

CASE NO. 5998 CRB-2-15-3  
CLAIM NOS. 200180194 & 200178053

: COMPENSATION REVIEW BOARD

DANIEL FILOSI, SUCCESSOR  
EXECUTOR OF THE ESTATE OF  
DONALD L. FILOSI, JR.

: WORKERS' COMPENSATION  
COMMISSION

and

: MAY 9, 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

## **RULING ON RESPONDENTS' MOTION FOR RECONSIDERATION AND REQUEST FOR REARGUMENT**

JOHN A. MASTROPIETRO, CHAIRMAN. The respondents have filed a Motion for Reconsideration and Request for Reargument from the Compensation Review Board's Opinion issued on January 19, 2017. In that decision, the board reversed the trial commissioner's decision to deny collateral estoppel and remanded the matter for

additional hearings. The board also concluded “that the parties are sufficiently in privity such that the application of collateral estoppel would not be inequitable.” Filosi v. Electric Boat Corporation, 5998 CRB-2-15-3 (January 19, 2017).

In support of their motion, the respondents contend that the decision of the board “is inconsistent with the law firmly established by the Supreme Court in Birnie v. Electric Boat Corp., 288 Conn. 392 (2008).” Respondent Insurers’ Motion for Reconsideration and Request for Reargument, p. 2. The respondents further assert “that the Board’s holding [which] requires analyzing the evidence in the federal proceeding rather than the burden of proof standard applied has returned the parties to square one relative to arguments and findings put forth by then Commissioner Doyle and this Board in the Birnie case.” *Id.* The respondents maintain that because this board “could not establish or determine the standard applied by the ALJ,” *id.*, 5, its analysis should have proceeded no further and the decision of the trial commissioner to deny collateral estoppel should have been affirmed.

In addition, the respondents argue that the board’s conclusions regarding the issue of privity of the respondents likewise require reconsideration given that the state workers’ compensation insurance carriers are barred from participating in the federal proceedings and therefore lack the opportunity to defend a claim unless and until it is brought in the workers’ compensation forum. The respondents point out that because the state carriers “face all if not the vast majority of the liability for state benefits,” *id.*, 10, they are exposed to higher liability than the self-insured employer in light of the more generous benefits available in the state forum.

We have reviewed the contentions put forth by the respondents and are not persuaded that affording the parties in this dispute the opportunity for additional argument will resolve the issues raised by the respondents in their motion.

In Birnie, supra, our Supreme Court identified the issue on appeal as follows:

whether the contributing factor standard applied by the administrative law judge ... is a more relaxed standard of causation that [sic] the substantial factor standard under the state act, such that the commissioner in the subsequent state action should have been prohibited from collaterally estopping the defendant from relitigation the issue of causation....

Id., 404-405.

The court reviewed the causation standards in the two forums, as well as the principles underlying collateral estoppel generally, and ultimately held that:

Because we cannot adequately compare the scope of the contributing factor standard as applied, and the substantial factor standard as required under the state act, we are unable to determine whether the application of the collateral estoppel doctrine is proper in this case. We conclude, therefore, that the application of collateral estoppel by the commissioner in this case was improper.

Id., 414.

In the present matter, the respondents accurately point out that this board, in its Opinion of January 19, 2017, stated the following: “[w]e 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.’” Filosi v. Electric Boat Corporation, 5998 CRB-2-15-3 (January 19, 2017), quoting Birnie, supra, 417. The respondents thus maintain that purely on the basis of this omission in the ALJ’s findings, the matter at bar also warrants dismissal of the claim for collateral

estoppel. However, it is our considered position that despite the similarity between the two matters on this point, Birnie is distinguishable from the case presently before us.

In Birnie, both the administrative law judge and the trial commissioner relied upon a medical report provided by John Bigos, M.D., wherein the doctor opined that the claimant's:

exposure to industrial irritants *contributed to his obstructive and restrictive lung disease* that was a significant factor in limiting his ability to engage in any meaningful exertion which contributed to his deconditioned state and consequently his cardiac problems and ultimate death. (Emphasis added.)

Birnie, supra, 397, *quoting* August 23, 2002 opinion letter of John P. Bigos, M.D.

On the basis of this report, the ALJ ultimately concluded 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." (Emphasis added.)

*Id.*, 399, *quoting* June 9, 2003 Decision of the Administrative Law Judge. Subsequently, when the claim was brought in the workers' compensation forum, the trial commissioner found that:

While the standard the [a]dministrative [l]aw [j]udge utilized was *a more relaxed standard*, the evidence which supports the June 9, 2003 decision and which was found to be the more persuasive evidence, also satisfied the standard applied in the ... [s]tate [w]orkers' [c]ompensation proceedings, and accordingly, the issue of causation or compensability was fully and fairly litigated in the federal action pursuant to the Longshore ... Act. (Emphasis in the original.)

*Id.*, 401-402, *quoting* May 6, 2005 Finding and Award of the Commissioner acting for the Second District.

In reviewing the appeal, the Supreme Court noted that:

[a]lthough it is clear that the contributing factor standard, as applied by the administrative law judge, requires that there be *some* causal connection between the decedent's employment with the defendant and his myocardial infarction and death, nowhere in his decision does the administrative law judge articulate the precise level of contribution necessary to satisfy the causation standard. (Emphasis in the original.)

Id., 416-417.

The court therefore held that:

[s]ince we have not been given enough information by the administrative law judge to compare adequately the scope of the contributing factor and substantial factor standards, we must conclude that the commissioner's application of the doctrine of collateral estoppel, as well as the board's subsequent affirmance of the commissioner's decision, were improper.

Id., 418.

In the matter presently before us, the ALJ, after a thorough review of the credentials and qualifications of all of the medical experts, chose to rely upon the November 26, 2012 medical report of Laura S. Welch, M.D., a board-certified physician in internal medicine and occupational medicine. In our Opinion of January 19, 2017, we stated the following relative to this medical evidence:

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.

Filosi v. Electric Boat Corporation, 5998 CRB-2-15-3 (January 19, 2017).

The foregoing passage clearly indicates that in reviewing this appeal, we placed great significance on the fact that in Birnie, the ALJ relied upon medical evidence which found the claimant’s workplace exposure to asbestos was merely a contributing factor while the ALJ in the present matter relied upon medical evidence stating that the workplace exposure to asbestos was a substantial contributing factor. It remains our position, contrary to the assertions of the respondents, that the present matter can therefore be distinguished from Birnie, supra, on this basis. We are also inclined to agree with the following argument by the claimant:

Here, unlike in Birnie, the ALJ literally expressed the actual level of contribution he found between asbestos exposure, injury, and death. Even if this Commission were to reconsider and find that the ALJ did not plainly express the scope of the standard applied (i.e., the use of “magic words”), or cited to other Longshore opinions that relied upon a narrower scope of the standard of causation, it does not change the ALJ’s articulation and findings that the Claimant’s evidence met the “substantial contributing factor” standard of causation required here.

March 2, 2017 Objection to Motion for Reconsideration and Motion for Reargument, pp. 3-4.

Having reviewed the respondents’ motion, we conclude that no amount of additional argument by the parties will serve to alter the fact that the medical evidence relied upon by the trial commissioner in the present matter differs significantly from the medical evidence presented in Birnie, supra. Relative to the respondents’ contentions

regarding the privity of the parties, the board considers its analysis as set forth in the Opinion of January 19, 2017 to be well-reasoned, thorough, and firmly rooted in precedent. As such, the respondents' Motion for Reconsideration and Request for Reargument is denied.

Commissioners Ernie R. Walker and Nancy E. Salerno concur.