SUSAN MARANDINO *v.* PROMETHEUS PHARMACY ET AL.
(SC 18135)

Rogers, C. J., and Norcott, Katz, Vertefeuille and McLachlan, Js.*

Argued April 29, 2009—officially released January 26, 2010

Jason M. Dodge, with whom, on the brief, was *Douglas L. Drayton*, for the appellants-appellees (defendants).

Angelo Paul Sevarino, for the appellee-appellant (plaintiff).

Joram Hirsch and *Robert F. Carter* filed a brief for the Connecticut Trial Lawyers Association as amicus curiae.

Opinion

VERTEFEUILLE, J. In this consolidated appeal, the defendants, Prometheus Pharmacy and CNA RSKCo Services, appeal and the plaintiff, Susan Marandino, cross appeals from the judgment of the Appellate Court, which had affirmed a finding by a workers' compensation commissioner that the plaintiff had a compensable arm injury but reversed the finding that she also had a compensable knee injury.[1] *Marandino* v. *Prometheus Pharmacy*, 105 Conn. App. 669, 686, 939 A.2d 591 (2008). On appeal, the defendants claim that the Appellate Court improperly concluded that the plaintiff was entitled to temporary total incapacity benefits under General Statutes § 31-307 (a)[2] of the Workers' Compensation Act (act) after having received permanent partial disability benefits pursuant to a voluntary agreement. In her cross appeal, the plaintiff claims that the Appellate Court improperly concluded that the workers' compensation commissioner for the sixth district (commissioner) improperly relied on a report by Vincent Santoro, an orthopedic surgeon, in reaching the commissioner's decision that the plaintiff's arm and knee injuries were causally related. We affirm in part and reverse in part the judgment of the Appellate Court.

The Appellate Court opinion sets forth the following facts and procedural history. "In February, 1999, while employed by Prometheus Pharmacy, the plaintiff fell at her place of work and sustained an injury to her master right elbow. Beginning in July, 1999, the plaintiff underwent surgeries and received treatment for her arm injury from Andrew Caputo, an orthopedic surgeon. Specifically, on July 12, 1999, the plaintiff underwent an open reduction internal fixation of her right radial head fracture with left iliac crest bone graft, which was secured by a titanium plate, as well as a right carpal tunnel release. In December, 1999, Caputo discovered that there was a crack in the titanium plate and that surgery was required to fix it. Therefore, on January 19, 2000, the plaintiff underwent a right radial head replacement and release of her right elbow contracture.

"On March 1, 2001, the plaintiff underwent her final arm surgery, a right anterior subcutaneous ulnar nerve transposition and excision of deep sutures on her right lateral elbow. Thereafter, the plaintiff underwent an independent medical evaluation with Andrew Nelson, a physician. He diagnosed the plaintiff with, among other things, right upper extremity chronic regional pain syndrome, which he opined was directly and causally related to the injury sustained when the plaintiff fell at her place of work and that the plaintiff's prognosis was poor to fair. He also opined that she was significantly impaired, requiring ongoing narcotic medication and that '[a]t best she would only be able to utilize her right upper extremity as a sedentary assistant unless additional evaluation and possible intervention pro-

vided her function by way of range of motion, strength, and decreased pain.' Nelson opined that the plaintiff would reach maximum medical improvement in March, 2002, approximately twelve months after her final surgery on March 1, 2001. In 2002, Nelson authored a second independent medical evaluation in which he indicated that there was no significant change in the plaintiff's complaints or physical evaluation since the November 9, 2001 independent medical examination and that the plaintiff suffered from a permanent partial impairment of 41 percent of the right upper extremity.

"Beginning in June, 2000, and through the time of the hearings before the commissioner, the plaintiff was treated by a pain specialist, Steven Beck, for her arm injury. Beck's notes indicate an increase in pain, sensitivity and immobility over time, as well as an increase in narcotic medication over time to control the plaintiff's arm pain. Beck testified at his deposition that the plaintiff suffers from complete regional pain syndrome and reflex sympathetic dystrophy.

"On April 24, 2002, the plaintiff reached maximum medical improvement and entered into a voluntary agreement to receive permanent partial disability benefits, in accordance with General Statutes § 31-308, on the basis of a 41 percent permanent partial impairment of her right upper extremity. The plaintiff received benefits in accordance with that agreement for 85.28 weeks.

"In the meantime, in January, 2000, between the plaintiff's first and second arm surgeries, she suffered an injury to her right knee. The plaintiff was in her home and hurriedly was ascending her basement stairs to answer a telephone that was ringing on the first floor when she felt herself fall backward. To secure her balance, and fearful about the crack in the plate in her right arm, the plaintiff reached out for the railing, located on her right side, with her left arm. In doing so, she jerked her body and twisted her right knee. The plaintiff was treated by [Santoro] . . . for her knee injury and underwent two surgeries for an osteochondral lesion.

"At some point, after the voluntary agreement was entered into, a hearing was scheduled before the commissioner in which the plaintiff sought to receive benefits for total incapacity. Hearings were held before the commissioner on the matter, and he made several findings, specifically, that the plaintiff had a compensable 41 percent permanent partial disability of her master right arm, that her knee injury was compensable and that she was totally incapacitated and entitled to benefits in accordance with § 31-307.[3] The defendants appealed to the [compensation review board (board)], challenging the commissioner's findings that the plaintiff's knee injury was compensable and that the plaintiff was totally incapacitated and entitled to benefits in accordance with § 31-307. The defendants [did] not challenge the commissioner's finding that the plaintiff

has a compensable 41 percent permanent partial disability of her master right arm.[4] The board affirmed the findings of the commissioner and dismissed the defendants' appeal." Id., 671–74.

Thereafter, the defendants appealed from the decision of the board to the Appellate Court. On appeal to the Appellate Court, the defendants claimed that: (1) "the plaintiff is not entitled to total incapacity benefits under § 31-307 . . . because the plaintiff reached maximum medical improvement and entered into a voluntary agreement to receive permanent partial disability benefits, she is unable to request total incapacity benefits without demonstrating a change in [her] medical condition since entering into the agreement . . . [and] that even if the plaintiff can demonstrate a medical change sufficient to seek modification of her award, she is not entitled to total incapacity benefits as she has not exercised reasonable diligence in securing employment and, as such, has not demonstrated a diminished earning capacity in accordance with § 31-307"; id., 681–82; and (2) that the board improperly sustained "the commissioner's finding that the plaintiff's knee injury was compensable . . . [because] the reports on which the commissioner relied, in part, to make this finding should not have been admitted into evidence . . . [and] that there was insufficient evidence in the record on which the commissioner could rely to find that the plaintiff's knee injury was causally related to the prior compensable arm injury." Id., 674.

The Appellate Court concluded that the board properly affirmed the commissioner's award of total incapacity benefits to the plaintiff. Id., 685–86. Specifically, the Appellate Court concluded that the plaintiff had presented sufficient evidence to establish that the condition of her right arm had worsened from the time that she had entered into the voluntary agreement and that she had met her burden of establishing that she was unemployable by presenting evidence of a vocational rehabilitation expert. Id., 684–86. A majority of the Appellate Court panel further concluded that the board had improperly affirmed the decision of the commissioner that the plaintiff's knee injury was compensable because the medical reports on which the commissioner relied did not constitute competent evidence. Id., 680–81. Judge Mihalakos dissented from that portion of the decision. Id., 686. Accordingly, the Appellate Court reversed the decision of the board with respect to its finding that the plaintiff's knee injury was compensable, but affirmed it in all other respects. Id. This certified, consolidated appeal followed. Additional facts and procedural history will be set forth as necessary.

"As a threshold matter, we set forth the standard of review applicable to workers' compensation appeals. The principles that govern our standard of review in workers' compensation appeals are well established.

The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . It is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and [the] board. . . . A state agency is not entitled, however, to special deference when its determination of a question of law has not previously been subject to judicial scrutiny." (Internal quotation marks omitted.) *Deschenes* v. *Transco, Inc.*, 288 Conn. 303, 311, 953 A.2d 13 (2008); *Coppola* v. *Logistec Connecticut, Inc.*, 283 Conn. 1, 5–6, 925 A.2d 257 (2007); *Tracy* v. *Scherwitzky Gutter Co.*, 279 Conn. 265, 272, 901 A.2d 1176 (2006) ("[n]either the . . . board nor this court has the power to retry facts" [internal quotation marks omitted]); *Gartrell* v. *Dept. of Correction*, 259 Conn. 29, 36, 787 A.2d 541 (2002) ("[t]he commissioner has the power and duty, as the trier of fact, to determine the facts" [internal quotation marks omitted]).

I

In their appeal, the defendants claim that the Appellate Court improperly concluded that the plaintiff was entitled to total incapacity benefits under § 31-307 despite having entered into a voluntary agreement for the payment of permanent partial disability benefits under § 31-308 (b).[5] Specifically, the defendants assert that the workers' compensation statutory scheme creates a progression in which the claimant "numerically progresses by statute number" from temporary total incapacity to temporary partial disability to maximum medical improvement. The defendants further claim that because the plaintiff had progressed along the statutory time line to maximum medical improvement and entered into a voluntary agreement to receive permanent partial disability benefits, she was not entitled to temporary total incapacity benefits because she did not formally file a motion to open or modify her award under General Statutes § 31-315.[6] In response, the plaintiff asserts that the Appellate Court properly concluded that she was entitled to temporary total incapacity benefits even after receiving permanent partial disability benefits pursuant to the voluntary agreement. Specifically, the plaintiff claims that the workers' compensation statutory scheme does not contain a strict progression and that the remedial nature of the statutory scheme militates against strict construction of the act. The plaintiff further asserts that it is within the discretion of the commissioner to award total incapacity benefits to a claimant like herself even after the claimant enters into a voluntary agreement to receive permanent partial disability without the claimant formally filing a motion to open the award. We agree with the plaintiff.

The defendants' appeal raises an issue of statutory interpretation, over which we exercise plenary review. See, e.g., *Considine* v. *Waterbury*, 279 Conn. 830, 836, 905 A.2d 70 (2006). "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 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., 836–37.

We begin with the language of the relevant provisions of the act. Section 31-307 (a) provides in relevant part that "[i]f any injury for which compensation is provided under the provisions of this chapter results in total incapacity to work, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of the injured employee's average weekly earnings as of the date of the injury . . . ." Section 31-308 (b) provides in relevant part: "With respect to the following injuries, the compensation, in addition to the usual compensation for total incapacity but in lieu of all other payments for compensation, shall be seventy-five per cent of the average weekly earnings of the injured employee . . . . All of the following injuries include the loss of the member or organ and the complete and permanent loss of use of the member or organ referred to . . . ." In chart form, § 31-308 (b) then lists the compensable injuries to individual body parts, including the arm, and specifically the master arm, with the loss at or above the elbow entitling a claimant to 208 weeks of compensation. Section 31-315 further provides in relevant part: "Any award of, or voluntary agreement concerning, compensation made under the provisions of this chapter . . . shall be subject to modification in accordance with the procedure for original determinations, upon the request of either party . . . whenever it appears to the compensation commissioner, after notice and hearing thereon, that the incapacity of an injured employee has increased, decreased or ceased, or that the measure of dependence on account of which the compensation is paid has changed, or that changed conditions of fact have arisen which necessitate a

change of such agreement, award or transfer in order properly to carry out the spirit of this chapter. The commissioner shall also have the same power to open and modify an award as any court of the state has to open and modify a judgment of such court. The compensation commissioner shall retain jurisdiction over claims for compensation, awards and voluntary agreements, for any proper action thereon, during the whole compensation period applicable to the injury in question."

On appeal, the defendants assert that the plain language of § 31-308 (b), which provides that compensation under that section is "in addition to the usual compensation for total incapacity but in lieu of all other payments for compensation" indicates that once a claimant receives permanent partial disability benefits he or she is not eligible for any other benefits.[7] The plaintiff responds that this court previously has concluded that a claimant can receive total incapacity benefits after having received permanent partial disability benefits and nothing in the present case requires a departure from this precedent. We agree with the plaintiff, and conclude that in interpreting the language and interrelationship of §§ 31-307, 31-308 (b) and 31-315, we do not write on a clean slate, but are bound by our previous judicial interpretations of this language and the statutory scheme. See *Hummel* v. *Marten Transport, Ltd.*, 282 Conn. 477, 501, 923 A.2d 657 (2007) (holding that § 1-2z does not require this court to overrule prior judicial interpretations of statutes, even if not based on plain meaning rule).

Over the course of the last 100 years, this court frequently has interpreted the provisions of our workers' compensation statutory scheme by looking at the purpose and the legislative history of the act. At the outset, it is important to understand that the act provides for two unique categories of benefits—those designed to compensate for loss of earning capacity and those awarded to compensate for the loss, or loss of use, of a body part. See *Rayhall* v. *Akim Co.*, 263 Conn. 328, 349–51, 819 A.2d 803 (2003); see also 4 A. Larson & L. Larson, Workers' Compensation Law (2009) § 80.04, p. 80-13. "Total or partial incapacity benefits fall into the first category. See General Statutes §§ 31-307 and 31-308 (a). Disability benefits, also referred to as specific indemnity awards or permanency awards, fall into the second category." *Pizzuto* v. *Commissioner of Mental Retardation*, 283 Conn. 257, 267, 927 A.2d 811 (2007).

With this distinction in mind, we turn to our previous cases interpreting the language of § 31-308 (b). We first examine the case of *Costello* v. *Seamless Rubber Co.*, 99 Conn. 545, 122 A. 79 (1923). In *Costello*, the plaintiff suffered an injury that caused, inter alia, the amputation of two phalanges and the greater part of the third phalanx of the second finger of the right hand. Id., 547.

The plaintiff was awarded total incapacity benefits related to this injury for the period of August 13, 1920, to November 10, 1920. Id. Starting November 10, 1920, the plaintiff was awarded permanent partial disability benefits for the loss of use of the second finger. Id., 546. After the original amputation, there remained a portion of the bone of the proximal phalanx, which caused the plaintiff pain and made him unable to do full work until May 9, 1922, when he had a second operation for the removal of this piece of bone from the second finger. Id. As a result of this condition, the commissioner awarded the plaintiff partial incapacity from January 24, 1921, to May 9, 1922. Id. The defendants appealed to this court from the judgment of the trial court affirming the commissioner's award for the second period of incapacity, claiming that the statute excluded any allowance for partial incapacity due to the loss of a second finger except that specifically provided for in General Statutes (1918 Rev.) § 5352, as amended by chapter 142, § 7, of the 1919 Public Acts, the predecessor to § 31-308. Id., 547–48.

In considering the defendants' claim in *Costello*, this court examined the history of the act. "Prior to 1919 [§ 5352] read: 'In case of the following injuries the compensation, in lieu of all other payments [for compensation], shall be half of the average weekly earnings of the injured employee, prior to such injury for the terms respectively indicated.' While the statute was in this form the case of *Kramer* v. *Sargent & Co.*, 93 Conn. 26, 104 Atl. 490 [1918], came to this court. In that case the claimant was injured, and lost, by amputation on the same day, the terminal phalanx of one finger, and received one award for the loss of a phalanx and another award for total incapacity resulting from such loss. We held in that case that the phrase 'in lieu of all other payments' for compensation excluded all other payments than that specified in the schedule on account of the loss of the member and the handicap of the future through such loss. In the case of *Franko* v. *Schollhorn Co.*, 93 Conn. 13, 104 Atl. 485 [1918], decided on the same day, the claimant suffered an injury to a finger, which was followed by a period of total incapacity preceding its final loss by amputation, and for the total incapacity during the period of the unsuccessful attempt to save the finger, we held that the claimant was entitled to compensation in addition to the specific compensation for its subsequent loss by amputation. The effect of these two decisions was that § 5352 was held not to exclude additional compensation for incapacity preceding the loss of a member, but to exclude additional compensation for subsequent incapacity caused by such loss. And since the *Kramer* case did not present any other question, it would be more accurate to say that § 5352 was held to exclude additional compensation for subsequent incapacity normally due to such loss.

"In *Saddlemire* v. *American Bridge Co.*, 94 Conn. 618, 110 Atl. 63 [1920], the claimant suffered an injury resulting in the loss by amputation of his right leg, and either as a result of the original injury to the right leg, or from infection following its amputation, a phlebitis developed in the left leg, causing a partial incapacity quite distinct from and additional to the partial incapacity due to the loss of the right leg. The finding did not make it clear whether the phlebitis resulted from the original injury or from the amputation, and the defendant contended that in the latter case it was a direct consequence of the loss of the leg, and no additional compensation could be awarded in excess of the specific compensation for the loss of the leg. On this point we said: 'Compensation for the loss of a leg includes the loss of earning power during the cure, and such damages as are the ordinary and immediate incidents of such a loss. But where, in consequence of the amputation, injuries result which are distinguishable from those immediate results of the amputated limb, for example, if a nervous disorder ensue, or blood poisoning set in, or a phlebitis develops, affections such as these were not intended by the [act] to be compensated in the loss of this member. They are not the normal and immediate incidents of the lost member. We pointed out in *Kramer* v. *Sargent & Co.*, [supra, 93 Conn. 28], that the injuries specified in [§ 5352] . . . for the loss of a member, will ordinarily involve a period of incapacity of varying duration.' " *Costello* v. *Seamless Rubber Co.*, supra, 99 Conn. 548–49.

Relying on *Saddlemire*, this court in *Costello* clarified that "[a]ll of the injuries resulting from the loss of the member include those ordinary, natural and immediate results of the loss of the member. When the results are unusual, and are not the ordinary incidents following the amputation, and partial or total incapacity results, this is not to be attributed to the loss of the member, and is specifically included in the cases which [General Statutes (1918 Rev.) § 5355, the predecessor to § 31-315] provides shall authorize a modification of the original award." (Internal quotation marks omitted.) Id., 549–50.

In *Costello*, the defendants unsuccessfully attempted to distinguish the *Saddlemire* case "on the ground that the unusual condition creating an additional partial incapacity was . . . confined to the stump of the amputated finger and did not extend into the hand or into another finger." Id., 550. This court rejected this claim, holding that "no distinction based on the mere location of the abnormal condition can be sustained." Id. This court further concluded that, "[c]ompensation is awarded for incapacity, measured, with more or less accuracy, by loss of earning power, and the point of statutory construction involved is, as the *Saddlemire* case distinctly holds, whether or not the incapacity in question is one which can fairly be said to be a

contemplated consequence of 'the loss of, or the complete and permanent loss of the use of,' the particular member involved." Id.

This court further relied on the fact that *Kramer* and *Franko* were decided prior to the 1919 amendment of § 5352, which added the words "in addition to the usual compensation for total incapacity . . . ." Public Acts 1919, c. 142, § 7. This court concluded that "[t]his addition, so far as it affects the prior construction of the section, provides a more liberal measure of compensation because it obliterates the distinction theretofore drawn between total incapacity preceding and following the loss, and thereby reverses the ruling in the *Kramer* case. The award in the *Saddlemire* case was made before the amendment, but the reasoning of that opinion is not affected thereby." *Costello* v. *Seamless Rubber Co.*, supra, 99 Conn. 550–51.

In 1940, this court reaffirmed the holding in *Costello*, concluding that "[w]here, as here, there is disability followed by specific indemnity and subsequent disability the question always is whether the final disability is distinct from and due to a condition which is not a normal and immediate incident of the loss." *Morgan* v. *Adams*, 127 Conn. 294, 296, 16 A.2d 576 (1940); see id. (concluding that plaintiff was entitled to total incapacity benefits for second period of incapacity during which plaintiff experienced further trouble with eye and had it removed). This court distinguished cases in which the final disability was "not only traceable to the original injury but was due to a condition which was a normal and immediate incident of the loss. Compensation was accordingly denied. In the *Costello* case the contrary was true and compensation was awarded . . . ." Id.

In *Morgan*, the disability award was for the "loss of sight in one eye" under General Statutes (1930 Rev.) § 5237, also a predecessor to § 31-308 (a). This court reasoned that "[t]he statute specifically refers to the loss of sight, not to the loss of the eye. That aside, it is common knowledge that the loss of sight does not necessarily or even usually involve the loss of the eye. While the commissioner did not find in so many words that the loss of the eye was not a normal incident of the loss of sight, he did find a changed condition of fact requiring medical attention and resulting in disability." Id. On the basis of that finding of a changed condition, this court concluded that the plaintiff's claim in *Morgan* was consistent with the ruling in *Costello* and that the plaintiff's final disability was compensable. Id.; see also *Osterlund* v. *State*, 135 Conn. 498, 506–507, 66 A.2d 363 (1949) (concluding that claimant, who previously had been paid temporary partial and permanent partial disability benefits, would be eligible for award of additional temporary total incapacity benefits if he demonstrated that he was unemployable).

In the eighty-seven years since the decision in *Costello*

v. *Seamless Rubber Co.*, supra, 99 Conn. 545, the legislature has not amended the statute for total incapacity benefits to preclude a claimant from recovering incapacity benefits for a subsequent disability if it is distinct from and due to a condition that is not a normal and immediate incident of the loss for which the claimant received disability benefits for loss of use. Although legislative silence is not always indicative of legislative affirmation, we have routinely considered legislative inaction for a significant period of time to be significant. See *Hummel* v. *Marten Transport, Ltd.*, supra, 282 Conn. 502 (legislature's failure to act in eighteen years since court first interpreted statute "highly significant"); id., 494–95 ("[o]nce an appropriate interval to permit legislative reconsideration has passed without corrective legislative action, the inference of legislative acquiescence places a significant jurisprudential limitation on [this court's] authority to reconsider the merits of [its] earlier decision" [internal quotation marks omitted]); *Hammond* v. *Commissioner of Correction*, 259 Conn. 855, 873–74, 792 A.2d 774 (2002) (rejecting argument regardless of its merits because court constrained by more than sixteen years of legislative silence); *Rivera* v. *Commissioner of Correction*, 254 Conn. 214, 252, 756 A.2d 1264 (2000) (six years of legislative silence indicative of legislature's affirmation). Accordingly, we conclude that a claimant is not precluded from receiving total incapacity benefits under § 31-307 for a subsequent disability if it is distinct from and due to a condition that is not a normal and immediate incident of the loss for which she received permanent partial disability benefits under § 31-308 (b).[8]

In the present case, at the hearing on her application for total disability benefits, the plaintiff presented evidence that demonstrated that she was totally incapacitated due to conditions that were not a normal or immediate incident of the partial loss of use of her right arm. Specifically, the plaintiff presented evidence from Beck, her treating physician. Beck opined in a deposition, as noted in the commissioner's findings, that the plaintiff "suffered from complete regional pain syndromes and reflex sympathetic dystrophy, which had developed over time" and that her "condition was myofascial pain and ongoing sympathetic fiber pain based on continued lost range of motion, sensitivity to touch and swelling of forearm and wrist." Beck also testified in the deposition that he doubted that the plaintiff "could hold a job . . . ." The plaintiff also presented evidence from Andrew Caputo, a surgeon who had performed a prior surgery on her right arm, which indicated that in May, 2004, she had a fracture line at the proximal aspect of the stem and posterior interosseous nerve[9] paresthesia.[10] Caputo recommended "repeat" X rays and indicated that an additional surgery might be necessary in the future to alleviate that condition. The plaintiff also introduced evidence from Albert Sabella, an

expert in the field of vocational evaluation. Sabella testified that the plaintiff would not be able to meet the requirements of her previous job as a pharmacy technician and that she did not have transferable skills from that job because of the limited use of her right arm. Sabella concluded that it was not reasonable for the plaintiff to pursue any type of employment because of her lack of physical ability in her right arm, her absence from the workforce for approximately three years, her chronic pain in her master arm and the fact that she was still receiving medical treatment. On the basis of the foregoing evidence, the commissioner found that the plaintiff was totally incapacitated and was entitled to benefits under § 31-307. Although the commissioner did not explicitly find that the pain and ongoing medical issues that the plaintiff was enduring were not a normal incident of the partial loss of use of the right arm, it is implicit that the partial loss of use of the arm does not necessarily or even usually involve the complications from which the plaintiff suffered.[11] Accordingly, we conclude that the Appellate Court properly determined that the plaintiff was entitled to total incapacity benefits.

The defendants further claim that the plaintiff's failure to file a motion to open or modify pursuant to § 31-315 precludes her from receiving total incapacity benefits pursuant to § 31-307. Section 31-315 provides in relevant part: "Any award of, or voluntary agreement concerning, compensation made under the provisions of this chapter . . . shall be subject to modification in accordance with the procedure for original determinations, upon the request of either party . . . whenever it appears to the compensation commissioner, after notice and hearing thereon, that the incapacity of an injured employee has increased, decreased or ceased, or that the measure of dependence on account of which the compensation is paid has changed, or that changed conditions of fact have arisen which necessitate a change of such agreement, award or transfer in order properly to carry out the spirit of this chapter. The commissioner shall also have the same power to open and modify an award as any court of the state has to open and modify a judgment of such court. The compensation commissioner shall retain jurisdiction over claims for compensation, awards and voluntary agreements, for any proper action thereon, during the whole compensation period applicable to the injury in question." This court has recognized that a modification of an award pursuant to § 31-315 is the appropriate means of obtaining total incapacity benefits in a situation in which a claimant suffers a subsequent disability. See *Costello* v. *Seamless Rubber Co.*, supra, 99 Conn. 550 ("[w]hen the results are unusual, and are not the ordinary incidents following the [injury], and partial or total incapacity results, this is not to be attributed to the loss [of use] of the member, and is specifically included in the cases which [§ 31-315, formerly General

Statutes (1918 Rev.) § 5355] provides shall authorize a modification of the original award" [internal quotation marks omitted]). Bearing in mind, however, the remedial purposes of the workers' compensation statutory scheme, we cannot conclude that the plaintiff's failure to file a formal motion to modify precludes her receipt of benefits under the act. See *Pizzuto* v. *Commissioner of Mental Retardation*, supra, 283 Conn. 265 ("[W]e are mindful that the act indisputably is a remedial statute that should be construed generously to accomplish its purpose. . . . The humanitarian and remedial purposes of the act counsel against an overly narrow construction that unduly limits eligibility for workers' compensation. . . . Accordingly, [i]n construing workers' compensation law, we must resolve statutory ambiguities or lacunae in a manner that will further the remedial purpose of the act. . . . [T]he purposes of the act itself are best served by allowing the remedial legislation a reasonable sphere of operation considering those purposes." [Citations omitted; internal quotation marks omitted.]).

First, in the present case, the record demonstrates that the commissioner and the parties considered the plaintiff's application for total incapacity benefits to be the equivalent of a motion to open or modify pursuant to § 31-315. Indeed, as we have explained previously herein, the commissioner's determination that the plaintiff was entitled to total incapacity benefits was based on a finding that her condition had changed since she entered into the voluntary agreement. In considering the plaintiff's request for total incapacity benefits, the commissioner, therefore applied the standard applicable to a § 31-315 motion. Second, the defendants have failed to point to any way in which the plaintiff's failure to file a formal motion to open or modify pursuant to § 31-315 prejudiced them. Indeed, at the hearing the defendants never objected to the plaintiff's failure to file a motion under § 31-315, were given adequate notice of the hearing and were able to participate, present evidence, and cross-examine witnesses. Furthermore, the board considered the commissioner's award "as modifying the prior award based on [a] changed condition of fact under § 31-315."

Moreover, keeping in mind the purpose of the act, which is to be liberally construed to provide coverage for employees who are injured while working, we conclude that it would violate public policy to deny the plaintiff benefits on the basis of her failure to frame her application for total incapacity benefits as a motion to open or modify under § 31-315. *Dubois* v. *General Dynamics Corp.*, 222 Conn. 62, 67, 607 A.2d 431 (1992) ("[w]e are mindful of the principles underlying Connecticut practice in workmen's compensation cases: that the legislation is remedial in nature . . . and that it should be broadly construed to accomplish its humanitarian purpose" [citation omitted; internal quotation

marks omitted]); *Massolini* v. *Driscoll*, 114 Conn. 546, 553, 159 A. 480 (1932) ("[t]he [act] is to be construed with sufficient liberality to carry into effect the beneficent purpose contemplated in that legislation, and not to defeat that purpose by narrow and technical definition"). Accordingly, we affirm the judgment of the Appellate Court affirming the board's conclusion that the plaintiff is entitled to total incapacity benefits under § 31-307.

II

In her cross appeal, the plaintiff claims that the Appellate Court majority improperly concluded that the commissioner should not have relied on a medical report from Santoro in determining that the plaintiff's knee injury was compensable. In support of her claim, the plaintiff asserts that the issue of whether the plaintiff's arm injury was the proximate cause of her knee injury was a factual issue within the province of the commissioner. Moreover, the plaintiff further claims that Santoro's report constituted substantial and credible evidence on which the commissioner properly relied in finding that the plaintiff's arm injury was the proximate cause of her knee injury. In response, the defendants assert that the Appellate Court majority properly concluded that the commissioner improperly relied on Santoro's report because it was not supported by competent evidence on which the commissioner could rely. We agree with the plaintiff, and accordingly reverse the judgment of the Appellate Court as it relates to the plaintiff's knee injury.

At the hearing before the commissioner, the plaintiff sought to enter into evidence her medical records from Santoro. The records contained a note and a letter in which Santoro expressed his opinion that the plaintiff's knee injury was causally related to the arm injury. The note, dated November 28, 2000, stated: "*I feel that there is* [*a*] *direct related cause of the knee injury to the right elbow pre-existing problem.*" (Emphasis added.) The letter, which also was authored by Santoro and was dated April 5, 2002, was written to the plaintiff's attorney and provided: "I am responding to your . . . correspondence regarding your client and my patient, [the plaintiff]. Please be advised that we have recommended surgery and this dates back to [February, 2002]. I talked specifically with the [plaintiff] that she had an osteochondral lesion [in her knee]. *This is a direct result of her previous work-related trauma and as such is a continuation of her ongoing problems. This does not represent a new condition.*" (Emphasis added.)

The defendants objected to the admission of the November, 2000 note on the ground that it was not a medical report in accordance with General Statutes § 52-174 (b).[12] Over the defendants' objection, the commissioner admitted the note into evidence. The defendants did not object, however, to the admission into

evidence of the April 5, 2002 letter.[13] In his findings and award, the commissioner determined that "Santoro reported that there is [a] direct related cause of the [plaintiff's] knee injury to her right elbow preexisting problem" and further found that "[t]he opinion of . . . Santoro with respect to the cause of the [plaintiff's] injury to her right knee *being uncontradicted* is persuasive." (Emphasis added.)

On appeal to the Appellate Court, the defendants claimed that there was not sufficient evidence in the record on which the commissioner could rely to find that the plaintiff's knee injury was causally related to her arm injury. The Appellate Court majority agreed with the defendants and concluded that, "Santoro's reports provided a determination of causation without any supporting medical facts from which medical causation could reasonably be inferred. Because Santoro's opinion regarding causation is merely a statement devoid of a basis in fact . . . it was not competent evidence, but rather speculation and conjecture and, as such, could not, without more, be relied on to determine whether legal causation existed between the arm and [knee] injury." *Marandino* v. *Prometheus Pharmacy*, supra, 105 Conn. App. 680–81.[14]

As we have explained previously herein, "[t]he principles that govern our standard of review in workers' compensation appeals are well established. The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . Neither the . . . board nor this court has the power to retry facts." (Citation omitted; internal quotation marks omitted.) *Tracy* v. *Scherwitzky Gutter Co.*, supra, 279 Conn. 272.

"To recover under the [act], an employee must meet the two part test embodied in General Statutes § 31-275,[15] namely, that the injury claimed arose out of the employee's employment and occurred in the course of the employment. . . . [I]n Connecticut traditional concepts of proximate cause constitute the rule for determining . . . causation [in a workers' compensation case]." (Citation omitted; internal quotation marks omitted.) *DiNuzzo* v. *Dan Perkins Chevrolet Geo, Inc.*, 294 Conn. 132, 141, 982 A.2d 157 (2009). "An actual cause that is a substantial factor in the resulting harm is a proximate cause of that harm. . . . The finding of actual cause is thus a requisite for any finding of proximate cause." (Internal quotation marks omitted.) *Winn* v. *Posades*, 281 Conn. 50, 57, 913 A.2d 407 (2007).

"When, as in the present case, it is unclear whether an employee's [subsequent injury] is causally related to a compensable injury, it is necessary to rely on expert medical opinion. See, e.g., *Murchison* v. *Skinner Precision Industries, Inc.*, 162 Conn. 142, 152, 291 A.2d 743

(1972). Unless the medical testimony by itself establishes a causal relation, or unless it establishes a causal relation when it is considered along with other evidence, the commissioner cannot reasonably conclude that the [subsequent injury] is causally related to the employee's employment. . . . Id. Expert opinions must be based [on] reasonable probabilities rather than mere speculation or conjecture if they are to be admissible in establishing causation. . . . To be reasonably probable, a conclusion must be more likely than not. . . . Whether an expert's testimony is expressed in terms of a reasonable probability that an event has occurred does not depend [on] the semantics of the expert or his use of any particular term or phrase, but rather, is determined by looking at the entire substance of the expert's testimony. . . . *Struckman* v. *Burns*, 205 Conn. 542, 554–55, 534 A.2d 888 (1987)." (Internal quotation marks omitted.) *DiNuzzo* v. *Dan Perkins Chevrolet Geo, Inc.*, supra, 294 Conn. 142–43.

In her cross appeal, the plaintiff claims that the Appellate Court majority improperly concluded that the commissioner's finding that her knee injury was compensable was not supported by competent medical evidence. To the contrary, the plaintiff asserts that the commissioner properly relied on the uncontroverted medical opinion of her attending physician. The plaintiff further claims that Santoro's report did not constitute speculation or conjecture merely because it did not contain the supporting medical facts for his conclusion regarding causation. We agree with the plaintiff.

This court has repeatedly stated that, a workers' compensation award must be based on competent evidence and that, in workers' compensation matters, "the opinions of experts [are] to be received and considered as in other cases generally . . . ." (Internal quotation marks omitted.) *Cooke* v. *United Aircraft Corp.*, 152 Conn. 214, 216, 205 A.2d 484 (1964). It is axiomatic that the trier of fact has "wide discretion in ruling on the admissibility of expert testimony and, unless that discretion has been abused or the ruling involves a clear misconception of the law, the trial court's decision will not be disturbed." (Internal quotation marks omitted.) *Sullivan* v. *Metro-North Commuter Railroad Co.*, 292 Conn. 150, 157, 971 A.2d 676 (2009). "The essential facts on which an expert opinion is based are an important consideration in determining the admissibility of his opinion." *State* v. *Douglas*, 203 Conn. 445, 452, 525 A.2d 101 (1987). "In order to render an expert opinion the witness must be qualified to do so and there must be a factual basis for the opinion. . . . Some facts must be shown as the foundation for an expert's opinion, but there is no rule of law declaring the precise facts which must be proved before such an opinion may be received in evidence." (Citations omitted; internal quotation marks omitted.) *State* v. *John*, 210 Conn. 652, 677, 557 A.2d 93, cert. denied, 493 U.S. 824, 110 S. Ct. 84, 107 L. Ed.

2d 50 (1989).

In the present case, the plaintiff presented evidence from Santoro in which he definitively stated that it was his medical opinion that the plaintiff's knee injury was causally related to her arm injury. As we have explained previously herein, the defendants did not object to the admission of the medical report of Santoro being admitted into evidence. See footnote 13 of this opinion. At the hearing, the defendants did not challenge Santoro's qualifications as an expert witness; nor did they offer any contrary report or witness. Indeed, the evidence at the hearing established that Santoro was the plaintiff's attending physician who had treated her for approximately two years and performed two surgeries on her knee. Accordingly, it is undisputed that Santoro was qualified to provide an expert opinion in this matter. Compare *Cooke* v. *United Aircraft Corp.*, supra, 152 Conn. 216 ("[in workers' compensation matters] the opinions of experts [are] to be received and considered as in other cases generally but . . . the opinion of a physician which is based wholly or partly on statements and symptoms related to the physician by the patient on a personal examination is inadmissible where the examination was made for the purpose of qualifying the physician to testify as a medical expert" [internal quotation marks omitted]).

Instead, on appeal the defendants claimed and the Appellate Court majority agreed that Santoro's expert opinion was not competent because he failed to include the supporting medical facts behind his conclusion in his medical report. We disagree. As we have explained previously herein, the facts on which an expert relies for his medical opinion is relevant to determining the admissibility of the expert opinion, but once determined to be admissible, there is no rule establishing what precise facts must be included to support an expert opinion. See *State* v. *Douglas*, supra, 203 Conn. 452; see also *State* v. *John*, supra, 210 Conn. 677. Once Santoro's report was admitted into evidence, the trier of fact—the commissioner—was free to determine the weight to be afforded to that evidence. *Wasniewski* v. *Quick & Reilly, Inc.*, 292 Conn. 98, 103, 971 A.2d 8 (2009) ("[t]he credibility of the witnesses and the weight to be accorded to their testimony is for the trier of fact" [internal quotation marks omitted]). If the defendants sought to challenge the credibility or weight to be afforded to Santoro's expert opinion of causation they could have done so by deposing him prior to the hearing or calling him as a witness at the hearing. The defendants did neither. Accordingly, we cannot conclude that the commissioner's reliance on the unequivocal expert opinion of Santoro was not reasonable.

Moreover, as we have explained previously herein, it is proper to consider medical evidence *along with all other evidence* to determine whether an injury is

related to the employment. *Murchison* v. *Skinner Precision Industries, Inc.*, supra, 162 Conn. 151. In the present case, the plaintiff personally testified that on January 1, 2000, while in the basement of her home, she heard the telephone ring. As the plaintiff began to climb the stairs hurriedly to answer the telephone, she felt herself fall backward. Because of the injury to her right arm, she did not grab the handrail with that arm, but instead twisted around and grabbed the handrail with her left arm. The plaintiff further testified that when she did so, she gave herself "quite a tug . . . twisted [her] knee . . . [and] felt a crunch." The Appellate Court majority concluded that "[t]here is nothing in Santoro's reports, or in the record, to suggest that the arm injury, rather than some other source, was a substantial factor in bringing about the knee injury." *Marandino* v. *Prometheus Pharmacy*, supra, 105 Conn. App. 680. We disagree and conclude that the plaintiff's own testimony corroborated Santoro's medical opinion. Accordingly, we conclude that the commissioner properly determined that the knee injury was causally related to the plaintiff's employment based on the expert opinion of Santoro when considered along with the other evidence.

The defendants claim that this appeal is controlled by our recent case, *DiNuzzo* v. *Dan Perkins Chevrolet Geo, Inc.*, supra, 294 Conn. 132. We disagree. In *DiNuzzo*, we affirmed the conclusion of the Appellate Court that the commissioner improperly relied on the opinion of the plaintiff's medical expert because there was not a proper factual basis in the record for the expert's opinion. Id., 144. In *DiNuzzo*, the plaintiff's expert testified that the decedent's death was caused by arthesclerotic disease, which was causally related to his previous compensable spinal injury because the prior injury had severely limited his ability to maintain his physical fitness and aerobic conditioning. Id., 135. The evidence before the commissioner established, however, that the plaintiff's expert had not examined the decedent's body, that he did not know if the decedent had a congenital heart defect that would have caused the heart attack, and that no autopsy had been performed. Id., 138. Indeed, the plaintiff's expert conceded that it was impossible to know the exact cause of the decedent's death and that a number of other factors could have caused a sudden death. Id. On the basis of that record, we concluded that it was unreasonable for the commissioner to have relied on the opinion of the plaintiff's expert to award the plaintiff a claim for dependent widow's benefits pursuant to the act. Id., 147–48.

The expert opinion evidence in the present case is readily distinguishable from that in *DiNuzzo*. First, as we have explained previously herein, Santoro was the plaintiff's attending physician who had treated her for approximately two years after she had received the

injury for which she sought compensation. Unlike the medical expert in *DiNuzzo*, Santoro had performed multiple physical examinations of the plaintiff's injured knee, as well as reviewing other diagnostic reports, such as a magnetic resonance imaging report. Second, unlike the expert in *DiNuzzo*, Santoro was able to state with medical certainty that the plaintiff's knee injury was causally related to her arm injury. There is no evidence in the record to indicate that Santoro was not certain of this causal relationship. See *Aspiazu* v. *Orgera*, 205 Conn. 623, 632, 535 A.2d 338 (1987) ("An expert opinion cannot be based on conjecture or surmise but must be reasonably probable. . . . Any expert opinion that describes a condition as possible or merely fifty-fifty is based on pure speculation." [Citation omitted; internal quotation marks omitted.]). Accordingly, Santoro's expert opinion is outside the realm of speculation and the commissioner reasonably relied on it in reaching his decision.

The judgment of the Appellate Court is affirmed with respect to the defendants' appeal challenging the award of total incapacity benefits to the plaintiff; the judgment of the Appellate Court is reversed with respect to the plaintiff's cross appeal regarding the compensability of her knee injury and the case is remanded to that court with direction to affirm the compensation review board's decision.

In this opinion NORCOTT and McLACHLAN, Js., concurred.

* This case was argued prior to the implementation of the policy of this court to hear all cases en banc.

[1] The defendants appealed, and the plaintiff cross appealed, from the judgment of the Appellate Court. We granted the defendants' petition for certification to appeal limited to the following question: "Did the Appellate Court properly determine that the [plaintiff] was entitled to temporary total benefits after having received permanent partial disability benefits pursuant to a voluntary agreement?" *Marandino* v. *Prometheus Pharmacy*, 286 Conn. 916, 945 A.2d 977 (2008).

We granted the plaintiff's petition for certification to appeal limited to the following question: "Did the Appellate Court properly determine that the workers' compensation commissioner improperly relied on the report by Vincent Santoro, an orthopedic surgeon?" *Marandino* v. *Prometheus Pharmacy*, 286 Conn. 917, 945 A.2d 977 (2008).

[2] General Statutes § 31-307 (a) provides: "If any injury for which compensation is provided under the provisions of this chapter results in total incapacity to work, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of the injured employee's average weekly earnings as of the date of the injury, calculated pursuant to section 31-310, after such earnings have been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act made from such employee's total wages received during the period of calculation of the employee's average weekly wage pursuant to section 31-310; but the compensation shall not be more than the maximum weekly benefit rate set forth in section 31-309 for the year in which the injury occurred. No employee entitled to compensation under this section shall receive less than twenty per cent of the maximum weekly compensation rate, as provided in section 31-309, provided the minimum payment shall not exceed seventy-five per cent of the employee's average weekly wage, as determined under section 31-310, and the compensation shall not continue longer than the period of total incapacity."

Technical changes not relevant to this appeal have been made to § 31-307 since the time of the plaintiff's claim for benefits. See Public Acts 2006,

No. 06-84. For purposes of convenience, we refer herein to the current revision of the statute.

[3] The defendants concede that the plaintiff is eligible for additional discretionary benefits in accordance with General Statutes § 31-308a.

[4] At oral argument in the Appellate Court, the defendants conceded that the Appellate Court could sustain the board's affirmance of the commissioner's finding that the plaintiff was unemployable and, thus, totally incapacitated on the basis of the 41 percent permanent partial disability of the plaintiff's master right arm. In other words, sustaining the commissioner's finding that the plaintiff is totally incapacitated would not require this court to sustain the commissioner's finding that the knee injury is compensable.

[5] General Statutes § 31-308 (b) provides in relevant part: "With respect to the following injuries, the compensation, in addition to the usual compensation for total incapacity but in lieu of all other payments for compensation, shall be seventy-five per cent of the average weekly earnings of the injured employee, calculated pursuant to section 31-310, after such earnings have been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act made from such employee's total wages received during the period of calculation of the employee's average weekly wage pursuant to said section 31-310, but in no case more than one hundred per cent, raised to the next even dollar, of the average weekly earnings of production and related workers in manufacturing in the state, as determined in accordance with the provisions of section 31-309, or less than fifty dollars weekly. All of the following injuries include the loss of the member or organ and the complete and permanent loss of use of the member or organ referred to:

"MEMBER	INJURY	WEEKS OF COMPENSATION
"Arm		
"Master arm	Loss at or above elbow	208 . . . ."

We note that § 31-308 (b) was amended after the time of the plaintiff's claim by the addition of injuries to other parts of the body. See Public Acts 2000, No. 00-8. Those amendments are not relevant to this appeal and for purposes of convenience, we refer herein to the current revision of the statute.

[6] General Statutes § 31-315 provides: "Any award of, or voluntary agreement concerning, compensation made under the provisions of this chapter or any transfer of liability for a claim to the Second Injury Fund under the provisions of section 31-349 shall be subject to modification in accordance with the procedure for original determinations, upon the request of either party or, in the case of a transfer under section 31-349, upon request of the custodian of the Second Injury Fund, whenever it appears to the compensation commissioner, after notice and hearing thereon, that the incapacity of an injured employee has increased, decreased or ceased, or that the measure of dependence on account of which the compensation is paid has changed, or that changed conditions of fact have arisen which necessitate a change of such agreement, award or transfer in order properly to carry out the spirit of this chapter. The commissioner shall also have the same power to open and modify an award as any court of the state has to open and modify a judgment of such court. The compensation commissioner shall retain jurisdiction over claims for compensation, awards and voluntary agreements, for any proper action thereon, during the whole compensation period applicable to the injury in question."

[7] See footnote 3 of this opinion.

[8] We disagree with the concurring opinion, which states that the defendants clearly concede in their brief that if the plaintiff demonstrated a change in condition, then § 31-307 benefits are allowed. Although we acknowledge that the defendants concede that the plaintiff "was not without remedy for some change in her physical condition after accepting permanent partial [disability benefits]" and that she could have filed a motion for modification under § 31-315, the defendants *never* concede that she would be entitled to *§ 31-307 benefits* if she demonstrated such a change and such concession would be wholly inconsistent with their principal claim in this matter. We understand that the defendants are raising one principal claim, namely, that the plaintiff cannot receive total incapacity benefits under § 31-307 after entering into a voluntary agreement for the payment of permanent partial disability benefits under § 31-308 (b). We therefore rely on *Costello* v. *Seamless Rubber Co.*, supra, 99 Conn. 545, and its progeny to address under what circumstances a claimant is entitled to receive total incapacity benefits after

receiving permanent partial disability benefits, and do not address whether, "*in the absence of a changed condition*, a claimant is entitled to receive total incapacity benefits after receiving permanent partial disability benefits." (Emphasis altered.)

[9] The posterior interosseous nerve is "the terminal portion of the deep branch of the radial [nerve] . . . ." Stedman's Medical Dictionary (28th Ed. 2006).

[10] Paresthesia is "[a] spontaneous abnormal usually nonpainful sensation (e.g., burning, pricking) . . . ." Stedman's Medical Dictionary (28th Ed. 2006).

[11] As we explain more fully in part II of this opinion, the commissioner also determined that the plaintiff's injury to her right knee was compensable. Because we conclude in part II that the commissioner properly determined that the right knee injury was compensable and that the knee injury is distinct from and due to a condition that is not a normal and immediate incident of the partial loss of the use of the plaintiff's right arm, we conclude that the right knee injury provides yet another basis on which the plaintiff was properly awarded total incapacity benefits.

[12] Although § 52-174 (b) was amended after the proceedings before the commissioner in the present case; see Public Acts 2008, No. 08-81; those changes are not relevant to this appeal. For purposes of convenience, references herein to § 52-174 are to the current revision of the statute.

[13] On appeal to the Appellate Court, the defendants claimed that the report in which Santoro opined that the plaintiff's knee injury was causally related to her arm injury should not have been admitted into evidence because it was not a medical report for the purposes of § 52-174 (b). As we have explained previously in this opinion, there were two documents admitted into evidence by the commissioner that contained Santoro's opinion that the plaintiff's knee injury was causally related to the plaintiff's arm injury, namely, the November, 2000 note and the April, 2002 letter. The defendants did not object to the admission of the April, 2002 letter. The Appellate Court concluded, that because "[t]he defendants did not object to [the April, 2002] letter during the hearing . . . they can not raise the propriety of its admission into evidence for the first time on appeal." *Marandino* v. *Prometheus Pharmacy*, supra, 105 Conn. App. 675, citing *Lorthe* v. *Commissioner of Correction*, 103 Conn. App. 662, 699, 931 A.2d 348 ("[t]his court does not review claims raised for the first time on appeal"), cert. denied, 284 Conn. 939, 937 A.2d 696 (2007). The Appellate Court further concluded that, because the April, 2002 letter contained the same opinion of causation regarding the knee and arm injury as the November, 2000 note, the November, 2000 note was cumulative of the opinion contained in the April, 2002 letter. *Marandino* v. *Prometheus Pharmacy*, supra, 675–76. Therefore, the Appellate Court concluded that it was not necessary to reach the issue of whether the commissioner properly admitted the November, 2000 note because, "even if the November . . . 2000 note was admitted improperly, the commissioner could have relied on the April 5, 2002 letter for the very same proposition." Id., 676, citing *State* v. *Williams*, 30 Conn. App. 654, 656, 621 A.2d 1365 (1993) ("We do not reach the issue of whether the trial court's ruling was proper. . . . It is well established that a judgment need not be reversed merely because inadmissible evidence has been admitted, if permissible evidence to the same effect has also been placed before the jury." [Citations omitted.]); *State* v. *Farnum*, 275 Conn. 26, 31 n.4, 878 A.2d 1095 (2005) ("[i]n light of our conclusion that there was sufficient evidence to affirm the defendant's conviction in the absence of this evidence, we need not address this claim"). We agree with the Appellate Court.

[14] Judge Mihalakos dissented from the majority opinion of the Appellate Court. *Marandino* v. *Prometheus Pharmacy*, supra, 105 Conn. App. 686. Noting that, "[w]hether Santoro's opinion was based on facts is a preliminary question of admissibility . . . [and that] [o]nce Santoro's report was properly received, the commissioner was entitled to rely on the conclusions set forth in the report if he found it credible." Id., 689 (*Mihalakos*, *J.*, dissenting). Judge Mihalakos further concluded: "I disagree with the majority's conclusion that Santoro's report was based on speculation and conjecture because it did not include any supporting medical facts. . . . The conclusion reached by Santoro was unequivocal . . . . There simply is no indication that his opinion was based on speculation or conjecture, rather than on a reasonable probability." (Citations omitted.) Id., 689–90. Accordingly, Judge Mihalakos would have affirmed the judgment of the board, affirming the factual determinations of the commissioner. Id., 693.

[15] General Statutes § 31-275 provides in relevant part: "As used in this

chapter, unless the context otherwise provides:

"(1) 'Arising out of and in the course of his employment' means an accidental injury happening to an employee or an occupational disease of an employee originating while the employee has been engaged in the line of the employee's duty in the business or affairs of the employer upon the employer's premises, or while engaged elsewhere upon the employer's business or affairs by the direction, express or implied, of the employer, provided . . . .

"(B) A personal injury shall not be deemed to arise out of the employment unless causally traceable to the employment other than through weakened resistance or lowered vitality . . . .

"(E) A personal injury shall not be deemed to arise out of the employment if the injury is sustained: (i) At the employee's place of abode, and (ii) while the employee is engaged in a preliminary act or acts in preparation for work unless such act or acts are undertaken at the express direction or request of the employer . . . ."