CASE NO. 5891 CRB-2-13-10 : COMPENSATION REVIEW BOARD
CLAIM NO. 200175830

JAMES ROCK (Deceased)
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: OCTOBER 16, 2014

STATE OF CONNECTICUT
UNIVERSITY OF CONNECTICUT
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLEE

and

GALLAGHER BASSETT SERVICES, INC.
ADMINISTRATOR

APPEARANCES:

The claimant was represented by Nathan J. Shafner, Esq., and Amity L. Arscott, Esq., Embry and Neusner, 118 Poquonnock Road, Groton, CT 06340-1409.

The respondent was represented by Lawrence G. Widem, Esq., Assistant Attorney General, Office of the Attorney General, 55 Elm Street, Hartford, CT 06141-0120.

This Petition for Review from the October 23, 2013 Ruling On Motion To Dismiss of the Commissioner acting for the Eighth 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 claimant in this matter has appealed from a Ruling on a Motion to Dismiss wherein the trial commissioner dismissed the present claim for benefits. The trial commissioner determined that based on the facts in this case, where the decedent died prior to filing a claim under Chapter 568 and left no dependents, that the Commission lacked jurisdiction to consider the claim. We concur with the commissioner to the extent that the decision herein addressed entitlement to benefits under § 31-307 C.G.S. and § 31-308(b) C.G.S. However, we remand this matter for further proceedings to ascertain whether other forms of benefits may be permissible.

The facts in this case are dissimilar to the vast majority of claims under our statute. They were also undisputed at the formal hearings. The claimant was employed by the State of Connecticut as an agricultural agent and educator and passed away on June 27, 2010 at the age of 85. A Form 30C was filed on October 19, 2011 asserting that the claimant suffered from mesothelimoma due to asbestos exposure contracted during the course of his employment. At the time of the claimant's death he did not have any presumptive dependents; nor any dependents in fact. During the claimant's life he did not file a Form 30C or request a hearing with the Commission seeking benefits for exposure to asbestos. The claimant also did not seek payment of any temporary total, temporary partial, or permanent partial disability benefits during his lifetime.

Based on these facts the trial commissioner concluded that an estate lacks standing to pursue permanent partial disability benefits because § 31-308(d) C.G.S. limits such awards to an enumerated list of beneficiaries.[1] The commissioner further found that

[1] This statute reads as follows:

an estate did not have standing to seek § 31-307 C.G.S. benefits when a claim for such benefits had not been made prior to the decedent's demise. The trial commissioner cited Bassett v. Stratford Lumber Co., 105 Conn. 297 (1926) for the position such an award was a personal benefit limited to the injured employee to pursue.

The claimant filed a number of post-judgment motions. A motion for clarification was filed and the trial commissioner denied this motion. The claimant also filed a motion to substitute the administrator of the claimant's estate as party claimant as well as a motion to change the caption of the case. Both motions were denied by the trial commissioner. The claimant has commenced the instant appeal; and the respondent has filed a motion to dismiss the appeal for lack of standing. That motion was not addressed by the trial commissioner.

At the onset we must ascertain if the Commission has jurisdiction over this claim. The respondent has challenged the subject matter jurisdiction of the Commission to consider a claim brought by an estate for Chapter 568 benefits, rather than a claim brought by a surviving dependent of the decedent. It is black letter law that "a challenge to subject matter jurisdiction can be raised at any time" and that "[o]nce the question of lack of jurisdiction of a court is raised, [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 quotation marks omitted.) Berry v. State/Department of Public Safety, 4866 CRB-4-04-9 (August 19, 2005). The argument they present is that the "estate" is

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Sec. 31-308(d). Any award or agreement for compensation made pursuant to this section shall be paid to the employee, or in the event of the employee's death, whether or not a formal award has been made prior to the death, to his surviving spouse or, if he has no surviving spouse, to his dependents in equal shares or, if he has no surviving spouse or dependents, to his children, in equal shares, regardless of their age.

not a "person" for the purposes of conferring legal standing to commence an action. They cite § 52-599 C.G.S., and Isaac v. Mount Sinai Hospital, 3 Conn. App. 598 (1985) for their position.[2] The respondent argues that as the claim was initiated by the estate and not by an administrator or executor of the estate, it is legally invalid.

The claimant argues that precedent has construed § 52-599 C.G.S. to permit the legal representative of an estate to commence a claim for benefits under Chapter 568. They cite Fredette v. Connecticut Air National Guard, 283 Conn. 813, 835 (2007) for the proposition that § 52-599 C.G.S. has been interpreted to permit the executor or administrator of an estate to bring a post-mortem claim under Chapter 568. They argue that the notice provisions of § 31-294c(a) C.G.S. are more specific than the terms of § 52-599 C.G.S., and therefore the principle of statutory construction would make the notice statute under Chapter 568 the operative law in this instance.[3] The claimant also points to

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[2] This statute reads as follows:

Sec. 52-599. Survival of cause of action. Continuation by or against executor or administrator. (a) A cause or right of action shall not be lost or destroyed by the death of any person, but shall survive in favor of or against the executor or administrator of the deceased person.

(b) A civil action or proceeding shall not abate by reason of the death of any party thereto, but may be continued by or against the executor or administrator of the decedent. If a party plaintiff dies, his executor or administrator may enter within six months of the plaintiff's death or at any time prior to the action commencing trial and prosecute the action in the same manner as his testator or intestate might have done if he had lived. If a party defendant dies, the plaintiff, within one year after receiving written notification of the defendant's death, may apply to the court in which the action is pending for an order to substitute the decedent's executor or administrator in the place of the decedent, and, upon due service and return of the order, the action may proceed.

(c) The provisions of this section shall not apply: (1) To any cause or right of action or to any civil action or proceeding the purpose or object of which is defeated or rendered useless by the death of any party thereto, (2) to any civil action or proceeding whose prosecution or defense depends upon the continued existence of the persons who are plaintiffs or defendants, or (3) to any civil action upon a penal statute.

[3] This statute reads as follows:

Sec. 31-294c. Notice of claim for compensation. Notice contesting liability. Exception for dependents of certain deceased employees. (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

Flouton v. Can, Inc., 4379 CRB-7-01-4 (March 13, 2002) where this tribunal considered a claim for benefits filed by an estate. As the claimant views the situation, an estate may have standing to commence an action, and that question is separate and distinct from whether or not the putative beneficiaries may have a statutory right to benefits.

We agree with the claimant that our notice statute should govern over the more general statute regarding the survival of a cause of action belonging to a deceased individual. The right to seek relief before the Commission is exclusively a statutory remedy, and therefore we are not bound by the common law as regards to the eligibility to seek benefits. 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). We find that the Isaac case, which the respondent relies upon, is based on a statute permitting suits in civil court for wrongful death (which at the time of that case was § 52-555 C.G.S.), which we find inapplicable to our statutory remedies. Our notice statute permits a "legal representative of the deceased employee" to file a claim on their behalf. We turn to the principles delineated in § 1-2z C.G.S. that we must apply the "plain meaning" of the statute when we interpret a statute. Presumably the General Assembly, having applied the term of "executor or administrator" in similar

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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. An employee of the state shall send a copy of the notice to the Commissioner of Administrative Services. As used in this section, "manifestation of a symptom" means manifestation to an employee claiming compensation, or to some other person standing in such relation to him that the knowledge of the person would be imputed to him, in a manner that is or should be recognized by him as symptomatic of the occupational disease for which compensation is claimed.

statutes; could have chosen to utilize this language in § 31-294c(a) C.G.S. as limiting filing of claims on behalf of a deceased individual to such individuals. Instead, the General Assembly chose to utilize what we believe is the more expansive term "legal representative" as a party empowered to file a claim within the jurisdiction of the statute. As held in Walter v. State, Svcs. For The Blind, 63 Conn. App. 1 (2001), we may not "by construction, supply omissions in a statute or add exceptions or qualifications" when the General Assembly has chosen to utilize certain statutory language. Id., 8. We also must acknowledge our statute is "remedial in nature" and must be "broadly construed to accomplish its humanitarian purpose." Id., 6-7. Moreover, we are bound by a "judicial policy preference" that favors allowing litigants to be heard on the merits, id., 7, *citing* Pietraroia v. Northeast Utilities, 254 Conn. 60, 74 (2000).

Our conclusion that the term "legal representative of the deceased employee" extends beyond the term of "executor or administrator" is consistent with our recent precedent. As noted, in Flouton, supra, it appears the decedent's estate was the party in interest before the trial commissioner. In Greenberg v. ABB Combustion Engineering Services, Incorporated, 5521 CRB-1-10-1 (June 11, 2012) the initial Form 30C was filed in the name of the decedent and the respondents challenged subject matter jurisdiction. We rejected that conclusion and concluded the commissioner had subject matter jurisdiction over the claim. Our decision in Greenberg cited Fredette, supra, and Berry v. State/Dept. of Public Safety, 5162 CRB-3-06-11 (December 20, 2007). In Berry the claimant appealed the trial commissioner's dismissal of her claim for survivorship benefits 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 for this claim asserting the notice was irredeemably defective, based on the holding of Kuehl v. Z-Loda Systems Engineering, 265 Conn. 525 (2003)." Id. We concluded, however, that given the totality of the circumstances that the respondent should have been aware the claimant in Berry was seeking survivorship benefits as "[a] reasonable conclusion from reading this 30C form is that relief would be sought under § 31-306 C.G.S; if for no other reason than Trooper Berry was no longer alive to receive the other forms of relief available under Chapter 568, such as temporary total or permanent partial disability benefits." Id.

The Appellate Court reached a similar conclusion in its decision in Estate of Haburey v. Town of Winchester, 150 Conn. App. 699 (2014). The claim in that case had been commenced in the name of an estate and citing Kuehl, supra, the respondents sought dismissal asserting a lack of subject matter jurisdiction. The Appellate Court agreed with this tribunal that Kuehl did not mandate dismissal of the claim as written notice seeking benefits was filed in a timely manner. Id., 708-709, 711-712. We will revisit Haburey, however, as the remainder of that opinion is unsupportive of elements of relief sought by the claimant.

The eligibility of a claimant for benefits under Chapter 568 is limited to those remedies provided for under the statute. Discuillo, supra. The trial commissioner in the present case concluded the claimant was not entitled to an award under either § 31-307 C.G.S. or § 31-308(b) C.G.S. We concur with that judgment, in part based on the rationale expressed in Berry, supra.

In the present case the decedent filed no claim while he was alive. Since an award of benefits under § 31-307 C.G.S. requires a claimant to establish a compensable

injury prevented him or her from earning wages, we question whether jurisdiction exists for an award of temporary total disability benefits. We also note that in Morgan v. East Haven, 208 Conn 576, 584-585 (1988) the Supreme Court determined that an award for inability to work due to a work injury, as opposed to a "specific" award for loss of use of a body part, was not an award that passed to a decedent's estate, citing Bassett, supra. As the Supreme Court pointed out in Cappellino v. Cheshire, 226 Conn. 569 (1993), in discussing our Act, "[t]he underlying objective is to provide for the workman and those dependent on him." Id., 575. In the present case, there were no dependents upon the decedent's labor at the time of his death. Accordingly, there can be no eligibility for an award under § 31-307 C.G.S.

Our precedent and statutes have dealt with awards for permanent partial disability in a different fashion. When a claimant has been awarded benefits under § 31-308(b) C.G.S., and dies prior to receiving their entire award for permanent partial disability, this accrued sum has been treated as an asset to be paid to their dependents or heirs. In the present case, however, no specific award was granted to the decedent during his life. The claimant has not directed us to any precedent where a post-mortem award of § 31-308(b) C.G.S. benefits has been awarded to a claimant in a scenario such as one presented herein where the claimant had made no claim for any benefits under Chapter 568 during his lifetime.

We note that in Churchville v. Bruce R. Daly Mechanical Contractor, 299 Conn. 185 (2010) the Supreme Court affirmed our decision that a dependent spouse could collect the balance of a specific award post-mortem. However, in Churchville the decedent had been adjudged to have sustained a compensable injury and had been paid

temporary total disability benefits during his lifetime. We determined in Churchville v. Bruce R. Daly Mechanical Contractor, 5365 CRB-8-08-8 (August 4, 2009) that prior precedent in McCurdy v. State, 227 Conn. 261 (1993) "clearly states that a permanent partial disability award vests when the claimant attains maximum medical improvement." Id. In the present matter there is no pending claim from the injured worker capable of being vested as an award for permanent partial disability. Therefore, this case is clearly distinguishable on the facts from Churchville, McCurdy, supra, Cappellino, supra, and Flouton, supra. Those cases deal with the treatment of a pending claim after the death of the claimant, wherein this claim was filed post-mortem.

Our statutory scheme clearly allows for compensation when a compensable injury results in the death of a worker. That statutory relief, however, is limited to the terms of § 31-306 C.G.S. and as clearly stated in Discuillo, supra, our tribunal may not deviate from the forms of relief provided for by statute.[4] See also, Vincent v. New Haven, 285 Conn. 778 (2008), where an award of survivor's benefits was held not to include health insurance coverage as that form of relief had not been enumerated under § 31-306. The terms of § 31-306 C.G.S., with a single exception, limit recovery to those who are either presumptive dependents of the decedent under the statute, or dependents in fact. In the present case, the decedent had no dependents at the time of his death. We note that § 31-306(a)(1) C.G.S. permits a claimant to receive four thousand dollars in burial benefits if his or her death was due to a compensable injury. This relief is not contingent on the existence of any dependents, and is paid to whoever assumes responsibility for such

[4] See § 31-308(b) C.G.S. "Notwithstanding the provisions of this subsection, the complete loss or loss of use of an organ which results in the death of an employee shall be compensable pursuant only to section 31-306."

expenses. The remaining relief available under § 31-306 C.G.S. (a) (2) through (7) is contingent on the existence of a "presumptive dependent" as defined by our statute or a "dependent in fact" as found by the trial commissioner. The parties concur there are no dependents of the decedent. Therefore, the terms of § 1-2z C.G.S. direct us to the conclusion that relief under this statute to a decedent's estate is limited to the payment of burial expenses.

We return now to the most recent precedent on post-mortem claims for benefits under Chapter 568, Haburey, supra. The Haburey decision, as we noted earlier, declined to find a claim for benefits jurisdictionally invalid when the claim form presented a claim by an estate. However, the same decision supports our view that the avenues of relief under such circumstances do not include the relief sought in the present case. The Appellate Court considered the issue of whether the trial commissioner could, after reviewing the claim, conclude that notwithstanding its citation of having been brought by the decedent's estate, that it was actually a claim for survivor benefits for the dependent spouse.

> Our inquiry therefore reduces to determining whether the form 30c filed on January 3, 1997, was filed on behalf of the decedent's estate or by the plaintiff widow. The form does not provide space to specify which type of benefits was being sought: benefits for an injured worker (or his estate) or for a dependent spouse. The form 30c filed in this case refers neither to the ''estate of Robert Haburey'' nor to his surviving spouse, the plaintiff. In the description section of the form, it states: ''The decedent came in contact with a virus at work which resulted in his death.'' This reference to ''[t]he decedent'' alerted the defendants that the notice of claim filed pertained to claims arising from the decedent's death.
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> Accordingly, two possible inferences could be drawn from the form 30c that was filed in this case. The first inference, urged by the defendants, is that the claim was filed by the estate of the

> decedent, to compensate his estate for the decedent's lost wages during his brief hospitalization immediately preceding his death, and for his medical expenses. The second inference, urged by the plaintiff, is that the form 30c was filed on behalf of the plaintiff for survivorship benefits as her husband's surviving spouse. Choosing between these two inferences is a question of fact, which is within the commissioner's province. *Thompson* v. *Roach*, supra, 52 Conn. App. 824 (''[t]he power and duty of determining the facts rest on the commissioner, the trier of facts'' [internal quotation marks omitted]). There is no evidence in this record that an estate ever was opened on behalf of the decedent on or before January 3, 1997, when notice of claim was filed**. Had the commissioner accepted the inference urged by the defendants, the only claim would have been for the payment of lost wages for the three days the decedent was hospitalized preceding his death, plus his medical expenses.** The decedent was paid an hourly rate of $15.64 and worked an eight hour shift. Therefore, his claim for lost wages during his three day hospitalization would have been $375.36, less any statutory caps and less any applicable federal and state taxes. See General Statutes §§ 31-294d and 31-307. ''The [commissioner] alone is charged with the duty of initially selecting the inference [that] seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court.'' (Internal quotation marks omitted.) *Sapko* v. *State*, supra, 305 Conn. 371. In his rulings, the commissioner selected the latter of these two inferences and determined that the form 30c was filed on behalf of the decedent's widow, the plaintiff, rather than on behalf of the decedent himself, or his estate. We conclude that it was reasonable for the commissioner to select this inference, and the defendants have not met their burden of convincing us otherwise. Absent an extraordinarily strong showing that this choice was erroneous, like the board, this court ''is precluded from substituting its judgment for that of the commissioner with respect to factual determinations.'' (Internal quotation marks omitted.) *McFarland* v. *Dept. of Developmental Services*, 115 Conn. App. 306, 315, 971 A.2d 853, cert. denied, 293 Conn. 919, 979 A.2d 490 (2009).

Id., 709-711. (Emphasis added.)

Therefore, Haburey stands for the proposition that unless a claimant is statutorily qualified to seek survivorship benefits, his or her available benefits subsequent to the death of a worker due to a compensable injury are limited to whatever actual lost wages

the decedent sustained between their injury and their death, as well as any medical expenses which can be attributed to the compensable injury.[5] Haburey does not stand for the proposition that an estate may seek benefits under § 31-308(b) C.G.S. and we have been presented with no precedent which stands for that proposition.

We reach this conclusion in part due to a decision which is the gravamen of the claimant's argument, Flouton, supra. The claimant argues that this case supports their jurisdictional argument. On the other hand, the case also stands for the proposition that even when there is a pending unpaid award for permanency when an injured worker dies, there is no means for an estate to be paid that award. "As set forth in some detail above, we conclude that the legislature designated the class legally able to receive an unpaid, unmatured permanency award as dependents and children of any age, and specifically chose not to broaden this class by including estates." Id. The holding in Flouton would be supportive of permitting adult children of a decedent to seek payment of the remainder of a pending permanency award; but it specifically reversed the finding of a trial commissioner that an estate could be paid this award and offers no support for an estate seeking a post-mortem award of previously unsought permanency benefits.

We therefore affirm the trial commissioner's conclusion in this case that the estate herein cannot seek benefits for temporary total disability benefits and permanent partial disability benefits. To the extent that the Ruling on the Motion to Dismiss determined that this Commission lacked **any** subject matter jurisdiction over the estate's claim, this decision is vacated and the matter remanded for further proceedings. The claimant may

[5] We also note that in Estate of Haburey v. Town of Winchester, 150 Conn. App. 699 (2014), the decedent was employed on a full time basis at the time of his ultimately fatal injury and had a dependent spouse. The record herein does not indicate the decedent was working or seeking employment in the period prior to his demise nor did he have any dependents.

proceed, subject to its proof, to advance a claim for benefits under § 31-306(a)(1) C.G.S. and those elements of relief deemed permitted for a decedent's estate in Haburey, supra.

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