

CASE NO. 6016 CRB-8-15-5
CLAIM NO. 800116164

: COMPENSATION REVIEW BOARD

TERRENCE J. QUINN, ET AL
CLAIMANT-APPELLANT

: WORKERS' COMPENSATION
COMMISSION

v.

: MARCH 31, 2016

STONE & WEBSTER ENGINEERING
CORP., ET AL
EMPLOYER

and

ROYAL IDEMNITY CO., ET AL
INSURER
RESPONDENTS-APPELLEES

and

SECOND INJURY FUND
RESPONDENT-APPELLEE

APPEARANCES:

The claimant was represented by Christopher Meisenkothen, Esq., Early, Lucarelli, Sweeney & Meisenkothen, LLC, One Century Tower, 11th Floor, 265 Church Street, New Haven, CT 06510.

The respondents Stone & Webster and Royal Indemnity (Arrowpoint) were represented by Matthew S. Necci, Esq., Halloran & Sage, One Goodwin Square, 225 Asylum Street, Hartford, CT 06103.

The respondents Buckingham Routh and Sentry Insurance were represented by Maribeth M. McGloin, Esq., Williams Moran, LLC, PO Box 550, Fairfield, CT 06428.

The respondents Buckingham Routh and Liberty Mutual Insurance were represented by Marian Yun, Esq., Meehan, Turret & Rosenbaum, 101 Barnes Road, 3rd Floor, Wallingford, CT 06492.

The respondents McRory & Marran, Acme Plumbing and Travelers Indemnity Co., were represented by John P. Clarkson, Esq., Law Offices of Charles G. Walker, 300 Windsor Street, PO Box 2138, Hartford, CT 06145.

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

This Petition for Review from the May 12, 2015 Finding and Dismissal of David W. Schoolcraft the Commissioner acting for the Eighth District was heard December 18, 2015 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Randy L. Cohen and Stephen M. Morelli.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has appealed from a Finding and Dismissal in which the trial commissioner, David Schoolcraft, determined that the surviving spouse's claim for benefits in this matter had not been filed in a timely manner, and therefore the claim was jurisdictionally barred. Commissioner Schoolcraft's decision was based substantially on reliance on our opinion in McCullough v. Swan Engraving, Inc., 5875 CRB-4-13-8 (August 5, 2014). Since the Finding and Dismissal in this case was issued the Supreme Court has ruled on the McCullough precedent in McCullough v. Swan Engraving, Inc., 320 Conn. 299 (2016) and ruled that the legal interpretation of § 31-294c C.G.S.¹ our tribunal relied on was in error. Since the

¹ 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 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.

(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-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.

(c) Failure to provide a notice of claim under subsection (a) of this section shall not bar maintenance of the proceedings if there has been a hearing or a written request for a hearing or an assignment for a hearing within a one-year period from the date of the accident or within a three-year period from the first manifestation of a symptom of the occupational disease, as the case may be, or if a voluntary agreement has been submitted within the applicable period, or if within the applicable period an employee has been furnished, for the injury with respect to which compensation is claimed, with medical or surgical care as provided in section 31-294d. No defect or inaccuracy of notice of claim shall bar maintenance of proceedings unless the employer shows that he was ignorant of the facts concerning the personal injury and was prejudiced by the defect or inaccuracy of the notice. Upon satisfactory showing of ignorance and prejudice, the employer shall receive allowance to the extent of the prejudice.

(d) Notwithstanding the provisions of subsection (a) of this section, a dependent or dependents of a deceased employee seeking compensation under section 31-306 who was barred by a final judgment in a

Supreme Court's McCullough decision holds that when a prior claim for benefits has been filed in a timely manner under Chapter 568 that a surviving spouse has no time limitation to file a claim for § 31-306 C.G.S. benefits, we conclude that we must reverse the trial commissioner's decision in this case and hold that the surviving spouse's claim herein is jurisdictionally valid.

The following facts are pertinent to our consideration of this appeal. The claimant herein is the surviving spouse of Terrence Quinn, who worked as a plumber from 1956 to 1999. On June 15, 1997 Mr. Quinn was diagnosed with lung cancer and on July 23, 1998 Mr. Quinn's attorneys filed with the Commission timely written notices of claim for compensation as to the various respondent employers. The claimant alleged that his lung cancer was an occupational disease resulting from exposure to asbestos while working for the various employers. These notices listed the date of injury as June 15, 1997, his date of diagnosis. That date is also the date of first manifestation of a symptom of his claimed occupational disease. The respondents issued Forms 43 contesting this claim. Mr. Quinn was not paid any benefits under Chapter 568 for his claim, nor were there any hearings held on his claim.

Terrence Quinn died on February 19, 1999. The trial commissioner noted that his surviving spouse did not file a claim for survivor benefits within one year of his death or within three years of the first manifestation of his asserted occupational disease. On May 1, 2001, the claimant widow filed with the Commission "Amended Notice(s) of Claim"

court of law from filing a claim arising out of the death of the deceased employee, whose date of injury was between June 1, 1991, and June 30, 1991, and whose date of death was between November 1, 1992, and November 30, 1992, because of the failure of the dependent to timely file a separate death benefits claim, shall be allowed to file a written notice of claim for compensation not later than one year after July 8, 2005, and the commissioner shall have jurisdiction to determine such dependent's claim."

as to the various respondent employers. These amended notices indicated they were being filed on “behalf of the above employee (and dependents) ...” These amended notices listed the date of decedent’s death and identified Teresa Quinn as “Executrix of the Estate of Terrence J. Quinn.” No hearings were requested or held on any claim arising out of the alleged occupational disease for nearly 10 years. Then, on April 5, 2011, counsel for the claimant widow filed a written request for a hearing. While this did not refer to Mrs. Quinn or state that the hearing was being requested to discuss section 31-306 benefits, it listed the injured worker as “Terrence Quinn, Dec’d,” and the date of injury as: “6/15/1997 – Lung Cancer; 2/19/1999 death.”

On October 6, 2014 the respondent employer Buckingham Routh and its insurer, Sentry Insurance Co., filed a Motion to Dismiss. The other insurers have joined in the motion. The respondents argued that the claimant failed to file the claim for compensation as a dependent in the time prescribed by § 31-294c C.G.S., and that therefore the claim was untimely. The trial commissioner determined that the issue of whether the survivor’s claim was jurisdictionally valid needed to be bifurcated from the merits of the decedent’s underlying claim for occupational disease. Based on the facts stated herein the trial commissioner concluded Mrs. Quinn’s claim for survivor benefits was filed more than three years after the manifestation of her husband’s occupational disease and more than one year following her husband’s death. The commissioner noted that no hearings had been held on either the underlying occupational disease claim or the claim for survivor benefits before the claimant filed her notice of claim. Since the claim for survivor’s benefits under § 31-306 C.G.S. was not filed, nor was the claim otherwise pursued, in the time frames required by § 31-294c C.G.S., Mrs. Quinn’s claim for

survivor benefits was untimely and the trial commissioner ordered the claim to be dismissed. Commissioner Schoolcraft prepared a Memorandum of Decision outlining his legal reasoning for the Finding and Dismissal.

The claimant did not file a Motion to Correct, but filed a timely Petition for Review and Reasons for Appeal. The gravamen of her appeal is that the trial commissioner misapplied the law in this case and her claim was filed in a jurisdictionally valid manner. Since the Supreme Court addressed a very similar fact pattern in McCullough and found that claim jurisdictionally valid, we are persuaded by this argument.

The claimant's argument before the trial commissioner and before this tribunal was lengthy but can be summarized succinctly: the Supreme Court's opinion in Fredette v. Connecticut Air National Guard, 283 Conn. 813 (2007) should apply to circumstances beyond the issues litigated in that case and necessarily implied that once an injured worker filed a jurisdictionally timely claim for benefits, there was no time limitation whatsoever on the filing of a dependent claim after the original claimant's death. The trial commissioner extensively reviewed Fredette in deciding this case but did not find it applicable. Memorandum of Decision, pp. 6-9. The claimant also presented the same argument in this case that we considered and rejected in our McCullough opinion, that the distant precedent in Tolli v. Connecticut Quarries Co., 101 Conn. 109 (1924) was on point and compelled a finding of jurisdiction for a survivor's claim. In our McCullough opinion we found Tolli factually distinguishable and in the present case the trial commissioner also found that precedent distinguishable from the claimant's situation. Memorandum of Decision, p. 9.

The Supreme Court in McCullough viewed the law differently and as a result, reached a different outcome. After reviewing the terms of the notice statute, § 31-294c C.G.S. and the precedent in Fredette, supra, the Court concluded as follows.

In the present case, there is no language in § 31-294c creating a statute of limitations for a claim for survivor's benefits or language requiring that a dependent file a separate claim for survivor's benefits if the employee filed a timely claim for benefits during his or her lifetime. If the legislature had intended to require such a filing and to provide a statute of limitations period, it could have done so. In the face of a legislative omission, it is not our role to engraft language onto the statute to require a dependent to file a claim for survivor's benefits in such a situation.

McCullough, supra, 310.

Since in the present case it is undisputed that the original claim by the decedent was filed in a jurisdictionally timely manner, we cannot distinguish this case from McCullough where the Supreme Court found the dependent's claim for survivorship benefits was jurisdictionally valid. We also note that the Supreme Court distinguished this fact pattern from the precedent in Kuehl v. Z-Loda Systems Engineering, Inc., 265 Conn. 525 (2003), which the trial commissioner cited in his Memorandum of Decision (see pp. 5-6) as grounds to find this claim time barred and jurisdictionally invalid.

McCullough, supra, 313-314.

We note that subsequent to the McCullough Supreme Court decision counsel for the respondent Second Injury Fund sent a letter to this tribunal expressing concerns as to the retroactivity of that decision and further expressing public policy concerns from the apparent judicial interpretation that there is an unlimited time period to commence a claim for survivor's benefits. While we may be concerned as to the future applicability of the Supreme Court's holding in McCullough as to future cases, we are not in a position

to revisit issues already litigated and decided by the Supreme Court.² To the extent the McCullough precedent requires clarification; this tribunal lacks the jurisdiction to address those questions and must defer to the Appellate Court and Supreme Court.

We are bound by the decision of the Supreme Court in McCullough, supra, as it applied squarely to the issue presented in this appeal. That decision compels us to reverse the trial commissioner's Finding and Dismissal and to rule that the claimant's bid for survivor benefits is jurisdictionally valid.

Commissioners Randy L. Cohen and Stephen M. Morelli concur in this opinion.

² We note that the decision in McCullough v. Swan Engraving, Inc., 320 Conn. 299 (2016) did not address the future vitality of the precedent in Tardy v. Abington Constructors, Inc., 71 Conn. App. 140 (2002). Nor did it address the concern we expressed in McCullough v. Swan Engraving, Inc., 5875 CRB-4-13-8 (August 5, 2014) that in Discuillo v. Stone & Webster, 242 Conn. 570 (1997) the Supreme Court, in the absence of any statutory time limitation to commence claims for repetitive trauma injuries, applied what it deemed the most appropriate provision of § 31-294c C.G.S., rather than finding no statutory time limitations existed for such claims, as the court held "we are not inclined to interpret our workers' compensation scheme to reach such a bizarre result." *Id.*, fn.8. It is certainly possible in the absence of any time limitation a manifestly stale claim for survivorship benefits could be presented, similar to some of the preclusion cases this tribunal has had to recently address. Perhaps similar to what the Supreme Court did in McCullough, supra, as to the vague precedent in Fredette v. Connecticut Air National Guard, 283 Conn. 813 (2007), the court will clarify these issues in a future opinion.