

CASE NO. 5910 CRB-6-14-2  
CLAIM NO. 601038930

: COMPENSATION REVIEW BOARD

ESTATE OF JOSEPH P. MICALE  
ROBERTA MICALE (Surviving Spouse)  
CLAIMANT-APPELLEE

: WORKERS' COMPENSATION  
COMMISSION

v.

: JANUARY 8, 2015

STATE OF CONNECTICUT  
DEPT. OF EMERGENCY SERVICES  
AND PUBLIC PROTECTION  
EMPLOYER  
SELF-INSURED  
RESPONDENT-APPELLANT

and

GALLAGHER BASSETT SERVICES  
ADMINISTRATOR

APPEARANCES:

The claimant was represented by James F. Kane, Esq., Law Offices of James F. Kane, LLC, One Liberty Square, New Britain, CT 06051.

The respondent was represented by Francis C. Vignati, Jr., Esq., Assistant Attorney General, Office of the Attorney General, 55 Elm Street, Hartford, CT 06141-0120.

This Petition for Review from the January 27, 2014 Finding and Award of the Commissioner acting for the Sixth District was heard August 29, 2014 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Daniel D. Dilzer and Stephen M. Morelli.

## OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondent has appealed from a Finding and Award which determined the claimant, Roberta Micale, was entitled to benefits under § 31-306 C.G.S. for the death of her spouse, Joseph P. Micale. The respondent argues that although Mr. Micale was treating for a compensable injury the circumstances of his death, which was due to a Fentanyl overdose, make the death noncompensable. The respondent cites Sapko v. State, 305 Conn. 360 (2012) for this position. The claimant argues that the trial commissioner correctly distinguished this case from Sapko, and that the death herein was caused by treatment for the decedent's compensable injury. After reviewing the record we concur with the claimant that the trial commissioner reached a reasonable decision based on the law and the evidence. We affirm the Finding and Award.

The commissioner found that Mr. Micale was employed by the respondent in 1982. The commissioner also found Roberta Micale was married to Mr. Micale as of that date and was married to him at the time of his death. On September 29, 1982, Mr. Micale sustained a back injury while in the course of his employment and subsequently underwent fusion surgery. He continued to have back pain and, as a result, Dr. Charles Kime performed an L5/S1 decompression laminectomy on March 29, 2002. Mr. Micale sustained nerve damage as a result of the March 29, 2002 surgery, with progressive weakness in his legs. As a result of the weakness in his legs, Mr. Micale fell in 2002, fracturing his left ankle, and again in 2003, tearing his right rotator cuff and injuring his left thumb. He was totally disabled from 2002 to the time of his death.

Joseph Micale's primary care physician, Stephen Zebrowski, M.D., prescribed medications for Mr. Micale's compensable injuries, and Dr. Zebrowski testified that Mr. Micale's depression, hypertension, reflux, and headaches were all related to his underlying back pain from the compensable injury. Among the drugs prescribed by Dr. Zebrowski were Duragesic transdermal patches, the active ingredient being Fentanyl. Dr. Zebrowski began prescribing Duragesic patches on January 20, 2003 and prescribed a 75 microgram/hour Duragesic patch for Mr. Micale to apply every other day. Findings, ¶ 10. (Emphasis in original.) The recommended dosage of Fentanyl is 25-100 micrograms/hour with a change of patches every 72 hours. Findings, ¶ 11. (Emphasis in original.) In addition to the Duragesic patches, Mr. Micale was also taking Benzodiazepine and Amitriptylene at the time of his death on June 20, 2012. Both of these drugs can cause respiratory depression.

The Associate Medical Examiner found that the cause of Mr. Micale's June 20, 2012 death was Fentanyl toxicity. The concentration of Fentanyl in Mr. Micale's bloodstream at the time of his death was 11 nanograms per milliliter and the average concentration of Fentanyl in persons who died of Fentanyl toxicity was 8.3 nanograms per milliliter. Dr. Marc J. Bayer, board-certified in emergency medicine and medical toxicology, performed a records review on this case at the request of the respondent. He concluded that the prescription of Fentanyl above the recommended dosage was very likely the cause of death.

Based on these facts the trial commissioner concluded Mr. Micale died on June 20, 2012 of Fentanyl toxicity and that the September 28, 1982 work related injury and subsequent treatment therefore, were substantial contributing factors in Mr. Micale's

death. The commissioner concluded that Dr. Stephen Zebrowski prescribed medications to treat Mr. Micale's back pain, one of which was Duragesic patches which contained Fentanyl. As Roberta Micale was the sole presumptive dependent of Joseph P. Micale on June 20, 2012, the trial commissioner awarded her benefits under § 31-306 C.G.S.

The respondent filed a Motion to Correct seeking corrections consistent with finding that the § 31-306 C.G.S. claim was not compensable. The trial commissioner denied this motion in its entirety. The respondent has pursued this appeal. The gravamen of the appeal is that the death of Joseph Micale cannot be linked to his compensable injury by probative evidence. They further argue that the precedent in Sapko is applicable herein. Since both deaths were due to an overdose of prescription drugs, they argue that there is not a nexus of proximate cause between the compensable injury and the death for which benefits are being sought. We disagree with the respondent's reasoning herein. We find that there was a sufficient evidentiary foundation for the trial commissioner to find the dependent claim compensable. We further find that Sapko is distinguishable on the facts and the commissioner could find that the compensable 1982 injury was the proximate cause of the decedent's death.

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). We also note that in cases wherein causation of an injury is contested the trial commissioner's "findings of basic facts *and* his finding as to whether those facts support an inference that the plaintiff's injury arose from his employment are subject to a highly deferential standard of review." Blakeslee v. Platt Bros. & Co., 279 Conn. 239, 253-254 (2006). (Emphasis in the original.)

The trial commissioner in this case concluded that the decedent's fatal Fentanyl overdose was the sequelae of his compensable back injury. The basis identified in the Finding and Award was that the patches containing Fentanyl were prescribed by Dr. Zebrowski, who was the decedent's treating physician for his compensable injury. The respondent has attempted to find a parallel with the factual circumstances in Sapko. We do note that in both Sapko and the present case the demise of the decedent was due to an overdose of prescription drugs. The trial commissioner in Sapko found that the death was due to intervening factors and the chain of causation to the decedent's compensable injury had been broken. The trial commissioner in the present case found no such intervening factor. We will review the record to ascertain if this was a reasonable determination that the cases are factually distinguishable.

We note that in Sapko the trial commissioner found the decedent's death was due to the excessive ingestion of two different prescription drugs, oxycodone and seroquel. The commissioner further found that the decedent's prescription of these two drugs was made by two different physicians and the decedent accidentally took these medications at a level far beyond the therapeutic dose which he had been prescribed. In the present case,

the trial commissioner found that the decedent's Fentanyl overdose was consistent with the dosage that the treating physician had prescribed for him in treating the pain the decedent suffered after his compensable back injury. We believe that a fact finder could reasonably find the nexus of proximate cause too attenuated to award benefits under the facts presented in Sapko, yet reach a determination that the facts herein supported compensability. We reach this determination based on the precedent applying the "proximate cause" standard subsequent to Sapko, such as Hart v. Federal Express Corporation, 5897 CRB-2-13-11 (November 12, 2014), Hadden v. Capitol Region Education Council, 5843 CRB-1-13-5 (May 20, 2014) and Madden v. Danbury Hospital, 5745 CRB-7-12-4 (April 22, 2013).

As the Appellate Court recently opined in Turrell v. Dept. of Mental Health & Addiction Services, 144 Conn. App. 834 (2013), a trial commissioner is vested with a great deal of discretion in determining whether the facts on the record support finding proximate cause between an injury and employment.

[Our Supreme Court] has defined proximate cause as [a]n actual cause that is a substantial factor in the resulting harm . . . . The question of proximate causation . . . belongs to the trier of fact because causation is essentially a factual issue. . . . It becomes a conclusion of law only when the mind of a fair and reasonable [person] could reach only one conclusion; if there is room for a reasonable disagreement the question is one to be determined by the trier as a matter of fact. (Citations omitted; internal quotation marks omitted.) *Sapko v. State*, 305 Conn. 360, 372–73, 44 A.3d 827 (2012). [W]hether a sufficient causal connection exists between the employment and a subsequent injury is . . . a question of fact for the commissioner.

Id., 845.

Based on the record herein, we believe that a "fair and reasonable person" could trace a clear path between the decedent's 1982 work injury, the subsequent surgical

intervention to address this injury, and the chronic pain the decedent sustained from these surgeries which led to the prescription of Fentanyl. Since the decedent followed the pharmaceutical regimen prescribed by his authorized treating physician we believe the trial commissioner could reasonably find the link between the decedent's injury and death was not so tenuous as to proscribe an award under § 31-306 C.G.S.

The respondent argues against this conclusion on two points. They argue that since the prescribed dosage of Fentanyl to the decedent by Dr. Zebrowski was excessive that the physician's errors broke the chain of causation. They also argue that there was insufficient expert testimony on the issue of causation to support the award. We find neither argument meritorious.

It is black letter law that when a physician provides treatment to an injured worker for a compensable injury and the treatment ultimately proves injurious; that the additional injuries resulting from the treatment are a compensable sequelae of the original injury. We find Mana v. Sarah, Inc., 5073 CRB-3-06-3 (March 22, 2007) on point and dispositive of this issue. In Mana the claimant was found to require drug detoxification and the respondents challenged the compensability of this treatment, as the commissioner's examiner had found the level of medication being prescribed for her compensable injury was injurious to the claimant. We rejected the argument that ineffective or injurious treatment negated compensability, *citing* Student v. Corometrics Medical Systems, Inc., 3980 CRB-8-99-2 (February 9, 2000).

It is now uniformly held that aggravation of the primary injury by medical or surgical treatment is compensable. Examples include exacerbation of the claimant's condition, or death, resulting from antibiotics, antitoxins, sedatives, painkillers, anesthesia, electrical treat [sic] & hardments, or corrective or exploratory surgery.

Citing 1 Larson & L. Larson, Workers' Compensation Law (1999) § 10.09[1].

Id.

The factual circumstances herein are similar to Mana, supra. The decedent's death was the result of being prescribed excessive narcotic medication by his treating physician for his compensable injury. We then turn to the other argument raised by the respondent. They argue that the expert testimony in this case did not establish causation, *citing* Murchison v. Skinner Precision Industries, Inc., 162 Conn. 142, 152 (1972). As we will explain in further detail, we are not persuaded by this argument.

The trial commissioner noted his reliance on the evidence presented by the Associate Medical Examiner and by Dr. Marc J. Bayer. The commissioner found that the medical examiner found that the cause of Mr. Micale's death was Fentanyl toxicity. Findings, ¶ 14. He further found that Dr. Bayer opined that the prescription of Fentanyl above the recommended dosage was very likely the cause of death. Findings, ¶ 18. The respondent argues that these medical opinions do not link the compensable injury to the cause of death. Respondent's Brief, p.13. We disagree. We note that in reviewing medical evidence a trial commissioner must evaluate this evidence in its totality in determining whether it supports a finding of compensability. See Marandino v. Prometheus Pharmacy, 294 Conn. 564, 595 (2010) and O'Reilly v. General Dynamics Corp., 52 Conn. App. 813, 816 (1999). In addition "it is proper to consider medical evidence *along with all other evidence* to determine whether an injury is related to the employment." Marandino, supra, 595. (Emphasis in original.)

We note that the official certificate of death, Claimant's Exhibit A, lists "Fentanyl Toxicity" as the immediate cause of Mr. Micale's death. Stevens v. Raymark Industries,



Inc., 5215 CRB-4-07-4 (March 26, 2008), stands for the proposition that a trial commissioner has the discretion to choose to rely on a death certificate in ascertaining if a death was due to a compensable injury. A commissioner may find expert testimony on the cause of death more persuasive and choose not to rely on a death certificate, Dsupin v. Wallingford, 5757 CRB-8-12-6 (November 1, 2013), but in the present case the trial commissioner found the witness testimony consistent with the documentary evidence. Upon reviewing the record, we concur.

The Associate Medical Examiner prepared a Post Mortem Report dated August 20, 2012, Claimant's Exhibit C, wherein Susan S. Williams, M.D. opined that the cause of Mr. Micale's death was due to Fentanyl toxicity and the manner of death was an accident. Dr. Bayer prepared a report dated December 5, 2012, Claimant's Exhibit E, where he stated "I agree with the medical findings contained in both the Certificate of Death and the Autopsy Report." Dr. Bayer was deposed on March 12, 2013. At his deposition he reiterated that Fentanyl toxicity caused the death of Mr. Micale, Respondent's Exhibit 2, pp. 21-22. He further testified that the prescription of Fentanyl above the recommended therapeutic level was the proximate cause of the decedent's death. *Id.*, p. 26. While Dr. Bayer discounted the impact of the decedent's compensable spine injury of September 28, 1982 in the need for this prescription, *id.*, p. 27, he clearly related the need for stronger pain medicine to a subsequent surgical event.

Well, in 1982 he had an injury. Subsequently he had a surgical repair of his injury and did well for years afterwards. In 2002 he had another injury where his pain began. And then he had an operation which failed. And it was noted that there was some nerve damage at the time. And, so, my belief is that it was after that second operation where there was actual nerve damage done that caused him to have more significant pain, and pain of a different quantity and quality than the pain he had before.

Id., p. 27.

It is clear that Dr. Bayer related the decedent's need for narcotic medication to his 2002 spine surgery, which the trial commissioner found was the sequela of the decedent's original compensable spine injury. Therefore, despite the claim of the respondent, there should be no dispute that probative expert testimony linked the cause of the decedent's demise to treatment for his compensable injury. We note that our review of the record indicates that there is no expert testimony linking the death of Mr. Micale to any cause other than accidental Fentanyl overdose and no evidence in the record that the decedent's ingestion of this drug was related to any basis other than following the treatment regimen outlined by his treating physician for a compensable injury.

We find that the Finding and Award was based on a foundation of uncontroverted expert opinion.<sup>1</sup> The claimant had the burden of persuasion in seeking § 31-306 C.G.S. benefits and the record herein documents that she met that burden.

Therefore, we affirm the Finding and Award.

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

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<sup>1</sup> For that reason, we affirm the trial commissioner's denial of the respondent's Motion to Correct.