MOTIONS TO PRECLUDE

By David C. Leard

I. Historical Background and Precedent

Conn. Gen. Stat. sec 31-294c(b): "an employer who fails to contest liability for an alleged injury or death on or before the twenty-eighth day after receiving a written notice of claim and who fails to commence payment for the alleged injury or death on or before such twenty-eighth day, shall be conclusively presumed to have accepted the compensability of the alleged injury or death."

Over the years, this had been interpreted as analogous to a default motion in civil court. In other words, once the motion was granted, compensability (liability) was conclusively established; however, the extent of the claimant's disability (damages) still needed to be proved and was allowed to be contested by the respondent (hearing in damages).

Case Law

Menzies v. Fisher, 165 Conn. 338 (1973)
The seminal case on motions to preclude. A general denial is insufficient; respondent must give a specific reason for the denial of claim. "We deny a compensable accident or injury" is insufficient.

Adzima v. UAC Norden Division, 177 Conn. 107 (1979)
This case has sometimes been cited for the proposition that respondents can still contest the extent of disability even after preclusion is granted. In fact, the court stated exactly the opposite. The court held that the preclusion statute did not apply to a situation where a respondent has accepted compensability of a case.

Bush v. Quality Bakers of America, 2 Conn. App. 363, cert. denied 194 Conn. 804 (1984)
Upheld the constitutionality of the preclusion statute
Stated that the extent of disability cannot be contested once preclusion is granted, citing *Adzima*. Also stated that once preclusion is granted, the commissioner cannot make any further inquiry or finding regarding that issue.

Castro v. Viera, 207 Conn. 420 (1988)
Respondent can contest jurisdictional issues; a motion to preclude cannot preclude this. Employer-employee relationship is a jurisdictional issue which can be contested.

Ash v. New Milford, 207 Conn. 665 (1988)
Once a Commissioner finds statutory preclusion of any defense to compensability, the Commissioner is no longer permitted to make any factual exploration or finding concerning such

compensability. The employer's failure to contest liability forecloses any further inquiry.

Tovish v. Gerber Electronics, 19 Conn. App. 273 (1989), cert. denied, 212 Conn.814 (1989)
A Form 43 claiming that the injury "did not arise out of or in the course and scope of employment" was sufficiently specific; preclusion denied.

DeAlmeida v. M.C.M. Stamping Corp., 29 Conn. App. 441 (1992)
Causation of injuries does not have to be proven once preclusion is granted; causation does not implicate subject matter jurisdiction.

Pereira v. State, 228 Conn. 535 (1994)
Injury did not "arise out of or in the course of employment" is a sufficient denial to avoid preclusion. It challenges one of the essential elements of a workers compensation claim; it is not a general denial like *Menzies*. Dicta in a footnote: Strict compliance with the statute is not required of claimant in preparing a Form 30C.

Russell v. Mystic Seaport Museum, 252 Conn. 596 (2000)
Strict compliance not required in Form 30C, citing Pereira. Form 30C alleging repetitive trauma "prior to 9/23/94" deemed sufficient. Form 43's listing an injury date different than the date on the Form 30C were deemed insufficient to avoid preclusion.

Del Toro v. Stamford, 270 Conn. 532 (2004)
Post-traumatic stress syndrome, a purely mental injury that did not stem from a physical injury, is not a compensable injury under the act. Therefore, respondents were not precluded from contesting liability, as the commission lacks subject matter jurisdiction over this injury.

Grounds for Motion to Preclude: untimely disclaimer or insufficiently vague disclaimer

Defenses to Motion to Preclude: lack of subject matter jurisdiction due to: inadequate or untimely Form 30C, lack of employer-employee relationship, or injury not within the workers compensation act.

II. *Harpaz and Donahue*

In Harpaz v. Laidlaw Transit, Inc., 286 Conn. 102 (2008), the Connecticut Supreme Court held that when a motion to preclude is granted, a respondent is precluded from contesting both compensability and the extent of disability. The court determined that the statute, 31-294c, is ambiguous in regards to "extent of disability", and looked to the evolution of the statute over the years and the legislative history. The court stated that under the law prior to 1990, a respondent was precluded from contesting liability and the extent of disability. The court discussed the *Adzima* case among others. The court determined that the legislative changes in the early 1990s

did not intend to change that prior law.

However, as stated above, many practitioners believe that the prior law did allow respondents to contest the extent of disability. Thus, *Harpaz* was seen by many workers comp practitioners as a major change in the law.

In addition, the *Harpaz* court went on to say that even after the granting of a motion to preclude, the claimant still bears the burden of proving his case! The court discussed this in only one paragraph near the end of the decision. The court attempted to draw a distinction between the "employer" being conclusively presumed to have accepted compensability of injury versus an "injury" being conclusively presumed to be compensable.

This represents a major change in the law. A Motion to Preclude is no longer similar to a Motion for Default: now, liability still has to be proven, but the respondent cannot contest liability or damages.

Donahue v. Veridiem, Inc., 291 Conn. 537 (2009), determined procedures to be followed at a formal hearing post-*Harpaz*. The court held that once a motion to preclude is granted, the only role the respondent plays is "to decide whether to stipulate to the compensation claimed." The respondent specifically is not allowed to present evidence, to cross-examine the claimant's witnesses, or to submit a brief.

However, the *Donahue* court further held that while an employer is conclusively presumed to have accepted compensability of injury, the commission is not. The claimant still bears the burden of proof, and the trial Commissioner is entitled to question and discredit the claimant's evidence. The *Donahue* court in footnote 10 expressly failed to follow precedent leading to the opposite conclusion, including *Bush*, *Ash*, and possibly *Harpaz* itself! The formal hearing which results is now an inquisition by the Commissioner, rather than an adversarial proceeding. This is analogous to the current practice in social security disability claims.

Footnote 8 of *Donahue* leaves open a major issue for the future. In footnote 8, the court declined to reconsider the holding in *Harpaz*. In doing so, the court stated, inter alia, "the defendant gives an unduly expansive interpretation [to Harpaz] as barring an employer from contesting any subsequent claim for additional compensation." This begs the question: since a respondent is now precluded from contesting the extent of disability, how long does preclusion last?

III. Judicial Interpretation post-*Harpaz*

White v. Wal-Mart Stores, 5363CRB-2-08-7 (June 30, 2009)
IME must be totally disregarded in light of prior motion to preclude which was granted.

Sanchez v. Spec Personnel, 5487CRB-1-09-8 (August 18, 2010)
Found error in the admission of an IME and commissioner's exam report, as well as a

respondent's brief, after a motion to preclude had been granted.

Callender v. Reflexite Corp., 5504CRB-6-09-10 (October 8, 2010)
Multiple Form 30C's filed in a repetitive trauma claim. Held that later injuries arising from the same repetitive trauma do not require the filing of a second form 30C. Accordingly, motion to preclude denied even though no form 43 filed in response second form 30C.

Mehan v. Stamford, 127 Conn. App. 619 (2011), cert. denied 301 Conn. 911 (2011)
Claimant on his Form 30C did not fill in the injury section and did not sign it. Claimant gave it to his supervisor who filled in the injury section and signed it on the claimant's behalf. Held that strict compliance with 31-294c is not required of a claimant in filing a Form 30C, and so the Form 30C here was found sufficient. Appellate court also declined to consider respondent's due process claim in light of *Harpaz* and *Donahue*.

IV. Issues for the future

A. How long does preclusion last?

Footnote 8 in the *Donahue* case leaves open a huge issue for the future: once preclusion is granted, is the respondent ever entitled to contest the extent of disability at some time in the future? Footnote 8 itself implies that a respondent is entitled to contest a "subsequent claim for additional compensation." However, this is one sentence in a footnote which is dictum.

The *Adzima* court stated that a claim for permanent partial disability benefits "may not be translated into an initial claim for liability to which our holding in *Menzies v. Fisher* would apply." Id at 116. Recall, though, that the respondent in Adzima had accepted compensability of the initial claim.

In Sanchez v. Spec Personnel, *supra*, the issue at the formal hearing was permanent partial disability benefits. The permanency rating by the treating physician took place almost 2 years after the date of injury, and approximately 9 months after the granting of the motion to preclude. The respondent was held to be precluded from contesting the issue of permanency. Thus, the *Sanchez* decision implies that preclusion applies to issues that arise even after the date of granting the motion to preclude.

In White v. Walmart, *supra*, the CRB dealt with the issue of the compensability of a second surgery. The claim was initially found compensable by a motion to preclude in 2004. The original injury was in 2003, as was the first surgery. In 2006, the treating physician indicated that a second surgery was necessary and was related to the initial injury. The respondent obtained an IME which, it was argued, was favorable to the respondent. The CRB held that the IME must be disregarded. The CRB held that the respondent was precluded from challenging the validity of the claimant's evidence due to the motion to preclude from 2004. Thus, it appears that issues that arise approximately 2 years after the granting of a motion to preclude are still subject to preclusion.

B. Commissioners exams?

The commissioner's exam in the *Sanchez* case was disallowed because it relied in part on the inadmissible IME. However,the CRB in *Sanchez* specifically stated that, post-*Harpaz* and *Donahue*, the trial Commissioner retains broad powers including the power to order a commissioner's exam. Recall that *Harpaz* and *Donahue* allow a Commissioner to question the claimant and to make an ultimate determination of credibility. Thus, so long as the commissioner's exam does not rely on inadmissible evidence, the commissioner's exam still appears to be available per *Sanchez*. However, once a motion to preclude is granted, it would seem inappropriate for a respondent to request a commissioner's exam.

C. Strategies:

Respondents: tender VA?

Claimant: get % sooner?

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286 Conn. 102 (Conn. 2008)

942 A.2d 396

David HARPAZ

v.

LAIDLAW TRANSIT, INC., et al.[1]

No. 17844.

Supreme Court of Connecticut

March 18, 2008

Argued Nov. 28, 2007.

[942 A.2d 397] Philip F. Spillane, New Milford, for the appellant (plaintiff).

Erik S. Bartlett, for the appellees (defendants).

NORCOTT, KATZ, PALMER, VERTEFEUILLE and SCHALLER, Js.

OPINION

KATZ, J.

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The dispositive issue in this workers' compensation appeal is whether an employer that is deemed "conclusively presumed to have accepted the compensability of the alleged injury" under General Statutes § 31-294c (b) [2] because of its failure **[942 A.2d 398]** to contest liability or commence payment of compensation within the time

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period prescribed is permitted to contest the extent of the claimant's disability from that alleged injury. The plaintiff, David Harpaz, appeals from the decision of the workers' compensation review board (board) affirming the decision of the workers' compensation commissioner for the seventh district (commissioner) that dismissed the plaintiff's claim against the named defendant, Laidlaw Transit, Inc. [3] The plaintiff contends that the board improperly concluded that, although the defendant was barred from contesting the compensability of the plaintiff's alleged back injury, the defendant was not barred from contesting the compensability of the plaintiff's back surgeries because the conclusive presumption under § 31-294c (b) does not bar challenges to the extent of a claimant's disability. We conclude that the conclusive presumption of compensability under § 31-294c (b) bars challenges to the extent of the disability. Accordingly, we reverse the decision of the board.

The commissioner's decision reflects the following findings of fact and procedural history. On November 7, 2001, the plaintiff, who then was employed by the defendant as a bus driver, was involved in a motor vehicle accident while fulfilling the responsibilities of his job. The plaintiff did not seek medical treatment for the November, 2001 accident until June, 2002. On July 24, 2002, the plaintiff underwent the first of two surgeries on his lumbar spine. On October 31, 2002, the plaintiff filed a notice of claim alleging a back injury as a result of the November, 2001 accident. On March 15, 2003, the defendant filed a notice contesting the extent of the plaintiff's disability and his need for surgery.

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On May 15, 2003, the defendant filed another notice contesting the compensability of the alleged injuries. Thereafter, the plaintiff filed a motion to **[942 A.2d 399]** preclude the defendant from contesting compensability, pursuant to § 31-294c (b), which the commissioner granted on the ground that the defendant had filed its notices contesting liability more than twenty-eight days after the plaintiff filed his notice of claim. On March 23, 2004, the plaintiff underwent a second lumbar spine surgery.

Thereafter, at the hearing Before the commissioner, the plaintiff contended that the conclusive presumption barring the defendant from contesting compensability under § 31-294c (b) extended to all sequelae of his injury, whereas the defendant contended that the presumption did not prevent it from contesting the extent of the plaintiff's disability or need for surgery. [4] The commissioner concluded that the plaintiff "must establish a direct causal connection between his compensable injury and his need for surgery, notwithstanding [the defendant's] preclusion from contesting liability." The commissioner concluded that, issues of preclusion aside, the plaintiff had failed to establish this connection, crediting the opinion of Glenn Taylor, an orthopedic surgeon who had performed an independent examination of the plaintiff on behalf of the defendant. Accordingly, the commissioner dismissed the plaintiff's claim seeking to have his surgeries found compensable.[5]

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The plaintiff appealed from the commissioner's decision to the board, which affirmed the decision. The board

found the present case indistinguishable from its decision in *Tucker v. Connecticut Winpump, Inc.,* No. 4492, CRB-5-02-2 (February 21, 2003), wherein it had determined that an employer's failure to file a timely denial of liability for an employee's claim of lung injury for workplace exposure to chemicals did not preclude the employer from contesting whether the employee's chronic pulmonary obstructive disease had been caused by the exposure to chemicals. The board noted that, in *Tucker,* the case had "turned on whether the preclusion related to the inhalation of workplace chemicals served to bar evaluation of whatever ailments he claimed were sequelae of the compensable injury." The board explained that it had rejected that claim because of the distinction recognized in the statute and case law between the right to contest liability and the right to contest the extent of disability. The board further explained that its holding in *Tucker* had relied on the fact that "[§ 31-294c] was amended in 1993, removing language [that] limited the ability of [employers] to contest the extent of disability." See Public Acts 1993, No. 93-228, § 8. It rejected the plaintiff's contention that *Tucker* was inconsistent with the Appellate Court's decision in *DeAlmeida v. M.C.M. Stamping Corp.,* 29 Conn.App. 441, 615 A.2d 1066 (1992),

[942 A.2d 400] noting that *DeAlmeida* had predated the substantial revisions to § 31-294c in 1993. This appeal followed.

On appeal, the plaintiff contends that the 1993 amendment to § 31-294c (b) did not change the *effect* of the conclusive presumption, under which an employer is barred from contesting a claimant's right to compensation

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and the extent of his or her disability.[6] He points to the fact that the statute as amended in 1993 retained language referring to the extent of disability. In response, the defendant acknowledges that, under § 31-294c prior to the 1993 amendment, "an employer who did not timely contest compensability may have been precluded from contesting both liability and the extent of the claimant's disability." The defendant contends, however, that, under the 1993 amendment to § 31-294c, "it is clear that the legislature intentionally omitted the language from [the statute], which included the reference to contesting the extent of an employee's disability." We agree with the plaintiff.

Under our well established standard of review, "[w]e have recognized that [a]n agency's factual and discretionary determinations are to be accorded considerable weight by the courts.... 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.... We have determined, therefore, that . . . deference . . . to an agency's interpretation of a statutory

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term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation ...." (Internal quotation marks omitted.) *Pasquariello v. Stop & Shop Cos.,* 281 Conn. 656, 663, 916 A.2d 803 (2007).

Our appellate courts have not examined the conclusive presumption under § 31-294c (b) in relation to challenges to the extent of disability since the 1993 amendment that the board concluded was dispositive of the issue in the present case. Moreover, the board did not indicate that it had applied a time-tested interpretation of the statute since the 1993 amendment. "Accordingly, we do not defer to the board's construction and exercise plenary review in accordance with our well established rules of statutory construction." *Id.*

"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, including **[942 A.2d 401]** the question of whether the language actually does apply.... In seeking to determine that meaning, General Statutes § 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.... When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter ...." (Internal quotation marks omitted.) *Id.,* at 663-64, 916 A.2d 803.

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We begin with the text of § 31-294c (b). See footnote 2 of this opinion for the full text of the statute. Although the parties rely on either the inclusion or omission of the phrase "extent of his disability" in different parts of the statute, it is useful first to view these parts within their context of the statute as a whole. See *Maritime Ventures, LLC v. Norwalk,* 277 Conn. 800, 826-27, 894 A.2d 946 (2006). The first two sentences of § 31-294c (b) address the procedure that an employer must follow if it wants to contest "liability to pay compensation ...." The statute prescribes therein that, within twenty-eight days of receiving a notice of claim, the employer must file a

notice stating that it contests the claimant's right to compensation and setting forth the specific ground on which compensation is contested. The third sentence: (1) provides that an employer who fails to file a timely notice contesting liability must commence payment of compensation for the alleged injury within that same twenty-eight day period; and (2) grants the employer who timely commences payment a one year period in which to "contest the employee's right to receive compensation

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on any grounds *or the extent of his disability* "; but (3) relieves the employer of the obligation to commence payment within the twenty-eight day period if the notice of claim does not, inter alia, include a warning that "the employer shall be conclusively presumed to have accepted the compensability of the alleged injury or death unless the employer either files a notice contesting liability on or Before the twenty-eighth day after receiving a written notice of claim or commences payment for the alleged injury or death on or Before such twenty-eighth day." (Emphasis added.) General Statutes § 31-294c (b). The fourth sentence provides for reimbursement to an employer who timely pays and thereafter prevails in contesting compensability. Finally, the fifth sentence sets forth the consequences to an employer who neither

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timely pays nor timely contests liability: "Notwithstanding the provisions of this subsection, an employer who fails to contest liability for an alleged injury or death on or Before the twenty-eighth day after receiving a written notice of claim and who fails to commence payment for the alleged injury or death on or Before such twenty-eighth day, *shall be conclusively presumed to have accepted the compensability of the alleged injury or death.*" (Emphasis added.) General Statutes § 31-294c (b).

The plaintiff relies on the language in the third sentence of § 31-294c (b) addressing "the extent of . . . disability" as evidence that, contrary to the board's decision, the 1993 amendment did not change the limitation on an employer's right to contest the extent of disability. The defendant, on the other hand, relies on the omission of any language in the last sentence of the statute expressly barring the right to contest the extent of disability.

[942 A.2d 402] We conclude that the text of § 31-294c (b) does not yield a plain meaning as to the issue in this appeal for reasons beyond those raised by the parties and considered by the board. On the one hand, the fifth sentence mandating the conclusive presumption of compensability does not provide expressly that this presumption bars challenges to the extent of disability. In addition, the third sentence relieves the employer of its obligation to commence payment if the employee's notice of claim does not warn the employer that it "shall be conclusively presumed to have accepted the compensability of the alleged injury or death" if it fails to pay or contest liability within the prescribed period; General Statutes § 31-294c (b); but does not require the warning to state that the employer will be barred from contesting the extent of disability. These omissions would suggest that an employer is not barred from doing so.

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On the other hand, however, the third sentence of the statute expressly preserves the employer's right to contest the extent of disability, up to one year, only *if* it timely commences payment. The limited preservation of that right raises the question of whether, by negative implication, an employer who fails to preserve that right by its timely payment of compensation (or who fails timely to contest the claim) is barred from asserting such a defense. In other words, although the fifth sentence of § 31-294c (b) providing the conclusive presumption of compensability does not forbid challenges to the extent of disability, one has to question why the legislature would have preserved expressly and for a limited period of time the right of an employer who timely pays compensation to contest the extent of an employee's disability and yet would have placed no limit on the right of an employer who fails to pay compensation in compliance with the statute to raise such a defense. Finally, we note that the statute varyingly refers to "liability" and "compensability," without a clear indication whether the terms are used synonymously or have a different meaning. See *Hasselt v. Lufthansa German Airlines,* 262 Conn. 416, 426, 815 A.2d 94 (2003) (" '[t]he use of the different terms . . . within the same statute suggests that the legislature acted with complete awareness of their different meanings . . . and that it intended the terms to have different meanings' "). Accordingly, the statute yields no plain meaning, and we turn to the genealogy and legislative history of § 31-294c (b) to answer the issue raised in this appeal.[7]

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The genesis of the conclusive presumption is Public Acts 1967, No. 842, § 7. Prior to that public act, General Statutes (Rev. to 1967) § 31-297 set forth essentially the same procedure that an employer must follow if it wants to contest liability as do the first two sentences of the current version of § 31-294c (b). Section 31-297, however, prescribed no consequences for employers' untimely disclaimer of liability, and workers' compensation commissioners had taken varied approaches to that issue. See *Menzies v. Fisher,* 165 Conn. 338, 343, 334 A.2d 452 (1973). The 1967 public act addressed that issue by adding the following sentence: "If the employer or his legal representative fails to file the

notice contesting liability within the time prescribed herein, the employer shall be conclusively presumed to have accepted the compensability of such alleged injury or death and **[942 A.2d 403]** shall have no right thereafter to contest the employee's right to receive compensation [8] on any grounds or the extent of his disability." Public Acts 1967, No. 842, § 7.

In this court's first opinion addressing the conclusive presumption, *Menzies v. Fisher,* supra, 165 Conn. at 342-43, 334 A.2d 452, the court explained: "The statutory changes which are of concern to us here were in one small section of a rather substantial piece of legislation, Public Acts 1967, No. 842. By this [public] act the legislature sought to correct some of the glaring inequities and inadequacies of the Workmen's Compensation Act. Among the defects in previous provisions of the [Workmen's Compensation Act] were the needless, prejudicial delays in

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the proceedings Before the commissioners, delays by employers or insurers in the payment of benefits, lack of knowledge on the part of employees that they were entitled to benefits and the general inequality of resources available to claimants with bona fide claims. See 12 H.R. Proc., Pt. 9, 1967 Sess., pp. 4035-37. When the amendment was proposed for passage, the member of the committee presenting the bill (1967 Sess., H.B. 2161) stated: 'The present law requires employers to give notice of intention to contest within [twenty] days after notice of injury. The commissioners are not in agreement as to what the results are when the employer fails to give the required notice, or where the notice involved does not comply with the law. Some hold, in effect, that there is no penalty, while others hold there is no right to contest liability, but the extent of injury may still be contested. This section clears up the situation. It provides that within [twenty] days after written notice of claim is made, the employer must file a statement of intention to contest and the basis upon which he will contest. *If he fails to file this notice within the time stated or the notice is defective, the employer cannot thereafter contest either liability or extent of liability.* This will mean that employers will now have to reinvestigate claims promptly and act quickly; it also means that employees will be able to learn early in the proceedings what the defects are, if any, in their claims.' 12 H.R. Proc., Pt. 9, 1967 Sess., p. 4036." (Emphasis added.)

In *Adzima v. UAC/Norden Division,* 177 Conn. 107, 108-109, 411 A.2d 924 (1979), this court concluded that the conclusive presumption did not bar an employer who timely had paid all benefits due under the initial claim from contesting a subsequent claim for additional benefits. [9]

[942 A.2d 404] Specifically, the court framed the issue as

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whether "to extend the 'conclusive preclusion of defense' provision of [then § 31-297 (b)] beyond situations where an employer contests its initial liability to pay compensation, to a situation such as the present case, where the employer disputes only the extent of the [claimant's] disability." *Id.,* at 113, 411 A.2d 924. The court concluded that "a claim for [permanent] disability, resulting from partial incapacity, under [General Statutes (Rev. to 1971)] § 31-308 (m) may not be translated into an initial claim for liability to which our holding in *Menzies* . . . would apply." *Id.,* at 116, 411 A.2d 924. The court noted: "The statute clearly speaks to a threshold failure on the employer's part to contest 'liability': to claim, for example, that the injury did not arise out of and in the course of employment . . . [or] that the injury fell within an exception to the coverage provided by workmen's compensation .... *If there is such a failure to contest, both liability, and any substantive claim as to the extent of disability, are precluded.*" (Citations omitted; emphasis added.) *Id.,* at 113-14, 411 A.2d 924.

Thereafter, in *DeAlmeida v. M.C.M. Stamping Corp.,* supra, 29 Conn.App. at 441, 615 A.2d 1066, the Appellate Court considered the application of the conclusive presumption to an employer that, like in the present case, had failed to file a timely notice contesting liability or to commence

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timely payment of compensation.[10] The court affirmed the board's decision concluding that the conclusive presumption barred the defendant employer from challenging the causal relationship between the plaintiff's employment and his claim for compensation for low back strain syndrome and degenerative disc disease. *Id.,* at 443-46, 615 A.2d 1066. The Appellate Court reasoned: "[The workers' compensation] statutes compromise an employee's right to a common law tort action for work related injuries in return for relatively quick and certain compensation.... Thus, in order to meet the legislative purpose of creating a quick vehicle for the recovery by the claimant for work related injuries, time constraints as mandated by the statute are a critical method of ensuring that the purpose of the statute will be fulfilled." (Citations omitted; internal quotation marks omitted.) *Id.,* at 446, 615 A.2d 1066. The court noted that "[t]he language of § 31-297 (b) is absolute in its terms.... The [board] correctly determined that where a motion for preclusion has been granted, the issue of causation is subject to it and is, thus, conclusively presumed." (Citations omitted.) *Id.,* at 448-49, 615 A.2d 1066.

These cases indicate that, under the revision of § 31-297 (b) as amended by the 1967 public act, an

employer could contest the claim from the outset or could contest the extent of disability if it timely paid all the benefits due under the initial claim. If, however, the employer was deemed

[942 A.2d 405] "conclusively presumed to have accepted the compensability of [the] alleged injury"; Public Acts 1967, No. 842, § 7; the employer was barred from

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asserting *all* nonjurisdictional defenses, [11] including those that might bear on the extent of the employee's disability. See also *Ash v. New Milford,* 207 Conn. 665, 673, 541 A.2d 1233 (1988) ("[O]nce the commissioner found statutory preclusion of any defense to compensability, he was no longer permitted to make any factual exploration or finding concerning such a potential question. [The employer's] threshold failure to contest liability foreclosed any further inquiry [not involving jurisdiction of the Workers' Compensation Act]." [Internal quotation marks omitted.]); *Castro v. Viera,* 207 Conn. 420, 431, 541 A.2d 1216 (1988) (referring to " 'conclusive preclusion of defense' provision of [§ 31-297 (b)]"). We therefore turn to the post-1967 amendments to the statute.

In 1990, the legislature added the following proviso to the preclusion of defense language in § 31-297 (b): "If the employer or his legal representative fails to file the notice contesting liability within the time prescribed herein, [12] the employer shall be conclusively presumed to have accepted the compensability of such alleged injury or death and shall have no right thereafter to contest the employee's right to receive compensation on any grounds or the extent of his disability, *provided the employer shall not be conclusively presumed to have accepted compensability when the written notice of claim has not been properly served in accordance with* [*General Statutes §*] *31-321 or when the written notice of claim fails to include a warning that the employer shall be precluded from contesting liability unless a notice contesting liability is filed within the time period set forth in this section.*" (Emphasis added.) Public Acts 1990, No. 90-116, § 9 (P.A. 90-116). This amendment is significant because it appears to be the genesis of the notice requirement in the third sentence of the current version of § 31-294c (b), under which an employer is relieved of the obligation to commence payment within the twenty-eight day period if the notice of claim is similarly deficient. Indeed, like the current statute, the proviso added by P.A. 90-116 relieved the employer of its obligations if the claimant's notice failed to include a warning regarding preclusion, but did not mandate that the warning state expressly that an effect of the presumption would be a bar on contesting the extent of disability. That consequence is clear, however, by virtue of the language expressly so providing that precedes the proviso. Accordingly, P.A. 90-116 did not affect the employer's inability to contest the extent **[942 A.2d 406]** of disability once the conclusive presumption attached. Rather, it provided that the presumption would not attach if, and only if, the employer failed to receive adequate notice from the claimant.

There is additional evidence that the legislature at this time considered the preclusion language to encompass a bar on contesting the extent of disability. The 1990 substitute bill originally reported out of committee had proposed to amend § 31-297 (a), the subsection setting forth the claimant's obligations, rather than to amend § 31-297 (b), the subsection setting forth the employer's obligations. See Substitute House Bill No.

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5099, § 5. That bill stated that the claimant's notice "shall . . . be on a form prescribed by the [workers' compensation] commissioner, which *may* be in the following configuration ...." (Emphasis added.) *Id.* The suggested configuration provided, inter alia: "If a notice contesting liability is not filed within the time prescribed herein, the employer shall be precluded from contesting the employee's right to receive compensation on any grounds or the extent of his disability." *Id.* Ultimately, the legislature deleted the permissive notice form in favor of the proviso in subsection (b), which expressly relieved the employer from further obligations if the notice of claim was deficient. See Substitute House Bill No. 5099, § 5, as amended by Amendment A. Representative Joseph A. Adamo, house chairman of the joint standing committee on labor and public employees, provided the following explanation of the amended bill during debate in the House of Representatives: "[W]e provide the protections that business thought were necessary in lieu of the form of notice which basically puts in place that there will not be a conclusive presumption of acceptance one, when the claim does not meet the notice requirement set out in [§] 31-321 or two, when the written notice fails to include a warning that the employer shall be precluded from contesting unless notice of contesting liability is filed within the time period set forth in this section." 33 H.R. Proc., Pt. 7, 1990 Sess., p. 2283.

Thus, P.A. 90-116 simply added a notice requirement regarding the conclusive presumption, leaving intact the existing conclusive presumption and its attendant effects--a bar on any defenses, including those challenging the extent of disability. The legislature presumably was fully cognizant that the effect of the conclusive presumption was harsh, but ensured through P.A. 90-116 that employers would be warned of the consequences of their untimely response to a notice of claim.

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See *Black v. London & Egazarian Associates, Inc.,* 30 Conn.App. 295, 304-305, 620 A.2d 176 ("We recognize that the effect of the preclusion statute is often harsh. We note further that the legislature has amended the workers' compensation statutes subsequent to the events giving rise to this case by providing a requirement of notice of preclusion to employers.... Nonetheless, strict adherence to the [Workers' Compensation Act's] time constraints are essential to effectuate the legislative purpose of 'creating a quick vehicle for recovery by the claimant for work related injuries ....' " [Citation omitted.]), cert. denied, 225 Conn. 916, 623 A.2d 1024 (1993).

The following year, the legislature deleted subsections (a) and (b) from § 31-297 and added those subsections with no substantive changes to a new statute, § 31-294c. See Public Acts 1991, No. 91-32, §§ 11 and 16. Notably, at that same time, the legislature added a conclusive presumption with an identical effect to General Statutes § 31-355 to address circumstances wherein the second injury fund had failed to file a timely notice contesting liability. See Public Acts 1991, No. 91-207, § 1

[942 A.2d 407] ("[i]f the treasurer fails to file the notice contesting liability within the time prescribed in this section, the treasurer shall be conclusively presumed to have accepted the compensability of such alleged injury or death from the second injury fund *and shall have no right thereafter to contest the employee's right to receive compensation on any grounds or contest the extent of the employee's disability* " [emphasis added]).

In 1993, the legislature undertook comprehensive reforms to the Workers' Compensation Act. Although this court often has focused on the principal goal of that act--cutting costs for employers and insurers; see, e.g., *Rayhall v. Akim Co.,* 263 Conn. 328, 346, 819 A.2d 803 (2003); *Schiano v. Bliss Exterminating Co.,* 260 Conn. 21, 40, 792 A.2d 835 (2002); we have recognized

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that the legislature also undertook at this time to make the system more efficient and to ensure that employees received prompt payment of compensation. [13] See *Del Toro v. Stamford,* 270 Conn. 532, 547, 853 A.2d95 (2004).

Initially, these reforms did not include any changes to § 31-294c (b). See Raised House Bill No. 7172. During committee hearings, however, employer representatives testified that the existing twenty-eight day limitation period for employers to contest claims needed to be changed. See Conn. Joint Standing Committee Hearings, Labor and Public Employees, Pt. 5, 1993 Sess., p. 1732, written testimony of George R. Bleazard, director of safety and health for Pfizer, Inc.'s manufacturing facility in Groton; Conn. Joint Standing Committee Hearings, Labor and Public Employees, Pt. 4,1993 Sess., p. 1324, remarks of Steve Senior, terminal manager for Roadway Express, Inc.; see also written statement submitted by Bonnie Stewart, representative of Connecticut Business and Industry Association, with attached draft of workers' compensation reform proposal included in legislative file for House Bill No. 7172. These statements reflect the employers' understanding that, under existing law, the only way they could avoid the conclusive presumption and preserve their right to contest liability for any aspect of an employee's claim was

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to file a notice contesting that claim within twenty-eight days. Thus, if they failed to contest a claim and began to make payments, they understood that they were barred from thereafter contesting the claim. See written statement submitted by Stewart and attached draft of workers' compensation reform proposal included in legislative file for House Bill No. 7172 ("In a case where the employer is uncertain about *any aspect of his liability,* to protect himself, he must file a notice to contest liability within [twenty-eight] days. If he does not, he is forever barred from contesting and has 'bought the claim for life.' However, in protecting himself [by contesting the claim], the employee's legal right to any indemnity payment is delayed."

[942 A.2d 408] [Emphasis added.]); *id.*("the law is unfair as written, because employers who do not contest a case within the time allowed must pay the costs of a claim *throughout its life* " [emphasis added]); Conn. Joint Standing Committee Hearings, Labor and Public Employees, Pt. 4, 1993 Sess., p. 1324, testimony of Senior ("Currently if a claim is not contested within [twenty-six] days of our knowledge of that claim, it is presumed to have been accepted. If an employer pays a medical bill, he has *fully accepted the claim although he may want to contest the disability issues.*" [Emphasis added.]). One representative of business interests contended that the existing system benefited neither employers nor employees and suggested amending the statute to permit employers to pay a claim but retain the right thereafter to contest liability, subject to paying a penalty if the contested claim ultimately was determined to be compensable. See written statement submitted by Stewart and attached draft of workers' compensation reform proposal included in legislative file for House Bill No. 7172.

Apparently in response to these concerns, the bill reported out of the labor and public employees committee,

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Substitute House Bill No. 7172, § 9, [14] proposed to amend § 31-294c (b) by eliminating the conclusive

presumption that altogether barred an employer's "right thereafter to contest the employee's right to receive compensation on any grounds" and the "extent of the employee's disability" if the employer had failed to contest liability within twenty-eight days. Instead, the bill proposed to preserve those same defenses, for a one year period, for employers who timely paid compensation and to provide reimbursement to such employers who thereafter prevailed. In keeping with that change, Substitute House Bill No. 7172 also proposed to amend the notice requirement to provide in relevant part that "the employer shall not be presumed to have accepted compensability and shall not be required to commence

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payment of compensation when the written notice . . . fails to include a warning that the employer shall be precluded from contesting liability **[942 A.2d 409]** unless a notice contesting liability is filed within one year from the receipt of the written notice of claim."

Thereafter, the office of legislative research raised the following concern in its bill analysis: "Although the bill specifies that an employer is precluded from contesting a claim if he does not do so within one year of receiving the notice of claim, it does not say what happens when an employer neither files a notice of intent to contest within the first [twenty-eight] days nor begins paying compensation Before the [twenty-eight] days are up. The bill appears to give an employer who does not begin payments up to one year to contest a claim." [15] Office of Legislative Research, Amended Bill Analysis for Substitute House Bill No. 7172, p. 85. Evidently, to address this omission and the unintended benefit such omission might provide to noncomplying employers, approximately one week later, the legislature adopted an amendment to Substitute House Bill No. 7172. It mandated that the employee's notice of claim contain two warnings: (1) if the employer commenced payment within twenty-eight days of receiving a claim, it would have a one year period to contest liability; and (2) if the employer neither commenced

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payment nor filed a notice contesting liability within that twenty-eight day period, it would be "conclusively presumed to have accepted the compensability of the alleged injury or death ...." Substitute House Bill No. 7172, as amended by Amendment A. [16] The amendment

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also **[942 A.2d 410]** added the following sentence: "Notwithstanding the provisions of this subsection, an employer who fails to contest liability for an alleged injury or death on or Before the twenty-eighth day after receiving a written notice of claim and who fails to commence payment for the alleged injury or death on or Before such twenty-eighth day, shall be conclusively presumed to have accepted the compensability of the alleged injury or death." *Id.*

Thus, just like its predecessors, § 31-294c (b), as amended by Public Act 93-228, § 8, required that the employee's notice contain a warning that untimely actions by the employer would result in a conclusive presumption, without requiring that the notice state the *effect* of that conclusion presumption. At the same time, like its predecessors, the statute gives contextual meaning to the presumption by reference to the terms that precede it. An employer who timely commences payment has one year from receiving notice of the claim to contest liability, the same one year period for challenging the claimant's right to receive compensation on any ground or the extent of his disability. By contrast, the employer who does not commence payment within the prescribed period is conclusively presumed to have accepted the compensability of the injury.

It is significant that the legislature added the final sentence prescribing the conclusive presumption to address problems that arose as a result of language that appeared to extend the one year period to contest liability--either the right to compensation on any ground or the extent of disability--not only to employers who timely had commenced payment, but also to

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employers who had failed to comply with the statutory mandates. The legislature's responsive, contemporaneous action strongly suggests that it specifically intended the final sentence of § 31-294c (b) to distinguish between the rights of an employer who timely commenced payment of compensation and the rights of an employer who neither timely paid nor timely contested liability--the former being permitted to contest both the employee's right to compensation on any ground and the extent of his disability for one year from notice of the claim, and the latter being precluded from asserting such defenses altogether upon the employer's failure to comply with the twenty-eight day period to respond to the notice of claim.[17] Under **[942 A.2d 411]** such a construction, the 1993 amendment would have changed the status quo for employers who timely had paid compensation, but would have retained the status quo for employers who had not paid timely.

Comments during legislative debate on the amended bill support this distinction. During debate in the House of Representatives on Substitute House Bill No. 7172, as amended by Amendment A, Representative Michael Lawlor summarized the effect of the 1993 amendment on § 31-294c (b) as follows: "Opening the [twenty-eight] day restriction on the time during which an employer can challenge application for [workers']

compensation system. We allow challenges up to one year." 36 H.R. Proc., Pt. 18, 1993 Sess., p. 6143; see *id.*, at p. 6254, remarks of Representative Lawlor ("[t]here is a deadline of one year on the amount of time during which an employer

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can contest an application for benefits"); see also Office of Legislative Research, Amended Bill Analysis for Substitute House Bill No. 7172, as amended by House Amendment A, p. 75 (Explaining "Pay Without Prejudice" changes to § 31-294c under the bill as amended by House Amendment A as follows: "If the employer chooses to pay without prejudice, [this] allows him still to contest the compensability of the injury or the extent of the employee's disability up to one year after receiving the claim notice.... Continues to preclude from contesting a claim any employer who does not respond to a properly served claim notice within [twenty-eight] days after receiving it.").

Indeed, there is not a single indication in the vast legislative history of Public Act 93-228, including the concerns raised by the business representatives that prompted the legislature to amend § 31-294c (b), that the amendment was intended to alter the status quo except to expand the time period--from twenty-eight days to one year--in which employers that elected to pay compensation could contest a claim. Put differently, there is no evidence that the legislature intended to provide a benefit to employers who failed to comply with their statutory obligations that heretofore had been denied those employers.

Undoubtedly, the vast nature of the 1993 reforms could explain why proponents of the bill would not have mentioned every aspect of those reforms. It seems counterintuitive, however, that a change to the law that had been in effect for the preceding twenty-seven years--from 1967 to 1993--prescribing a conclusive presumption that barred employers from asserting any defenses to "liability or extent of liability"; *Menzies v. Fisher,* supra, 165 Conn. at 343, 334 A.2d 452; would have taken place without a single legislator or employee representative expressing some comment. See *Statewide Grievance Committee v. Rozbicki,* 211 Conn. 232, 244, 558 A.2d

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986 (1989) (" '[a] major change in legislative policy, we believe, would not have occurred without some sort of opposition or at least discussion in the legislature' "), cert. denied, 502 U.S. 1094, 112 S.Ct. 1170, 117 L.Ed.2d 416 (1992), quoting *George P. Gustin Associates, Inc. v. Dubno,* 203 Conn. 198, 208, 524 A.2d 603 (1987).

In sum, the genealogy and the legislative history of § 31-294c (b) explain why the statute preserves an employer's right to contest a claimant's right to compensation on any ground and the extent of his disability upon timely payment, while both **[942 A.2d 412]** the required warning notice to the employer of the conclusive presumption and the conclusive presumption itself do not refer expressly to a bar on contesting the extent of disability. Dating from its inception in the 1990 public act, the legislature never required the warning to state the specific consequences of the conclusive presumption; instead, the broader term it used when referring to the warning notice--contesting liability--always has been given contextual meaning by reference to the terms that precede it, a bar on contesting the right to compensation on any ground or the extent of disability. Although the 1993 public act did not state expressly that the conclusive presumption would bar such defenses, it expressly set forth the prerequisite for preserving the right to assert such defenses--timely payment of compensation. See Public Act 93-228, § 8. Upon satisfying that prerequisite, the employer would have one year to raise any defense, including contesting the extent of disability. The language limiting this right to certain employers for a specified period of time, indicates that, just as an employer would preserve its right to assert such defenses if it timely paid compensation, the employer necessarily would lose the right to assert those same defenses if it did not pay compensation within the prescribed period. Indeed, reading the public act otherwise, an employer who complied with the legislature's

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clear intent to encourage timely payment would be subject to a one year limitation for contesting the extent of disability, but an employer who violated that intent by neither paying nor contesting compensability within the prescribed period would be subject to no statutory limitation on its right to contest the extent of disability.[18] "We are obligated to search for a construction of the statute that makes a harmonious whole of its constituent parts." *International Brotherhood of Police Officers, Local 564 v. Borough of Jewett City,* 234 Conn. 123, 136, 661 A.2d 573 (1995); accord *Chambers v. Electric Boat Corp.,* 283 Conn. 840, 845, 930 A.2d 653 (2007). The construction we have given the statute is the only one that renders all parts of the statute in harmony.

We therefore conclude that, under § 31-294c (b), if an employer neither timely pays nor timely contests liability, the conclusive presumption of compensability attaches and the employer is barred from contesting the employee's right to receive compensation on any ground or the extent of the employee's disability. Such a penalty is harsh, but it reflects a just and rational result. *Chambers v. Electric Boat Corp.,* supra, 283 Conn. at 845, 930 A.2d 653 ("we are mindful that the legislature is presumed to have intended a just and rational result" [internal quotation marks omitted]). An employer readily

can avoid the conclusive presumption by either filing a timely notice of contest or commencing timely payment of compensation with the right to repayment if the

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employer prevails. Should the employer's timely and reasonable investigation reveal that an issue regarding the extent of disability has not yet manifested, the employer still can preserve its right to contest that issue at **[942 A.2d 413]** some later point in time simply by paying the compensation due under the claim, even if all that is due is payment of medical bills. See *Adzima v. UAC/Norden Division,* supra, 177 Conn. at 108, 411 A.2d 924; see also footnote 8 of this opinion discussing definition of "compensation."

It is clear, however, that the legislature prescribed the conclusive presumption for the purpose of protecting employees with "bona fide claims." *Menzies v. Fisher,* supra, 165 Conn. at 342, 343, 334 A.2d 452. Accordingly, although the legislature intended to bar noncomplying employers from contesting compensability, there is no evidence that it intended to relieve a claimant of his responsibility under the Workers' Compensation Act--to prove that he has suffered a compensable injury, i.e., an injury that arose out of and in the course of his employment, including the extent of his disability. See General Statutes § § 31-275 and 31-284; see also *Pereira v. State,* 228 Conn. 535, 542, 637 A.2d 392 (1994) ("In order to qualify for workers' compensation benefits a claimant must prove five distinct elements.... One of the elements of a prima facie claim is that the claimant has suffered a personal injury arising 'out of and in the course of employment.' " [Citation omitted.]). It is an axiom of workers' compensation law that the plaintiff must establish the predicates to compensation "by competent evidence." *Pereira v. State,* supra, at 544, 637 A.2d 392; *Murchison v. Skinner Precision Industries, Inc.,* 162 Conn. 142, 151, 291 A.2d 743 (1972). The conclusive presumption does not disturb these well settled principles. Indeed, § 31-294c (b) provides that the *employer* is conclusively presumed to have accepted the compensability of the injury, not that the *injury* is conclusively presumed to be compensable.

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In the present case, the commissioner stated that, preclusion aside, the plaintiff would need to establish the compensability of his injury, or more specifically, the causal connection between his need for surgery and his compensable injury. Because the commissioner expressly credited the defendant's expert over the plaintiff's expert, the commissioner concluded that the plaintiff had failed to sustain his burden. There is nothing, however, to suggest that the commissioner would have made the same determination in the absence of the expert testimony presented by the defendant. Accordingly, because the defendant neither commenced payment to the plaintiff nor filed a notice contesting liability within the prescribed twenty-eight day period, under § 31-294c (b), on remand, the defendant is barred from contesting the compensability of the plaintiff's claim, including the extent of the plaintiff's disability, leaving the plaintiff to his burden of proof.

The decision of the board is reversed and the case is remanded to the board with direction to reverse the commissioner's decision and to remand the case to the commissioner for further proceedings consistent with this opinion.

In this opinion the other justices concurred.

Notes:

[1] The caption of this opinion has been changed to reflect the proper name of the named defendant. We note that although the relevant documents in the workers' compensation proceedings were captioned listing Laidlaw Education Services as the named defendant, the text of the documents correctly listed Laidlaw Transit, Inc., as the plaintiff's employer. Counsel for the defendants also refers to Laidlaw Transit, Inc., on his brief to this court.

[2] General Statutes § 31-294c (b) provides: "Whenever liability to pay compensation is contested by the employer, he shall file with the commissioner, on or Before the twenty-eighth day after he has received a written notice of claim, a notice in accord with a form prescribed by the chairman of the Workers' Compensation Commission stating that the right to compensation is contested, the name of the claimant, the name of the employer, the date of the alleged injury or death and the specific grounds on which the right to compensation is contested. The employer shall send a copy of the notice to the employee in accordance with section 31-321. If the employer or his legal representative fails to file the notice contesting liability on or Before the twenty-eighth day after he has received the written notice of claim, the employer shall commence payment of compensation for such injury or death on or Before the twenty-eighth day after he has received the written notice of claim, but the employer may contest the employee's right to receive compensation on any grounds or the extent of his disability within one year from the receipt of the written notice of claim, provided the employer shall not be required to commence payment of compensation when the written notice of claim has not been properly served in accordance with section 31-321 or when the written notice of claim fails to include a warning that (1) the employer, if he has commenced payment for the alleged injury or death on or Before the twenty-eighth day after receiving a written notice of claim, shall be precluded from contesting liability unless a notice

contesting liability is filed within one year from the receipt of the written notice of claim, and (2) the employer shall be conclusively presumed to have accepted the compensability of the alleged injury or death unless the employer either files a notice contesting liability on or Before the twenty-eighth day after receiving a written notice of claim or commences payment for the alleged injury or death on or Before such twenty-eighth day. An employer shall be entitled, if he prevails, to reimbursement from the claimant of any compensation paid by the employer on and after the date the commissioner receives written notice from the employer or his legal representative, in accordance with the form prescribed by the chairman of the Workers' Compensation Commission, stating that the right to compensation is contested. Notwithstanding the provisions of this subsection, an employer who fails to contest liability for an alleged injury or death on or Before the twenty-eighth day after receiving a written notice of claim and who fails to commence payment for the alleged injury or death on or Before such twenty-eighth day, shall be conclusively presumed to have accepted the compensability of the alleged injury or death."

[3] The plaintiff appealed from the board's decision to the Appellate Court pursuant to General Statutes § 31-301b, and we thereafter transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. The defendant Laidlaw Transit, Inc.'s insurer, Crawford and Company, also is a defendant in this action. For convenience, we refer to Laidlaw Transit, Inc., as the defendant.

[4] The plaintiff's proposed finding and award indicates that he had sought compensation for the two surgeries, for total and partial incapacity for periods following the surgeries and for a 37.3 percent permanent partial disability of his back. It appears from the transcript of the hearing Before the commissioner that the defendant successfully sought to limit the decision to the issue of the compensability of the surgeries, because compensability of the other benefits hinged on whether the surgeries were compensable.

[5] It is not entirely clear from the commissioner's decision whether he was addressing the 2002 surgery only, the 2004 surgery only or both surgeries. The expert testimony to which the commissioner referred opined only as to whether the 2002 surgery was related to the bus accident, but the commissioner expressly referred to the plaintiff's "need for surgery in 2004" and "his surgeries of 2004." Because the plaintiff sought compensation for both surgeries and it appears from the record that both surgeries treated the same injury, we presume that the commissioner dismissed the plaintiff's claim for compensation for both the 2002 and 2004 surgeries.

[6] In the alternative, the plaintiff contends that, even if an employer may contest the extent of a claimant's disability, the defendant is contesting the *causation* of his medical condition, not the extent of his disability. The plaintiff contends that, under *DeAlmeida v. M.C.M. Stamping Corp.,* supra, 29 Conn.App. at 441, 615 A.2d 1066, a challenge to causation is barred by the conclusive presumption of compensability. We note that, in *DeAlmeida,* the Appellate Court did not indicate whether it construed the defendant's challenge to causation as one to the extent of disability or one to compensability more generally. Neither that court nor this court previously has construed the phrase "extent of disability." In light of our conclusion that an employer's failure to commence payment or to contest liability within the prescribed twenty-eight day period bars that employer from raising *all* nonjurisdictional defenses, including those related to the extent of the claimant's disability, however, it is immaterial whether we characterize the defendant's challenge as one to the compensability of the claim generally or one to the extent of the plaintiff's disability or some other possible nonjurisdictional defense.

[7] We note that, although the board relied on its previous decision in *Tucker v. Connecticut Winpump, Inc.,* supra, No. 4492, CRB-5-02-2, as precedent for its conclusion in the present case that the 1993 amendment to § 31-294c (b) eliminated the bar on contesting the extent of disability, in neither the present case nor *Tucker* did the board examine the genealogy and legislative history of § 31-294c (b).

[8] Although the term "compensation" was not defined by statute until 1991; see *Schiano v. Bliss Exterminating Co.,* 260 Conn. 21, 37 n.12, 792 A.2d 835 (2002); the term long had been understood and later was defined to include all benefits provided under the Workers' Compensation Act--indemnity (permanent impairment), disability (incapacity) and medical, surgical and hospital costs. See *Weinberg v. ARA Vending Co.,* 223 Conn. 336, 345-47, 612 A.2d 1203 (1992); see also General Statutes § 31-275 (4) (defining "compensation").

[9] In *Adzima v. UAC/Norden Division,* supra, 177 Conn. at 108, 411 A.2d 924, the plaintiff's decedent had sustained a workplace injury, thereafter had undergone back surgery to relieve pain, but subsequently had refused another surgery to treat continued pain. The employer paid all benefits due during this time. *Id.,* at 108-109, 411 A.2d 924. Shortly after refusing the second surgery, the decedent died, and the plaintiff sought indemnity benefits for a 25 percent permanent partial disability to the decedent's back. *Id.,* at 108-10, 411 A.2d 924. Because the defendant employer had failed to file a timely notice contesting the indemnity claim, the plaintiff contended that the board improperly had concluded that the conclusive presumption under § 31-297 (b) did not bar the defendant employer from contesting whether the decedent had reached maximum medical improvement

Before his death, the prerequisite for receipt of that benefit. *Id.,* at 109, 411 A.2d 924. In affirming the board's decision, the court in *Adzima* underscored that, in the case Before it, there was no question that the claimant had a right to receive compensation, as evidenced by the fact that the benefits "would be in the nature of continuing disability payments, arising after acceptance of an employee's initial claim." *Id.,* at 115, 411 A.2d 924.

[10] The statute applicable in *DeAlmeida* was the 1987 revision of § 31-297 (b), which, for all intents and purposes, was the same as the 1967 revision of that statute as amended by the 1967 public act. The Appellate Court rejected the defendant's contention that Public Acts 1990, No. 90-116, § 9, which relieved the employer of its obligation to pay if the employee's notice was defective and which is discussed later in this opinion, applied retroactively to the case. *DeAlmeida v. M.C.M. Stamping Corp.,* supra, 29 Conn.App. at 449-50, 615 A.2d 1066.

[11] Although initially, the Appellate Court had construed the conclusive presumption to bar an employer even from asserting jurisdictional defenses to a claim; *LaVogue v. Cincinnati, Inc.,* 9 Conn.App. 91, 93, 516 A.2d 151, cert. denied, 201 Conn. 814, 518 A.2d 72 (1986); *Bush v. Quality Bakers of America,* 2 Conn.App. 363, 372-74, 479 A.2d 820, cert. denied, 194 Conn. 804, 482 A.2d 709 (1984); this court thereafter recognized that the conclusive presumption cannot bar defenses related to the commissioners' subject matter jurisdiction under the Workers' Compensation Act. See *Castro v. Viera,* 207 Conn. 420, 429, 541 A.2d 1216 (1988) (employer not barred from contesting employer-employee relationship); *Del Toro v. Stamford,* 270 Conn. 532, 547, 853 A.2d 95 (2004) (employer not barred from contesting whether injury for which compensation is sought is covered); see also *Infante v. Mansfield Construction Co.,* 47 Conn.App. 530, 534-35, 706 A.2d 984 (1998) (employer not barred from contesting timely initiation of claim).

[12] Public Acts 1989, No. 89-31, extended the time period from twenty days to twenty-eight days for an employer to give notice that it was contesting a claim for any injury sustained on or after October 1, 1989.

[13] For example, one reform in 993 imposed a 20 percent penalty, *in addition to other interest or penalties,* on late payment of compensation due under an award, a voluntary agreement or from the second injury fund. See Public Acts 1993, No. 93-228, § 14, now codified at General Statutes § 31-303. Prior to 1993, the act already provided penalties for untimely payment, one of which permitted a court to assess 12 percent interest and attorney's fees for an employer's failure either to contest liability in a timely manner or to commence payment within thirty-five days after the filing of a claim. See General Statutes § 31-300 (authorizing court to "include in the award in the case of undue delay in payments of compensation, interest at twelve per cent per annum and a reasonable attorney's fee" and providing that "[p]ayments not commenced within thirty-five days after the filing of a written notice of claim shall be presumed to be unduly delayed unless a notice to contest the claim is filed in accordance with section 31-297").

[14] Substitute House Bill No. 7172, § 9, proposed the following changes to § 31-294c (b), with bracketed material reflecting proposed deletions and upper case material proposing additions: "If the employer or his legal representative fails to file the notice contesting liability [within the time prescribed in this subsection] ON OR Before THE TWENTY-EIGHTH DAY AFTER HE HAS RECEIVED THE WRITTEN NOTICE OF CLAIM, the employer shall be [conclusively] presumed to have accepted the compensability of the alleged injury or death and shall COMMENCE PAYMENT OF COMPENSATION FOR SUCH INJURY OR DEATH WITHIN THE PRESCRIBED TIME LIMITATIONS OF THIS CHAPTER [have no right thereafter to], BUT MAY contest the employee's right to receive compensation on any grounds or the extent of his disability WITHIN ONE YEAR FROM THE RECEIPT OF THE WRITTEN NOTICE OF CLAIM, provided the employer shall not be [conclusively] presumed to have accepted compensability AND SHALL NOT BE REQUIRED TO COMMENCE PAYMENT OF COMPENSATION when the written notice of claim has not been properly served in accordance with section 31-321 or when the written notice of claim fails to include a warning that the employer shall be precluded from contesting liability unless a notice contesting liability is filed within [the time period set forth in this subsection] ONE YEAR FROM THE RECEIPT OF THE WRITTEN NOTICE OF CLAIM. THE EMPLOYER SHALL BE ENTITLED, IF HE PREVAILS, TO REIMBURSEMENT FROM THE CLAIMANT OF ANY COMPENSATION PAID BY THE EMPLOYER ON AND AFTER THE DATE THE COMMISSIONER RECEIVES WRITTEN NOTICE FROM THE EMPLOYER OR HIS LEGAL REPRESENTATIVE, IN ACCORDANCE WITH THE FORM PRESCRIBED BY THE CHAIRMAN OF THE WORKERS' COMPENSATION COMMISSION, STATING THAT THE RIGHT TO COMPENSATION IS CONTESTED."

[15] We note that the summaries prepared by the office of legislative research expressly provide: " 'The following fiscal impact statement and bill analysis are prepared for the benefit of members of the General Assembly, solely for purposes of information, summarization and explanation and do not represent the intent of the General Assembly or either house thereof for any purpose.' " Office of Legislative Research, Bill Analysis for Substitute House Bill No. 7172; Office of Legislative Research, Amended Bill Analysis for Substitute House Bill No. 7172, as amended by House Amendment A.

Although the comments of the office of legislative research are not, in and of themselves, evidence of legislative intent, they properly may bear on the legislature's knowledge of interpretive problems that could arise from a bill. See, e.g., *State v. George J.,* 280 Conn. 551, 575, 910 A.2d 931 (2006), cert. denied, --- U.S. ----, 127 S.Ct. 1919, 167 L.Ed.2d 573 (2007).

[16] Substitute House Bill No. 7172, § 8, as amended by Amendment A, proposed the following changes to § 31-294c (b), with bracketed material reflecting proposed deletions and upper case material reflecting proposed additions: "If the employer or his legal representative fails to file the notice contesting liability [within the time prescribed in this subsection] ON OR Before THE TWENTY-EIGHTH DAY AFTER HE HAS RECEIVED THE WRITTEN NOTICE OF CLAIM, the employer shall [be conclusively presumed to have accepted the compensability of the alleged injury or death and shall have no right thereafter to] COMMENCE PAYMENT OF COMPENSATION FOR SUCH INJURY OR DEATH ON OR Before THE TWENTY-EIGHTH DAY AFTER HE HAS RECEIVED THE WRITTEN NOTICE OF CLAIM, BUT THE EMPLOYER MAY contest the employee's right to receive compensation on any grounds or the extent of his disability WITHIN ONE YEAR FROM THE RECEIPT OF THE WRITTEN NOTICE OF CLAIM, provided the employer shall not be [conclusively presumed to have accepted compensability] REQUIRED TO COMMENCE PAYMENT OF COMPENSATION when the written notice of claim has not been properly served in accordance with section 31-321 or when the written notice fails to include a warning that (1) the employer, IF HE HAS COMMENDED PAYMENT FOR THE ALLEGED INJURY OR DEATH ON OR Before THE TWENTY-EIGHTH DAY AFTER RECEIVING A WRITTEN NOTICE OF CLAIM, shall be precluded from contesting liability unless a notice contesting liability is filed within [the time period set forth in this subsection] ONE YEAR FROM THE RECEIPT OF THE WRITTEN NOTICE OF CLAIM, AND (2) THE EMPLOYER SHALL BE CONCLUSIVELY PRESUMED TO HAVE ACCEPTED THE COMPENSABILITY OF THE ALLEGED INJURY OR DEATH UNLESS THE EMPLOYER EITHER FILES A NOTICE CONTESTING LIABILITY ON OR Before THE TWENTY-EIGHTH DAY AFTER RECEIVING A WRITTEN NOTICE OF CLAIM OR COMMENCES PAYMENT FOR THE ALLEGED INJURY OR DEATH ON OR Before SUCH TWENTY-EIGHTH DAY. AN EMPLOYER SHALL BE ENTITLED, IF HE PREVAILS, TO REIMBURSEMENT FROM THE CLAIMANT OF ANY COMPENSATION PAID BY THE EMPLOYER ON AND AFTER THE DATE THE COMMISSIONER RECEIVES WRITTEN NOTICE FROM THE EMPLOYER OR HIS LEGAL REPRESENTATIVE, IN ACCORDANCE WITH THE FORM PRESCRIBED BY THE CHAIRMAN OF THE WORKERS' COMPENSATION COMMISSION, STATING THAT THE RIGHT TO COMPENSATION IS CONTESTED. NOTWITHSTANDING THE PROVISIONS OF THIS SUBSECTION, AN EMPLOYER WHO FAILS TO CONTEST LIABILITY FOR AN ALLEGED INJURY OR DEATH ON OR Before THE TWENTY-EIGHTH DAY AFTER RECEIVING A WRITTEN NOTICE OF CLAIM AND WHO FAILS TO COMMENCE PAYMENT FOR THE ALLEGED INJURY OR DEATH ON OR Before SUCH TWENTY-EIGHTH DAY, SHALL BE CONCLUSIVELY PRESUMED TO HAVE ACCEPTED THE COMPENSABILITY OF THE ALLEGED INJURY OR DEATH."

[17] Indeed, although the defendant views the "extent of disability" language in § 31-294c (b) as permissive, not implicitly preclusive, it correctly posits in its brief to this court: "The 'extent of disability' language . . . is only triggered when an employer commences payment on, or Before , the twenty-eighth day after receiving notice of a claim. It actually is a benefit to the employer who begins paying within twenty-eight days, because it allows that employer not only to contest compensability, but also to contest the extent of the claimant's alleged disability."

[18] We are mindful that, as a practical matter, as long as an employee pursued his claim with the commissioner, the employer would not have had an unlimited time to contest compensability because, at the hearing Before the commissioner, the employer would have to contest or concede liability. See General Statutes § 31-297. There is no evidence in the legislative history to § 31-294c that the hearing requirements under § 31-297, which predate the conclusive presumption; see Public Acts 1961, No. 491, § 19; had any bearing on the 1993 amendments, which clearly were directed to the limited purpose of providing a benefit to employers who timely had paid compensation.

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291 Conn. 537 (Conn. 2009)

970 A.2d 630

Maura DONAHUE

v.

VERIDIEM, INC., et al.

No. 18237.

Supreme Court of Connecticut.

May 19, 2009

Argued Jan. 6, 2009.

Neil Johnson, Hartford, for the appellant (plaintiff).

Dominick C. Statile, Glastonbury, with whom, on the brief, were Marie Gallo-Hall and Jean McNulty, for the appellees (defendants).

[970 A.2d 631] ROGERS, C.J., and NORCOTT, KATZ, PALMER and ZARELLA, Js.

KATZ, J.

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In *Harpaz v. Laidlaw Transit, Inc.,* 286 Conn. 102, 128-29, 942 A.2d 396 (2008), this court concluded that an employer deemed " conclusively presumed to have accepted the compensability of the alleged injury" under General Statutes § 31-294c(b),[1]

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because of its failure either to contest liability or to commence payment of compensation within the prescribed time period under the statute, is precluded from contesting both the compensability and the extent of disability arising from the alleged injury. The appeal in the present case raises the issue of whether an employer subject to the conclusive presumption is precluded from challenging the claimant's proof through cross-examination and submission of a written argument. The plaintiff, Maura Donahue, appeals from the decision of the compensation review board (board) affirming the decision of the workers' compensation commissioner (commissioner) denying the plaintiff's claim for compensation for medical care and permanent partial disability for her back injury. In a decision issued prior to *Harpaz,* the commissioner had concluded that, although the plaintiff's back injury is conclusively presumed to be compensable because the **[970 A.2d 632]** named defendant,[2] Veridiem, Inc., failed to file a timely notice contesting the plaintiff's claim, the plaintiff's evidence that this compensable injury had caused her need for the medical care and her disability for which she sought compensation was not credible. The plaintiff contends that the board's decision must be reversed because the commissioner improperly allowed the defendant to contest her claim by challenging her proof. We agree with the plaintiff. We therefore reverse the board's decision.

The commissioner's decision and the record reveal the following undisputed facts and procedural history. The plaintiff commenced employment with the defendant on January 3, 2002. On January 16, 2003, the workers' compensation commission (commission) received a notice of claim from the plaintiff alleging that she had sustained an injury on January 17, 2002, arising out of

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and in the course of her employment. On January 21, 2003, the defendant received a written notice of claim alleging that, on January 17, 2002, the plaintiff had sustained an injury to her " lower back/ruptured disk" when she fell on a wet floor at the defendant's corporate office. The defendant filed a notice contesting liability, which the commission received on February 24, 2003.

At the beginning of the formal hearing on her claim, held on October 21, 2005, [3] the plaintiff asserted that she intended to file a notice to preclude the defendant from contesting liability because its notice to contest her claim had been filed beyond the twenty-eight day period prescribed under § 31-294c(b). See footnote 1 of this opinion. Without objection from the plaintiff, the commissioner proceeded with the hearing. The plaintiff was the only witness to testify, subject to the defendant's cross-examination. The only exhibits put into evidence were those submitted by the plaintiff, principal among those being medical records and bills, including hospital bills for a December, 2002 back surgery.

On November 14, 2005, the plaintiff filed a motion to preclude the defendant from contesting liability. That day, the commissioner held a " [p]re-[f]ormal" hearing on the motion and the defendant's objection thereto and added the issue of preclusion to those previously raised for consideration at the formal hearing. The defendant thereafter filed a fifteen page brief with the commission contending that the plaintiff's claim should be denied for several reasons, including that " [f]actually, the [plaintiff] has not proven that her back problems for which she ultimately underwent surgery arose out of and in the course of her employment," and " the

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[plaintiff] has not established a prima facie medical case" to establish the causal link between her employment and her injury.

On December 19, 2005, the plaintiff submitted a motion to add additional evidence to the record that she had received that day, specifically, a letter from Inam U. Kureshi, the neurosurgeon who had performed the plaintiff's back surgery. Kureshi opined in the letter that, after her December 3, 2002 lumbar discectomy, the plaintiff had a 6.67 percent permanent partial disability of the spine and that, within reasonable medical probability, this injury had been caused by the January 17, 2002 fall at work.[4] Over the defendant's objection, the commissioner thereafter permitted **[970 A.2d 633]** the plaintiff to add Kureshi's letter to the record.

In her decision filed on April 3, 2006, the commissioner framed the case as raising three issues: (1) " Whether the [plaintiff's] motion to preclude under § 31-294c(b) should be granted" ; (2) " Whether the [plaintiff's] January 17, 2002 back injury arose out of and in the course of her employment under [General Statutes] § 31-275" ; and (3) " If found compensable, what benefits are due to the [plaintiff]?" The commissioner concluded that the motion to preclude should be granted and, therefore, that the plaintiff's January 17, 2002 back claim was compensable. The commissioner concluded,

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however, that the plaintiff's claim for reimbursement of medical bills and for permanent partial disability benefits should be denied. The commissioner found the plaintiff's testimony not to be credible or persuasive with respect to the extent of her disability. The commissioner similarly found Kureshi's letter " [not] to be credible or persuasive relating [the plaintiff's] January, 2002 injury to her need for medical care and surgery or the 6.67 [percent] permanent partial disability of the back."

In support of her decision, the commissioner cited the following evidence. The plaintiff did not fill out an accident report or file a notice of injury regarding the January, 2002 incident. The plaintiff was not sore on the day of the fall, but felt some soreness and noticed bruising on the back side of her hip and lower thigh the following day. She did not experience any problems as a result of the fall until the following month. The plaintiff thereafter sought treatment from her general practitioner for complaints of fatigue and muscle soreness, but never complained of back problems. Her general practitioner's reports from February, March and April of 2002, made no reference to a work incident. On July 26, 2002, the plaintiff received a magnetic resonance imaging (MRI) that showed disc protrusions at multiple levels. A November 27, 2002 report from Hartford Hospital indicated that the plaintiff had alleged ongoing lower back pain since July, 2002, and did not indicate any reference to a work injury.[5] In reliance on the foregoing evidence, the commissioner denied the plaintiff's claim for compensation for medical care and disability.

The plaintiff appealed from the commissioner's decision to the board, relying on the Appellate Court's holding

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in *DeAlmeida v. M.C.M. Stamping Corp.,* 29 Conn.App. 441, 615 A.2d 1066 (1992), in support of her claim that the commissioner's decision had failed to give the finding of preclusion its full force and effect as to liability and causation. The board rejected the plaintiff's claim on two grounds. First, it concluded that the revision of § 31-294c (b) at issue in *DeAlmeida* had been amended in 1993 " to specifically permit a respondent to challenge the extent of disability."

[970 A.2d 634] Second, the board noted that, even predating *DeAlmeida,* " the burden has always been on the claimant to establish [that] her disability is linked to the compensable injury.... If the trier is not persuaded by the claimant's [medical] evidence, there is nothing that this board can do to override that decision on appeal." (Citations omitted; internal quotation marks omitted.) The board concluded that the present case was legally indistinguishable from two of its prior cases rejecting a similar claim, the most recent being *Harpaz v. Laidlaw Education Services,* No. 5040, CRB 7-05-12 (December 11, 2006). Accordingly, the board affirmed the commissioner's decision.

Pursuant to General Statutes § 31-301b, the plaintiff appealed from the board's decision to the Appellate Court. While that appeal was pending, this court issued its decision in *Harpaz v. Laidlaw Transit, Inc.,supra*, 286 Conn. at 102, 942 A.2d 396. In that case, we concluded that the 1993 amendment to § 31-294c(b) was intended only to remedy a problem affecting employers that had complied with the statutory limitations by timely commencing payment of a claim, and, as a result, provided an extended time period to allow such employers to contest either compensability or the extent of disability. *Id.*, at 127-29, 942 A.2d 396. We further concluded that § 31-294c(b) as amended, when read contextually and in its entirety, as well as in connection with the legislative history and genealogy of the statute, did not intend to change the

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status quo for employers that had not complied with the statutory time limits for either commencing payment or contesting liability of the claim. *Id.*, at 129-30, 942 A.2d 396. Thus, consistent with the past practice for the preceding twenty-seven years, we concluded that employers that had not complied with either predicate

were precluded from challenging both the compensability of the injury and the extent of disability. *Id.*, at 128-29, 942 A.2d 396. We underscored, however, that preclusion did not relieve claimants of their obligation to prove their claim by competent evidence. *Id.*, at 131, 942 A.2d 396. We summarized the defect in the proceeding Before the commissioner in *Harpaz* as follows: " In the present case, the commissioner stated that, preclusion aside, the plaintiff would need to establish the compensability of his injury, or more specifically, the causal connection between his need for surgery and his compensable injury. Because the commissioner expressly credited the defendant's expert over the plaintiff's expert, the commissioner concluded that the plaintiff had failed to sustain his burden. *There is nothing, however, to suggest that the commissioner would have made the same determination in the absence of the expert testimony presented by the defendant.* Accordingly, because the defendant neither commenced payment to the plaintiff nor filed a notice contesting liability within the prescribed twenty-eight day period, under § 31-294c(b), on remand, the defendant is barred from contesting the compensability of the plaintiff's claim, including the extent of the plaintiff's disability, *leaving the plaintiff to his burden of proof.* " (Emphasis added.) *Id.*, at 132, 942 A.2d 396.

In light of that decision, in the present case, the Appellate Court asked the parties to file supplemental briefs on the impact of *Harpaz* on the issues raised on appeal. After hearing oral argument and reviewing the supplemental briefs, the Appellate Court requested that the appeal be transferred to this court, pursuant to

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Practice Book § 65-2. [6] We granted the Appellate **[970 A.2d 635]** Court's request and transferred the appeal to this court pursuant to General Statutes § 51-199(c).

In their supplemental briefs, the parties take different positions as to an employer's role in the proceedings after the commissioner grants a motion to preclude. The plaintiff contends that, although she was required to prove her case, the defendant was precluded, by virtue of the conclusive presumption, from cross-examining witnesses, arguing against coverage and filing briefs in opposition to her claim.[7] The defendant takes the position that it was precluded only from putting forth its own expert and evidence, not from challenging the plaintiff's proof.[8] We conclude that, once a motion to preclude is granted, the only role an employer plays

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is to decide whether to stipulate to the compensation claimed. If the employer does not so stipulate, the claimant proceeds with her case, subject to examination by the commissioner.

In determining the meaning and effect of preclusion under § 31-294c(b), we note that we do not afford deference to an agency's interpretation of a statute when, as in the present case, the construction of a statute previously has not been subjected to " judicial scrutiny" or to " a governmental agency's time-tested interpretation...." (Internal quotation marks omitted.) *Harpaz v. Laidlaw Transit, Inc.,supra*, 286 Conn. at 109, 942 A.2d 396; *Pasquariello v. Stop & Shop Cos.,* 281 Conn. 656, 663, 916 A.2d 803 (2007). Accordingly, in the present case, we " exercise plenary review in accordance with our well established rules of statutory construction." (Internal quotation marks omitted.) *Harpaz v. Laidlaw Transit, Inc.,supra*, at 109, 942 A.2d 396.

" When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature.... In seeking to determine that meaning, General Statutes § 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.... When a statute is not plain and unambiguous, we also look for interpretive guidance **[970 A.2d 636]** to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter...." (Internal quotation marks omitted.) *Id.*

Neither party has contended that § 31-294c(b) is plain and unambiguous as to the question presented in this

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appeal. We agree. As the discussion that follows indicates, although the statute provides some guidance, it does not provide specific direction on the employer's role once a motion to preclude has been granted. Therefore, we are not limited to the text of the statute to resolve the matter Before us.

Turning first to that text, § 31-294c(b) provides in relevant part that " an employer who fails to contest liability for an alleged injury or death on or Before the twenty-eighth day after receiving a written notice of claim and who fails to commence payment for the alleged injury or death on or Before such twenty-eighth day, shall be conclusively presumed to have accepted the compensability of the alleged injury or death." We have referred to this statute, or its predecessor, as setting forth a " conclusive presumption." *Harpaz v. Laidlaw Transit, Inc.,supra*, 286 Conn. at 105, 942 A.2d 396; *Del Toro v. Stamford,* 270 Conn. 532, 542 n. 8, 853 A.2d 95 (2004); *Castro v. Viera,* 207 Conn. 420, 427, 541 A.2d 1216

(1988); *Adzima v. UAC/Norden Division,* 177 Conn. 107, 111, 411 A.2d 924 (1979). Generally, a conclusive or irrebuttable presumption is " [a] presumption that cannot be overcome by any additional evidence *or argument* ...." (Emphasis added.) Black's Law Dictionary (7th Ed. 1999); accord 29 Am.Jur.2d, Evidence § 184 (1994) ("[a] conclusive or irrebuttable presumption is ... a substantive rule of law directing that proof of certain basic facts conclusively provides an additional fact which cannot be rebutted"); 9 Wigmore, Evidence § 2492 (Chadbourn Ed. Rev. 1981) ("[w]herever from one fact another is said to be conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule is really providing that where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case"); see

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State v. Williams, 199 Conn. 30, 35 n. 4, 505 A.2d 699 (1986) ("[a] conclusive presumption removes the presumed element from the case once the [s]tate has proven the facts giving rise to the presumption" [internal quotation marks omitted]); *State v. Harrison,* 178 Conn. 689, 695-96, 425 A.2d 111 (1979) ("a conclusive presumption does more than shift the burden: it deprives the jury of any fact-finding function as to intent, and removes from the prosecution any requirement to go forward or to persuade, beyond a recital of events, let alone to prove"); *Ducharme v. Putnam,* 161 Conn. 135, 142, 285 A.2d 318 (1971) (explaining when contrasting rebuttable and irrebuttable presumptions that, " [i]n both cases it is a substitute for proof; in the one open to challenge and disproof, and in the other conclusive" [internal quotation marks omitted]).

In light of such settled principles, we would have expected the legislature not to have used such unequivocal language or, at a minimum, to have added some qualifying language to the conclusive presumption in § 31-294c(b) had it intended to permit employers subject to this sanction to have some adversarial role in the proceedings. Compare General Statutes § 52-86(c) ("[a] creditor appearing pursuant to the provisions of this section shall not be permitted to plead in abatement, to plead or give in evidence the statute of limitations, to plead that the contract was not in writing according to the requirements of the statute, or to plead any other statutory defense consistent with the justice of the plaintiff's **[970 A.2d 637]** claim") and Practice Book (2008) § 13-4(4) ("[i]f disclosure of the name of any expert expected to testify at trial is not made in accordance with this subdivision, or if an expert witness who is expected to testify is retained or specially employed after a reasonable time prior to trial, such expert shall not testify if, upon motion to preclude such testimony, the judicial authority determines that the late disclosure [A] will cause undue prejudice to the moving party; or [B] will

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cause undue interference with the orderly progress of trial in the case; or [C] involved bad faith delay of disclosure by the disclosing party"). To read preclusion to allow the employer to cross-examine witnesses and to submit written argument in opposition to the plaintiff's claim would translate, essentially and simply, to a sanction barring the employer from introducing its own expert witness. An employer could do much to avoid the sting of such a limited sanction, however, by hiring a medical expert to prepare his counsel to ask the appropriate medical questions on cross-examination to discredit the plaintiff or her expert. Such a result hardly would comport with the board's own description of preclusion as a " harsh remedy" ; *West v. Heitkamp, Inc.,* No. 4587, CRB-5-02-11 (October 27, 2003); *Verrinder v. Matthew's Tru Colors Painting & Restoration,* No. 4936, CRB-4-05-4 (December 6, 2006); having a " drastic effect...." *Aulenti v. Darien,* No. 4571, CRB-7-02-9 (September 5, 2003); id. ("Also, we are conscious of the drastic effect of a [m]otion to [p]reclude, as it divests the employer of the right to contest liability for a claim. We do not believe that this rather harsh remedy should be imposed without ensuring that both parties have been provided with the due process protections inherent in a formal proceeding.").

Appellate case law addressing the question of whether the granting of a motion to preclude constitutes a final judgment indicates that the employer does have a role to play following such a decision, albeit a rather limited one. In considering the final judgment question, the Appellate Court has noted: " The test for determining whether the defendants have appealed from a final judgment turns on the scope of the proceedings on remand. *Szudora v. Fairfield,* 214 Conn. 552, 556, 573 A.2d 1 (1990). ' [I]f such further proceedings are merely ministerial, the decision is an appealable final judgment, but if further proceedings will require the exercise of independent

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judgment or discretion and the taking of additional evidence, the appeal is premature and must be dismissed.' *Id.*, citing *Matey v. Estate of Dember,* 210 Conn. 626, 630, 556 A.2d 599 (1989)." *Quinn v. Standard-Knapp, Inc.,* 40 Conn.App. 446, 447-48, 671 A.2d 1333 (1996). Applying that general principle to the granting of a motion to preclude, these cases indicate that, when an employer stipulates entirely to the compensation being claimed, that is, both the compensability and the extent of disability arising from the alleged injury, the remand to the commissioner usually involves a non-discretionary calculation of benefits using the formula set forth by statute and thus is a final judgment; but when the employer does not so stipulate, an evidentiary hearing is necessary so that the claimant may prove her right to the

compensation claimed. Compare *id.,* at 448-49, 671 A.2d 1333 (evidentiary hearing required), *Rodriguez v. Bruce Mfg. & Molding Co.,* 30 Conn.App. 320, 323-24, 620 A.2d 149 (1993) (same) and *Shira v. National Business Systems, Inc.,* 25 Conn.App. 350, 353, 593 A.2d 983 (1991) (same) with *Vachon v. General Dynamics Corp.,* 29 Conn.App. 654, 657 n. 3, 617 A.2d 476 (1992) (no evidentiary hearing required), cert. denied, 224 Conn. 927, 619 A.2d 852 (1993) and *Guinan v. Direct Marketing Assn., Inc.,* 22 Conn.App. 515, 517, 578 A.2d 129 (1990) (same). There is nothing in these cases to **[970 A.2d 638]** suggest that an employer has the right to test the evidence proffered by the claimant at these proceedings by way of question or argument.[9]

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Two possible reasons come to mind as to why the employer should be able to participate in the proceeding to challenge the plaintiff's proof, both of which we ultimately reject. First, it could be argued that the employer's participation would be consistent with the legislature's goal to ensure payment of " ' bona fide claims.' " *Harpaz v. Laidlaw Transit, Inc.,supra*, 286 Conn. at 131, 942 A.2d 396, quoting *Menzies v. Fisher,* 165 Conn. 338, 342-43, 334 A.2d 452 (1973). Indeed, for that reason, we recognized in *Harpaz* that the granting of a motion to preclude does not relieve a claimant of her obligation to prove her claim-that the compensation claimed in fact arises from the compensable injury-by competent evidence. *Harpaz v. Laidlaw Transit, Inc.,supra*, at 131, 942 A.2d 396; *Shira v. National Business Systems, Inc.,supra*, 25 Conn.App. at 353, 593 A.2d 983 ("[t]he plaintiff has the burden of proving the extent of his incapacity"); *Peters v. Southern Connecticut State University,* No. 1103, CRD-3-90-8 (January 13, 1992) (remanding case in light of conclusion that award for permanent partial benefits was found without competent supporting evidence because medical reports of plaintiff's expert, on which commissioner had relied, were never made part of evidentiary record). We are not persuaded by this argument, however, because the employer's participation would aid in achieving that goal at the cost of undermining the incentive that the preclusive sanction was intended to have of facilitating prompt payment of claims. See *Menzies v. Fisher,supra*, at 342, 334 A.2d 452 ("[a]mong the defects in previous provisions of the [Workers' Compensation] [A]ct were the needless, prejudicial delays in the proceedings Before the commissioners, delays by employers or

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insurers in the payment of benefits, lack of knowledge on the part of employees that they were entitled to benefits and the general inequality of resources available to claimants with bona fide claims"). As importantly, the *commissioner's* role in the proceedings sufficiently advances that goal without the accompanying detrimental effect.

The plaintiff conceded at oral argument to this court that preclusion would not limit the commissioner's ability to test her proof. We agree. Indeed, § 31-294c(b) and the workers' compensation scheme generally indicate that the conclusive presumption under § 31-294c does not operate to bar *any* inquiry on the claim, but, rather, only the *employer's* ability to do so. [10] By its own terms, § 31-294c(b) attaches **[970 A.2d 639]** the conclusive presumption to the *employer.* Had the legislature intended not to allow the commissioner to probe the plaintiff's proof, it readily could have stated that the compensability of the injury shall be conclusively presumed, rather than that the employer is conclusively presumed to have accepted the compensability of the claim. Compare General Statutes § 10a-109g(b) ("[a]fter issuance, all securities of the university shall be conclusively presumed

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to be fully and duly authorized and issued under the laws of the state") and General Statutes § 20-325g ("[t]here shall be a conclusive presumption that a person has given informed consent to a dual agency relationship with a real estate broker if that person executes a written consent in the following form prior to executing any contract or agreement for the purchase, sale or lease of real estate"). More significantly, the legislature specifically vested the commissioners with broad powers and authorized them to exercise such powers " in a manner that is best calculated to ascertain the substantial rights of the parties and carry out the provisions and intent of this chapter." General Statutes § 31-298; see General Statutes § § 31-287 and 31-294f. In the absence of an express indication that the legislature intended to abrogate or limit that authority when a motion to preclude is granted, we presume that the commissioner retains such authority. See *Micklos v. Iseli Co.,* No. 1450, CRB-5-92-7 (June 17, 1994) ("the trier's evidentiary inquiry into the extent of the disability was not foreclosed by the respondent's failure to file a timely disclaimer of liability under [General Statutes § 31-297(b), now § 31-294c(b)]").

The second possible reason to allow the defendant to test the plaintiff's proof is that, if the commissioner is allowed to examine the plaintiff's proof, there would be no meaningfully different effect than if the employer were to assume the same role. In other words, if the commissioner is not required to be a passive recipient of evidence submitted by a claimant, the employer should not be required to be a passive spectator at the evidentiary hearing. Although this argument has some superficial appeal, for the reasons previously set forth, there is no textual support for this construction of § 31-294c(b), and indeed the text suggests otherwise. Given that the policy concerns on both sides-ensuring that bona fide claims are paid and providing a strong incentive for

employers either to commence payment or to

provide timely notice of the basis for a contest to payment-are effectuated by a rule under which the commissioner holds a claimant to her proof without unsolicited assistance from the employer,[11] we reject this reason as well.

Our decision in this case is largely guided by our previous interpretation of

[970 A.2d 640] § 31- 294c(b) in *Harpaz v. Laidlaw Transit, Inc.,supra*, 286 Conn. at 102, 942 A.2d 396. To the extent that the defendant raises legitimate policy considerations that dictate a different outcome, the legislature may weigh these considerations and address them as it sees fit.

In the present case, the defendant cross-examined the plaintiff and submitted a brief opposing her right to the compensation claimed. Although the commissioner cited to testimony adduced through direct examination of the plaintiff and exhibits submitted by the plaintiff in support of the vast majority of the factual findings, we are not convinced that the defendant's challenges to the plaintiff's case had no effect on the commissioner's decision. Therefore, the plaintiff is entitled to a new proceeding Before a different commissioner.

The decision of the board is reversed and the case is remanded to the board with direction to reverse the commissioner's decision and to remand the case to a new commissioner for further proceedings.

In this opinion the other justices concurred.

Notes:

[1] General Statutes § 31-294c(b) provides: " Whenever liability to pay compensation is contested by the employer, he shall file with the commissioner, on or Before the twenty-eighth day after he has received a written notice of claim, a notice in accord with a form prescribed by the chairman of the Workers' Compensation Commission stating that the right to compensation is contested, the name of the claimant, the name of the employer, the date of the alleged injury or death and the specific grounds on which the right to compensation is contested. The employer shall send a copy of the notice to the employee in accordance with section 31-321. If the employer or his legal representative fails to file the notice contesting liability on or Before the twenty-eighth day after he has received the written notice of claim, the employer shall commence payment of compensation for such injury or death on or Before the twenty-eighth day after he has received the written notice of claim, but the employer may contest the employee's right to receive compensation on any grounds or the extent of his disability within one year from the receipt of the written notice of claim, provided the employer shall not be required to commence payment of compensation when the written notice of claim has not been properly served in accordance with section 31-321 or when the written notice of claim fails to include a warning that (1) the employer, if he has commenced payment for the alleged injury or death on or Before the twenty-eighth day after receiving a written notice of claim, shall be precluded from contesting liability unless a notice contesting liability is filed within one year from the receipt of the written notice of claim, and (2) the employer shall be conclusively presumed to have accepted the compensability of the alleged injury or death unless the employer either files a notice contesting liability on or Before the twenty-eighth day after receiving a written notice of claim or commences payment for the alleged injury or death on or Before such twenty-eighth day. An employer shall be entitled, if he prevails, to reimbursement from the claimant of any compensation paid by the employer on and after the date the commissioner receives written notice from the employer or his legal representative, in accordance with the form prescribed by the chairman of the Workers' Compensation Commission, stating that the right to compensation is contested. Notwithstanding the provisions of this subsection, an employer who fails to contest liability for an alleged injury or death on or Before the twenty-eighth day after receiving a written notice of claim and who fails to commence payment for the alleged injury or death on or Before such twenty-eighth day, shall be conclusively presumed to have accepted the compensability of the alleged injury or death."

We note that although § 31-294c was amended after the proceedings in this case by the addition of subsection (d), the remainder of the statute was unchanged. References herein to the statute are to the current revision.

[2] Veridiem, Inc.'s insurer, OneBeacon Insurance, also is a defendant in this case. For convenience, we refer to Veridiem, Inc., as the defendant.

[3] There is no evidence in the record to explain the one year and eight month lapse of time between the date the commission received notice of the defendant's intent to contest the plaintiff's claim and the hearing on her claim. See General Statutes § 31-297 (setting forth time period for hearing of claims).

[4] Kureshi's letter stated in relevant part: " [The plaintiff] has been a patient of mine since 2002. She first saw Dr. Arnold Rossi, my partner, in August of 2002 after she suffered an injury on January 17, 2002. The [plaintiff] fell at work and as a result of that fall she developed severe back and leg pain. She was initially

evaluated by Dr. Rossi and then by Dr. [John] Grady-Benson. The [plaintiff] was found to have a lumbar radiculopathy secondary to a disc herniation and some mild adductor hip pain, which was treated effectively by Dr. Grady-Benson." After setting forth the progressive course of the plaintiff's medical treatment, which ultimately led to back surgery, Kureshi stated: " After reviewing her records, it is clear to me that [the plaintiff] suffered this injury as [a] direct result of her injury of her fall that she sustained [on] January 17, 2002 with reasonable medical probability."

[5] The plaintiff did file a motion to correct this finding, for reasons that are not evident to us upon review of her motion, which the commissioner denied. The plaintiff did not challenge that finding on appeal.

[6] Practice Book § 65-2 provides in relevant part: " If, at any time Before the final determination of an appeal, the appellate court is of the opinion that the appeal is appropriate for supreme court review, the appellate court may file a brief statement of the reasons why transfer is appropriate. The supreme court shall treat the statement as a motion to transfer and shall promptly decide whether to transfer the case to itself."

[7] We note that, in her original appellate brief, the plaintiff had claimed that the burden was not on her to establish that her disability was linked to the compensable injury. In light of our intervening decision in *Harpaz v. Laidlaw Transit, Inc.,supra*, 286 Conn. at 131, 942 A.2d 396, concluding that the conclusive presumption does not relieve a claimant of her obligation to prove her claim, we need not address this claim.

[8] The defendant also contended in its supplemental brief, and later at oral argument to this court, that: (1) public policy concerns, namely, malfeasance by claimants seeking compensation for injuries not proximately caused by their employment, favor revisiting the holding in *Harpaz* ; and (2) our reasoning in *Harpaz* was flawed because, inter alia, we failed to comply with General Statutes § 1-2z by ignoring the plain meaning of the text, as manifested by the deletion of certain text as a result of the 1993 amendment to § 31-294c (b). We reject the defendant's invitation. The defendant gives an unduly expansive interpretation to *Harpaz* as barring an employer from contesting any subsequent claim for additional compensation. We also note that the defendant's arguments as to § 1-2z misconstrues that statute, which limits courts to the current text of the statute to determine whether the meaning is unambiguous and only permits resort to extratextual sources, such as amendments to the statute, after there is a determination that the text is ambiguous.

[9] We note, however, that in *Guinan v. Direct Marketing Assn., Inc.,* 21 Conn.App. 63, 571 A.2d 143, aff'd on remand, 23 Conn.App. 805, 580 A.2d 1251, cert. denied, 216 Conn. 829, 582 A.2d 206 (1990), the Appellate Court indicated that *both* parties could present evidence to the commissioner after the motion to preclude was granted. See *id.,* at 66, 571 A.2d 143 ("[w]hile General Statutes [§ 31-297(b), now § 31-294c (b)] states that the defendants are precluded from contesting the extent of the plaintiff's disability, the determination of the extent of that disability and the total amount of compensation under [General Statutes] § 31-308 necessarily involves the presentation of evidence by both parties and factfinding on the part of the commissioner"). The context for this statement is unclear, and, to the extent that it is inconsistent with our understanding of the effect of preclusion, we reject it. Following our decision in *Harpaz,* it is clear that an employer cannot present evidence following the granting of a motion to preclude, and the defendant does not claim otherwise. The only issue is whether an employer subject to the conclusive presumption is precluded from challenging the claimant's proof through cross-examination and submission of written argument.

[10] We recognize that an Appellate Court case and dicta in two cases from this court relying on that case have indicated that, once the conclusive presumption attaches, no further inquiry is permitted, even by the *commissioner.* See *Bush v. Quality Bakers of America,* 2 Conn.App. 363, 373-74, 479 A.2d 820 ("[w]e agree with the conclusion of the compensation review division that once the commissioner found statutory preclusion of any defense to compensability, ' he was no longer permitted to make any factual exploration or finding concerning such a potential question' "), cert. denied, 194 Conn. 804, 482 A.2d 709 (1984); *Ash v. New Milford,* 207 Conn. 665, 673-74, 541 A.2d 1233 (1988) (quoting *Bush*); see also *Harpaz v. Laidlaw Transit, Inc.,supra*, 286 Conn. at 116-17, 942 A.2d 396 (citing *Ash*). This specific issue was not squarely Before the court in these three cases, and we are convinced that it is contrary to the purposes of the workers' compensation scheme to require employers to pay claims that are not bona fide simply because they failed to meet a twenty-eight day deadline for filing their notice to contest the claim.

[11] We acknowledge the possibility that there may be circumstances in which the commissioner properly may seek records or information from the employer to aid in the adjudication of a claim and the calculation of benefits.
