CASE NO. 5875 CRB-4-13-8 : COMPENSATION REVIEW BOARD
CLAIM NO. 400049727

JANICE MCCULLOUGH, Dependent Widow of
ARTHUR MCCULLOUGH[1], Deceased
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

: AUGUST 5, 2014

SWAN ENGRAVING, INC., ET AL
EMPLOYER

and

CONNECTICUT INSURANCE GUARANTY
FUND, SUCCESSOR TO AMERICAN
MUTUAL (Insolvent)
INSURER
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by Christopher Meisenkothen, Esq., Early, Lucarelli, Sweeney & Meisenkothen, LLC, One Century Tower, 11th Floor, 265 Church Street, PO Box 1866, New Haven, CT 06508-1866.

The respondents were represented by Melissa A. Murello, Esq., Montstream & May, LLP, 655 Winding Brook Drive, PO Box 1087, Glastonbury, CT 06033-6087.

This Petition for Review from the July 25, 2013 Finding and Award of the Commissioner acting for the Eighth District was heard March 28, 2014 before a Compensation Review Board panel consisting of Commissioners Michelle D. Truglia, Daniel E. Dilzer and Stephen M. Morelli.

[1] This matter was originally captioned as Arthur McCullough v. Swan Engraving, Inc., et al.

OPINION

MICHELLE D. TRUGLIA, COMMISSIONER. The respondents in this case have appealed from a Finding and Award which determined that the claimant, Janice McCullough, brought a timely § 31-306 C.G.S. claim for benefits following the death of her husband. Pursuant to § 31-294c C.G.S., the respondents argue that the claim was untimely and, therefore, this Commission lacks jurisdiction as the claim was brought more than one year after the demise of Mr. McCullough. After reviewing the facts and the law we conclude that we cannot rule on this issue at this time. In order to determine whether the Commission has jurisdiction we need to have findings as to whether the provisions of § 31-306b C.G.S. were followed in this matter. As the record lacks evidentiary findings on these issues, we herein remand this matter to the Eighth District for a *de novo* hearing to determine compliance with this statute and to determine whether a § 31-306 C.G.S. claim brought 55 weeks post-mortem is jurisdictionally valid.

The trial commissioner in this matter reached the following findings of fact which, subsequent to a Motion to Correct, were incorporated in a Revised Finding and Award dated August 20, 2013. The commissioner found the original claimant sustained a compensable work-related lung injury on February 11, 2000, which later resulted in his death on March 31, 2005. He filed a timely Notice of Claim on May 30, 2002 and a subsequent voluntary agreement accepting the claimant's lung injury was approved on February 26, 2013. Janice McCullough is the spouse and dependent of the claimant as defined by C.G.S. § 31-306. She filed this widow's claim on April 19, 2006, about 55 weeks after the death of the claimant.

The respondents challenged the timeliness of the widow's claim on the grounds that it was not filed within one year of the decedent's March 31, 2005 death. The claimant's widow countered by arguing that her claim was timely because her husband's underlying workers' compensation claim was timely and because recent Appellate Court caselaw interpreting the provisions of Conn. Gen. Stat. § 31-306 make the claim timely. The commissioner concluded that Mrs. McCullough's claim was timely in Findings, ¶ 8 and ordered the respondents to pay § 31-306 benefits relating back to the date of Mr. McCullough's death in 2005.

The respondents' Motion to Correct was granted in part, however their Motion for Articulation was denied.

The respondents pursued this appeal. They argue that any claim for § 31-306 C.G.S. benefits must be commenced in the manner prescribed under § 31-294c C.G.S., and rely on this language in the statute.

> (a) 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.

As the respondents view the situation the dependent widow had a clear one year time period from the date of the original claimant's death in which to file her own claim for benefits. She failed to do so, therefore the Commission lacks jurisdiction over the claim. The claimant argues that precedent from the early years of our workers'

compensation laws in Connecticut governs this situation and that Tolli v. Connecticut Quarries Co., 101 Conn. 109 (1924) is on point. As the claimant interprets Tolli, once the original claimant filed a timely claim for benefits, a post-mortem claim for dependent's benefits could be filed at any time thereafter. After review, we find neither the claimant's interpretation of Tolli, nor the trial commissioner's Finding and Award, appropriately address the relevant provisions of § 31-306b C.G.S. which we believe was intended to be applied in a coordinate fashion with § 31-294c C.G.S.

On appeal, we generally extend deference to the decisions made by the trial commissioner. "As with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial court could have reasonably concluded as it did." Daniels v. Alander, 268 Conn. 320, 330 (2004). The Compensation Review Board cannot retry the facts of the case and may only overturn the findings of the trial commissioner if they are without evidentiary support, contrary to the law, or based on unreasonable or impermissible factual inferences. Kish v. Nursing and Home Care, Inc., 248 Conn. 379 (1999) and Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Nonetheless, while we must provide deference to the decision of a trial commissioner, we may reverse such a decision if the commissioner did not properly apply the law or reached a decision unsupported by the evidence on the record. Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

The facts found by the trial commissioner in this matter are not in dispute so our appellate arguments focused on the trial commissioner's application of the statute. We note, that in so doing we are directed by § 1-2z C.G.S. to apply the "plain meaning" of

statutes. "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and *its relationship to other statutes.* If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Emphasis added.)

"[T]he workers' compensation system in Connecticut is derived exclusively from statute . . . . A commissioner may exercise jurisdiction to hear a claim only under the precise circumstances and in the manner particularly prescribed by the enabling legislation. Cantoni v. Xerox Corp., 251 Conn. 153, 160 (1999), *citing* Discuillo v. Stone & Webster, 242 Conn. 570, 576 (1997)." Verrinder v. Matthew's Tru Colors Painting & Restoration, 4936 CRB-4-05-4 (December 6, 2006), *appeal dismissed*, A.C. 28367 (July 25, 2007). The provisions of § 31-294c(a) state that in the event of a death of a claimant, there are two alternative methods of calculating the statute of limitations. The claim could be filed within two years of the date of the accident or within two years of the date in which an occupational disease first manifested itself; or the claim could be filed within one year of the claimant's death, if this time period would allow a longer time to file a claim than the initial two year period.

We followed this application of § 31-294c(a) C.G.S. in our decision in Fredette v. Connecticut Air National Guard, 4828 CRB-8-04-7 (January 13, 2006). In Fredette the claimant died more than two years after the date of manifestation of his ultimately fatal disease; but the claim was filed by his surviving spouse less than one year after his death. We also noted that an initial claim for benefits could have been brought by the claimant within three years of first manifestation of illness had he been alive. We cited Mingrone

v. Burndy Corporation, 9 Conn. Workers' Comp. Rev. Op. 252, 1109 CRD-7-90-9 (November 21, 1991) as standing for the proposition that a surviving spouse should not have a shorter time period to file benefits under the statute than the original claimant would have had. We further distinguished the case on the facts from Bartlett v. J.B. Williams Soap Factory, 4511 CRB-8-02-3 (March 3, 2003), where the initial claim for benefits was made more than one year after the death of the injured worker.

The claimant has seized on verbiage from the Supreme Court decision affirming Fredette to assert that Tolli, supra, is still the governing precedent as to the timeliness of claims for survivor benefits under Chapter 568. See Fredette v. Connecticut Air National Guard, 283 Conn. 813 (2007). The claimant cites language in that opinion that appears to cite Tolli for the proposition that once the original claimant files a timely claim for compensation a surviving spouse has a limitless time to file a claim for § 31-306 C.G.S. benefits. Fredette, supra, 824-825. We are not persuaded by this argument for a number of reasons. Initially, we note that such an interpretation cannot be reconciled with the plain meaning of § 31-294c C.G.S. and therefore would be barred by § 1-2z C.G.S.[2] Moreover, we have examined Tolli, supra, and it is factually distinguishable from the case at hand. Tolli did not, despite the claimant's suggestion to the contrary, involve a timely claim by an injured worker and a subsequent dispute as to the timeliness of the subsequent post-mortem dependent spouse claim. Instead, in Tolli, the initial *timely*

[2] We do note that Hummel v. Marten Transport, Ltd., 282 Conn. 477 (2007) stands for the proposition that § 1-2z C.G.S. was not intended to overrule prior Supreme Court or Appellate Court precedent which was inconsistent with the plain meaning of statutes. Hummel, however, dealt with the "final judgment" rule, which had been the focus of extensive appellate precedent directly on point in recent years. Id., 490-501. Conversely, Tolli v. Connecticut Quarries Co., 101 Conn. 109 (1924) is factually distinguishable from the case herein and has been cited only once by any appellate court in the past 67 years. We therefore find the decision in Hummel which affirmed unambiguous binding appellate precedent inapplicable to the amorphous legal issues presented in this case; in particular, as we find that legislation inconsistent with the claimant's interpretation of Tolli was enacted subsequent to that decision.

claim was by the worker's widow and the dispute occurred as to the timeliness of a later claim filed by the worker's parents, who asserted that they had also been dependent on the decedent's income. The Tolli decision hinged on the fact that once the respondents were aware of the initial claim for dependent benefits and a hearing had been held on the issue which culminated in the award of benefits; they had the opportunity to ascertain the identity of all other possible claimants besides the surviving spouse. Id., 116-117. The court concluded that the initial "hearing" encompassed their claims as well and the respondents had therefore received notice. Id. Simply put, Tolli does not stand for the proposition that the claimant now asserts. The case herein does **not** involve the substitution of beneficiaries to an existing award of survivor benefits. Instead it deals with an initial claim for survivor benefits.

We do not believe that the Supreme Court's Fredette decision extended the holding of Tolli to cover circumstances far beyond the fact pattern of the original decision. Had that been the intent of the Supreme Court, we believe that they would have stated so in an unambiguous fashion, and they did not do so. We also note that we have previously been presented with the argument that the dicta in the Supreme Court's Fredette decision was binding on this tribunal and rejected this analysis. See Estate of Greenberg v. ABB Combustion Engineering Services, Incorporated, 5521 CRB-1-10-1 (June 11, 2012).

> We find similarly unpersuasive the argument propounded by respondents' ABB/CNA that either footnote 12 or footnote 18 of the Fredette decision have any bearing on the matter at bar. In footnote 12, the court is merely giving voice to its recognition that there would need to be some time limitation on the filing of a separate claim by dependents or legal representative following the death of a decedent who had filed a timely claim during his lifetime but declining to decide the question. Respondents'

> reliance on footnote 18 is similarly unavailing, because the Fredette court is again positing an alternative fact pattern – how long a dependent would have to file a claim following the death of a decedent who had filed a claim within the three-year limitation period – and again declining to decide the question. While the Supreme Court's considerations are always entitled to great deference, we do not find that either of the Fredette footnotes cited by respondents ABB/CNA sheds much light on our analysis of the fact pattern presently before us.

We further note that the same Justice who authored the Fredette opinion also authored the Supreme Court's contemporaneous opinion in Chambers v. Electric Boat Corp., 283 Conn. 840 (2007). In Chambers, the surviving spouse attempted to file a claim under § 31-306 C.G.S. benefits after her husband's death. Her husband, however, had only filed a claim during his lifetime for federal Longshore Act benefits and never filed a claim for benefits under Chapter 568. We affirmed the trial commissioner's denial of this claim, Chambers v. General Dynamics Corp./Electric Boat Division, 4952 CRB-8-05-6 (June 7, 2006), and our decision was affirmed by the Supreme Court. In that decision the court declined to follow the mindset behind the dicta in Fredette to extend lenient application of the notice statute to a claim for survivor benefits.

> Dependents' claims are separate and distinct from underlying injury claims; *Biederzycki* v. *Farrel Foundry & Machine Co.*, 103 Conn. 701, 704–705, 131 A. 739 (1926); and a dependent may not rely on the claim of his decedent, but rather he must file his own claim for dependent's benefits under § 31-306. See Public Acts 1998, No. 98-104, § 1 (providing, in response to cases from board precluding dependents' benefits, that, in cases in which employee received benefits at time of death, employer must notify dependents that they must file separate notices of claim to pursue benefits under § 31-306). As we explained in *Fredette*, however, the proviso language of the statute of limitations does not set forth a separate and distinct limitations period for dependents' claims. *Fredette* v. *Connecticut Air National Guard*, supra, 283 Conn. 836. Instead, the proviso serves ''as an expansion of the underlying one year limitations period for cases in which the employee had, during his lifetime, failed to satisfy the underlying statute of limitations

> but still had died relatively swiftly . . . namely, within two years of the injury.'' (Citation omitted; internal quotation marks omitted.)

Id., 849-850.[3]

The decision in Chambers therefore restates the clear and unambiguous holding of Duni v. United Technologies Corp./Pratt & Whitney Aircraft Division, 239 Conn. 19 (1996) and Tardy v. Abington Constructors, Inc., 71 Conn. App. 140 (2002) that a claim for survivor's benefits under § 31-306 C.G.S. is: a) a separate and distinct claim for benefits but: b) reliant on a viable claim for Chapter 568 benefits existing for the decedent at the time of his or her death. "First, the availability of survivorship benefits under § 31-306 is inextricably linked to, and wholly dependent upon, the existence of a compensable injury or illness suffered by the employee. . . . Moreover, a dependent has no compensation rights unless and until the employee dies as a result of the occupational injury or disease." Duni, supra, 25. In Tardy, the Appellate Court rejected the defendant's argument that the claimant was not obligated to file a separate dependency claim. "[T]he statutory scheme requires a dependent filing for a death benefit to file a separate claim. . . ." Tardy, supra, 144.

The claimant argues that Tardy is inapplicable to the facts of this case. She further argues that the compensation review board decision cited in Tardy, Sellew v. Northeast Utilities, 12 Conn. Workers' Comp. Rev. Op. 135 (1994) was "overruled" by Fredette. We are not persuaded as the Fredette opinion did not cite either Tardy nor Sellew. On the other hand, Tardy did cite § 31-306b C.G.S.

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[3] The holding in Fredette v. Connecticut Air National Guard, 283 Conn. 813 (2007) was recently extensively analyzed in Wikander v. Asbury Automotive Group, 137 Conn. App. 665 (2012). The Appellate Court determined that when a compensable injury results in immediate death that § 31-294c C.G.S. allows a claimant two years from the date of death in which to file a § 31-306 C.G.S. claim. Id., 674-678.

> Section 31-306b(a) provides that "[n]ot later than thirty days after the date an employer or insurer discontinues paying weekly disability benefits to an injured employee under the provisions of this chapter due to the death of the injured employee, the employer or insurer shall send by registered or certified mail to the last address to which the injured employee's workers' compensation benefit checks were mailed, a written notice stating, in simple language, that dependents of the deceased employee may be eligible for death benefits under this chapter, *subject to the filing and benefit eligibility requirements of this chapter*." (Emphasis added.) In the event that an employer does not comply with the notification requirement, § 31- 306b(c) provides in relevant part that ''[e]ach dependent who, in the opinion of the commissioner, demonstrates that he was prejudiced by the failure of an employer or insurer to comply with the notice requirements of subsection (a) of this section *shall be granted an extension of time in which to file a notice of claim for compensation with the deceased employee's employer or insurer pursuant to section 31-294c* . . . .'' (Emphasis added.) Senator Edith G. Prague, who offered the language in the Senate, stated on the Senate floor that the purpose of the amendment was that, "when an injured employee dies from the injuries that were incurred when he was working and was receiving workers' [compensation] benefits for, the employer and the insurer, or the insurer, will notify, by registered certified mail, the widow or the surviving dependents *of their ability to reapply for benefits for either the surviving spouse or the dependent children* . . . . This part of the amendment will protect those people who do not realize that they can apply for benefits." (Emphasis added.) 41 S. Proc., Pt. 6, 1998 Sess., p. 1808, remarks of Senator Edith G. Prague. Accordingly, we conclude that the legislature intended for a dependent filing for a death benefit to file a separate notice of claim.

Id., 147-148.

We find that this statute should be applied to the facts herein.[4] As a result, while we reject the claimant's reliance on Tolli, supra, we are also not persuaded by the respondents' argument that the precedent in Sellew mandates reversal of the trial

[4] We note that § 31-306b C.G.S. was not cited anywhere in the opinion issued in Fredette v. Connecticut Air National Guard, 283 Conn. 813 (2007). As we find that this statute directly impacts the statutory time limits for the filing of claims for survivor benefits, and was in force at the time of that decision, we find this omission further supports the argument that the dicta in Fredette as to the time limits to file such claims is of little probative weight.

commissioner's decision. The 1994 decision in Sellew predates the legislative enactment of § 31-306b C.G.S., which had an effective date of October 1, 1998 and was in force for all times relevant to this claim.[5] This statute requires a respondent to send notice upon knowledge of a claimant's death of the potential eligibility of his or her dependents for death benefits. We note this statute unambiguously references the "filing and benefit eligibility requirements" of Chapter 568 as governing the filing of claims for § 31-306 C.G.S. benefits. See § 31-306b(a) C.G.S. Further, in § 31-306b(c) C.G.S. the statute states,

> The failure of an employer or insurer to comply with the notice requirements of subsection (a) of this section shall not excuse a dependent of a deceased employee from making a claim for compensation within the time limits prescribed by subsection (a) of section 31-294c unless the dependent of the deceased employee demonstrates, in the opinion of the commissioner, that he was prejudiced by such failure to comply. Each dependent who, in the opinion of the commissioner, demonstrates that he was prejudiced by the failure of an employer or insurer to comply with the notice requirements of subsection (a) of this section shall be granted an extension of time in which to file a notice of claim for compensation with the deceased employee's employer or insurer pursuant to section 31-294c, but such extension shall not exceed the period of time equal to the interim between the end of the thirty-day period set forth in subsection (a) of this section and the date the notice required under said subsection was actually mailed.

The General Assembly, by enacting § 31-306b(c) C.G.S., clearly stated that claims for survivorship benefits are subject to the notice limitations delineated in § 31-294c(a) C.G.S.[6] Were Tolli, supra, to have held to the contrary, such a holding would

[5] We also note that in Sellew v. Northeast Utilities, 12 Conn. Workers' Comp. Rev. Op. 135 (1994) we remanded the matter to the trial commissioner to ascertain if a hearing request during the statutory notice period under § 31-294c(c) C.G.S. served as an effective substitute to a notice of claim.

[6] While the terms of § 1-2z proscribe reliance on legislative history unless the "plain meaning" of a statute is unclear, were we to rely on the legislative history for Public Act 98-104 we would find it indisputably

have been invalidated by the enactment of inconsistent legislation governing the issue. "We presume that, by enacting a statute, the legislature intended a change in existing law. . . ." Connecticut National Bank v. Giacomi, 242 Conn. 17, 39 (1997). Chapter 568 is a creation of state statute, and it is the role of the General Assembly to delineate the appropriate parameters of eligibility for benefits under the statute. Discuillo v. Stone & Webster, 242 Conn. 570, 576-577 (1997).[7] We also must assume the General Assembly did not intend to adopt meaningless legislation and if there are two possible interpretations of a statute, the more reasonable one is applicable. Hall v. Gilbert & Bennett Mfg. Co., 241 Conn. 282, 302-303 (1997). In addition "statutes must be read not to conflict with each other, but, rather, to form a coherent scheme." Derrane v. City of Hartford, 295 Conn. 35, 45 (2010). Since § 1-2z C.G.S. requires us to reconcile § 31-294c C.G.S. with § 31-306b C.G.S., we believe the only reasonable statutory interpretation is that claims under § 31-306 C.G.S. must be commenced under the time limitations of § 31-294c C.G.S., subject to the limited exceptions expressly provided for under § 31-306b C.G.S.

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supports the conclusion the notice provisions of Chapter 568 applies to survivor benefit claims. The bill's sponsor, Senator Edith Prague, explained the provisions of the bill as follows on the Senate floor.

> "There is a year within you can apply for benefits. The employer or the insurer will notify the people involved then they can apply for benefits and the notification will go out no later than 30 days after the injured worker has died.
>
> If there is a time frame within which the surviving spouse or the dependent children were not notified it would extend the period of application for that amount of time."
>
> Senate Proceedings Vol. 41, Part 16, p. 1808 April 29, 1998.

[7] We note that the Supreme Court in Discuillo v. Stone & Webster, 242 Conn. 570 (1997) noted that one could theoretically suggest that as there was no explicit time limit under § 31-294c C.G.S. to file a repetitive trauma claim that by implication there was no time limitation at all. The Court rejected that argument as "we are not inclined to interpret our workers' compensation scheme to reach such a bizarre result." Id., footnote 8.

We must therefore ascertain if the terms of this statute were applied by the trial commissioner in this case. We have reviewed the hearing transcript and the exhibits. We find no indicia that the issue of statutory compliance with § 31-306b C.G.S. was considered by the litigants or the trial commissioner. There is no evidence that the respondents sent a notice to potential survivorship claimants upon the original claimant's death; nor any testimony from Mrs. McCullough that she received such a notice. The statute requires a trial commissioner to ascertain if the absence of notice of the availability of survivor benefits excuses the late filing of a claim for such benefits. The evidence presented at the hearing would not have enabled the commissioner to reach such a decision. This poses a situation where the matter should be referred back to the trier of fact.

> No case under this Act should be finally determined when the trial court, or this court, is of the opinion that, through inadvertence, or otherwise, the facts have not been sufficiently found to render a just judgment. When this appears, the case must be returned to the commissioner for a finding in accordance with the suggestions made by the trial court or this court, and for an award to be made upon the corrected finding.

Cormican v. McMahon, 102 Conn. 234, 238 (1925).

Accordingly, we remand this matter to the Eighth District for a *de novo* hearing.[8] At this hearing the trial commissioner will consider whether the respondents appropriately complied with their obligation under § 31-306b C.G.S. and whether their compliance, or lack thereof, has prejudiced the claimant by depriving the Commission of jurisdiction over her claim. We therefore defer to a factual determination as to whether

[8] We recognize that the trial commissioner whose decision we now remand for further proceedings is no longer able to determine the issue which must be addressed on remand. Since the issues herein are limited in scope we do not believe that either party would be prejudiced by turning the issue herein over to a new commissioner for a *de novo* hearing.

the filing of a notice of claim in this matter, three weeks beyond the standard statutory limitation of § 31-294c C.G.S., is saved by the provisions of § 31-306b C.G.S.

Commissioners Daniel E. Dilzer and Stephen M. Morelli concur in this opinion.