CASE NO. 6346 CRB-4-19-9 : COMPENSATION REVIEW BOARD
CLAIM NOS. 400089260 & 400017430

KATHY SERCA, : WORKERS' COMPENSATION
DEPENDENT WIDOW OF COMMISSION
LOUIS SERCA, DECEASED
CLAIMANT-APPELLEE

v. : DECEMBER 2, 2021

CITY OF BRIDGEPORT
SELF-INSURED
EMPLOYER
RESPONDENT-APPELLANT

and

PMA MANAGEMENT CORP.
THIRD-PARTY ADMINISTRATOR

and

SECOND INJURY FUND
RESPONDENT-APPELLEE

APPEARANCES:

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

The respondent was represented by Joseph J. Passaretti, Jr., Esq., Montstream Law Group, L.L.P., 655 Winding Brook Drive, P.O. Box 1087, Glastonbury, CT 06033.

The Second Injury Fund was represented by Patrick G. Finley, Esq., Assistant Attorney General, Office of the Attorney General, 165 Capitol Avenue, Suite 4000, Hartford, CT 06106.

This Petition for Review from the August 29, 2019 Finding and Award of Jodi Murray Gregg, Administrative Law Judge acting for the Fourth District, was heard on April 30, 2021 before a Compensation Review Board panel consisting of Commission Chairman Stephen M. Morelli and Administrative Law Judges David W. Schoolcraft and Brenda D. Jannotta.[1]

OPINION

STEPHEN M. MORELLI, CHAIRMAN. The respondent employer (respondent) has petitioned for review from the August 29, 2019 Finding and Award (finding) of Jodi Murray Gregg, Administrative Law Judge acting for the Fourth District.[2] We find harmless error and accordingly affirm the decision.

The trier identified the following issues for analysis in association with a compensable heart and hypertension claim filed by the claimant's decedent in 1973: (1) compensability; (2) motion to preclude; (3) cost of living adjustments; and (4) survivor's benefits. Noting that the facts in this case were not in dispute, the trier made the following findings which are pertinent to our review of this matter. The decedent was employed as a firefighter for the respondent from April 1, 1958, through April 30, 1987. In 1973, he sustained an acute myocardial infarction and was diagnosed with heart disease. Although he notified the respondent of his condition at that time, he did not file a form 30C; however, the respondent accepted the claim as compensable and paid the associated benefits.[3] On May 9, 1984, the decedent filed a form 30C with the

[1] Effective October 1, 2021, the Connecticut Legislature directed that the phrase "Administrative Law Judge" be substituted when referencing a workers' compensation commissioner. See Public Act 21-18.
[2] We note that two motions for extensions of time and four postponements were granted during the pendency of this appeal.
[3] "A form 30C is the document prescribed by the Workers' Compensation Commission to be used when filing a notice of claim pursuant to the Workers' Compensation Act, General Statutes § 31-275 et seq." Mehan v. Stamford, 127 Conn. App. 619, 622 n.4, *cert. denied*, 301 Conn. 911 (2011).

Workers' Compensation Commission noticing a claim for an acute myocardial infarction with a March 22, 1973 date of injury.[4] The decedent retired from employment with the respondent on April 30, 1987, and received a disability pension effective as of that date.

In 1988, the decedent relocated to Florida, where he remained until his death. While in Florida, the decedent came under the care of Saukara N. Dinavahi, M.D., and S.K. Rao Musunuru, M.D. On August 11, 1988, the decedent underwent quadruple aorto-coronary bypass surgery. On April 24, 1989, he filed a form 30C referencing a "heart surgery" injury with a date of injury of August 10, 1988.[5] On September 10, 1992, Administrative Law Judge Frank J. Verrilli issued a Finding and Award for benefits pursuant to General Statutes § 7-433c as a result of the injury sustained on March 22, 1973.[6] See Claimant's Exhibit F. He also found the decedent eligible for a permanent partial disability award of 50 percent of the cardiovascular system.

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[4] The evidentiary record indicates that this form 30C was dated May 1, 1984, and was received by the Workers' Compensation Commission on May 9, 1984.

[5] In her Finding and Award, the administrative law judge found that this form 30C was filed on August 24, 1989, "one year and fourteen days after the underlying injury of August 10, 1988 and four months after the Decedent-Claimant's retirement from the City of Bridgeport." Findings, ¶¶ 11, 12. See also Appellant's Brief, p. 4. However, in light of her ultimate conclusions in this matter, we deem these inaccuracies harmless error. See D'Amico v. Dept. of Correction, 73 Conn. App. 718, 729 (2002), *cert. denied*, 262 Conn. 933 (2003).

[6] General Statutes § 7-433c (a) states: "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

In correspondence to Dinavahi dated April 2, 1993, Musunuru diagnosed the decedent with:

1. Coronary artery disease, status post coronary bypass surgery 1988.
2. Carotid artery disease.
3. History of hypertension.
4. History of mitral valve prolapse.
5. History of diverticulosis.
6. History of ruptured disc.
7. History of hyperlipidemia.

Respondent's Exhibit 6.

The condition of the decedent continued to worsen, and he underwent surgeries in 1996, 2004 and 2008. In June 2008, he was hospitalized complaining of shortness of breath. A cardiac catheterization was performed which showed three-vessel coronary artery disease. Musunuru recommended that the decedent undergo additional coronary bypass surgery as well as a mitral valve replacement. The decedent declined any further treatment and his condition continued to deteriorate. In a Physician's Admission Order Form dated August 2, 2010, the decedent was diagnosed with congestive heart failure, atherosclerotic heart disease, atrial fibrillation and a mitral valve condition. See Claimant's Exhibit A, Sub-Exhibit E.

On August 19, 2010, the decedent passed away. The medical examiner's report stated that his death was due to natural causes. On April 22, 2014, Dinavahi, after summarizing the decedent's history of cardiovascular symptoms since 1973 and noting

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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."

that his cardiac disease had resulted in his retirement, opined as follows regarding the cause of death:

> It is my belief that from the fact that he has been under our care primarily for his cardiac problems with worsening of his cardiac condition ultimately resulting in sudden death. [sic] I believe that his death is directly related to the condition that caused his premature retirement. He was also followed by a cardiologist on a regular basis.

Claimant's Exhibit A, Sub-Exhibit D.

On July 16, 2014, following a review of Dinavahi's report, the Board of Fire Commissioners granted the claimant a "Widow's Line of Duty Disability Pension" effective as of August 20, 2010. Claimant's Exhibit D. On September 7, 2012, the claimant filed a form 30D claiming survivor's benefits due to the death of the decedent from his compensable heart claim of March 22, 1973. On March 29, 2013, the respondent filed a form 43 in response to this claim.[7] The claimant filed a motion to preclude the respondent from contesting the claim due to its failure to respond to the form 30D within twenty-eight days. The respondent contended that the claim for survivor's benefits is untimely pursuant to General Statutes § 31-294c.[8]

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[7] "A form 43 is a disclaimer that notifies a claimant who seeks workers' compensation benefits that the employer intends to contest liability to pay compensation. If an employer fails timely to file a form 43, a claimant may file a motion to preclude the employer from contesting the compensability of his claim." Mehan v. Stamford, 127 Conn. App. 619, 623 n.6, *cert. denied*, 301 Conn. 911 (2011).

[8] 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

In her finding, the trier noted that in McCullough v. Swan Engraving, Inc., 320 Conn. 299 (2016), our Supreme Court had stated:

> [T]here 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. If the legislature had intended to require such a filing and to provide a statute of limitations period, it could have done so. In the face of a legislative omission, it is not our role to engraft language onto the statute to require a dependent to file a claim for survivor's benefits in such a situation.

Id., 310.

The trier also noted that the provisions of General Statutes § 31-306 provide that cost-of-living adjustments (COLAs) be awarded to any dependent for a death arising from a compensable injury occurring on or before September 30, 1977.[9] She further

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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."

[9] General Statutes § 31-306 states in relevant part: "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 … 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. (A) The weekly compensation rate of each dependent entitled to receive compensation under this section as a result of death arising from a compensable injury occurring on or after October 1, 1977, shall be adjusted annually as provided in this subdivision as of the following October first, and each subsequent October first, to provide the dependent with a cost-of-living adjustment in the dependent's weekly compensation rate as determined as of the date of the injury under section 31-309…. The cost-of-living increases provided under this subdivision shall be paid by the employer without any order or award from the commissioner. The adjustments shall apply to each payment made in the next succeeding twelve-month period commencing with the October first next succeeding the date of the injury. With respect to any dependent receiving benefits on October 1, 1997, with respect to any injury occurring on or after July 1, 1993, and before October 1, 1997, such benefit shall be recalculated to October 1, 1997, as if such benefits had been subject to recalculation annually under this subparagraph. The difference between the amount of any benefits that would have been paid to such dependent if such benefits had been subject to such recalculation and the actual amount of benefits paid during the period between such injury and such recalculation shall be paid to the dependent not later than December 1, 1997, in a lump-sum payment. The employer or its insurer shall be reimbursed by the Second Injury Fund, as provided in section 31-354, for adjustments, including lump-sum payments, payable under this subparagraph for deaths from compensable injuries occurring on or after July 1, 1993, and before October 1, 1997, upon presentation of any vouchers and information that the Treasurer shall require…. The cost of the adjustments shall be paid by the employer or its insurance carrier who shall be reimbursed for such cost from the Second Injury Fund as provided in section 31-354 upon presentation of any vouchers and information that the Treasurer shall require…."

noted that a Finding and Award had previously been issued acknowledging acceptance of the decedent's March 22, 1973 heart claim pursuant to the provisions of § 7-433c and awarding, inter alia, permanent partial disability benefits for a 50-percent disability of the cardiovascular system. In addition, she found persuasive Dinavahi's April 22, 2014 report opining that the death of the decedent was the result of the progression of his compensable March 22, 1973 heart claim. As such, the trier concluded that the death of the decedent was caused by this injury and the dependent survivor's claim was compensable pursuant to the provisions of § 7-433c.

The trier also determined, in light of our Supreme Court's holding in McCullough, supra, that the claimant was not required to file a separate or new claim for benefits following the death of her husband from his work-related injury. However, she found that the claimant did file a form 30D, and the respondent's form 43 contesting the claim was filed more than twenty-eight days after the form 30D was filed. The trier therefore concluded that the respondent was precluded from contesting the claim. She further found that because the decedent's death was the result of a work-related injury that occurred prior to September 30, 1977, the claimant was entitled to COLAs retroactive to June 2010.

The trier ordered the respondent to pay survivor's benefits to the claimant consistent with the provisions of §§ 7-433c and 31-306 commencing on August 19, 2010. She also ordered the respondent to pay the claimant the statutory burial allowance of $4,000.00. Finally, she noted that additional evidentiary hearings would be scheduled in order to examine the issue of reimbursement of the COLAs.

The respondent filed a motion to correct, which was denied in its entirety, and a motion for articulation, contending that the finding was ambiguous because it was "impossible" for the respondent to determine whether the claimant was owed benefits pursuant to chapter 568 (the Workers' Compensation Act) or § 7-433c.[10] Respondent-Appellant's Motion to Articulate, p. 2. The respondent pointed out that because our Supreme Court has held that "[a]n injured employee or the Decedent-Claimant's dependent may elect to proceed under either chapter 568 or C.G.S. § 7-433c," the administrative law judge was required to specifically state under which statutory scheme benefits were to be paid to the claimant. Id., *citing* Bakelaar v. West Haven, 193 Conn. 59 (1984).

The trier granted the motion for articulation, indicating in her ruling that the September 10, 1992 Finding and Award acknowledged acceptance of the March 22, 1973 heart claim pursuant to the provisions of § 7-433c and the associated claim for survivor's benefits was the result of the progression of this heart claim. As such, she stated that the respondent was to pay survivor's benefits pursuant to the provisions of § 7-433c as well as COLAs pursuant to § 31-306.

The respondent appealed, contending that the trier erred in granting preclusion and in relying upon McCullough, supra, for the conclusion that the claimant was not required to file a new or separate claim for survivor's benefits. The respondent also asserted that the trier erroneously determined that the claim should be administered pursuant to the provisions of § 7-433c rather than chapter 568. In its third claim of error,

[10] The Workers' Compensation Act is codified at chapter 568 of the General Statutes, §§ 31-275 to 31-355b.

the respondent raised the issue of reimbursement of the COLAs by the Second Injury Fund (fund).

However, at proceedings before this tribunal, counsel for the respondent indicated he was no longer challenging the trier's findings with regard to the compensability of the survivor's claim and acknowledged that the claimant had met her prima facie burden.[11] Accordingly, our review of this matter will be limited to an examination of the respondent's claims of error relative to the statutory scheme under which this claim should continue to be litigated and the issue of the reimbursement of the COLAs by the fund.[12]

The standard of review we are obliged to apply to the findings and legal conclusions of an administrative law judge is well-settled. "The [trier'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). Thus, "it is … immaterial that the facts permit the drawing of diverse inferences. The

[11] At oral argument held on April 30, 2021, counsel for the respondent, when queried as to whether the claimant had met her prima facie burden, replied: "But frankly, I'm taking for granted, because of what I know about this case, that it absolutely unequivocally will have happened in this case." April 30, 2021 Compensation Review Board Transcript, p. 9. In addition, in response to a query as to whether he was limiting his appeal to the issue of COLA reimbursement, he replied in the affirmative. See id., 13.

[12] We note that in its brief, the Second Injury Fund concurred with the respondent municipality's arguments relative to the issues of compensability and preclusion. See Respondent-Appellee's Brief, p. 3. However, in light of the fact that the fund did not seek to preserve these claims of error at oral argument, we deem them abandoned on appeal.

[trier] alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court." Fair v. People's Savings Bank, 207 Conn. 535, 540 (1988), *quoting* Del Vecchio v. Bowers, 296 U.S. 280, 287 (1935).

We begin our analysis with the claim of error relative to the conclusion that the claim should continue to be administered pursuant to the provisions of § 7-433c. The respondent contends that the administrative law judge erred by "[failing] to take into consideration whether the Claimant preferred to pursue her claim under chapter 568 or C.G.S. § 7-433c. Instead, the Trial Commissioner, in effect, chose C.G.S. § 7-433c on behalf of the Claimant – which is in direct conflict with the law." Id., 19. The respondent cites Bergeson v. New London, 269 Conn. 763 (2004), as authority for this contention, noting that in that decision, our Supreme Court held that "[a]n employee may, if the facts so warrant, elect to proceed under either chapter 568 or § 7-433c." Id., 768, *quoting* Collins v. West Haven, 210 Conn. 423, 427 (1989). See also Bakelaar, supra.

The respondent further points out that "it would be more advantageous for the claimant to proceed under Chapter 568 as these benefits are not taxable …." Appellant's Brief, p. 20. Moreover, in light of preclusion having been granted, the claimant no longer bears the burden of proof to establish that the decedent's cause of death was related to the underlying heart and hypertension claim.[13] The respondent further avers that the

[13] In its motion to correct, the respondent asserted that "[i]f the Respondents are precluded, then the claimant has no burden of proof, and thereby does not need the presumptive relief of C.G.S. § 7-433c." September 11, 2019 Respondent's Motion to Correct. As such, "the claim should arise under Chapter 568, not the Heart and Hypertension Act." Id. Although we recognize that the decedent in the present matter was not required to establish causation in order to prosecute his claim for heart and hypertension benefits, there is no question that the surviving dependent bore the burden of establishing that the decedent's death was caused by the injury which had given rise to the § 7-433c claim. As discussed previously herein, the respondent in the instant matter is not challenging the trier's findings with regard to the compensability of the survivor's claim and acknowledged at oral argument that the claimant had satisfied her prima facie

claimant's "clear assent" to the respondent's decision to file its motion for articulation signified that the claimant had "a clear preference to pursue her claim under Chapter 568 …." Id., 21.

We are not so persuaded. In Bakelaar, supra, the municipal employer argued that if an injured worker's "claim falls within chapter 568, he may not elect recovery under § 7-433c." Id., 68. Our Supreme Court disagreed, stating:

> [T]o adopt this reasoning would contravene the legislative mandate of § 7-433c, which "specifically requires the payment of compensation to firemen and policemen who have successfully passed a physical examination which failed to reveal any evidence of hypertension or heart disease and who subsequently die or are disabled as a result of such conditions."

Id., *quoting* Plainville v. Travelers Indemnity Co., 178 Conn. 664, 670 (1979).

The court further observed that "[t]he imposition of a burden to show whether injuries occurred 'on duty' is not warranted by the relief afforded to claimants under § 7-433c." Id., 69. Nevertheless, despite the Bakelaar court's preservation of a claimant's right to elect the statutory scheme under which he or she wishes to proceed, we do not find Bakelaar applicable to the circumstances of the present matter.[14]

The evidentiary record demonstrates, and the administrative law judge so found, that the underlying claim has been consistently administered pursuant to the provisions of § 7-433c. In addition, the record is devoid of any evidence which would allow for the reasonable inference that either the decedent or the claimant ever contemplated electing

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burden. Nonetheless, we are not persuaded that the granting of preclusion served to convert a heart/hypertension claim into a chapter 568 claim by operation of law.

[14] In the present matter, the Second Injury Fund has posited that the holding in Bakelaar v. West Haven, 193 Conn. 59 (1984), which provides for an injured employee's election of statutory remedy, is not applicable to a surviving dependent. Given that we are not persuaded that Bakelaar is applicable to the present matter, we decline to reach that issue in our analysis of the instant appeal.

to pursue a chapter 568 claim. In fact, in her brief, the claimant states that she "takes no position on the Respondent-Appellants' other two arguments regarding under which chapter (568 or 7-433c) the claim should be administered …." Claimant-Appellee's Brief, p. 6. We therefore find no support for the respondent's contention that the claimant ever demonstrated her "clear assent" to the claim being administered pursuant to chapter 568 rather than § 7-433c. Id., 21.

We further note that the respondent did not move to correct the trier's findings indicating that the 1992 Finding and Award had awarded the decedent heart and hypertension benefits for the March 22, 1973 heart claim; the decedent's death was caused by this injury; and the instant claim for survivor's benefits arose from this injury. Our review of this finding indicates that Administrative Law Judge Verrilli specifically stated that "[t]he parties … were subject to the provisions of the Connecticut General Statutes, Section 7-433c," September 10, 1992 Finding and Award, ¶ 2, and he awarded the decedent permanency benefits for 50 percent of the cardiovascular system pursuant to the provisions of § 7-433c. In light of the foregoing, we find no error with regard to the trier's conclusion that the instant claim for survivor's benefits should continue to be administered pursuant to the provisions of § 7-433c rather than chapter 568.[15]

[15] The respondent further avers that if the claimant were permitted to prosecute her claim pursuant to chapter 568 rather than § 7-433c, the fund would be liable to reimburse the respondent municipality regardless of the holding in Bergeson v. New London, 269 Conn. 763 (2004). In support of this contention, the respondent cites Hasselt v. Lufthansa German Airlines, 262 Conn. 416 (2003), noting that when "the legislature has enacted COLA payments retroactively for claimants with dates of injury prior to the legislation, due process considerations ***have induced the legislature to require the Second Injury Fund to reimburse employers for the payment of COLAs in these cases***." (Emphasis in the original.) Appellant's Brief, pp. 23-24. As such, the respondent contends that "Hasselt stands for the proposition that when a claim falls under Chapter 568, the employer may seek reimbursement from the Second Injury Fund and the Fund is subsequently liable for said reimbursement." Id., p. 30. Given that we have determined that the administrative law judge did not err in ruling that the claim be administered pursuant to the provisions of § 7-433c, we decline to examine this argument in any depth.

We turn next to the issue of whether the respondent municipality is entitled to reimbursement of the COLAs due to the claimant. In her finding, the trier concluded that the claimant was eligible for these benefits but did not identify the party responsible for paying them, noting instead that additional evidentiary hearings would be held on the issue. In a subsequent ruling in response to the respondent's motion for articulation, she concluded that the respondent was responsible for paying these benefits; however, she did not rule on the issue of whether the fund would be required to reimburse the respondent for these payments.

Despite the fact that the trier did not rule on the issue of COLA reimbursement, the respondent has asserted on appeal that the fund is liable to the respondent for these payments regardless of whether the survivor's claim is administered pursuant to chapter 568 or § 7-433c. We question whether this issue is ripe for appellate review, in light of the fact that the trier reserved judgment pending the result of additional proceedings. However, given that both the fund and the respondent briefed the issue, and it was raised at oral argument without objection, in the interests of judicial economy, we will examine the respondent's arguments at this juncture.

General Statutes § 31-306 (c) (1), which provides for COLAs for surviving dependents, states in relevant part:

> The dependents of any deceased employee who was injured between January 1, 1952, and December 31, 1973, and who subsequently dies, shall be paid compensation on account of the death retroactively to the date of the employee's death. The cost of the payment or adjustment shall be paid by the employer or its insurance carrier who shall be reimbursed for such cost from the Second Injury Fund as provided in section 31-354 upon

> presentation of any vouchers and information that the Treasurer shall require.

General Statutes § 31-306 (c) (1).

In addition, General Statutes § 31-354 (a) states that "[t]he fund shall be used to provide the benefits set forth in section 31-306 for adjustments in the compensation rate and payment of certain death benefits …." It is the respondent's position that the language of these statutory provisions "specifically authorizes and directs the Second Injury Fund to provide reimbursement of retroactive COLA 'adjustments' and … 'death benefits' required by the Workers' Compensation Act and 'other statutes' outside the Act." Appellant's Brief, p. 23.

Our review of the evidentiary record indicates that in the present matter, the decedent's date of injury was March 22, 1973. The respondent concedes that because the decedent's date of injury falls within the date range established by § 31-306 (c) (1), the claimant's retroactive claim for COLAs is controlled by those statutory provisions. See Iacomacci v. Trumbull, 209 Conn. 219, 222 (1988). However, the respondent also points out that in situations involving retroactive payments, reimbursement from the fund "is provided because of concerns that retroactive burdens raise constitutional concerns and concepts of fundamental fairness." Appellant's Brief, p. 24.

The fund disagrees with the respondent's assessment of its liability, and has asserted, consistent with Bergeson, supra, and McNulty v. Stamford, 37 Conn. App. 835 (1995), that it is not responsible for reimbursing a municipal employer for COLAs paid pursuant to § 7-433c claims. Rather, because "rights under C.G.S. § 7-433c are clearly separate from those under Chapter 568 for constitutional reasons, the provision in

§ 31-306 (a) (2) (A) regarding reimbursement by the Fund is not applicable to claims arising under C.G.S. § 7-433c."[16] Respondent-Appellee's Brief, p. 5.

In McNulty, supra, our Appellate Court reviewed an appeal brought by the fund challenging a commissioner's finding which held the fund liable for the reimbursement of COLAs paid to the surviving spouse of a § 7-433c claimant. Citing both Plainville, supra, and Bakelaar, supra, the court stated that "[i]n both cases our Supreme Court definitely held that § 7-433c benefits are not … payable under any part of the Workers' Compensation Act." Id., 844. The court also observed that heart and hypertension law is "separate and distinct from chapter 568," id., 839, and "[t]he fund was created, not to serve the purposes found in § 7-433, but to serve those in the Workers' Compensation Act …." Id., 840. As such, the court reversed the decision of the administrative law judge, stating that "[t]he express language of § 7-433c provides for one and only one payor of the benefits of compensation and medical care: the municipal employer. The

[16] General Statutes § 31-306 (a) (2) (A) provides in relevant part: "The weekly compensation rate of each dependent entitled to receive compensation under this section as a result of death arising from a compensable injury occurring on or after October 1, 1977, shall be adjusted annually as provided in this subdivision as of the following October first, and each subsequent October first, to provide the dependent with a cost-of-living adjustment in the dependent's weekly compensation rate as determined as of the date of the injury under section 31-309…. The cost-of-living increases provided under this subdivision shall be paid by the employer without any order or award from the commissioner…. The adjustments shall apply to each payment made in the next succeeding twelve-month period commencing with the October first next succeeding the date of the injury. With respect to any dependent receiving benefits on October 1, 1997, with respect to any injury occurring on or after July 1, 1993, and before October 1, 1997, such benefit shall be recalculated to October 1, 1997, as if such benefits had been subject to recalculation annually under this subparagraph. The difference between the amount of any benefits that would have been paid to such dependent if such benefits had been subject to such recalculation and the actual amount of benefits paid during the period between such injury and such recalculation shall be paid to the dependent not later than December 1, 1997, in a lump-sum payment. The employer or its insurer shall be reimbursed by the Second Injury Fund, as provided in section 31-354, for adjustments, including lump-sum payments, payable under this subparagraph for deaths from compensable injuries occurring on or after July 1, 1993, and before October 1, 1997, upon presentation of any vouchers and information that the Treasurer shall require. No claim for payment of retroactive benefits may be made to the Second Injury Fund more than two years after the date on which the employer or its insurer paid such benefits in accordance with this subparagraph."

fund is not a municipal employer. The fund is never mentioned in § 7-433c as a payor or reimburser."[17] Id., 842.

In the present matter, the respondent contends that "[a]lthough the holding of McNulty is clear, it was decided before 1997 – when the legislature amended C.G.S. § 31-306 (a) (2) (A) to restore COLAs and provide for reimbursement from the fund." Appellant's Brief, p. 26. The respondent also notes that the legislative history for this amendment did not reference McNulty, other similar cases, or the provisions of § 7-433c. The respondent thus avers that "[t]he legislature had the opportunity to set forth clear precedent on whether or not the Second Injury Fund was liable for reimbursement and failed to take such action." Id., 25-26.

Nearly twenty years later, in Bergeson, supra, our Supreme Court reviewed an appeal brought by a municipal employer challenging this board's reversal of the administrative law judge's finding that the fund was required to reimburse the employer for COLAs paid to a claimant in association with her deceased husband's § 7-433c claim. The court noted that in reversing the decision, this tribunal had relied upon McNulty, supra, "in which the Appellate Court concluded that an earlier revision of § 31-306 (a) (2) (A) did not require the fund to reimburse municipal employers for COLAs paid in connection with § 7-433c benefits." Bergeson, supra, 768. The court further noted that the provisions of § 31-306 (a) (2) (A) specifically state that reimbursements would be issued by the fund "for adjustments … *payable under this subparagraph for deaths from compensable injuries* occurring on or after July 1, 1993, and before October 1, 1997 …."

[17] In McNulty v. Stamford, 37 Conn. App. 835 (1995), our Appellate Court also contrasted the provisions of General Statutes § 7-433c with those of General Statutes §§ 7-314a (d) and 5-145a, noting that the latter "expressly bring certain heart and hypertension cases within chapter 568." Id., 843.

(Emphasis in the original.) Id., 770-71. The court observed that "it is apparent that the term 'compensable injuries,' as used in § 31-306 (a) (2) (A), would apply only to injuries that are causally related to the employee's job, and to occupational disease," id., thereby distinguishing benefits paid for such injuries from those paid in connection with heart and hypertension claims.

In the present matter, the respondent concedes that "Bergeson is clear that the Fund is not required to reimburse municipalities for COLAs paid in connection with a claim arising under C.G.S. §7-433c." Appellant's Brief, p. 26. However, the respondent also contends that "the Bergeson holding is limited to the time period of 1993 to 1997 and the language of § 31-306 (a) (2) (A)." Id. The respondent argues that although:

> the holding in Bergeson posits reasonable public policy, it does not apply to the present facts as at the time of the claimant's injury, 1973, ***no assessments*** were made retroactively by the Treasurer on behalf of the Second Injury Fund against employers for the period of January 1, 1952 to December 31, 1973, be they for C.G.S. § 7-433c claims or any claims under Chapter 568. (Emphasis in the original.)

Id., 28.

In addition, the respondent points out that in 2001, the legislature passed P.A. 01-162 which inter alia "retroactively reinstated COLAs for dependents of employees who were injured between January 1, 1952 and December 31, 1973." Id. However, although the fund was deemed responsible for reimbursing these payments, the legislature did not implement any sort of mechanism for relieving the fund of liability for same. "Regardless of the impact this would have on the Fund, the legislature sought no

retroactive assessments nor did it limit who was entitled to reimbursements from the Fund." Id., 29. The respondent therefore contends that:

> the holding of Bergeson was one of fairness – municipalities should not be entitled to reimbursement for benefits that the Second Injury Fund did not consider in their assessments. Given that these considerations disappear with the enactment of P.A. 01-162, the holding of Bergeson should not be found applicable to the underlying case.

Id., 30.

We are not persuaded by the respondent's arguments in this regard. We note at the outset that at oral argument for Bergeson, the respondent municipality "conceded that § 7-433c benefits generally are not included in the calculation of assessments to the fund under the Workers' Compensation Act." Id. As such, the court observed that "were we to imply liability to the fund in the present case, it would create the anomalous result of allowing municipal employers to obtain the benefit of fund reimbursement without incurring the statutory liability of 'the special assessment premium surcharge' …." Id., 782, *quoting* General Statutes § 31-354 (a).

The court also extensively examined the legislative history behind § 31-306 (a) (2) (A), noting that until July 1, 1993, "dependents of deceased employees were entitled to COLAs for deaths arising from compensable injuries sustained on or after October 1, 1977." Id., 772. However, on July 1, 1993, the legislature eliminated these COLAs, only to "reverse course" on October 1, 1997, and reinstate COLAs for dependents of deceased employees injured on or after July 1, 1993, and before October 1, 1997, the payment of which would entitle employers and insurers to reimbursement from the fund. Id., 772.

The court stated that in so doing, the legislature "intended that the primary economic impact of that provision would be on the fund, and not on employers or their

insurers. It also is apparent, however, that the legislature was concerned with keeping the impact on the fund to a minimum." Id., 776. The court further noted that the legislative history for this amendment contained no reference to the heart and hypertension statutes and, as such, the legislature "was concerned primarily with workers' compensation benefits, and not with benefits under § 7-433c." Id., 780.

Ultimately, the Bergeson court concluded:

> In sum, although we recognize that the legislature may well have been concerned with the fiscal impact on municipalities of retroactive payment of COLAs, and therefore expressly authorized reimbursement from the fund for that purpose with regard to workers' compensation benefits, we cannot extend that limited expression of statutory authority to imply that the fund also is liable to reimburse municipal employers for COLAs paid in connection with the *separate and distinct* legislation of § 7-433c. As evidenced by the legislature's usage of express statutory authority of fund reimbursement in § 31-306 (a) (2) (A), as well as in other statutes, the legislature certainly knew how to authorize payment from the fund had it intended to do so…. Accordingly, we conclude that the fund is not required to reimburse a municipal employer, like the city in the present case, for COLAs paid in connection with a claim under § 7-433c. (Emphasis added.)

Id., 782-83.

The foregoing analysis clearly demonstrates that in deciding Bergeson, the court was well-acquainted with the statutory framework underlying the calculations and procedures for fund assessments. However, in describing the heart and hypertension statutes as "separate and distinct legislation," id., 782, the Bergeson court echoed the same rationale previously articulated by the Appellate Court in McNulty, supra, recognizing a sharp distinction between claims brought pursuant to chapter 568 and those brought under the auspices of § 7-433c. Moreover, as discussed previously herein, the McNulty court went to great lengths to distinguish claims brought pursuant to

chapter 568, for which the fund was created, from those brought pursuant to the provisions of the Heart and Hypertension Act, which "clearly limits the source of benefits to the claimant's municipal employer." Id., 842. As such, we are not persuaded that either Bergeson or McNulty can be disregarded in order to assign liability for the COLAs reimbursements due and payable in the instant matter to the fund.

We are similarly not persuaded that the passage of P.A. 01-162, which reinstated COLAs for dependents of employees injured between January 1, 1952, and December 31, 1973, without the imposition of any retroactive assessments, leads inexorably to the inference that in the present matter, the fund should be held liable for reimbursing a municipality for COLAs paid to the dependent of a claimant who prosecuted his claim pursuant to the provisions of § 7-433c. This is particularly so given that in Bergeson, which was decided in 2004, our Supreme Court did not reference P.A. 01-162.

There is harmless error; the August 29, 2019 Finding and Award of Jodi Murray Gregg, Administrative Law Judge acting for the Fourth District, is accordingly affirmed.

Administrative Law Judges David W. Schoolcraft and Brenda D. Jannotta concur in this Opinion.