CASE NO. 6041 CRB-1-15-10 : COMPENSATION REVIEW BOARD
CLAIM NO. 100196111

JOSHUA CLARK (Deceased)
COURTNEY ANN CLARK
(Dependent in Fact) and
EVERETT JOSHUA CLARK
(Dependent Child)
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: JANUARY 30, 2017

MIDDLESEX CORPORATION
EMPLOYER

and

GALLAGHER BASSETT SERVICES, INC.
INSURER
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Paul S. Levin, Esq., Law Offices of Paul S. Levin, 40 Russ Street, Hartford, CT 06106.

The respondents were represented by Richard A. Knapp, Esq., Mullen & McGourty, PC, 2 Waterside Crossing, Suite 102A, Windsor, CT 06095.

This Petition for Review[1] from the October 7, 2015 Finding And Award In Part/And Dismissal In Part of Christine L. Engel, the Commissioner acting for the First District, was heard September 23, 2016 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Ernie R. Walker and Nancy E. Salerno.

[1] We note that a postponement was granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. This is a case where we must ascertain if our statutes offer relief to a dependent child who had not been born prior to the date of the original claimant's death. The claimant, Courtney Lomax Clark, (a/k/a Courtney Ann Clark) argues that the trial commissioner, Christine L. Engel erred as the commissioner awarded her § 31-306 C.G.S. benefits subsequent to the death of her spouse and original claimant, Joshua Clark, but failed to award their son, Everett Clark, survivor benefits. Commissioner Engel concluded that § 31-306(a)(2) C.G.S.[2] did not

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[2] This statute reads as follows:
"Sec. 31-306. Death resulting from accident or occupational disease. Dependents. Compensation. (a) Compensation shall be paid to dependents on account of death resulting from an accident arising out of and in the course of employment or from an occupational disease as follows:
(2) To those wholly dependent upon the deceased employee at the date of the deceased employee's injury, a weekly compensation equal to seventy-five per cent of the average weekly earnings of the deceased calculated pursuant to section 31-310, after such earnings have been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act made from such employee's total wages received during the period of calculation of the employee's average weekly wage pursuant to said section 31-310, as of the date of the injury but not more than the maximum weekly compensation rate set forth in section 31-309 for the year in which the injury occurred or less than twenty dollars weekly. (A) The weekly compensation rate of each dependent entitled to receive compensation under this section as a result of death arising from a compensable injury occurring on or after October 1, 1977, shall be adjusted annually as provided in this subdivision as of the following October first, and each subsequent October first, to provide the dependent with a cost-of-living adjustment in the dependent's weekly compensation rate as determined as of the date of the injury under section 31-309. If the maximum weekly compensation rate, as determined under the provisions of said section 31-309, to be effective as of any October first following the date of the injury, is greater than the maximum weekly compensation rate prevailing at the date of the injury, the weekly compensation rate which the injured employee was entitled to receive at the date of the injury or October 1, 1990, whichever is later, shall be increased by the percentage of the increase in the maximum weekly compensation rate required by the provisions of said section 31-309 from the date of the injury or October 1, 1990, whichever is later, to such October first. The cost-of-living increases provided under this subdivision shall be paid by the employer without any order or award from the commissioner. The adjustments shall apply to each payment made in the next succeeding twelve-month period commencing with the October first next succeeding the date of the injury. With respect to any dependent receiving benefits on October 1, 1997, with respect to any injury occurring on or after July 1, 1993, and before October 1, 1997, such benefit shall be recalculated to October 1, 1997, as if such benefits had been subject to recalculation annually under this subparagraph. The difference between the amount of any benefits that would have been paid to such dependent if such benefits had been subject to such recalculation and the actual amount of benefits paid during the period between such injury and such recalculation shall be paid to the dependent not later than December 1, 1997, in a lump-sum payment. The employer or its insurer shall be reimbursed by the Second Injury Fund, as provided in section 31-354, for adjustments, including lump-sum payments, payable under this subparagraph for deaths from compensable injuries occurring on or after July 1, 1993, and before October 1, 1997, upon presentation of any vouchers and information that the Treasurer shall require. No claim for payment of retroactive benefits may be made

allow for an award of benefits to Everett Clark. The claimant has appealed arguing that this interpretation is inconsistent with the humanitarian purpose of our statute. We find that Commissioner Engel appropriately applied the statute and affirm the Finding And Award In Part/And Dismissal In Part ("Finding") issued October 7, 2015.

The following facts are relevant to our inquiry. Joshua Clark sustained a compensable injury on January 19, 2013. Both the claimant and the respondent insurer submitted jurisdictional voluntary agreements to the Commission. At the time of his injury Joshua Clark's tax filing status was single but he was living with Courtney Lomax at the time. They had met in Washington State and had moved together to Connecticut for Mr. Clark's job, and subsequent to his injury they moved back to Washington State. Mr. Clark was treating for his injury when he died on March 26, 2014. After reviewing the medical evidence Commissioner Engel concluded that this death was the result of prescription medication Mr. Clark was taking for his compensable injury. Ms. Lomax legally changed her name to Courtney Ann Clark on June 20, 2014. On September 26, 2014 she gave birth to a son, Everett Clark. Genetic evidence established that Joshua

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to the Second Injury Fund more than two years after the date on which the employer or its insurer paid such benefits in accordance with this subparagraph. (B) The weekly compensation rate of each dependent entitled to receive compensation under this section as a result of death arising from a compensable injury occurring on or before September 30, 1977, shall be adjusted as of October 1, 1977, and October 1, 1980, and thereafter, as provided in this subdivision to provide the dependent with partial cost-of-living adjustments in the dependent's weekly compensation rate. As of October 1, 1977, the weekly compensation rate paid prior to October 1, 1977, to the dependent shall be increased by twenty-five per cent. The partial cost-of-living adjustment provided under this subdivision shall be paid by the employer without any order or award from the commissioner. In addition, on each October first, the weekly compensation rate of each dependent as of October 1, 1990, shall be increased by the percentage of the increase in the maximum compensation rate over the maximum compensation rate of October 1, 1990, as determined under the provisions of section 31-309 existing on October 1, 1977. The cost of the adjustments shall be paid by the employer or its insurance carrier who shall be reimbursed for such cost from the Second Injury Fund as provided in section 31-354 upon presentation of any vouchers and information that the Treasurer shall require. No claim for payment of retroactive benefits may be made to the Second Injury Fund more than two years after the date on which the employer or its insurance carrier paid such benefits in accordance with this subparagraph."

Clark was Everett Clark's father. Ms. Clark submitted financial evidence found persuasive by Commissioner Engel that she was dependent on the earnings of Joshua Clark prior to his death.

Based on these facts Commissioner Engel ordered the respondents to pay dependency benefits under § 31-306(a)(6) C.G.S. to Courtney Clark as dependent in fact of the decedent, Joshua Clark. On the other hand, while she found evidence was presented that Everett Clark was the son of the decedent, she determined that he did not exist as of the time of Joshua Clark's injury and therefore was not a dependent as of the date of his injury, and therefore was not eligible for benefits under § 31-306(a)(2) C.G.S.

The claimant appealed from the Finding asserting that the commissioner misapplied the statute by denying survivorship benefits to the decedent's unborn son. She cites the precedent in Crook v. Academy Drywall Co., 219 Conn. 28 (1991) as grounds for finding an unborn child at the time of a worker's injury a "dependent" under the terms of Chapter 568. She believes that Commissioner Engel's interpretation of the statute is inconsistent with that precedent and the humanitarian purpose of our Act.

The respondents argue that the facts herein are more congruent with the precedent in Wislocki v. Prospect, 72 Conn. App. 444 (2002). That case stands for the proposition that someone who is not a dependent at the time of a claimant's original date of injury cannot later recover dependency benefits when the claimant succumbs to his or her injury. As the respondents view the law since Everett Clark had not been conceived until a date subsequent to Joshua Clark's compensable injury, he is in the same position as the widow in Wislocki, who did not enter into a relationship with the decedent until after he

had already sustained a compensable injury. We find this to be the most reasonable interpretation of our statute and our precedent.

We note that the facts in this case are not in dispute and we are essentially ruling on whether the trial commissioner appropriately applied the law. Nonetheless we do generally provide reasonable deference to the decision reached by the trial commissioner, although in accord with Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007), we may reverse such a decision if the commissioner did not properly apply the law or reached a decision unsupported by the evidence on the record.

Section 31-306(2) C.G.S. limits compensation to those individuals "wholly dependent" upon the decedent's earnings at "the date of the injury." The claimant suggests that Crook, supra, stands for the proposition that when someone sustains a compensable injury that their child who had yet to have been born as of that date was a dependent entitled to benefits. Having reviewed the facts of Crook we find them sufficiently dissimilar to the present case so as to warrant a different outcome herein. We note that Crook was decided on the basis of whether § 31-308b C.G.S. (which has since been repealed) permitted a dependency allowance for a child born after the date of the claimant's injury but conceived prior to that date. (Emphasis added.) The Supreme Court applied the doctrine of "En ventre sa mere", see fn.4 of Crook, supra, to deem that for beneficial purposes this child was legally born as of the date of the claimant's injury. The Crook decision also pointed out that the factual question of whether the claimant "wholly or mainly supported" the child could not be resolved until the child's birth. Id., 34. Finally, the Supreme Court invited the General Assembly to clarify the statute in

regards to the issue of the dependency status of children born after a worker's compensable injury or a worker's death. Id., 35.

In the present case Everett Clark was not *in utero* as of the date of the decedent's injury. Therefore there is a substantive factual distinction between this case and Crook. Had Everett Clark been born within nine months of the January 19, 2013 compensable injury the concept of *En ventre sa mere* would support a finding, in light of the fact that his mother was deemed a dependent in fact of the claimant as of that date, that he was a dependent as of the date of injury. However, we cannot extend the holding in Crook to future potential dependents of an injured worker due to the "date of injury" rule, see Dahle v. Stop & Shop, 6035 CRB-6-15-10 (August 8, 2016), *appeal withdrawn* (2016)[3] and the precedent in Wislocki.

We find Wislocki substantially tracks the issues in this case and is dispositive of the outcome. In that case the claimant sustained a compensable heart injury in 1988 prior to meeting his future wife, who married him in 1990. In 1999 the claimant died as a result of his compensable injury and Mrs. Wislocki filed for § 31-306 C.G.S. benefits, asserting that she was a presumptive dependent under the statute.[4] She also argued that

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[3] The claimant argues that our decision in Micale v. State/Dept. of Emergency Services and Public Protection, 5910 CRB-6-14-2 (January 8, 2015) should be read in a manner that when a claimant who sustained a compensable injury succumbs later to a sequalae of that injury, that a new, later date of injury be established for eligibility for § 31-306 C.G.S. benefits as of the date of the claimant's death. We reject this reasoning as inconsistent with the clear imprimatur of the holding of Wislocki v. Prospect, 72 Conn. App. 444 (2002). In addition, unlike the claimant's arguments herein, we do not read the Supreme Court's opinion in McCullough v. Swan Engraving, Inc., 320 Conn. 299 (2016) as impacting the substantive eligibility requirements of § 31-306 C.G.S. in any manner; only standing for a liberal statutory interpretation regarding notice issues as to a separate claim for dependents.

[4] Section 31-275(19) C.G.S. reads as follows:
(19)'"Presumptive dependents' means the following persons who are conclusively presumed to be wholly dependent for support upon a deceased employee: (A) A wife upon a husband with whom she lives at the time of his injury or from whom she receives support regularly; (B) a husband upon a wife with whom he lives at the time of her injury or from whom he receives support regularly; (C) any child under the age of eighteen, or over the age of eighteen but physically or mentally incapacitated from earning, upon the parent

she was a "dependent in fact" under the terms of the statute.[5] The Second Injury Fund, which had been transferred this claim from the claimant's employer, denied that Mrs. Wislocki was a dependent due to her lack of a relationship with the claimant at the time of his injury. Id., 446. The trial commissioner concurred with that position and denied the § 31-306 C.G.S. claim. Our tribunal affirmed this decision, see Wislocki v. Prospect, 4226 CRB-5-00-4 (July 5, 2001), focusing on the "date of injury" rule and citing precedent in Wheat v. Red Star Express Lines, 156 Conn. 245, 249 (1968) that the elements of dependency are fixed at the time of a claimant's injury. Id. Mrs. Wislocki appealed our decision to the Appellate Court. The Appellate Court affirmed our decision. While the claimant argued that § 31-306 C.G.S. was ambiguous and that it should be interpreted liberally and in a humanitarian fashion, Wislocki, supra, 449, the Appellate Court noted that prior precedent had limited eligibility for § 31-306 C.G.S. awards to those who lived with the decedent or were dependent upon his or her earnings *at the time of the injury.* Id., 450 (Emphasis in the original.) The Appellate Court cited Wheat, supra, Piccinim v. Connecticut Light & Power Co., 93 Conn. 423, 424-25 (1919) and Whalen v. New Haven Pulp & Board Co., 127 Conn. 394, 395 (1940) as authority for this position. Consequently, they held "[f]or purposes of receiving survivor's benefits

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with whom he is living or from whom he is receiving support regularly, at the time of the injury of the parent; (D) any unmarried child who has attained the age of eighteen but has not attained the age of twenty-two and who is a full-time student, upon the parent with whom he is living or from whom he is receiving support regularly, provided, any child who has attained the age of twenty-two while a full-time student but has not completed the requirements for, or received, a degree from a postsecondary educational institution shall be deemed not to have attained the age of twenty-two until the first day of the first month following the end of the quarter or semester in which he is enrolled at the time, or if he is not enrolled in a quarter or semester system, until the first day of the first month following the completion of the course in which he is enrolled or until the first day of the third month beginning after such time, whichever occurs first."

[5] Section 31-275(7) C.G.S. reads as follows:
(7) '"Dependent in fact' means a person determined to be a dependent of an injured employee, in any case where there is no presumptive dependent, in accordance with the facts existing at the date of the injury."

pursuant to the act, we conclude that a wife is a presumptive dependent of her employee husband only if, at the time of his injury, she lives with him or receives support regularly." Wislocki, supra, 451. To the extent the claimant argued that this application of the statute yielded an inequitable result, the Appellate Court cited Wheat, supra, for the tenet that statutory language could not be altered by a court or a workers' compensation commissioner no matter how deserving the beneficiary might be. Id., 452.[6]

We note that the claimant argues that the result in Wislocki is inconsistent with the stated rationale that workers' compensation is remedial legislation with a humanitarian purpose, and that eligibility standards for beneficiaries should be liberally construed. However, we are limited in our jurisdiction as this Commission may only award benefits in the manner prescribed in statute. Hanson v. Transportation General, Inc., 245 Conn. 613, 618 (1998). We also note that the General Assembly has had the opportunity to have legislatively overruled Wislocki for over 14 years, and has left this precedent and § 31-306 C.G.S. alone. As the Supreme Court pointed out in Hanson,

> [w]e have long acted on the hypothesis that the legislature is aware of the interpretation that the courts have placed upon one of its legislative enactments. Once an appropriate interval to permit legislative reconsideration has passed without corrective legislative action, the inference of legislative acquiescence limits judicial authority to reconsider the merits of its earlier decision.

Id., 618-19. The concept of legislative acquiescence leads us to conclude that having chosen not to address the Wislocki decision for over a decade that the General Assembly does not intend to expand the remedial scope of our statutes to individuals who were not dependent on the injured claimant's earnings as of the date of their injury.

[6] Joy Wislocki was not known to Ronald Wislocki on the date of his compensable injury and this fact denied her eligibility for dependency benefits. Everett Clark was not known to Joshua Clark as of the date of his compensable injury. *Stare decisis* requires that under a similar fact pattern that we reach a similar result as to Everett Clark's eligibility for § 31-306 C.G.S. benefits.

Therefore, we affirm Commissioner Engel's Finding.

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