 468, 473, 138 A. 438 (1927).

In the present case, however, the record does not reflect that exhibit K was offered and admitted for a limited purpose. See id., 471 (counsel explicitly stated purpose of offer and trial court admitted evidence for purpose claimed); *Stohlts* v. *Gilkinson*, 87 Conn. App. 634, 650, 867 A.2d 860 (court explicitly recognized that evidence was presented only for limited purpose and then improperly proceeded to use it for "totally different purpose" (internal quotation marks omitted)), cert. denied, 273 Conn. 930, 873 A.2d 1000 (2005). The plaintiff's counsel did not indicate that he was offering the documents only for the purpose of impeaching Yelmini's credibility, and, with no objection from the department, the commissioner admitted exhibit K as a full exhibit.

To the extent that the plaintiff contends that the limited purpose of the evidence should have been clear from the record, despite his counsel's failure to explicitly state as much, we are not persuaded. The plaintiff is correct that, initially, the plaintiff's counsel cross-examined Yelmini regarding the references to arbitration in exhibit K. Those questions reasonably can be construed as an attempt to impeach Yelmini's testimony that a supersedence appendix was not required if an agreement had been reached through arbitration. Nevertheless, after the commissioner recited the language on the cost sheet stating that "[t]he state will be responsible for Social Security and Workers' Compensation," the plaintiff's counsel proceeded to use exhibit K in asking Yelmini whether per diem employees were entitled to workers' compensation benefits.[14]

Because exhibit K was admitted in full, without limitation, we conclude that the commissioner was entitled to rely on that exhibit as substantive evidence. See *Gagliano* v. *Advanced Specialty Care, P.C.*, 329 Conn. 745, 759, 189 A.3d 587 (2018) ("[a]n exhibit offered and received as a full exhibit is in the case for all purposes . . . and is usable as proof to the extent of the rational persuasive power it may have" (citation omitted; internal quotation marks omitted)); *Houghtaling* v. *Commissioner of Correction*, 203 Conn. App. 246, 279, 248

A.3d 4 (2021) (evidence "marked as a full exhibit without objection . . . was evidence in the case for all purposes"); see also *Curran* v. *Kroll*, 303 Conn. 845, 864, 37 A.3d 700 (2012) (In considering whether there was sufficient evidence presented to support jury's verdict, reviewing court properly took into account evidence that "was admitted in full, without limitation. In the absence of any limiting instruction, the jury was entitled to draw any inferences from the evidence that it reasonably would support."). Accordingly, the board properly upheld the commissioner's substantive use of exhibit K.

II

The plaintiff next claims that the commissioner failed to allocate to the department the burden of proving that he was not entitled to the enhanced benefits of § 5-142 (a). Specifically, he argues that the department, in filing a form 43, "had the burden of proof since it was interposing a defense to a claim for benefits." He further contends that the department "was required by law to prove how [his] full pay compensation rights had been taken away," and, "[s]ince [the department] failed to prove a defense that it had the burden of proof on, the commissioner should have found for [the plaintiff]." We are not persuaded.

The following additional procedural history is relevant to this claim. At the formal hearing, the commissioner referred to the department as the "moving party," but the question of which party bore the burden of proof remained an issue throughout the proceedings.[15] In his original decision, the commissioner did not state which party bore the burden of proof on any of the issues presented.[16]

In his motion to correct, the plaintiff requested that the commissioner correct his ruling to explicitly state that "[the department] had the burden of proof asserting that [the plaintiff] was not entitled to benefits pursuant to . . . § 5-142 (a) . . . ." In ruling on the motion to correct, the commissioner declined to correct his original decision in that respect, explaining: "For purposes of the formal hearing, the parties agreed the [department] was the moving party. However, given that the question presented was jurisdictional in nature, I do not agree the [department] had the burden of proof." In his memorandum accompanying the ruling on the motion to correct, the commissioner further explained: "The question of whether any individual falls within the class of people covered by a legislatively created compensation program is a question of fact for which the burden of proof may properly be assigned to one side or the other. However, the question of whether the *class* to which an individual belongs is covered by a legislatively created compensation program is a question of law and quintessentially jurisdictional. Whatever the equities may be, the fact that the [department] paid [the plaintiff] under § 5-142 (a) for some time before

deciding he was not entitled to such payment does not give me the right to ignore the jurisdictional question once it has been raised, and it does not place a burden of proof on the [department].” (Emphasis in original.)

The board agreed with the commissioner, recognizing that a claimant seeking temporary total disability benefits bears the burden of proving certain facts, such as incapacity to work. The board recognized that the plaintiff’s medical status was not in dispute but concluded: “[W]e are not persuaded that the burden of proof in this claim rested solely with the [department].”

The following legal principles guide our analysis of this issue. It is well established that a party claiming benefits under the Workers’ Compensation Act has the burden of proving certain jurisdictional facts, including “that he is an employee of the employer from whom he seeks compensation.” *Gamez-Reyes* v. *Biagi*, 136 Conn. App. 258, 270, 44 A.3d 197, cert. denied, 306 Conn. 905, 52 A.3d 731 (2012); see also *Riveiro* v. *Fresh Start Bakeries*, 159 Conn. App. 180, 189, 123 A.3d 35 (setting forth five elements that claimant has burden of proving to establish prima facie case under Workers’ Compensation Act, including that “the claimant is a qualified claimant under the act” (internal quotation marks omitted)), cert. denied, 319 Conn. 930, 125 A.3d 205 (2015).

Similarly, a party seeking the enhanced, full salary benefits set forth in § 5-142 (a) has the burden to prove that he has satisfied the statutory requirements of that section, including that “he is among the class of protected workers.” *Nelson* v. *State*, 99 Conn. App. 808, 814, 916 A.2d 74 (2007). The covered group of employees includes “any member of . . . any institution or facility of the Department of Mental Health and Addiction Services giving care and treatment to persons afflicted with a mental disorder or disease, or any institution for the care and treatment of persons afflicted with any mental defect . . . .” General Statutes § 5-142 (a).

Thus, in the present case, the plaintiff, as the party claiming entitlement to § 5-142 (a) benefits, had the burden of proving that he was a “member” of the department pursuant to that section. See *Nelson* v. *State*, supra, 99 Conn. App. 814. The fact that the department had been the party to initiate the hearing before the commissioner, by way of its form 43, does not impact the burden of proof.[17] See *Riveiro* v. *Fresh Start Bakeries*, supra, 159 Conn. App. 192–93 (burden placed on plaintiff, as party seeking workers’ compensation, even where issues were considered as result of defendants filing form 43). The commissioner, therefore, correctly did not impose on the department the burden of proof with respect to that issue.

A closer question is presented as to whether the burden should have shifted to the department after the commissioner concluded that the plaintiff was a “mem-

ber" of the department and had met the requirements of § 5-142 (a), to prove that the plaintiff's right to receive benefits under § 5-142 (a) had been superseded. The plaintiff contends that the department was "required by law" to prove the supersedence of § 5-142 (a), but he has not provided this court with any legal authority to support that argument.

Our review of § 5-278, the statute governing the supersedence process, and related case law, does not provide guidance on this issue. See, e.g., *Cox* v. *Aiken*, 278 Conn. 204, 216–18, 897 A.2d 71 (2006) (not explicitly allocating burden of proof on issue of supersedence, but noting that defendants, as proponents of that claim, had cited and provided relevant supersedence appendix to court); *Board of Trustees* v. *Federation of Technical College Teachers*, 179 Conn. 184, 197–98, 425 A.2d 1247 (1979) (no allocation of burden of proof on issue of supersedence). Nevertheless, "[i]t is an elementary rule that whenever the existence of any fact necessary in order that a party may make out his case or establish his defense, the burden is on such party to show the existence of such fact." (Internal quotation marks omitted.) *Leonetti* v. *MacDermid, Inc.*, 310 Conn. 195, 214–15, 76 A.3d 168 (2013); see also *Gartrell* v. *Dept. of Correction*, 259 Conn. 29, 40, 787 A.2d 541 (2002) (burden fell on employer to establish departure from general rule of compensability for regular benefits under Workers' Compensation Act). Thus, it remains unclear as to whether the plaintiff would bear the burden of proving that § 5-278 was not superseded by a collective bargaining agreement, once that issue was raised, in connection with his ultimate burden of proving that he was entitled to § 5-142 (a) benefits, or whether the department would bear the burden of proving the facts necessary to demonstrate the supersedence of § 5-278, as the proponent of that claim.

We need not decide this question in the present case. Regardless of which party bore the burden of proof, the commissioner had before him evidence from which he reasonably could conclude that the plaintiff's ability to receive § 5-142 (a) benefits had been superseded by a 1989 memorandum of agreement between the state and the plaintiff's union, as we explain in part III of this opinion. The allocation of the burden of proof was not dispositive of the commissioner's decision and, therefore, the plaintiff has failed to demonstrate how any error on the part of the commissioner in declining to impose the burden on the department would require reversal.

III

The plaintiff next claims that the board improperly upheld the commissioner's conclusion that a 1989 memorandum of agreement between the state and the plaintiff's union superseded § 5-142 (a). Specifically, he argues that (1) the commissioner's findings regarding

the 1989 memorandum of agreement were made on the basis of "nonexistent evidence," because neither the agreement nor the complete "submission package" to the legislature had been entered into evidence before the commissioner, and (2) because the commissioner's findings were not supported by the evidence, the commissioner could not reasonably conclude that the supersedence process had been followed regarding such an agreement. We are not persuaded.

The following additional facts are relevant to our analysis. At the formal hearing before the commissioner, Yelmini testified that the documents admitted as exhibit K appeared to be related to a new "supplemental agreement [that] . . . wasn't part of a normal contract negotiation." She explained that exhibit K indicated "that there was a memorandum of agreement between the state and the [plaintiff's union], and, so, it wasn't a part of the regular contract. The memorandum of agreement was dated, according to this, December 7 of 1989." Yelmini made clear that her testimony was based on her review of exhibit K at that moment, as she had no independent recollection of the documents.

Although she was not familiar with exhibit K, Yelmini indicated that she previously had seen similar documents prepared by the Office of Policy and Management. Yelmini testified that the 1989 memorandum of agreement "presumably" had been submitted to the legislature with the cost sheet and supersedence appendix in exhibit K. On questioning from the commissioner and the plaintiff's counsel, Yelmini further testified that, under her interpretation of the documents in exhibit K, per diem employees would be entitled to "regular" workers' compensation benefits but not the enhanced benefits of § 5-142 (a). She also agreed that the language contained in article 9, § 21, of the 1993 collective bargaining agreement[18] was "substantively, if not identically, the same" as the language on the cost sheet of exhibit K.

In his September 17, 2020 written findings and order, the commissioner made the following relevant factual findings in support of his conclusion that § 5-142 had been superseded: "In December, 1989, the state and the union negotiated an agreement whereby the state could hire per diem nurses to fill gaps in coverage. The agreement was that per diem nurses would be paid significantly more than permanent nurses, but they would not be eligible for retirement or other benefits. In presenting that agreement to the legislature for approval, the Office of Policy and Management included a fiscal statement stating that: 'The State will be responsible for Social Security and Workers' Compensation.' [Exhibit K.]. . . . The December, 1989 amendment to the collective bargaining agreement . . . was submitted to the General Assembly along with the supersedence appendix indicating that the agreement would affect, inter alia

. . . §§ 5-142 through 5-144."

In his motion to correct, the plaintiff challenged the basis of the commissioner's factual findings and, more specifically, his reliance on exhibit K. The plaintiff set forth the following requested correction: "[The plaintiff] attempted to offer exhibit K, a document made February 21, 1990, after the effective date of the 1989 collective bargaining agreement, through the testimony of Linda Yelmini. It refers to a memorandum of agreement dated December 7, 1989, also after the date of the collective bargaining agreement. The actual memorandum is not in evidence. . . . Yelmini testified she had no recollection of this document and it is unknown if the language of this exhibit, or any of it ever became part of any collective bargaining agreement. . . . Yelmini also testified she had no recollection of the document, and when asked by the commissioner, she testified she was not familiar with the specific document, exhibit K. She had no personal knowledge of the 1989 collective bargaining agreement. . . . There is no evidence as to what was done with the exhibit K or whether it became the language of any collective bargaining agreement or was added to any collective bargaining agreement. There is no evidence that any language was ever inserted into any collective bargaining agreement that would affect the ability of a per diem psychiatrist like [the plaintiff] from collecting benefits pursuant to . . . § 5-142 (a). There is no evidence that the language of exhibit K ever went before the legislature for ratification under the procedures as set out under . . . § 5-278 et seq., which allow a collective bargaining agreement to supersede state statutes in certain situations where the proper procedures are followed." (Citation omitted; emphasis omitted.)

At the hearing on the motion to correct, the plaintiff's counsel explained that he had received the documents comprising exhibit K during discovery. They had been emailed to him by the department as loose pages, but he "interpreted them to be one document."[19] The plaintiff's counsel argued, among other things, that, because Yelmini was not familiar with exhibit K, no other witness had testified about the documents, and no one had the actual 1989 memorandum of agreement, exhibit K was a "free floating document that has absolutely no meaning or legal significance." He argued that there was no evidence about whether the supersedence appendix marked as part of exhibit K ever went before the legislature with a 1989 memorandum of agreement, or whether it was, instead, "just a draft or a piece of paper that somebody typed up one day, was floating around in the office, and somehow got sent to [him]."

The commissioner questioned whether he should reopen the evidence to allow the parties to present the 1989 memorandum of agreement, particularly given that "the missing information . . . is all public record."[20]

The plaintiff's counsel argued against reopening the evidence, as it was his position that the hearing was over and that the commissioner was bound by the record that existed. The department's counsel argued that the commissioner could open the record and take additional evidence but explained that employees within the Office of Labor Relations had searched through its records for the 1989 memorandum of agreement and had been unable to find it. He contended that, even without the actual 1989 memorandum of agreement, it was clear from the language of article 9, § 21, of the 1993 collective bargaining agreement that the substance of the 1989 memorandum of agreement had been approved by the legislature and incorporated into that contract.[21]

In his ruling on the motion to correct, the commissioner noted, as to his reliance on exhibit K, that "implicit in the [plaintiff's] offer [was] the representation that it was an official record that had been presented to the legislature." The commissioner made an additional factual finding at the plaintiff's request, as previously set forth in this opinion, that the 1989 memorandum of agreement was reached after the 1989 collective bargaining agreement, the memorandum of agreement was not in evidence, and Yelmini was not familiar with either the 1989 collective bargaining agreement or the 1989 memorandum of agreement.

The commissioner ultimately determined, however, that he did not need to reopen the evidence and that his original decision was sustainable even without the 1989 memorandum of agreement. In his memorandum of decision accompanying his ruling on the motion to correct, the commissioner explained: "Regarding the content of the December 7, 1989 [memorandum of agreement], the document is unavailable[22] and, contrary to the [plaintiff's] arguments, I am satisfied that the existing record provides ample evidence of the terms of that agreement and its impact on the question presented here. . . .

"The [plaintiff] argues that we do not know what the [memorandum of agreement] stated, and that there is no evidence it was ever incorporated into the [collective bargaining agreement]. I believe he is wrong on both points. It is reasonable to presume that—at least as to any material changes—the text of [a memorandum of agreement] reached after the printing of any given [collective bargaining agreement] will either be included as a separate item in the printed version of the next [collective bargaining agreement], as is often done, or that it will be incorporated into the body of that subsequent [collective bargaining agreement] as one of the enumerated articles. The December 7, 1989 [memorandum of agreement] was not reprinted as a separate item in the published version of the 1993 [collective bargaining agreement]. However, if one reads the

[Office of Policy and Management] budget estimate that was attached to the 1989 [memorandum of agreement (Exhibit K)], and then reads article 9, [§] 21, of the 1993 [collective bargaining agreement (Exhibit G, pp. 27–29)], it would require wilful blindness not to recognize that the content of the 1989 [memorandum of agreement] was fully incorporated into the 1993 [collective bargaining agreement] (albeit expanded to include other medical professionals such as the [plaintiff]). . . .

"The [Office of Policy and Management] document appended to the 1989 [memorandum of agreement] stated that per diem nurses 'shall not be entitled to retirement benefits, health or life insurance benefits, paid leave, longevity or other economic benefits.' [Exhibit K.] The 1993 [collective bargaining agreement] used *exactly* the same language in limiting the rights of per diem employees, which by then also included per diem psychiatrists. [Exhibit G, p. 27.] Each of those benefits listed as being expressly denied to per diem workers was created by statute, and each of those statutes is listed in the supersedence appendix, right alongside § 5-142 (a). It would be wholly illogical to think that inclusion of § 5-142 (a) on the list was somehow meant to *grant* per diem employees the right to benefits under § 5-142 (a) while the inclusion of all those other statutes was clearly meant to *deny* per diem employees the benefits otherwise available to permanent employees."[23] (Emphasis in original; footnote added; footnotes omitted.)

On review, the board upheld the commissioner's factual findings and concluded that he had drawn reasonable inferences from the evidence. The board recognized that neither party had submitted into evidence the 1989 memorandum of agreement and noted that "the commissioner's frustration with this gap in the evidentiary record was palpable" at the hearing on the motion to correct. Nevertheless, on the basis of exhibit K and its comparison to the 1993 collective bargaining agreement, the board determined that there was sufficient evidence to support the commissioner's finding that the supersedence process had been followed with respect to a 1989 memorandum of agreement. Specifically, the board explained that "the evidentiary record contains the supersedence appendix associated with the 1989 [memorandum of agreement] which specifically states that § 5-142 (a) was one of the provisions affected by the [memorandum of agreement]," and that the commissioner had the benefit of Yelmini's testimony, including her agreement that certain language contained on the cost sheet in exhibit K was "substantively, if not identically, the same" as the language in article 9, § 21, of the 1993 collective bargaining agreement.

The board concluded that, once the commissioner

found that the provisions contained in the 1989 memorandum of agreement were essentially incorporated into the 1993 collective bargaining agreement, "it was also within his prerogative to conclude, on the basis of the supersedence appendix contained in exhibit K, that the correct supersedence process for the [memorandum of agreement] was followed." In reaching its conclusion, the board emphasized its deferential standard of review: "We recognize that the [plaintiff] disagrees with the inferences drawn by the fact finder in this matter. We concede that a different fact finder might have drawn different inferences from the evidentiary record. However, the fact that such a possibility exists does not provide an adequate basis for reversal by an appellate tribunal."

On appeal, as before the board, the plaintiff challenges the commissioner's factual findings that (1) the state and the plaintiff's union had negotiated an agreement in December, 1989, providing that per diem nurses would be paid significantly more than permanent nurses but would not be eligible for retirement benefits or certain other economic benefits, and (2) that the December, 1989 memorandum of agreement was submitted to the General Assembly along with a supersedence appendix indicating that the agreement would affect, inter alia, §§ 5-142 through 5-144. The plaintiff first argues that, without the 1989 memorandum of agreement, "we do not know if such an agreement actually exists," and, without the complete "submission package" sent to the legislature, "it is impossible to know if exhibit K contains a complete supersedence appendix or the one actually submitted . . . . We do not know on this record if any documents were sent to the legislature in 1989. In fact, the document might be a draft or a different version of the finally submitted cost sheet and the final copy might have included different supersedence language or it could have contained contradictory language." The plaintiff further argues that, without such evidence, the commissioner could not reasonably conclude that the supersedence process set forth in § 5-278 (b) had been followed. We address each of these arguments in turn.

Before addressing these arguments, however, we reiterate that our standard of review, like the board's, is highly deferential. "[T]he power and duty of determining the facts rests on the commissioner . . . . [T]he commissioner is the sole arbiter of the weight of the evidence and the credibility of witnesses . . . ." (Internal quotation marks omitted.) *Frantzen* v. *Davenport Electric*, supra, 206 Conn. App. 367. Thus, "[*o*]*nce the commissioner makes a factual finding*, [*we are*] *bound by that finding if there is evidence in the record to support it*." (Emphasis in original; internal quotation marks omitted.) *Reid* v. *Speer*, 209 Conn. App. 540, 545, 267 A.3d 986 (2021), cert. denied, 342 Conn. 908, 271 A.3d 136 (2022). "The conclusions drawn by [the com-

missioner] 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. . . . *We will not change the finding of the commissioner unless the record discloses that the finding includes facts found without evidence* . . . ." (Emphasis added; internal quotation marks omitted.) *Mele* v. *Hartford*, 118 Conn. App. 104, 107, 983 A.2d 277 (2009). Overall, "[w]e must interpret [the commissioner's finding] with the goal of sustaining that conclusion in light of all of the other supporting evidence." (Internal quotation marks omitted.) *Story* v. *Woodbury*, 159 Conn. App. 631, 637, 124 A.3d 907 (2015).

First, our review of the record leads us to conclude that the commissioner's findings were based on reasonable inferences drawn from the evidence. Specifically, exhibit K and its comparison to the 1993 collective bargaining agreement provided a sufficient basis from which the commissioner reasonably could infer that (1) a 1989 memorandum of agreement existed between the state and the plaintiff's union, and (2) that agreement had been submitted to and approved by the legislature along with the documents in exhibit K.

The commissioner reasonably found that, given that the heading of the cost sheet in exhibit K specifically refers to the plaintiff's union and a "Memorandum of Agreement dated 12/7/89," a 1989 memorandum of agreement between the state and the plaintiff's union existed and contained the provision regarding per diem nursing positions as set forth in exhibit K.[24]

The commissioner's additional inference, that the memorandum of agreement had been submitted to and approved by the legislature with the documents in exhibit K, also was supported by the evidence. Although Yelmini was not familiar with the specific documents in exhibit K, her testimony that the 1989 memorandum of agreement "presumably" had been submitted to the legislature with those documents is consistent with § 5-278 (b) (3), which provides in relevant part that "[a]ny supplemental understanding reached between such parties containing provisions which would supersede any provision of the general statutes or any regulation of any state agency or would require additional state funding shall be submitted to the General Assembly for approval in the same manner as agreements and awards. . . ."

Additionally, in light of the similarity of the language set forth in exhibit K and article 9, § 21, of the 1993 collective bargaining agreement, the commissioner reasonably could conclude that the 1989 memorandum of agreement had, in fact, been submitted to and approved by the legislature with the documents in exhibit K. The language on the cost sheet of exhibit K, associated with the 1989 memorandum of agreement, states in relevant part: "Registered Professional and Licensed Practical

Nurses hired on a per diem basis *shall not be entitled to retirement benefits, health or life insurance benefits, paid leave, longevity or other economic benefits*." (Emphasis added.) Article 9, § 21, of the 1993 collective bargaining agreement similarly states in relevant part that "[i]ndividuals in per diem classifications *shall not be entitled to retirement benefits, health insurance or life insurance benefits, paid leave, longevity or other economic benefits* . . . ."[25] (Emphasis added.) In setting forth the positions of per diem employees covered by article 9, § 21, of the 1993 collective bargaining agreement, that provision first lists the positions of registered professional nurse and licensed practical nurse—the same positions referenced in exhibit K as being part of the 1989 memorandum of agreement—then lists the additional positions of occupational therapist, physical therapist, physician, psychiatrist, psychologist, and speech therapist.

Because the language reflected in those documents had been phrased in almost exactly the same manner, and such a provision had not been contained in the prior collective bargaining agreement,[26] the commissioner reasonably inferred that the inclusion of such language in the 1993 collective bargaining agreement resulted from the 1989 memorandum of agreement, along with the documents in exhibit K, being submitted to and approved by the legislature. Thus, in light of exhibit K and its comparison to the 1993 collective bargaining agreement, we simply cannot conclude that the commissioner's decision was supported by "no evidence," as the plaintiff contends. See *Mele* v. *Hartford*, supra, 118 Conn. App. 108–11 (reversing board's decision where "no evidence whatsoever exist[ed] in the record" to support commissioner's finding).

We acknowledge, as the plaintiff argues, that the actual 1989 memorandum of agreement, or the complete "submission package" to the legislature, would have provided stronger, more direct evidence than that evidence in the record on which the commissioner based his findings. The absence of such evidence, however, does not provide a basis for reversing the commissioner's decision. See *Frantzen* v. *Davenport Electric*, supra, 206 Conn. App. 367–68 (considering deferential standard of review, board improperly reversed commissioner's decision on basis of its assertion that decision "could have rested on a more solid evidentiary foundation" (internal quotation marks omitted)).

Similarly, although it hypothetically was possible that the documents in exhibit K were preliminary drafts rather than the final documents submitted to the legislature,[27] we cannot conclude that the commissioner's inference drawn from these documents was "so unreasonable as to be unjustifiable"; (internal quotation marks omitted) *Curran* v. *Kroll*, supra, 303 Conn. 857; given the similarity of the language contained on the

cost sheet of exhibit K and article 9, § 21, of the 1993 collective bargaining agreement. See *Riveiro* v. *Fresh Start Bakeries*, supra, 159 Conn. App. 192 ("It is . . . immaterial that the facts permit the drawing of diverse inferences. The [commissioner] alone is charged with the duty of initially selecting the inference which seems most reasonable, and [the commissioner's choice], if otherwise sustainable, may not be disturbed by a reviewing court." (Internal quotation marks omitted.)); see also *Curran* v. *Kroll*, supra, 857 ("[P]roof of a material fact by inference from circumstantial evidence need not be so conclusive as to exclude every other hypothesis. . . . In other words, an inference need not be compelled by the evidence; rather, the evidence need only be reasonably susceptible of such an inference." (Internal quotation marks omitted.)).

Next, we conclude that the commissioner reasonably concluded, on the basis of his findings, that § 5-142 had been superseded by the 1989 memorandum of agreement between the state and the plaintiff's union. "[U]nder [§ 5-278 (b) and (e)] a collective bargaining agreement term may supersede inconsistent statutes and regulations, provided that the appropriate procedure has been followed. . . . [Section] 5-278 (b) implicitly requires that, in order for the legislature to approve or reject a collective bargaining agreement term in conflict with law, the particular contract term must be stated distinctly and correctly by the employer in the transmittal of the contract to the legislature. If the notification required by § 5-278 (b) did not apprise the legislature of the conflicting . . . term, then that term . . . would be ultra vires. Put another way, a term at variance with law, not approved by the legislature in accordance with . . . § 5-278 (b), does not enjoy the preferential position provided for legislatively approved conflicting terms by § 5-278 (e), but is rendered a nullity. Neither party to the agreement is therefore entitled to enforce that term." (Internal quotation marks omitted.) *Cox* v. *Aiken*, supra, 278 Conn. 216; see also *State College American Assn. of University Professors* v. *State Board of Labor Relations*, 197 Conn. 91, 99, 495 A.2d 1069 (1985) ("[w]ith respect to a collective bargaining agreement approved pursuant to § 5-278 (b), unless a particular statute or regulation has been referred to specifically in the documents submitted to the legislature, its terms must necessarily prevail over conflicting provisions of the agreement").

Here, the supersedence appendix in exhibit K specifically referred to the provision of the agreement governing the per diem nursing positions and listed § 5-142 as one of the statutes that would be "amended" by that provision. Given that the commissioner reasonably found that the supersedence appendix had been submitted to the legislature, the commissioner also reasonably could conclude that the citation to § 5-142 in the appendix would have alerted the legislature that the refer-

enced agreement term conflicted with that statute, and, more specifically, that the enhanced, full salary benefits set forth in § 5-142 (a) were included among the "other economic benefits" to which per diem employees were not entitled.[28] See *Cox* v. *Aiken*, supra, 278 Conn. 217 (statute superseded where supersedence appendix specifically mentioned relevant contract provisions and cited statute at issue as one of numerous affected statutes and regulations).

The commissioner, therefore, reasonably concluded that the plaintiff's right to the enhanced, full salary benefits under § 5-142 (a) was superseded by a 1989 memorandum of agreement between the state and the plaintiff's union. Accordingly, the board properly upheld the commissioner's conclusion.

IV

The plaintiff also claims that the commissioner's analysis was inconsistent as to whether the enhanced benefits of § 5-142 (a) are included among the "other economic benefits" denied to per diem employees, as that language is used in the 1993 collective bargaining agreement.[29] Specifically, the plaintiff contends that the commissioner initially concluded, in his original decision, that § 5-142 (a) benefits were not included among the "other economic benefits," but then contradicted that conclusion in his memorandum of decision on the motion to correct when he stated: "The simple fact is that when the very first per diem position was created, § 5-142 (a) was one of the 'other economic benefits' denied to per diem employees." We are not persuaded.

The plaintiff's claim is premised on a misinterpretation of the commissioner's original decision. See *In re Jacquelyn W.*, 169 Conn. App. 233, 241, 150 A.3d 692 (2016) (interpretation of court's decision is subject to our plenary review). The plaintiff reads the decision to hold that "the removal of economic benefits for per diems was not in reference to *any* workers' compensation rights . . . including full pay compensation for qualifying injuries." (Emphasis added.) The plaintiff specifically points to language in the commissioner's conclusion that states that "[t]he argument that [the plaintiff] was an employee but not covered by the Workers' Compensation Act, because such benefits fall under the category of 'other economic benefits' is without any support in fact or law." Considering that portion of the conclusion in the context of the remainder of the original decision, however, it is clear that the commissioner was referring only to the regular workers' compensation benefits set forth under the Workers' Compensation Act, and not the enhanced, full salary benefits set forth in § 5-142 (a). Indeed, immediately following the language relied on by the plaintiff, the commissioner stated: "It is clear, however, that when the state and the union first agreed to create a special class of per diem employees, this class of workers was expressly

excluded from the economic benefit of . . . § 5-142 (a)."

The commissioner had explained, in the analysis portion of his original decision, that "the argument that the union—and ultimately the legislature—meant to deprive an entire class of workers of the *basic protections* of the Workers' Compensation Act with the catch-all phrase 'other economic benefits' is wholly unsustainable. *However, the argument that the provisions of § 5-142 (a) fall under the umbrella of 'other economic benefits' is not so easily dismissed.*" (Emphasis added.) The commissioner proceeded to reject the department's claim that the "other economic benefits" language set forth in the 1993 collective bargaining agreement operated, by itself, to supersede § 5-142 (a); see, e.g., *State College American Assn. of University Professors* v. *State Board of Labor Relations*, supra, 197 Conn. 99 (explaining that statute must be "referred to specifically in the documents submitted to the legislature" to effectuate supersedence); but he went on to explain that the supersedence appendix accompanying the 1989 memorandum of agreement, marked as part of exhibit K, made clear that § 5-142 (a) benefits were, in fact, included among the "other economic benefits" denied to per diem employees.[30] Accordingly, the commissioner's memorandum of decision on the motion to correct is entirely consistent with his original decision in that regard.

V

Finally, the plaintiff claims that the board erred in upholding the commissioner's decision because the commissioner improperly held that the 1993 collective bargaining agreement, which added several job classifications to the provision regarding per diem employees, including the position of psychiatrist, was not required to go through a new supersedence process. We are not persuaded.

The following additional facts are relevant to our analysis. In the commissioner's September 17, 2020 written findings and order, he found the following facts related to the 1993 collective bargaining agreement: "By 1993, the state was having difficulty hiring sufficient medical staff to cover all shifts. The state then began hiring per diem psychiatrists to fill in. To that point, however, the [collective bargaining agreement] only included provisions for per diem nurses. That December, the state and the union negotiated an amendment to the collective bargaining agreement that sanctioned the practice of hiring additional per diem medical staff, including psychiatrists. . . . That agreement, incorporated into the 1993 [collective bargaining agreement] as [§] 21 of article 9, provided that 'per diem psychiatrists' would be paid at an hourly rate that was 150 [percent] of the rate paid to a permanent employee with the title of Psychiatrist-4 (a position now classified as 'Principal

Psychiatrist'). . . . The new provision specifically provided that per diem medical staff 'shall not be entitled to retirement benefits, health insurance [or] life insurance [benefits], paid leave, longevity or other economic benefits.' . . . No supersedence appendix was submitted to the legislature relative to these 1993 changes regarding per diem workers."

In his accompanying memorandum of decision, the commissioner explained that the 1993 collective bargaining agreement did not impact the supersedence of § 5-142 (a) that had been effectuated by the 1989 memorandum of agreement: "The purpose of the 1993 agreement was not the creation of a new class of workers, i.e., per diem workers, because the class already existed. The purpose of the 1993 changes was merely to expand the types of clinical staff that could be hired under the heading per diem. The list of per diem professionals under which [the plaintiff] is covered includes the very per diem nurses that were working before 1993. If the legislature had already denied members of the per diem class of employees the benefits of § 5-142 (a), the only way the 1993 changes could have reversed that decision would be if there had been an express intent to do so. This would have required either a statement to that effect in the contract language (there is none), or the attachment of a supersedence appendix specifically listing § 5-142 (a). No such appendix was sent to the legislature."

In the plaintiff's motion to correct, he requested the commissioner to find, instead, that "[t]he 1993 collective bargaining agreement provision of article 9, § 21, was completely new language compared to the earlier 1989 collective bargaining agreement. . . . This would have required submission of a supersede[nce] appendix, because § 5-278 (b) (3) requires this if there is a change in the language of the contract, which there was, by the addition of several new job classes in the 1993 document." The commissioner denied this request, explaining: "That the position of per diem psychiatrist was a new classification is already established by the findings. . . . The rest of the requests made are recitations of evidence or mere argument." The commissioner also recognized that "the 1993 [collective bargaining agreement] used *exactly* the same language [as the Office of Policy and Management document appended to the 1989 memorandum of agreement] in limiting the rights of per diem employees, which by then also included per diem psychiatrists." (Emphasis in original.)

On review, the board concluded: "[W]e find nothing unreasonable or illogical relative to the commissioner's inference that the supersedence process, specifically with regard to the provisions of § 5-142 (a), was not required again in 1993 because the only change to the contract provisions which had been established by the

1989 [memorandum of agreement] was the addition of several job classifications, including that of psychiatrist, to the list of permitted per diem employees. . . . [W]e agree with the commissioner that the addition of several job classifications eligible for per diem employees did not materially change the statutory provisions governing these employees which had already been put into place by virtue of the prior [memorandum of agreement] and its accompanying supersedence appendix."

We agree with the board. The 1993 collective bargaining agreement was not required to go through the supersedence process because, as explained in part III of this opinion, the commissioner reasonably inferred that the legislature already had approved the provision of the contract that conflicted with § 5-142 (a) by way of the 1989 memorandum of agreement. The commissioner also reasonably inferred that that provision subsequently was incorporated into the 1993 collective bargaining agreement. "[O]nce the legislature has approved a collective bargaining provision that conflicts with a statute or regulation, that approval remains effective with respect to future agreements between the state and a particular bargaining unit, and the conflicting provision need not be resubmitted for approval." *Cox* v. *Aiken*, supra, 278 Conn. 216–17.

The plaintiff nevertheless argues that the 1989 memorandum of agreement pertained only to certain per diem nursing positions, and, therefore, once the 1993 collective bargaining agreement added six additional job classifications to the provision regarding per diem employees, including the position of psychiatrist, it was required to go through a new supersedence process. In support of his contention, the plaintiff relies on § 5-278 (b) (3), which provides in relevant part that, "[o]nce approved by the General Assembly, any provision of an agreement or award need not be resubmitted by the parties to such agreement or award as part of a future contract approval process *unless changes in the language of such provision are negotiated by such parties*. . . ." (Emphasis added.) We are not persuaded.

The inclusion of additional per diem positions in the 1993 collective bargaining agreement did not impact the language of the provision that conflicted with § 5-142 (a) and had been approved by the legislature by way of the 1989 memorandum of agreement, specifically, that per diem employees "shall not be entitled to retirement benefits, health insurance or life insurance benefits, paid leave, longevity or other economic benefits . . . ." Instead, as the commissioner concluded, the 1993 collective bargaining agreement merely expanded the class of per diem employees that already existed. Accordingly, the board properly upheld the commissioner's conclusion that the 1993 collective bargaining agreement did not need to go through a new supersedence process.

The decision of the Compensation Review Board is affirmed.

In this opinion the other judges concurred.

[1] General Statutes § 5-142 (a) provides in relevant part: "If any member of . . . any institution or facility of the Department of Mental Health and Addiction Services giving care and treatment to persons afflicted with a mental disorder or disease . . . sustains any injury (1) . . . as a result of being assaulted in the performance of such person's duty . . . and (2) that is a direct result of the special hazards inherent in such duties . . . [s]uch person shall continue to receive the full salary that such person was receiving at the time of injury subject to all salary benefits of active employees, including annual increments, and all salary adjustments, including salary deductions, required in the case of active employees, for a period of two hundred sixty weeks from the date of the beginning of such incapacity. . . ."

[2] The plaintiff sets forth seven overlapping claims of error in his brief, which we have distilled into the five issues addressed in this opinion.

[3] An adjuster at Gallagher Bassett Services, Inc., questioned the department's calculation, given the "rather astronomical weekly compensation rate," asking whether the plaintiff's contract had only been for sixteen hours per week and whether the additional twenty-four hours per week would constitute overtime not included in calculating the plaintiff's salary. See *Vecca* v. *State*, 29 Conn. App. 559, 563, 616 A.2d 823 (1992) (explaining that calculation of "full salary" under § 5-142 does not include overtime pay or other salary enhancements); *Chadbourne* v. *Dept. of Mental Health & Addiction Services*, No. 6243, CRB-5-18-1 (January 8, 2019) (explaining that part-time employee's full salary must be calculated on basis of "the actual hours she was contractually obligated to work on a regular basis" during period prior to injury). A human resources associate from the department, however, maintained that the plaintiff was entitled to his full hourly rate multiplied by forty, the number of hours that he typically worked in one week.

[4] In April, 2018, Gallagher Bassett Services, Inc., proposed voluntary agreements setting the rate for total incapacity at $7896, but the plaintiff did not sign the agreements and they were not submitted to the commissioner for approval pursuant to General Statutes § 31-296.

[5] At the start of the formal hearing on October 18, 2018, the plaintiff filed a motion to preclude the department from contesting liability on the basis that the department's July 18, 2018 form 43 was untimely filed, which the commissioner denied.

[6] The department repeatedly changed its position throughout the proceedings as to whether it viewed the plaintiff as an "employee" who was entitled to receive workers' compensation benefits under the Workers' Compensation Act. Nevertheless, the department's final position, as set forth in its posthearing brief, was that the plaintiff was not an "employee," and the commissioner addressed that issue accordingly.

[7] General Statutes § 5-278 (e) (1) provides in relevant part that, "where there is a conflict between any agreement or arbitration award approved in accordance with the provisions of sections 5-270 to 5-280, inclusive, on matters appropriate to collective bargaining, as defined in said sections, and any general statute or special act, or regulations adopted by any state agency, *the terms of such agreement or arbitration award shall prevail* . . . ." (Emphasis added.)

[8] Although the 1993 collective bargaining agreement predates the plaintiff's employment, the parties agreed that the material provisions of the more recent collective bargaining agreement are not different from those agreed upon in 1993.

[9] Although Yelmini testified concerning her understanding of the 1993 collective bargaining agreement, the commissioner repeatedly stated that he would not assign any weight to her interpretation of the agreement, as it presented a question of law for him to decide.

[10] General Statutes § 5-278 (b) (1) provides in relevant part: "Any agreement reached by the negotiators shall be reduced to writing. The agreement, *together with a request* for funds necessary to fully implement such agreement and *for approval of any provisions of the agreement which are in conflict with any statute* or any regulation of any state agency, and any arbitration award, issued in accordance with section 5-276a, together with a statement setting forth the amount of funds necessary to implement such award, shall be filed by the bargaining representative of the employer with the clerks of the House of Representatives and the Senate within ten days

after the date on which such agreement is reached or such award is distributed. . . .'' (Emphasis added.)

[11] The 1993 collective bargaining agreement contains a provision that states in relevant part: ''Statutes or regulation shall be construed to be superseded by this [a]greement as provided in the [s]upersedence [a]ppendix or where, by necessary implication, no other construction is tenable. The [e]mployer shall prepare a [s]upersedence [a]ppendix listing any provisions of the [a]greement which are in conflict with any existing statute or regulation for submission to the [l]egislature. . . .''

[12] Despite his conclusion, the commissioner subsequently recognized that, ''[p]ractically speaking, it is difficult to see [how] § 5-142 (a) would be applied to truly per diem workers. . . . Permanent employees under the [collective bargaining agreement] have defined hours and pay rates. What, exactly, is the full salary of an employee who works only sporadically, when needed, and whose contract of employment lasts only a day?''

In its subsequent review of the commissioner's decision, the board did not address the issue of whether the plaintiff was a ''member'' of the department entitled to the enhanced benefits of § 5-142 (a), because the department had failed to raise the issue in the context of a cross appeal. Nevertheless, the board expressed that ''[w]e share the commissioner's perplexity relative to the issue of how an employee who is employed on an 'intermittent basis' can be deemed eligible for an enhanced benefit which requires as the basis for its calculation the identification of the 'full salary' being paid to the employee at the time of the injury.''

On appeal to this court, the department does not claim, or raise as an alternative ground for affirmance, that the plaintiff is not entitled to § 5-142 (a) benefits in the first instance because he is not a ''member'' of the department as contemplated by that statute. Consequently, we express no opinion as to this issue.

[13] The plaintiff also claims that the commissioner drew unreasonable inferences from exhibit K, which we address in part III of this opinion.

[14] As a result, the commissioner also used exhibit K as substantive evidence in concluding that the plaintiff was entitled to regular benefits under the Workers' Compensation Act.

[15] The plaintiff's contention that ''all parties and the commissioner understood [that the department] had the burden of proof'' is belied by the record. Indeed, at one point during the formal hearing, the plaintiff's counsel acknowledged that it was his burden to prove that the plaintiff was a ''member'' of the department pursuant to § 5-142 (a).

[16] Because the commissioner had not specified to which party it allocated the burden of proof, the plaintiff's contention that the commissioner ''contradicted his original decision,'' and ''inexplicably reversed his decision regarding the burden of proof'' in his ruling on the motion to correct, is not supported by the record.

[17] To the extent that the plaintiff also argues that the burden of proof should have been imposed on the department because it initially decided to compensate him at the ''full salary'' rate pursuant to § 5-142 (a), the plaintiff cites no legal authority, and we have found none, supporting that proposition.

[18] The 1993 collective bargaining agreement was admitted into evidence before the commissioner and marked as exhibit G.

[19] On appeal, the plaintiff raises a concern that ''there is no proof of the origins of the two documents making up exhibit K or even whether they had once been part of the same document.'' The plaintiff's counsel raised a similar concern at the hearing before the board, arguing that ''I received exhibit K in discovery and they were loose pages. I didn't know what they were and . . . really, I don't even know if it's a complete document. I offered it, I stapled the document together. I don't even know if that's the way it was meant to be or if it had been assembled that way before or it if was missing pages.''

Before the commissioner, however, the plaintiff's counsel had explained: ''[I]t was a two page document and I didn't want to separate one part from the other, because . . . it had been given to me in discovery and *it appeared to me that* [*it*] *was a unitary two page document and I can't see it being appropriate to separate the pages out*.'' (Emphasis added.)

[20] Our review of the record reveals that the commissioner expressed concern about the accuracy of his original decision, but he did not, as the plaintiff argues, ''actually [state that] exhibit K, by itself, was insufficient evidence to support his decision at this November 18, 2020 hearing,'' or make other ''general statements about realizing the decision was wrong.''

When the commissioner stated that, "[i]n essence, exhibit K is insufficient proof of the content of the memorandum of agreement," he was summarizing the plaintiff's position as set forth in the motion to correct.

[21] The department recognized that the 1989 memorandum of agreement had not been appended to the 1993 collective bargaining agreement as had other memoranda of agreements but explained: "We either incorporate it and it becomes part of the collective bargaining agreement itself, or we attach it as a memorandum of agreement that becomes part of the collective bargaining agreement that way. Or, we supersede it in the collective bargaining agreement."

[22] The commissioner accepted as true the parties' representations that they did not have the 1989 memorandum of agreement and that efforts by the department to find a copy of that particular agreement had been unsuccessful.

[23] Consistent with this reasoning, the commissioner had noted in his original decision that the supersedence appendix in exhibit K "did not mention any part of chapter 568," i.e., the Workers' Compensation Act, given the notation on the cost sheet that "[t]he State will be responsible for Social Security and Workers' Compensation."

[24] The cost sheet in exhibit K was dated February 21, 1990, after the date of the referenced memorandum of agreement.

[25] Article 9, § 21, of the 1993 collective bargaining agreement did not include other language contained on the cost sheet, such as that "[t]he State will be responsible for Social Security and Workers' Compensation."

[26] The prior collective bargaining agreement, which went into effect on July 1, 1989, was admitted into evidence before the commissioner and marked as exhibit 2.

[27] At oral argument before this court, the department's counsel acknowledged the possibility that the documents in exhibit K "theoretically" could have been drafts.

[28] In light of the supersedence appendix and its reference to § 5-142, the present case is distinguishable from the cases cited by the plaintiff, in which the legislature had not been sufficiently apprised of the conflicting contract provisions or statutes at issue. See *Nagy* v. *Employees' Review Board*, 249 Conn. 693, 706–707, 735 A.2d 297 (1999) (record did not permit finding that agreement contained provision that conflicted with statutes at issue or conclusion that such provision, if it existed, was submitted to and approved by legislature); *State College American Assn. of University Professors* v. *State Board of Labor Relations*, supra, 197 Conn. 99 ("supersedence analysis" sent to legislature with collective bargaining agreement did not mention any conflict with public act enacting statute at issue); *Board of Trustees* v. *Federation of Technical College Teachers*, supra, 179 Conn. 197 (transmittal letter accompanying collective bargaining agreement indicated existence of conflict with law only in relation to different contract provision).

[29] As set forth previously in this opinion, article 9, § 21, of the 1993 collective bargaining agreement provides that per diem employees "shall not be entitled to retirement benefits, health insurance or life insurance benefits, paid leave, longevity or *other economic benefits* . . . ." (Emphasis added.)

[30] Our analysis is consistent with the board's observation that "the commissioner concluded that it was the 1989 [memorandum of agreement], not the 1993 [collective bargaining agreement], that served to bar per diem employees' entitlement to § 5-142 (a) benefits, and the reference to 'other economic benefits' in the [memorandum of agreement] merely reflected that change in the law."