CASE NO. 6129 CRB-8-16-9 : COMPENSATION REVIEW BOARD
CLAIM NOS. 100198128, 100200110, 100198414

THOMAS PEDERZOLI, JR. (DECEASED) : WORKERS' COMPENSATION COMMISSION
MARY ELLEN PEDERZOLI
DEPENDENT-WIDOW
CLAIMANT-APPELLANT

v. : JULY 18, 2017

UNITED TECHNOLOGIES
PRATT & WHITNEY
EMPLOYER
SELF-INSURED

and

KELLY SERVICES
EMPLOYER

and

CHARTIS/AIG CLAIMS, INC., CHUBB/ESIS, and
LIBERTY MUTUAL INSURANCE
ADMINISTRATORS
INSURERS
RESPONDENTS-APPELLEES

APPEARANCES: The claimant was represented by Melissa Riley, Esq., Embry and Neusner, P.O. Box 1409, 118 Poquonnock Road, Groton, CT 06340-1409.

The respondents, UTC/Pratt & Whitney and AIG Claims, Inc., and ESIS Claims, were represented by Zachary M. Delaney, Esq., Pomeranz, Drayton & Stabnick, L.L.C., 95 Glastonbury Boulevard, Glastonbury, CT 06033-4412.

The respondents, Pratt & Whitney and UTC and Liberty Mutual Insurance, were represented by Marian Yun, Esq.,

Law Offices of Meehan, Turret & Rosenbaum, 108 Leigus Road, First Floor, Wallingford, CT 06492.

This Petition for Review from the August 29, 2016 Finding and Dismissal by Peter C. Mlynarczyk, the Commissioner acting for the Eighth District, was heard on February 17, 2017 before a Compensation Review Board panel consisting of Commission Chairman John A. Mastropietro and Commissioners Christine L. Engel and Daniel E. Dilzer.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has petitioned for review from the August 29, 2016 Finding and Dismissal by Peter C. Mlynarczyk, the Commissioner acting for the Eighth District. We find error and accordingly remand this matter for additional hearings consistent with this Opinion.[1]

The trial commissioner identified the following issues for determination: 1) compensability of the claimant's decedent's mesothelioma; 2) compensation rate; 3) medical treatment; 4) entitlement to temporary total disability benefits; 5) entitlement to permanent partial disability benefits; 6) dependent widow's entitlement to survivor benefits and funeral expenses; and, 7) apportionment. The commissioner made the following factual findings which are pertinent to our analysis of this appeal. In a deposition taken on December 22, 2014, the claimant's decedent ("decedent") testified that he worked at Pratt & Whitney ("Pratt") for forty (40) years in many different areas where asbestos removal occurred at some point. He began his employment with Pratt, which was his first full-time job after graduating from high school, on February 26, 1968,

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

and worked there for eleven (11) months, at which time he was called to active duty in the U.S. Navy and assigned to the Seabees. He was discharged on December 31, 1970, and in January 1971, he returned to his former job in the accounts payable department at Pratt.

On April 1, 1971, the decedent began working in the research center in Office Building A ("OBA") located at 400 Main Street in East Hartford. His responsibilities there primarily consisted of office duties, and although he was required to bring mail to Office Building B ("OBB"), he did not go into any of the shops or onto the factory floor. However, he did have to go through the test cells at the research center and walk from the financial area to information systems, which was on the other side of the factory. In 1977, he returned to OBA and worked in contracts for approximately fifteen (15) or sixteen (16) months; during this time, he was responsible for passing out paychecks, which required that he spend half a day each week on the shop floor. He then received another promotion and began working in the War Building, which was attached to OBA until it was torn down. While employed at the War Building, the decedent worked on material cost analysis, which required him to spend time on the manufacturing floor because he was responsible for going into the machine shop to inventory gold paste.

From 1978 to 1980, the decedent spent a minimum of one day a week on the shop floor. In 1980, he was asked to take a job in overhead systems and worked as a financial analyst from 1980 to 1982 in OBB. The decedent testified that while he was employed at OBB during this time period, asbestos removal was occurring and, because of all the

renovations, his office was a converted conference room. In addition, plastic wrap had been hung to prevent material from falling onto the ground and signs were posted everywhere. The decedent indicated that he was not required to wear a mask, no masks were supplied, and no air testing was conducted.

In July 1983, the decedent was given the job of financial manager for the assembly and test department and transferred to Office Building M ("OBM"). From 1983 to 1988, although his office was in OBM, the decedent was also in the test building on a daily basis. Moreover, as he was responsible for consolidating the finances for Middletown and East Hartford, he spent time on the assembly floor in both locations. Towards the end of 1988, a decision was made to consolidate the assembly and test department in Middletown, and the decedent became responsible for closing the East Hartford facility and coordinating the work to be performed on the Middletown assembly floor.

In 1993, the decedent returned to OBB, where he remained until 1995 in the role of contract auditor. He testified that he was not sure whether the asbestos removal was complete at that point. On May 15, 1995, he got a job in contracts and began working in J Building, which "was notorious for having problems," Claimant's Exhibit F, p. 30, while it was undergoing asbestos renovations. In order to get to J Building, the decedent had to go through the south administration building which had been vacated for renovations. He was also required to go onto the shop floor. When queried as to whether

he had any reason to believe that he may have been exposed to asbestos at Pratt & Whitney, the decedent responded:

> They've had so much there that I can't honestly say I wasn't exposed to it because you don't know what's up in the walls and the ceilings or at those buildings. I just pointed out ones where I saw signs and things, so I can't say. I did work there.

Id., 32.

The decedent worked in J Building through 1997. In 1998, he returned to OBG and remained there until 2000 working in contracts. OBG was completed in 1982 and is identical to OBB, which was completed in 1968 and which had many asbestos issues. From 2000 to 2003, he worked in OBE on spare parts sales, which required him to travel frequently to Europe. During this time, he visited the assembly floors of Iberia Airlines in Spain. In 2003, he retired for the first time and, in 2004, was asked to return to work in finance as a consultant. From 2004 to 2006, he worked in OBG as a part-time employee for Kelly Services. From 2006 to 2007, he returned to the Middletown plant, and his three-year contract with Kelly Services expired. When asked whether he believed he was exposed to asbestos while working at Pratt for Kelly Services, he replied, "I cannot say no." Id., 37. He left Pratt for six months, and then returned as a "blue badge," which is a regular Pratt & Whitney part-time employee. During the latter part of 2007 to 2008, he worked at OBE.

The decedent was in the U.S. Navy for two years of active duty. He was stationed on land, not on ship, as part of a mobile construction battalion that built bridges and handled building materials for roads and pipes. He lodged a claim with the Veterans

Administration because he believes he was exposed to asbestos as well as Agent Orange during his two eight-month tours in Vietnam. In 1988, he took a cleaning job at the condominium complex where he resided and also did a one-day floor job at a home in Enfield. He does not know if the floor had asbestos. In addition, in 1966, he worked at a foundry for one or two years, and does not know if he was exposed to asbestos at the foundry.

The decedent indicated that during the time period from 1968 to 2008, he never directly handled asbestos or worked on any pipes or gaskets. He never saw asbestos in the air, although it was dusty in the construction areas. He believes that OBG was built asbestos-free, but thinks he was exposed to asbestos while at OBE as "they did a ton of renovation." Id., 57. However, he did not begin working at OBE until the renovations were complete. He remembered that while construction was going on at Pratt, there were signs with red emblems but he couldn't remember whether the signs said "asbestos." There was also a lot of yellow tape blocking people off in addition to plastic sheeting hung from ceiling to floor. He never went into the construction areas and the workers who did wore protective clothing and respirators. He testified that OBB was known to be "loaded with asbestos" [and] "[i]t took them years to rectify that." Id., 68-69. He testified that he worked in multiple areas of OBB which were very close to the areas where construction was occurring.

The decedent was diagnosed with mesothelioma on October 6, 2014 based on the results of a biopsy and pathology analysis. He ultimately succumbed to the effects of

mesothelioma on May 7, 2015. He and his wife were married on May 6, 1995 and remained married through the date of the decedent's death.

David Smith, a co-worker of the decedent, testified by deposition. He indicated that he started working at Pratt's Middletown plant in 1972 and moved to the East Hartford facility in 1976, where he met the decedent when they both worked in the finance department at the War Building. On an annual basis, the finance department was responsible for conducting an audit of the physical inventory, which usually took three days (Friday, Saturday and Sunday). Both he and the decedent would conduct the audits. Once a week, the decedent was also responsible for passing out paychecks and would have to physically go out on the shop floor at the start of the shift and pass out twenty to forty checks. It would generally take him thirty (30) to sixty (60) minutes per shift. The decedent also supported assembly and test, so he had additional opportunities to go out on the shop floor where there was not much ventilation. When asked if he believed he and the decedent were exposed to asbestos while on the shop floor, Smith replied:

> We very well could have been, sure…. Well, just by the fact that asbestos was being used at that time to insulate. You know, the facility was being heated by steam and they had various steam pipes around the facility itself, which at that time, I believe, was insulated with asbestos, so just from that very nature, we would have been exposed to that. Again, some of the processes that they may have been using may have required some type of asbestos, so we could have been exposed from that perspective as well. So yeah, I believe it very well possibly could have happened.

Claimant's Exhibit R, p. 15.

Smith also testified that the War Building was dusty and OBB had a known asbestos issue. Abatement was performed sometime in the early 1980s, and signs were posted and areas blocked off. In OBB, steam pipes and floor and ceiling tiles were abated. He didn't recall seeing any asbestos particles in the air. From the 1990s to the 2000s, Pratt was very proactive in asbestos abatement, which occurred in areas in which he and the decedent worked. Smith indicated that when he was near the abatement areas, he could not avoid exposure to some of the dust.

Gary Kingston, another former co-worker of the decedent, testified by deposition on September 17, 2015. He indicated that he began working at Pratt in the spring of 1969, left for a while and returned in 1971, and then remained at Pratt until he retired in 2003. He recalled that the decedent had worked in OBG and OBB. Kingston stated that he went onto the production floor at OBB less than ten percent (10%) of the time, and although there was a great deal of exposed piping on the production floor, he did not notice any white particles in the air or poor air quality. He also testified that the shop floor had hangar doors that were kept open in the spring, summer, and fall so that air blew in and it was like being outdoors. Kingston stated that although he has been diagnosed with asbestosis, he has not brought a claim against Pratt but, rather, filed a claim against the U.S. Navy. He testified that while he was in the Navy, he was stationed at Mare Island Naval Shipyard and was responsible for fire watch during welding operations. He was required to move around a big asbestos blanket and every time he moved it, he could see "floaties" which he inhaled. Respondents' Exhibit 1, p. 16.

Based on the foregoing, the trial commissioner concluded that although the claimant had "provided ample evidence that asbestos was present in various areas of the Pratt & Whitney East Hartford plant," Conclusion, ¶ A, the claimant "failed to provide persuasive evidence that [the decedent] was injuriously exposed to asbestos while working there." Id. The trier dismissed the claim.

The claimant filed an extensive Motion to Correct which was denied in its entirety, and this appeal followed. On appeal, the claimant contends that the trier utilized an erroneous standard when he concluded that the claimant had failed to meet her burden of proof that the decedent was "injuriously exposed" to asbestos while employed at Pratt. The claimant also argues that the facts found by the trial commissioner establish that the decedent was exposed to asbestos at Pratt and, as such, the trier's conclusions are inconsistent with his factual findings. Finally, the claimant claims as error the trier's failure to grant her Motion to Correct.

The standard of deference we are obliged to apply to a trial commissioner's findings and legal conclusions is well-settled. 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, 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). "This presumption, however, can be challenged by the argument that the trial commissioner did not properly apply the law or has reached a finding of fact inconsistent with the evidence presented at the formal hearing." Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

We begin with the claimant's contention that the trial commissioner utilized an incorrect standard of proof in concluding that the decedent did not provide persuasive evidence that he was "injuriously exposed" to asbestos at Pratt. The claimant points out that "[t]he term 'injuriously exposed' is not the legal standard of causation in workers' compensation cases but a means to assist the commissioner in assigning liability to the last putative employer" when resolving an apportionment claim pursuant to § 31-299b C.G.S.[2] Appellant's Brief, p. 7. See Joslyn v. U.S. Silica Co., 16 Conn. Workers' Comp. Rev. Op. 247, 3281 CRB-8-96-2 (June 24, 1997); Konovaluk v. Graphite Die Mold, Inc., 4437 CRB-3-01-9 (August 8, 2002). As such, "[t]he concerns raised by Section 31-299b are irrelevant to Mr. Pederzoli's claims and employment," id., and the trial commissioner's conclusions resulted from an incorrect application of the law. We agree.

It is well-settled that the "traditional concepts of proximate cause furnish the appropriate analysis for determining causation in workers' compensation cases," Dixon v.

[2] Section 31-299b C.G.S. (Rev. to 1985) 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…."

United Illuminating Co., 57 Conn. App. 51, 60 (2000), and "the test for determining whether particular conduct is a 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 the requisite 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), *quoting* Daubert v. Naugatuck, 267 Conn. 583, 589 (2004). 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 explained that:

> [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.

However, it should be noted that in Sapko, supra, our Supreme Court revisited the language discussing the substantial contributing factor test in Birnie, stating that a full reading of the passage in question should make it "evident that we did not intend to lower the threshold beyond that which previously had existed." Sapko, supra, at 391. The court then went on to observe 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., 391-92.

In the present matter, the trial commissioner dismissed the claim on the basis that the claimant failed to provide persuasive evidence that the decedent was "injuriously exposed" to asbestos while employed at Pratt & Whitney. Conclusion, ¶ A. In light of our inability to ascertain whether the "injurious exposure" standard can be reconciled with the foregoing precepts relative to the substantial contributing factor standard, we are unable to affirm the decision of the trial commissioner.

In addition, we note that the commissioner dismissed the claim despite concluding that the claimant had provided "ample evidence" regarding the presence of asbestos at Pratt. Our review of the factual findings in this matter reveals that the claimant adduced

a great deal of testimony from both the decedent and the decedent's co-worker, David Smith, regarding their long employment histories with Pratt and the extent of the asbestos abatement operations which occurred in the different facilities where they worked during their tenure with Pratt.

It is of course axiomatic that "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). We also concede that the claimant's testimony regarding his exposure to asbestos at Pratt was more equivocal than his testimony regarding his exposure while in the Navy. See, e.g., Findings, ¶ 1.u. and ¶ 1.bb. *as contrasted with* Findings, ¶ 1.ff. Nevertheless, in light of the apparent inconsistency between the trier's evidentiary findings and his ultimate conclusion, we are unable to affirm the decision. This is particularly so given that the evidentiary findings are silent regarding two medical opinions which appear to attribute the claimant's mesothelioma to his employment at Pratt: the June 18, 2015 report of Jerrold L. Abraham, M.D., which references the claimant's description of "a moderately heavy exposure to asbestos during the abatement process" and concludes "to a reasonable degree of medical certainty that Mr. Pederzoli's asbestos exposure was the cause of his malignant mesothelioma and will very likely be the cause of his death," Claimant's Exhibit D, and the January 26, 2015 report of Daniele J. Montgomery, M.D., which also referenced the claimant's "significant exposure to asbestos in his work for Pratt and Whitney from 1968 until 2009" and concluded that "long term exposure to

asbestos is a substantial contributing factor in the development of mesothelioma, and is a recognized risk factor."[3] Claimant's Exhibit G.

In light of the foregoing analysis, we remand this matter for additional proceedings on the issue of whether the claimant's exposure to asbestos while employed at Pratt was a substantial contributing factor in the development of his mesothelioma. "We have held that, where the findings of a trial commissioner appear to be inherently inconsistent amongst themselves, or with the trier's conclusions, the correct approach is to remand the matter for clarification." Ortiz v. Highland Sanitation, 4439 CRB-4-01-9 (November 12, 2002).

Finally, the claimant contends that the trial commissioner's denial of her Motion to Correct constituted error. Insofar as the trier's denial of the proposed corrections was inconsistent with the board's analysis as presented herein, the denial constituted error.

There is error; the Finding and Dismissal is accordingly remanded for additional proceedings consistent with this Opinion.

Commissioners Christine L. Engel and Daniel E. Dilzer concur.

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[3] It should be noted that Dr. Abraham did not examine the claimant but, rather, reviewed pathology slides and medical reports.