CASE NO. 6284 CRB-4-18-8 CLAIM NO. 400090754	:	COMPENSATION REVIEW BOARD
JAMES G. ARLIO CLAIMANT-APPELLEE	:	WORKERS' COMPENSATION COMMISSION
v.	:	JULY 25, 2019

TOWN OF TRUMBULL/
POLICE DEPARTMENT
EMPLOYER
SELF-INSURED

and

CONNECTICUT INTERLOCAL
RISK MANAGEMENT ASSOCIATION (CIRMA)
ADMINISTRATOR
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by David J. Morrissey, Esq., Morrissey, Morrissey & Mooney, L.L.C., 203 Church Street, P.O. Box 31, Naugatuck, CT 06770.

The respondents were represented by Terrance M. Brennan, Esq., McGann, Bartlett & Brown, L.L.C., 111 Founders Plaza, Suite 1201, East Hartford, CT 06108.

This Petition for Review from the July 18, 2018 Finding and Award by Randy L. Cohen, the Commissioner acting for the Fourth 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 David W. Schoolcraft.[1]

[1] We note that one motion for extension of time was 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 the commissioner determined that a police officer who had received benefits pursuant to General Statutes § 7-433c established that his kidney disease was the sequela of his compensable hypertension and, therefore, was also compensable under the heart and hypertension statute.[2] The respondent municipality asserts that this decision is inconsistent with our Supreme Court's analysis in Holston v. New Haven Police Dept., 323 Conn. 607 (2016). Upon review, we find that this tribunal, in Dickerson v. Stamford, 6215 CRB-7-17-8 (September 12, 2018), *appeal transferred*, S.C. 20244 (January 30, 2019), ruled on the issue of whether a sequela claim may be brought pursuant to § 7-433c. Given that the concept of *stare decisis* governs this fact pattern, we affirm the finding in this matter.

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[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."

The commissioner reached the following factual findings which are pertinent to our review. She found the claimant had been employed as a Trumbull police officer since 1978 and passed a pre-employment physical which did not reveal any evidence of heart disease. On or about December 4, 2012, the claimant was evaluated by Robert A. Caserta, M.D., a cardiologist at Connecticut Heart & Vascular Center, P.C. Caserta diagnosed the claimant with hypertension and left ventricular hypertrophy (LVH), a thickening of the heart wall due to long-standing hypertension. The claimant, who continued to exhibit elevated systolic blood pressure, continued to treat with Caserta and with Manuel C. Pun, M.D.

The claimant filed a claim for § 7-433c benefits. On November 20, 2014, a Finding and Award was approved by the commissioner awarding the claimant a 40 percent permanent partial disability of the cardiovascular system due to hypertension. The award was based on the opinion rendered on August 28, 2013, by the respondents' examiner, Kevin J. Tally, M.D., of Consulting Cardiologists, P.C., who opined that the claimant suffered from "hypertension with significant end organ damage, including both left ventricular hypertrophy as well as chronic kidney disease in large part due to his hypertension." Claimant's Exhibit A [Exhibit C].

The claimant commenced treating for his kidney disease in December 2012 after a renal and bladder ultrasound demonstrated bilateral renal cysts. The ultrasound also revealed findings consistent with bladder outlet obstruction. The claimant was referred to William A. Hunt, M.D., a board-certified nephrologist with Nephrology Associates, P.C., to treat his kidney disease. He first began treating with Hunt on December 12, 2012, and his chronic kidney disease has gotten progressively worse since that time. In a report

dated October 25, 2017, Hunt assigned a 65 percent permanent partial disability to each of the claimant's kidneys pursuant to the 6th Edition of the AMA Guidelines. See Claimant's Exhibit A [Exhibit D]. Hunt ascribed the causation of the kidney disease to hypertension, opining that the claimant "had many years of untreated hypertension which is the predominant etiology of his renal failure." Respondents' Exhibit 2 [Exhibit 2: December 15, 2017 report of William A. Hunt, M.D.] He further opined "that the major factor contributing to his chronic kidney disease was hypertension." Id.

At his deposition, Hunt testified that "the kidney is a very vascular organ, so it's sensitive to injury, and it turns out that very high pressures injure the capillary wall, and that leads to some inflammation and then eventual scarring and damage of the kidney." Respondents' Exhibit 2, p. 11. He further testified that although the obstruction in the claimant's kidney could be a small factor in the development of kidney disease, it was not a significant factor.

Anthony J. Cusano, M.D., a nephrologist at Connecticut Kidney & Hypertension Specialists, performed a records review at the request of the respondents and issued a report on October 10, 2017. He identified multiple factors behind the claimant's kidney disease, including the claimant's history of hypertension noted at the medical evaluation of 2012, the fact that the hypertension "was not under medical therapy for several years prior to that time," and the claimant's bladder outlet obstruction and urinary retention. Claimant's Exhibit B [Exhibit 1]. Cusano initially indicated that he believed polycystic kidney disease could be a cause of the claimant's kidney condition due to the presence of several cysts; subsequent to the issuance of his report, the doctor was provided with the

actual films of the claimant's kidney ultrasound and, in December 2017, stated that he could not definitively diagnose polycystic disease.[3]

Cusano further testified that the bladder outlet obstruction and urinary retention were substantial contributing factors in the development of the claimant's chronic kidney disease, stating, "I believe that played the major role because of [the] nature of the obstruction that was described and because of the way that kind of problem creates chronic kidney disease." Claimant's Exhibit B, p. 9. Although Cusano indicated that hypertension was one of the two most common causes of kidney disease, he did not consider it a causative factor in this case. He agreed that sustained high blood pressure damages capillaries and causes kidney failure but was not able to state that the claimant's high blood pressure was a significant contributing factor within a reasonable medical probability. Id., 10-11.

Hunt disagreed with Cusano's opinion, opining that the claimant's polycystic kidney condition was not a significant factor leading to his kidney disease. See Respondents' Exhibit 2, p. 14. Hunt also indicated that although there were cysts on the claimant's kidney, they were insufficient to cause damage. Id. He further disagreed with Cusano's opinion that the bladder outlet obstruction and urinary retention were significant contributing factors in causing the claimant's kidney disease. Id., 12.

[3] We note that in Findings, ¶ 18, the commissioner stated that "[a]fter reviewing the films, [Cusano] could make a definitive diagnosis of polycystic disease." Our review of the record indicates that in fact, Cusano testified that his review "did not confirm a definitive diagnosis, but it did leave open the possibility further history from the claimant would need to be obtained regarding family history, since it's a hereditary disorder, to really make the final confirmation." Claimant's Exhibit B, p. 8. However, the record also demonstrates that Hunt was of the opinion that the claimant's kidney cysts were not a substantial contributing factor to his kidney disease, and the commissioner ultimately found Hunt's opinion more persuasive than Cusano's. See Respondents' Exhibit 2, p. 14. As such, we deem the omission of the word "not" from Findings, ¶ 18, scrivener's error. See D'Amico v. Dept. of Correction, 73 Conn. App. 718, 729 (2002), *cert. denied*, 262 Conn. 933 (2003).

The commissioner found Hunt's opinions fully credible and persuasive and, as such, adopted his theory relative to the cause of the claimant's kidney disease and his assessment of the claimant's degree of permanent partial disability. She did not find Cusano's opinion persuasive, and specifically rejected his theory that the bladder outlet obstruction and urinary retention were significant contributing factors to the claimant's kidney disease.

The commissioner noted the respondents' contention that on the basis of the foregoing factual circumstances, Holston, supra, bars an award to the claimant because the decision prohibits sequela claims from a compensable claim for hypertension or heart disease. The claimant argues that the respondents' position is at odds with the provisions of § 7-433c, which state that a statutorily eligible employee who suffers an impairment of health caused by hypertension should receive benefits in the same manner as provided for under chapter 568.

After considering the arguments made by the respective parties, the commissioner found the claimant's position relative to Holston more persuasive than that of the respondents; she therefore concluded that Holston did not bar sequela claims and the plain language of the statute supported compensating the claimant. Accordingly, she awarded the claimant § 7-433c benefits for his kidney disease.

The respondents filed a motion to correct proposing that the commissioner instead find Cusano's opinion more credible and persuasive than Hunt's and therefore conclude that Holston bars an award of § 7-433c benefits to the claimant. The commissioner denied this motion in its entirety and the respondents have pursued this appeal, which essentially restates the arguments raised in their motion to correct.

The standard of deference we are obliged to apply to a trial 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).

We begin with the respondents' contention that the commissioner erroneously relied upon Hunt's opinion. We have reviewed Hunt's medical reports and deposition testimony and find that he offered an unequivocal opinion regarding the causation of the claimant's kidney disease, which opinion was supported by numerous physical examinations of the claimant. See Claimant's Exhibits A, B; Respondents' Exhibit 2. It is axiomatic that the commissioner is the ultimate judge of the merits of conflicting medical opinions, and if we find her determination reasonable, we must affirm this decision on appeal. See O'Reilly v. General Dynamics Corp., 52 Conn. App. 813, 818-819 (1999). The commissioner concluded that the causation theory advanced by Hunt was more meritorious than that presented by Cusano, and in a "dueling expert"

case, the commissioner retains the prerogative to choose the opinion she deems more persuasive and weighty.[4] See Dellacamera v. Waterbury, 4966 CRB-5-05-6 (June 29, 2006), *appeal withdrawn*, A.C. 27853 (September 12, 2006). As such, the only remaining inquiry is whether the claimant was eligible to recover benefits pursuant to § 7-433c once the commissioner determined that the claimant's kidney disease was a sequela of his compensable hypertension. We conclude that the award of § 7-433c benefits was proper.

In the matter at bar, the respondents contend that our Supreme Court's analysis in Holston removed jurisdiction from the Workers' Compensation Commission for sequela injuries.[5] This board was previously presented with the same argument in Dickerson v. Stamford, 6215 CRB-7-17-8 (September 12, 2018), *appeal transferred*, S.C. 20244 (January 30, 2019), and we rejected the respondents' position.

> To read Holston to bar a General Statutes § 7-433c claimant from asserting his injury was a sequelae injury, and require him or her to file a new claim or forfeit access to benefits, would clearly engraft a limitation which cannot be expressly found within the plain language of the statute. The statute clearly requires that we treat claims brought under that act in the same manner as chapter 568 claims. Consequently, the result herein would be inconsistent with

[4] In Larocque v. Electric Boat Corporation, 5942 CRB-2-14-6 (July 2, 2015), we restated the standard articulated in Sapko v. State, 305 Conn. 360 (2012), for establishing causation in a contested claim under chapter 568. "Viewing the precedent in Voronuk, DiNuzzo and Sapko together as a whole, it is clear that since Birnie our appellate courts have restated the need for claimants seeking an award under chapter 568 to present reliable, nonspeculative evidence and to carry their burden of proof that there is a clear nexus of proximate cause between employment and injury." In a § 7-433c case, the proximate cause analysis is not applicable to the initial injury as a result of the statutory presumption. However, a claimant must establish that any sequelae from the initially compensable injury meets this standard. Upon review, we are satisfied that the instant claimant's kidney condition was proven to this standard.

[5] In Holston v. New Haven Police Dept., 323 Conn. 607 (2016), our Supreme Court stated: "The defendant also cites to Marandino v. Prometheus Pharmacy, 294 Conn. 564, 591–92, 986 A.2d 1023 (2010), and Hernandez v. Gerber Group, 222 Conn. 78, 86, 608 A.2d 87 (1992), for the proposition that if there is a causal relationship between one injury and another, they are considered to be one event for the purposes of compensation pursuant to the Workers' Compensation Act. As we have explained previously in this opinion, § 7-433c is different from the Workers' Compensation Act because it does not require any proof of causation. Accordingly, we conclude that Marandino and Hernandez are inapplicable to our resolution of the plaintiff's claim under § 7-433c." Id., 618, n.7.

> the reasoning the *same jurists* who ruled on Holston, reached in McCullough [v. Swan Engraving, Inc., 320 Conn. 299 (2016)]. (Emphasis in the original.)

Id.

This board recently had the opportunity to address the Holston decision in Coughlin v. Stamford, 6218 CRB-5-17-9 (February 15, 2019), *appeal transferred*, S.C. 20319 (June 26, 2019). In Coughlin, the commissioner concluded that the claimant's coronary artery disease, which was found to have flowed from the claimant's compensable hypertension, was not compensable under § 7-433c. This tribunal reversed that decision, stating:

> Were the claimant to have sustained the sequelae of a compensable injury under chapter 568, he would not be expected to file a new notice of claim. We do not extend the holding of Holston to require a claimant proceeding under General Statutes §7-433c to do what would not be required under chapter 568.[6]

Id., *quoting* Dickerson, supra.

We further concluded that our interpretation of Holston was more aligned with the purpose of § 7-433c, which treats sequela injuries due to a compensable heart and hypertension claim in the same manner as a claim deemed compensable under chapter 568. We noted inter alia that the Holston court's reasoning "primarily focused on whether the claimant's initial notice of claim for his heart disease was timely," and we

[6] In Coughlin v. Stamford, 6218 CRB-5-17-9 (February 15, 2019), *appeal transferred*, S.C. 20319 (June 26, 2019), this board cited Felia v. Westport, 214 Conn. 181 (1990), as supportive of compensability of sequela injuries under General Statutes § 7-433c. See Coughlin, n.7. In Felia, our Supreme Court observed that "[o]n its face, the language 'compensation … in the same amount and the same manner' suggests that, once § 7-433c coverage is established, the measurement of the plaintiff's benefits under this statute is identical to the benefits that may be awarded to a plaintiff under chapter 568. We have regularly so held…." Id., 185. In the present matter, the claimant contends that the dismissal of his kidney disease claim on the basis of the court's analysis in Holston is at odds with the plain language of the statute and places "the hypertensive or heart diseased police officer or firefighter who elects [§] 7-433c in a far worse position than a similarly situated hypertensive or heart diseased Chapter 568 claimant." Claimant/Appellee's Brief, p. 14.

questioned whether it "can be applied to a matter in which causation is also implicated." Id. We therefore found sequela injuries fell within the scope of the heart and hypertension statute.

Our Appellate Court recently clarified the scope of application of Holston when a new claim is initiated pursuant to § 7-433c. In Brocuglio v. Thompsonville Fire District #2, 190 Conn. App. 718 (2019), the court concluded that although Holston permitted the claimant to file separate claims for either hypertension or heart disease, Ciarlelli v. Hamden, 299 Conn. 265 (2010), required that a claimant file a timely claim under § 7-433c for any form of heart disease within the statutory limits of General Statutes § 31-294c or risk losing eligibility for relief under the heart and hypertension statute for any future unrelated episode of heart disease. In reversing the decision of this tribunal, the Brocuglio court held that "[p]ursuant to Ciarlelli, the plaintiff was required to file a form 30c notice of claim under § 7-433c within one year of being advised by his cardiologist that he suffered from pericarditis."[7] Id., 739.

The parties do not dispute that in the present matter, the claimant's initial claim for benefits under § 7-433c was jurisdictionally valid. Pertinent case law suggests that once a jurisdictionally valid claim has been filed, not only are flow-through injuries compensable but survivorship claims arising from deaths due to the compensable injuries have also vested. In Costanzo v. Stamford**,** 6274 CRB-7-18-5 (May 3, 2019), *appeal pending*, A.C. 42968 (May 20, 2019), and Gentle v. Stamford**,** 6264 CRB 3-18-4 (May 30, 2019), *appeal pending*, A.C. 43055 (June 12, 2019), this board rejected challenges to the contestability of survivor claims predicated on the respondents'

[7] See Brocuglio v. Thompsonville Fire District #2, 6165 CRB-1-16-12 (December 21, 2017), *rev'd*, 190 Conn. App. 718 (2019).

argument that such claims were in conflict with Holston, supra. In the present matter, we find persuasive the proposition that the original claim for benefits preserved compensability for future manifestations of the claimant's chronic kidney disease.

The respondents also argue that our Supreme Court's analysis in Carriero v. Naugatuck, 243 Conn. 747 (1998), suggests that Holston must be interpreted in a manner which would deny benefits to the claimant. We find that argument unpersuasive. The only issue for determination in Carriero was whether the permanent partial disability and retirement payments to a retired police officer were subject to the statutory "ceiling" set forth in General Statutes § 7-433b (b).[8] Id., 748-49. Carriero did not address the scope of medical or indemnity benefits available under the Heart and Hypertension Act or the manner in which a claimant could go about establishing eligibility for such benefits because the claimant in that case had already been awarded benefits and the municipality was not contesting the claimant's eligibility for those benefits. Thus, in light of the considerable factual distinctions between Carriero and the present matter, we do not afford Carriero any weight in the disposition of this dispute.

The plain language of General Statutes § 7-433c requires that benefits be awarded "in the same amount and the same manner as that provided under chapter 568…." In Brocuglio, supra, our Appellate Court, in stating that "[t]here is no language in § 7-433c

[8] General Statutes § 7-433b (b) states: "(b) Notwithstanding the provisions of any general statute, charter or special act to the contrary affecting the noncontributory or contributory retirement systems of any municipality of the state, or any special act providing for a police or firemen benefit fund or other retirement system, the cumulative payments, not including payments for medical care, for compensation and retirement or survivors benefits under section 7-433c shall be adjusted so that the total of such cumulative payments received by such member or his dependents or survivors shall not exceed one hundred per cent of the weekly compensation being paid, during their compensable period, to members of such department in the same position which was held by such member at the time of his death or retirement. Nothing contained in this subsection shall prevent any town, city or borough from paying money from its general fund to any such member or his dependents or survivors, provided the total of such cumulative payments shall not exceed said one hundred per cent of the weekly compensation."

or Holston or Ciarlelli that permits a paid municipal firefighter to file more than one claim for heart disease," appears to limit a claimant to a single lifetime claim for heart disease benefits. Id., 742. If that is indeed the case, limiting the relief available from the one permissible claim would clearly be engrafting a limitation which cannot be found in the plain language of the statute. This commission is obligated to abide by our Supreme Court's directive that "[i]n light of the remedial nature of the Heart and Hypertension Act, this court should not impose greater constraints on the benefits afforded to disabled police officers and firefighters than the legislature has chosen to adopt." Szudora v. Fairfield, 214 Conn. 552, 559 (1990), *citing* Costello v. Fairfield, 214 Conn. 189, 194 (1990).

We conclude that the adoption of the respondents' position in this case would impose a constraint on a claimant's eligibility for benefits which cannot be found in the statute. If the claimant's kidney disease was the result of his compensable hypertension, then the kidney disease is compensable as well.[9]

There is no error; the July 18, 2018 Finding and Award of Randy L. Cohen, the Commissioner acting for the Fourth District, is accordingly affirmed.

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

[9] We uphold the commissioner's denial of the respondents' motion to correct. This motion sought to interpose the respondents' conclusions relative to the law and the facts presented and, as such, the 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).