CASE NO. 6237 CRB-8-18-1 CLAIM NO. 200175830	: COMPENSATION REVIEW BOARD
JAMES S. ROCK (DECEASED) ISABEL ROCK RUSSACK, SUCCESSOR ADMINISTRATOR CLAIMANT-APPELLANT	: WORKERS' COMPENSATION COMMISSION
v.	: OCTOBER 17, 2019
UNIVERSITY OF CONNECTICUT EMPLOYER SELF-INSURED RESPONDENT-APPELLEE	
and	
GALLAGHER-BASSETT SERVICES, INC. THIRD-PARTY ADMINISTRATOR	

APPEARANCES:

The claimant was represented by Amity L. Ascott, Esq., Embry and Neusner, 118 Poquonnock Road, P.O. Box 1409, Groton, CT 06340.

The respondent was represented by Lawrence G. Widem, Esq., Assistant Attorney General, Office of the Attorney General, 55 Elm Street, P.O. Box 120, Hartford, CT 06141-0120.

This Petition for Review from the November 22, 2017 Finding and Dismissal by David W. Schoolcraft, the Commissioner acting for the Eighth District, was heard on December 21, 2018, before a Compensation Review Board panel consisting of Commission Chairman Stephen M. Morelli and Commissioners Scott A. Barton and Jodi Murray Gregg.[1]

[1] We note that a motion to stay and a motion for extension of time were granted during the pendency of this matter.

OPINION

STEPHEN M. MORELLI, CHAIRMAN. The claimant has petitioned for review from the November 22, 2017 Finding and Dismissal (finding) by David W. Schoolcraft, the Commissioner acting for the Eighth District (commissioner). We find no error and accordingly affirm the decision of the commissioner.

In his finding, the commissioner identified as the threshold issue for determination the inquiry into whether the claimant, the administrator of the estate of the deceased worker, could pursue a claim for benefits on behalf of the decedent in light of prior litigation and a ruling by the Supreme Court dismissing the appeal.[2] Provided that additional litigation was not barred, the commissioner identified as the second issue for determination the question of whether the claimant had proved that the decedent sustained a compensable occupational disease that arose out of and in the course of his employment with the respondent employer.

Following a formal hearing held on June 20, 2017, the commissioner made the following findings relative to the issue of jurisdiction which are pertinent to our review. The decedent was employed by the respondent university from April 1, 1957, until May 31, 1992. He retired as a research associate and for many years had been an agricultural agent who specialized in poultry inspections. On June 27, 2010, the decedent died of malignant mesothelioma. At the time of his death, he was unmarried and had no surviving dependents as contemplated by General Statutes § 31-306.[3]

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[2] See Estate of Rock v. University of Connecticut, 323 Conn. 26 (2016).

[3] General Statutes § 31-306 (a) states in relevant part: "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…."

On November 29, 2010, the Court of Probate for the District of Norwich issued a fiduciary's probate certificate indicating that Eleanor A. Turek, a vice president with Wells Fargo Bank, had been appointed the executor of the decedent's estate. Turek retained the law firm of Embry and Neusner to pursue workers' compensation benefits in the matter. On October 19, 2011, counsel for the claimant filed a notice of claim which identified the injured worker as "James S. Rock, dec'd.," cited a date of injury on or about November 15, 2009, and identified mesothelioma as the injury/illness, allegedly caused by "exposure to asbestos, harmful lung irritants and/or other carcinogens," at various locations around the state. Administrative Notice Exhibit 14. At the time that the notice of claim was filed, counsel for the claimant also filed a notice of appearance identifying the claimant as "James S. Rock, dec'd."

On June 10, 2013, Isabel Rock Russack (Russack) was appointed as the "Successor Administrator, d.b.n., c.t.a." of the decedent's estate. The firm of Embry and Neusner was again retained to pursue workers' compensation benefits in the matter, and on July 22, 2013, counsel for the claimant filed an amended notice of claim. This notice identified the injured worker as "James Stoll Rock (dec'd)," and was substantively the same as the notice filed in 2011 except that the address shown for the injured worker was the same address as that listed on the probate certificate for Russack. Administrative Notice Exhibit 1.

On September 23, 2013, a formal hearing was held and exhibits were entered into evidence.[4] However, before the case could be decided on the merits, the respondent moved for dismissal on jurisdictional grounds, and oral argument was held on that issue.

[4] At the hearing held on June 20, 2017, the parties stipulated to the admission of the exhibits admitted at the formal hearings held in 2013, and those exhibits were made full exhibits for the June 20, 2017 hearing. Additional exhibits were entered into evidence at the June 20, 2017 hearing.

On October 23, 2013, the commissioner granted the respondent's motion to dismiss. He dismissed the claim for permanent partial disability benefits on the basis that an estate does not have standing to pursue such benefits; the claim for temporary total benefits was also dismissed because the claim had not been filed prior to the decedent's death. The commissioner did not reach the issue of whether the decedent had sustained an occupational disease. Motions to substitute Russack for the "Estate of James Rock" and a request for change of caption were also filed, both of which were denied on November 25, 2013.

The claimant appealed these decisions to the Compensation Review Board; the case was captioned "James Rock (Deceased) v. State of Connecticut University of Connecticut." On October 16, 2014, the board issued its Opinion holding that the estate, as the legal representative of the deceased worker, had standing to pursue certain claims for compensation but not temporary total or permanent partial disability benefits.[5] The board remanded the case to the commissioner to examine the claimant's eligibility for reimbursement for the decedent's medical and burial expenses.[6]

Before the matter could be heard by a commissioner, the claimant again appealed, and the appeal was transferred to our Supreme Court, which captioned the case as "Estate of James Rock v. University of Connecticut." In its decision, the court observed that "[a]n estate is not a legal entity … [and] can neither sue nor be sued." (Citation omitted, internal quotation marks omitted.) Estate of Rock v. University of Connecticut, 323

[5] See Rock v. State/University of Connecticut, 5891 CRB-2-13-10 (October 16, 2014), *appeal transferred*, S.C. 19465 (April 1, 2015), *rev'd in part*, 323 Conn. 26 (2016).

[6] General Statutes § 31-306 (a) (1) provides that: "Four thousand dollars shall be paid for burial expenses in any case in which the employee died on or after October 1, 1988. If there is no one wholly or partially dependent upon the deceased employee, the burial expenses of four thousand dollars shall be paid to the person who assumes the responsibility of paying the funeral expenses."

Conn. 26, 32 (2016) *quoting* Isaac v. Mount Sinai Hospital, 3 Conn. App. 598, 600, *cert. denied*, 196 Conn. 807 (1985). As such, the court held that the "plaintiff does not have standing to pursue any type of workers' compensation benefits." Id., 33. On September 12, 2016, this board issued an order vacating its conclusion that an estate can act as the legal representative of a deceased employee but indicating that it stood by its opinion "in all other respects." Findings, ¶ 13, *quoting* September 12, 2016 Order. The board declined a request by the claimant to clarify the meaning of its order.

On October 17, 2016, the claimant filed a motion to amend the case caption. The claimant filed a notice of substitution dated January 10, 2017, indicating that Russack was substituting herself as the legal representative of the estate of James Rock. The claimant also filed a request for a formal hearing dated January 10, 2017, seeking a ruling on whether the legal representative of the decedent's estate had standing to pursue benefits in light of the Supreme Court's decision and whether the decedent had sustained an occupational disease. On April 5, 2017, the respondent filed a memorandum of law in opposition to the claimant's request for a formal hearing. On June 20, 2017, the firm of Embry and Neusner filed a notice of appearance in the matter indicating that the firm was representing "Isabel Rock Russack, legal representative of the Estate of James Rock" and "Isabel Rock Russack, adult child and legal representative of James Rock Estate." Administrative Notice Exhibit 12. On the same date, the claimant also filed another motion to substitute party claimant.[7]

In addition to the findings relative to jurisdiction, the commissioner also made the following findings relative to compensability. In May 2008, the decedent was diagnosed

[7] The transcript for the June 20, 2017 formal hearing indicates that the Notification of Appearance and Motion to Substitute Party Claimant were submitted at the formal hearing of that date. See Transcript, pp. 7-8.

with non-Hodgkins lymphoma and came under the care of Jie Yang, M.D. In March 2009, Yang referred the decedent to a thoracic surgeon, and the decedent was hospitalized from March 10, 2009, to March 18, 2009, for treatment of a large pleural effusion and partial collapse of his left lung. A pleural biopsy taken at this time indicated that the decedent was suffering from chronic inflammation and mesothelial hyperplasia. The decedent underwent a PET scan in June 2009 and, following some additional studies, was informed on August 10, 2009, that he had mesothelioma. The decedent underwent chemotherapy in the fall and winter of 2009 and 2010.

In March 2010, the decedent began treating with Bryan Chang, M.D., prior to commencing radiation therapy during March and April of 2010. The "History & Physical Examination" portion of the March 8, 2010 report from the decedent's initial consultation with Chang states the following:

> He previously worked as an agricultural agent for the University of Connecticut, evaluating and repairing chicken houses. He states [that] many of these chicken houses had exposed insulation, and [cites] this as his only potential source of asbestos exposure.

Claimant's Exhibit E, p. 1.

The decedent underwent radiation therapy during March and April 2010, following which it was determined that he was not a candidate for surgery. On April 27, 2010, he was admitted to Backus Hospital complaining of abdominal pain and remained hospitalized until May 20, 2010. He was again hospitalized on June 7, 2010, and died in a nursing facility on June 27, 2010.

The decedent never testified regarding his employment or potential exposure to asbestos. The evidentiary record contains neither affidavits nor written statements by the decedent regarding potential exposure to asbestos during the course of his employment.

The evidentiary record also does not contain any testimony from the decedent's coworkers or anyone else who might be familiar with the chicken coops visited by the decedent during his employment with the respondent. No direct evidence of asbestos in any particular chicken coop inspected by the decedent has been entered into the record.

None of the physicians who treated the decedent have offered an opinion that his mesothelioma was connected to his employment with the respondent employer. In 2013, the claimant requested a records review from M. Saud Anwar, M.D., who issued a report on March 28, 2013. In that report, Anwar stated:

> After having extensive review of the patient's record and seeing the documentation of his career at University of Connecticut and also understanding his job responsibility and multiple years of exposure and being close to and exposed to insulation in and around chicken coops, it is my expert medical opinion that the patient's exposure to asbestos while he was employed at the University of Connecticut agricultural extension program is more likely than not the cause of [the decedent's] … mesothelioma and his death.[8]

Claimant's Exhibit A, p. 2.

At his deposition, Anwar testified that the only known cause of mesothelioma – a disease that is universally fatal – is inhalation of airborne asbestos fibers. He "confirmed his opinion that [the decedent's] cause of death was mesothelioma and that this was necessarily caused by exposure to asbestos." Findings, ¶ 32. Anwar described the basis for his opinion regarding the decedent's employment exposure as follows: "The patient had felt that his work for multiple years when he was working around insulated areas of chicken coops in Connecticut … was the source of his exposure to asbestos." Claimant's Exhibit A, p. 1. Anwar derived this history from Chang's March 8, 2010 report, which

[8] In this report, Anwar did not reference any studies which demonstrated a link between employment in or around chicken coops and the disease of mesothelioma.

was "the only medical record in the five binders of material sent for his review ("15 pounds" of records) that made any mention of where Mr. Rock might have been exposed to asbestos." Findings, ¶ 33.

Anwar further testified that it was unnecessary for any of the decedent's doctors to have opined that his mesothelioma was due to asbestos exposure, given that asbestos exposure is the only cause of mesothelioma. In addition, although none of the decedent's treating physicians had opined that the exposure was related to his work for the university, Anwar suggested that this was likewise unnecessary, given that the physician's "job was to treat the patient for his asbestos-related disease, not to identify the place where he was exposed." Findings, ¶ 34. See also Claimant's Exhibit J, pp. 38, 41. Anwar conceded that for many years, asbestos was also used in homes, appliances, and other non-occupational settings.

The commissioner reached the following conclusions with regard to jurisdiction. He noted that although our Supreme Court had ruled that an estate cannot bring a compensation claim, neither the initial notice of claim nor the notice of appearance filed by the claimant on October 19, 2011, "contained any suggestion that Embry and Neusner was representing the "estate" of Mr. Rock." Conclusion, ¶ A. He also noted that the Workers' Compensation Commission (commission) did not caption the case so as to indicate that it involved the decedent's estate. The commissioner further found that Embry and Neusner had been retained by the duly-appointed executor of the estate in order to determine what, if any, workers' compensation benefits the decedent might have been entitled to at the time of his death. He observed that although any benefits due and

owing to the decedent would of necessity be payable to his estate, "the 'estate' was never the representative of Mr. Rock, nor was it ever the claimant." Conclusion, ¶ B.

Noting that "[a]ll benefits payable under the Connecticut Workers' Compensation Act (regardless of to whom they may be payable), arise from the contractual relationship between the worker and the employer at the time of injury," Conclusion, ¶ C, the commissioner observed that completing the notice of claim with "the name of the injured worker is not only an administrative necessity for this commission, it provides *the* critical piece of information that must be given to the employer so that it may meet its obligation to promptly investigate claims." (Emphasis in the original.) Id. The commissioner determined that the form 30C in this matter correctly stated the name of the claimant and also provided the necessary additional information that the claimant was deceased. Thus, as long as counsel filing the notice of claim "was properly retained by the legal representative of the injured (subsequently deceased) worker, the claim is properly before the commission…. Captioning the case in the name of the legal representative would serve no purpose and would only create confusion." Conclusion, ¶ E.

In addition, the commissioner concluded that although the parties had an obligation to notify the commission regarding any change in the identity of the representative pursuing the workers' compensation claim, it was not necessary to request the commission's permission to substitute a party and "the caption of the case is not subject to change so long as it properly identifies the injured worker." Conclusion, ¶ F. As such, the commissioner concluded that because the claim had been filed, and continued to be pursued, by the legal representative of the decedent, the decision of our

Supreme Court did not preclude the administrator's right to pursue the claim to a formal hearing on the merits. Conclusion, ¶ G.

With regard to the issue of compensability, the commissioner concluded that the decedent had been an employee as contemplated by the Workers' Compensation Act, and the respondent university was his employer. The commissioner found persuasive Anwar's opinion that the disease of mesothelioma can only be caused by inhalation of airborne asbestos fibers and was satisfied that the decedent had been exposed to such fibers at some point during his life, the inhalation of which ultimately caused the mesothelioma. However, the commissioner also noted that the connection between the decedent's mesothelioma and his employment with the respondent university "must be established by competent medical opinion evidence," Conclusion, ¶ J, and the only medical opinion in evidence which supported causation was Anwar's opinion.

The commissioner found that the doctor's causation opinion was predicated on the assumption that the decedent had been exposed to airborne asbestos fibers while visiting chicken coops as part of his employment for the university, which assumption "rests entirely on comments attributed to [the decedent] in Dr. Chang's March 8, 2010 office note, the only direct evidence of potential exposure in this case."[9] Conclusion, ¶ K. The commissioner pointed out that the comments attributed to the decedent in Chang's report merely suggested that some of the chicken coops visited by the decedent contained exposed insulation, and those visits were the only occasions the decedent could remember when he might have been exposed to asbestos. However, there was "nothing

[9] We note that in Conclusion, ¶ K, of the November 22, 2017 Finding and Dismissal, the commissioner indicated that Chang's report was dated March 8, 2009. We deem this harmless scrivener's error. See D'Amico v. Dept. of Correction, 73 Conn. App. 718, 729 (2002), *cert. denied*, 262 Conn. 933 (2003).

in [the decedent's] statement that can be logically interpreted as an assertion that the material referred to was asbestos." Conclusion, ¶ L.

The commissioner also remarked that:

> Even if the statement referred to in Dr. Chang's report had been an affirmative representation by Mr. Rock that there was asbestos insulation in some of the chicken coops he visited, I would not consider that meaningful support for Dr. Anwar's opinion. Indicia of reliability can be attached to a patient's hearsay statement to a medical treatment record if the statement was material to the treatment of the patient and was made for that purpose; such statements are considered reliable because it is presumed a patient will tell the truth to his physician when his health is on the line.

Conclusion, ¶ M.

Thus, although the provisions of General Statutes § 31-298 do afford a commissioner the "leeway to consider hearsay evidence," id., the commissioner in the present matter was not persuaded that the decedent's statement to Chang on March 8, 2010, provided an adequate foundation for Anwar's opinion.[10]

Instead, the commissioner determined that:

> In the absence of some epidemiological studies suggesting a connection between work in chicken coops and mesothelioma (or even other asbestos-related diseases), Dr. Anwar's vague testimony that he has heard of other cases where poultry workers had mesothelioma provides no meaningful evidence to support finding a causal connection in this case. Similarly, his anecdotal examples of asbestos abatement in chicken coops in other states provide no evidence of such exposure in this case. Any inference that the chicken coops Mr. Rock visited during his employment with the University of Connecticut contained asbestos products

[10] General Statutes § 31-298 states in relevant part: "In all cases and hearings under the provisions of this chapter, the commissioner shall proceed, so far as possible, in accordance with the rules of equity. He shall not be bound by the ordinary common law or statutory rules of evidence or procedure, but shall make inquiry, through oral testimony, deposition testimony or written and printed records, in a manner that is best calculated to ascertain the substantial rights of the parties and carry out the provisions and intent of this chapter…."

> that might be drawn from the sources cited by Dr. Anwar would be entirely speculative.[11]

Conclusion, ¶ N.

Given that the commissioner found "no competent evidence" that the decedent had been exposed to airborne asbestos fibers during his employment with the respondent university, the commissioner denied the claim for compensation. Conclusion, ¶ O.

The respondent filed a motion for articulation, upon which the commissioner took no action, and a motion for reconsideration, which was denied.[12] The respondent and the claimant both filed motions to correct; the respondent's motion was denied in its entirety, and the claimant's motion was denied save for the addition of information to the findings relative to the marketing and distribution of the asbestos flex boards used in chicken coop construction.[13] The respondent also filed a motion to dismiss the appeal, arguing that the matter was time-barred because the claimant's motion to correct improperly challenged the commissioner's conclusions of law rather than his factual findings. The respondent further contended that in light of the Supreme Court's prior ruling in this matter, the doctrines of collateral estoppel and/or res judicata barred the claimant from continuing to litigate the appeal.[14]

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[11] In light of the fact that the commissioner's findings clearly demonstrate his understanding that his assessment of the evidence was not constrained by the "hearsay rule," we find no merit in the claimant's contention that the commissioner deemed the decedent's comments to Chang as "unreliable" simply because they arguably constituted hearsay.

[12] The respondent has not appealed the commissioner's decisions relative to these motions.

[13] See December 14, 2017 Ruling on Claimant's Motion to Correct.

[14] "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.... To assert successfully the doctrine of issue preclusion, therefore, a party must establish that the issue sought to be foreclosed actually was litigated and determined in the prior action between the parties or their privies, and that the determination was essential to the decision in the prior case…. An issue is *actually litigated* if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined…. An issue is *necessarily determined* if, in the absence of a determination of the issue, the judgment could not have been validly rendered…. Therefore, a party may assert the doctrine of collateral estoppel successfully when three requirements are met: [1] [t]he issue must have been fully and fairly

We begin our analysis with the respondent's motion to dismiss. Our review of the record indicates that the commissioner in the present matter issued his decision on November 22, 2017. The claimant's motion to correct dated December 6, 2017, was ruled upon by the commissioner on December 14, 2017. The claimant's petition for review was then filed on January 2, 2018, within the twenty-day appeal period set forth in Administrative Regulations § 31-301-1:

> An appeal from an award, a finding and award, or a decision of the commissioner upon a motion shall be made to the Compensation Review Board by filing in the office of the commissioner from which such award or such decision on a motion originated an appeal petition and five copies thereof. Such appeal shall be filed within twenty days after the entry of such award or decision and shall be in substantial conformity with the forms approved by said board.[15]

The respondent contends that in Stec v. Raymark Industries, Inc., 299 Conn. 346 (2010), our Supreme Court held that "the only means of obtaining appellate review of the trial commissioner's … findings and conclusions was by way of a timely appeal from the trial commissioner's finding and award." January 23, 2018 Respondent-Employer's Reply to the Claimant's Objection to the Respondents' Motion to Dismiss Appeal, p. 2. Our review of Stec indicates that the court did indeed conclude that the failure of the Second Injury Fund to file its appeal from a commissioner's General Statues § 31-355 (b)

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litigated in the first action, [2] it must have been actually decided, and [3] the decision must have been necessary to the judgment." (Citations omitted; emphasis in the original; internal quotation marks omitted.) Wiacek Farms, LLC v. Shelton, 132 Conn. App. 163, 168–69 (2011), *cert. denied*, 303 Conn. 918 (2012). "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.... If the same cause of action is again sued on, the judgment is a bar with respect to any claims relating to the cause of action which were actually made or *which might have been made.*" (Emphasis in the original; internal quotation marks omitted.) New England Estates, LLC v. Branford, 294 Conn. 817, 842 (2010), *quoting* Powell v. Infinity Ins. Co., 282 Conn. 594, 600 (2007).

[15] The claimant indicates that her petition for review was filed on December 26, 2017; however, commission records indicate it was filed on January 2, 2018.

order within the twenty-day period articulated in § 31-301 (a) served to deprive this board of subject matter jurisdiction, because the twenty-day appeal period began to run when the commissioner issued the underlying finding and award.[16] However, apart from a reference to § 31-301-1 in a footnote, Stec is silent regarding the operation of the regulation, which allows, inter alia, for an appeal from "a decision of the commissioner upon a motion . . . ." Id., 354, n.13.

Having reviewed the claimant's motion to correct, we concede that several of the proposed corrections do appear to challenge the commissioner's conclusions of law, particularly with regard to the weight of the evidence. However, a number of the proposed corrections also involve the incorporation of additional information from the record into the factual findings. We are therefore not persuaded that the motion to correct was so legally deficient that it failed to toll the statutory time limit for filing an appeal. Finally, for reasons discussed elsewhere in this Opinion, we are not persuaded that the Supreme Court's decision in this matter provided a reasonable basis for invoking the doctrine of collateral estoppel or res judicata.

In addition to filing a motion to dismiss, the respondent, in its brief, has challenged the standing of the estate administrator to pursue a claim for workers'

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[16] General Statutes § 31-355 (b) states in relevant part: "When an award of compensation has been made under the provisions of this chapter against an employer who failed, neglected, refused or is unable to pay any type of benefit coming due as a consequence of such award or any adjustment in compensation required by this chapter, and whose insurer failed, neglected, refused or is unable to pay the compensation, such compensation shall be paid from the Second Injury Fund. The commissioner, on a finding of failure or inability to pay compensation, shall give notice to the Treasurer of the award, directing the Treasurer to make payment from the fund…."

General Statutes § 31-301 (a) states in relevant part: "At any time within twenty days after entry of an award by the commissioner, after a decision of the commissioner upon a motion or after an order by the commissioner according to the provisions of section 31-299b, either party may appeal therefrom to the Compensation Review Board by filing in the office of the commissioner from which the award or the decision on a motion originated an appeal petition and five copies thereof…. If a party files a motion subsequent to the finding and award, order or decision, the twenty-day period for filing an appeal of an award or an order by the commissioner shall commence on the date of the decision on such motion."

compensation benefits.[17] We would have anticipated that such an argument challenging the commissioner's findings would be advanced by way of a cross-appeal, given that it is generally held that "[i]f an appellee wishes to change the judgment in any way, the party must file a cross appeal." (Internal quotation marks omitted.) East Windsor v. East Windsor Housing, Ltd., LLC, 150 Conn. App. 268, 270, n.1 (2014), *quoting* Connole v. Dabij, 140 Conn. App. 494, 496, n.5 (2013). However, it is equally axiomatic that a challenge to the commission's subject matter jurisdiction must be addressed before a decision can be rendered on the underlying merits of a claim. "Once the question of lack of jurisdiction of a court is raised, [it] must be disposed of no matter in what form it is presented." Cambodian Buddhist Society of Connecticut, Inc. v. Planning & Zoning Commission, 285 Conn. 381, 398, n.10 (2008). See also Castro v. Viera, 207 Conn. 420, 429 (1988). As such, even in the absence of a cross-appeal, we will address the respondent's arguments regarding the standing of the estate administrator to bring this claim.

As discussed previously herein, the Supreme Court, in its decision, reversed in part the prior Opinion of this board in this matter "because an estate is not a legal entity capable of advancing a claim for any form of workers' compensation benefits…." Estate of Rock, supra, 28. However, the court also observed that the notice provisions contained in General Statutes § 31-294c (a) specifically reference the ability of a "legal representative of the deceased employee" to advance a claim, and explained that "[t]he

[17] In Stec v. Raymark Industries, Inc., 299 Conn. 346 (2010), our Supreme Court explained that "'[s]tanding is the legal right to set judicial machinery in motion …[and] is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved…. Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest … has been adversely affected.'" (Internal quotation marks omitted.) Id., 373-374, *quoting* Gold v. Rowland, 296 Conn. 186, 207 (2010).

commonly accepted meaning of the term 'legal representative' is executor, administrator, or heir." Id., 31. The instant commissioner, upon review of the record, found that none of the documents filed at the initiation of this claim reflected that the claim had been brought by the decedent's estate, and although any workers' compensation benefits obtained on the decedent's behalf would be payable to his estate, the estate never represented the decedent or was identified as the claimant. In addition, the commissioner, having examined the pertinent probate documents, was also satisfied that Russack was the duly-appointed administrator of the decedent's estate. As such, the commissioner concluded that she was not precluded from prosecuting her claim by the Supreme Court's decision.

Although the respondent persists in arguing that the administrator has no standing to litigate, or re-litigate the claim, it has not brought to the attention of this board anything in the evidentiary record which would serve to refute the commissioner's findings and conclusions relative to the information actually reported in the claim initiation documents in this matter. We also note that although the commissioner in the earlier proceedings took administrative notice of the claimant's form 30C in his October 23, 2013 Ruling on Motion to Dismiss, he never made a specific factual finding that the form 30C had been filed by the decedent's estate. The Supreme Court decision in this matter was limited to its holding that an estate does not have standing to file a workers' compensation claim.[18] Our review of the factual findings in the current appeal indicates that the decedent's estate did not file the claim, and the individual who is

[18] It may be reasonably inferred that the Supreme Court's denial of the claimant's September 15, 2016 Motion for Reconsideration En Banc may have stemmed from its reluctance to render a decision on what was essentially a factual determination; i.e., the identity of the party that filed the workers' compensation claim.

prosecuting the claim possesses the statutory authority to do so.[19] We are therefore not persuaded by the respondent's arguments to the effect that continuing legal proceedings are barred by the doctrines of res judicata or collateral estoppel. "No case under this Act should be finally determined when the … court is of the opinion that, through inadvertence, or otherwise, the facts have not been sufficiently found to render a just judgment."[20] Cormican v. McMahon, 102 Conn. 234, 238 (1925).

We next turn to the merits of the appeal. The claimant contends that the commissioner erroneously concluded that the totality of the evidence was insufficient to establish that the decedent's mesothelioma arose out of and in the course of his employment. The claimant argues that the commissioner failed to properly credit both the decedent's statement to Chang regarding his exposure to asebestos in the chicken coops, and Anwar's opinion, which was based upon that statement. The claimant also contends that the commissioner applied an incorrect standard of proof in reaching his conclusions relative to causation. We find none of these claims of error persuasive.

The standard of review that this board, as an appellate tribunal, is obliged to apply to a commissioner's decision 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).

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[19] Our review of the record indicates that on occasion, claimant's counsel stated that the claim had been brought by the decedent's estate. We would simply reiterate the distinction drawn by the commissioner in this matter; to wit, although our Supreme Court held that a decedent's estate was legally prohibited from initiating a workers' compensation claim, the estate would be the recipient of any workers' compensation benefits awarded posthumously to the decedent.

[20] We also note that the provisions of General Statutes § 31-315 afford a commissioner "the same power to open and modify an award as any court of the state has to open and modify a judgment of such court," which generally contemplates situations involving accident, mistakes of fact, and fraud, but not mistakes of law. See Liano v. Bridgeport, 55 Conn. App. 75, 84 (1999).

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), *quoting* Thalheim v. Greenwich, 256 Conn. 628, 656 (2001). 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 v. People's Savings Bank, 207 Conn. 535, 540 (1988), *quoting* Del Vecchio v. Bowers, 296 U.S. 280, 287 (1935).

We begin with the claimant's contention that the decedent's statements to Chang regarding his belief that his "only" exposure to asbestos occurred while he was inspecting and repairing chicken coops was "plausible and credible, considering the prolific use of asbestos in the first half of the twentieth century." Appellant's Brief, p. 3. The claimant argues that the commissioner found that (1) the decedent had contracted and died from mesothelioma; (2) mesothelioma is caused by exposure to asbestos; and (3) the decedent told his treating physician that his exposure to asbestos occurred in the workplace. The claimant argues that although the commissioner found these facts to be true, "he incorrectly discredited certain evidence and found that the totality of the evidence was insufficient to establish that Mr. Rock's mesothelioma arose out of and in the course of his employment." Id., 5. We are not so persuaded.

"It is well settled in workers' compensation cases that the injured employee 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." Keenan

v. Union Camp Corp., 49 Conn. App. 280, 282 (1998) *citing* Murchison v. Skinner Precision Industries, Inc., 162 Conn. 142, 151 (1972). However, "'[c]ompetent evidence' does not mean any evidence at all. It means evidence on which the trier properly can rely and from which it may draw reasonable inferences." Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 451 (2001). As such, when "it is difficult to ascertain whether or not the disease arose out of the employment, it is necessary to rely on expert medical opinion." Metall v. Aluminum Co. of America, 154 Conn. 49, 52 (1966). In addition, our Appellate Court has observed that:

> The standard in Connecticut is well settled; expert opinions must be based on reasonable probabilities rather than mere speculation or conjecture if they are to be admissible in establishing causation…. To be reasonably probable, a conclusion must be more likely than not. (Internal citation omitted.)

O'Reilly v. General Dynamics Corp., 52 Conn. App. 813, 817 (1999).

As discussed previously herein, the commissioner in the present matter was presented with essentially two medical opinions which could theoretically support the claimant's contention that the decedent's exposure to asbestos occurred during his employment as a poultry inspector with the respondent employer. The first was the "History & Physical Examination" portion of Chang's March 8, 2010 report, wherein the doctor reported that the decedent had been employed as an agricultural agent for the respondent employer and the decedent believed his "only" exposure to asbestos occurred when he encountered exposed insulation while inspecting and repairing chicken coops.[21] See Claimant's Exhibit E, p. 1. The second was proffered by Anwar, who, in his report of March 28, 2013, also noted that the decedent believed the source of his exposure to

[21] Chang also noted that the decedent reported that he smoked one-half to three packs of cigarettes a day for approximately thirty years but that he quit in the 1970s. See Claimant's Exhibit E, p. 1.

asbestos was the insulation in the chicken coops. See Claimant's Exhibit A, p. 1. As noted previously herein, in that same report, Anwar went on to state that based on his review of the decedent's medical reports and the documents associated with the employment, "it is my expert medical opinion that the patient's exposure to asbestos while he was employed at the University of Connecticut agricultural extension program is more likely than not the cause of [the decedent's] … mesothelioma and his death." Id., 2.

Our review of the evidentiary record indicates that Anwar, at his deposition, also testified that "it's a known fact that insulation material that was used during that era did have asbestos, well-proven and well-known, and chicken coops also had it." Claimant's Exhibit J, p. 28. Anwar confirmed that based on his review of the decedent's tests, X-rays, and diagnostic information, along with his own training and experience, he could "state to a reasonable degree of probability" that the decedent's employment with the respondent employer was a contributing factor to the decedent's mesothelioma. Id., 31.

However, Anwar also acknowledged that asbestos was used extensively in warships, and that the decedent had been in the Marines, but he did not know if the decedent had ever been stationed on a warship. Anwar further testified that the decedent had been an agricultural agent for the University of New Hampshire from 1955 to 1957, although he did not know if the decedent was inspecting chicken coops at this time. Anwar conceded that he had never personally inspected a chicken coop, see id., 47, and that he had never consulted with an industrial hygienist or an environmental expert since becoming a doctor. Anwar also conceded that the "typical home" of the 1950s and 1960s contained asbestos in such common household items as the toasters, clothes dryers,

ovens, table mats, ceiling tiles, paint and carpeting. Id., 58. Anwar further acknowledged that asbestos is still in use today in automobile brake padding.

Having reviewed the evidence pertaining to causation submitted into the instant record, we can discern no reasonable basis for reversing the conclusions of the commissioner. We are certainly not persuaded by the claimant's contention that the commissioner utilized "an incorrect standard of proof" in arriving at his conclusions. "[I]n Connecticut traditional concepts of proximate cause constitute the rule for determining … causation [in workers' compensation cases]…. [T]he test of proximate cause is whether the [employer's] conduct is a substantial factor in bringing about the [employee's] injuries…." (Citations omitted; internal quotation marks omitted.) Sapko v. State, 305 Conn. 360, 372 (2012), *quoting* DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132, 141-42 (2009). Moreover, "[t]he question of proximate causation … belongs to the trier of fact because causation is essentially a factual issue…. It becomes a conclusion of law only when the mind of a fair and reasonable [person] could reach only one conclusion; if there is room for a reasonable disagreement the question is one to be determined by the trier as a matter of fact." (Citations omitted; internal quotation marks omitted.) Sapko, supra, 373, *quoting* Stewart v. Federated Dept. Stores, Inc., 234 Conn. 597, 611 (1995).

In addition, although the evidence clearly suggests that the decedent believed his exposure to asbestos occurred while working in chicken coops, and Anwar was similarly persuaded that the decedent's exposure had occurred in this manner, the commissioner was under no compunction to accept this narrative.[22] Ultimately, it is the trial

[22] As the respondent points out, in the "Patient Identification" portion of the June 29, 2009 initial intake report of Eastern Connecticut Hematology & Oncology Associates, Jie Yang, M.D., stated that the etiology

commissioner's responsibility "to assess the weight and credibility of medical reports and testimony." O'Reilly, supra, 818. The factual findings in this matter clearly reflect that the commissioner reviewed the evidence submitted by the claimant regarding the source of the decedent's exposure to asbestos and did not find it persuasive. Although the claimant may disagree with the commissioner's decision, absent a clear showing of error, this board is sharply constrained in its ability to challenge the factual findings.

> Essentially, the appellant seeks to have this board independently assess the evidence presented and substitute our presumably more favorable conclusions for those reached by the trial commissioner. This we will not do. This board does not engage in de novo proceedings and will not substitute our factual findings for those of the trial commissioner.

Vonella v. Rainforest Café, 4788 CRB-6-04-2 (March 16, 2005).

There is no error; the November 22, 2017 Finding and Dismissal by David W. Schoolcraft, the Commissioner acting for the Eighth District, is accordingly affirmed.

Commissioners Scott A. Barton and Jodi Murray Gregg concur in this Opinion.

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of the claimant's mesothelioma was "unclear." Claimant's Exhibit G. In addition, in her report of September 17, 2009, Yang noted under "Social History" that the decedent "[d]enies exposure to radiation or any toxins." Id.