CASE NO. 6274 CRB-7-18-5 CLAIM NOS. 700156517 & 700003440	: COMPENSATION REVIEW BOARD
SUSAN L. COSTANZO, EXECUTRIX OF THE ESTATE OF LOUIS A. COSTANZO, JR., and DEPENDENT SURVIVOR CLAIMANT-APPELLEE	: WORKERS' COMPENSATION COMMISSION
v.	: MAY 3, 2019
CITY OF STAMFORD EMPLOYER SELF-INSURED RESPONDENT-APPELLEE	
and	
PMA MANAGEMENT CORPORATION OF NEW ENGLAND THIRD-PARTY ADMINISTRATOR	

APPEARANCES:

The claimant was represented by Earl T. Ormond, Esq., Ormond Romano, L.L.C., 799 Silver Lane, Second Floor, Trumbull, CT 06611.

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 May 10, 2018 "*De Novo* Review of Ruling on Form 36 Dated 5/26/17 Which Was Granted Effective 7/31/17, Prospectively Cutting Off Widow's Benefits Under C.G.S. Sec. 31-306 in Reliance on Holston v. City of New Haven, 323 Conn. 607 (2016)" of Michelle D. Truglia, the Commissioner acting for the Seventh District, was heard November 30, 2018 before a Compensation Review Board panel consisting of Commission Chairman Stephen M. Morelli and Commissioners Scott A. Barton and Jodi Murray Gregg.

OPINION

STEPHEN M. MORELLI, CHAIRMAN. In this appeal, the respondent asserts that although widows' benefits have been included within the ambit of General Statutes § 7-433c since the legislation was adopted decades ago, our Supreme Court's decision in Holston v. New Haven Police Dept., 323 Conn. 607 (2016), and our Appellate Court's decision in Staurovsky v. Milford Police Dept., 164 Conn. App. 182 (2016), *appeal dismissed*, *cert. improvidently granted*, 324 Conn. 693 (2017), have banned this relief.[1] The decedent in the present matter, a Stamford police officer, obtained benefits pursuant to the heart and hypertension statute while an active member of the force, retired, and later succumbed to an illness which was deemed a sequela of his compensable cardiac condition. The claimant, his widow, filed for survivor benefits after her husband's demise, and the respondent contends that the claim for benefits arising from the

[1] General Statutes Sec. 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."

decedent's fatal illness is outside the scope of § 7-433c because the claim was filed after the decedent retired from the police force.

The commissioner, in her May 10, 2018 "*De Novo* Review of Ruling on Form 36 Dated 5/26/17 Which Was Granted Effective 7/31/17, Prospectively Cutting Off Widow's Benefits Under C.G.S. Sec. 31-306 in Reliance on Holston v. City of New Haven, 323 Conn. 607 (2016)" (ruling), rejected the respondent's position. We conclude that pertinent case law stands for the proposition that once a respondent accepts an injury as compensable, death because of that injury creates an entitlement for dependent benefits pursuant to General Statutes § 31-306 (a).[2] Therefore, we affirm the ruling.

In her ruling, the commissioner noted that the parties had stipulated to the following facts:

a. The decedent, Louis Costanzo, Jr., was hired as a city of Stamford Policeman on April 5, 1976.

b. On or about December 7, 1992, the decedent was diagnosed with hypertension and established a compensable claim for hypertension under the provisions of Conn. Gen. Stat. Sec. 7-433c;

c. In January 1999, the decedent began having problems with his kidneys and sought treatment for this condition. The

[2] 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 as follows:
(1) 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.
(2) To those wholly dependent upon the deceased employee at the date of the deceased employee's injury, a weekly compensation equal to seventy-five per cent of the average weekly earnings of the deceased calculated pursuant to section 31-310, after such earnings have been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act made from such employee's total wages received during the period of calculation of the employee's average weekly wage pursuant to said section 31-310, as of the date of the injury but not more than the maximum weekly compensation rate set forth in section 31-309 for the year in which the injury occurred or less than twenty dollars weekly….
(3) If the surviving spouse is the sole presumptive dependent, compensation shall be paid until death or remarriage…."

respondents initially paid for the decedent's kidney treatment but later contested payments claiming that the kidney condition was not related to his previously accepted hypertension claim;

d. The [decedent] underwent a kidney transplant on September 14, 2000;

e. On April 1, 2004, a Finding & Award was issued wherein the [decedent's] kidney condition was found compensable under the provisions of Chapter 568 and the provisions of Conn. Gen. Stat. Sec. 7-433c;

f. In April 2006, the decedent filed a claim for damages to his remaining kidney;

g. On July 7, 2006, the [decedent] retired from the Stamford Police Department;

h. On July 25, 2006, a Stipulation to Date was filed and approved compensating the [decedent] for permanent partial disability on both kidneys under Conn. Gen. Stat. Sec. 7-433c;

i. The decedent passed away on March 6, 2010, secondary to heart disease, hypertension and end-stage renal disease. The [decedent] was not a uniformed member of the Stamford Police Department at the time of his death;

j. On June 28, 2010 the decedent's widow, Susan Costanzo, filed a Form 30D for survivor's benefits under Conn. Gen. Stat. Secs. 31-306 and 7-433c;

k. On July 12, 2010, the respondents filed a Form 43 denying survivorship benefits on the basis that no supporting documentation was submitted showing that the decedent's death was directly and causally related to the previously accepted 7-433c claim;

l. Susan Costanzo provided medical documentation in the form of a death certificate and physician letters stating that the decedent's diagnosis of hypertension exacerbated his end-stage renal disease which was a substantial factor in his death;

m. After receiving a copy of the Costanzo marriage certificate and medical evidence confirming a causal connection with the accepted claim under 7-433c, the respondents began paying Susan Costanzo a survivorship benefit pursuant to 7-433c in

the amount of $769 per week from the date of the decedent's death forward;

n. There is no Finding & Award for a survivorship benefit;

o. A Form 36 was filed on May 26, 2017, challenging coverage for the survivorship benefit on the basis that 7-433c does not cover a death that occurs while the decedent is not a uniformed member of the Police Department;[3]

p. The Form 36 was approved effective July 31, 2017; respondents paid all survivorship benefits from the date of death through July 31, 2017.

Ruling, ¶¶ 2.a.-2.p.

The commissioner noted that no deposition testimony or live testimony was entered into the record at the formal hearing. She also noted that the respondent offered no medical evidence suggesting that the decedent's ultimately fatal end-stage renal disease was a disease or pathology which differed from the renal failure condition originally accepted by the respondent. She summarized the respondent's argument for dismissing the survivorship claim as follows:

4. The respondent's Form 36 of May 26, 2017 asks that the Commission prospectively discontinue widow's benefits under C.G.S. Sec. 31-306, citing the Supreme Court's decision in Reginald Holston v. New Haven Police Department, et al., 323 Conn. 607 (2016) in support of their argument. Specifically, the respondent argues in its Motion to Dismiss that the Supreme Court in Holston "rejected the concept of contribution of one pathology to the development of a second pathology [or a "flow from condition/disease] as a saving grace for a statute of non-claim defense." Mot. to Dismiss, p. 5. Holston, 323 Conn. at 616.

Ruling, ¶ 4.

[3] We note that in her May 10, 2018 Ruling, ¶ 2.o, the commissioner found that the form 36 was approved on May 23, 2017, rather than May 26, 2017. 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).

The commissioner concluded that the decedent had clearly filed his claims for hypertension and kidney disease while he was a uniformed member of the Stamford police department. She noted that: (1) the respondent accepted the hypertension claim before the decedent's retirement; (2) the claim for one kidney was accepted by virtue of a April 1, 2004 Finding & Award issued by the Workers' Compensation Commission prior to the decedent's retirement; and (3) the claim for the second kidney was accepted as part of a July 25, 2006 Stipulation to Date which was approved approximately three months after the decedent's retirement. She concluded that the respondent had accepted the decedent's renal disease in 2006, "at the beginning of his decline from that disease, and before his retirement as a uniformed member of a municipal police department." Conclusion, ¶ C.

In addition, the commissioner was not persuaded that referring to the decedent's kidney condition as "end-stage renal disease" signified that the condition constituted "a new pathology or disease such that it would have required the [decedent] to file a new, and clearly time-barred, claim after retirement…." Id. Instead, the commissioner concluded:

> D. The [decedent] died as a natural, unavoidable consequence of the accepted "conditions or impairments of health" that were suffered while a uniformed member of a municipal police department; he did not die of a new pathology or disease.

Conclusion, ¶ D.

The commissioner essentially rejected the respondent's argument that pursuant to Holston, supra, the dependent's claim was now barred as a matter of law.

> E. I do not interpret the Holston case as a mechanism to undermine the administration of 7-433c cases under Chapter 568 which would otherwise entitle the widow to death

benefits under C.G.S. Sec. 31-306 for a death caused by accepted injuries/conditions.

F. The claim for widow's benefits under the provision of C.G.S. Sec. 31-306 is not time-barred as the decedent died on March 6, 2010 and the decedent's widow filed her claim for widow's benefits on June 28, 2010, after the death of her husband from a previously accepted claim for hypertension and renal failure as set forth above.

Conclusion, ¶¶ E, F.

As a result of this *de novo* review, the commissioner denied, with prejudice, the form 36 filed by the respondent on May 26, 2017. The respondent did not file a motion to correct from this ruling. Instead, timely reasons of appeal were filed asserting that the commissioner had erred as a matter of law in awarding § 7-433c benefits to a surviving spouse of a retired police officer.

It is well-settled that our standard of appellate review is limited and deferential to the fact-finding prerogative of the commissioner. In the present case, the respondent did not file a motion to correct, and it may therefore be inferred that the factual findings in this matter are not subject to challenge. See Stevens v. Raymark Industries, Inc., 5215 CRB-4-07-4 (March 26, 2008), *appeal dismissed*, A.C. 29795 (June 26, 2008). Nonetheless, we must evaluate whether the commissioner was empowered to grant the relief sought by the claimant. "As 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).

In the present matter, the respondent, in asserting that "§7-433c does not provide benefits for an event, in this case death, that occurs after active duty has ended," is essentially arguing that a survivorship claim can never arise from the award of § 7-433c benefits. Respondent-Appellant's Brief, p. 4. The respondent contends that Staurovsky, supra, bans the award of any benefits pursuant to that statute once a police officer or fire fighter is no longer on active duty. Given that a deceased police officer or firefighter is, by definition, no longer on active duty, such an interpretation of Staurovsky would effectively prevent the award of § 7-433c benefits to a claimant's dependents following the death of the claimant due to a compensable heart disease.

As has been the case in previous appeals brought before this board on this issue, the respondent's argument primarily rests on the fact that § 7-433c has been described as "bonus legislation." Zaleta v. Fairfield, 38 Conn. App. 1, 5 (1995). Nonetheless, it is also well-settled that the Heart and Hypertension Act "provides for the administration of benefits in the same amount and the same manner as that provided under [the Workers' Compensation Act]…." Holston, supra, 615, *citing* Ciarlelli v. Hamden, 299 Conn. 265, 278 (2010).

In Bassett v. Stratford Lumber Co., 105 Conn. 297 (1926), our Supreme Court stated that "[o]ur Workmen's Compensation Act was enacted in order to give to the workman, *or those dependent upon him*, compensation for a part of the loss occasioned by his disability *or death* arising in the course of and out of his employment…." (Emphasis added.) Id., 298-99. In the same year the court issued Bassett, it also issued

Biederzycki v. Farrel Foundry & Machine Co., 103 Conn. 701 (1926), in which the court pointed out that survivorship claims are derivative of the original injury sustained by the claimant. The court stated:

> If the employee is awarded compensation for an injury, and in consequence of it, subsequently dies, the injury preceding the death *and the death* arose out of the one injury, compensation for the latter *is payable to and belongs to the dependent*, while the compensation awarded to the living employee is payable to and belongs to him.[4] (Emphasis added.)

Id., 704-705.

These principles have consistently been applied in cases involving the Heart and Hypertension Act. For instance, in Pyne v. New Haven, 177 Conn. 456 (1979), our Supreme Court stated:

> The legislature enacted General Statutes § 7-433c for the purpose of placing policemen who die or are disabled as a result of hypertension or heart disease in the same position vis-a-vis compensation benefits as policemen who die or are disabled as a result of service related injuries…. In the case of those policemen and firemen covered by its provisions, § 7-433c was designed to impact not only on workmen's compensation benefits but upon retirement *and survivor's benefits* as well.

(Emphasis added.) Id., 460-61.

In addition, we note that in McCullough v. Swan Engraving, Inc., 320 Conn. 299 (2016), our Supreme Court discussed the derivative nature of survivorship benefits. In that case, the court reversed a decision by this tribunal concluding that a claim for benefits pursuant to § 31-306 must be filed in accordance with the time limitations set

[4] A discussion of the manner in which a claim for survivor's benefits is derivative of a claim for a prior compensable injury can also be found in Fredette v. Connecticut Air National Guard, 283 Conn. 813 (2007), in which the court cited, inter alia, Biederzycki v. Farrel Foundry & Machine Co., 103 Conn. 701, 704-705 (1926). See Fredette, supra, 838.

forth in General Statutes § 31-294c (a).[5] See McCullough v. Swan Engraving, Inc., 5875 CRB-4-13-8 (August 5, 2014), *rev'd*, 320 Conn. 299 (2016). On appeal before the Supreme Court, the claimant argued that "the timely filing of any claim for benefits under the act satisfies the limitation period for all potential claims under the act." Id., 301. The court agreed, holding that "there is no language in § 31-294c creating a statute of limitations for a claim for survivor's benefits or language requiring that a dependent file a separate claim for survivor's benefits if the employee filed a timely claim for benefits during his or her lifetime." Id., 310.

In the present matter, the commissioner found that the decedent had obtained an award for § 7-433c benefits while he was still an active member of the Stamford police department. See Ruling, ¶ 2.e. Given that an award for survivor's benefits is derivative of the original claim, we therefore find that the respondent's reliance upon Staurovsky, supra, is misplaced, because in that matter, the initial claim for § 7-433c benefits was filed subsequent to the claimant's retirement from the police force. In the instant appeal,

[5] General Statutes § 31-294c (a) states in relevant part: "No proceedings for compensation under the provisions of this chapter shall be maintained unless a written notice of claim for compensation is given within one year from the date of the accident or within three years from the first manifestation of a symptom of the occupational disease, as the case may be, which caused the personal injury, provided, if death has resulted within two years from the date of the accident or first manifestation of a symptom of the occupational disease, a dependent or dependents, or the legal representative of the deceased employee, may make claim for compensation within the two-year period or within one year from the date of death, whichever is later. Notice of claim for compensation may be given to the employer or any commissioner and shall state, in simple language, the date and place of the accident and the nature of the injury resulting from the accident, or the date of the first manifestation of a symptom of the occupational disease and the nature of the disease, as the case may be, and the name and address of the employee and of the person in whose interest compensation is claimed…. As used in this section, 'manifestation of a symptom' means manifestation to an employee claiming compensation, or to some other person standing in such relation to him that the knowledge of the person would be imputed to him, in a manner that is or should be recognized by him as symptomatic of the occupational disease for which compensation is claimed."

however, the claimant's right to survivorship benefits following her husband's death had vested pursuant to her husband's original claim.[6]

Even though we recognize that in certain factual circumstances, Holston, supra, and Staurovsky, supra, do serve to limit the right of retired employees to obtain relief pursuant to the provisions of § 7-433c, we do not find the reasoning of these decisions applicable to survivorship claims in which the genesis of the claim was a compensable injury that occurred prior to the issuance of those decisions.[7] As long as a dependent's right to obtain compensation vests at the time of the initial claim for benefits, a subsequent change in legal interpretation promulgated by an appellate court would not impair the dependent's derivative right to obtain compensation.

We find Jones v. Redding, 296 Conn. 352 (2010), instructive on this point. In Jones, the respondent municipality moved to open an approved voluntary agreement following an appellate court decision in which the court held that employees similarly situated to the claimant were outside the jurisdictional ambit of § 7-433c. The claimant argued that the respondents had failed to contest jurisdiction prior to executing the voluntary agreement and, therefore, the statute governing the modification of workers'

[6] The claimant contends that the "Tardy" test for the award of survivorship benefits was satisfied in this matter. Claimant-Appellee's Brief, p. 8. See Tardy v. Abington Constructors, Inc., 71 Conn. App. 140 (2002). Our review of the record indicates that the claimant is correct, in that "(1) the employee died, (2) the claimant was a dependent under the act and (3) the decedent's death was causally related to the compensable injuries." Id., 144.

[7] This tribunal has consistently rejected the argument that Holston v. New Haven Police Dept., 323 Conn. 607 (2016), bars claims predicated on a "flow through" theory of sequelae injuries. See, e.g., 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). While we do not find it necessary at this juncture to reiterate our discussion in those two matters, we would note that our prior analysis in both Dickerson and Coughlin leads us to conclude that the respondent's reliance upon Holston, supra, in the matter at bar is equally unpersuasive.

compensation agreements, i.e., General Statutes § 31-315, did not allow for modification of the agreement.[8]

The Jones court indicated that when decisions are issued which serve to redefine the law, parties which had relied on a prior interpretation of the law did not engage in a mistake of fact. The court stated: "Rather, we agree with the board that the parties' failure to recognize that § 7-433c did not apply to them was a mistake of law, which, based as it is on decisional law, is not within the scope of § 31-315." Id., 369. The court also held that:

> allowing retroactive recalculations of awards in nonpending cases … would plunge the workers' compensation system into a state of paralytic uncertainty. Employers and insurers, as well as injured employees, would find it difficult, if not impossible, to plan for the future if judgments could be opened and retroactively modified on the basis of unanticipated changes in the law.

Id., 374, *quoting* Marone v. Waterbury, 244 Conn. 1, 18-19 (1998).

In the matter at bar, once the decedent had obtained his award in 2004, both he and the respondent could have reasonably expected that the decedent's dependents would be eligible for a dependency award should he succumb to his compensable illness. The court's reasoning in Jones, supra, suggests that a subsequent change in decisional law should not disturb such a vested right. It also suggests that any challenge to jurisdiction

[8] General Statutes § 31-315 states: "Any award of, or voluntary agreement concerning, compensation made under the provisions of this chapter or any transfer of liability for a claim to the Second Injury Fund under the provisions of section 31-349 shall be subject to modification in accordance with the procedure for original determinations, upon the request of either party or, in the case of a transfer under section 31-349, upon request of the custodian of the Second Injury Fund, whenever it appears to the compensation commissioner, after notice and hearing thereon, that the incapacity of an injured employee has increased, decreased or ceased, or that the measure of dependence on account of which the compensation is paid has changed, or that changed conditions of fact have arisen which necessitate a change of such agreement, award or transfer in order properly to carry out the spirit of this chapter. The commissioner shall also have 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. The compensation commissioner shall retain jurisdiction over claims for compensation, awards and voluntary agreements, for any proper action thereon, during the whole compensation period applicable to the injury in question."

over an injury must occur either contemporaneously or prior to the initial award to the original claimant, neither of which occurred in this case.

We note that this line of reasoning was also evident in Czujak v. Bridgeport, 55 Conn. App. 789 (1999). In Czujak, the claimant sought to gain additional benefits as a result of a favorable Supreme Court decision reached after he was awarded § 7-433c benefits. Our Appellate Court affirmed this tribunal's decision denying benefits to the claimant, stating:

> Because the plaintiff filed neither an appeal nor a motion to correct the commissioner's November 27, 1984 finding and award, that decision became final after the appeal period expired, well before Szudora [v. Fairfield, 214 Conn. 552 (1990)] was decided. Thus, the award was not pending when Szudora was decided and, unless the commissioner had the authority to modify the award pursuant to § 31-315, the plaintiff is not entitled to retroactive or prospective application of Szudora.

Id., 793-94.

Given, then, that a new interpretation of law did not warrant modification of the existing award, our Appellate Court upheld the award.

In the matter at bar, the respondent is seeking to undo decades of settled law pertaining to the eligibility of dependents to receive awards after the wage earner upon whom they relied succumbs to a compensable injury. Our Supreme Court's holding in Fredette v. Connecticut Air National Guard, 283 Conn. 813 (2007), makes it clear that such action should **not** be undertaken in the absence of definitive guidance from the General Assembly or an appellate court. "In the interpretation of a statute, a radical departure from an established policy cannot be implied. It must be expressed in unequivocal language." (Internal quotation marks omitted.) Id., 822, *quoting* State v. Ellis, 197 Conn. 436, 459 (1985). In light of the fact that we find Staurovsky, supra,

factually distinguishable, and Holston, supra, equivocal at best, we conclude that the respondent has not sustained its burden of persuasion in contending that the claimant should be deprived of her survivor's benefits.

There is no error; the May 10, 2018 "*De Novo* Review of Ruling on Form 36 Dated 5/26/17 Which Was Granted Effective 7/31/17, Prospectively Cutting Off Widow's Benefits Under C.G.S. Sec. 31-306 in Reliance on Holston v. City of New Haven, 323 Conn. 607 (2016)" is accordingly affirmed.

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