****

The "officially released" date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the "officially released" date appearing in the opinion.

All opinions are subject to modification and technical correction prior to official publication in the Connecticut Reports and Connecticut Appellate Reports. In the event of discrepancies between the advance release version of an opinion and the latest version appearing in the Connecticut Law Journal and subsequently in the Connecticut Reports or Connecticut Appellate Reports, the latest version is to be considered authoritative.

****

STEPHEN T. COCHRAN *v.* DEPARTMENT OF TRANSPORTATION (AC 45531)

Alvord, Moll and Cradle, Js.

Syllabus

Pursuant to statute (§ 31-307 (a)), "[i]f any injury for which compensation is provided under the provisions of this chapter results in total incapacity to work, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of the injured employee's average weekly earnings as of the date of the injury . . . ."

The defendant appealed to this court from the decision of the Compensation Review Board, which affirmed the decision of the Workers' Compensation Commissioner awarding the plaintiff temporary total disability benefits, pursuant to § 31-307 (a), to commence retroactively. The plaintiff, who sustained a compensable back injury in 1994 while employed by the defendant, accepted an incentivized early retirement benefits package from the defendant in 2003. The plaintiff had no intention of returning to the workforce upon leaving state service and taking his retirement and did not ever return to the workforce. In 2015, he sought a workers' compensation hearing to discuss medical treatment, reimbursement of expenditures, and settlement. The commissioner determined that the plaintiff was entitled to, inter alia, temporary total disability benefits commencing December 30, 2017, reasoning that he had established through nonphysician vocational rehabilitation expert testimony that he was unemployable as of that date. *Held* that the board improperly affirmed the commissioner's award of § 31-307 (a) benefits to the plaintiff beginning retroactively on December 30, 2017: the plain and unambiguous language of § 31-307 (a) did not entitle the plaintiff to temporary total disability benefits when he had elected early retirement and never intended to reenter the workforce because it could not be said that his injury resulted in his total incapacity to work or that he had any wage loss or experienced any loss of earning power; moreover, the plaintiff's claim that § 31-307 (a) indicates that an injured worker "shall" be paid a weekly compensation regardless of the reason for leaving the workforce and without having demonstrated any intention to return was unreasonable, as that construction disregarded the prefatory language of the provision that requires that, for an injury to be eligible, it must result in "total incapacity to work"; furthermore, because the statutory purpose of an award of temporary total disability benefits pursuant to § 31-307 (a) is to compensate a claimant for wage loss or loss of earning power, an award to the plaintiff, who elected to retire with no intention of returning to the workforce, would not effectuate the statutory purpose.

Argued May 16—officially released August 8, 2023

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Third District awarding certain disability benefits to the plaintiff, brought to the Compensation Review Board, which affirmed the commissioner's decision, and the defendant appealed to this court. *Reversed*; *judgment directed.*

Cynthia Sheppard, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Joshua Perry*, solicitor general, for the appellant (defendant).

James H. McColl, Jr., for the appellee (plaintiff).

Opinion

ALVORD, J. The defendant, the Department of Transportation, appeals from the decision of the Compensation Review Board (board) affirming the award of benefits under General Statutes § 31-307 (a), by the Workers' Compensation Commissioner for the Third District (commissioner)[1] to the plaintiff, Stephen T. Cochran, to commence retroactively on December 30, 2017, and for a three month period following a surgery in April, 2013. On appeal, the defendant claims that the board erred in upholding the commissioner's decision to award temporary total disability benefits because the plaintiff, pursuant to the language of § 31-307 (a), was not entitled to those benefits. We agree with the defendant and, accordingly, reverse the decision of the board.[2]

The following facts, as found by the commissioner or as undisputed in the record, and procedural history are relevant to our resolution of this appeal. On November 9, 1967, the plaintiff began working as a laborer/part-time driver for the defendant as an entry-level employee. Throughout his term of employment with the defendant, the plaintiff was promoted on several occasions and held various positions including transportation general supervisor, operations superintendent, maintenance operations supervisor, and transportation maintenance director.

In June, 1993, the plaintiff was working as a transportation general supervisor and was responsible for overseeing one garage with a crew of thirty employees. That year, the plaintiff underwent two noncompensable back surgeries, the first in June, 1993, and the second in October, 1993.[3] Following each of those surgeries, the plaintiff returned to work with the defendant.

In January, 1994, while in the role of transportation general supervisor, the plaintiff sustained an injury to his lumbar spine while lifting a tractor-trailer tire weighing 300 to 400 pounds over a Jersey barrier[4] on Interstate 84. In the process of lifting the tire, the plaintiff fell over the Jersey barrier. When he stood up, the plaintiff felt a twinge in his back. That night, the plaintiff filed an accident report, and some time thereafter, he sought medical treatment at a designated facility for a workplace injury (January, 1994 injury).[5] The plaintiff continued to work following the January, 1994 injury.

In June, 1994, the plaintiff experienced an onset of severe back pain. Shortly thereafter, the plaintiff underwent lower back surgery, performed by Glenn Taylor, an orthopedic surgeon, which the defendant accepted (June, 1994 surgery). Following the June, 1994 surgery, the plaintiff was out of work for approximately six weeks. The plaintiff then returned to work in his regular position with the defendant. The plaintiff began pain management treatment with Mark Thimineur, a physi-

cian, in 1995. The plaintiff stopped the pain management treatment with Dr. Thimineur in 2016.

In April, 1995, the plaintiff had another back surgery performed by Dr. Taylor, to remove hardware that had been implanted in his back, which the defendant accepted. The plaintiff then returned to work one week later in his regular position with the defendant.

On April 12, 1995, the defendant issued a voluntary agreement form accepting the plaintiff's January, 1994 injury as compensable and acknowledging that the plaintiff was entitled to a permanent partial disability award of 29.5 percent to the lumbar spine.

On April 1, 2003, the plaintiff, who was then fifty-four years old, accepted an incentivized early retirement benefits package offered by the defendant. At that point, the plaintiff had worked for the defendant for thirty-six years, and he was employed as a transportation maintenance director. The plaintiff had no intention of returning to the workforce upon leaving state service and taking his retirement.

In 2005, the plaintiff obtained two workers' compensation administrative hearings in which he sought a return visit to Dr. Taylor and reimbursement for his payments for pain medication. The defendant authorized the medical care and payments and agreed to cover additional testing and follow-up care recommended by Dr. Taylor.

On March 14, 2012, the plaintiff sought treatment from Federico P. Girardi, a surgeon, at the Hospital for Special Surgery in Manhattan, New York. It is undisputed that the plaintiff did not seek authorization or notify the defendant prior to seeking treatment with Dr. Girardi. The plaintiff scheduled a back surgery with Dr. Girardi for June, 2012, but later cancelled the surgery. In January, 2013, the plaintiff returned to Dr. Girardi for a surgical consult because his back pain had returned. On April 2, 2013, the plaintiff underwent back surgery with Dr. Girardi (April, 2013 surgery).

On March 15, 2015, the plaintiff sought a workers' compensation hearing to discuss medical treatment, reimbursement of expenditures, and settlement. The commissioner held evidentiary hearings on October 31, 2019, and February 27, July 22, September 8 and October 5, 2020. During the hearings, the commissioner heard testimony from the plaintiff and the plaintiff's wife. The parties also introduced into evidence various exhibits, the majority of which were evaluations, reports, and deposition testimony from various providers whom the plaintiff had seen since he sought the workers' compensation hearing in March, 2015. Additionally, the commissioner took administrative notice of several prior notices for hearings and filings.

During the hearings, when asked by his counsel whether his "back symptomology" impacted his job

duties prior to his retirement, the plaintiff testified that "[i]t just got to a point where I was in pain all day and I was taking these medications. Eventually, it would have got me in big trouble, you know, taking all this medication on company time." Additionally, the plaintiff testified that the defendant "offered an early retirement" and he took a "regular retirement as opposed to a disability retirement." The plaintiff acknowledged that his retirement involved his acceptance of an incentivized early retirement benefits package, a "golden handshake," and that his acceptance of the incentivized early retirement benefits package meant that "[t]here was more money." Moreover, when asked by counsel for the defendant whether he "intend[ed] to work anywhere else after leaving state service and taking [his] state retirement," he responded, "No." He further testified that, since his retirement, he had not had any contact with the defendant. Specifically, he indicated that he had not asked the defendant to rescind his retirement, whether he could work 120 days per year, whether he could work part-time, or whether he could work from home. Additionally, he testified that, prior to retiring, he had not asked the defendant to "perform a less arduous duty search for [him]" or "accommodate [him] so that [he] could continue to work." Moreover, he testified that, since he retired, he had not sought rehabilitation services for assistance in finding a sedentary job or requested assistance from anyone in finding a job he could do part-time or from home. The plaintiff's wife testified that, when the plaintiff retired in 2003, "he was still pretty functional . . . . He got up, got ready, went to work." Additionally, she testified that, since the plaintiff retired, his back condition has deteriorated over time.

On July 24, 2017, Phillip S. Dickey, a neurosurgeon, performed a commissioner's examination of the plaintiff and reviewed medical records as part of his examination, following which he concluded that the plaintiff had "the lightest of work capacity." On December 12, 2017, Albert Sabella, a rehabilitation counselor, performed a vocational assessment of the plaintiff at the office of the plaintiff's attorney. On December 30, 2017, Sabella authored a report in which he opined that, "[b]ased on [his] review of the medical record, assessment interview, occupational and labor market analysis, it is [his] opinion that [the plaintiff] has formidable employment barriers including substantial physical restrictions, age, prolonged absence from the workforce, no useful transferable or marketable vocational ability and ongoing chronic pain. He continues to take narcotic medication and would not pass a drug screen. . . . [I]t is more likely than not, that based on [the plaintiff's] vocational profile, he is unable to compete for appropriate work within his physical capabilities, find an employer who will hire him, or to maintain employment on a sustainable basis."

Following the hearings, both parties submitted post-trial briefs, in which the plaintiff sought, inter alia, "temporary total disability benefits retroactive to 2003, and/or postspecific wage loss benefits," and the defendant contested the plaintiff's claim for benefits and "asserted that any temporary total [disability] benefits owed would be offset by [the plaintiff's] retirement Social Security benefits [and] contested the compensability of the [April, 2013] surgery, as well as the nature and extent of the [plaintiff's] current disability."

On April 23, 2021, the commissioner issued her findings and decision. The commissioner concluded that the plaintiff "is entitled to temporary total [disability] benefits for the three month period following his 2013 surgery . . . [and] is entitled to temporary total [disability] benefits commencing December 30, 2017." The commissioner stated that she "do[es] not award benefits pursuant to General Statutes § 31-308a [governing benefits for partial permanent disability] as [the plaintiff] did not meet his burden in establishing that he was willing to perform work in the state, nor did he establish he is currently able to perform work in the state." She found "that for the three month period subsequent to his [April, 2013] surgery, [the plaintiff] is entitled to temporary total [disability] benefits as he demonstrated through medical testimony that he was totally disabled during this time and that the surgery was related to his 1994 date of injury." Additionally, she found "that, from April 1, 2003, until December 30, 2017 (with the exception of the three month post [April, 2013 surgery] time period . . .), [the plaintiff] did not meet his burden in proving he was entitled to temporary total [disability] benefits as he did not demonstrate he actively sought employment during this time but could not secure any, nor did he demonstrate through persuasive nonphysician vocational rehabilitation expert or medical testimony that he was unemployable during this time period." Therefore, the commissioner concluded that, "[b]ased on the totality of the evidence submitted, [the plaintiff] established that his condition deteriorated over time since 2003, and he has met his burden that he is entitled to temporary total [disability] benefits as of December 30, 2017, because he established through persuasive nonphysician vocational rehabilitation expert testimony that he was unemployable as of that date."[6] In support of her findings, the commissioner found "the opinion of . . . Sabella persuasive to the issues before [her] because his opinion, from a vocational perspective, that [the plaintiff] is without a work capacity is consistent with the balance of the record, including the [functional capacity evaluation] evidence, and Dr. Dickey's opinion that [the plaintiff] has 'the lightest of work capacities.' "[7]

On May 11, 2021, the defendant appealed to the board, claiming, inter alia,[8] that the commissioner misapplied

the law when she "ordered the payment of [temporary] total disability benefits ad infinitum despite the [plaintiff] having taken a voluntary incentive retirement program in 2003 and not having suffered any loss of earning capacity."

On May 6, 2022, the board affirmed the commissioner's decision. The board disagreed with the defendant's claim that the award of ongoing temporary total disability benefits as of December 30, 2017, was erroneous because the award contravenes the original intent of § 31-307 and the plaintiff acknowledged that he had no intention of returning to the workforce following his retirement. The board stated that § 31-307 "in its current form imposes no constraints on a claimant's ability to collect temporary total disability benefits due to retirement status; rather it mandates that the injured claimant '*shall* be paid a weekly compensation equal to seventy-five per cent of the injured employee's average weekly earnings as of the date of injury.' . . . Given that we do not consider this statutory language in any way ambiguous, we are therefore compelled by the provisions of General Statutes § 1-2z to give the 'plain language' of the statute its full force and effect." (Emphasis in original; footnote omitted.) Moreover, the board concluded that the portions of the evidentiary record that the commissioner found persuasive, namely Sabella's vocational report and deposition testimony, which were introduced into evidence by the plaintiff, in addition to the testimony of the plaintiff and his wife, provided an adequate basis for supporting the award. Finally, the board noted that our Supreme Court's decision in *Laliberte* v. *United Security, Inc.*, 261 Conn. 181, 801 A.2d 783 (2002), further supported the commissioner's decision. Specifically, the board pointed to language in *Laliberte* in which our Supreme Court stated that "§ 31-307 (a) contains no provision permitting the discontinuance of the total disability benefits of an injured employee based on his incarceration . . . [and] that it is not the court's role to acknowledge an exclusion when the legislature painstakingly has created such a complex statute. . . . The complex nature of the workers' compensation system requires that policy determinations be left to the legislature, not the judiciary." (Citations omitted; internal quotation marks omitted.) Therefore, the board concluded that "we find no error on the part of the [commissioner] in awarding ongoing temporary total disability benefits to the [plaintiff] consistent with the evidentiary record in this matter." This appeal followed.

The defendant claims that the board erred in affirming the commissioner's decision awarding the plaintiff ongoing temporary total disability benefits, pursuant to § 31-307 (a), beginning on December 30, 2017. Specifically, the defendant argues that "the 'plain and unambiguous' meaning of . . . § 31-307 denies [temporary total disability] benefits to voluntary retirees, like [the plaintiff], who have no wages to replace

and whose departure from the workforce initially resulted from their own choice, not their disability." Although the plaintiff agrees that the language of § 31-307 (a) is plain and unambiguous, he argues that the statute mandates temporary total disability benefits and points to the language "shall be paid" to support his assertion that the defendant is "attempting to insert barriers to temporary total disability benefits that the legislature considered but did not include within § 31-307." We agree with the defendant.

We first set forth our 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. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) *Clark* v. *Waterford*, *Cohanzie Fire Dept.*, 346 Conn. 711, 724, 295 A.3d 889 (2023). "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 [the] 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. . . . Whe[n] . . . [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. . . . Because this appeal raises an issue of statutory construction that is of first impression for this court, our review is plenary." (Citation omitted; internal quotation marks omitted.) *Bergeson* v. *New London*, 269 Conn. 763, 769, 850 A.2d 184 (2004).

Our review of the defendant's claim is guided by the well established principles of statutory construction. "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case . . . . In seeking to determine that meaning . . . § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Vitti* v. *Milford*, 336 Conn. 654, 660, 249 A.3d 726 (2020). "Importantly, ambiguity exists only if the statutory lan-

guage at issue is susceptible to more than one plausible interpretation. . . . In other words, statutory language does not become ambiguous merely because the parties contend for different meanings." (Internal quotation marks omitted.) *In re Amanda C.*, 218 Conn. App. 731, 741, 292 A.3d 1269, cert. denied, 347 Conn. 904, A.3d (2023). "Furthermore, it is axiomatic that those who promulgate statutes . . . do not intend to promulgate statutes . . . that lead to absurd consequences or bizarre results. . . . Consequently, [i]n construing a statute, common sense must be used and courts must assume that a reasonable and rational result was intended . . . and, further, if there are two [asserted] interpretations of a statute, we will adopt the . . . reasonable construction over [the] one that is unreasonable." (Citations omitted; internal quotation marks omitted.) *State* v. *Courchesne*, 296 Conn. 622, 710, 998 A.2d 1 (2010).

In accordance with § 1-2z, we begin our analysis with the plain language of § 31-307 (a), which provides in relevant part that, "[i]f any injury for which compensation is provided under the provisions of this chapter results in total incapacity to work, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of the injured employee's average weekly earnings as of the date of the injury . . . ."

We conclude that the plain and unambiguous language of § 31-307 (a) requires that, in order to be eligible for temporary total disability benefits, a claimant's "injury . . . [result] in total incapacity to work." General Statutes § 31-307 (a). "Our Supreme Court has defined total incapacity to work as the inability of the employee, *because of his injuries*, to work at his customary calling or at any other occupation he might reasonably follow." (Emphasis added; internal quotation marks omitted.) *O'Connor* v. *Med-Center Home Health Care, Inc.*, 140 Conn. App. 542, 550, 59 A.3d 385, cert. denied, 308 Conn. 942, 66 A.3d 884 (2013). Accordingly, the plaintiff, who elected to retire from employment and thereby received an incentivized early retirement benefits package and affirmatively conceded that he had no intention of returning to the workforce, was not entitled to temporary total disability benefits pursuant to the statute.

The plaintiff testified that the defendant offered him an incentivized early retirement benefits package, which he accepted at age fifty-four. He further testified that, following his retirement on April 1, 2003, he had no intention of returning to the workforce. Additionally, the commissioner found that, "from April 1, 2003, until December 30, 2017 . . . [the plaintiff] did not meet his burden in proving that he was entitled to temporary total [disability] benefits, as he did not demonstrate he actively sought employment during this time, but could not secure any . . . ." The commissioner's finding is supported by the plaintiff's testimony that he did not

pursue any rehabilitation services, did not request alternative working conditions from the defendant, such as part-time work, and did not request to rescind his retirement. The commissioner determined, however, that, as of December 30, 2017, the plaintiff was entitled to § 31-307 (a) benefits "because he established through persuasive nonphysician vocational rehabilitation expert testimony that he was unemployable as of that date." Although "[w]e will not, on appeal, disturb the commissioner's credibility determinations"; *Britto* v. *Bimbo Foods, Inc.*, 217 Conn. App. 134, 147, 287 A.3d 1140 (2022), cert. denied, 346 Conn. 921, 291 A.3d 1040 (2023); "the construction given to the workers' compensation statutes by the commissioner and [the] board . . . is not entitled . . . to special deference when [their] determination of a question of law has not previously been subject to judicial scrutiny." (Internal quotation marks omitted.) *Bergeson* v. *New London*, supra, 269 Conn. 769. Accordingly, we conclude that the plain and unambiguous language of § 31-307 (a) does not entitle the plaintiff to temporary total disability benefits where he elected to take an incentivized early retirement benefits package and never intended to reenter the workforce because it cannot be said that his injury *resulted* in his total incapacity to work. Therefore, we agree with the defendant that the board's affirmance of the commissioner's determination that the plaintiff was entitled to ongoing § 31-307 (a) benefits beginning on December 30, 2017, was contrary to the plain and unambiguous language of the statute.

Additionally, our plain language analysis is supported by the relationship between § 31-307 and other pertinent statutes in the Workers' Compensation Act, General Statutes § 31-275 et seq.; see General Statutes § 1-2z; and precedent from our Supreme Court. "Benefits available under the [Workers' Compensation Act] serve the dual function of compensating for the disability arising from the injury *and for the loss of earning power* resulting from that injury. . . . Compensation for the disability takes the form of payment of medical expenses . . . and specific indemnity awards . . . . *Compensation for loss of earning power* takes the form of partial or total incapacity benefits." (Citations omitted; emphasis added; internal quotation marks omitted.) *Starks* v. *University of Connecticut*, 270 Conn. 1, 8–9, 850 A.2d 1013 (2004). Our Supreme Court has "recognized a distinction between benefits awarded under the [Workers' Compensation Act] to *compensate for wage loss* and those awarded to compensate for the loss, or loss of use, of a body part. . . . Total or partial incapacity benefits fall into the first category. See General Statutes §§ 31-307 and 31-308 (a)." (Citations omitted; emphasis added.) *Pizzuto* v. *Commissioner of Mental Retardation*, 283 Conn. 257, 267, 927 A.2d 811 (2007). Our Supreme Court further has distinguished between "permanent partial disability" benefits pursuant to § 31-

308 and "temporary total incapacity" benefits pursuant to § 31-307. See *Churchville* v. *Bruce R. Daly Mechanical Contractor*, 299 Conn. 185, 193, 8 A.3d 507 (2010) (The court noted that, because §§ 31-307 and 31-308 benefits "compensate an employee for distinct losses, entitlement to the two benefits is triggered by different factors. Entitlement to incapacity benefits depends on the employee's capacity to work. General Statutes §§ 31-307 (a) and 31-308 (a).").

Where a claimant elects to retire with no intention of returning to the workforce, fails to pursue any employment, and subsequently seeks § 31-307 (a) benefits, an award of temporary total disability benefits would not effectuate the statutory purpose of compensating the claimant for "wage loss"; *Pizzuto* v. *Commissioner of Mental Retardation*, supra, 283 Conn. 267; or " 'loss of earning power . . . .' " *Starks* v. *University of Connecticut*, supra, 270 Conn. 8. In the present case, the plaintiff elected an incentivized early retirement benefits package in April, 2003. It was the plaintiff's testimony that he had no intention of returning to the workforce upon retirement and, in fact, he did not pursue or intend to pursue any employment thereafter. Accordingly, at the time the commissioner determined in 2021 that the plaintiff was retroactively entitled to temporary total disability benefits, as of December 30, 2017, it cannot be said that the plaintiff had any "wage loss" or that he had experienced any "loss of earning power."

The plaintiff argues that the plain and unambiguous language of § 31-307 (a) mandates an award for temporary total disability benefits by emphasizing the phrase in the statute, "the injured worker *shall be paid* a weekly compensation." (Emphasis in original.) The plaintiff's singular focus on that phrase of the statute ignores the prefatory language of § 31-307 (a), "injury . . . results in total incapacity to work." As previously set forth, the operative provision of § 31-307 (a), which we are tasked with interpreting, requires that, to be eligible for temporary total disability benefits, the claimant's "injury . . . results in total incapacity to work." A construction of the statute that effectively disregards the "results in total incapacity to work" provision, in favor of an interpretation that an injured worker "shall" under all circumstances, regardless of his reason for leaving the workforce and without having demonstrated any intention to return, be entitled to § 31-307 (a) benefits would be unreasonable. See *State* v. *Courchesne*, supra, 296 Conn. 710 ("if there are two [asserted] interpretations of a statute, we will adopt the . . . reasonable construction over [the] one that is unreasonable" (internal quotation marks omitted)).[9]

Additionally, the plaintiff relies on our Supreme Court's opinion in *Laliberte* v. *United Security, Inc.*, supra, 261 Conn. 181, to support his argument that

"there are no restrictions on temporary total disability benefits contained within § 31-307, whether for incarceration or retirement." We are not persuaded. In *Laliberte*, our Supreme Court was tasked with determining, as a matter of first impression, "whether workers' compensation benefits for temporary total disability [pursuant to § 31-307 (a)] may be discontinued when the recipient is incarcerated." (Footnote omitted.) Id., 182–83. Following a second work-related injury, the plaintiff was awarded benefits pursuant to § 31-307 (a) in 1990. Id., 184. In 1999, the defendant Second Injury Fund sought to discontinue the plaintiff's benefits because he was incarcerated at that time. Id. On appeal, the defendant claimed that "the plaintiff's incarceration permits [it] to discontinue workers' compensation benefits because his inability to work is caused by his incarceration." Id. The plaintiff argued that "it [was] his disability, and not his imprisonment, that preclude[d] him from working." Id. Our Supreme Court agreed, stating that "§ 31-307 (a) contains no provision permitting the discontinuance of total disability benefits of an injured employee based on his incarceration. . . . The plaintiff has been found to be, and remains, totally incapable of working due to his disability. The statute does not address inability to work because of incarceration. As a result, no intent concerning discontinuance of benefits because of incarceration can be inferred from the statute itself." Id., 186.

As the plaintiff acknowledges, the facts in *Laliberte* are discernably different from the present case. The defendant aptly distinguishes the present case from *Laliberte* by stating, "The *Laliberte* claimant was totally disabled by injury before his . . . incarceration and remained totally disabled throughout. If he had not been incarcerated, he still would have been out of the workforce—even if he wanted to work and sought work. In contrast, [the plaintiff] removed himself from the workforce. He was working full duty when he chose to retire. The reason he has no wages to replace is that he chose to take his pension and Social Security retirement benefits instead." Our Supreme Court's repeated use of the phrase "discontinuance of benefits" in *Laliberte* summarizes the distinction between the claimant in that case and the plaintiff in the present case and further underscores the validity of our interpretation of § 31-307 (a). In *Laliberte*, the plaintiff's work injury resulted in his removal from the workforce, and, at that time, he began receiving his § 31-307 (a) benefits, which the defendant sought to *discontinue* when the plaintiff subsequently was incarcerated. *Laliberte* v. *United Security, Inc.*, supra, 261 Conn. 184. The fact that the plaintiff in *Laliberte* became incarcerated while he was receiving § 31-307 (a) benefits, however, did not permit the defendant to discontinue payment of the plaintiff's temporary total disability benefits because his injury initially resulted in his total incapac-

ity to work and he would have been unable to seek and/or obtain employment at any point in time, whether or not he was incarcerated for a period of time. Id., 186. The circumstance of the plaintiff in the present case is completely different. He elected to remove himself from the workforce, where he had no intention of returning, and more than ten years later sought to *obtain* § 31-307 (a) benefits. We cannot conclude that the plaintiff is entitled to § 31-307 (a) benefits when he removed himself from the workforce with no intention of returning.

For the foregoing reasons, we conclude that the board improperly affirmed the commissioner's award of § 31-307 (a) benefits to the plaintiff beginning retroactively on December 30, 2017.[10]

The decision of the Compensation Review Board is reversed and the case is remanded to the board with direction to reverse the decision of the commissioner with respect to the award of temporary total disability benefits to the plaintiff.

In this opinion the other judges concurred.

[1] We note that, in 2021, the legislature enacted No. 21-18 of the 2021 Public Acts (P.A. 21-18), codified at General Statutes § 31-275d, which substituted the term "administrative law judge" for "workers' compensation commissioner" and "commissioner" in several enumerated sections of the General Statutes, including sections contained in the Workers' Compensation Act, General Statutes § 31-275 et seq. Because the events at issue in this appeal occurred prior to October 1, 2021, the effective date of P.A. 21-18, in this opinion we use the terms workers' compensation commissioner and commissioner.

[2] In support of its claim that the board erred in affirming the commissioner's decision to retroactively award the plaintiff a three month period of § 31-307 (a) benefits following his April, 2013 surgery, the defendant renews its claim that the plaintiff is not entitled to any temporary total disability benefits. In the alternative, the defendant claims that "this court should reverse the board's award" because "[b]enefits are unavailable after unauthorized out-of-state treatment absent a . . . [commissioner's] determination that the treatment was reasonable, necessary, and unavailable in Connecticut . . . [and] [n]o such determination was made here." In light of our conclusion that the plaintiff was not entitled to temporary total disability benefits commencing on December 30, 2017, for the reasons set forth in this opinion, the plaintiff necessarily was precluded from entitlement to § 31-307 (a) benefits following his April, 2013 surgery, and, thus, we need not address the defendant's alternative claim on appeal. See footnotes 8 and 10 of this opinion.

[3] It is undisputed that the plaintiff never sought any workers' compensation benefits related to these 1993 surgeries.

[4] A Jersey barrier is "a concrete slab [thirty-two] inches high with slanted sides that is used in tandem with others to block or reroute traffic or to divide highways." Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 671.

[5] We note that the record reflects conflicting dates regarding the date of the plaintiff's January, 1994 injury, a discrepancy that the board also noted. The voluntary agreement identifies the date of injury as January 1, 1994. The plaintiff testified that, although the report indicates the incident occurred on January 1, 1994, it did not occur on that date, but it did occur in January, 1994. Accordingly, we refer to the injury as occurring in January, 1994, throughout this opinion.

[6] The commissioner also ordered the defendant "to pay benefits to compensate [the plaintiff] for the increased permanent partial disability to his lumbar spine." In support of her decision, the commissioner found that, "[b]ased on the totality of the evidence submitted, [the plaintiff] has met his burden that, as of July 24, 2017, the permanent partial disability to his lumbar spine increased to 40 percent" and specifically credited Dr. Dickey's

opinion "that the [plaintiff] has sustained an increased permanent partial disability to his lumbar spine."

[7] On April 26, 2021, the defendant filed a motion to correct, in which it requested that the commissioner correct several of her findings and amend her conclusions, the majority of which were directed at the commissioner's determination that the defendant was responsible for the plaintiff's April, 2013 surgery with Dr. Girardi. The plaintiff filed an objection to the defendant's motion to correct. On April 28, 2021, the commissioner granted the defendant's motion to correct to the extent that it sought a correction of a scrivener's error, but denied the remainder of the defendant's requests as "unnecessary."

[8] The defendant also claimed that the "commissioner misapplied the law when she ordered the payment of [temporary] total disability benefits following unauthorized medical treatment from an out-of-network, out-of-state provider." The board disagreed, stating that the "determination of what constitutes reasonable or necessary medical care is a factual determination [which] . . . is squarely within the purview of the trial commissioner." The board noted that the commissioner had "conclude[d] that the [plaintiff] had established his eligibility for three months of postsurgery temporary total disability benefits by way of persuasive medical testimony demonstrating that he was totally disabled during this time period and that 'the surgery was related to his 1994 date of injury.' " Therefore, the board concluded that "it may be reasonably inferred that the decision of the [commissioner] to award temporary total disability benefits for this time period was logically predicated on her conclusion that the [April, 2013] surgery constituted reasonable and necessary medical treatment."

The defendant also raises this claim on appeal and argues that "[b]enefits are unavailable after unauthorized out-of-state treatment absent [a commissioner's] determination that the treatment was reasonable, necessary, and unavailable in Connecticut. No such determination was made here." Because we reverse the board's decision affirming the commissioner's award of temporary total disability benefits following the plaintiff's April, 2013 surgery, we need not address the defendant's claim. See footnote 2 of this opinion.

[9] The plaintiff briefly suggests that other provisions in the statutory scheme support his interpretation of § 31-307 (a). Our review of his arguments does not impact our conclusion that his interpretation is unreasonable.

[10] The defendant also claims that the board erred in affirming the commissioner's decision to retroactively award the plaintiff temporary total disability benefits pursuant to § 31-307 (a) for a three month period following his April, 2013 surgery because "[the plaintiff] is not entitled to any temporary total [disability] benefits." We agree with the defendant and, accordingly, conclude that the plaintiff also was not entitled to § 31-307 (a) benefits following his April, 2013 surgery for the same reason that he was not entitled to ongoing benefits retroactive to December 30, 2017. See footnote 2 of this opinion.