CASE NO. 5747 CRB-1-12-4
CLAIM NO. 200143658 : COMPENSATION REVIEW BOARD

PATRICIA LEVARGE, Dependent Widow of
RICHARD LEVARGE, Deceased
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

: JANUARY 13, 2014

ELECTRIC BOAT CORPORATION
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLANT

and

TRAVELERS
ACE USA/ESIS
INSURERS
RESPONDENTS-APPELLEES

APPEARANCES: The claimant was represented by Carolyn P. Kelly, Esq., Suisman, Shapiro, Wool, Brennan, Gray & Greenberg, PC, The Courtney Building, 2 Union Plaza, Suite 200, New London, CT 06320.

The respondents Electric Boat Corporation and Travelers/ACE USA/ESIS were represented by Lucas D. Strunk, Esq., Pomeranz, Drayton &Stabnick, LLC, 95 Glastonbury Boulevard, Glastonbury, CT 06033-4412.

The respondent Electric Boat Corporation, self-insured, was represented by Peter D. Quay, Esq., Law Office of Peter D. Quay, LLC, PO Box 70, Taftville, CT 06380.

This Petition for Review[1] from the October 11, 2012 Ruling Re: Motion to Articulation and Motion to Correct of the Commissioner acting for the First District was heard May 31, 2013 before a Compensation Review Board panel

[1] We note that the respondents Travelers/ESIS originally filed a Petition for Review from the Commissioner acting for the First District March 30, 2012 Finding Pursuant to Remand Order of June 16, 2009. That Petition for Review was subsequently withdrawn November 15, 2012.

We note that extensions of time were granted during the pendency of this appeal.

consisting of Commission Chairman John A. Mastropietro and Commissioners Charles F. Senich and Peter C. Mlynarczyk.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant in this matter is the dependent spouse of the decedent. This is not the first instance where this tribunal has been asked to review issues that have arisen among the parties. Before we begin any discussion of the issue(s) presented before us today, a brief review of what has transpired is useful.

Much of the factual history was well documented both by this tribunal and the Supreme Court. See Levarge v. Electric Boat Corp., 4884 CRB-8-04-11 (November 30, 2005), [hereafter Levarge I], *appeal dismissed for lack of final judgment,* 282 Conn. 386 (2007); Levarge v. Electric Boat Corp., 5358 CRB-2-08-6 (June 16, 2009) [hereafter Levarge II]. While the issue under review here is focused on a claim of legal error, a brief review of the factual circumstances is as follows.

The claimant is the dependent spouse of the decedent Richard Levarge. The decedent was employed at Electric Boat from 1956 through 1992. During the course of his employment the decedent was exposed to asbestos dust and debris. In 1991, the decedent had a malignant polyp removed from a vocal cord. He was then diagnosed with squamous cell carcinoma. The decedent underwent radiation therapy and while initial results were positive, the cancer reappeared having spread to his lungs. The decedent ceased working in November, 1992 and succumbed on April 7, 1993. Death was

ascribed as respiratory arrest secondary to metastatic laryngeal cancer. See Levarge v. General Dynamics Corp., 282 Conn. 386, 388 (2007).

A claim for benefits was brought pursuant to the federal Longshore and Harbor Workers' Compensation Act (hereafter "LHWCA"). Proceedings were held before federal Administrative Law Judge David W. DiNardi. On February 3, 1995, Judge DiNardi issued his opinion awarding benefits pursuant to the LHWCA. A claim for benefits was also brought pursuant to Chapter 568 and after some dormancy, the claim was heard.[2]

As part of the proceedings pursuant to Chapter 568, the claimant filed a motion to limit the participation of the respondents on the basis of collateral estoppel. The trial commissioner, in his October 29, 2004 Ruling Re: Motion to Limit Participation of ACE USA Dated July 6, 2004, considered whether the respondents should be precluded from asserting a defense to the claim on the issue of causation. Legal support for the motion to limit participation of the respondents was based, in part, on the Supreme Court's holding in Lafayette v. General Dynamics Corp., 255 Conn. 762 (2001). In Lafayette, the Court held that the trial commissioner erred in failing to preclude the respondents from defending the issue of causation in proceedings brought under Chapter 568.

Additionally, in this tribunal's opinion in Robert v. General Dynamics, 4691 CRB-2-03-7 (June 14, 2004), this board held that based on Lafayette, supra, and the policy underpinning § 31-299b, the claimant should not be compelled to again prove

[2] A Form 30C was filed with the Commission on July 12, 1993. No action was pursued by the claimant until March 2003. See Levarge I, supra.

causation having fully litigated the issue with parties who were in privity.[3]

In his October 29, 2004 Ruling the trial commissioner ruled that the respondents were precluded from asserting a defense on the issue of causation. Further, consistent with Robert, supra, he held application of the principle of collateral estoppel was appropriate as the respondents were in privity and shared an identification of interests with the LHWCA proceedings. The respondents ACE USA/Travelers appealed to this board. It was the appeal from the October 29, 2004 Ruling which was the subject of this tribunal's opinion in Levarge I.

In Levarge I, we affirmed the trial commissioner's conclusion that the respondents should be precluded from mounting a defense on the issue of causation. Following this tribunal's opinion in Levarge I, the respondents ACE USA/Travelers further appealed the matter. In its consideration of the matter, the Supreme Court dismissed the appeal on the basis of lack of final judgment. The Court determined that as the issue of apportionment was not decided by the trial court and such a determination was more than just a ministerial act, the appeal must be dismissed. The Court also stated "on remand" the matter of apportionment should be decided. See Levarge, 282 Conn. 386, 391 (2007).

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[3] This board stated in Robert v. General Dynamics, 4691 CRB-2-03-7 (June 14, 2004),

> [H]aving carried the burden of proof as to the liability of the last employer, § 31-299b shields the claimant from having to endure the time and expense of proving liability against other respondents in the chain of causation. See Barron v. City Printing Company, 55 Conn. App. 85 (1999). The only difference between this case and other cases arising pursuant to § 31-299b is the Supreme Court's opinion in Lafayette, supra, holding that liability against an employer for an injury arising out of and in the course of employment litigated pursuant to the federal Longshore Harbor Workers' Compensation Act collaterally estops the respondent in that proceeding from relitigating the issue in this forum.

Thereafter the trial commissioner determined the pro rata apportionment liability of the respondents. In his June 12, 2008 Supplemental Finding and Award the trial Commissioner concluded, inter alia, that liability should be apportioned as follows; 79.9 percent to ACE, 11.3 percent to Travelers and 8.8 percent to Electric Boat/Self Insured. In that Supplemental Finding and Award the trial Commissioner also concluded that there was privity among the respondents and on the basis of the Supreme Court's holding in Lafayette, supra, the respondents were precluded from litigating the issue of causation on the basis of collateral estoppel.

The respondents appealed the trial commissioner's June 12, 2008 Supplemental Finding and Award. This tribunal considered the issues raised in that appeal and issued its opinion in Levarge v. Electric Boat Corp., 5358 CRB-2-08-6 (June 16, 2009) [Levarge II]. In Levarge II, the primary issue presented to the board was whether the trial Commissioner erred in concluding that the respondents were precluded from litigating the issue of causation. However, between the time the trial Commissioner issued his June 12, 2008 Supplemental Finding and Award and the date of oral argument before the Compensation Review Board, the Supreme Court issued its opinion in Birnie v. Electric Boat Corp., 288 Conn. 392 (2008).

Birnie, was another case involving the application of the doctrine of collateral estoppel. There again the court was asked to consider whether a determination as to causation rendered pursuant to the LHWCA was binding upon the respondents as to causation and entitlement to benefits pursuant to Chapter 568.

The Birnie court held that the respondents were not precluded from defending the issue of causation because the administrative law judge's opinion awarding benefits

pursuant to the LHWCA failed to articulate the causation standard applied with enough specificity to permit "an adequate comparison of the contributing factor and the substantial factor causation standards." Id., at 396. In Birnie, the court stated, inter alia;

> Although we can discern from the administrative law judge's decision that he concluded *some* causal connection is required under the contributing factor standard, the decision provides no indication of the scope of the standard actually applied; that is, whether a de minimus causal connection would satisfy the standard, or whether, like claims under this state act, the causal connection needs to be more than de minimus in order to be compensable.

Birnie, supra, at 414.

Given that this tribunal had the benefit of the Supreme Court's holding and analysis in Birnie, we held in Levarge II that a remand to the trial Commissioner was necessary so as to permit the determination of the proximate cause standard applied by the federal administrative law judge in his February 1995 decision.

A second issue considered by this tribunal as part of Levarge II was whether the respondent-appellant, Electric Boat, could benefit from our ruling remanding the matter for a determination as to the proximate cause standard applied in the LHWCA award.

We held that as the respondent Electric Boat had failed to appeal from the initial October 29, 2004 Ruling of the trial Commissioner, it could not benefit from the appellate efforts of the respondents Travelers and ACE USA. Thus, the respondent Electric Boat was precluded from defending the Chapter 568 claim on collateral estoppel grounds as that was the ruling of the trial Commissioner in his October 29, 2004 Ruling.

In accordance with this tribunal's remand in Levarge II, on March 30, 2012 the trial Commissioner issued a Finding Pursuant to Remand Order of June 16, 2009

[Hereafter March 30, 2012 Finding and Order]. In the March 30, 2012 Finding and Order, the trial Commissioner concluded, inter alia:

> [T]he Decedent Claimant's occupational exposure to asbestos was more than a 'de minimus amount,' which contributed to the development of his cancer and subsequent death…. I further find and conclude that the administrative law judge's findings and award on the issue of causation is sufficient to subject the Respondents to collateral estoppel in accordance with Lafayette. The Respondents are estopped from re-litigating the issue of causation.

March 30, 2012 Finding and Order, ¶¶ A-B.

Further the trier held in Order, ¶ I, "The Respondents are collaterally estopped/precluded from litigating the issue of causation." March 30, 2012 Finding and Order.

The respondents-insurers, Travelers, ACE USA/ESIS, filed a Petition for Review, a Motion to Correct and a Motion for Articulation. The trial Commissioner in his October 11, 2012 Ruling Re: Motion to Articulation and Motion to Correct [hereafter October 11, 2012 Ruling] relating to the March 30, 2012 Finding and Order corrected many of the factual findings set out in the March 30, 2012 Finding and Order. In that October 11, 2012 Ruling the trial Commissioner concluded that the standard of causation utilized by the administrative law judge was "not the standard mandated and consistent with Connecticut case law." October 11, 2012 Ruling, ¶ A. The trial commissioner also concluded:

> I further find and conclude Judge Di Nardi did not utilize or articulate that the Claimant's asbestos exposure was a substantial or material cause of his throat cancer. He applied a lesser standard. As such, estoppel is not applicable and the state Respondents are not estopped from re-litigating the issue of causation in the state forum.

> I further find and conclude that as a result of the above findings, there is no privity concerning the state Respondents and the self-insured Respondent in the Federal Longshore proceedings.

October 11, 2012 Ruling, ¶¶ B-C.

Following the trier's October 11, 2012 Ruling, the respondents Travelers and Ace USA ESIS withdrew their appeal. Electric Boat Self Insured filed an appeal from the trial commissioner's October 11, 2012 Ruling.

The ultimate issue put forth on review is "whether the trial commissioner erred in not Ordering that Respondents ACE and Travelers are collaterally stopped/precluded from litigating the issue of causation in the proceeding."[4] We find no error.

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[4] The respondent Electric Boat filed its Reasons of Appeal on January 17, 2013 and indicated eight reasons of appeal. They were as follows:

1. Whether the trial Commissioner erred when in his *Ruling Re: Motion to Articulation and Motion to Correct* issued October 11, 2012, the trial Commissioner deleted Paragraphs 1 – 20 of *Finding Pursuant to Remand Order of June 16, 2009* that was issued on March 31, 2012.
2. Whether the trial Commissioner erred when he found that Administrative Law Judge David W. DiNardi in his Decision and Order of February 1, 1995 used a de minimus standard of causation.
3. Whether the trial Commissioner erred when he stated that the ALJ did not conclude that Claimants is best this exposure was a substantial or material causes cancer when in fact the administrative law get judge did make that finding.
4. Whether the trial Commissioner erred in not finding that the administrative law judge's findings were sufficient to apply collateral estoppel to the facts of this case when in fact they were.
5. Whether the trial Commissioner erred in his *Ruling Re: Motion to Articulation and Motion to Correct* when he deleted Paragraphs A-choose two of the Finding dated March 30, 2012.
6. Whether the trial Commissioner erred in not finding the administrative law judge's findings and his award on the issue of causation is sufficient to subject Respondents CASE and Travelers to collateral estoppel in accordance with *Lafayette.*
7. Whether the trial Commissioner erred in not finding that there was privity among the Respondents Electric Boat Corporation and ACE and Travelers in accordance with *Roberts v. General Dynamics,* 4691 CRB-2-03-7 (June 14, 2004), a conclusion he had reached on March 30, 2012.
8. Whether the trial Commissioner erred in not Ordering that Respondents Ace and Travelers are collaterally estopped/precluded from litigating the issue of causation in this proceeding.

Once again between the time the trial commissioner issued his March 30, 2012 Finding and Order and his October 11, 2012 Ruling the Supreme Court issued an opinion which clarified certain points of law necessary to the proximate cause analysis required in this matter, Sapko v. State, 305 Conn. 360 (2012).[5] Sapko concerned the issue of whether the Supreme Court's holding in Barry v. Quality Steel Products, Inc., 263 Conn.424 (2003) abrogating the doctrine of superceding causation in actions brought in negligence also applied to Workers' Compensation matters. The Sapko court held that Barry's holding did not apply to Workers' Compensation claims. The Court reasoned that as Chapter 568 is based on a strict liability theory of causation as opposed to the comparable negligence theory of tort law Barry was inapplicable. Thus, under Workers' Compensation law a proximate causation chain was still capable of being broken by an intervening event.

As part of its analysis the Sapko Court reviewed proximate causation standards under Workers' Compensation law. The Court considered the appellant's argument that Birnie suggested causation was satisfied if the work related event contributed to the harm in something more that a de minimus way. Sapko held that the appellant's reliance upon the de minimis standard referenced in Birnie was misplaced. In Sapko, the court counseled that Birnie did not hold a different proximate causation standard than that which already existed under Chapter 568 claims. The court noted:

> [I]n reaching our conclusion in *Birnie*, we undertook an in-depth examination of the contributing and substantial factor standards to facilitate a comparison of the two tests. It was in this context that we observed that the substantial factor test requires that the employment contribute to the injury "in more than a deminimis

[5] Sapko v. State, 305 Conn. 360 (2012) issued June 12, 2012.

> way." Id., 413. The "more than . . . deminimis" language is preceded, however, by statements explaining that "the substantial factor standard is met if the employment *materially or essentially contributes* to bring about an injury"; (emphasis in original) id., 412; which, by contrast, "does *not* connote that the employment must be the *major* contributing factor in bringing about the injury . . . nor that the employment must be the *sole* contributing factor in development of an injury." (Citation omitted; emphasis in original.) Id. Thus, it is evident that we did not intend to lower the threshold beyond that which previously had existed.

Sapko, supra, at 391.

Consistent with the proximate cause analysis of Sapko the trial commissioner in his October 11, 2012 Ruling held that the respondents Travelers, ACE USA, ESIS were not collaterally estopped from defending their liability under Chapter 568.

The Respondent self insured argues that under the LHWCA the claimant enjoys a presumption favoring an award for benefits and that once the claimant meets the prima facie case burden, the respondents "must introduce substantial evidence that the injury did not arise out of or in the course of employment." Lafayette, supra, at 775. The Lafayette court described the process as follows:

> Once a prima facie case has been established for such death benefits, § 20(a) of the Longshore Act provides a presumption that the claim is covered by the Longshore Act. See 33 U.S.C. § 920(a); Fleischmann v. Director, Office of Workers' Compensation Programs, 137 F.3d 131, 137 (2d Cir.1998). In order for a claimant to establish a prima facie case to invoke the presumption, the claimant must show that he has suffered an injury and that conditions existed in the workplace that could have caused the injury. Bath Iron Works v. Brown, 194 F.3d 1, 4 (1st Cir.1999). If the so-called § 20(a) presumption of coverage is invoked, the burden of going forward with the evidence shifts to the employer. In order to rebut the § 20(a) presumption, the employer must introduce substantial evidence that the injury did not arise out of or in the course of employment. See 33 U.S.C. § 920(a); U.S. Industries/Federal Sheet Metal, Inc. v. Director, Office of Workers' Compensation Programs, 455 U.S. 608, 611, 102 S.Ct. 1312, 71 L.Ed.2d 495 (1982); Fleischmann v. Director, Office of Workers'

> Compensation Programs, supra, 134. If the employer offers substantial evidence that the injury was not work-related, the presumption falls out of the case entirely; Del Vecchio v. Bowers, 296 U.S. 280, 286, 56 S.Ct. 190, 80 L.Ed. 229 (1935); and the administrative judge must weigh all of the evidence in the record. The administrative judge may then rule in favor of the claimant only if he or she concludes that the claimant has met his or her burden of proving by a preponderance of the evidence that the injury was work-related. See Director, Office of Workers' Compensation Programs v. Greenwich Collieries, 512 U.S. 267, 277-78, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994).

Lafayette, supra, at 774-775 (citations omitted; footnotes omitted.)

If we understand the appellate argument of the self insured Electric Boat correctly, it is in the unusual position of advancing that the federal ALJ's award of LHWCA benefits indicates that the respondent did not meet its burden of persuasion and thus, all respondents should be collaterally estopped from defending the issue of causation. Further, its position is buttressed by the fact that the respondents were in privity. Thus, if the self insured Electric Boat, is collaterally estopped the same should apply to the other respondents. Electric Boat points out that the holding of the trier in his October 29, 2004 Ruling was affirmed by this body in Levarge I, supra. We might agree with the appellant's argument if the Supreme Court had not clarified the appropriate proximate cause analysis between the time this tribunal issued Levarge I and the trier's ruling in his October 11, 2012 Ruling. Therefore the trial commissioner did not err as a matter of law in concluding as he did.

We therefore affirm the October 11, 2012 Ruling Re: Motion to Articulation and Motion to Correct of the Commissioner acting for the First District.

Commissioners Charles F. Senich and Peter C. Mlynarczyk concur.