CASE NO. 5763 CRB-6-12-6 : COMPENSATION REVIEW BOARD
CLAIM NO. 601009149

ESTATE OF ROBERT C. HABUREY : WORKERS' COMPENSATION
CLAIMANT-APPELLEE COMMISSION

v. : JUNE 14, 2013

TOWN OF WINCHESTER
EMPLOYER

and

CONNECTICUT INTERLOCAL RISK
MANAGEMENT AGENCY
INSURER
RESPONDENTS-APPELLANTS

and

SECOND INJURY FUND
RESPONDENT-APPELLEE

APPEARANCES:

In the proceedings below and at oral argument, the claimant was represented by Zbigniew S. Rozbicki, Esq., Zbigniew S. Rozbicki -- Law Offices LLC, 100 East Main Street, P.O. Box 419, Torrington, CT 06790-0419. Following oral argument and while the matter was pending before the Compensation Review Board, a notice of appearance in lieu of Attorney Rozbicki was filed by Maureen O'Doherty, Esq., Law Office of Maureen O'Doherty, 11 Center Street, Torrington, CT 06790.

The respondents Town of Winchester and Connecticut Interlocal Risk Management Agency were represented by Richard S. Bartlett, Esq., McGann, Bartlett & Brown, 111 Founders Plaza, Suite 1201, East Hartford, CT 06108.

Respondent Second Injury Fund was represented by Richard R. Hine, Esq., Assistant Attorney General, Office of the Attorney General, P.O. Box 120, Hartford, CT 06141-0120.

This Petition for Review from the May 30, 2012 Finding and Award of the Commissioner acting for the Sixth District was heard on November 30, 2012 before a Compensation Review Board panel consisting of Commission Chairman John A. Mastropietro and Commissioners Jodi Murray Gregg and Daniel E. Dilzer.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondents Town of Winchester and Connecticut Interlocal Risk Management Agency [hereinafter "respondents"] have petitioned for review from the May 30, 2012 Finding and Award of the Commissioner acting for the Sixth District. We find no error and accordingly affirm the decision of the trial commissioner.

The trial commissioner made the following factual findings which are pertinent to our review of this matter. The claimant's son testified that he would visit his father at work once or twice a week and he would usually find him inside a building of approximately twenty-five by thirty feet raking raw sewage from grates into a wheelbarrow or hosing the solid waste off the grates with a high-pressure power hose. There was a mist in the room from the sewage, and sewage would occasionally splash onto his father. The son testified that he himself occasionally worked for the respondent employer performing outdoor maintenance tasks and he had been asked to sweep the parking lot at the sewer department on April 4, 1996, one week before his father's death, because other sewer department employees were out sick. He indicated that after his father became ill, his father told him that he (the father) still might have to go into work because other co-workers were also ill. The son testified that he was unaware of any illness outbreaks in the community.

The decedent's spouse also testified that prior to his final illness, her husband was a healthy and energetic man. She testified that her husband occasionally returned home from work with soiled clothes and shoes and would always undress in the cellar; she would then pick up his clothes with a stick and throw them in the washing machine. She indicated that the claimant was admitted to the hospital on April 10, 1996 after complaining of feeling chilled, weak and achy. He did not experience diarrhea or vomiting. The last time she saw her husband was in the evening of April 11, 1996. She testified that she received a phone call from the hospital between 2:00 a.m. and 3:00 a.m. on April 12, 1996 telling her that he had died. She also stated that she was unaware of any outbreaks of illness in the community.

Richard Kemp, a co-worker of the claimant's decedent, testified that he had been employed by the respondent sewer plant for thirty-four years. He also described the working conditions experienced by the claimant but noted that the room in which the claimant generally worked had an air exchanger. However, he stated that individuals who raked the grates would occasionally get splashed, and the only protective gear worn consisted of gloves and possibly overshoes. He testified that in the courses he took during his career, he learned that untreated sewage contains pathogens that are harmful to human health but he was taught only to wear gloves and wash his hands. Kemp testified that on the Friday before the claimant's death, he, the claimant and a co-worker named Gordon Ellis were all sick with flu-like symptoms, and that Kemp tried to get the claimant to cover for him but the claimant declined, claiming that he felt too ill.[1] Kemp testified that his symptoms – diarrhea, vomiting and achiness – seemed similar to the

[1] Kemp testified that a fourth co-worker, Tom Cook, never became ill. Mr. Cook was responsible for drawing samples and taking them back to the lab for testing.

claimant's, and Ellis also reported experiencing body ache, stomach ache, vomiting and nausea. Kemp also indicated that he was unaware of any outbreaks of illness in the community at large at this time.

David R. Lawrence, M.D., was called to testify, and indicated that he is a board-certified internal medicine doctor who uses his knowledge of infectious diseases on "pretty much a daily basis." September 21, 2011 Transcript, p. 6. Lawrence admitted the claimant to Winsted Memorial Hospital when the claimant returned to that hospital's emergency room on April 10, 1996 after having been discharged from the same emergency room earlier that day. Lawrence had never met or treated the claimant prior to his admission to the hospital. The emergency room record from the earlier visit indicated that the claimant had been ill for one week with weakness and body aches but no vomiting or diarrhea. He did not have a temperature but did have an elevated white count. Upon his discharge, the claimant was feeling better and the initial assessment was viral syndrome with dehydration. According to the history Lawrence took directly from the claimant, the claimant had been in good health until approximately a week before when he had developed chills and a mild cough. In the three days before presentation, he had experienced muscle aches, progressive shortness of breath and nonspecific abdominal discomfort but no nausea, vomiting, or diarrhea. The claimant was unaware of having been exposed to anyone with a similar illness, and the doctor was also unaware of anyone else presenting with the same symptoms.

Lawrence asked George Record, M.D., a general surgeon, to evaluate the claimant's complaint of abdominal pain, and also contacted James O'Halloran, M.D., an infectious disease specialist who consulted with Winsted Memorial Hospital. Record did

not report any significant findings relative to the claimant's abdominal pain. The claimant also underwent a chest x-ray and blood work; the latter demonstrated an elevated white cell count consistent with a severe infection. The claimant also had a low sodium count and elevated muscle enzymes consistent with a severe illness of bacterial origin, as well as acute acidosis. Lawrence's initial impression was that the claimant was in septic shock, which is often caused by a toxin. The claimant's skin had mottled, which was an indication that his organs were already shutting down. The claimant also had evidence of rhabdomyolysis when he arrived at the ER that morning, and when he was readmitted later, those numbers had essentially doubled. There was no evidence of Gram-negative or Gram-positive organisms, which can be present in cases of septic syndrome; the doctor testified that a broad-spectrum approach was utilized, which was extended on the second day to include a medication effective against Legionella. A second chest x-ray had demonstrated a left lower lobe infiltrate, prompting Lawrence to treat for Legionella because Legionella is known to cause pneumonia. The doctor testified that the claimant did not respond to the antibiotic therapy because he was in a rapid decline, and the doctor was never able to determine the cause of the claimant's sepsis because the pathogen was never recovered.

An autopsy was performed, and the findings included an inflammatory process in the lungs, greater in the left than the right, and erythremia of the trachea. The doctor testified that the findings relative to the pneumonic process were consistent with Legionella. He also testified that using a Venn diagram and the current medical knowledge of pathogens, only two organisms fit the claimant's presentation, and the claimant's symptoms were more consistent with Legionella rather than leptospirosis, the

other possibility. Lawrence explained that Legionella is a water-borne organism which usually enters the human system through the inhalation of contaminated water particles, and that sewage containing Legionella has been medically linked to sewer worker infections. Lawrence testified that he could not "think of any other place that [the claimant] would have been where he was likely to contact something that would do this to him" other than the claimant's employment. Id., at 68. Lawrence explained that radiographic evidence of illness might not have shown upon the claimant's initial presentation because of his severe dehydration. The claimant also did not demonstrate nausea, vomiting or diarrhea, but the "constellation of symptoms" associated with Legionella do not universally apply to every patient. Findings, ¶ 4.hh. Lawrence testified that his testimony was based in part on the development of medical knowledge since 1996.

Brian Cooper, M.D., an infectious disease specialist and board-certified internist who currently does vaccine research and development for Novartis, performed a records review and also testified in this matter. He indicated that he concurred with the discharge diagnosis of sepsis of unknown etiology, but that based on the claimant's symptoms, opined that it was very unlikely that the claimant had contracted Legionnaire's Disease. Cooper testified that he was relying in part for his opinion on an article from the Netherlands which included a case study of seventeen patients with Legionnaire's Disease. He noted that the claimant did not have either severe pneumonia or an extremely high fever, and that based on statistical probability, the rhabdomyolosis was more likely infectious than non-infectious. However, when asked if the medical records contained any indication of where the claimant may have come into contact with

potentially infectious agents, he replied, "[t]he history mentioned that he worked in a sewage treatment plant." November 2, 2011 Transcript, p. 36.

David Lawrence, MD, was called to testify again in rebuttal. He stated that he found the article relied upon by Cooper of little interest because it was published in an "obscure" journal fifteen years ago and was based upon only seventeen patients. January 4, 2012 Transcript, p. 5. Lawrence noted that the article did cite that in all seventeen cases, mortality was related to circulatory failure rather than respiratory failure, which was also the case with the claimant. Lawrence also testified that the claimant's lack of fever was not related to "the specific offending agent," id., at 14, but, rather, indicated that the claimant's system was unable to mount a fever, which is generally considered a "poor prognostic indicator." Id. Lawrence also reiterated, contrary to Cooper's assertion that a diagnosis of Legionella did not appear in the hospital record, that Legionella was included as a possible diagnosis when the claimant was being treated at the hospital.

Lawrence relied in part upon a document entitled "Health Hazard Manual: Waste Water Treatment Plant and Sewer Workers" (Cornell University ILR School, 1997) [hereinafter "Health Hazard Manual"] which indicates that treatment plant workers experience health problems and deaths and are generally exposed to microbiological and chemical agents through inhalation. Respondents' Exhibit 1, I.D. 12. Wastewater treatment workers have reported nausea, vomiting, indigestion, diarrhea and flu-like symptoms and antibody studies have documented that disease exposures have occurred. The document also states that disease-causing organisms have been found in sewage sludge and workers are therefore at an increased risk of infection or disease. With

specific regard to Legionella, the disease results from inhalation of aerosols containing the organism, and the organism has been isolated from the water in the cooling towers of air conditioning units. The "Health Hazard Manual" also contained information regarding a study conducted in Skokie, Illinois wherein sewage and air sample particulates were inoculated in guinea pigs who went on to manifest Legionella pneumophila in their spleen cells. Lawrence also relied in part on two other medical treatise articles which identified a link between rhabdomyolosis and Legionella.

Based upon the foregoing, the trial commissioner concluded, *inter alia*, that the claimant had been exposed to aerosolized raw sewage while in the performance of his duties, and that during the week that the claimant fell ill, two of his three co-workers also became ill with similar symptoms. The trier found that there was no evidence of any disease outbreaks within the general community and also no evidence that the illness contracted by the claimant was contagious, given that neither the claimant's wife nor his son became ill despite their proximity to the claimant. The trier found that Lawrence expanded the antibiotics administered to the claimant to include one known to be effective against Legionella, but the claimant did not respond to treatment and ultimately died of sepsis. The etiology of the sepsis was unknown because no pathogen was ever recovered, although the autopsy revealed findings consistent with Legionella.

The trier found persuasive Lawrence's differential diagnosis of the claimant's disease process, noting that through the use of a Venn diagram, there were two possible organisms which could have caused the claimant's death but that his symptoms were more consistent with Legionella rather than leptospirosis. It was undisputed that the claimant was exposed to pathogens at the treatment plant, and that one of the organisms

that induces rhabdomyolosis is the bacteria that causes Legionnaire's Disease. The trier also found persuasive Lawrence's opinion that the claimant contracted Legionella at the treatment plant, particularly in light of the fact that several co-workers were also ill at the same time.

The trier did not find Cooper's testimony persuasive because the doctor overlooked the possible diagnosis of Legionella in Lawrence's medical notes of April 10, 1996 and was apparently unaware that several of the claimant's co-workers also fell ill at the same time. The trier found that the Netherlands study on which Cooper had relied had only examined seventeen patients and that Cooper had also "tried to impose an analysis that was at odds with the parameters of the article itself."[2] Conclusion, ¶ V) c. The trier also observed that although Cooper denied the claimant's illness was work-related, when queried, Cooper pointed to the claimant's workplace as a potential source of an infectious agent.

The trial commissioner concluded that the claimant died of sepsis which was contracted as a result of the claimant's exposure to pathogens at the treatment plant, and the pathogen which killed the claimant was Legionella. The trier found that the claimant's death arose out of and in the course of his employment, and "[g]iven the peculiar nature of daily exposure to a plethora of pathogens by employees such as [the claimant] who work directly with raw sewage, the sepsis caused by Legionella in this case is considered an occupational disease." Conclusion, ¶ Y. The trier ordered the respondents to pay burial costs pursuant to § 31-306(a)(1) C.G.S. and survivor benefits

[2] The trial commissioner explained that the array of symptoms referenced in the article was sufficiently broad so as to potentially include the claimant. Conclusion, ¶ V) c.

pursuant to § 31-306(a)(3) C.G.S. to the claimant's spouse.[3] The trier also ordered that the respondents pay the costs associated with Lawrence's testimony.

The respondents filed an extensive Motion to Correct which was denied in its entirety, and a Request for an Escrow Order on June 8, 2012, which was also denied, and this appeal followed. On appeal, the respondents identify the following issues of contention:

1) whether the trier erroneously denied the respondents' Motion to Dismiss and determined that the Workers' Compensation Commission had jurisdiction over the claim even though the dependent widow, Shirley Haburey, never filed a Notice of Claim;

2) whether the trier erred in concluding that there was sufficient and competent medical evidence to find a causal relationship between the claimant's infection and his employment, that Legionnaire's Disease was the cause of the claimant's death, and that the claimant's illness was an occupational disease as defined by § 31-275(15) C.G.S.;[4]

3) whether the trier's denial of the respondents' Motion to Dismiss constituted error; and

4) whether the trier denied the respondents their due process right to a fair trial and deprived the respondents of the opportunity to review evidence by first granting the respondents' objection to the introduction of any medical literature which supported the

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[3] Section 31-306(a)(1) C.G.S. (Rev. to 1995) states: "Compensation shall be paid to dependents on account of death resulting from an accident arising out of and in the course of employment or from an occupational disease as follows: (1) Four thousand dollars shall be paid for burial expenses in any case in which the employee died on or after October 1, 1988. If there is no one wholly or partially dependent upon the deceased employee, the burial expenses of four thousand dollars shall be paid to the person who assumes the responsibility of paying the funeral expenses."
Sec. 31-306(a)(3) C.G.S. (Rev. to 1995) states: "If the surviving spouse is the sole presumptive dependent, compensation shall be paid until death or remarriage."

[4] Sec. 31-275(15) C.G.S. (Rev. to 1995) states: "'Occupational disease' includes any disease peculiar to the occupation in which the employee was engaged and due to causes in excess of the ordinary hazards of employment as such, and includes any disease due to or attributable to exposure to or contact with any radioactive material by an employee in the course of his employment."

doctor's causation opinion and then determining that a causal relationship existed between the disease which caused the claimant's death and his employment.

We begin our analysis with a recitation of the well-settled standard of review we are obliged to apply to a trial commissioner's findings and legal conclusions.

> … the role of this board on appeal is not to substitute its own findings for those of the trier of fact. Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 451 (2001). The trial commissioner's role as factfinder encompasses the authority to determine the credibility of the evidence, including the testimony of witnesses and the documents introduced into the record as exhibits. Burse v. American International Airways, Inc., 262 Conn. 31, 37 (2002); Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999). If there is evidence in the record to support the factual findings of the trial commissioner, the findings will be upheld on appeal. Duddy v. Filene's (May Department Stores Co.), 4484 CRB-7-02-1 (October 23, 2002); Phaiah v. Danielson Curtain (C.C. Industries), 4409 CRB-2-01-6 (June 7, 2002). This board may disturb only those findings that are found without evidence, and may also intervene where material facts that are admitted and undisputed have been omitted from the findings. Burse, supra; Duddy, supra. We will also overturn a trier's legal conclusions when they result from an incorrect application of the law to the subordinate facts, or where they are the product of an inference illegally or unreasonably drawn from the facts. Burse, supra; Pallotto v. Blakeslee Prestress, Inc., 3651 CRB-3-97-7 (July 17, 1998).

McMahon v. Emsar, Inc., 5049 CRB-4-06-1 (January 16, 2007).

As mentioned previously herein, on June 27, 2012, the claimant filed a Motion to Dismiss Respondents' Appeal/Petition for Review which appears to be predicated on the argument that because the respondents tendered payment to the claimant after the trial Commissioner issued the May 30, 2012 Finding and Award and before the respondents filed their appeal petition, they "intentionally relinquished" their right to appeal. See June 27, 2012 Motion to Dismiss Respondents' Appeal/Petition for Review [hereinafter "Claimant's Motion to Dismiss"], p. 2. As legal authority for this proposition, the

claimant cites Connecticut Light & Power Co. v. Public Utilities Control Authority, 176 Conn. 191, 201 (1978); and Annot., 169 A.L.R. 985, 988 (1947), which states: "The general rule is that 'the right to appeal the facts of a judgment or order, and the right to appeal therefrom are not concurrent, but are wholly inconsistent, and an election of either is a waiver and renunciation of the other.'"

Our review of the authority cited, i.e., Connecticut Light & Power Co. v. Public Utilities Control Authority, supra, indicates that the claimant may have omitted certain language in the quotation which we believe provides the context in which the quote should be read. The quote with the omitted text is as follows:

> [T]he general rule [is] that "'(t)he right to accept the fruits of a judgment or order, and the right to appeal therefrom, are not concurrent, but are wholly inconsistent, and an election of either is a waiver and renunciation of the other.'" Annot., 169 A.L.R. 985, 988 (1947). That rule, however, is subject to numerous exceptions. Id., at 1055, et. seq.… (Emphasis added.)

Connecticut Light & Power Co. v. Public Utilities Control Authority, supra, at 201.

Upon consideration, we believe that the appeal provisions of our Workers' Compensation Act, as codified at § 31-301 C.G.S., et. seq., provide statutory authority for not following the "general rule." As the respondents note in their "Response to Claimant's Motion to Dismiss Dated June 26, 2012," § 31-301(f) C.G.S. provides, in pertinent part, that "[d]uring the pendency of any appeal of an award made pursuant to this chapter, the claimant shall receive all compensation and medical treatment payable…."[5] If we were to accept the claimant's argument we would, essentially, vitiate

[5] Section 31-301(f) C.G.S. (Rev. to 1995) states: "During the pendency of any appeal of an award made pursuant to this chapter, the claimant shall receive all compensation and medical treatment payable under the terms of the award to the extent the compensation and medical treatment are not being paid by any health insurer or by any insurer or employer who has been ordered, pursuant to the provisions of subsection

the respondents' right to appeal pursuant to § 31-301(a) C.G.S. by virtue of their compliance with § 31-301(f) C.G.S.[6] We are therefore not persuaded that the respondents' appeal should be dismissed on the basis argued by the claimant.

In follow up to the Respondents' Response to Claimant's Motion to Dismiss the claimant filed a Reply to Respondents' Response to Claimant's Motion to Dismiss [hereinafter "Claimant's Reply"] dated August 2, 2012. In that reply, the claimant contends, *inter alia*, that the respondents "failed to submit any relevant, competent, or material issues of fact or law that the payments of the Award, were not made in satisfaction of the Award, were made conditionally, with reservation, or were made subject to the outcome of the appeal under § 31-301(f) C.G.S." Assuming, *arguendo*, that the claimant's contention is correct, we do not find that it alters the conclusion reached above. Additionally, the Claimant's Reply includes various other assertions which either duplicate her previous argument in support of dismissal or seek to prevent respondents from recouping payments made to the claimant in the event the trial commissioner's Finding and Award is reversed. As respondents have not as yet sought repayment, the claimant's assertions are premature and not ripe for consideration as part of this appeal. Thus, given that the claimant's arguments in this regard appear to run counter to the letter and spirit of the appeal provisions of the Workers' Compensation Act and/or are untimely, the claimant's Motion to Dismiss is denied.

(a) of this section, to pay a portion of the award. The compensation and medical treatment shall be paid by from the Second Injury Fund pursuant to section 31-354."

[6] Sec. 31-301(a) C.G.S. (Rev. to 1995) states, in pertinent part: "At any time within twenty days after entry of an award by the commissioner, after a decision of the commissioner upon a motion or after an order by the commissioner according to the provisions of section 31-299b, either party may appeal therefrom to the Compensation Review Board by filing in the office of the commissioner from which the award or the decision on a motion originated an appeal petition and five copies thereof…..

As previously stated herein, the respondents have challenged the subject matter jurisdiction of this agency on the basis that the claimant's widow never filed a claim for benefits pursuant to § 31-294c(a) C.G.S.[7] It is of course well-settled that once the jurisdiction of a court is questioned, "[it] must be disposed of no matter in what form it is presented … and the court must fully resolve it before proceeding further with the case." (Internal citations omitted; internal quotations omitted.) Castro v. Viera, 207 Conn. 420, 429 (1988), *quoting* "Valley Cable Vision, Inc. v. Public Utilities Commission, 175 Conn. 30, 32 (1978). See also Gimbel v. Gimbel, 147 Conn. 561, 566 (1960). This is so because the jurisdiction of the commissioners "is confined by the Act and limited by its provisions. Unless the Act gives the Commissioner the right to take jurisdiction over a claim, it cannot be conferred upon [the commissioner] by the parties either by agreement, waiver or conduct." Id., at 426, *quoting* Jester v. Thompson, 99 Conn. 236, 238 (1923). As such, we are obligated to review the jurisdictional challenge before we can move to an examination of the merits of the claim.

The respondents contend that on January 3, 1997, a Notice of Claim was filed by Robert G. Haburey stating that "the decedent came in contact with a virus at work which resulted in his death." Appellants' Brief, p. 3; April 12, 2010 Formal Hearing, Claimant's Exhibit A. A timely denial was issued and the respondents subsequently filed

[7] Section 31-294c(a) C.G.S. (Rev. to 1995) states, in pertinent part: "No proceedings for compensation under the provisions of this chapter shall be maintained unless a written notice of claim for compensation is given within one year from the date of the accident or within three years from the first manifestation of a symptom of the occupational disease, as the case may be, which caused the personal injury, provided, if death has resulted within two years from the date of the accident or first manifestation of a symptom of the occupational disease, a dependent or dependents, or the legal representative of the deceased employee, may make claim for compensation within the two-year period or within one year from the date of death, whichever is later. Notice of a claim for compensation may be given to the employer or any commissioner and shall state, in simple language, the date and place of the accident and the nature of the injury resulting from the accident, or the date of the first manifestation of a symptom of the occupational disease and the nature of the disease, as the case may be, and the name and address of the employee and of the person in whose interest compensation is claimed…."

a Motion to Dismiss "[w]hen it became evident that the matter was going to proceed to a formal hearing with the principal claimant being Shirley Haburey, as dependent widow…." Appellants' Brief, p. 3. On April 12, 2010, Commissioner Amado Vargas held a formal hearing at which he reviewed, *inter alia*, the subject Notice of Claim and concluded that while the notice was "less than ideal," it substantially complied with the notice requirements of § 31-294c(a) C.G.S. May 7, 2010 Ruling on Motion to Dismiss, ¶ 2. Commissioner Vargas denied the respondents' Motion to Dismiss but also ruled against the claimant proceeding on the issue of preclusion because preclusion requires "almost perfect" claim filing. Id., ¶ 4. The respondents now appeal this decision.[8]

We note at the outset that Robert Haburey obviously did not file the subject notice of claim, given that it was filed more than seven months after his death. We also observe that the notice clearly states that the claim for benefits is predicated on the death of the claimant. Finally, we note that the exhibits submitted for review at the formal hearing on April 12, 2010 included two hearing notices scheduling hearings on February 10, 1997 and March 12, 1997, respectively, in the matter of the Estate of Robert G. Haburey v. Town of Winchester, an appearance letter dated February 4, 1997 filed by respondents' counsel's firm of McGann, Bartlett & Brown, also in the case of the Estate of Robert G. Haburey v. Town of Winchester, and an undated pre-formal memorandum filed in the matter noting that Shirley Haburey was an "interested party." Appellants' Brief, p. 3.

As this board recently observed in Estate of Greenberg v. ABB Combustion Engineering Services, Incorporated, 5521 CRB-1-10-1 (June 11, 2012), "[w]e do not

[8] On May 12, 2010, the respondents filed a Notice of Intent to Appeal acknowledging that the trial commissioner's denial of the Motion to Dismiss was not a final judgment and preserving their right to appeal the denial "in the event of an unfavorable disposition on the merits." May 12, 2010 Notice of Intent to Appeal.

dispute the respondents' assertion that [the decedent's spouse] was indeed required to file her own claim for benefits. "While an injured worker's claim and his dependent's claim invariably arise out of the same compensable injury, this fact cannot obscure the notion that '[t]he classes of compensation awarded an employee and his dependents are separate and independent of each other.'" Sellew v. Northeast Utilities, 12 Conn. Workers' Comp. Rev. Op. 135, 1422 CRB-8-92-5 (April 7, 1994), *dismissed for lack of final judgment*, A.C. 13541, 13542 (June 14, 1995), *quoting* Biederzycki v. Farrel Foundry & Machine Co., 103 Conn. 701, 704 (1926). See also Tardy v. Abington Constructors, Inc., 71 Conn. App. 140, 144 (2002) ("statutory scheme requires a dependent filing for a death benefit to file a separate claim"). However, as was also the case in Greenberg, supra, we find that this board's prior decision in Berry v. State/Dept. of Public Safety, 5162 CRB-3-06-11 (December 20, 2007) is dispositive of the respondents' arguments regarding the sufficiency of notice in this matter.

In Berry, the claimant appealed the trial commissioner's dismissal of her claim for survivorship benefits which had been predicated on a Form 30C that failed to identify the dependent widow by name or indicate that she was seeking survivorship benefits. The respondent challenged subject matter jurisdiction based on the holding of Kuehl v. Z-Loda Systems Engineering, 265 Conn. 525 (2003). This board distinguished Berry from Kuehl at the outset, noting that in Kuehl, the widow did not file a notice for § 31-306 C.G.S. benefits or request a hearing for survivor benefits until some six years after her husband's death, having instead provided to the employer an amended complaint in a related third-party action, which the court deemed "insufficient to establish that Z-Loda Systems had actual notice of the plaintiff's intent to seek survivor's

benefits." Id., at 536. The Kuehl court also disagreed with the claimant's contention "that the savings provisions of subsection (c) of § 31-294c evince a legislative intent to permit claims in circumstances such as those in the present case," id., at 537, remarking that the "savings provision addresses a 'defect or inaccuracy' in a notice of claim for compensation; it does not excuse, however, the *failure to file* a notice of claim." (Emphasis in the original.) Id.

Having thus distinguished Berry from Kuehl on its facts, this board examined the applicability of the "totality of circumstances" test as referenced in Hayden-Leblanc v. New London Broadcasting, 12 Conn. Workers' Comp. Rev. Op. 3, 1373 CRD-2-92-1 (January 5, 1994). In Hayden, we stated that "[w]hile compliance with the limitation period set forth in § 31-294 is jurisdictional in nature …; *substantial compliance* with the notice *content* requirements set forth in § 31-294 sufficient to fulfill the purpose of the statute will toll the running of the statutory period." (Emphasis in the original; internal citations omitted.) Id., at 4. We then concluded that "the notice need not be drafted with 'absolute precision,'" id., at 5, *quoting* Black v. London & Egazarian Associates, Inc., 30 Conn. App. 295, 303 (1993), *cert. denied*, 225 Conn. 916 (1993), and "a written notice of claim lacking one or more of the elements set forth in § 31-294 may be sufficient to meet the time limitations requirement of that statute…." Fuller v. Central Paving Co., 5 Conn. Workers' Comp. Rev. Op. 92, 94, 655 CRD-1-87 (April 6, 1988).

This board next reviewed our Appellate Court's reasoning in Tardy, supra, wherein the defendants, subject to a Motion to Preclude, challenged the sufficiency of a widow's notice of claim which reported the place of injury rather than the place of the decedent's death and indicated as one of the two claimants the name of the decedent

rather than the decedent's estate. The court was not persuaded by the defendants' assertion that the information provided was "'clearly enough to prevent or hinder a timely investigation of the claim by the [defendants]' to determine whether to file a notice to contest." Id., at 149. The court remarked that because "workers' compensation is remedial legislation with a humanitarian purpose, we liberally construe its provisions in favor of the employee," id., and, as such, "strict compliance with a notice of claim is not required as long as it puts the employer on notice to make a timely investigation." Id., at 150. See also Pereira v. State, 228 Conn. 535, n. 8 (1994).

Having reviewed the foregoing, this board, in Berry, reversed the trier's dismissal of the claim, concluding that "our reading of the Kuehl and Tardy cases is that there must be either a complete absence of notice to warrant dismissal of a claim or granting preclusion; or notice which was so fundamentally deficient as to prejudice the other party." Id. We deemed such a reading "consistent with the plain language of § 31-294c(c) C.G.S. [which states that] '[n]o defect or inaccuracy of notice of claim shall bar maintenance of proceedings unless the employer shows that he was ignorant of the facts concerning the personal injury and was prejudiced by the defect or inaccuracy of the notice.'" Berry, supra. We also observed that "we find the notice filed in this case substantially similar to the notice for § 31-306 C.G.S. benefits we deemed sufficient in Tardy (lacking only the name of the claimant) and are not persuaded that the law on this issue has been materially changed in the past five years." Id.

Turning to the matter at bar, we find the notice of claim filed in this case to be sufficiently similar to the notice filed in Berry such that the reasoning we employed in Berry must be applied herein as well. Although the instant notice also failed to

specifically identify the decedent's spouse as the claimant or indicate that survivorship benefits were being sought, it may be reasonably inferred, particularly in light of the other evidentiary submissions offered at the formal hearing before Commissioner Vargas, that the trier simply did not consider the respondents to have been unduly prejudiced by alleged deficiencies in the notice.[9] We find no error in that assessment and hereby affirm Commissioner Vargas' denial of the respondents' Motion to Dismiss.

We turn now to the allegations of error relative to the findings set forth in the subject Finding and Award of May 30, 2012. The respondents contend that the trier's conclusion that the claimant died of Legionnaire's Disease was based on insufficient competent medical evidence. Moreover, the respondents argue that no medical or scientific evidence was presented at trial in support of the trier's determination that the claimant contracted Legionnaire's Disease at the treatment plant or that Legionnaire's Disease constituted an occupational disease that "was peculiar to the employment of waste water treatment workers." Appellants' Brief, p. 11.

It is axiomatic that "in Connecticut traditional concepts of proximate cause constitute the rule for determining … causation" in a workers' compensation case. McDonough v. Connecticut Bank & Trust Co., 204 Conn. 104, 118 (1987). Moreover:

[9] This is particularly so given that the submissions presented at the formal hearing included hearing notices for February 10, 1997 and March 12, 1997, respectively, both of which reference the Estate of Robert G. Haburey. It may be argued that these hearing notices would implicate the "savings" provision of § 31-294c(c) C.G.S. (Rev. to 1995), which states: "Failure to provide a notice of claim under subsection (a) of this section shall not bar maintenance of the proceedings if there has been a hearing or a written request for a hearing or an assignment for a hearing within a one-year period from the date of the accident or within a three-year period from the first manifestation of a symptom of the occupational disease, as the case may be, or if a voluntary agreement has been submitted within the applicable period, or if within the applicable period an employee has been furnished, for the injury with respect to which compensation is claimed, with medical or surgical care as provided in section 31-294d. No defect or inaccuracy of notice of claim shall bar maintenance of proceedings unless the employer shows that he was ignorant of the facts concerning the personal injury and was prejudiced by the defect or inaccuracy of the notice. Upon satisfactory showing of ignorance and prejudice, the employer shall receive allowance to the extent of the prejudice."

> The personal injury must be the result of the employment and flow from it as the inducing proximate cause. The rational mind must be able to trace the resultant personal injury to a proximate cause set in motion by the employment and not by some other agency, or there can be no recovery.

Stulginski v. Waterbury Rolling Mills Co., 124 Conn. 355, 361-362 (1938), *quoting* Madden's Case, 222 Mass. 487, 495 (1916).

In the instant matter, Lawrence, at his deposition held on March 2, 2011, described the sequence of events surrounding the claimant's admission to and treatment at Winsted Memorial Hospital which culminated in the claimant's death. Lawrence indicated that the claimant was initially administered a broad spectrum of antibiotics to counteract sepsis, and a drug known to be effective against Legionella was added when the doctor received the results of a lung x-ray demonstrating infiltrates in the claimant's left lower lobe. Lawrence testified that Legionnaire's Disease is a known cause of sepsis; however, the claimant did not live long enough to obtain confirming laboratory results for Legionella serum titers, which would have needed to be repeated in two to four weeks. Lawrence indicated that although he had initially attributed the claimant's death by sepsis to a virus, he had changed his opinion after "[r]eviewing the case in light of current information about infectious diseases and possible etiologies that might have led to the death of [the claimant]." Respondents' Exhibit 1, p. 58. Lawrence explained the differential diagnosis process by which he had arrived at his conclusion that the claimant had died after contracting Legionnaire's Disease, and indicated that his opinion was "based on reasonable medical probability." Id., at 82.

Lawrence further testified that the Legionella bacteria is usually contracted from a contaminated water source, and that based on the history drawn from the claimant, "the most likely place would be his place of work since nobody in his family or anybody in

the area came up with Legionella in that time frame." Id., at 66. Lawrence testified that while researching on-line the issue of the prevalence of Legionnaire's Disease among waste water treatment workers, he had been unable to find any "statements either making a connection or saying there is no connection." Id., at 68. He also testified that he "tried to find a reference for wastewater workers on line and didn't turn up anything in particular to any kind of studies that would suggest a cluster of exposure and illness." Id., at 66-67.

Respondents' counsel presented Lawrence with the following excerpt from the "Health Hazard Manual":

> LEGIONELLA has been isolated from the water in the cooling towers of air conditioning units in association with disease outbreaks, suggesting that disease in man results from exposure to aerosols containing the organism. Wastewater-exposed workers and the neighbors of treatment plants have not shown that exposure posed a risk of infection.

Respondents' Exhibit 1, I.D. 12, p. 14.

When asked by respondents' counsel whether he was "aware of any literature to the contrary," Lawrence replied that he did not. Respondents' Exhibit 1, p. 71. Lawrence also testified that he did not "know whether or not as a scientific fact Legionella exists in untreated sewage," but that he could "scientifically be presumptive." Id., at 87. Lawrence stated that "[t]here is no reason for me to not think that it's possible to have Legionella in untreated sewage," id., at 73, and indicated that because of the severity of the claimant's illness, the claimant "was exposed to a large inoculum since he was a healthy host, and I would have to take into consideration different possible environmental exposures that could deliver such an inoculum and that would include a water source such as untreated sewage." Id., at 74. Lawrence also opined that the

claimant's work in an enclosed area would increase the likelihood of exposure.

Lawrence stated that his opinion, based on reasonable medical probability, was that:

> Mr. Haburey's sepsis was caused by Legionella and it came from a water source and it was likely that contaminated sewage would be the source of his inoculation because of the severity of the illness in someone who doesn't have significant underlying problems, and the less likelihood that he would come in contact with a source of Legionella in the community.[10]

Id., at 81.

Lawrence was called to testify at a formal hearing held on September 21, 2011. Our review of the transcript indicates that the doctor essentially reiterated the testimony previously offered at his deposition relative to the circumstances surrounding the claimant's admittance to and treatment at Winsted Memorial Hospital. He also again stated that he had changed his original opinion regarding the claimant's cause of death based on the fact that the medical knowledge base has expanded to include "[a] greater understanding of individual pathogens…." September 21, 2011 Transcript, p. 38. Specifically with regard to Legionella, the doctor stated:

> [f]urther studies have advanced the understanding of how it works, where it's found, those kind of things, [and by] retrospectively applying the medical information that's available to me now and overlaying it on Mr. Haburey's case, I can say with some certainty that I believe with good certainty that I believe he died of Legionella.

Id., at 40.

[10] We note that the "Health Hazard Manual: Wastewater Treatment Plant and Sewer Workers" (Cornell University ILR School, 1997) also states that "[a]lthough no significant increase in human disease appears to be attributable to aerosols from wastewater treatment plants, sludge application, or spray irrigation sites, these studies are considered inconclusive by those who believe the potential exists. The issue of potential versus actual risk is complicated by several factors which prevent a definite conclusion about the health hazards." (Emphasis in the original.) Respondents' Exhibit 1, I.D. 12, p. 31.

The doctor also gave a more expansive description of the differential diagnosis process, explaining how, through the use of a Venn diagram, he was able to narrow down the list of possible causes for the claimant's symptoms until he could conclude with reasonable medical certainty that the claimant died of Legionnaire's Disease. Id., at pp. 44-48.

Lawrence also explained how he had reached the opinion that the claimant came into contact with Legionella at his place of employment.

> When you are evaluating a patient who has an infection, you want to know where they were, who they were with, what they were exposed to, including other people, animals, travel to areas where some disease may be endemic, but foreign in America. You want to know the circumstances of their life in the last reasonable period of time where they could have contracted something.

Id., at 67-68.

The doctor testified that having performed this evaluation, and "[e]ven with a broad list of potential pathogens, regardless of my opinion of the pathogen, I cannot think of any other place that Mr. Haburey would have been where he was likely to contact something that would do this to him." Id., at 68.

We are of course mindful of the stricture that "[u]nless 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 conclude that the disease arose out of the employment." Murchison v. Skinner Precision Industries, Inc., 162 Conn. 142, 152 (1972), *citing* Madore v. New Departure Mfg. Co., 104 Conn. 709, 714 (1926). "Expert opinions must be based upon 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." (Internal citation

omitted.) Struckman v. Burns, 205 Conn. 542, 554-555 (1987). However, having reviewed the testimony offered by Lawrence in light of this well-accepted standard, we find it offers sufficient support for the trial commissioner's conclusion that the claimant's death was due to Legionnaire's Disease which he contracted while working at the wastewater treatment plant. This is particularly so in light of the fact that the trier also found persuasive the testimony offered by Lawrence in rebuttal of Cooper's evidence, and the fact that two other co-workers of the claimant also reported feeling ill during the same time frame.[11]

We recognize that neither Lawrence nor any other medical professional can assert with absolute certainty what may have caused the claimant's death. However, we also recognize that the Workers' Compensation Act does not require that the evidence presented in support of a claim for workers' compensation benefits meet such an exacting standard. "The purpose of the Workers' Compensation Act is remedial in nature and should be construed to accomplish its humanitarian purpose." Scott v. Bridgeport, 4637 CRB-4-03-2 (February 24, 2004). The evidence must persuade the trier that it is "more likely than not" than the employment caused the injury. Struckman, supra, at 555. Based on the evidence presented herein, we find that the trier could have reasonably inferred that it did. "It is … immaterial that the facts permit the drawing of diverse inferences. The [commissioner] alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be

[11] Although the record does not clearly substantiate that the claimant and his co-workers suffered from identical symptoms, we find that the trial commissioner could have reasonably inferred that the timing of their illness was not coincidental.

disturbed by a reviewing court." [12] Fair v. People's Savings Bank, 207 Conn. 535, 540 (1988), *quoting* Del Vecchio v. Bowers, 296 U.S. 280, 287 (1935).

We note that the respondents have taken particular exception to the trial commissioner's finding stating that Lawrence had offered testimony to the effect that, "[s]ewage that has Legionella in it has been medically linked to infection of sewage workers." Findings, ¶ 4.cc. The respondents assert that this finding was not supported by the evidence but, rather, occurred during a *voir dire* of Lawrence relative to the issue of whether the doctor's opinion on causation had been affected by additional medical research conducted after his deposition, the results of which had not been shared with the respondents.[13] The respondents objected to the admission of the new medical information and the trier sustained their objection. The respondents now assert that it was improper for the trier to find causation based upon this finding. We disagree with the respondents' contention. As the preceding discussion indicates, we have determined that the trial commissioner's conclusions were supported by ample evidence. Moreover, the admitted evidence included a case history conducted at the North Side Sewage Treatment Works in Skokie, Illinois referenced in the "Health Hazard Manual" in which "particulates from sewage and air samples collected at the plant were inoculated in guinea pigs. In one experiment using undiluted sewage, Legionella pneumophila was identified in spleen cells 6-7 days later. Infections were not detected in animals

[12] Given that our findings on causation are in fact dispositive of the appeal, we decline to address whether, under the particular facts of this matter, Legionnaire's Disease constitutes an occupational disease as contemplated by § 31-275(15) C.G.S. See footnote 4, supra.

[13] During the voir dire, Lawrence explained that he had read the deposition of Brian Cooper, MD, "and it angered me, and so I did more research." September 21, 2011 Transcript, p. 56. Lawrence stated, "I had this opinion before. I fortified it with further information. I had that opinion in my deposition in March. I had the opinion that Legionella was the cause, and I have fortified it by finding evidence that there are known sewage worker infections that have been traced to the plants of Legionella found both in the workers and in the workplace." Id., at 57.

inoculated with aerosol samples." See Respondents' Exhibit 1, I.D. 12, p. 19. As such, we find that even without recourse to the excluded medical research, this finding was not lacking in foundation and its inclusion in the factual findings thus constituted harmless error at most.

As mentioned previously herein, the respondents filed an extensive Motion to Correct which was denied in its entirety. The respondents claim as error the trial commissioner's denial of their Motion to Correct. Our review of the proposed corrections indicates that the respondents are merely reiterating the arguments made at trial which ultimately proved unavailing. As such, we find no error in the trier's decision to deny the respondents' Motion to Correct. When "a Motion to Correct involves requested factual findings which were disputed by the parties, which involved the credibility of the evidence, or which would not affect the outcome of the case, we would not find any error in the denial of such a Motion to Correct." Robare v. Robert Baker Companies, 4328 CRB-1-00-12 (January 2, 2002).

Finally, the respondents have claimed that the trier deprived the respondents of their due process right to a fair trial when he found "a causal relationship between the disease which caused the claimant's death and his employment after [the trier] had granted the respondents' objection to the introduction of the medical literature supporting the doctor's causation opinion." Appellants' Brief, p. 24. The respondents aver that the denial of their due process is predicated on the basis that they were not given the opportunity to cross-examine the claimant's expert or have their expert witness review the subject medical literature. In light of our review of the circumstances surrounding the

proffer of the additional medical evidence, and our ultimate conclusion in this matter, we believe the respondents' claim is without merit.

There is no error; the May 30, 2012 Finding and Award of the Trial Commissioner acting for the Sixth District is hereby affirmed.

Commissioners Jodi Murray Gregg and Daniel E. Dilzer concur in this opinion.