CASE NOS. 6065 CRB-5-15-12 : COMPENSATION REVIEW BOARD
5996 CRB-5-15-3
CLAIM NO. 500004999

JANET BRENNAN (acting Executrix)
for THOMAS BRENNAN
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

: OCTOBER 31, 2016

CITY OF WATERBURY
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLANT

APPEARANCES:

The claimant was represented by Francis J. Grady, Esq., and Richard O. LaBrecque, Esq., Grady & Riley, LLP, 86 Buckingham Street, Waterbury, CT 06710.

The respondent was represented by Benjamin F. Erwin, Esq., City of Waterbury, Office of Corporation Counsel, 235 Grand Street, Third Floor, Waterbury, CT 06702.

The Petitions for Review[1] from the January 30, 2015 Ruling Re: Motion to Substitute Party and the December 7, 2015 Finding and Decision of Charles F. Senich the Commissioner acting for the Fourth District were heard June 17, 2016 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Ernie R. Walker and Michelle D. Truglia.

[1] We note that postponements and extensions of time were granted during the pendency of these appeals.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondent City of Waterbury has taken appeals from two decisions reached by Commissioner Charles Senich which granted relief sought by the claimant. The controversies herein involve a § 7-433c award issued two decades ago to Thomas Brennan, the Waterbury Fire Chief. The respondent has appealed from a decision of Commissioner Senich dated January 30, 2015 (hereafter the "Substitution Motion") to grant the claimant's motion to substitute the Estate of Thomas Brennan for the original claimant. They have also appealed from a December 7, 2015 Finding and Decision (hereafter the "2015 Finding") awarding permanent partial disability benefits to the substitute claimant. The gravamen of the respondent's jurisdictional argument as to the substitution of claimants is that pursuant to Morgan v. East Haven, 208 Conn. 576 (1988) an estate is not a legally qualified recipient of funds from an award under § 7-433c C.G.S., and such awards can only be granted to a statutorily enumerated class of beneficiaries. The claimant argues that subsequent legislation overruled Morgan.

We find Morgan has not been overruled and therefore is still good law, and therefore the decision as to the identity of the party claimant must be vacated and remanded for additional proceedings. The respondent has raised a number of arguments as to the merits of the 2015 Finding. Upon review we find that it is substantially sound and we affirm the central elements of this decision. We have determined that certain issues however, were not addressed by the trial commissioner and must be remanded to him for further proceedings.

A review of the factual background behind this case is in order. In November 1991 the claimant/decedent, Thomas Brennan, was hired as the Waterbury Fire Chief. He later filed a claim for § 7-433c C.G.S. benefits which resulted in a Finding and Award and a Stipulation of Facts being issued by the Commission on December 1, 1993. Chief Brennan retired from service on December 30, 1995. The parties entered a Stipulation as to Facts dated June 24, 2013. The claimant/decedent was married to Janet Brennan at all times up to the date of his death, April 20, 2006. Mrs. Brennan is the executrix of the decedent's estate and was the party claimant subsequent to the decedent's death.

Commissioner Senich reviewed the medical history of the decedent in the 2015 Finding. He noted the claimant/decedent reached maximum medical improvement on October 13, 1993. He also noted Dr. Joseph Robert Anthony opined on November 29, 1995 that the claimant had an 80% whole body impairment. The commissioner also noted that Dr. James Flint, Dr. Stephen Widman and Dr. Joel Sherman had issued lesser disability ratings for the claimant/decedent in 1995 and 1996 of 50% and 75%. The Commissioner also noted that on November 28, 2012 Dr. Anthony issued a revised opinion asserting the claimant's condition deteriorated after his 1995 evaluation and determining his disability rating should be 90%. On December 3, 2013 Dr. Anthony testified that this was a rating as to the claimant's heart and cardiovascular system.

The commissioner also noted that for several years after the December 1, 1993 Finding and Award the parties attempted to negotiate a full and final stipulation. A resolution did not occur. The respondent did make partial payments towards the claimant's permanent partial disability rating. On July 31, 1997 the City sent counsel for the claimant a check for $59,200.20 which he said represented payment of 115.4 weeks

of permanent partial disability between the claimant's date of maximum medical improvement and his date of retirement. On June 22, 1999 the City sent claimant's counsel a check for $20,890.85 which represented prescription reimbursements of $2,908.12 and 52 weeks of advanced permanent partial disability payments of $17,982.12. The respondent calculated the value of this check by applying an offset pursuant to § 7-433b C.G.S. The commissioner also noted the respondent paid the claimant/decedent temporary total disability benefits from February 19, 2003 to April 20, 2006, the date of the claimant's death.

Based on these subordinate facts Commissioner Senich concluded in the 2015 Finding that Janet Brennan was a presumptive dependent pursuant to § 31-275(19) C.G.S. and § 7-433c C.G.S. and her testimony was fully credible and persuasive. He determined the claimant/decedent was entitled to a permanent partial disability rating of 80% with a maximum medical improvement date of October 13, 1993. The commissioner also reached findings as to the claimant/decedent's compensation rate as of the date of maximum medical improvement. He found the medical opinions of Dr. Anthony fully credible and persuasive, but found this physician's post-mortem report inapplicable to the issues presented. The commissioner did not find the opinions rendered by the other medical witnesses fully credible and persuasive. Commissioner Senich rejected any claim that laches or estoppel applied in this case, and determined that the claimant/decedent had a vested right to his permanent partial disability award prior to his death, citing Churchville v. Daly, 299 Conn. 185 (2010). He found that the surviving spouse, Janet Brennan, was entitled to the vested award pursuant to § 7-433c C.G.S. and § 31-308(b) C.G.S.

Commissioner Senich also concluded that he would not address any claim regarding § 31-307 C.G.S. benefits as these benefits "were paid by mutual agreement" prior to the claimant/decedent's death. He also concluded that the parties had agreed to have the issue of a benefit cap under § 7-433b C.G.S. or § 7-433c C.G.S. not addressed at this time. The 2015 Finding originally determined in Conclusion, ¶ Q that the unpaid portion of the permanent partial disability award would be paid to Janet Brennan and not the estate of Thomas Brennan. However, subsequent to the claimant filing a "Motion for Articulation and to Correct" the trial commissioner changed the recipient of this award to Janet Brennan, executrix of the Estate of Thomas Brennan, in accordance with a Substitution Motion granted on January 30, 2015 by the commissioner.

We considered two petitions for review simultaneously at oral argument on June 17, 2016. We will consider the merits of the initial appeal on the Substitution Motion first, as it directly impacts elements of relief granted by the trial commissioner in the 2015 Finding, which was the subject of the respondent's second Petition for Review. The respondent appealed from the trial commissioner's decision to grant the claimant's Substitution Motion and argues that this decision was contrary to law. While as an appellate body we must provide great deference to decisions made by a trial commissioner, see Kish v. Nursing & Home Care, Inc., 248 Conn. 379 (1999) and Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988), we may reverse 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). We are persuaded that due to the continued validity of the Morgan case the trial commissioner erred in this matter.

We note that Morgan has many similarities to the present case. In Morgan the original claimant was the East Haven fire chief who sustained congestive heart failure while employed by the town, retired and filed a § 7-433c C.G.S. claim. A trial commissioner determined the claimant had a 75% permanent partial disability of his cardiovascular system and he was awarded benefits under § 31-308 C.G.S. for this permanent disability. Mr. Morgan died and his widow received benefits until her death, wherein at that point the estates of Mr. and Mrs. Morgan sought to have payments directed to the estates. The town argued that the plain language of § 7-433c C.G.S. limited an award of benefits to "dependents." Id., 582-583. The Supreme Court agreed. "We cannot construe 'dependents,'. . . to include the estates of the recipients." Id., 583.

> The plaintiff argues that as this involved a "specific" award for loss of use of a body part, and not a "special" award for lost income that the award should pass as a liquidated sum to the original claimant's estate upon his death. The Supreme Court, however, cited the preamble of the statute for the proposition that since the statutes existed to protect first responders from economic loss benefits under the heart and hypertension act "resemble special benefits under the workers' compensation statute, and as such, do not pass to the estate of the [beneficiary]."

Id., 586.

In addition, the Supreme Court made clear that for reasons beyond the verbiage in the heart and hypertension statute's preamble that it did not believe an estate could be entitled to such an award. In citing precedent governing Chapter 568, they made clear that the distinction between special and specific awards was not dispositive of the issues herein. Citing Bassett v. Stratford Lumber Co., 105 Conn. 297 (1926) the court held "any ummatured part of a weekly compensation scheme does not succeed to the estate of the employee." Id., 587. The Supreme Court summarized its holding as follows "General

Statutes § 7-433c does not require the payment of benefits to the estate of a deceased recipient; compensation is restricted to the employee and that person's dependents." Id., 589.

The claimant acknowledges that Morgan has not been overruled by the Supreme Court and remains binding precedent, but argues that subsequent legislative revisions of § 7-433c C.G.S. have rendered it moot as to the present controversy. We have reviewed the subsequent revisions to this statute so as to ascertain what the law was during the period when Mr. Brennan sustained his injury and was awarded benefits.

We note that in the next session of the General Assembly the legislature passed Public Act 89-346, which was an apparent effort to rectify the harsh impact of Morgan that an unpaid posthumous award could not be paid to nondependents. This legislation amended § 31-308 C.G.S. and it subsequently read as follows.

> (d) Any award for compensation made pursuant to this section shall be paid to the employee, or in the event of such employee's 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.

In 1993 Public Act 93-228 clarified this provision. Section 19 of the new legislation recodified § 31-308 and made the relevant subsection governing awards § 31-308(d) C.G.S. In addition, new language was added that expended the applicability of this section to "agreements" as well as "awards" and indicated this section was applicable "WHETHER OR NOT A FORMAL AWARD HAS BEEN MADE PRIOR TO THE DEATH" of the injured worker. We note that Section 35 of Public Act 93-228 indicated it had an effective date of July 1, 1993, and therefore was in effect at the time Mr. Brennan received his original award on December 1, 1993.

The claimant argues that a subsequent legislative revision to § 7-433c C.G.S., Public Act 96-231 served to repeal Morgan. We are not persuaded. We note that this statute had an effective date of July 1, 1996, which was well after the claimant/decedent's date of injury, his date of maximum medical improvement or the date of his original award. Additionally, the statute does not represent that it was intended to have a retroactive impact. Therefore, the "date of injury rule" as delineated in Iacomacci v. Trumbull, 209 Conn. 219, 222 (1988) and Gil v. Courthouse One, 239 Conn. 676, 685-688 (1997) would suggest Public Act 96-231 did **not** impact the rights of claimants who filed a claim for § 7-433c C.G.S. benefits prior to its effective date, and was limited to claims filed subsequent to this date.

We do concur that the "economic loss" language which was cited in Morgan was excised from the heart and hypertension statute in 1996 as a result of Public Act 96-231. We further note, however, that this term was embedded in a statement contained in the pre-1996 version of the law explaining the General Assembly's purpose in enacting bonus legislation for the benefit of first responders.[2] The other language changed in this legislation removed the eligibility conditions for § 7-433c C.G.S. benefits previously in

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[2] The provisions of § 7-433c C.G.S. repealed by Public Act 96-231 relevant to our inquiry read as follows:

(a) "[In recognition of the peculiar problems of uniformed members of paid fire departments and regular members of paid police departments, and in recognition of the unusual risks attendant upon these occupations, including an unusually high degree of susceptibility to heart disease and hypertension, and in recognition that the enactment of a statute which protects such fire department and police department members against economic loss resulting from disability or death caused by hypertension or heart disease would act as an inducement in attracting and securing persons for such employment, and in recognition, that the public interest and welfare will be promoted by providing such protection for such fire department and police department members, municipal employers shall provide compensation as follows:]"

The provisions this Public Act added to § 7-433c C.G.S. read as follows:

ONLY THOSE PERSONS EMPLOYED ON THE EFFECTIVE DATE OF THIS ACT SHALL BE ELIGIBLE FOR ANY BENEFITS PROVIDED BY THIS SECTION. Sec. 2. This act shall take effect July 1, 1996.

place and substituted new language barring eligibility for benefits to any police officer or fire fighter who was not employed on the effective date of this Act. For the purpose of our analysis we will presume that the plain meaning of Public Act 96-231 is ambiguous as to whether the General Assembly intended to do anything besides simply bar newly hired employees from eligibility for heart & hypertension benefits. Clearly the now repealed preamble language spoke to the legislative purpose behind § 7-433c C.G.S. which was to induce men and women to enter these occupations through enhanced benefits. This is now superfluous since newly hired employees were now ineligible for these benefits. We believe this reading, i.e. that the legislature merely removed the stated rationale for "bonus" legislation, (see Bergeson v. New London, 269 Conn, 763, 777, fn10 (2004)), is the more reasonable reading of the statute.[3] We arrive at this conclusion after reviewing the legislative history in accordance with § 1-2z C.G.S.

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[3] The General Assembly's website contains this official summary of the purpose of Public Act 96-231.

PA 96-231-sSB 677
Labor and Public Employees Committee
AN ACT CONCERNING HEART AND HYPERTENSION BENEFITS

SUMMARY: "This act makes paid municipal police officers and firefighters ineligible to claim disability benefits under the heart and hypertension law ("H&H" benefits) unless they are employed on July 1, 1996. This provision is superseded by a later act (PA 96-230) that makes such employees ineligible for H&H benefits unless they began their employment before July 1, 1996.

The act also eliminates (1) a requirement that police officers and firefighters hired after June 30, 1992 work at least two years before becoming eligible for H&H benefits and (2) a provision that allows a town to defeat an H&H claim from a police officer or firefighter hired after that date if it proves by a preponderance of evidence that the employee's disability is not job-related. Instead, it makes all firefighters and police officers employed on July 1, 1996 eligible for H&H benefits if they meet certain conditions.

Finally, the act eliminates the statutory justification for special H&H benefits by repealing the statement recognizing the peculiar problems and unusual risks suffered by municipal police officers and firefighters, including a high susceptibility to heart disease and hypertension, and expressing an intent to promote recruitment of municipal police officers and firefighters by granting them a special H&H benefit."
EFFECTIVE DATE: July 1, 1996

BACKGROUND
Heart and Hypertension Benefits

The review of Substitute Senate Bill 677, which became Public Act 96-231, evinces no support for the position that the General Assembly had any interest in changing the categories of eligible beneficiaries for unpaid permanent partial disability awards under § 7-433c C.G.S. We have reviewed the floor discussion when the bill was considered by the State Senate on April 25, 1996. The sole concern stated by the bill's sponsor, Senator Louis DeLuca, was to put a cap on the cost of the heart and hypertension benefit program by barring newly hired employees from receiving these benefits. The advocate of an alternative to this bill, Senator Thomas Colapietro, shared Senator DeLuca's goal toward reducing the fiscal burden on municipalities but suggested this could be done with a different set of eligibility limits without barring claims from newly hired employees. There was no floor discussion as to special or specific benefits, who would be appropriate non employee beneficiaries of awards, or any discussion of any Supreme Court precedent. The Senate adopted Senator DeLuca's bill. See Sen. Proc. Vol. 39, Part 8, pp. 2569-2621.

"By law, to be eligible for H&H benefits, a municipal police officer or firefighter must (1) be a member of a paid department, (2) have taken a physical exam when he began working which showed no evidence of heart disease or hypertension (high blood pressure), and (3) be disabled or have died from heart disease or hypertension.

H&H benefits consist of (1) a retirement allowance equal to what the officer or firefighter would receive for a disabling injury or death in the line of duty and (2) compensation and medical care in the same amounts and manner as provided under the workers' compensation law. The sum of the two payments cannot exceed 100% of the current weekly salary of active employees holding the same rank in the same department as the officer or firefighter held when he died or retired.

Related Act

PA 96-230, among other things, makes municipal police officers and paid firefighters eligible for H&H benefits only if they begin employment before July 1, 1996. The grandfathering provisions of the two acts conflict but the provision in PA 96-230 controls and supersedes the one in this act because it was passed later."

The discussion as to this bill in the House on May 12, 1996 was essentially similar. Again, Representatives Robert Landino and Robert Ward advocated for the bill passed by the Senate while Representative James O'Rourke advocated for an alternative similar to the amendment Senator Colapietro had offered. No discussion as to issues germane to the topic of this appeal occurred. The House approved the Senate bill. House Proc. Vol. 39, Part 18, pp. 6431-6445.

The discussions at the committee level were equally unsupportive of the claimant's argument that Public Act 96-231 was intended to undo the result in Morgan. At the March 12, 1996 Labor and Public Employees Committee hearing municipal officials such as Southington Town Council chair Andrew Meade and Torrington Mayor Mary Jane Gryniuk argued fiscal conditions made the current heart and hypertension law unsustainable. Donald Downes of the Office of Policy and Management echoed these concerns and recommended only existing employees be retained in the system. Representative of the Connecticut Conference of Municipalities concurred in this policy direction. Witnesses who expressed concern over this approach from the Connecticut Trial Lawyers Association and members of municipal labor unions did not address any matters germane to the issues under consideration in this appeal.

Therefore, we can find no basis for the claimant's argument that subsequent legislation undid the result in Morgan. On the other hand, we find that precedent indicates that in cases such as this one, a vested but unpaid permanency award is properly paid to dependents or adult children of the claimant/decedent. We find Cappellino v. Cheshire, 226 Conn. 569 (1993) on point. In Capellino, the defendant argues that permanent partial disability awards did not survive the death of the claimant. The

Supreme Court found that Bassett, supra, was still good law and cited Public Act 89-346 as enumerating the statutory beneficiaries of such awards. Id., 575-576. As to the specific issue as to whether an estate can receive an unpaid but vested permanent partial disability award, this tribunal ruled against this position in Flouton v. Can, Inc., 4379 CRB-7-01-4 (March 13, 2002). In Flouton we engaged in a detailed review of the legislative history behind Public Act 89-346 and concluded the intent of that legislation was to ensure that when an employee entitled to permanent partial disability benefits died the adult children remained eligible to receive such benefits. The claimant in Flouton relied on the holding in McCurdy v. State, 227 Conn. 261 (1993) to support paying the vested award to the estate, but we found that in McCurdy the facts were somewhat unusual as the decedent's widow was not a dependent, and that the date of injury in that case predated the effective date of Public Act 89-346. Therefore, we concluded that for injuries occurring after October 1, 1989 an estate was not entitled to receive unpaid unmatured permanency awards.[4] We are not persuaded that the facts in this case are

[4] The last Supreme Court case interpreting McCurdy v. State, 227 Conn. 261 (1993) was Churchville v. Bruce R. Daly Mechanical Contractor, 299 Conn. 185 (2010) and noted that this was the purpose of Chapter 568.

"We have long recognized that the beneficiaries of the Workers' Compensation Act, General Statutes § 31-275 et seq., include both the injured employee and his or her dependents. See, e.g., *Bassett* v. *Stratford Lumber Co.*, 105 Conn. 297, 299, 135 A. 574 (1926). Section 31-308 (d) provides that a surviving spouse or presumptive dependent of a decedent employee is entitled to an award of compensation to which the employee would have been entitled regardless of whether a formal award was made prior to the employee's death. See footnote 11 of this opinion. The entitlement of a surviving spouse or presumptive dependent, accordingly, depends on the entitlement of the employee. The question of whether Margery Churchville is entitled to the permanent partial disability benefits, therefore, turns on whether the plaintiff was entitled to recover those benefits." Id., 191-192.

This tribunal found in Churchville that the right to a permanent partial disability award vested as of the date of maximum medical improvement both for the original claimant and any dependent. The Supreme Court affirmed that decision.

dissimilar enough to the facts in Flouton to reach a different outcome.[5] [6]

As we find the trial commissioner's decision to grant Paragraph 3 of the Claimant's "Motion for Articulation and to Correct" was in error, as well as the Substitution Motion granted by the trial commissioner on January 30, 2015, we vacate these decisions and remand the issue of who may be the statutorily authorized recipient of Mr. Brennan's § 31-308 C.G.S. award for further proceedings.

We now turn to the other issues which were subjects of the City's appeal. To summarize our conclusions, we find the substantive award for permanent partial disability sustainable based on evidence that the trial commissioner found credible and persuasive. On ancillary issues raised by the appellant focusing primarily on the calculation of the award, we remand those issues for further proceedings.

The appellant argues that the trial commissioner failed to properly weigh the conflicting medical evidence in this case in determining the claimant/decedent had an 80% permanent partial disability and reached maximum medical improvement on October 23, 1993. The City argues that Dr. Anthony, who offered the 80% rating the trial commissioner found reliable, subsequently revised his opinion as to the claimant's disability ratings postmortem to a 90% permanent partial disability rating. As the appellant views this situation, pursuant to Risola v. Hoffman Fuel Company of Danbury, 5120 CRB-7-06-8 (July 20, 2007) both of Dr. Anthony's opinions must now be

[5] While not directly on point, we note the recent Supreme Court decision in Estate of Rock v. University of Connecticut, 323 Conn. 26 (2016) reiterated that an "estate" is not a legal entity and therefore, lacks standing under Chapter 568 to file a claim for benefits in its own behalf. Id., 31-32.

[6] Further support for the premise that only statutorily enumerated beneficiaries may receive awards under Chapter 568 may be found in Vincent v. New Haven, 285 Conn. 778 (2008) where in construing § 7-433c C.G.S. and § 31-306 C.G.S. the Supreme Court noted "unless there is evidence to the contrary, statutory itemization indicates that the legislature intended the list to be exclusive." Id., 789.

disregarded as unreliable and the disability ratings proffered by Dr. Flint and Dr. Widman, the City's examiners, be applied in this case. Both of those ratings established a permanency rating of 50%. We are not persuaded by that argument as this misstates the holding in Risola and is inconsistent with the trial commissioner's role to evaluate medical evidence.

In Risola the trial commissioner decided to rely on a disability rating from a physician who later opined to a higher disability rating and the commissioner offered no explanation why the subsequent opinion was not deemed reliable. In accordance with Bazelais v. Honey Hill Care Center, 5011 CRB-7-05-10 (October 25, 2006) we ordered the matter remanded **not** to implement another expert's opinion, but for the trial commissioner to clarify his Finding and Award given the inconsistent evidence. Such a remand is unnecessary in this case as we believe in Conclusion, ¶ U, the trial commissioner offered cogent reasoning for disregarding Dr. Anthony's subsequent opinion. It is black letter law that, "it is the trial commissioner's function to assess the weight and credibility of medical reports and testimony. . . ." O'Reilly v. General Dynamics Corp., 52 Conn. App. 813, 818 (1999). As an appellate panel we may not intercede if a trial commissioner's conclusions are based on probative evidence. As there is no averment that Dr. Anthony's medical opinions were deficient in some manner, we must respect the trial commissioner's determination as to the claimant/decedent's level of disability reliable.[7]

[7] For those reasons we find no error in the trial commissioner's denial of the respondent's Motion to Articulate. That motion sought to have the trial commissioner offer an explanation as to why he found Dr. Anthony more persuasive and credible than Dr. Flint and Dr. Widman. Dellacamera v. Waterbury, 4966 CRB-5-05-6 (June 29, 2006) stands for the principle that this tribunal will affirm a trial commissioner's determination as to relative evidentiary weight in "dueling expert" cases. While an articulation is in order "where the trial court's decision contains some ambiguity or deficiency reasonably susceptible of

The appellant also argues that any motion to substitute a party claimant in this matter should be barred by the doctrine of laches. We find this argument devoid of merit for a number of reasons. First, as we held in Kalinowski v. Meriden, 5028 CRB-8-05-11 (January 24, 2007) "[a] conclusion that a plaintiff has been guilty of laches is one of fact for the trier and not one which can be made by this court, unless the subordinate facts found make such a conclusion inevitable as a matter of law" citing Tinaco Plaza, LLC v. Freebob's, Inc., 74 Conn. App. 760, 776 (2003). The trial commissioner specifically found that laches did not apply to this matter, Conclusion, ¶ J, and we must respect this conclusion.[8] In any event, the Supreme Court's decision in McCullough v. Swan Engraving, Inc., 320 Conn. 299 (2016) establishes conclusively that once a initial timely claim for benefits has been filed that there is no time limitation presently for a claim for dependent's benefits. Id., 314. In light of the McCullough holding, we find no error in permitting a substitution of party claimant, provided such a claimant is among those statutorily enumerated to receive benefits.

We do believe the appellant has raised some legitimate concerns as to the 2015 Finding but they are issues mostly as to disputes that the trial commissioner chose not to address in this document which now must be resolved. The City argues that it was error not to address the statutory cap on benefits contained in § 7-433b C.G.S.[9] They argue

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clarification", Haines v. Turbine Technologies, Inc. 5932 CRB-6-14-4 (March 9, 2015), a determination such as the one made in the present case is generally unambiguous.

[8] We note that laches is a form of relief rooted in equity and a party seeking such relief must establish "clean hands." While it is not our role to assess responsibility for long delays in this case, it must be noted that it was the City who asserted inability to pay a settlement.

[9] This statute reads as follows:

"Sec. 7-433b. Survivors' benefits for firemen and policemen. Maximum cumulative payment. (a) Notwithstanding the provisions of any general statute, charter or special act to the contrary affecting the

that this issue was consistently cited as an issue under dispute in the hearing notices but was not addressed in the 2015 Finding. The City cites Aylward v. Bristol/Board of Education, 5756 CRB-6-12-5 (May 15, 2013), *aff'd*, 153 Conn. App. 913 (2014)(Per Curiam), as grounds to remand this matter for a decision. We have reviewed the file and do note that this issue was properly noticed for consideration. The claimant has argued that this statute did not need to be addressed in the 2015 Finding as the unpaid permanency award was deemed to be payable to the claimant/decedent's estate, and this placed the award outside the scope of § 7-433b C.G.S. However, in light of our conclusion that the Morgan decision requires payment of this award to an enumerated recipient under § 31-308(d) C.G.S., and not to the claimant/decedent's estate, we believe the trial commissioner must now engage in a factual determination as to whether the

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noncontributory or contributory retirement systems of any municipality of the state, or any special act providing for a police benefit fund or other retirement system, the survivors of any uniformed or regular member of a paid fire department or any regular member of a paid police department whose death has been suffered in the line of duty shall be eligible to receive such survivor benefits as are provided for in the Workers' Compensation Act, and, in addition, they shall receive such survivor benefits as may be provided for in the retirement system in which such department member was a participant at the time of his death; provided such pension benefits (1) shall not terminate upon the remarriage of the spouse of such member, and (2) shall be adjusted so that the total weekly benefits received by such survivors shall not exceed one hundred per cent of the weekly compensation being paid, during their compensable period, to members of such department at the maximum rate for the same position which was held by such deceased at the time of his or her death. Nothing contained in this subsection shall prevent any town, city or borough from paying money from its general fund to any such survivors, provided total weekly benefits paid shall not exceed said one hundred per cent of the weekly compensation.

(b) Notwithstanding the provisions of any general statute, charter or special act to the contrary affecting the noncontributory or contributory retirement systems of any municipality of the state, or any special act providing for a police or firemen benefit fund or other retirement system, the cumulative payments, not including payments for medical care, for compensation and retirement or survivors benefits under section 7-433c shall be adjusted so that the total of such cumulative payments received by such member or his dependents or survivors shall not exceed one hundred per cent of the weekly compensation being paid, during their compensable period, to members of such department in the same position which was held by such member at the time of his death or retirement. Nothing contained in this subsection shall prevent any town, city or borough from paying money from its general fund to any such member or his dependents or survivors, provided the total of such cumulative payments shall not exceed said one hundred per cent of the weekly compensation."

limitations under § 7-433c C.G.S. apply in this matter. We remand this issue for further consideration.

Another issue raised by the appellant concerns whether the trial commissioner erred by not finding a credit for the City against the unpaid permanent partial disability award for temporary total disability payments advanced prior to the claimant/decedent's death. While the City again cites Aylward as authority to remand this matter for a decision, the claimant argues that there had been a mutual agreement at the formal hearing not to address this issue at this time. The claimant also argues that the facts of this case closely parallels Capellino, supra, where it was found that no credit for temporary total disability benefits would be applied against the unpaid partial permanent award due to the decedent's spouse and/or children. We note that from a logistical standpoint the proper amount due to the claimant in this matter must be reduced to an ascertainable sum. In addition, whether the facts in this case are consistent with the decision in Capellino, or a case cited by the City where a credit for advanced payments of § 31-307 C.G.S. benefits **was** applied against the unpaid permanency award, Syzmaszek v. Meriden, 5346 CRB-6-08-5 (April 2, 2009), should be a factual determination reached by the trial commissioner subsequent to a hearing. Therefore, we remand this issue to the trial commissioner.

The need to ascertain the proper amount due the claimant in this matter is the gravamen of the City's averment that it was error for the trial commissioner to deny its motion for a stay on payment of benefits. We note that the claimant did not brief this issue and in light of the prior determinations we have reached we believe that this decision was in error and the commissioner must arrive at a final determination as to the

amount owed. The trial commissioner in his 2015 Decision did not establish a defined weekly benefit due to the claimant (or an enumerated beneficiary) or determine the number of weeks of unpaid permanency benefits the City was obligated to pay. In the absence of this calculation, the City presents a legitimate argument as to the logistics of paying this award. Therefore, we believe the Motion for Stay should have been granted.

The claimant did brief an issue not briefed by the City, the issue of whether the Russo v. Waterbury litigation in Superior Court over payment limitations in the Waterbury City Charter should be considered in this forum. Since the City agreed at the May 3, 2014 Formal Hearing to take this issue off the table for discussion, May 3, 2014 Transcript, p. 3, we will not address this issue at this juncture.

We find that it was error in this case for the trial commissioner to allow the estate to be substituted as the party claimant in this matter.

We remand this matter to the trial commissioner for further proceedings consistent with this opinion.

Commissioners Ernie R. Walker and Michelle D. Truglia concur with this opinion.