

CASE NO. 6264 CRB-3-18-4 : COMPENSATION REVIEW BOARD
CLAIM NOS. 700132095 & 700171221

JUDITH T. GENTLE, EXECUTRIX OF : WORKERS' COMPENSATION
THE ESTATE OF JOSEPH E. COMMISSION
GENTLE, JR. and DEPENDENT
SURVIVOR
CLAIMANT-APPELLEE

v. : MAY 30, 2019

CITY OF STAMFORD
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLANT

and

PMA MANAGEMENT CORPORATION
OF NEW ENGLAND
THIRD-PARTY ADMINISTRATOR

APPEARANCES: The claimant was represented by Elizabeth L. Jones, Esq.,
and Stewart M. Casper, Esq., Casper & de Toledo, L.L.C.,
1458 Bedford Street, Stamford, CT 06905.

The respondent was represented by Scott Wilson Williams,
Esq., Williams Law Firm, L.L.C., 2 Enterprise Drive,
Suite 412, Shelton, CT 06484.

This Petition for Review from the March 21, 2018 Finding
and Award, Ruling on Motion to Dismiss, Ruling on Form
36 by Scott A. Barton, the Commissioner acting for the
Third District, was heard October 26, 2018 before a
Compensation Review Board panel consisting of
Commission Chairman Stephen M. Morelli and
Commissioners Peter C. Mlynarczyk and David W.
Schoolcraft.¹

¹ We note that two motions for extension of time were granted during the pendency of this appeal.

OPINION

STEPHEN M. MORELLI, CHAIRMAN. The respondent in this matter has appealed from a Finding and Award, Ruling on Motion to Dismiss, Ruling on Form 36 (finding) in which Commissioner Scott A. Barton (commissioner) determined that the dependent spouse of a deceased police officer who received General Statutes § 7-433c benefits was entitled to survivorship benefits.² The city of Stamford, consistent with its posture in a number of recent appeals, asserts that this relief is now inconsistent with our Supreme Court's decision in Holston v. New Haven Police Dept., 323 Conn. 607 (2016). Judith Gentle, the claimant widow, filed for survivor benefits after her husband's demise, and the respondent contends that the claim for benefits arising from the decedent's fatal illness is outside the scope of § 7-433c because the claim was filed after the decedent retired from the police force. We note that the legal arguments

² General Statutes § 7-433c states: "(a) Notwithstanding any provision of chapter 568 or any other general statute, charter, special act or ordinance to the contrary, in the event a uniformed member of a paid municipal fire department or a regular member of a paid municipal police department who successfully passed a physical examination on entry into such service, which examination failed to reveal any evidence of hypertension or heart disease, suffers either off duty or on duty any condition or impairment of health caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability, he or his dependents, as the case may be, shall receive from his municipal employer compensation and medical care in the same amount and the same manner as that provided under chapter 568 if such death or disability was caused by a personal injury which arose out of and in the course of his employment and was suffered in the line of duty and within the scope of his employment, and from the municipal or state retirement system under which he is covered, he or his dependents, as the case may be, shall receive the same retirement or survivor benefits which would be paid under said system if such death or disability was caused by a personal injury which arose out of and in the course of his employment, and was suffered in the line of duty and within the scope of his employment. If successful passage of such a physical examination was, at the time of his employment, required as a condition for such employment, no proof or record of such examination shall be required as evidence in the maintenance of a claim under this section or under such municipal or state retirement systems. The benefits provided by this section shall be in lieu of any other benefits which such policeman or fireman or his dependents may be entitled to receive from his municipal employer under the provisions of chapter 568 or the municipal or state retirement system under which he is covered, except as provided by this section, as a result of any condition or impairment of health caused by hypertension or heart disease resulting in his death or his temporary or permanent, total or partial disability. As used in this section, 'municipal employer' has the same meaning as provided in section 7-467.

(b) Notwithstanding the provisions of subsection (a) of this section, those persons who began employment on or after July 1, 1996, shall not be eligible for any benefits pursuant to this section."

presented in this matter are identical to the ones we considered in Costanzo v. Stamford, 6274 CRB-7-18-5 (May 3, 2019), *appeal pending*, A.C. 42968 (May 20, 2019), and because we cannot discern a material distinction between the factual bases of the two cases, *stare decisis* compels us to reach the same result. We affirmed the award of survivorship benefits in Costanzo, *supra*, and we therefore affirm the finding in this matter.

In his March 21, 2018 decision, the commissioner began by finding that the decedent had become a paid member of the Stamford police department in 1968.³ He then made the following eighteen factual findings based on the stipulation of the parties:

2. In 1968, Mr. Gentle successfully passed a physical examination on entry into such service which examination failed to reveal any evidence of hypertension or heart disease.
3. On September 10, 1977, Mr. Gentle was diagnosed with hypertension.
4. Pursuant to Finding and Award dated June 11, 1987, Mr. Gentle's claim for benefits for his September 10, 1977 hypertension claim and July 27, 1982 heart disease claim under C.G.S. §7-433 were deemed compensable. [This case was ultimately assigned file number 700132095. The Finding and Award further acknowledges that Mr. Gentle "is married."]
5. Pursuant to Supplemental Finding and Award dated January 12, 1988, Mr. Gentle was assigned a 51% rating to his cardiovascular system due to his hypertension and heart disease.
6. Pursuant to Stipulation to Date dated August 26, 2005, Respondent agreed to acknowledge compensability of Mr. Gentle's hypertension, coronary artery disease,

³ In making his award to the claimant widow, the commissioner, on the same grounds, denied a motion to dismiss filed by the respondent on December 22, 2017, and also denied a form 36 dated May 18, 2017.

aggravation of diabetic condition, vascular disease of lower extremities, and kidney insufficiency.⁴

7. The Claimant [sic] qualified for a disability retirement effective December 16, 2005. [The Respondent paid Mr. Gentle temporary total disability benefits from the date of his retirement until the date of his death in August 2014.]
8. On August 28, 2014, Mr. Gentle passed away. His Certificate of Death lists immediate cause of death as cardiac arrest, underlying cause as ventricular fibrillation, with significant conditions contributing to death listed as end stage renal disease (ESRD), and Coronary Artery Disease (CAD).
9. In September 2014, Respondent filed a Form 36, [dated September 2, 2014] granted by Commissioner [Jodi Murray] Gregg on September 8, 2014.
10. In September 2014, Mrs. Gentle filed a timely Form 30D pursuant to C.G.S. §7-433b. [This claim was filed on September 11, 2014, and assigned file number 700171221.]
11. In September 2014, Respondent filed a timely Form 43 [dated September 22, 2014] contesting Mrs. Gentle's claim stating: Mr. Gentle's death did not arise out of nor [occur] during the course of employment with Stamford, there was no medical evidence to support causal relationship between the September 10, 1977 heart/hypertension claim and death, and death was due to intervening causal factors hence absence of causal relation to September 10, 1977 claim.
12. Pursuant to Stipulation to Date dated January 22, 2016, Respondent agreed to pay Mrs. Gentle \$2,500 to resolve claims for past benefits due. Parties further agreed that the Stipulation to Date would not end, reduce, or resolve Mrs. Gentle's current and continuing entitlement to weekly death benefits, and that Respondent would continue to pay a

⁴ In this finding, the trial commissioner also recited the opinions of five physicians that formed the basis of the stipulation to date: "a. Mr. Gentle's treating cardiologist, Dr. Yap, who supported causal relationship between Mr. Gentle's current cardiac and vascular conditions and his 1977 hypertension claim; b. Mr. Gentle's treating nephrologist, Dr. Hines, who supported causal relationship between Mr. Gentle's kidney dysfunction to his hypertension and diabetes; c. Respondent's independent medical evaluation by Dr. Reid, an endocrinologist, and; d. Respondent's independent medical evaluation by Dr. Krauthamer, a cardiologist, who both supported causal relationship between Mr. Gentle's hypertension, coronary artery disease, diabetes and vascular disease of the lower extremities, and the accepted September 1977 hypertension claim." Findings, ¶¶ 6.a-d.

weekly death benefit to Mrs. Gentle after the Stipulation to Date was approved.

13. Respondent paid Mrs. Gentle weekly death benefits pursuant to the Stipulation to Date dated January 22, 2016, until July 10, 2017.
14. In May 2017, Respondent filed a Form 36 dated May 18, 2017, based upon precedent of Holston v. New Haven and its progeny.
15. At an informal hearing held on July 10, 2017, Commissioner Truglia approved the Form 36 dated May 18, 2017. This approval was later vacated.
16. In May 2017, Respondent also filed a Form 43 dated May 18, 2017, based upon the precedent of Holston v. New Haven and its progeny.
17. At an informal hearing held on July 30, 2017, Commissioner Engel approved Respondent's Form 36 dated May 18, 2017, effective July 30, 2017.
18. As of August 2, 2017, Mrs. Gentle was legally authorized to act as fiduciary of Mr. Gentle's estate.
19. Dr. Portnay, Mr. Gentle's treating cardiologist at the time of his death, was deposed by parties on October 23, 2017. Dr. Portnay testified that the cardiac arrest which precipitated Mr. Gentle's death was more likely than not caused by a metabolic event rather than an attack ischemic in nature.

Findings, ¶¶ 2-19.

The commissioner reached a number of additional factual findings which went beyond the stipulated facts presented.⁵ The bulk of these (Findings, ¶¶ 20-28) consisted largely of recitation from testimony given by Edward J. Portnay, M.D., in his deposition. Portnay opined that by the time of the decedent's death, he had suffered "a significant

⁵ In its motion to correct, the respondent argued that the addition of these factual findings was error. As it has not briefed this issue, we deem the issue abandoned on appeal. Christy v. Ken's Beverage, Incorporated, 5157 CRB-8-06-11 (December 7, 2007); St. John v. Gradall Rental, 4846 CRB-3-04-8 (August 10, 2005), *appeal withdrawn*, A.C. 26883 (February 14, 2006).

myocardial infarction” which had scarred his heart, and he also suffered from diabetes, hyperlipidemia, peripheral vascular disease, and end-stage kidney disease requiring dialysis. See Findings, ¶ 20, *quoting* Claimant’s Exhibit V, p. 9. Portnay said that hypertension is a risk factor for heart disease, kidney disease, stroke, and certain types of vascular disease, and the decedent’s hypertension was a “major precursor” to his development of heart disease, his heart attack and his kidney condition. See Findings, ¶ 21; *id.*, 13. His testimony described the interaction of these conditions and how they can “feed off themselves” to increase the risk of death. See Findings, ¶ 22; *id.*, 14.

Portnay explained that the decedent had not died of a myocardial infarction (a blocked artery in the heart) but, rather, from cardiac arrest that was “an electrical issue.” *Id.*, 21. He noted that the decedent was in ventricular fibrillation when he arrived at the hospital prior to his death, and he died of cardiac arrest due to a metabolic crisis. See Findings, ¶¶ 26-28. Portnay explained that the kidney disease caused elevated potassium levels, which is an electrolyte imbalance that is “clearly associated with ventricular arrhythmias.” Claimant’s Exhibit V, p. 19. He opined that the increase in potassium probably had “a large part to play in him developing his cardiac arrest.” *Id.* He said that the decedent’s heart was already damaged by cardiomyopathy from prior heart attacks and was unable to handle the abnormal rhythm brought on by the electrolyte imbalance. See Findings, ¶ 25. He opined that the decedent’s “*combination* of hypertension, his heart disease, and his kidney disease all *dramatically* led to his ultimate cardiac arrest.” (Emphasis added in Finding.) See Findings, ¶ 24; *id.*, 18.

The commissioner then noted the legal arguments advanced by the parties. The respondent, citing Holston, *supra*, and Staurovsky v. Milford Police Dept., 164 Conn.

App. 182 (2016), *appeal dismissed, cert. improvidently granted*, 324 Conn. 693 (2017), argued that because the decedent was no longer a uniformed police officer at the time of his death, the Workers' Compensation Commission lacked jurisdiction to award benefits. The claimant argued that because the medical evidence demonstrated that the decedent's death was due to conditions which flowed from his compensable hypertension, his death was a compensable event. In light of the fact that the decedent had been receiving § 7-433c benefits prior to his death, the case was distinguishable from Staurovsky, *supra*.

Based on these facts, the commissioner reached a series of conclusions. He noted Portnay's opinion that the decedent's "hypertension condition was a *major cause* of the development of his heart disease, heart attack, and kidney condition." (Emphasis in the original.) Conclusion, ¶ O. He also cited Portnay's opinion that "all of Mr. Gentle's compensable health conditions including hypertension, heart disease, and kidney disease, played a *significant role* in his ultimate death [from] cardiac arrest." (Emphasis in the original.) Conclusion, ¶ P. The trial commissioner then assessed "the report and opinions of Dr. Portnay as fully credible and persuasive regarding the issue of the cause of Mr. Gentle's death." Conclusion, ¶ Q.

As a result, the commissioner concluded that the decedent's death flowed from his compensable heart and hypertension claim, and the "compensable medical conditions, including hypertension, heart disease, and kidney disease were substantial factors in the cause of his ultimate death." Conclusion, ¶ U. The commissioner held that "it is irrelevant that the [decedent] died while he was no longer a uniformed police officer because his death was substantially related to and therefore caused by his compensable underlying heart and hypertension claim pursuant to C.G.S. § 7-433c." Conclusion, ¶ X.

Accordingly, the commissioner denied the respondent's motion to dismiss and the form 36, and ordered the respondent to pay § 7-433c benefits to the decedent's dependent spouse.

The respondent filed a motion to correct seeking to remove the factual findings that went beyond the stipulated facts presented and to substitute a new conclusion that Holston, *supra*, and Staurovsky, *supra*, mandated dismissal of the claimant widow's claim for benefits. The commissioner denied this motion in its entirety and the respondent has pursued this appeal.

The standard of deference we are obliged to apply to a commissioner's findings and legal conclusions on appeal 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 essential question posed in this appeal is whether the precedent in Holston, *supra*, and Staurovsky, *supra*, bars survivorship claims under § 7-433c. The respondent

argues that because death is a “new pathology” which was not covered under the pre-existing vested claim for heart and hypertension benefits, an award of benefits to the police officer’s widow is outside the ambit of the statute. Appellant’s Brief, p. 8. It rejects the position that flow-through injuries are within the scope of the heart and hypertension statute, and cites recent case law for the proposition that only police officers who are still employed by the city can avail themselves of § 7-433c benefits.

We rejected this position in Costanzo, supra, in which we specifically determined that flow-through injuries and conditions were a viable means to create eligibility for a survivorship claim. In that Opinion, we noted that in Dickerson v. Stamford, 6215 CRB-7-17-8 (September 12, 2018), *appeal transferred*, S.C. 20244 (January 30, 2019), and Coughlin v. Stamford, 6218 CRB-5-17-9 (February 15, 2019), *appeal pending*, A.C. 42668 (March 5, 2019), we applied that rule to active and retired police officers and fire fighters. We also cited long-standing precedent in Bassett v. Stratford Lumber Co., 105 Conn. 297, 303-304 (1926), and Biederzycki v. Farrel Foundry & Machine Co., 103 Conn. 701, 704-705 (1926), for the proposition that survivorship claims are derivative of the decedent’s compensable injury and, as such, found the survivorship claim of the dependent widow in Costanzo compensable.

The concept of *stare decisis* requires this tribunal to apply our analysis in Costanzo to this case, unless the two cases can be distinguished on the facts. In Costanzo, the commissioner found that the death in question was “a natural, unavoidable consequence of the accepted ‘conditions or impairments of health’ that were suffered while a uniformed member of a municipal police department....” *Id.* In the present matter, the commissioner found that the decedent “died as a result of heart failure due to

the ongoing cascade of serious medical conditions and symptoms that were directly related to his underlying compensable heart and hypertension claim.” Conclusion, ¶ R. The commissioner relied on Portnay’s opinion on this point and found the witness credible and persuasive.

We must therefore determine whether the commissioner could have reasonably reached this conclusion based on this evidence. We note that this is not a “dueling expert” case in which the commissioner was obligated to weigh the relative merit of conflicting medical opinions. The respondent did not submit into the record any medical witnesses or reports offering an opinion as to the cause of the decedent’s death. If the commissioner could have reasonably found that Portnay’s testimony supported the conclusion that the decedent’s death was the result of his compensable injuries, then the finding should be affirmed.

Our review of Portnay’s deposition of October 23, 2017, indicates that the doctor unequivocally linked the decedent’s death to his preexisting compensable heart ailments. “I think that the combination of hypertension, his heart disease, and his kidney disease all dramatically led to his ultimate cardiac arrest.” Claimant’s Exhibit V, p. 18. We further note that counsel for the respondent had the opportunity to cross-examine Portnay after the testimony elicited by claimant’s counsel but chose not to do so. *Id.*, 22. In Berube v. Tim’s Painting, 5068 CRB-3-06-3 (March 13, 2007), this tribunal observed that when a party does not challenge a medical opinion, it may be considered “as is.” We believe that Portnay’s opinion was sufficient to support the conclusions reached in the commissioner’s finding.⁶

⁶ We uphold the commissioner’s denial of the respondent’s motion to correct. This motion sought to interpose the respondent’s conclusions relative to the law and the facts presented and, as such, the

We have noted that on occasion, the strict application of our statutes has led to what we have described as a “harsh remedy.” West v. Heitkamp, Inc., 4587 CRB-5-02-11 (October 27, 2003), *appeal dismissed for lack of final judgment*, A.C. 24805 (February 11, 2004). However, our interpretation of the applicable law in this matter does not support imposing the harsh remedy of dismissal of the survivorship claim against the widow of the decedent. The commissioner’s finding was consistent with the evidence presented on the record and the case law governing § 7-433c.

There is no error; the March 21, 2018 Finding and Award, Ruling on Motion to Dismiss, Ruling on Form 36 of Scott A. Barton, the Commissioner acting for the Third District, is accordingly affirmed.

Commissioners Peter C. Mlynarczyk and David W. Schoolcraft concur in this opinion.

commissioner retained the discretion to deny these corrections. See D’Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003); Brockenberry v. Thomas Deegan d/b/a Tom’s Scrap Metal, Inc., 5429 CRB-5-09-2 (January 22, 2010), *aff’d*, 126 Conn. App. 902 (2011) (*per curiam*); Liano v. Bridgeport, 4934 CRB-4-05-4 (April 13, 2006).