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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. In no event will any such motions be accepted before the ''officially released'' date.

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FLYNN, J., dissenting. I respectfully dissent from the result reached by the majority for several reasons and would affirm the decision of the worker's compensation review board.

First, the majority does not contend that there was no medical evidence to support the trial commissioner's findings. There was such substantial evidence. Under our standard of appellate review, the commissioner's factual findings should stand where supported by substantial evidence. See *Thompson* v. *Roach*, 52 Conn. App. 819, 824, 728 A.2d 524, cert. denied, 249 Conn. 911, 733 A.2d 227 (1999).

Second, not only did the second injury fund (fund) never make any effort to submit proposed draft findings to the commissioner, but because it made no motion to correct the commissioner's findings, under long established precedent from our Supreme Court, the commissioner's findings must stand. *Mack* v. *Blake Drug Co.*, 152 Conn. 523, 525, 209 A.2d 173 (1965).

Finally, in light of the substantial evidence supporting and consistent with the commissioner's decision, coupled with the fund's failure to file a motion to correct findings it claimed were inconsistent, I disagree with the majority's contention that the commissioner's June 24, 1999 decision resulted from inferences unreasonably drawn from the facts found.

Our workers' compensation law permits a commissioner to find that a worker may be temporarily totally disabled or partially permanently disabled by a second injury without concluding by necessity that the impairment or physical limitations must have been continuous, simply because after suffering a third injury and reaching maximum medical improvement the commissioner finds that the permanency found after that third injury was due in part to the second injury and an earlier first injury.

I begin by setting forth some factual background.The plaintiff, Richard Gillis, suffered three successive work related injuries to his right knee while working for three successive employers, the last two of which increased the partial permanent disability of the first. See *Gillis* v. *White Oak Corp.*, 49 Conn. App. 630, 635 n.10, 716 A.2d 115, cert. denied, 247 Conn. 919, 722 A.2d 806 (1998).

The first of the injuries occurred on July 7, 1981, the second on November 6, 1986, and the third on April 20, 1992.

This case is before us because General Statutes (Rev. to 1985) § 31-349 (b), as amended by Public Acts 1986, No. 86-31, requires that "as a condition precedent to an employer's transfer of liability to the [second injury]

fund for an employee's permanent disability, the employer must furnish notice of intent to transfer to the custodian of the fund ninety days prior to the expiration of the first 104 weeks of a claimant's disability. *Vaillancourt* v. *New Britain Machine/Litton*, 224 Conn. 382, 393, 618 A.2d 1340 (1993).'' *Karutz* v. *Feinstein & Herman P.C.*, 59 Conn. App. 565, 568, 757 A.2d 680, cert. denied, 254 Conn. 949, 762 A.2d 901 (2000).

The fund asserts that the December 16, 1994 notice from the second employer, White Oak, to the fund was untimely because, in the fund's view, the December 14, 1994 notice of intent to transfer liability to the fund was given more than one year and nine months after the injury and therefore was not in compliance with the pertinent statute in effect. In the fund's view, the 1999 decision of the commissioner was, thus, illegal, unreasonable and illogical in its application of the facts to the law because he found that the plaintiff was disabled from November 7, 1986, to March 1, 1987, and was not disabled again until October 14, 1992.

In reversing the board's determination that the commissioner correctly determined that the notice to the fund was timely, the majority specifically relies on the commissioner's finding that on the date of maximum medical improvement, October 14, 1992, the plaintiff had a ''permanent partial impairment of 23.17 percent . . . .'' From this, despite substantial medical evidence in the record to the contrary, the majority makes the illogical leap that, ''at a minimum, [the plaintiff] 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.'' The majority then concludes that the ''first 104 weeks of disability [less 90 days]'' in which to notify the fund ran continuously from the November 6, 1986 time of injury, not intermittently as the commissioner and board had concluded.

In his June 24, 1999 decision, the commissioner specifically stated that ''upon all the evidence'' before him, ''I am satisfied, conclude and find that:

* * *

''C) The Claimant's first 104 weeks of disability as documented by the medical record runs through to April 20, 1999 as follows:

''Temporary total disability from November 6, 1986 through March 1, 1987 (16 3/7 weeks)

''Permanent partial disability from October 14, 1992 through November 5, 1993, (55 3/7 weeks)

''Temporary total disability from September 8, 1998 through April 20, 1999 (32 1/7 weeks)

''D) For the period 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).''

In reaching its conclusion that the commissioner improperly made those findings, the majority states: ''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 this inconsistency, we conclude that the commissioner's decision in this case resulted from an unreasonable inference from the facts found.''

I find no analysis or reference in the majority opinion as to how any piece of medical evidence is inconsistent with the commissioner's findings that Gillis was unimpaired for a period of time after March 1, 1987. I thus dissent from that conclusion.

My review and analysis of the actual evidence before the commissioner shows that there was, in fact, substantial evidence supporting both the commissioner's finding of a period of no disability and the board's affirmance of that finding and refusal to retry the facts. Numerous medical reports in evidence agree that prior to all of his injuries, the plaintiff suffered from degenerative arthritis of both knees. Dr. Robert L. Fisher, the commissioner's examining physician, stated in a July 8, 1993 report that was in evidence: ''I feel the injury in 1986 clearly was a temporary aggravation of obviously severe pre-existing problems. I would not attribute any permanent disability to the injury of 1986.''[1]

Fisher's evidence that the 1986 injury caused only *temporary aggravation* of the knee condition and caused *no* permanent disability to the plaintiff was substantial evidence supporting a finding that the plaintiff was not continuously disabled.

''Judicial review of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Substantial evidence exists if the administrative record affords a substantial basis of fact from which the fact in issue can be reasonably inferred.'' (Internal quotation marks omitted.) *Schallenkamp* v. *DelPonte*, 229 Conn. 31, 40, 639 A.2d 1018 (1994).

''In determining whether an administrative finding is supported by substantial evidence, a court must defer to the agency's assessment of the credibility of the witnesses and to the agency's right to believe or disbe-

lieve the evidence presented by any witness . . . in whole or in part.'' (Internal quotation marks omitted.) *Bancroft* v. *Commissioner of Motor Vehicles*, 48 Conn. App. 391, 400, 710 A.2d 807, cert. denied, 245 Conn. 917, 717 A.2d 234 (1998).

Another physician, Dr. Glen Taylor, a specialist in orthopedics who treated the plaintiff, stated in a September 16, 1991 report that ''I do not think the injury of November of 1986 to his right knee was significant. I see no mention of it in my history about one month later and at that time recommended arthroscopy based upon worsening degenerative changes within his knee.'' This evidence from the plaintiff's own treating physician, finding the 1986 injury ''not significant,'' affords a substantial basis of fact from which the intermittency of disability can be reasonably inferred.

Finally, and perhaps most telling, a late May 18, 1997 report from Taylor, also in evidence, states that Gillis' injuries after 1981 were ''minor'' and ''did not cause any dramatic deterioration of his knee *but rather with time contributed to further deterioration*.'' (Emphasis added.) This is another piece of substantial evidence affording a basis in fact from which the commissioner could have inferred that the disability arising out of the ''minor'' 1986 injury was not continuous from the date of the 1986 injury.

Furthermore, the majority cites no medical evidence in the record to rebut the commissioner's finding that for the periods from March 1, 1987, through October 13, 1992, and from November 6, 1993, through December 14, 1994, there was ''no evidence of medical or physical limitations or impairments attributable to the November, 1986 injury . . . .''

The commissioner's holding that the disability was not continuous was consistent with the substantial body of medical evidence before the tribunal.

I next turn to the failure of the majority to analyze, decide, or give any explanation for failing to decide a second issue distinctly raised by the defendant employer, White Oak. In its brief, White Oak states: ''[A]t no time during these proceedings has the [fund] filed a motion to correct in accordance with Administrative Regulation § 31-301-4.''[2] Our Supreme Court long has recognized that where the findings and conclusions of a trial commissioner have not been attacked by way of a motion to correct, such findings and conclusions must stand. *Mack* v. *Blake Drug Co.*, supra, 152 Conn. 525; see also *Vanzant* v. *Hall*, 219 Conn. 674, 679, 594 A.2d 967 (1991).[3] A principal treatise, which has been cited as authority more than twenty-five times in the last twenty-five years by our Supreme Court and this court, puts the matter this way: ''If the appeal is premised upon or includes a claim that the originating commissioner's finding of facts was incorrect, then in

addition to the petition to review [by the board], one must also file a motion to correct the findings.'' J. Asselin, Connecticut Workers' Compensation Practice Manual (1985) p. 261.

The compensation review board, in reviewing the commissioner's decision, noted that ''in its trial brief filed with the commissioner, the fund made no specific arguments or proposed findings regarding the dates of the claimant's disability for the purposes of determining the 104 weeks'' and further found that the fund's arguments on appeal were ''an unreasonable attempt to litigate an issue which it chose not to litigate before the trial commissioner.'' In its decision, the board stated:

''The trial commissioner specifically found that for the period from March 1, 1987 through October 13, 1992 and November 6, 1993 through December 14, 1994, there was '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).' . . . Apparently, (it is not explained in its brief) the fund in its appeal has chosen the January 27, 1987 date based upon the trial commissioner's finding in his October 4, 1994 decision that Dr. Taylor assessed a twenty-five percent permanent partial disability of the claimant's right knee on January 27, 1987.

''The fund conveniently overlooks, however, that in the October 4, 1994 decision, the trial commissioner awarded all permanent partial disability benefits based upon an October 14, 1992 date of maximum medical improvement. In the instant case, the trial commissioner, in his October 4, 1994 decision, chose to rely upon the October 14, 1992 date of maximum medical improvement as the date of the claimant's permanent partial disability. This was a factual determination for the trial commissioner to make, and we will not allow the fund to retry the facts before this board, especially where it has not filed a motion to correct.''

The fund's failure to request factual findings from the commissioner, or to request that he correct the findings he actually made, does not permit the fund to litigate these findings for the first time on appeal to this court. Nor can we upset a commissioner's factual findings in the face of substantial evidence supporting them.

Because both the plaintiff's treating orthopedic physician and the commissioner's examining physician found the second injury to be slight, contributing to the impairment only after the passage of time, the commissioner had substantial evidence in the record before him supporting the finding of intermittency in the impairment of the plaintiff.

It is an axiom of our administrative law needing no citation that the scope of judicial review of the rulings

of an administrative agency is limited and that administrative remedies must first be exhausted before looking to the courts for relief. A litigant cannot look to the appellate process as a de novo opportunity to litigate matters not raised below.

That principle is applicable here where the administrative process permits a litigant such as the fund both to request particular findings and after a decision is made to move to correct factual findings. Here, the fund did neither.

Where the fund had administrative remedies which it did not use, much less exhaust, I disagree that we should permit it to bypass those remedies and resort to direct appeal to the courts. To permit it to do so flies in the face of the well established purposes of the doctrine of exhaustion of administrative remedies: (1) to effect legislative intent that matters be handled by the administrative agency statutorily charged with them where it is possible to obtain relief there; (2) to foster an orderly process of administrative adjudication and judicial review, offering a reviewing court the benefit of the agency's findings and conclusions, thus relieving courts of the burden of prematurely deciding questions that, entrusted to an agency, may receive a satisfactory administrative disposition and avoid the need for judicial review; and (3) to ensure the integrity of the agency's role in administering its statutory responsibilities. See *Hartford v. Hartford Municipal Employees Assn.*, 259 Conn. 251, 281–82, 788 A.2d 60 (2002).

Finally, I address the majority's contention that the commissioner's decision resulted from inferences unreasonably drawn from facts found, which it links to the commissioner's findings that no evidence existed of medical or physical limitations or impairments attributable to the November, 1986 injury during certain time periods. It takes issue with the commissioner's finding that "[t]here is no evidence of medical or physical limitations or impairments attributable to the November, 1986 injury" "for the period[s] from March 1, 1987 through October 13, 1992, and November 6, 1993 through December 14, 1994, the date when notice was perfected . . . ."

It is again worth noting that neither the fund, nor the majority, points us to *any evidence* of medical or physical limitations or impairments during those time periods in which the commissioner found no evidence.

The majority does recognize that "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." I take issue with the claimed inconsistency the majority finds in paragraph five of the findings. That finding states:

"5) The Claimant was found to have reached maximum medical improvement as of October 14, 1992 with a total overall entitlement to a permanent impairment of 23.17 percent, fifty-five and three sevenths (55 3/7) weeks as a result of the November 6, 1986 injury."

I disagree with the majority's conclusion that "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."

The majority fails to appreciate the significance of the fact that our statutory workers' compensation system contemplates injuries that may be only temporarily totally disabling. See General Statutes § 31-295 (a). Finding number five was made as of an October 14, 1992 date of maximum improvement after the plaintiff had suffered a third injury on April 20, 1992. The majority cites no authority for the proposition that once a partial permanent disability rating is established, it must be continuously disabling even if there was surgical amelioration and no further medical evidence of impairment or disability for a long period of time after the injury, or where only with the passage of time the injury contributed to deterioration of the previously arthritic knee resulting ultimately in a partial permanent disability. I find no logic in the majority's premise precisely because competent medical evidence before the commissioner from the treating physician, Taylor, indicates no continuous impairment from what originally was viewed as a minor injury to a brittle plaintiff suffering from preexisting degenerative arthritis unrelated to any of his work injuries.

I would affirm the conclusions of the compensation review board. It affirmed the commissioner's ruling that the notice was timely. It observed that the fund had failed to make an adequate record before the commissioner, and failed to use the administrative remedies it had to request draft findings or to move to correct the commissioner's findings, which administrative regulations and our case law both permitted and obligated it to do. Under those circumstances, the board stated that it would not retry the facts. Nor should we.

I respectfully dissent.

[1] Fisher also reported: "I think this man should proceed with a total knee replacement. I think the need for this replacement is related to the preexisting degenerative change in his knee, which undoubtedly would have progressed over the last fifteen years with or without the above injuries and required a replacement with or without those injuries. Regardless of whether this man elects to proceed with a total knee replacement, I think he should give up construction work and find some more sedentary type of occupation. I have not seen X rays of his left knee, but apparently he also has significant degenerative arthritis in this knee as well."

[2] Section 31-301-4 of the Regulations of Connecticut State Agencies, entitled "Correction of finding," provides: "If the appellant desires to have the finding of the commissioner corrected he must, within two weeks after such finding has been filed, unless the time is extended for cause by the

commissioner, file with the commissioner his motion for the correction of the finding and with it such portions of the evidence as he deems relevant and material to the corrections asked for, certified by the stenographer who took it, but if the appellant claims that substantially all the evidence is relevant and material to the corrections sought, he may file all of it so certified, indicating in his motion so far as possible the portion applicable to each correction sought. The commissioner shall forthwith, upon the filing of the motion and of the transcript of the evidence, give notice to the adverse party or parties.''

[3] The *Vanzant* court stated: ''A motion to correct the commissioner's finding, as provided in § 31-301-4 of the Regulations of Connecticut State Agencies, is the proper vehicle to be used when an appellant claims that the commissioner's finding is incorrect or incomplete. We have long held that this motion is not merely a technical requirement and that the failure to file this motion justifies dismissal of an appeal, for if an appellant claims that the finding is incorrect, the matter should first be called to the attention of the commissioner that he may have an opportunity to supply omitted facts or restate findings in view of the claims made in the motion.'' (Internal quotation marks omitted.) *Vanzant* v. *Hall*, supra, 219 Conn. 679.