CASE NO. 5889 CRB-4-13-10 : COMPENSATION REVIEW BOARD
CLAIM NO. 400081440, 400048733

MADELINE KING, Dependent
Spouse of EARL KING, Deceased
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

: SEPTEMBER 18, 2014

CITY OF BRIDGEPORT
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLANT

and

PMA MANAGEMENT
ADMINISTRATOR

APPEARANCES: The claimant was represented by David J. Morrissey, Esq., Morrissey, Morrissey & Mooney, LLC, 203 Church Street, Naugatuck, CT 06770.

The respondent was represented by Marie E. Gallo-Hall, Esq., Montstream & May, LLP, 655 Winding Brook Road, Glastonbury, CT 06033-6087.

This Petition for Review from the October 9, 2013 Finding and Award of the Commissioner acting for the Fourth District was heard April 25, 2014 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Stephen B. Delaney and Michelle D. Truglia.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondent has appealed from a Finding and Award which determined the claimant, Madeline King, the dependent spouse of Earl King, was entitled to survivor benefits. The Finding and Award determined that the respondent failed to appropriately respond to the claimant's Form 30D and therefore, granted the claimant's Motion to Preclude. The respondent has appealed, arguing that they had no obligation to file a disclaimer responsive to a claim for survivor benefits derivative of a prior claim for a compensable injury. They also assert that the claim lacked sufficient medical evidence on causation to constitute a prima facia case, and therefore, the Commissioner lacked subject matter jurisdiction necessary so as to sustain an award. We are not persuaded by either argument. We affirm the Finding and Award.

The trial commissioner reached the following findings at the conclusion of the formal hearing. He found that Earl King was a Bridgeport police officer who was diagnosed on June 13, 2001 with coronary artery disease; which was found to be compensable under § 7-433c C.G.S. in an October 29, 2002 Finding and Award. Mr. King died on August 4, 2010 and the death certificate listed cardiac arrest and coronary artery disease as the primary cause of death. Mrs. King filed a Form 30D as the decedent's dependent spouse on August 31, 2010 which was received by the respondent City of Bridgeport and by the Commission on September 1, 2010. The respondent did not file a Form 43 disclaiming responsibility for this claim until November 3, 2010. This disclaimer asserted the death of Mr. King was unrelated to his compensable illness. Mrs. King filed a Motion to Preclude on December 22, 2010.

At the hearing Mrs. King testified that she married the decedent in 1970 and they had been continuously married until her husband's death. Mrs. King also testified both she and her late husband had guardianship of their granddaughter, Aleah King. Aleah's younger sister, Iyana Elise Roberts, also lived with them on the day of Mr. King's death. Mrs. King testified an autopsy was not conducted because she told police her husband had been recovering from a stroke and gave them a list of the medications he was taking, after which she was told an autopsy was unnecessary. The respondent argues that death due to a stroke falls outside the jurisdiction of this Commission, citing § 31-275(16) C.G.S.[1]

Based on this record the trial commissioner concluded that the death certificate was persuasive evidence that Mr. King's primary cause of death was coronary artery disease. The commissioner also found that coronary artery disease was a compensable condition by virtue of the claimant's October 29, 2002 Finding and Award. Mr. King died on August 4, 2010, leaving his wife, a granddaughter for whom he was a legal guardian, and that granddaughter's sister, who lived with his family. The commissioner further found that the Form 30D filed by the claimant was filed in a timely manner; but the Form 43 by the respondent disclaiming responsibility for the claim was not filed in a timely manner. The commissioner further concluded that as the cause of the decedent's death was an injury for which compensability had already been established, the

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[1] The relevant terms of this statute read as follows:

"(16)(A) "Personal injury" or "injury" includes, in addition to accidental injury that may be definitely located as to the time when and the place where the accident occurred, an injury to an employee that is causally connected with the employee's employment and is the direct result of repetitive trauma or repetitive acts incident to such employment, and occupational disease".

Commission had subject matter jurisdiction over this claim. The commissioner approved the Motion to Preclude.

The respondent filed a Motion to Correct seeking to add findings supportive of finding the claim noncompensable. The respondent also filed a Motion for Articulation seeking to have the trial commissioner expound on his reasoning for granting the Motion to Preclude. The trial commissioner denied both motions in their entirety. The respondent then commenced the instant appeal.

The respondent argues that the claimant did not prove the claim arose out of a personal injury under our statute, or in the alternative, that the trial commissioner was obligated to articulate how he reached this determination. The respondent also argues that based on their interpretation of Fredette v. Connecticut Air National Guard, 283 Conn. 813 (2007) that the claimant was not required to file a new notice of claim in order to seek survivor benefits, and therefore, based on that logic, the respondent was absolved of the need to file a timely disclaimer. Therefore, the respondent believes the Motion to Preclude should not have been granted. We are not persuaded by either argument.

We will deal first with the jurisdictional argument since, as per Castro v. Viera, 207 Conn. 420 (1988), we must address a jurisdictional challenge prior to considering the merits of a case. The respondent argues that the claimant failed to establish that the claim herein was for a "personal injury" as defined in § 31-275(16) C.G.S. The claimant argues that she presented prima facia proof of causation in the form of the official death certificate. We find the claimant's argument more persuasive.

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).

The claimant in the present matter submitted as evidence a death certificate as to her husband's cause of death. The document states that the immediate cause of death was "cardiac arrest." The document then states that the examiner should sequentially list the conditions leading to the immediate cause of death. The document lists only one such precipitating cause; "CAD." It is acknowledged that this is a common acronym for coronary artery disease.[2] We further note that it is unequivocal that the decedent's 2002 Finding and Award determined that he suffered from compensable coronary artery disease. We do not believe the trial commissioner's conclusion that the claimant presented probative evidence that the death of the decedent was due to a compensable injury unreasonable; especially as we review our recent precedent on the issue of what constitutes sufficient proof that an injury is compensable. See Hadden v. Capitol Region Education Council, 5843 CRB-1-13-5 (May 20, 2014), appeal pending, A.C. 36913.

> We have recently considered the issue of proximate causation of a claimant's injury in the wake of the Supreme Court's decision in Sapko v. State, 305 Conn. 360 (2012). In Madden v. Danbury

[2] The respondent points out that the document also suggests other ailments may have contributed to the decedent's death. We note that those ailments were listed only in Part II of the certificate as "other significant conditions contributing to death but not resulting in the underlying cause given in PART I."

> Hospital, 5745 CRB-7-12-4 (April 22, 2013) we cited Sapko, supra, as reiterating the long-standing "substantial factor" test for compensability. The Sapko decision clarified prior precedent from Birnie v. Electric Boat Corp., 288 Conn. 392, 412-13 (2008).
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> ....in 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 de minimis way.'' Id., 413. The ''more than . . . de minimis'' 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.

Id.

Based on this precedent, the claimant needed not to prove the claimant's compensable injury was the sole or most significant factor in his demise; she needed only to prove that the decedent's compensable injury was a material factor in the events that led to his demise.[3] The death certificate unequivocally states that coronary artery disease precipitated this death. The claimant cites Stevens v. Raymark Industries, Inc., 5215 CRB-4-07-4 (March 26, 2008) as standing for the principle that a trial commissioner may rely on a death certificate when determining whether a death is due to a compensable injury. We concur with this position, based on our analysis in Stevens.

> We find the evidence presented was definitive in nature. The death certificate clearly stated that asbestosis was a "significant condition" "contributing to death." We pointed out in Voronuk v.

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[3] We further note that unlike Sapko v. State, 305 Conn. 360 (2012), the trial commissioner was not presented with evidence from a medical examiner that a superseding cause other than the preexisting compensable injury was the proximate cause of the decedent's demise.

> Electric Boat Corporation, 5167 CRB-8-06-12 (January 17, 2008) that "significant" is a synonym for "substantial," citing McDonough v. Connecticut Bank & Trust Co., 204 Conn. 104 (1987). We also note that the death certificate is an official state document. In Samaoya v. William Gallagher, 4951 CRB-7-05-6 (April 26, 2006), *aff'd*, 102 Conn. App. 670 (2007), we pointed out a trial commissioner may place greater credence on official records than testimony from witnesses challenging such documents. The test in Dixon v. United Illuminating Co., 57 Conn. App. 51 (2000) is not whether a work related condition is the sole cause of injury, it is the claimant's burden to prove it is among the "substantial contributing factors." Id., n7. The trial commissioner had probative evidence that he chose to rely on that clearly stated asbestosis significantly contributed to the decedent's death.

Id.[4] [5]

The claimant presented evidence which the trial commissioner could and did find probative that her husband's compensable coronary arterial disease was a substantial factor in his death. Therefore, we find that the claim herein was jurisdictionally sound and the commissioner had legal authority to award the claimant benefits under § 31-306 C.G.S.[6]

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[4] We find that in Dsupin v. Wallingford, 5757 CRB-8-12-6 (November 1, 2013) we clarified our holding in Stevens v. Raymark Industries, Inc., 5215 CRB-4-07-4 (March 26, 2008), pointing out that when a death certificate lists multiple factors as a cause of death, the trial commissioner is not obligated to find the compensable illness was a substantial factor. Dsupin stands for upholding a commissioner's discretion to determine causation based on the evidence; which we are obligated to do as an appellate panel.

[5] In Stevens v. Raymark Industries, Inc., 5215 CRB-4-07-4 (March 26, 2008), the trial commissioner concluded that the opinion of the medical examiner was reliable, as unlike the opinion proffered in DiNuzzo v. Dan Perkins Chevrolet Geo, 294 Conn. 132 (2009) the witness was familiar with the claimant's condition and his opinion was not based on "conjecture, speculation, or surmise." We infer the trial commissioner in the present case also concluded the opinion was reliable; especially as it did not include any attenuated circumstances or reasoning. See Ryker v. Bethany, 97 Conn. App. 304, 309 (2005), *cert denied*, 280 Conn. 932 (2006). "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."

[6] We also note that in raising issues of causation, the respondents appear to be contesting matters that go beyond the issue of subject matter jurisdiction. See Callender v. Reflexite Corp., 137 Conn. App. 324 (2012), where the Appellate Court clearly distinguishes between jurisdictional challenges to a Motion to Preclude and a challenge to causation.

We turn to the question as to whether the trial commissioner could have granted a Motion to Preclude. There is no dispute that the respondent failed to file a Form 43 within 28 days of the claimant having filed a Form 30D. There is also no dispute that the respondent failed to undertake any other responsive action during that time period which would, as described in Dubrosky v. Boehringer Ingelheim Corporation, 145 Conn. App. 261 (2013), *cert. denied*, 310 Conn. 935 (2013), serve as an alternative response to the filing of a claim for the purposes of preclusion. The respondent relies on dicta from Fredette, supra, to claim that as a claim for survivor's benefits is a "derivative" claim that they are not legally bound by the 28 day statutory requirement under § 31-294c(b) C.G.S.[7] to file a disclaimer to a claim.

"Notwithstanding this statute's directive, our Supreme Court has declared that its conclusive presumption does not prevent an employer from contesting liability on the ground that the commissioner lacks subject matter jurisdiction over the claim. See *Castro* v. *Viera*, supra, 207 Conn. 430 (conclusive presumption of General Statutes [Rev. to 1983] § 31-297 [b], which is similar to that of § 31-294c [b], does not bar employer from contesting liability when ''question of the lack of subject matter jurisdiction has been squarely presented to commissioner''). In other words, the employer can always contest the existence of ''jurisdictional facts.'' ''A 'jurisdictional fact' is a fact that will permit a court to find jurisdiction.'' *Del Toro* v. *Stamford*, 270 Conn. 532, 543 n.9, 853 A.2d 95 (2004). Specifically, jurisdictional facts are ''[f]acts showing that the matter involved in a suit constitutes a subject-matter consigned by law to the jurisdiction of that court . . . .'' (Internal quotation marks omitted.) Id. The existence of an employer-employee relationship; see *Castro* v. *Viera*, supra, 433; and the proper initiation of a claim in the first instance under § 31-294c; see *Estate of Doe* v. *Dept. of Correction*, 268 Conn. 753, 757, 848 A.2d 378 (2004); are jurisdictional facts. The issue of causation, by contrast-that is, whether or not an injury arose out of and in the course of the employee's employment-has been held not to constitute a jurisdictional fact. See *DeAlmeida* v. *M.C.M. Stamping Corp*., 29 Conn. App. 441, 449, 615 A.2d 1066 (1992)." Id., 334-335.

On this point, see also Geraldino v. Oxford Academy of Hair Design, 5840 CRB-5-13-5 (April 17, 2014) and Volta v. United Parcel Service, 5612 CRB-7-10-12 (January 31, 2012) where we denied challenges to preclusion styled as "jurisdiction challenges" that actually were merely defenses as to causation.

[7] This statute reads as follows:

"(b) Whenever liability to pay compensation is contested by the employer, he shall file with the commissioner, on or before the twenty-eighth day after he has received a written notice of claim, a notice in accord with a form prescribed by the chairman of the Workers' Compensation Commission stating that the right to compensation is contested, the name of the claimant, the name of the employer, the date of the alleged injury or death and the specific grounds on which the right to compensation is contested. The employer shall send a copy of the notice to the employee in accordance with section 31-321. If the employer or his legal representative fails to file the notice contesting liability on or before the twenty-

We are puzzled by this reasoning. On a factual basis, we look to the Form 30D filed by the claimant on a form issued by this Commission. The form unambiguously informed the respondent that in the absence of a response within 28 days that it would lose the ability to challenge compensability of the claim. At the bottom of the form in bold print the Form 30D received by the respondent in this case stated as follows:

> **WARNING: If an employer does not file a notice contesting liability (e.g. Form 43) for this claim OR begin making workers' compensation benefit payments "without prejudice" within 28 calendar days from the date when this claim is received by personal delivery or by registered or certified mail, COMPENSABILITY SHALL BE PRESUMED and cannot thereafter be contested. If an employer chooses to begin making workers' compensation benefit payments "without prejudice" within 28 calendar days from the date of receipt of this claim and still wishes to contest this claim it must do so by filing a notice contesting liability for this claim within one year from receipt of this claim. [See Sec. 31-294c(b).]**

Nonetheless, the respondent falls back on their interpretation of appellate precedent to posit that the strict time limitations for filing claims under § 31-294c C.G.S. are inapplicable for the filing of survivor benefit claims, and therefore, based on some

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eighth day after he has received the written notice of claim, the employer shall commence payment of compensation for such injury or death on or before the twenty-eighth day after he has received the written notice of claim, but the employer may contest the employee's right to receive compensation on any grounds or the extent of his disability within one year from the receipt of the written notice of claim, provided the employer shall not be required to commence payment of compensation when the written notice of claim has not been properly served in accordance with section 31-321 or when the written notice of claim fails to include a warning that (1) the employer, if he has commenced payment for the alleged injury or death on or before the twenty-eighth day after receiving a written notice of claim, shall be precluded from contesting liability unless a notice contesting liability is filed within one year from the receipt of the written notice of claim, and (2) the employer shall be conclusively presumed to have accepted the compensability of the alleged injury or death unless the employer either files a notice contesting liability on or before the twenty-eighth day after receiving a written notice of claim or commences payment for the alleged injury or death on or before such twenty-eighth day. An employer shall be entitled, if he prevails, to reimbursement from the claimant of any compensation paid by the employer on and after the date the commissioner receives written notice from the employer or his legal representative, in accordance with the form prescribed by the chairman of the Workers' Compensation Commission, stating that the right to compensation is contested. Notwithstanding the provisions of this subsection, an employer who fails to contest liability for an alleged injury or death on or before the twenty-eighth day after receiving a written notice of claim and who fails to commence payment for the alleged injury or death on or before such twenty-eighth day, shall be conclusively presumed to have accepted the compensability of the alleged injury or death."

inchoate concept of mutuality, the requirement to respond to such claims is also waived. We find this reasoning to be unsound and not supported by our statutes or our precedent.

We dealt extensively with the Fredette case in our opinion in McCullough v. Swan Engraving, Inc., et al, 5875 CRB-4-13-8 (August 5, 2014), appeal pending, A.C. 37087. Our opinion in McCullough need not be fully restated, but noted in part that we had already been presented with arguments that the dicta in Fredette should be applied to § 31-306 C.G.S. claims, and had already rejected this reasoning.

> We do not believe that the Supreme Court's Fredette decision extended the holding of Tolli [v. Connecticut Quarries Co., 101 Conn. 109 (1924)] 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).
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> 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.

Our conclusion in McCullough was unequivocal. "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." Id. We reached this conclusion in part by concluding Chambers v. Electric Boat Corp., 283 Conn. 840 (2007) restates the continuing vitality of precedent governing survivor claims, 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.

The respondent and the claimant differ on whether Tardy governs this case. Based on the rationale we adopted in McCullough, the claimant presents the argument consistent with our precedent. In Tardy, the Appellate Court rejected the respondent's argument that it was absolved of the need to file a disclaimer because the claimant did not have a duty to file a new claim. The Appellate Court affirmed the granting of preclusion in that case as they concluded a separate notice was required for a dependent's claim for death benefits. Id., 146. Since a new notice was required by the claimant, there was a new claim that the respondent had to respond to. "…because this was a new claim, the employer was required to file a separate notice to contest stating the specific grounds on which it challenged liability." Id., 148. In the absence of such a disclaimer, preclusion could enter against the respondent. We followed this reasoning in affirming preclusion

against the respondent in Gorman v. Rogers Corporation, 5059 CRB-8-06-2 (February 21, 2007).[8]

We finally note the respondent cites Callender v. Reflexite Corp., 137 Conn. App. 324 (2012) in their brief as supportive of their position. Respondent's Brief, p. 4. Although the reasoning is novel, we are not persuaded. Callender stands for the proposition that a respondent may not consider the substantive merits of a Form 30C in determining whether a disclaimer is required. Instead, the respondent must respond to the issues stated within the four corners of the notice of claim; and should it not respond, face preclusion. As the claim in Callender purported to seek benefits for a new injury, the respondent was obligated to file a response within the statutory deadlines of § 31-294c C.G.S. See Footnote, ¶ 16 of Callender, which states in part, citing Tardy, supra, "…because this was a new claim, the defendant employer was required to file a separate notice to contest, stating the specific grounds on which it challenged its liability" Id.

The Appellate Court in Callender, in an opinion issued subsequent to Fredette, supra, therefore restated the precedent in Tardy, supra. Since we believe the legal issues herein are unambiguous, we do not believe the trial commissioner was obligated to articulate his reasoning in this case and find no error from his denial of the Motion for Articulation. Biehn v. Bridgeport, 5232 CRB-4-07-6 (September 11, 2008). We also find no error from the trial commissioner's denial of the Motion to Correct. The trial commissioner is not obligated to adopt the legal opinions and factual conclusions of a

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[8] In Gorman v. Rogers Corporation, 5059 CRB-8-06-2 (February 21, 2007), the respondent argued that preclusion should not enter against them as their counsel of record had not received a Notice of Claim. We found no statutory basis to require a claimant to serve a party's counsel and affirmed preclusion in that case.

litigant. D'Amico v. State/Department of Correction, 73 Conn. App. 718 (2002) and Liano v. Bridgeport, 4934 CRB-4-05-4 (April 13, 2006)

The respondent was bound by the term of the statute and the terms of the precedent in Tardy, supra, to respond to a claim for survivor benefits within the time limitation of the law. They did not do so. These facts compelled the trial commissioner to grant the Motion to Preclude. There is no error in that decision.

We affirm the Finding and Award.

Commissioners Stephen B. Delaney and Michelle D. Truglia concur in this opinion.