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KATZ, J., with whom, ROGERS, C. J., joins, concurring. I agree with the majority that the Appellate Court: (1) properly affirmed in part the decision of the workers' compensation review board (board) dismissing the appeal of the defendants, Prometheus Pharmacy and CNA RSKCo Services, from the decision of the workers' compensation commissioner (commissioner) concluding that the plaintiff, Susan Marandino, is entitled to total incapacity benefits; and (2) improperly reversed in part the board's decision insofar as it had dismissed the defendants' appeal from the commissioner's decision finding the plaintiff's knee injury compensable. I disagree, however, with the majority's analysis with respect to the first issue. Specifically, that issue requires the court to consider under what circumstances a claimant who has received permanent partial disability benefits under General Statutes § 31-308 (b) pursuant to a voluntary agreement subsequently may obtain total incapacity benefits under General Statutes § 31-307.[1] Although I agree with the majority that the plaintiff is entitled to total incapacity benefits, I would resolve the issue on a narrower basis than the majority does. Specifically, I would conclude only that the Appellate Court properly determined that the board properly had dismissed the defendants' appeal on the ground that the plaintiff's deteriorating condition since the execution of the voluntary agreement constituted a changed condition of fact that permitted modification of the agreement under General Statutes § 31-315.[2]

To explain my concerns and the more limited approach that I would take, I begin with a brief summary of the underlying proceedings and the parties' claims on appeal to this court. It is undisputed that, in 2002, following the plaintiff's third surgery in March, 2001, the parties executed a voluntary agreement under which the plaintiff received permanent incapacity benefits under § 31-308 (b) for a 41 percent permanent partial impairment to her right master arm. Sometime before February, 2004, when the formal proceedings in this case commenced, the plaintiff filed a claim seeking total incapacity benefits.[3] She did not file a formal motion to open or modify the agreement.

In his finding and award, the commissioner concluded that the plaintiff was totally incapacitated and, therefore, was entitled to benefits under § 31-307. In support of the incapacity determination, the commissioner found credible testimony and evidence relating to the plaintiff's 41 percent permanent partial disability to her arm, her chronic and debilitating pain and her long-term use of narcotic medication to treat that pain. Thereafter, the defendants filed a motion to correct the finding and award seeking to add or substitute, inter

alia, the following findings: (1) the parties had executed a voluntary agreement on April 24, 2002, for payment of permanent partial disability benefits, which the commissioner subsequently approved; (2) the plaintiff had offered no medical evidence of a change in her medical condition after April 24, 2002; (3) the plaintiff had not moved to open the voluntary agreement pursuant to § 31-315; and (4) "[t]he [plaintiff's] only entitlement [after accepting the permanent disability benefits] is for benefits payable due to a relapse pursuant to [General Statutes] § 31-307b, benefits for additional permanent partial disability pursuant to . . . § 31-308a or subject to [a] motion to modify the voluntary agreement pursuant to . . . § 31-315." The commissioner denied the motion. The defendants did not seek an articulation. See *Biehn* v. *Bridgeport*, No. 5232, CRB-4-07-6 (September 11, 2008) ("a [m]otion for [a]rticulation is a suitable remedy when the basis for the trial commissioner's conclusions is unclear or the factual findings as written are perceived to be ambiguous").

After the commissioner issued the final award, the defendants appealed to the board, which dismissed the appeal. The board determined that "[t]he presence of a deteriorating condition is an essential jurisdictional fact to [an] award [of] § 31-307 benefits when they have not been ordered previously . . . ." The board therefore examined whether the plaintiff's failure to move formally to open the award under § 31-315 rendered the award ineffective and whether the plaintiff had proved a changed condition. The board first concluded that, because the defendants had notice of the change in benefits sought and the award of § 31-307 benefits was to commence upon exhaustion of the § 31-308 (b) benefits, the absence of a formal motion to open the award was inconsequential and did not render the award ineffective. The board next concluded that, in light of evidence credited by the commissioner that would support a finding that the plaintiff's condition had worsened since 2002, the board would construe the award as modifying the agreement on the basis of a changed condition of fact under § 31-315.

The defendants appealed from the board's decision to the Appellate Court. As set forth in the the Appellate Court opinion, the defendants claimed that, "because the plaintiff reached maximum medical improvement and entered into a voluntary agreement to receive permanent partial disability benefits, she [was] unable to request total incapacity benefits without demonstrating a change in medical condition since entering into the agreement." *Marandino* v. *Prometheus Pharmacy*, 105 Conn. App. 669, 681, 939 A.2d 591 (2008). The defendants contended that the plaintiff had not demonstrated a changed condition to allow a modification of the parties' agreement under § 31-315 and, therefore, the Workers' Compensation Act, General Statutes § 31-275 et seq. (act), did not permit an award of incapacity benefits

under § 31-307. Id., 682. The Appellate Court focused exclusively on the question of whether the record supported the board's conclusions that the plaintiff's condition had changed and that she had proved that she was unemployable, affirming the judgment on that basis. Id., 682–86. Therefore, the court did not address the question of whether, in the absence of a changed condition, the act would have precluded the award of incapacity benefits.

In their certified appeal to this court, the defendants contend that the workers' compensation scheme sets forth a strict progression of benefits under which, once the plaintiff entered into a voluntary agreement to accept permanent partial disability benefits under § 31-308 (b), she could not receive total incapacity benefits under § 31-307 without moving to open and modify the agreement on the basis of a changed condition of fact under § 31-315.[4] They further contend that both the Appellate Court and the board improperly concluded that there was a changed condition of fact to warrant modifying the agreement to allow an award of total incapacity benefits because the plaintiff had not sought a modification of the agreement under § 31-315 and because the commissioner had made no express finding of a changed condition of fact. Accordingly, much of the defendants' brief to this court focuses on an issue that the Appellate Court did not address, namely, whether, *in the absence of a changed condition of fact*, the workers' compensation scheme permits the commissioner to award total incapacity benefits after a claimant has accepted permanent disability benefits.[5]

The majority agrees with the plaintiff's two responses to these contentions: first, that the scheme does not mandate a strict progression of benefits that bars an award of total incapacity benefits after a claimant receives permanent partial disability benefits; and, second, that the Appellate Court properly concluded that the plaintiff's condition had changed since executing the voluntary agreement, thereby allowing modification of the agreement. As support for the first conclusion, the majority points to a line of cases from 1918 to 1940 on which it relies for the following proposition: "[A] claimant is not precluded from receiving 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)."

I have several concerns about the majority's approach. Fundamentally, it appears to me that either of the plaintiff's responses, if correct, would be an independent and sufficient basis on which to affirm the Appellate Court. The only reason that we would need to reach both grounds is if we were to conclude that the act generally does *not* permit a subsequent award

of total incapacity benefits after a claimant has received permanent disability benefits. In that case, we would have to consider whether the plaintiff has met the conditions for modification of the voluntary agreement. Indeed, the board analyzed the question precisely in this manner. The Appellate Court implicitly assumed, *without deciding*, that the act would not permit the award in the absence of a changed condition and determined that such a condition had been established.

I would affirm the Appellate Court's judgment on the narrow basis of that court's decision for several reasons. First, the defendants repeatedly have conceded that a changed condition is a proper *legal* basis on which to modify a voluntary agreement for permanent disability benefits to allow a claimant subsequently to receive total incapacity benefits.[6] They simply dispute whether, *in the present case*, the procedural and substantive requirements to allow a modification of the agreement have been met. Second, although the plaintiff and the amicus curiae, the Connecticut Trial Lawyers Association, vigorously contest the defendants' contention that, after executing the voluntary agreement, the plaintiff would not be entitled to the incapacity benefits in the absence of a changed condition, they have cited no case law holding to the contrary. Indeed, the board's decision in the present case suggests that it agrees with the defendants' view of the statutory scheme.[7] Although our case law clearly supports the proposition that, at the time a claimant reaches maximum medical improvement, the commissioner has discretion whether to continue total incapacity benefits and hold in abeyance the award of permanent disability benefits; see *McCurdy* v. *State*, 227 Conn. 261, 268, 630 A.2d 64 (1993); *Osterlund* v. *State*, 129 Conn. 591, 597–600, 30 A.2d 393 (1943); it does not appear that our appellate courts directly have addressed the question posed by the defendants as to whether the failure to ask the commissioner to exercise his or her discretion at that point in time will bar a later award of incapacity benefits when there is no change in the claimant's condition. As I next explain, the case law cited by the majority does not address this question. Therefore, the question of whether the plaintiff would be entitled to total incapacity benefits in the absence of a changed condition is one of first impression that we do not need to reach if we conclude that there is such a changed condition. Because the majority concludes that there is such a changed condition in the present case and that the plaintiff did not need to move formally to modify the prior agreement, conclusions with which I agree, I would limit our decision to that basis. Undoubtedly, a case will arise in the future in which there is no such changed condition, necessitating analysis of this unresolved issue.[8]

I also disagree, for several reasons, with the majority's reliance on an old line of cases to affirm the award

on the ground that the plaintiff has demonstrated that her "subsequent disability . . . 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 . . . ." These cases address a particular circumstance in which there is a changed condition warranting modification of the award. See *Costello* v. *Seamless Rubber Co.*, 99 Conn. 545, 550, 122 A. 79 (1923) (quoting *Saddlemire* v. *American Bridge Co.*, 94 Conn. 618, 629, 110 A. 63 [1920], for proposition that "[w]hen 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]). Therefore, these cases do not bear on whether, in the *absence* of a changed condition, a claimant is entitled to total incapacity benefits after receiving permanent disability benefits.

I also am concerned that the majority's reliance on these cases may suggest that this court has adopted a narrow view of what constitutes a changed condition for purposes of § 31-315. There is precedent of more recent vintage in which claimants have recovered benefits without showing the distinct and unusual conditions contemplated in the cases cited by the majority. See, e.g., *Schiano* v. *Bliss Exterminating Co.*, 260 Conn. 21, 25–26, 792 A.2d 835 (2002); *Roswell* v. *State*, 29 Conn. App. 432, 433–34, 615 A.2d 1063, cert. denied, 224 Conn. 922, 618 A.2d 529 (1992); *Cappellino* v. *Cheshire*, 27 Conn. App. 699, 702, 608 A.2d 1185 (1992), cert. denied, 226 Conn. 569, 628 A.2d 595 (1993). Indeed, the line of cases cited by the majority arose after early holdings by this court, since limited or overruled by case law or public act, had concluded that a claimant who suffered the loss of, or loss of use of, a complete body part, upon reaching maximum medical improvement, could not receive incapacity benefits and was limited to the permanent disability benefits provided for such a loss under § 31-308 (b). See *Morgan* v. *Adams*, 127 Conn. 294, 296, 16 A.2d 576 (1940) (distinguishing holdings in *Panico* v. *Sperry Engineering Co.*, 113 Conn. 707, 156 A. 802 [1931], and *Stapf* v. *Savin*, 125 Conn. 563, 7 A.2d 226 [1939], as cases that did not involve distinct conditions following permanent disability); *McCurdy* v. *State*, supra, 227 Conn. 268–69 ("In *Osterlund* v. *State*, supra, [129 Conn.] 597–600, we overruled *Panico* and *Stapf* to the extent that they precluded a commissioner from exercising his or her discretion to continue total disability payments to a [claimant] who had reached maximum medical improvement but was still totally disabled from working. In *Osterlund*, we explained that 'there might be, in case of a partial loss of function, a great disproportion between the amount of specific

compensation provided and the actual effect of the injury, either from the standpoint of the employee's earning capacity or the physical impairment he suffered.' Id., 600."). Notably, neither the board, the plaintiff nor the amicus cites to or relies on this line of cases, and, indeed, the proposition for which they stand appears inconsistent with the characterization of the plaintiff's condition as a deterioration or worsening of her original condition.

Having stated my points of disagreement, I next briefly explain why I agree with the majority that, even in the absence of a formal motion to modify the agreement and an express finding by the commissioner that the plaintiff's condition had changed, the award of total incapacity benefits was proper. As the Appellate Court often has explained: "Administrative hearings, such as those held before a workers' compensation commissioner, are informal and are not bound by the common-law or statutory rules of evidence and procedure. *Bryan* v. *Sheraton-Hartford Hotel*, 62 Conn. App. 733, 740, 774 A.2d 1009 (2001); see General Statutes § 31-298. . . . Nonetheless, procedural due process is a requirement of adjudicative administrative hearings, including those held before work[ers'] compensation commissioners . . . . *Balkus* v. *Terry Steam Turbine Co.*, 167 Conn. 170, 177, 355 A.2d 227 (1974). Due process of law requires not only that there be due notice of the hearing but that at the hearing the parties involved have a right to produce relevant evidence, and an opportunity to know the facts on which the agency is asked to act, to cross-examine witnesses and to offer rebuttal evidence." (Citation omitted; internal quotation marks omitted.) *Testone* v. *C. R. Gibson Co.*, 114 Conn. App. 210, 217, 969 A.2d 179, cert. denied, 292 Conn. 914, 973 A.2d 663 (2009); accord *Ryker* v. *Bethany*, 97 Conn. App. 304, 314, 904 A.2d 1227, cert. denied, 280 Conn. 932, 909 A.2d 663 (2006).

In the present case, the defendants make no claim that the plaintiff's failure to file a formal motion violated their right to due process. The defendants knew precisely what benefits the plaintiff sought. They had ample opportunity to cross-examine witnesses and, indeed, during their deposition of Steven Beck, one of the plaintiff's physicians, specifically asked whether, at various points in time, the plaintiff's condition had improved, worsened or remained the same. The defendants' position in their posttrial brief to the commissioner was simply that the plaintiff's condition had not changed. Therefore, the plaintiff's failure to file a formal motion alleging a changed condition is not fatal.

The absence of an express finding of a changed condition is more problematic, but not insurmountable. The board previously has characterized the issue of whether there is a changed condition as a question of fact. *Saleh* v. *Poquonock Giant Grinder Shop*, No. 04005, CRB-01-

99-03 (March 13, 2000) ("The determination of whether changed conditions of fact exist which support a reopening of a voluntary agreement is a question of fact. *Lyons* v. *Wasley Products, Inc.*, No. 3788, CRB-6-98-3 [June 18, 1999]; *Knudsen* v. *GSD, Inc.*, [8 Conn. Workers' Comp. Rev. Op. 81 (1990)]."). Neither the board nor the courts have the authority to find facts, as that function is relegated exclusively to the commissioner. See *DiNuzzo* v. *Dan Perkins Chevrolet Geo, Inc.*, 294 Conn. 132, 141, 982 A.2d 157 (2009) ("[n]either the . . . board nor this court has the power to retry facts" [internal quotation marks omitted]); *Biasetti* v. *Stamford*, 250 Conn. 65, 71, 735 A.2d 321 (1999) ("[t]he commissioner has the power and duty, as the trier of fact, to determine the facts" [internal quotation marks omitted]). Nonetheless, I agree with the Appellate Court and the board that the evidence credited by the commissioner necessarily compels the conclusion that the commissioner implicitly found a changed condition.

The commissioner specifically credited the medical opinion of Beck, who had treated the plaintiff for pain management from 2000 to the date of the hearing, as well as the opinion of Albert Sabella, the plaintiff's vocational expert, who had relied on Beck's opinion as to the plaintiff's condition. The commissioner also found the plaintiff to be a credible witness. In finding unpersuasive the defendants' argument that the plaintiff was not totally incapacitated, the commissioner expressly pointed to the plaintiff's history of taking narcotic medications. The testimony and evidence credited reflected that Beck had been unable to treat effectively the severe, debilitating and chronic pain that the plaintiff experienced following her third surgery in March, 2001. Beck testified as to the progressively higher dosages and stronger types of narcotic medications that he had prescribed in attempting to treat her pain. Indeed, it appears that the only period in which he did not have to increase the plaintiff's medication was at or near the time that she executed the voluntary agreement. Beck also testified that the plaintiff's pain progression was the opposite of what he had expected when he began treating her, and that a September, 2003 nerve block had failed to diminish her pain, which in turn decreased her chances for success with other types of interventions. Finally, Beck noted that the plaintiff had sustained a fracture in the stem of a prosthesis implanted in her elbow following the third surgery and that, over a period of time, she had developed swelling and spreading of pain to a larger area of her arm and wrist than was affected when he initially had treated her. The totality of this evidence amply demonstrates a changed condition.

In disagreeing with the conclusions of the board and the Appellate Court as to the presence of a changed condition, the defendants take a narrow view of what constitutes a "changed [condition] of fact" for purposes

of § 31-315, essentially viewing it as requiring an increased incapacity. I disagree with their narrow interpretation. The changed condition language must be read in connection with the broad remedial language of § 31-315, which 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 . . .* [*or*] *award . . . in order properly to carry out the spirit of this chapter*." (Emphasis added.) See generally *Hunt* v. *Naugatuck*, 273 Conn. 97, 103–104, 868 A.2d 54 (2005) ("Pursuant to . . . § 31-315, a workers' compensation award is always limited to a claimant's current condition and [is] always subject to later modification upon the request of either party . . . if the complainant's condition changes. . . . Consequently, the commissioner, in any given case, may issue multiple findings and awards throughout the period of compensability, with each award fixing the claimant's benefits as of the formal hearing date on the basis of the claimant's then existing condition." [Citation omitted; internal quotation marks omitted.]). Indeed, the board previously has indicated that a treating physician's changed *perception* of a claimant's condition can provide a basis for modification. See *Kevorkian* v. *Peter Paul, Inc.*, 2 Conn. Workers' Comp. Rev. Op. 26, 28 (1983) (inferring from testimony that "there were changes in [the] claimant's condition between [the dates at issue] or at least changes in the way the doctors perceived that condition"). Therefore, I agree with the majority that the record compels the conclusion that a finding of a changed condition necessarily is implied by the evidence credited by the commissioner. Accordingly, I agree with the majority's conclusion that the Appellate Court's judgment should be affirmed in part as to its conclusion that the plaintiff is entitled to total incapacity benefits on the basis of this changed condition.

[1] Although both §§ 31-308 and 31-307 have been amended since the time of the relevant proceedings in the present case; see Public Acts 2006, No. 06-84; Public Acts 2000, No. 00-8; those changes are not relevant to this appeal and I, like the majority, refer herein to the current revision of those statutes for purposes of convenience.

[2] General Statutes § 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."

[3] Although the parties agree on these background facts, neither the plaintiff's request for the total incapacity benefits nor the voluntary agreement were made part of the record before this court. In addition, although the defendants suggest in their brief to this court that the plaintiff received some incapacity benefits prior to the execution of the agreement, there is no evidence in the record regarding the payment of such benefits.

[4] Specifically, the defendants contend that, in the absence of a changed condition, the scheme requires a strict, one-way progression from total incapacity benefits under § 31-307, to partial incapacity benefits under § 31-308 (a), to permanent disability benefits under § 31-308 (b). They further contend that, upon exhaustion of permanent disability benefits and without a changed condition, the only additional benefits that would be available are the discretionary benefits under General Statutes § 31-308a.

The defendants acknowledge that, under our case law, the commissioner would have had discretion to award total incapacity benefits to the plaintiff if she had requested them at the time the commissioner approved the voluntary agreement for permanent partial disability benefits under § 31-308 (b). They contend, however, that, once the plaintiff executed the agreement without asking for total incapacity benefits, she could not thereafter obtain those benefits without modifying the agreement, which would require, according to the defendants, a change in her condition.

[5] Within the context of this claim, the defendants' brief discusses the evidentiary requirements for establishing total incapacity. It is unclear whether this discussion is intended to support the defendants' claim that the plaintiff had not demonstrated a changed condition or whether it is an attempt to renew a different claim that they had raised in the Appellate Court, namely, that the plaintiff also is not entitled to total incapacity benefits because she failed to demonstrate that she actively sought employment. As the latter contention is neither separately briefed nor addressed in the conclusion of the defendants' brief, I agree with the majority's determination not to treat this discussion as raising a separate claim.

[6] Examples of the defendants' concession as to this legal question include the following statements in their brief: "*Unless* [*the plaintiff*] *proves a change in her physical condition* (such as hospitalization for the injury) her only remedy to secure additional benefits is on the next stop of the statutory time line or [§] 31-308a." (Emphasis added.) "The [plaintiff] was not without remedy for some change in her physical condition after accepting permanent partial disabilit[y] [benefits] 'in lieu of all other compensation.' *The commissioner had continuing jurisdiction under § 31-315 to modify an award or voluntary agreement if there had been a change in her condition*. . . . An appropriate motion for modification could have been filed or a motion to [open] if the [plaintiff] had evidence to support such motions. . . . *Based upon the evidence, she did not have any change in her condition to support a motion to modify or a motion to* [*open*]." (Citations omitted; emphasis added.)

[7] I note that, in reaching its conclusion that a deteriorating condition was an essential jurisdictional fact in the present case, the board relied on cases addressing the question of whether the doctrine of collateral estoppel bars a request for total incapacity benefits after a previous *denial* of a request for such benefits. See *Bailey* v. *Stripling Auto Sales, Inc.*, No. 4516, CRB-2-02-4 (May 8, 2003), citing *Schreiber* v. *Town & Country Auto Services*, No. 4239, CRB-3-00-5 (June 15, 2001). In those cases, the board had concluded that a claim for a different period based on proof of a condition that had deteriorated since the prior denial would not be barred under that doctrine. The board did not explain in its decision in the present case why a *failure* to request incapacity benefits at the time a voluntary agreement for permanent disability benefits is approved is tantamount to a *denial* of such a request. Compare *Liberty Mutual Ins. Co.* v. *Lone Star Industries, Inc.*, 290 Conn. 767, 789 n.29, 967 A.2d 1 (2009) ("collateral estoppel, or issue preclusion . . . prohibits the relitigation of an issue when that issue was *actually litigated and necessarily determined* in a prior action between the same parties or those in privity with them upon a different claim" [emphasis

added; internal quotation marks omitted]); see *Kalinowski* v. *Meriden*, No. 5028, CRB-8-05-11 (January 24, 2007) (discussing application of claim preclusion to workers' compensation proceedings); see also *LaSalla* v. *Doctor's Associates, Inc.*, 278 Conn. 578, 590, 898 A.2d 803 (2006) ("claim preclusion prevents the pursuit of any claims relating to the cause of action which were actually made or *might have been made*" [emphasis in original; internal quotation marks omitted]).

[8] The amicus also raises an interesting argument that, because the plaintiff was not seeking to change the permanency benefits provided under the voluntary agreement, she did not need to modify the agreement. The plaintiff has not taken a specific position in her brief as to whether she needed to modify the agreement. Again, I would save that issue for another day.