CASE NO. 5998 CRB-2-15-3 : COMPENSATION REVIEW BOARD
CLAIM NOS. 200180194 **&** 200178053

DANIEL FILOSI, SUCCESSOR EXECUTOR OF THE ESTATE OF DONALD L. FILOSI, JR. : WORKERS' COMPENSATION COMMISSION

and : JANUARY 19, 2017

DANIEL FILOSI, EXECUTOR OF
THE ESTATE OF KATHERINE
FILOSI, WIDOW OF DONALD L. FILOSI, JR.
CLAIMANT-APPELLANT

v.

ELECTRIC BOAT CORPORATION
EMPLOYER
SELF-INSURED

and

ACE USA
and
TRAVELERS INSURANCE COMPANY
INSURERS
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Amity L. Arscott, Esq., Embry and Neusner, P.O. Box 1409, Groton, CT 06340.

Respondent Electric Boat Corporation was represented by Peter D. Quay, Esq., Law Offices of Peter D. Quay, LLC, P.O. Box 70, Taftsville, CT 06380.

Respondents Electric Boat Corporation and its insurers ACE USA and Travelers Insurance Company waived oral argument and relied on their brief. They were represented by Lucas D. Strunk, Esq., and Christopher J. D'Angelo, Esq., Strunk, Dodge, Aiken, & Zovas, LLC, 100 Corporate Place, Suite 300, Rocky Hill, CT 06067.

This Petition for Review from the February 13, 2015 Finding and Dismissal of David W. Schoolcraft, the Commissioner acting for the Eighth District, was heard on May 20, 2016 before a Compensation Review Board panel consisting of Chairman John A. Mastropietro and Commissioners Ernie R. Walker and Nancy E. Salerno.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has petitioned for review from the February 13, 2015 Finding and Dismissal of David W. Schoolcraft, Commissioner acting for the Eighth District. We find error and accordingly reverse the decision of the trial commissioner and remand for further proceedings consistent with this Opinion.[1]

The trial commissioner, having identified as the threshold issue whether the respondents were barred from defending this matter because of a March 20, 2014 Decision and Order issued by an administrative law judge under the Longshore and Harbor Workers' Compensation Act, made the following findings which are pertinent to our review.[2] Electric Boat Corporation, a division of General Dynamics Corporation, is in the business of building submarines and maintains a shipyard in Groton, Connecticut. The claimant's decedent (hereinafter "decedent") was, with a few brief exceptions, an employee of Electric Boat from 1961 until 1998 and worked at the Groton shipyard. The decedent began smoking at the age of fourteen and continued smoking, with a couple of interruptions, until his death in 2012. There is conflicting evidence in the record

[1] We note that a Motion for Extension of Time and a Motion for Continuance were granted during the pendency of this appeal.

[2] The trial commissioner also identified as the primary issue whether the decedent's exposure to asbestos during his employment at Electric Boat was a significant factor in his lung cancer and/or death. The claimant has not appealed the trier's findings in this regard.

regarding how much the decedent smoked but overall, he smoked between one and two packs a day for all but a five-year period between 1980 and 1985. The decedent was hired as a rigger in 1961 and left the job during 1968 but returned in 1969. He continued to work as a rigger until he retired in 1988. For at least fourteen of those years, asbestos was routinely used and/or removed as part of the ship building/overhaul process.

As a rigger, the decedent's duties included using overhead hoists to move heavy machinery and parts on and off the submarines that were being built or overhauled in the shipyard. Anything that was too heavy to be carried on or off the submarines was moved by riggers; occasionally, riggers also assisted in the installation of pipes, reactor valves and other machinery. The decedent worked on all classes of submarines; in the winter months, "strip heaters," which had components containing asbestos, were used to heat the work environment. The decedent's duties also put him in proximity to other workers such as welders, laggers, pipefitters, grinders and painters, some of whom used asbestos-containing products. The environment on the submarines was often quite dirty, with dust and fumes in the air. In addition, the submarines held 55-gallon drums that were used as garbage cans. When the barrels were full, the decedent was responsible for hooking them up and hoisting them out of the boat over to a larger receptacle where the contents could be dumped. This process created a lot of dust and, during the years when asbestos was in use, some of the dumped material contained asbestos. The decedent was also required to perform other duties which involved exposure to asbestos such as pipe removal, the use of insulation, and the replacement of brake drums.

At some point prior to 1992, the decedent was chosen to be part of the CARET (Carotene and Retinol Efficacy Trial) study, in which people considered to be at risk of developing lung cancer were given either beta-carotene or a placebo to determine if the incidence of cancer could be reduced. In 1992, the decedent was examined by Thomas Godar, M.D., the director of the pulmonary department at St. Francis Hospital. The decedent reported that he smoked one-and-a-half to two packs of cigarettes a day, although he also said he had refrained from smoking from 1980 until 1985; as of 1992, the decedent had a roughly fifty-pack-per-year smoking history. Dr. Godar diagnosed the decedent with moderate chronic obstructive pulmonary disease due to heavy cigarette smoking and early emphysema. Dr. Godar also opined that there was no "physiological consequence" from exposure to asbestos and medical tests provided "insurmountable proof that no asbestosis exists." Findings, ¶ 16.

In 1998, the decedent retired from his employment with Electric Boat, in part due to orthopedic impairments. In early 2012, he was experiencing problems with his vision and consulted an eye doctor who, fearing that the decedent may have had a stroke, referred him for an MRI of the brain. The MRI revealed lesions that suggested metastatic disease, and additional imaging showed he had a mass in his lung. On February 29, 2012, the mass was biopsied and it was confirmed that he had lung cancer. The decedent began chemotherapy in spring of 2012.

On May 21, 2012, the decedent filed a notice of claim for compensation alleging a lung injury as a result of "exposure to dust and fumes" with a date of injury of "on or about 2/12/2012." Findings, ¶ 20. The decedent also filed a claim under the federal

Longshore and Harbor Workers' Compensation Act. Electric Boat, ACE USA and Standard Fire Insurance Company (Travelers) all filed disclaimers.

Prior to his demise, the decedent sought a medical opinion which would support his allegation that his lung cancer was a compensable occupational disease arising from his exposure to asbestos at Electric Boat. On November 26, 2012, Laura S. Welch, M.D., a board-certified physician in internal medicine and occupational medicine, opined that the decedent's asbestos exposure at Electric Boat was "a substantial contributing cause to the development of his lung cancer" and that he had a 100% impairment. Findings, ¶ 23. On December 17, 2012, the decedent died, and the cause of death on the death certificate was listed as "(a) cardiac arrest, (b) lung cancer." There is no dispute that he died of lung cancer. There is no evidence that an autopsy was performed on the decedent and, while a biopsy of his tumor was taken in 2012, there are no known lung tissue samples that can be microscopically examined for objective evidence of asbestos fibers.

On December 31, 2012, Katherine Filosi, the decedent's wife, filed a Form 30D notice of a dependent's claim. The cause of death was listed as "Lung cancer. Exposure to asbestos, dust and fumes." Findings, ¶ 26. On January 8, 2013, Electric Boat filed a disclaimer relative to the dependent widow's claim, and both the decedent's claim and the dependent widow's claim were transferred to the Eighth District for inclusion in the consolidated asbestos litigation docket. After the decedent's death, Dr. Welch was asked to review additional medical records. On May 29, 2013, the doctor wrote that the decedent's death was the result of his lung cancer and that "with a reasonable degree of medical certainty … the asbestos exposure sustained by Mr. Filosi in his more than 30

years work at the Electric Boat shipyard was a substantial contributing cause to the development of his lung cancer." Findings, ¶ 28.

The dependent widow sought a second expert medical opinion on causation from Arthur DeGraff, M.D., a pulmonary specialist in Hartford. The doctor reviewed the decedent's records and on June 10, 2013 wrote, "it is my opinion that Mr. Filosi's death from lung cancer is a direct result of his past smoking history combined with past asbestos exposure." Findings, ¶ 30. The respondents had medical record reviews conducted by Darryl Carter, M.D., and Milo Fox Pulde, M.D. Dr. Pulde reviewed the decedent's pathology reports and diagnostic images and, in correspondence dated July 3, 2013, opined that there was no causal connection between the decedent's high-grade neuroendocrine carcinoma and any exposure at Electric Boat. Dr. Carter, a board-certified physician in anatomic pathology, reviewed the decedent's medical records and, on July 31, 2013, opined that the decedent's cancer was caused by his heavy smoking and that there was nothing in the records to support a diagnosis of asbestosis. Dr. Carter also noted that there were no lung tissue samples that could be examined to confirm the presence of asbestos fibers or the concentration of any such fibers. Dr. Carter further opined that without x-ray evidence of asbestos or pathological evidence of asbestos in the lungs, "there is no basis for attributing causation of the putative carcinoma of the lung to asbestos in the medical record and pathology material reviewed." Findings, ¶ 36.

On August 5, 2013, a formal hearing pursuant to the Longshore Act was held before Timothy J. McGrath, an administrative law judge. The dependent widow was

seeking various benefits and the issue to be determined was causation. Under the Longshore Act, the last employer/insurer is solely liable for compensable occupational diseases without any right of apportionment. The only parties to that formal hearing were the dependent widow and Electric Boat, which was self-insured at the time of the claim. As part of the Longshore trial, the parties took deposition testimony from the four expert witnesses.[3] The transcripts were also made a part of the formal hearing before the trial commissioner.

Dr. Welch testified that although the decedent did not have evidence of asbestosis, she believed, based on her understanding of the decedent's job responsibilities and her review of his testimony, the decedent was exposed to enough asbestos such that asbestos exposure was, in addition to his cigarette smoking, a substantial factor in causing his lung cancer and subsequent death.

Dr. Pulde agreed with Dr. Welch that the decedent did not have asbestosis and testified that the decedent had died of a high-grade neuroendocrine carcinoma which was "almost exclusively tobacco related." Findings, ¶ 44. Dr. Pulde also indicated that he was not aware of any studies suggesting that the type of cancer cells the decedent had are caused by any type of occupational exposure. In addition, the doctor opined that the decedent's smoking history could more than account for his cancer and there was no evidence that the decedent's employment as a rigger had in any fashion contributed to the development or progression of the cancer.

[3] An attorney representing Electric Boat's insurers participated in the depositions.

In his deposition testimony, Dr. DeGraff indicated that asbestos is a carcinogen in and of itself, and that asbestos fibers can also carry cigarette by-products from the airways into the lung tissue. Dr. DeGraff agreed that heavy exposure to asbestos is necessary in order to link a smoker's lung cancer to his employment, and testified that based on his own prior experience and his understanding of the responsibilities entailed by employment as a rigger, the decedent's exposure to asbestos would have been "quite heavy." Findings, ¶ 50. Dr. DeGraff opined that the decedent probably did have asbestosis but it didn't show up in his medical tests because of his chronic obstructive pulmonary disease; he also testified that in the general population, 90% of lung cancers are caused by smoking.

Dr. Carter also testified at deposition, opining that the decedent's "very heavy smoking was the likely cause of his lung cancer which was the cause of his death." Findings, ¶ 54. Dr. Carter indicated that "in the absence of pathology evidence of fibers in the lung tissue, one cannot infer the existence of sufficient asbestos body burden to say that asbestos exposure was a significant factor in producing the cancer." Findings, ¶ 56.

On March 20, 2014, Judge McGrath issued a Decision and Order Awarding Benefits in favor of the dependent widow. The judge determined that she had shown there was an injury to the decedent's lungs and "there is also no dispute that Filosi was exposed to asbestos during the course of his employment at Electric Boat." Findings,

¶ 58. Judge McGrath concluded that the dependent widow had presented a *prima facie* case and was therefore entitled to the presumption of causation under U.S.C. § 920(a).[4]

Judge McGrath also determined that the respondent Electric Boat had presented an "unequivocal medical opinion of a physician refuting causation" and had therefore rebutted the statutory presumption of causation. Findings, ¶ 59. Judge McGrath described a claimant's post-rebuttal burden as follows: "The claimant bears the ultimate burden of persuasion and can only satisfy this burden if a preponderance of the evidence establishes the requisite causal connection." Findings, ¶ 60. The judge did not define the term "requisite causal connection." Judge McGrath concluded that the decedent's disability and death were "a direct result of his lung cancer, causally linked to his asbestos exposure while employed at Electric Boat." Findings, ¶ 61. He awarded total disability benefits for the time period of February 12, 2012 to December 17, 2012 (the decedent's date of death) and awarded death benefits to the dependent widow from December 17, 2012 forward. The judge also awarded a funeral allowance in the amount of $3,000.00.

Having reviewed the foregoing, the trial commissioner concluded, *inter alia*, that:

> Given Judge McGrath's failure to articulate "the requisite causal connection" that the claimant was obligated to prove in the federal case, and given his focus on expert opinions that asbestos fibers "can" cause cancer, I cannot conclude that his determination that

[4] 33 U.S.C.A. § 920 states: "In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary--
(a) That the claim comes within the provisions of this chapter.
(b) That sufficient notice of such claim has been given.
(c) That the injury was not occasioned solely by the intoxication of the injured employee.
(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another."

> the decedent's cancer was "causally linked to his asbestos exposure while employed at Electric Boat" equals a determination that the claimant had proved that employment and exposure to be a significant factor, or substantial contributing factor, in the development of his cancer. I cannot, therefore, preclude the respondents from defending under the doctrines of *res judicata* or collateral estoppel.

Conclusion, ¶ A.

The trial commissioner also determined that in light of the expert medical opinion in the record, "it is clear that Mr. Filosi's long-term tobacco abuse was a significant factor in causing his lung cancer. Moreover, I am satisfied that Mr. Filosi's smoking history was more than sufficient to fully explain his development of lung cancer." Conclusion, ¶ F. Noting that "[t]he experts agree that a heavy exposure to airborne asbestos is necessary to support a causal connection between asbestos and lung cancer," Conclusion, ¶ H, the trier observed that the dependent widow had produced no evidence relative to the quantity of asbestos fibers in the decedent's lungs and none of the decedent's x-rays or CT scans demonstrated significant levels of asbestos fibers in the lungs. The trier also remarked that based on the evidence presented, the decedent "did not meet any reasonable criteria for a diagnosis of asbestosis." Conclusion, ¶ N. Moreover, while the decedent's testimony established that he was exposed to airborne asbestos during his employment at Electric Boat, "the anecdotal evidence provided by his testimony cannot be quantified in any meaningful way." Conclusion, ¶ S. The trier also found that both Dr. Welch and Dr. DeGraff "significantly underestimated the extensive nature of Mr. Filosi's smoking history," Conclusion, ¶ U, and neither "had an accurate understanding of the actual extent of Mr. Filosi's exposure to airborne asbestos." Id.

The trial commissioner concluded that the dependent widow had failed to prove that the decedent's "exposure to asbestos during his employment at Electric Boat was a factor, let alone a significant factor, in causing his lung cancer or otherwise contributing to his death." Conclusion, ¶ W. As such, the trier dismissed the claims of the decedent's estate for benefits owed prior to the decedent's death as well as the dependent widow's claim for survivor benefits and a burial allowance pursuant to § 31-306 C.G.S.

The dependent widow filed a Motion to Correct which was granted in part and denied in part, and this appeal followed. On appeal, the claimant contends that the trial commissioner's refusal to apply the doctrine of collateral estoppel to the workers' compensation claim constituted error.[5] The claimant argues that the prior action in the Longshore forum "was fully and fairly litigated," Appellant's Brief, p. 10, and Judge McGrath's decision "was based on expert opinions that were stated with reasonable medical probability and that explicitly provided that asbestos was a substantial contributing factor in the development of Mr. Filosi's injury." (Emphasis in the original.) Id. The claimant also asserts that "[a]pplying collateral estoppel to this case promotes public policy because the standard of proof as applied by Judge McGrath comports with the state workers' compensation standard of proof." Id., 8.

We begin with a recitation of the well-settled standard of review we are obliged to apply to a trial commissioner's findings and legal conclusions. "The trial commissioner's factual findings and conclusions must stand unless they are without evidence, contrary to law or based on unreasonable or impermissible factual inferences." Russo v. Hartford,

[5] On March 21, 2016, Daniel Filosi, the Executor of the Estate of Katherine Filosi and Successor Executor of the Estate of Donald L. Filosi, Jr., was substituted as the claimant.

4769 CRB-1-04-1 (December 15, 2004), citing Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Moreover, "[a]s 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." Burton v. Mottolese, 267 Conn. 1, 54 (2003). Thus, "it is … immaterial that the facts permit the drawing of diverse inferences. The [commissioner] alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court." Fair, supra, 540 (1988), quoting Del Vecchio v. Bowers, 296 U.S. 280, 287 (1935).

Before proceeding with our analysis of the claimant's claim of error, it may be helpful to discuss the legal principles underlying the doctrines of collateral estoppel and res judicata generally.

> Claim preclusion (res judicata) and issue preclusion (collateral estoppel) have been described as related ideas on a continuum…. The doctrine of res judicata holds that an existing final judgment rendered upon the merits without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated as to the parties and their privies in all other actions in the same or any other judicial tribunal of concurrent jurisdiction…. Res judicata bars not only subsequent relitigation of a claim previously asserted, but subsequent relitigation of any claims relating to the same cause of action …which might have been made….
>
> Collateral estoppel, or issue preclusion, is that aspect of res judicata which prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties upon a different claim…. Collateral estoppel means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. (Citations omitted; internal quotation marks omitted.)

Berzins v. Berzins, 122 Conn. App. 674, 679-680 (2010), *quoting* Massey v. Branford, 119 Conn. App. 453, 464-65, *cert. denied*, 295 Conn. 921 (2010).

"An issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined…." (Citations omitted; internal quotation marks omitted.) Birnie v. Electric Boat Corp., 288 Conn. 392, 406 (2008). In addition, "[b]efore collateral estoppel applies there must be an identity of issues between the prior and subsequent proceedings. To invoke collateral estoppel the issues sought to be litigated in the new proceeding must be identical to those considered in the prior proceeding." Crochiere v. Board of Education, 227 Conn. 333, 345 (1993). Moreover,

> for res judicata to apply, four elements must be met: (1) the judgment must have been rendered on the merits by a court of competent jurisdiction; (2) the parties to the prior and subsequent actions must be the same or in privity; (3) there must have been an adequate opportunity to litigate the matter fully; and (4) the same underlying claim must be at issue.

Wheeler v. Beachcroft, 320 Conn. 146, 156–57 (2016).

Turning to the matter at bar, we note at the outset that the trial commissioner did not make any findings relative to the res judicata elements set forth in Wheeler, supra. Rather, the trier appears to have concluded that because the phrase "requisite causal connection" was not defined by Judge McGrath, it could not be determined if the causation standard utilized by the judge was the same as that utilized in the workers' compensation forum. As such, it may be inferred that the trier was unable to determine whether the requisite "identity of issues," Crochiere, supra, existed between the Longshore proceedings and the workers' compensation formal hearing. Having reviewed

the March 20, 2014 decision of the administrative law judge in its entirety, we are not so persuaded.

It is of course axiomatic that the "traditional concepts of proximate cause furnish the appropriate analysis for determining causation in workers' compensation cases," Dixon v. United Illuminating Co., 57 Conn. App. 51, 60 (2000), and "the test for determining whether particular conduct is proximate cause of an injury [is] whether it was a substantial factor in producing the result." (Internal quotation marks omitted.) Paternostro v. Arborio Corp., 56 Conn. App. 215, 222 (1999), *cert. denied*, 252 Conn. 928 (2000), *quoting* Hines v. Davis, 53 Conn. App. 836, 839 (1999). In order to establish a causal connection between the employment and the injury, a claimant "must demonstrate that the claimed injury (1) arose out of the employment, and (2) in the course of the employment…." Sapko v. State, 305 Conn. 360, 371 (2012). The claimant therefore "bears the burden of proof, not only with respect to whether an injury was causally connected to the workplace, but that such proof must be established by *competent evidence*." (Emphasis in the original.) Dengler v. Special Attention Health Services, Inc., 62 Conn. App 440, 447 (2001), *quoting* Keenan v. Union Camp Corp., 49 Conn. App. 280, 282 (1998).

In Birnie v. Electric Boat Corp., 288 Conn. 392 (2008), our Supreme Court held that "[i]t has been determined that the substantial factor standard is met if the employment "'*materially or essentially contributes* to bring about an injury….'" (Emphasis in the orginal.) Id., at 412, *quoting* Norton v. Barton's Bias Narrow Fabric Co., 106 Conn. 360, 365 (1927). The Birnie court stated:

> [t]he term "substantial" … does *not* connote that the employment must be the *major* contributing factor in bringing about the injury; … nor that the employment must be the *sole* contributing factor in development of an injury…. In accordance with our case law, therefore, the substantial factor causation standard simply requires that the employment, or the risks incidental thereto, contribute to the development of the injury in *more than a de minimis way*.

(Citations omitted, emphasis in the original.) Birnie, supra, at 412-13.

In Sapko, supra, our Supreme Court revisited the language discussing the substantial contributing factor test in Birnie and observed that a full reading of the passage should make it "evident that we did not intend to lower the threshold beyond that which previously existed." Sapko, supra, at 391. The court explained that in Birnie, the court:

> was confronted with determining whether the substantial factor test was more or less rigorous than the test applied by federal administrative law judges in adjudications involving the federal law. As a result, it is clear that the court's aim was not to clarify – much less alter – the substantial factor test but to explicate it in such a way as to facilitate a fair comparison with the federal test in question.

Id.

The federal standard requires that a claimant "first establish that he suffered an 'accidental injury … arising out of and in the course of employment.'" Claimant's Exhibit P, p. 10. In his March 14, 2014 Decision and Order, Judge McGrath explained that a claimant must "establish a *prima facie* case showing that he: 1) suffered harm or pain; and 2) conditions existed at his place of employment which could have caused, aggravated, or accelerated the harm or pain." Id., *quoting* 33 U.S.C. § 920. *See also* Bath Iron Works Corp. v. Fields, 599 F.3d 47, 53 (1st Cir. 2010). If a claimant

successfully establishes a *prima facie* case, the § 920(a) presumption applies and "the claimant is not required to show a causal connection between the harm and his working conditions, but rather must show only that the harm could have been caused by his working conditions." Id., *quoting* Bath Iron Works Corp. v. Preston, 380 F.3d 597, 605 (1st Cir. 2004). Moreover, "a claimant need not prove his working conditions were the predominant or sole cause of the injury; any aggravation or contribution entitles the claimant to benefits." Id.

> Once the Section (20)a [sic] presumption is applied, the employer bears the burden of production to rebut the presumption of causation…. The employer can only overcome the presumption by presenting substantial evidence that the alleged harmful workplace condition did not cause, contribute to, or aggravate the claimant's condition…. Substantial evidence is that which a reasonable mind might accept as adequate to support a finding that the workplace conditions did not cause the injury….
>
> Under the substantial evidence standard, an employer does not have to exclude any possibility of a causal connection to employment; it is sufficient to introduce medical evidence of "reasonable probabilities" demonstrating a lack of causation…. The Section 20(a) presumption may be successfully rebutted through testimony of a physician who unequivocally states with a reasonable degree of medical certainty that the injury or pain suffered by the claimant is not related to his working conditions…. (Internal citations omitted.)

Id., 10-11.

Judge McGrath determined that because Electric Boat had provided the testimony of Drs. Pulde and Carter refuting the decedent's presumption of causation, he was therefore required to "weigh all of the evidence as a whole and render a decision supported by substantial evidence." Id., 12. He further observed that "[t]he claimant bears the ultimate burden of persuasion and can only satisfy this burden if a

preponderance of the evidence establishes the requisite causal connection." Id. He also stated that "[i]n evaluating the evidence, the administrative law judge is entitled to weigh the medical evidence and draw inferences there from, but the judge is not bound to accept the opinion or theory of any particular medical expert." Id., *citing* Todd Shipyards Corp. v. Donovan, 300 F.2d 741 (5th Cir. 1962). Judge McGrath proceeded to conduct an extensive summarization and review of the expert testimony, ultimately remarking that "[i]n a case such as this, where the medical experts disagree so sharply regarding causation, the weighing of the evidence is strongly influenced by a weighing of each expert's qualifications and credibility." Id., 13.

Accordingly, Judge McGrath then embarked upon an assessment of the experts' credentials, noting that Dr. Welch "has an extensive work history facilitating medical surveillance programs for construction workers including assessments of the impact of asbestos on employees in industrial settings." Id. The judge pointed out that "Dr. Welch and her collaborators have published approximately a dozen papers evaluating the health effects of asbestos and other occupational hazards," id., and "has focused her practice and professional career on occupational medicine since her graduation from medical school in 1978." Id.

The judge also reviewed Dr. DeGraff's credentials, noting that the doctor "has been in practice since graduating medical school in 1955 with a primary focuses [sic] on pulmonary diseases," id., and "has published approximately 43 articles, many of which focus on pulmonary diseases." Id. With regard to Dr. Pulde, the judge noted that the doctor had testified that he has an "interest in oncology, particularly tumors of the lung,"

id., but that "lung diseases in general make up only 15 to 20 percent of his practice and only a 'very small' percentage of his practice involves asbestos-related disease." Id., 13. Finally, the judge found that Dr. Carter had published 161 original articles and 50 reviews of chapters or books and that his "focus lies in breast pathology and pulmonary/mediastinal pathology." Id.

Having reviewed the opinions and qualifications of the medical experts, Judge McGrath ultimately concluded that Dr. Welch was:

> the most qualified expert regarding the impact of asbestos on human lungs given her substantial experience in occupational medicine, including her participation in research studies and medical surveillance programs. I also find Dr. DeGraff to be a reliable expert in this matter as his research and explanations coincide with Dr. Welch's opinions.

Id., 13-14.

In addition, the judge stated:

> I do not credit Dr. Pulde's opinions in light of Dr. Welch's qualifications and given his own acknowledgement that there is 'controversy' … and 'a big debate' … regarding asbestosis as a requisite intermediate step to lung carcinogenesis. Although Dr. Carter is a credible witness, I cannot credit his opinion regarding causation because he admits there was insufficient pathology for him to make any findings regarding Filosi's body burden of asbestos and possible asbestosis…. Therefore, despite his credentials and experience, it is apparent that Dr. Carter simply did not have adequate material from which to draw any informed conclusions. (Internal citations omitted.)

Id., 14.

Having thus determined that the medical opinions offered by Drs. Welch and McGraff were more reliable than those offered by Drs. Pulde and Carter, the

administrative law judge concluded that the decedent's disability and death were "causally linked to his asbestos exposure while employed at Electric Boat." Id., 14.

Our review of the record before us indicates that on several different occasions, Dr. Welch opined that the decedent's exposure to asbestos at the Electric Boat shipyard was "a substantial contributing cause to the development of his lung cancer." *See* Claimant's Exhibit A; Claimant's Exhibit I; Claimant's Exhibit N, p. 72. As such, the claimant in the present case asserts that "[t]he trial commissioner's finding that Judge McGrath's decision was based on an undefined standard of causation is incorrect. The judgment was based on expert opinions that were stated with reasonable medical probability and that explicitly provided that asbestos was a substantial contributing factor in the development of Mr. Filosi's injury." (Emphasis in the original.) Appellant's Brief, p. 10. The claimant further contends that "[t]he opinion taken as a whole makes abundantly clear that Judge McGrath's decision was based upon expert opinions that explicitly found asbestos to be a **substantial contributing factor** to Mr. Filosi's disease and death." (Emphasis in the original.) Appellant's Brief, p. 6. We agree.

In Lafayette v. General Dynamics Corp., 255 Conn. 762 (2001), our Supreme Court, in reviewing a claim similar to the present action, observed that the administrative law judge had:

> imposed on the plaintiff the burden to prove, by a preponderance of the evidence, that the decedent's injury arose out of and occurred in the course of his employment at Electric Boat, and that the administrative law judge in fact required that this burden be satisfied without the aid of any presumption. This is the same burden that would obtain in the state workers' compensation proceeding.

Id., 781.

The Lafayette court also stated that "[a] thorough review of the administrative judge's decision makes it clear that he fully considered and determined, adversely to Electric Boat, the issue of whether the decedent's condition was caused by his employment at Electric Boat." Id., 777-778. The court therefore held that the doctrine of collateral estoppel barred the respondent from adjudicating the issue of causation under the Workers' Compensation Act. In the matter at bar, we find we are unable to distinguish the actions of the administrative law judge herein from the actions of the judge in Lafayette, supra, as it appears that the judge essentially "followed the same process that a trial commissioner would have to adhere to in order to make a finding of a compensable injury under the Workers' Compensation Act." Levarge v. Electric Boat Corp., 4884 CRB-8-04-11 (November 30, 2005), *appeal dismissed for lack of final judgment*, 282 Conn. 386 (2007). Moreover, "the medical opinions upon which the ALJ relied in determining compensability were stated with a reasonable degree of probability…." Robert v. Electric Boat Corporation, 4976 CRB-2-05-7 (July 26, 2006), *remanded for further proceedings in accordance with Levarge*, S.C. 17766/17767 (October 30, 2007). This matter can therefore also be distinguished from Larocque v. Electric Boat Corporation, 5942 CRB-2-14-6 (July 2, 2015), wherein we upheld the trial commissioner's decision to deny collateral estoppel because the award of the administrative law judge contained "no specific finding weighing the relative impact of work-related causation factors versus the impact of other factors behind the decedent's death." Id. "[I]f the claimant's evidence in the Longshore Act proceeding was

insufficient to award benefits under the standards of Chapter 568, a trial commissioner has every right to determine an award reliant on such evidence is not sufficient to merit the force of collateral estoppel." Id.

We recognize that in the administrative law judge's decision before us, at no point did the judge specifically "articulate the precise level of contribution necessary to satisfy the causation standard." Birnie, supra, 417. However, it is well-settled that "[w]hether an expert's testimony is expressed in terms of a reasonable probability that an event has occurred does not depend upon the semantics of the expert or his use of any particular term or phrase, but rather, is determined by looking at the entire substance of the expert's testimony." Struckman v. Burns, 205 Conn. 542, 555 (1987). We are therefore inclined to agree with the claimant that in the present matter, the administrative law judge:

> weighed the evidence and fully accepted the opinions of Dr. Welch and Dr. DeGraff, who testified that asbestos was a substantial contributing factor to the development of Mr. Filosi's lung cancer. It is clear – with or without stating the "magic words" – that Judge McGrath employed the "substantial contributing factor" standard of proof.

Appellant's Brief, p. 9.

Moreover, given that "the ALJ relied on an opinion sufficient to meet the standard of proving causation applicable under chapter 568, we need not determine whether the difference in the minimum standards of proof between our Act and the federal Longshore Act would preclude the application of the collateral estoppel doctrine." Levarge, supra. The present matter can therefore also be distinguished from Birnie, supra, wherein our Supreme Court, in reviewing an administrative law judge's decision holding that the claimant's "exposure to asbestos and other industrial irritants at [the defendant's

facilities] were [sic] a contributing factor in his myocardial infarction and death," id., 399, made the following observation:

> Although we can discern from the administrative law judge's decision that he concluded that *some* causal connection is required under the contributing factor standard, that decision provides no indication of the scope of the standard actually applied; that is, whether a de minimis causal connection would satisfy the standard, or whether, like claims under the state act, the causal connection needs to be more than de minimis in order to be compensable.

Id., 414.

Having determined that the decision of the administrative law judge comports with the standard for analysis as set forth in our Supreme Court's holding in Lafayette, supra, and also reflects that the administrative law judge properly adopted the substantial contributing factor standard in reaching his decision, we hereby reverse the decision of the trial commissioner to deny the application of collateral estoppel.

The claimant also contends that because "[i]t is well-established that Electric Boat, the employer, stood in the shoes of any insurers potentially liable for a part of the claim during its participation in proceedings under the Longshore Act," id., 11, the parties are in privity. Electric Boat also asserts that "there is privity of interest between the self-insured and the carriers," June 24, 2014 Transcript, p. 21, and "collateral estoppel must be applied equally against Electric Boat Corporation and ACE and Travelers if it is applied at all." Brief of Respondent Electric Boat Corporation, p. 31. However, the respondent insurers contend that:

> the rights and liabilities of the state carriers as compared to the employer in the federal forum diverge because of the difference in the standards of proof in the two forums. The only manner in which to guarantee privity under the doctrine that requires sharing

> of the same legal rights would be to allow respondent carriers as non-parties to participate in the federal proceedings. Certainly the administrative law judge will not welcome or allow additional unnecessary parties to the federal proceedings. It is only in that manner, however, that the insurers could properly ensure that all relevant standards of establishing causation are met.

Respondent Insurers' Brief, p. 8.

In Mazziotti v. Allstate Ins. Co., 240 Conn. 799 (1997), our Supreme Court stated the following:

> Privity is not established by the mere fact that persons may be interested in the same question or in proving or disproving the same set of facts. Rather, it is, in essence, a shorthand statement for the principle that collateral estoppel should be applied only when there exists such an identification in interest of one person with another as to represent the same legal rights so as to justify preclusion.

Id., 814, *citing* Joe's Pizza Inc. v. Aetna Life & Casualty Co., 236 Conn. 863, 868 (1996).

This board has also previously addressed the issue of privity. In Levarge, supra, we remarked:

> [T]he insurers ACE USA and Travelers share the same legal right here as did Electric Boat in its capacity as a self-insured defendant in the Longshore Act proceedings. Both were defending identical claims of compensation by the claimant, both faced a similar risk of being forced to accept financial liability for benefits payable on account of the decedent's injury should it be proven compensable, and both had the right to introduce medical evidence to dispute that compensability. Indeed, the risk to Electric Boat was greater under the LHWCA than it would have been under chapter 568, insofar as there was no apportionment scheme made available by the Longshore Act based upon a division of insurance liability for successive periods of asbestos exposure. Thus, as the last "insurer" on the risk during a period of asbestos exposure, Electric Boat had more than ample incentive to defend the Longshore Act claim that laryngeal cancer resulted from the decedent's asbestos exposure.

Id.

Based on our analysis in Levarge, we determined that because "Electric Boat essentially stood in the shoes of any insurers potentially liable for a part of the claim during its participation in proceedings under the Longshore Act," id., it would not "be inequitable to apply the doctrine of collateral estoppel, as the interests of any § 31-299b insurers were sufficiently represented in the Longshore Act proceedings."[6] Id. *See also* Robert, supra.

Having reviewed the matter at bar, we see no rationale for departing from our prior analysis as set forth in Levarge, supra, and Robert, supra. Rather, we are persuaded that the parties are sufficiently in privity such that the application of collateral estoppel would not be inequitable. Moreover, we find that the present matter can be distinguished on this issue from Larocque, supra, as there is no indication in the record before us that Electric Boat ever anticipated assigning its financial obligations to a "Special Fund," which we determined could conceivably "[present] an issue where the insurers' interests may be inconsistent with that of Electric Boat…." Id. We likewise distinguish the present matter from Levarge v. Electric Boat Corp., 5747 CRB-1-12-4 (January 13, 2014), wherein we declined to apply collateral estoppel to the insurers in light of the fact that between the time that the board had issued its first Levarge holding and the trial

[6] Section 31-299b C.G.S. states, in pertinent part: "If an employee suffers an injury or disease for which compensation is found by the commissioner to be payable according to the provisions of this chapter, the employer who last employed the claimant prior to the filing of the claim, or the employer's insurer, shall be initially liable for the payment of such compensation. The commissioner shall, within a reasonable period of time after issuing an award, on the basis of the record of the hearing, determine whether prior employers, or their insurers, are liable for a portion of such compensation and the extent of their liability. If prior employers are found to be so liable, the commissioner shall order such employers or their insurers to reimburse the initially liable employer or insurer according to the proportion of their liability…."

commissioner's subsequent ruling, the Supreme Court had issued its clarification of the proximate cause standard in Sapko v. State, 305 Conn. 360 (2012).

There is error; the February 13, 2015 Finding and Dismissal of David W. Schoolcraft, Commissioner acting for the Eighth District, is accordingly reversed and remanded for additional proceedings consistent with this Opinion.

Commissioners Ernie R. Walker and Nancy E. Salerno concur in this opinion.