CASE NO. 6252 CRB-8-18-3 CLAIM NOS. 200105401, 200144859 & 200184632	:	COMPENSATION REVIEW BOARD
ROBERT WOODMANSEE (decedent) ELEANOR WOODMANSEE (dependent widow of Robert Woodmansee) CLAIMANT-APPELLEE	:	WORKERS' COMPENSATION COMMISSION
v.	:	SEPTEMBER 11, 2019
ELECTRIC BOAT CORPORATION EMPLOYER SELF-INSURED and INSURANCE COMPANY OF NORTH AMERICA c/o ESIS and STANDARD FIRE INSURANCE COMPANY c/o TRAVELERS INSURERS RESPONDENTS-APPELLANTS		

APPEARANCES:

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

The respondents were represented by Lucas D. Strunk, Esq., Strunk, Dodge, Aiken, Zovas, 200 Corporate Place, Suite 100, Rocky Hill, CT 06067.

This Petition for Review from the February 23, 2018 Finding and Award by David W. Schoolcraft, the Commissioner acting for the Eighth District, was heard January 25, 2019 before a Compensation Review Board panel consisting of Commission Chairman Stephen M. Morelli and Commissioners Peter C. Mlynarczyk and Daniel E. Dilzer.[1]

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

OPINION

STEPHEN M. MORELLI, CHAIRMAN. The respondents in this matter have appealed from a Finding and Award (finding) in which Commissioner David W. Schoolcraft (commissioner) awarded the dependent spouse of a deceased shipyard worker benefits pursuant to General Statutes § 31-306. They appeal based on their position that General Statutes § 31-275 (1) (C)[2] bars an award of benefits when an injury or death is due to the use of alcohol. The commissioner determined that exposure to asbestos in the workplace was a significant factor behind the decedent's fatal colon cancer and the statute upon which respondents rely is applicable only to accidental injuries. We find the commissioner's determination was consistent with the evidence and the law and therefore we affirm the Finding and Award in this matter.

We will summarize the relevant facts herein. The decedent began working at the Electric Boat shipyard in 1969 as a pipefitter on submarines. This work was done in poorly ventilated spaces in proximity to asbestos. He later worked as a brazer which involved cutting sheets of insulating board which released asbestos fibers. He continued using asbestos board at work until 1978. He married the current claimant, Eleanor Woodmansee in 1986. The decedent filed a form 30C seeking compensation for exposure to asbestos and other lung irritants and carcinogens on February 13, 1996. An examination by pulmonologist, Robert Joseph Bundy, M.D., occurred on July 30, 1996. Bundy indicated that the claimant was suffering from nocturnal dyspnea, which raised the possibility of "asbestos-induced lung disease." Findings, ¶ 15, *quoting* Respondents' Exhibit 2, p. 2. The decedent retired from Electric Boat on October 30, 1998, and was

[2] General Statutes § 31-275 (1) (C) states: "In the case of an accidental injury, a disability or a death due to the use of alcohol or narcotic drugs shall not be construed to be a compensable injury."

not employed subsequent to that retirement. He filed a second form 30C on August 4, 2003, claiming he sustained occupational lung disease due to his workplace exposure to asbestos or other irritants. On September 8, 2003, he was examined by Niall Duhig, M.D., on referral from his attorney. Duhig noted a history of worsening dyspnea. The decedent discussed his exposure to asbestos board at work. He also indicated that he had smoked cigarettes in his twenties and that his wife still smoked. The respondents had their expert, Michael B. Teiger, M.D., examine the decedent on June 24, 2004. Teiger noted "low total lung capacity" and "a history consistent with asbestos exposure." Findings, ¶ 23, *quoting* Respondents' Exhibit 3, p. 6.

The decedent's condition deteriorated and on October 28, 2007, he was admitted to Lawrence & Memorial Hospital with weakness, shortness of breath and pain in his upper right abdominal quadrant. The history taken by the treating doctor, Carmine R. Crispino, M.D., was as follows:

> This is a 65-year-old male who has a long-time history of alcohol abuse. He drinks approximately 1 gallon of vodka per week. He has not seen a physician in 8 years. Over the past 3 weeks, he has been feeling ill and weak, and his family has noticed that he has developed total body edema. He is also mildly short of breath. He presented to the emergency department with anasarca and jaundice. He also has abdominal distention. He complains of mild right upper quadrant pain. He complains of mild shortness of breath with exertion. There is no fever or chills. He also has a left periorbital ecchymotic region and cellulitis of the left leg. His abdominal pain is 6 out of 10. He is unable to describe the pain.

Findings, ¶ 24, *quoting* Respondents' Exhibit 5, p. 34.

The decedent was admitted to the hospital at that time and the admitting physician, Anthony J. Cappola, M.D., believed that he most likely had a cirrhotic liver and liver failure secondary to his alcoholism, which had led to renal failure. The

decedent related his drinking to depression subsequent to a family tragedy twenty years earlier. He was discharged on November 7, 2007, with his renal failure largely resolved. Subsequent to his discharge, the decedent was seen by a variety of doctors for liver, prostate and urinary conditions. He had a significant bleeding problem after an effort in 2008 to treat his prostate hypertrophy. He also underwent colonoscopy examinations that revealed polyps that were felt at risk to become cancerous. In 2010, he again had abdominal pain, and a CT scan showed sigmoid diverticulosis, in addition to polyps.

On July 24, 2012, the decedent was admitted to Lawrence & Memorial Hospital for shortness of breath and anemia. Testing showed signs of congestive heart failure and a CT scan showed a blockage in his colon. A colonoscopy was performed to assess the blockage and it revealed an adenocarcinoma of his colon. Further tests revealed cancerous cells in two lymph nodes and evidence of metastatic lesions in the liver and lungs. Due to the decedent's liver condition, he was not a candidate for chemotherapy. Part of his colon was removed on July 31, 2012, and he was discharged on August 9, 2012. See Claimant's Exhibit O. He lived at home in Gales Ferry for about a year until entering a hospice facility in Branford in September 2013. On October 4, 2013, the decedent died at the age of seventy-one. The death certificate listed the immediate cause of his death as colon cancer. Other significant conditions listed as contributing to death were "cirrhosis, COPD/asbestosis." Findings, ¶ 30, *quoting* Claimant's Exhibit C. On November 13, 2013, decedent's spouse filed a form 30D seeking survivor's benefits pursuant to § 31-306, alleging that her husband's fatal disease was due to "[e]xposure to dust and fumes resulting in colon and lung cancer and death." Findings, ¶ 32.

The claimant's attorney had Martin Gregory Cherniack, M.D., perform a records review. Cherniack, after reviewing the decedent's history of occupational exposure, issued a report dated April 11, 2015, in which he ultimately opined that the colon cancer that killed the decedent was caused by the decedent's exposure to asbestos at Electric Boat. He noted the decedent's history of breathing complaints and ruled out the decedent's smoking and use of alcohol as factors. He cited various epidemiological studies linking asbestos exposure and colon cancer. After consideration of all factors, he concluded that, "Mr. Woodmansee's colon cancer can be reasonably attributed to his exposures at the Electric Boat shipyard, principally from asbestos." Findings, ¶ 36, *quoting* Claimant's Exhibit E, p. 8.

The respondents had two expert witnesses offer opinions as to the cause of the decedent's death. Milo F. Pulde, M.D., issued an opinion on August 19, 2015, which opined that while the decedent succumbed to colon cancer, asbestos exposure had no role in causing that cancer. See Claimant's Exhibit H. Michael M. Conway, M.D., issued a report on February 17, 2016, wherein he stated that it was not clear the decedent had asbestos-related lung disease but he agreed with Cherniack that there was a consensus of association between asbestos exposure and colon cancer and the decedent's colon cancer was in part secondary to asbestos exposure in the workplace. Conway determined the decedent's death was the direct result of metastatic colon cancer. See Claimant's Exhibit G. While the respondents conceded liability for survivor benefits under the Federal Longshore and Harbor Workers' Compensation Act (Claimant's Exhibit B), they continued to contest the claim for benefits filed under Chapter 568. They asked Conway to research the possible link between alcohol and colon cancer and on August 23, 2016,

he issued a report wherein he concluded that alcohol use was a factor in causing the decedent's colon cancer. See Respondents' Exhibit 8. At his March 16, 2017 deposition, Conway did not recant his prior opinion that asbestos exposure was a factor in causing the decedent's cancer but opined that alcohol as well was a significant factor. Id.

Cherniack and Pulde also offered augmented opinions as to the cause of the decedent's fatal cancer. Pulde issued a seventy-seven page report on December 27, 2016, which reiterated and expounded upon his position challenging a link between asbestos exposure and colon cancer and opined that there were studies supporting a link between alcohol use and colon cancer. See Respondents' Exhibit 6. At his May 12, 2017 deposition, Pulde opined that the actual cause of death for the decedent was end stage liver disease brought on by chronic alcohol use. He said that the decedent's colorectal cancer could be fully explained by non occupational factors such as smoking, alcohol use and diet. See Respondents' Exhibit 9. Cherniack, on the other hand, testified at a November 19, 2016 deposition that asbestos exposure had caused the decedent's cancer. See Claimant's Exhibit F. He said some studies had linked alcohol use and colon cancer, but wanted additional time to review the later studies, and issued a supplemental report on May 12, 2017. This report concluded that while recent studies had made a credible link between alcohol and colon cancer, the location of the decedent's tumor was not where alcohol related tumors were found. See Claimant's Exhibit S. On July 23, 2017, Pulde issued another report which presented a rebuttal to this conclusion. See Respondents' Exhibit 11.

Based on this record, the commissioner concluded that the decedent sustained a moderate to heavy cumulative exposure of asbestos fibers at work, smoked until his early

thirties and late in his life became a heavy user of alcohol. The alcohol consumption led to cirrhosis of the liver. In 2012, the decedent was diagnosed with terminal colon cancer and died on October 4, 2013 of that disease. As for the cause of the fatal cancer, the commissioner found smoking not to be a significant cause of the cancer, but found that the decedent's alcohol abuse and his moderate to heavy occupational asbestos exposure were significant factors in causing his fatal illness. As the decedent's employment was a significant factor in his death, the commissioner awarded the decedent's spouse funeral benefits and weekly benefits under § 31-306. The commissioner also issued a memorandum explaining his legal reasoning behind the finding and his evaluation of the evidence. He specifically rejected the respondents' argument that § 31-275 (1) (C) barred an award, determining that this statute was limited only to injuries from accidental injuries, and was inapplicable to occupational disease claims. See Commissioner's Memorandum dated February 23, 2018, p. 17.

The respondents did not file a motion to correct. While they did not contest the factual determination as to the cause of the decedent's death they contested the legal determination that when alcohol use and a workplace injury are both significant factors behind an occupational disease that benefits under Chapter 568 can be awarded due to the workplace injury. They filed a timely petition for review and reasons for appeal arguing that the commissioner misapplied § 31-275 (1) (C). The claimant has argued that the plain meaning of this statute limits its applicability to accidental injuries, and as the claim herein was for an occupational disease and she proved the decedent's workplace was a significant factor in that disease, she should prevail. We find the claimant's argument persuasive and an accurate application of the statute.

Since there has not been a challenge to the facts found herein our analysis will focus solely on whether the commissioner appropriately applied the law. 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), *quoting* Thalheim v. Greenwich, 256 Conn. 628, 656 (2001). "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).

The respondents' argument essentially rests on their belief that the commissioner reached a grammatically incorrect interpretation of the language of § 31- 275 (1) (C). As they interpret the statute, the phrase "in the case of an accidental injury, a disability or [a] death due to the use of alcohol or narcotic drugs shall not be construed to be a compensable injury" should be read "through a broader lens" and thus be read as a list of conditions to which alcohol use would bar recovery to a claimant. Respondents' Brief, p. 12. The respondents argue that the intent of the legislature was to add a comma to

this list, and in its absence we should presume one exists as "the intent of the language is clear." Id., p. 13-14. We disagree.

We note that we are bound by General Statutes § 1-2z in our application of our statutes. "General Statutes § 1-2z provides that '[t]he meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.'" First Union National Bank v. Hi Ho Mall Shopping Ventures, Inc., 273 Conn. 287, 291 (2005).[3] We also note that cases such as Cantoni v. Xerox Corp., 251 Conn. 153 (1999), and Discuillo v. Stone & Webster, 242 Conn. 570 (1997), stand for the proposition that our statutes must be administered in a fashion consistent with the manner in which they were written by the General Assembly. In Hunnihan v. Mattatuck Mfg. Co., 243 Conn. 438, 444 (1997), our Supreme Court further pointed out "that [s]tatutes are to be interpreted with regard to other relevant statutes because the legislature is presumed to have created a consistent body of law." (Citations omitted; internal quotation marks omitted.) Q*uoting* Conway v. Wilton, 238 Conn. 653, 663-64, 680 (1996).

Therefore, we look to the first part of statute 31-275 (1) (C) which states, "[i]*n the case of an accidental injury . . . ."* (Emphasis added.) We note that the term "accidental injury" as well as "occupational disease" are defined terms pursuant to General Statutes

[3] The respondents argue that an application of § 31-275 (1) (C) is limited only to "accidental injuries" and would yield "absurd and unworkable results." Respondents' Brief, pp. 15-17. We find the respondents' reasoning uncompelling and are not persuaded. It would be an absurd reading of the statute to determine it proscribes an award of benefits for an accidental injury under certain circumstances and then to find the statute provides benefits for disability or death resulting from such an accidental injury. We have been presented with no actual examples of the Commission interpreting the statute in the manner the respondents suggest.

§§ 31-275 (15) and 31-275 (16) (A). In § 31-275 (16) (A), the term "personal injury" is defined as encompassing "in addition to *accidental injury that may be definitely located as to the time when and the place where the accident occurred*, an injury to an employee that is causally connected with the employee's employment and is the direct result of repetitive trauma or repetitive acts incident to such employment, and occupational disease." (Emphasis added.)

There has been a long history wherein the General Assembly has defined "accidental injury" as a separate and distinct type of injury covered within Chapter 568. See, for example, Discuillo, supra, 577-578. We also note that in Weinberg v. ARA Vending Co., 223 Conn. 336 (1992), our Supreme Court noted the "familiar principle of statutory construction that where the same words are used in the statute two or more times they will ordinarily be given the same meaning in each instance." (Internal quotation marks omitted.) Id., 343, *quoting* AirKaman, Inc. v. Groppo, 221 Conn. 751, 758, 607 (1992). As a result, it is eminently reasonable to conclude that the General Assembly drafted the phrase *in the case of an accidental injury,* to limit the scope of § 31-275 (1) (C) to only accidental injuries and not include injuries that were the other defined forms of compensable injuries, i.e., occupational disease or repetitive trauma. Had the General Assembly intended this statute to govern all types of injuries under Chapter 568, we query why it would have included the initial phrase prior to the comma at all? The respondents essentially seek to have this statute interpreted to read as follows: *a disability or a death due to the use of alcohol or narcotic drugs shall not be construed to be a compensable injury.* Such an interpretation is inconsistent with "the well established principle that statutes must be construed, if possible, such that no clause,

sentence or word should be superfluous, void or insignificant, and that every sentence, phrase and clause is presumed to have a purpose." Hopkins v. Pac, 180 Conn. 474, 476 (1980).

The respondents argue that an "Oxford comma" should be added to this statute to implement what they believe to be its intended purpose, and the statute should be read effectively as follows: *[I]n the case of an accidental injury, a disability, or a death due to the use of alcohol or narcotic drugs shall not be construed to be a compensable injury"*, thus adding a comma after "disability."[4] Respondents' Brief, p. 12. We are not persuaded this was some form of scrivener's error. As we have explained an "accidental injury" is a defined form of compensable injury, while "disability" and "death" are among the consequences of having sustained a compensable injury. See for example, the definition of "previous disability" as delineated in § 31-275 (20).[5] This is also why we find the respondents' citation of Paternostro v. Arborio Corp., 56 Conn. App. 215 (1999), *cert. denied*, 252 Conn. 928 (2000), as grounds for reversal of the finding inapposite. Our Appellate Court could have readily determined in that case that it was necessary under the statute for the respondents to prove the claimant's death was caused by alcohol use without extending the scope of this statute beyond accidental injuries.

While General Statutes § 1-2z limits our consideration of a statute to its "plain meaning" the respondents have argued that the legislative history of this statute should be considered. We have reviewed the terms of Public Act 93-228, which was the last time

[4] The respondents argue this statute is similar to General Statutes § 31-275 (1) (F), where they claim a "missing comma" has been added via interpretation. That statute governed a variety of analogous terms as to land use appurtenant to a residence, i.e., "residential structure, the garage, the common hallways, stairways, driveways, walkways and the yard;" not as in this statute, which governs a type of compensable injury and then a list of the potential consequences.

[5] General Statutes § 31-275 (20) states: "'Previous disability' means an employee's preexisting condition caused by the total or partial loss of, or loss of use of, one hand, one arm, one foot or one eye resulting from accidental injury, disease or congenital causes, or other permanent physical impairment."

the General Assembly revised this provision of Chapter 568. The sole change enacted at that time was to remove the limiting word "habitual" from the phrase "use of alcohol or narcotic drugs." This change did not expand the scope of injuries covered by § 31-275 (1) (C); it simply allowed respondents to contest our authority to award benefits regarding accidental injuries which were the result of short-term substance abuse; rather than to force respondents to prove the claimant had a long-term substance abuse issue. The respondents have not presented any documentary evidence to our attention that provides additional support for their claim that the commissioner acted in derogation of legislative intent.[6] Indeed, the most recent Appellate Court decision construing § 31-275 (1) (C), Gamez-Reyes v. Biagi, 136 Conn. App. 258 (2012), concluded intoxication was not an issue of subject matter jurisdiction as:

> The [respondents] ignore[s] the fact that unlike General Statutes (Rev. to 1993) § 31-275 (16), the legislature did not dramatically amend General Statutes (Rev. to 1993) § 31-275 (1) (C) in 1993. Rather than adding extensive language barring an entire class of injuries to create § 31-275 (16) (B) (ii), the legislature simply removed the word 'habitual' from § 31-275 (1) (C). There is no basis for a determination by this court that the deletion of one word was intended to change what has been an affirmative defense for nearly 100 years into a subject matter jurisdictional bar to compensability or that the legislature intended to create a subject matter jurisdictional bar to claims separate and distinct from the affirmative defense outlined in § 31-284 (a).

Id., 273-274.

[6] Prior to the hearing before our tribunal, counsel for the respondent provided floor statements made by the proponents of Public Act 93-228. While we do not believe this statute is ambiguous, and therefore § 1-2z makes reliance on legislative history unnecessary, we have reviewed the submissions. We find most dispositive the statement by Representative DiMeo. "It is going to do certain things as far as to say to the worker out on the field, if you are under the influence of alcohol or drugs, don't come to work. Don't come to work." House Session Transcript, May 20, 1993. This clearly evinces a public policy to deter accidental injuries due to on-the-job impairment, and does not address chronic injuries resulting from off-the-clock personal conduct.

Since Gamez-Reyes described § 31-275 (1) (C) as a causation defense statute, not a subject matter jurisdiction statute, we cannot find authority from that precedent to extend the scope of this statute beyond accidental injuries.[7]

The claimant herein presented a claim for an occupational injury, not an accidental injury. She proved her claim to the commissioner's satisfaction and the statute permitted the commissioner to award the claimant benefits. Despite the respondents' argument that the statute herein is unworkable, they had every opportunity to present a defense that the decedent's death was non-compensable as the result of alcohol abuse. It is black-letter law that when a non-compensable injury becomes an intervening cause of an injured worker's death that his or her dependents cannot recover survivor benefits. See Lemieux v. Highland Dairy Co., Inc., 121 Conn. 483 (1936) and Sapko v. State, 305 Conn. 360, 378 (2012). The commissioner concluded that workplace asbestos exposure was a significant factor in causing the decedent's fatal illness, and did not accept the respondents' argument that alcohol abuse was the sole significant causation factor.[8] As

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[7] We take administrative notice of precedent where claimants have been awarded benefits for accidental injuries in spite of heavy alcohol consumption prior to their injuries. See Liptak v. State, 176 Conn. 320 (1978) (per curiam) and Corcoran v. Corcoran Moving and Storage Inc., 9 Conn. Workers' Comp. Rev. Op. 237, 239, 1030 CRD-5-90-6 (October 31, 1991), but note both cases predate Public Act 93-228.

[8] "Finally, the claimant appeals the trial commissioner's failure to find that either intoxication or willful and serious misconduct was the sole proximate cause of the decedent's death. We do not agree that such a finding was necessary under Connecticut law. The applicable standard for causation in our workers' compensation cases is the substantial causative factor test. See McDonough v. Connecticut Bank & Trust Co., 204 Conn. 104, 117 (1987). A claimant generally need prove that, within a reasonable degree of medical probability, employment-related events were a substantial factor in producing his injury or disability. See Benlock v. New Haven Terminal/Cilco Terminal, 3034 CRB-4-95-4 (April 25, 1997), *aff'd*, 48 Conn. App. 250 (1998) (per curiam). In this instance, of course, it is the respondents who have the burden of proving an affirmative defense. They thus needed to show that the decedent's intoxication or willful misconduct was a substantial factor in causing his accident in order to successfully invoke the exclusionary provision of § 31-284(a).

This 'substantial factor' test does not imply that there is a sole proximate cause or even one primary cause for any given injury. The term 'substantial' generally means 'worthwhile' or 'significant,' as opposed to 'the most important' or 'primary.' See Borkowski v. Sacheti, 43 Conn. App. 294, 303 (1994) ('substantial or significant chance' contrasted with 'greater than 50 percent chance'); Black's Law Dictionary, 5th Ed., p. 1280 ('substantial' defined as 'something worthwhile as distinguished from something without value or merely nominal'). In Muldoon v. Homestead Insulation Co. 231 Conn. 469

the respondents failed to seek a motion to correct, we must give this determination conclusive effect. See Stevens v. Raymark Industries, Inc., 5215 CRB-4-07-4 (March 26, 2008), *appeal dismissed*, A.C. 29795 (June 26, 2008).

In Walter v. State, 63 Conn. App. 1 (2001), our Appellate Court considered a somewhat similar issue regarding statutory interpretation. They held:

> We are also mindful that '[t]he court may not, by construction, supply omissions in a statute or add exceptions or qualifications, merely because it opines that good reason exists for so doing. . . . This is especially so where it appears that the omission was intentional. . . . In such a situation, the remedy lies not with the court but with the General Assembly.'

(Citations omitted.) Id., 8, *quoting* Bailey v. Mars, 138 Conn. 593, 598 (1952). This principle of statutory interpretation requires us to affirm the Finding and Award.

Commissioners Peter C. Mlynarczyk and Daniel E. Dilzer concur in this opinion.

(1994), our Supreme Court applied the substantial causative factor test to a workers' compensation case involving asbestos exposure. There they noted that the trier found that asbestos was not the only cause of the claimant's injury, but that the claimant's exposure '. . . played the major role in the causation of his asbestosis and colon cancer.' Id., 478." See Paternostro v. Arborio Corp., 3659 CRB-5-97-8 (September 8, 1998), *aff'd,* 56 Conn. App. 215 (1999), *cert. denied*, 252 Conn. 928 (2000).