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RICHARD GILLIS *v.* WHITE OAK CORPORATION ET AL.
(AC 21361)

Foti, Schaller and Flynn, Js.

Argued January 17—officially released November 12, 2002

(Appeal from the workers' compensation review board.)

Taka Iwashita, assistant attorney general, with whom were *Michael J. Belzer*, assistant attorney general, and, on the brief, *Richard Blumenthal*, attorney general, and *William J. McCullough*, assistant attorney general, for the appellee (defendant second injury fund).

James D. Moran, Jr., with whom was *James L. Sullivan*, for the appellees (named defendant et al.).

Opinion

SCHALLER, J. The defendant second injury fund (fund) appeals from the decision of the workers' compensation review board (board) affirming the determination by the workers' compensation commissioner (commissioner) that the defendant White Oak Corpora-

tion (White Oak) timely notified the fund, pursuant to General Statutes (Rev. to 1985) § 31-349, as amended by Public Acts 1986, No. 86-31, of its intention to transfer liability to the fund for the plaintiff employee's compensation.[1] On appeal, the fund claims that the board improperly affirmed the commissioner's determination that White Oak timely notified the fund of the transfer under § 31-349. We agree with the fund that White Oak's notice was not timely.[2]

The following facts and procedural history are relevant to our resolution of the fund's appeal. The plaintiff, Richard Gillis, first injured his right knee on July 7, 1981, while working for an employer unrelated to this appeal. Gillis again injured the same knee on November 6, 1986, while working for White Oak. Gillis injured his right knee a third time on April 20, 1992, while working for another employer unrelated to this appeal.

After hearings in 1993 and 1994 to determine the compensability of the 1986 injury and to decide which of Gillis' injuries were responsible for the medical opinion that Gillis should undergo a right knee replacement, the commissioner rendered his finding and award on October 4, 1994.[3] The commissioner found that on January 27, 1987, Gillis had reached maximum medical improvement and was left with 25 percent permanent partial disability in the right knee. The commissioner further assigned various portions of the 25 percent permanent partial disability to both the 1981 and 1986 injuries, concluding that 17.5 percent of the permanent disability was attributable to the 1986 injury. The fund was not a party to those proceedings.

On or about December 16, 1994, White Oak notified the fund, as required by § 31-349, that it sought to transfer liability for the 1986 injury to the fund. The fund took the position that the notice was untimely. The commissioner held another hearing on June 16, 1999, and concluded in his June 24, 1999, finding and award that notice was timely perfected on December 14, 1994, and that liability for the 1986 injury would transfer to the fund.[4] The fund appealed to the board from the commissioner's decision. On October 20, 2000, the board concluded that the commissioner correctly had determined that White Oak's notice was timely and affirmed the commissioner's decision. This appeal followed. Additional facts will be set forth as necessary.

On appeal, the fund claims that the board improperly affirmed the commissioner's determination that White Oak timely notified the fund of the transfer. Specifically, the fund argues that the commissioner improperly calculated Gillis' period of disability when deciding whether notice under § 31-349 was timely. The fund advances two arguments in support of its position. In its brief, the fund asserts that for the purposes of calculating the first 104 weeks of disability under § 31-349, Gillis was ''disabled'' as of October 14, 1992, and

remained disabled continuously thereafter. The commissioner found, in his June 24, 1999 finding and award, that Gillis had reached maximum medical improvement on that date and was left with a 23.17 percent permanent impairment as a result of the November 6, 1986 injury.[5] The fund takes the position that Gillis was continuously disabled from the date he was assigned the permanent disability rating because from that time on, he never ceased being disabled. At oral argument, the fund reasserted that position, but also argued that Gillis was disabled from the date of the second injury, November 6, 1986. We agree with the fund that White Oak's notice was untimely.

At the outset, we note our standard of review for the fund's claim. "Our standard of review of the board's determination is clear. [T]he [board's] hearing of an appeal from the commissioner is not a de novo hearing of the facts. Although the [board] may take additional material evidence, this is proper only if it is shown to its satisfaction that good reasons exist as to why the evidence was not presented to the commissioner. Otherwise, it is obliged to hear the appeal on the record and not retry the facts. . . . [T]he power and duty of determining the facts rests on the commissioner, the trier of facts. . . . The conclusions drawn by him 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." (Internal quotation marks omitted.) *Williams* v. *Best Cleaners, Inc.*, 237 Conn. 490, 500–501, 677 A.2d 1356 (1996).

We further note that the question of timeliness with regard to § 31-349 is not one of first impression. In *Karutz* v. *Feinstein & Herman, P.C.*, 59 Conn. App. 565, 567, 757 A.2d 680, cert. denied, 254 Conn. 949, 762 A.2d 901 (2000), an employee was injured at work, but continued to perform her duties and to receive regular pay for almost fourteen months after the injury. Subsequently, the employee was determined to be temporarily totally disabled and then temporarily partially disabled. Id. When the insurer sought to transfer liability to the fund, the fund contested the timeliness of the transfer, arguing that the employee was disabled from the date of the injury, even though she had lost no pay or time from work as a result of the injury. Id., 568–69. The commissioner, however, determined that the notice was timely because the disability period did not begin on the date of injury, and the board affirmed that decision. Id., 571–72.

On appeal, we stated "[t]he issue of timeliness centers on the meaning of the word 'disabled' contained in § 31-349. The terms 'disabled' and 'disability' are not defined in the workers' compensation statutes. Recent decisions of our Supreme Court, however, have established the meaning of 'disability' for purposes of § 31-349."

Id., 569.

We then quoted from *Williams* v. *Best Cleaners, Inc.*, supra, 237 Conn. 498, in which our Supreme Court stated that "[i]n the context of § 31-349, the term disability is susceptible of two meanings—physical impairment and loss of earning capacity. . . . Permanent disability is not defined within Connecticut's Workers' Compensation Act. General Statutes § 31-275 et seq. Previous disability, however, is defined within § 31-275 (20) as an employee's preexisting condition caused by the total or partial loss of, or loss of use of, one hand, one arm, one foot or one eye resulting from accidental injury, disease or congenital causes, or other permanent physical impairment. . . . In construing the act . . . this court makes every part operative and harmonious with every other part insofar as is possible. . . . In addition, the statute must be considered as a whole, with a view toward reconciling its separate parts in order to render a reasonable overall interpretation. . . . Thus, the meaning of the term disability should not vary simply because it is modified by permanent rather than previous. Accordingly, we define disability, for the purpose of § 31-349 (a), to refer to a claimant's physical impairment." (Citations omitted; internal quotation marks omitted.) *Karutz* v. *Feinstein & Herman, P.C.*, supra, 59 Conn. App. 569–70.

We determined in *Karutz* that "a person can be disabled for the purposes of § 31-349 even though he or she can carry on all the facets of his or her employment. The test is whether a claimant is physically impaired, not whether there exists a de facto inability to earn a wage." Id., 570. We also noted, as decided by our Supreme Court in *Innocent* v. *St. Joseph's Medical Center*, 243 Conn. 513, 705 A.2d 200 (1998), that "the rate of pay received by the claimant and the number of hours worked upon her return to work are not determinative of the time period of her disability under § 31-349 (a). Rather, the determinative factor as to whether the time period is to be included in calculating the 104 week period of disability that triggers the date by which the employer must furnish notice to the fund, is whether the claimant is medically impaired as a result of his or her work-related injury." (Internal quotation marks omitted.) *Karutz* v. *Feinstein & Herman, P.C.*, supra, 59 Conn. App. 571.

Reversing the board's affirmance of the commissioner's decision in *Karutz*, we stated that the commissioner had based his disability determination on the employee's ability to perform her job rather than on the date of medical impairment. Id., 572. On the basis of *Karutz* and the cases cited therein, it is clear that a person is disabled under § 31-349 for any period in which a medical physical impairment is established by the evidence before the commissioner. In the present case, a review of the commissioner's June 24, 1999

decision reveals that his conclusion resulted from inferences unreasonably drawn from the facts found.

The commissioner determined that Gillis' first 104 weeks of disability concluded on April 20, 1999, and that White Oak's notice, perfected on December 14, 1994, was timely because it was filed more than ninety days prior to the expiration of the first 104 weeks of disability. The commissioner reached that conclusion after finding that Gillis was totally disabled following his second injury for 16 3/7 weeks, from November 6, 1986, through March 1, 1987. The commissioner also found that subsequent to March 1, 1987, Gillis "returned to work full duty and was not disabled again until October 14, 1992, when he was entitled to permanent partial disability . . . ." That reference to October 14, 1992, relates to the commissioner's further finding that Gillis had reached maximum medical improvement as of October 14, 1992, and that as of that date, he had a permanent partial disability of 23.17 percent as a result of the November 6, 1986 injury.

The commissioner also found that Gillis was entitled to 55 3/7 weeks of permanent partial disability, from October 14, 1992, the date of maximum medical improvement, through November 5, 1993. In addition, the commissioner found that Gillis had been paid total disability benefits for 32 1/7 weeks as a result of the replacement surgery, from September 8, 1998 through April 20, 1999. In making these determinations, the commissioner stated that "[f]or the period[s] from March 1, 1987, through October 13, 1992, and November 6, 1993, through December 14, 1994, the date as of when notice was perfected, there is no evidence of medical or physical limitations or impairments attributable to the November, 1986 injury and, therefore, such period is not included in the calculation of timely notice under § 31-349 (a)."

We first note that the June 24, 1999 findings establish clearly that Gillis became physically impaired on the date of his second injury, November 6, 1986, because the commissioner found that Gillis was totally disabled for the period of November 6, 1986, through March 1, 1987. The question we must next address is whether Gillis ever fully recovered from the November 6, 1986 injury and returned to an unimpaired medical status. That is a critical matter because if at some point Gillis no longer was physically impaired, then he would not be disabled under § 31-349, and the time from his full recovery until the next impairment would not be included in calculating the first 104 weeks of his disability.

The commissioner determined that Gillis no longer was disabled after March 1, 1987, and through October 13, 1992. Specifically, the commissioner found, in finding number nine, that Gillis had returned to work "full duty" after March 1, 1987, and was not disabled again

until 1992. The commissioner then stated, in paragraph D of his conclusion, with regard to the same time period discussed in finding number nine, that "there is no evidence of medical or physical limitations or impairments attributable to the November 6, 1986 injury . . . ."[6] Thus, the commissioner concluded that Gillis was not impaired after March 1, 1987, and, because Gillis no longer was impaired, the commissioner further determined that Gillis no longer was disabled for purposes of § 31-349.

We conclude that the commissioner improperly determined Gillis' periods of disability. The commissioner's conclusion that Gillis was unimpaired after March 1, 1987, rests on the predicate that Gillis had recovered fully from his second injury as of that date. That conclusion is inconsistent with the commissioner's other findings. Given the irreconcilable nature of that inconsistency, we conclude that the commissioner's decision resulted from an unreasonable inference from the facts found.

In reaching our determination, we rely specifically on finding number five, in which the commissioner found that after Gillis had reached maximum medical improvement on October 14, 1992, Gillis had a permanent partial impairment of 23.17 percent as a result of the November 6, 1986 injury. That finding is critical because the assignment of a 23.17 percent permanent disability rating subsequent to March 1, 1987, is medically inconsistent with a conclusion that Gillis had recovered fully from the second injury by March 1, 1987, and no longer was impaired as of that date.[7]

The assignment of the permanent disability rating, after Gillis' knee had healed as well as it could, indicates that he never fully recovered from the second injury. That is the only conceivable conclusion in light of the fact that he was deemed to have a 23.17 percent disability *after having reached maximum medical improvement*. In light of that, we construe the commissioner's finding to indicate that Gillis continuously was impaired by the second injury from the date it occurred through the date of maximum medical improvement and thereafter. On the basis of that impairment, logic dictates that at a minimum, Gillis also was continuously disabled at a rate of between 23.18 percent and 100 percent from the time of the injury on November 6, 1986, through the date of maximum medical improvement on October 14, 1992. In sum, the assignment of the permanent disability rating demonstrates that Gillis was, and remains, physically impaired, and that he did not totally recover. Because he did not fully heal, he must have suffered a continuous impairment from the date of the injury.

As *Karutz* clearly informs us, for the purposes of § 31-349, disability refers to a claimant's physical impairment. A person can be disabled for the purposes of § 31-349 even though he can carry on all the aspects

of his employment. Guided by that principle, we conclude the commissioner's June 24, 1999 findings reveal that Gillis continuously was physically impaired from the time of the second injury, November 6, 1986, onward.[8] Given that uninterrupted impairment, Gillis continuously was disabled from November 6, 1986.[9]

In light of our interpretation of the commissioner's findings, our calculation of the first 104 weeks of disability for the purposes of § 31-349 leads us to conclude that the proper disability period was continuous in this case and, therefore, went uninterrupted from the date of the injury, November 6, 1986, through the 104 weeks, and expired in November, 1988.[10] In light of that conclusion, to file its transfer notice in a timely manner, White Oak would have had to file notice ninety days prior to the November date, sometime in August, 1988. The commissioner's findings reveal that White Oak perfected notice on December 14, 1994. We conclude that this filing was untimely and, as a result, the commissioner improperly transferred liability for Gillis' 1986 injury to the fund.[11]

We conclude the conclusions drawn by the commissioner in this case resulted from unreasonable inferences drawn from the facts found. We reverse the board's affirmance of the commissioner's decision that notice to the fund was timely and that liability for the November 6, 1986 injury should transfer to the fund.

The decision of the workers' compensation review board is reversed and the matter is remanded with direction to reverse the commissioner's decision to transfer liability to the second injury fund.

In this opinion FOTI, J., concurred.

[1] General Statutes (Rev. to 1985) § 31-349, as amended by Public Acts 1986, No. 86-31, provides in relevant part: "(a) The fact that an employee has suffered previous disability, or received compensation therefor, shall not preclude him from compensation for a later injury, nor preclude compensation for death resulting therefrom. If an employee who has previously incurred, by accidental injury, disease or congenital causes, total or partial loss of, or loss of use of, one hand, one arm, one foot or one eye, or who has other permanent physical impairment, incurs a second disability by accident or disease arising out of and in the course of his employment, resulting in a permanent disability caused by both conditions which is materially and substantially greater than that which would have resulted from the second injury alone, he shall receive compensation for the entire amount of disability, including total disability, less any compensation benefits payable or paid with respect to the previous disability, and necessary medical care, as elsewhere provided in this chapter, notwithstanding the fact that part of such disability was due to prior accidental injury, disease or congenital causes. The employer by whom the employee is employed at the time of the injury, or his insurance carrier, shall in the first instance pay all awards of compensation and all medical expenses provided by this chapter for the first one hundred four weeks of disability. As a condition precedent to the liability of the second injury fund, the employer or his insurance carrier shall, ninety days prior to the expiration of the one-hundred-four-week period, notify the custodian of the second injury fund of the pending case and shall furnish to said custodian a copy of the agreement or award together with all information purporting to support his claim as to the liability of the second injury fund, and shall make available to the custodian all medical reports as the custodian shall desire. Failure on the part of the employer or the carrier to comply does not relieve the employer

or carrier of its obligation to continue furnishing benefits under the provisions of this chapter. . . .''

''We look to the statute in effect at the date of injury to determine the rights and obligations between the parties. See *Civardi* v. *Norwich*, 231 Conn. 287, 293 n.8, 649 A.2d 523 (1994); *Iacomacci* v. *Trumbull*, 209 Conn. 219, 222, 550 A.2d 640 (1988). This rule applies to the employer's right to transfer liability to the fund pursuant to § 31-349. See *Plesz* v. *United Technologies Corp.*, 174 Conn. 181, 186–87 and n.2, 384 A.2d 363 (1978).'' *Dos Santos* v. *F.D. Rich Construction Co.*, 233 Conn. 14, 15–16 n.1, 658 A.2d 83 (1995).

[2] The fund also claims that the board improperly affirmed the commissioner's decision as to the extent of the fund's liability in this case. We do not reach that issue, however, because we agree with the fund that White Oak's notice was not timely. Because the notice was not timely, we conclude that the fund is not liable for the compensation and, therefore, we need not address the extent of any such liability.

[3] Gillis underwent a total knee replacement in September, 1998.

[4] We note that White Oak argues we may consider only the commissioner's findings in the June 24, 1999, finding and award because the fund never filed a motion to correct seeking to incorporate any or all of the October 4, 1994 findings into the June 24, 1999 decision. Although the fund rebuts that contention, we conclude that we need not address that issue because the June 24, 1999 finding and award, by itself, provides the findings necessary for our resolution of the fund's claim. Although the dissent states that we fail to analyze the issue of the motion to correct and fail to explain why we do not decide that issue, the preceding text provides ample explanation as to why we need not address White Oak's contention.

[5] We note that the fund makes the same argument for an even earlier period of time, namely, January 27, 1987, on the basis of the findings in the commissioner's October 4, 1994 finding and award that we previously discussed. We do not address that argument, however, based on our reasoning in footnote 4. Despite footnote 4, the dissent asserts that it was necessary for the fund to file a motion to correct because without it, the fund essentially is seeking to litigate issues of fact for the first time on appeal. We disagree. The fund does not seek to litigate facts, but rather challenges the commissioner's conclusion on the basis of the facts that were found. Although the fund did assert an argument that relied on the October 4, 1994 finding and award, the fund also asserted the same argument with regard to findings stated only in the June 24, 1999 finding and award. In essence, the fund has argued on appeal that even if we do not look at the findings from 1994 and focus only on the 1999 decision, the facts found, which are unchallenged, do not support the commissioner's conclusion. The fund, therefore, has accepted those findings and levied an attack on the commissioner's conclusion. As previously stated, we base our decision on only the June 24, 1999 finding and award, as that is all that is necessary for the resolution of this appeal.

[6] We note that although the commissioner's use of the term ''full duty'' indicates that he may have based his decision about Gillis' disabled status on Gillis' employment record, we need not discuss that implication because our decision relies on other findings.

[7] Although the dissent asserts that there is no analysis as to how the commissioner's findings are inconsistent with the medical evidence, it is not our role to review the evidence that was presented to the commissioner in this case. As the dissent itself notes, we must defer to the commissioner's decision to believe or to disbelieve the evidence on which findings of fact rest. Although the dissent goes into great detail in reviewing the evidence presented in this case, we believe that such review is not appropriate because we are not the fact finder. Rather, we must confine ourselves to the facts as found by the commissioner on the basis of his hearing of the evidence. Furthermore, to the extent that the dissent suggests that we do not analyze how the commissioner's findings themselves are inconsistent, the present discussion, in addition to what follows, provides a clear analysis.

[8] Although the dissent argues that the evidence supported the commissioner's conclusion, the dissent goes outside of the commissioner's findings and conducts an independent review of the evidence presented to the commissioner. Although some of what the dissent reviews was incorporated into the commissioner's findings, it is not our role to make our own determination as to the evidence presented to the commissioner. In reviewing the evidence, the dissent, in essence, makes its own findings of fact that support the commissioner's conclusion. Moreover, we believe the dissent's evidentiary

review on the degree of seriousness of the 1986 injury is not relevant to the analysis because the correct focus is on the commissioner's findings relevant to 1987 and beyond, after the commissioner determined that Gillis had recovered.

[9] We note that our decision here differs in analysis and reasoning from both of the arguments asserted by the fund and that we do not reach our decision under either of the fund's specific arguments. Rather, our conclusion that Gillis continuously was impaired from the date of the second injury relies on the conjoined effect of both of the fund's arguments about the date of injury and the assignment of a permanent disability rating. We further note that our decision does not create a per se rule that the assignment of a permanent disability rating renders the assignee of that condition continuously disabled ad infinitum. As the dissent contemplates, corrective surgery, time or the body's natural ability to mend itself may allow a person to recover fully from an injury even after having been assigned a permanent disability rating. Those factors, however, are not relevant under the facts of this case.

[10] We note that we need not deal with precise dates because White Oak's filing date is so far beyond the end of the 104 week period that a discussion that utilizes months and years yields adequate accuracy.

[11] On the basis of the complexity of Gillis' injury record in this case and the multiple hearings held, we note that although we have analyzed the fund's claim using the June 24, 1999 finding that Gillis had reached maximum medical recovery on October 14, 1992, we also consider another possibility with regard to the fund's claim. In so doing, we note that the commissioner's October 4, 1994 decision found that with regard to the second injury, Gillis had reached maximum medical improvement on January 27, 1987, and, as a result of the 1986 injury, was left with a 25 percent permanent partial disability. The commissioner also found, in paragraph F of his 1994 findings, which discussed the third injury in 1992, that Gillis had reached maximum medical improvement on October 14, 1992. We further note that in his 1994 final award, the commissioner made reference to White Oak's liability for the time period of 1986 and 1987, but referred to October 14, 1992, as the date of maximum medical improvement.

On the basis of the potential ambiguity with regard to the maximum improvement for each injury in the commissioner's 1994 finding and award, we note two possibilities with regard to the commissioner's 1999 findings, which relied on the 1994 findings. First, the commissioner, in 1999, determined that Gillis had reached maximum medical improvement for his 1986 injury nearly six years later. Or, the commissioner, in his 1999 finding, confused the date of maximum medical improvement for Gillis' 1992 injury with the date of maximum medical improvement for the second injury in 1986.

We note, however, without deciding, that even if that error occurred, it would not change our decision in this case because the commissioner's decision in 1999 as to Gillis' disability period still is inconsistent with the facts. Specifically, we note that if Gillis was found to have maximum medical improvement from the second injury on January 27, 1987, and was assigned a permanent disability rating on that date, then that assignment of permanent disability is inconsistent with the commissioner's 1999 finding that Gillis had completely recovered from his 1986 injury and no longer was impaired as of March 1, 1987. In other words, the finding of no impairment on March 1, 1987, is irreconcilable with the prior January 27, 1987, assignment of the permanent disability rating. Under those circumstances, we note that Gillis would be impaired, as he healed, from the date of the second injury to the date of maximum medical improvement on January 27, 1987, and that after that date, he would be deemed impaired because he had received a 25 percent permanent disability. Therefore, he would have been continuously disabled under those circumstances from the date of his second injury.