CASE NO. 6470 CRB-7-22-4 : COMPENSATION REVIEW BOARD
CLAIM NO. 700003691

ROSEANN ESPOSITO, SURVIVING SPOUSE OF ROBERT ESPOSITO, DECEASED : WORKERS' COMPENSATION
CLAIMANT-APPELLANT COMMISSION

v. : FEBRUARY 6, 2023

CITY OF STAMFORD
EMPLOYER
SELF-INSURED

and

PMA MANAGEMENT CORPORATION OF NEW ENGLAND
THIRD-PARTY ADMINISTRATOR
RESPONDENTS-APPELLEES

APPEARANCES:

The claimant was represented by Steven G. Howe, Esq., D'Agosto & Howe, L.L.C., 738 Bridgeport Avenue, Shelton, CT 06484.

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

This Petition for Review from the March 22, 2022 Findings and Order of Randy L. Cohen, Administrative Law Judge acting for the Seventh District, was heard on August 26, 2022 before a Compensation Review Board panel consisting of Chief Administrative Law Judge Stephen M. Morelli and Administrative Law Judges Daniel E. Dilzer and Carolyn M. Colangelo.[1]

[1] Effective October 21, 2021, the Connecticut legislature directed that the phrase "administrative law judge" be substituted when referencing a workers' compensation commissioner. See Public Acts 2021, No. 18, § 1.

OPINION

STEPHEN M. MORELLI, CHIEF ADMINISTRATIVE LAW JUDGE. The claimant has petitioned for review from the March 22, 2022 Findings and Order of Randy L. Cohen (finding), Administrative Law Judge acting for the Seventh District.[2] We affirm the result reached by the administrative law judge, albeit on alternative grounds.[3]

The administrative law judge identified as the sole issue for determination whether the decedent's surviving spouse was entitled to permanent partial disability benefits pursuant to General Statutes § 31-308 (b)[4] following the decedent's death on November 7, 2020. The trier took administrative notice of the June 9, 1998 Finding & Award of Commissioner Leonard S. Paoletta (1998 award) as well as two forms 36 filed on November 13, 1995, and April 1, 1998, respectively.[5]

Roseann Esposito, the decedent's alleged surviving spouse and sole presumptive dependent, was added as a party to this claim at formal proceedings held on July 19, 2021. Esposito and the decedent were married on July 4, 1974, in the state of New York, where they resided until 1976, at which time they relocated to Connecticut. The decedent commenced employment with the respondent-employer Stamford police

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[2] We note that one motion for extension of time was granted during the pendency of this appeal.

[3] "An appellate court is authorized to rely upon alternative grounds supported by the record to sustain a judgment." (Internal quotation marks omitted.) Martinez v. Empire Fire & Marine Ins. Co., 151 Conn. App. 213, 226 (2014), *aff'd*, 322 Conn. 47 (2016), *quoting* Mortgage Electronic Registration Systems, Inc. v. Goduto, 110 Conn. App. 367, 372, *cert. denied*, 289 Conn. 956 (2008).

[4] General Statutes § 31-308 (b) (Rev. to 1979) states in relevant part: "With respect to the following-described injuries, the compensation, in addition to the usual compensation for total incapacity but in lieu of all other payments for compensation, shall be sixty-six and two thirds per cent of the average weekly earnings of the injured employee, but in no case more than the maximum weekly benefit rate set forth in section 31-309, or less than twenty dollars weekly .... (7) for the complete and permanent loss of the sight of one eye, or the reduction in one eye to one-tenth or less of normal vision, two hundred and thirty five weeks ...."

[5] A form 36 is entitled "Notice of Intention to Reduce or Discontinue Payments."

department on April 5, 1976; at that time, he underwent a physical examination which determined that his vision was 20/20 in both eyes.

On April 24, 1982, the decedent suffered a compensable injury when he fell and struck the back of his head on a concrete floor; upon regaining consciousness, he discovered that his vision was blurred in both eyes. The decedent was initially treated by James E. Pulkin, an ophthalmologist, who diagnosed the claimant with "profound visual loss in both eyes" and "concluded that the best level of corrected vision in the right eye was 20/400 and finger counting at four inches in the left eye." Findings, ¶ 7, *quoting* June 9, 1998 Finding & Award, Findings, ¶ 6. At an informal hearing held on April 24, 1984, before the Workers' Compensation Commission (commission), the respondents agreed to provide statutory total disability benefits to the claimant in accordance with General Statutes § 31-307,[6] which provided inter alia that "[t]otal and permanent loss of sight of both eyes, or the reduction to one-tenth or less of normal vision" causes total incapacity. These benefits amounted to $531.03 per week.

In correspondence dated June 3, 1985, to decedent's then-counsel, Commissioner Gerald Kolinsky stated that the decedent was entitled to total disability benefits pursuant to General Statutes § 31-307 (a) "due to total and permanent loss of sight in both eyes." Claimant's Exhibit E.

[6] General Statutes § 31-307 (Rev. to 1979) states in relevant part: "If any injury for which compensation is provided under the provisions of this chapter results in total incapacity to work, there shall be paid to the injured employee a weekly compensation equal to sixty-six and two-thirds per cent of his average weekly earnings at the time of the injury; but the compensation shall in no case be more than the maximum weekly benefit rate set forth in section 31-309 for the year in which the injury occurred .... No employee entitled to compensation under this section shall receive less than twenty dollars weekly; and such compensation shall not continue longer than the period of total incapacity. The following-described injuries of any person shall be considered as causing total incapacity and compensation shall be paid accordingly: (a) Total and permanent loss of sight of both eyes, or the reduction to one-tenth or less of normal vision ...."

On or about April 1, 1998, the respondents filed a form 36 contesting the decedent's ongoing entitlement to statutory total disability benefits, resulting in a formal hearing before Commissioner Paoletta. The commissioner identified as one of the issues for determination "[t]he approval or denial of a Form 36 filed and received on April 1, 1998 and alleging that the [decedent's] permanent total disability status is other than it was in 1984." Findings, ¶ 13, *quoting* June 9, 1998 Finding & Award, ¶ III.

In his 1998 award, Commissioner Paoletta found that the decedent had sustained a compensable injury on April 24, 1982, while in the course of his employment as a police officer for the respondent-employer City of Stamford. The commissioner further found that the decedent had been receiving total disability benefits, initially pursuant to § 31-307 (a), subsequently revised to General Statutes § 31-307 (c) (1), for the "total and permanent loss of sight or the reduction to one-tenth or less of normal vision in both eyes."[7] Findings, ¶ 16, *quoting* 1998 Finding & Award, ¶ II. The commissioner noted that the eye injury sustained by the decedent on April 24, 1982, satisfied the standard for total incapacity and the condition had persisted for the preceding sixteen years. As such, the commissioner denied the form 36 and ordered the respondents to continue making payments pursuant to § 31-307 (c) (1).

The 1998 award was never appealed, and no additional findings or orders have been issued by the commission since the 1998 award. The most recent form 36, which was filed by the respondents on April 1, 1998, was denied. As such, there has been no change in the decedent's disability status since the original injury in 1982.

[7] See Public Acts 1991, No. 32, § 23.

The decedent died on November 7, 2020, at which time the claimant was legally married to the decedent. The decedent and claimant had married in 1974, divorced in 1992, remarried in 2010, and stayed married until the decedent's death in 2020. The respondents paid to the decedent statutory total disability benefits pursuant to § 31-307 (c) (1), along with all applicable cost-of-living adjustments pursuant to General Statutes § 31-307a,[8] from April 1982 through the date of the decedent's death on November 7, 2020.

No permanency benefits pursuant to § 31-308 (b) were ever paid to the decedent by the respondents or requested by the decedent during his lifetime. At the time that the decedent sustained his injury on April 24, 1982, § 31-308 (b) provided for 235 weeks of compensation for an eye injury causing "complete and permanent loss of sight in, or reduction of sight to one-tenth or less of normal vision."

The claimant contended that she was the decedent's sole presumptive dependent pursuant to General Statutes § 31-275 (19)[9] and, consistent with the findings of Commissioners Kolinsky and Paoletta, the decedent's bilateral eye condition became permanent as early as 1984 but no later than the 1998 award. As such, the decedent's right to permanency benefits vested several years before his death in 2020, and upon the

[8] General Statutes § 31-307a states in relevant part: "(a) The weekly compensation rate of each employee entitled to receive compensation under section 31-307 as a result of an injury sustained on or after October 1, 1969, and before July 1, 1993, which totally disables the employee continuously or intermittently for any period extending to the following October first or thereafter, shall be adjusted annually as provided in this subsection as of the following October first, and each subsequent October first, to provide the injured employee with a cost-of-living adjustment in his or her weekly compensation rate as determined as of the date of the injury under section 31-309.... The cost-of-living increases provided under this subsection shall be paid by the employer without any order or award from the administrative law judge. 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."

[9] General States § 31-275 (19) states in relevant part: "'Presumptive dependents' means the following persons who are conclusively presumed to be wholly dependent for support upon a deceased employee: (A) A wife upon a husband with whom she lives at the time of his injury or from whom she receives support regularly ...."

death of the decedent, his sole presumptive dependent became entitled to the vested permanency benefits. The respondents asserted that the date of injury rule establishes dependency rights as of the date of injury and a surviving spouse must be married to the decedent on both the date of injury and the date of death.[10] As such, the parties' divorce "broke the legal chain of the marriage and terminated any right the claimant may have had under [the decedent's] workers' compensation claim to meet the requirement of a surviving spouse/dependent."[11] Findings, ¶ 30.

On the basis of the foregoing, the administrative law judge found that the decedent's entitlement to permanent partial disability benefits vested no later than the 1998 award issued by Commissioner Paoletta. Consistent with that award, the decedent experienced a reduction to one-tenth or less of normal vision in both eyes as a result of the injury sustained on April 24, 1982. The administrative law judge therefore concluded that the decedent had reached maximum medical improvement by June 9, 1998, and, pursuant to the § 31-308 (b) schedule of benefits in effect on April 24, 1982, was entitled to a permanency award of 235 weeks of benefits for each eye.

The administrative law judge determined that the respondents had continuously paid the claimant total disability benefits in accordance with § 31-307 (c), along with the applicable cost-of-living adjustments pursuant to § 31-307a, from April 1982 until the

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[10] "The date of injury rule is a rule of statutory construction that establishes a presumption that 'new workers' compensation legislation affecting rights and obligations as between the parties, and not specifying otherwise, applie[s] only to those persons who received injuries after the legislation became effective, and not to those injured previously.'" Badolato v. New Britain, 250 Conn. 753, 756, n.5 (1999), *quoting* Gil v. Courthouse One, 239 Conn. 676, 685 (1997).

[11] Our review of the July 19, 2021 formal hearing transcript indicates that the respondents also challenged the claimant's contention that the June 9, 1998 Finding & Award of Commissioner Paoletta constituted a designation of maximum medical improvement. In addition, the respondents argued that because neither the date of maximum medical improvement nor the extent of impairment was ever established, the decedent's entitlement to permanent partial disability benefits never vested.

decedent's death on November 7, 2020. Citing Churchville v. Bruce R. Daly Mechanical Contractor, 299 Conn. 185 (2010), McCurdy v. State, 227 Conn 261 (1993), and Syzmaszek v. Meriden, 5346 CRB-6-08-5 (April 2, 2009), *appeal withdrawn*, A.C. 30987 (September 16, 2009), the trier concluded that the respondents were entitled to a credit against the permanency award for all indemnity benefits paid after the date of maximum medical improvement. Given that the amount of total disability benefits paid by the respondents between June 9, 1998, and November 7, 2020, was greater than the amount of permanency owed to the decedent, the trier denied and dismissed the claim for those benefits. The trier further concluded that the issue of whether the claimant was the presumptive dependent of the decedent was "not material to the outcome of this case as there [were] no permanency benefits still owing." Conclusion, ¶ G.

The claimant has appealed this decision, arguing that the administrative law judge erroneously applied the law when she concluded that the respondents were entitled to a credit against the unpaid permanency benefits for the total incapacity benefits paid by the respondents since the date of maximum medical improvement. The claimant contends that:

> The precedent erroneously relied upon by the trial judge in our case stands for the isolated proposition that when a claimant requests payment of permanency disability benefits in lieu of total incapacity benefits, the respondents are entitled to a credit against permanency for those payments that are made after the request. (Emphasis in the original.)

Appellant's Brief, p. 10.

Given that no request for the payment of the permanency benefits was ever made during the decedent's lifetime, it is the claimant's position that the permanency benefits vested in 1998, and "[t]his vested entitlement then automatically inured to the benefit of

the claimant's surviving spouse by operation of the law, such that it became payable to her upon the claimant's death if the payment for total incapacity had not stopped during the claimant's lifetime." Id., 17.

We begin our analysis of this matter with a recitation of the well-settled standard of review we are obliged to apply to a trier's findings and legal conclusions. "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 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).

On appeal, the claimant notes at the outset that it has been firmly established in our case law that total incapacity benefits and permanent partial disability benefits compensate an injured worker for different losses. Permanent partial disability, or "specific," benefits "are not paid as compensation for loss of earning power but to compensate the injured employee for the incapacity through life because of the loss or loss of use of the body member in question." Morgan v. East Haven, 208 Conn. 576, 584 (1988), *quoting* J. Asselin, Connecticut Workers' Compensation Practice Manual

(1985), p. 151. In contrast, an award for total incapacity, or "special," benefits "is one that is not compensation for the loss or loss of use of a body part, but is compensation for the inability to work as a result of the disability."[12] Id.

The claimant points out that in Cappellino v. Cheshire, 226 Conn. 569 (1993), our Supreme Court, in recognition of the distinction between the two types of benefits, held that "the payment of § 31-307 temporary total disability benefits does not discharge the obligation to pay § 31-308 permanent partial disability benefits at some point in the future." Id., 578, *citing* Paternostro v. Edward Coon Co., 217 Conn. 42, 46-47 (1991). The claimant therefore contends that because the factual findings in the instant matter "are strikingly similar to the facts in Cappellino ... they should dictate the same result." Appellant's Brief, p. 9. We are not persuaded.

In Cappellino, the decedent was awarded temporary total disability benefits after injuring his low back. Following a determination that he had reached maximum medical improvement and sustained a 30 percent permanent partial disability, the commissioner approved a voluntary agreement memorializing the decedent's entitlement to permanent partial disability benefits, and the respondent Second Injury Fund began paying the permanency. Subsequently, the decedent again became totally disabled, and the fund resumed payment of temporary total disability benefits, which payments continued until the decedent's death from causes unrelated to his injury. Upon application by the

[12] In Morgan v. East Haven, 208 Conn. 576 (1988), our Supreme Court observed that "[i]n the context of a workers' compensation claim, as opposed to a General Statutes § 7-433c claim, a distinction often is made between specific and special benefits based on the certainty of the award. Awards that are fixed for a certain period of time may be categorized as specific, and claims of uncertain duration may be categorized as special.... Underlying this distinction is the notion that specific awards for the loss of a body part are not contingent on incapacity, and thus, the compensation can be fixed at the time of injury. In contrast, a special award often is viewed as contingent on the disability." (Internal citation omitted.) Id., 584-85 n.11.

surviving spouse for the balance of the unpaid permanency award, the commissioner ordered the payment, which order was affirmed by this board and the Appellate Court.

In affirming the commissioner's order, our Supreme Court stated that it had "long held that the dependents of a deceased employee 'have the right to the unmatured part of the award of compensation for a specific sum for a fixed period for loss or impairment of a member ....'" Id., 575, *quoting* Bassett v. Stratford Lumber Co., 105 Conn. 297, 303-304 (1926). The court declined to overrule its prior ruling on this issue, observing that § 31-308 (b) "specifically provides that compensation for permanent partial disability shall be 'in addition to the usual compensation for total incapacity.'" Id., 577. The court further acknowledged that the revision of the statute in effect on the date of injury specifically contemplated the payment of permanent partial disability benefits "in addition to the usual compensation for total incapacity."[13] Id., 577, *quoting* § 31-308 (b).

In the present matter, we concede that the claim does bear some similarity to Cappellino, supra, insofar as both claims involve a putative surviving spouse seeking the payment of posthumous permanent partial disability benefits.[14] However, we do not find meritorious the claimant's assertion that in both claims, "a permanent disability was definitively established during the [decedent's] lifetime." Appellant's Brief, p. 9. In Cappellino, the parties entered into a voluntary agreement for permanency following the issuance of a medical opinion indicating that the decedent had reached maximum medical improvement and sustained a permanent partial impairment to his back.

[13] In Cappellino v. Cheshire, 226 Conn. 569 (1993), our Supreme Court also rejected the Second Injury Fund's argument that the resumption of payments for temporary total disability benefits vacated the voluntary agreement as to permanency by operation of law.

[14] In light of our affirmance of the administrative law judge's denial of permanent partial disability benefits, we decline to embark on an inquiry into the jurisdictional issue of whether the decedent's divorce from and remarriage to the claimant affected the claimant's dependency status.

In the instant matter, however, the claimant asserts that the permanent disability "was adjudicated and determined in 1998 after a formal hearing." Id. We disagree, as the 1998 award is devoid of any findings pertaining to the decedent's entitlement to permanent partial disability benefits. This lacuna is hardly surprising, given that the evidentiary record does not reflect that a permanency rating was ever sought by either party or that the decedent in this matter was ever deemed to have reached maximum medical improvement by a medical professional.[15] Rather, the 1998 award merely reflects the presiding commissioner's conclusion that the medical condition which had entitled the decedent to an award of statutory total disability benefits in 1982 remained unchanged in 1998.

It is well-settled in our case law that an injured worker's entitlement to permanent partial disability benefits vests when the worker reaches maximum medical improvement. We note that in Finkelstone v. Bridgeport Brass Co., 144 Conn. 470 (1957), our Supreme Court affirmed the denial of permanent partial disability benefits to the estate of a deceased worker who had been tentatively deemed to have reached maximum medical improvement for injuries to his left leg. The claimant never received a permanency rating and his physician subsequently changed his opinion regarding work capacity due to the claimant's ongoing medical complications. Following the claimant's death in an unrelated automobile accident, his estate sought permanent partial disability benefits primarily on the basis of a concession by the respondents that upon reaching maximum

[15] In Bacote v. Anaconda American Brass, 1 Conn. Workers' Comp. Rev. Op. 42, 18 CRD-5-80 (June 12, 1981), this board reviewed an appeal brought by the surviving spouse of a decedent who never entered into a voluntary agreement for the payment of permanency despite having reached maximum medical improvement. Rather, the decedent contended that he was totally disabled for another six years, until his death from unrelated causes. In reviewing the appeal, we remarked that "[i]t would certainly have been to [the decedent's] benefit to maintain this position because of the loss of cost-of-living adjustment were specific payment to have been ordered." Id., 44.

medical improvement, the extent of the loss of use of the decedent's leg would have been at least 25 percent. In affirming the commissioner's denial of permanent partial disability benefits to the estate, the court stated that "[n]o part of the compensation awarded or to be awarded for the decedent's partial loss of use of his left leg had accrued when he died, for it had not yet been determined that his leg had reached the state of maximum improvement." Id., 472.

In addition, one month after issuing Cappellino, supra, our Supreme Court released McCurdy v. State, 227 Conn. 261 (1993), holding that a commissioner does not have the discretion to deny a request for permanent partial disability benefits from an injured worker who has reached maximum medical improvement but remains totally disabled. The permanency benefits, which were being sought by a representative of the decedent's estate, had been denied by the trial commissioner on the grounds that the decedent's widow was not a presumptive dependent or a dependent-in-fact and the estate was not entitled to the award.

In reversing the decisions of the Appellate Court and this board, the court pointed out, consistent with Finkelstein, supra, that a claimant "has a right to a permanent partial disability award once he or she reaches maximum medical improvement." Id., 268. The court held that the commissioner had erroneously refused to incorporate into his decision additional findings indicating that the decedent had been assigned a permanent partial disability rating to his low back and had reached maximum medical improvement prior to his death. The court further concluded that the permanency benefits in dispute had

become payable when the decedent had requested them at a hearing held approximately two months after he was found to have reached maximum medical improvement.[16]

In 2010, our Supreme Court revisited the issue of the affirmative request for benefits in Churchville v. Bruce R. Daly Mechanical Contractor, 299 Conn. 185 (2010), wherein a putative surviving spouse requested the payment of benefits associated with several permanency ratings which had been assigned to the decedent during his lifetime but never collected. On review, the court noted that, consistent with the provisions of General Statutes § 31-308 (d),[17] "[t]he entitlement of a surviving spouse or presumptive dependent ... depends on the entitlement of the employee." Id., 192. The court further noted that an award for permanent partial disability benefits "necessarily depends on both the establishment of a permanent disability and the extent of the disability," id., 193, and reiterated that "[w]e have long held that an injured worker has a right to a permanent partial disability award once he or she reaches maximum medical improvement." Id., 193-94, *quoting* McCurdy, supra, 268. The court explained that:

> in McCurdy, our focus on an employee's request for disability benefits was limited to considering the effect that such a request has on the commissioner's discretion. Once an employee whose right to a disability benefit award has vested because that employee has reached maximum medical improvement requests payment of the disability benefits, the commissioner no longer has discretion to deny the award of the disability benefits, regardless of whether the employee remains totally incapacitated.... We did not,

[16] The decedent requested the permanent partial disability benefits on December 15, 1987 and passed away on December 24, 1987.

[17] General Statutes § 31-308 (d) states: "Any award or agreement for compensation made pursuant to this section shall be paid to the employee, or in the event of the employee's death, whether or not a formal award has been made prior to the death, to his surviving spouse or, if he has no surviving spouse, to his dependents in equal shares or, if he has no surviving spouse or dependents, to his children, in equal shares, regardless of their age."

> however, suggest that an employee's entitlement to disability benefits vested only upon the employee's request for such benefits.

Id., 195.

The Churchville court "[concluded], consistent with ... applicable precedents, that a plaintiff's right to permanent partial disability benefits, as well as the attendant entitlement enjoyed by the plaintiff's surviving spouse or presumptive dependent, vests when the plaintiff reaches maximum medical improvement, and does not depend on an affirmative request for such benefits." Id., 191.

Finally, in Brennan v. Waterbury, 331 Conn. 672 (2019), a case of somewhat more recent vintage, our Supreme Court reviewed an appeal brought by the executrix of a decedent seeking the payment of unpaid permanent partial disability benefits in association with a heart and hypertension claim. The court pointed out that:

> The significance of the date of maximum medical improvement ... is twofold. The date of maximum medical improvement is the point at which the *permanency* of the condition and, hence, the *right* to permanent disability benefits, is established, and it is also the point at which the *degree* of permanent impairment (loss of, or loss of use of a body part) can be assessed, which will determine the employer's payment obligations (i.e., number of weeks of compensation owed). An employer's payment obligations, then, are not fixed until the establishment of entitlement to permanent disability benefits. (Emphasis in the original.)

Brennan v. Waterbury, 331 Conn. 672, 695–96 (2019).

The court noted that although the decedent had received several permanency ratings during his lifetime, the respondents had paid only a portion of the permanent partial disability benefits ostensibly due and owing. The executrix contended that "the decedent reached maximum medical improvement on October 13, 1993, and, had the city timely paid those benefits starting from that date, all compensation due would have been

paid to the decedent before he began receiving temporary total disability benefits on February 19, 2003."[18] Id., 693. In deciding whether the permanency benefits in question had matured prior to the decedent's death such that they could properly pass to his estate, the court stated that it was "compelled to conclude that permanent disability benefits mature only after the degree of permanency has been fixed by way of an award or an agreement between the parties sufficient to establish a binding meeting of the minds." Id., 697. Accordingly, the court remanded the matter for further proceedings in order, inter alia, to determine whether the permanent partial disability benefits had matured prior to the decedent's death.[19]

Returning to the matter at bar, we recognize that, pursuant to the provisions of § 31-308 (b) in effect at the time of the decedent's original injury, the injuries sustained by the decedent appear to allow for an inchoate entitlement to 235 weeks of permanency benefits for each eye. However, as the foregoing analysis reflects, entitlement to permanent partial disability benefits cannot be established in the absence of proof that a claimant has reached maximum medical improvement along with the concomitant assignment or award of a permanent partial disability rating or "an agreement between

[18] In Brennan v. Waterbury, 331 Conn. 672 (2019), our Supreme Court determined that for several years prior to his death, the decedent had sought a full and final settlement of his claim, which the parties were unable to reach, due, at least in part, to the respondent municipality's "ongoing financial difficulties ...." Id., 677.

[19] On remand, following additional formal proceedings before this board, the administrative law judge, having found that the parties had stipulated to the date of maximum medical improvement and reached an agreement relative to permanent partial disability, concluded that "there was a clear meeting of the minds" that the decedent had sustained a permanent partial disability of the heart and the decedent's entitlement to permanent partial disability benefits had "vested and was matured" as of the stipulated maximum medical improvement date. May 21, 2021 Finding and Decision [of Charles F. Senich, Administrative Law Judge acting for the Fifth District,] Conclusions, ¶¶ G, ¶ P. The trier awarded to the estate all unpaid permanency benefits. In Brennan v. Waterbury, 6430 CRB-5-21-6 (April 11, 2022), *appeal pending*, A.C. 45467 (May 2, 2022), this board affirmed in part and remanded in part (on other grounds) the decision of the administrative law judge.

the parties sufficient to establish a binding meeting of the minds." Id. No such evidence was adduced in this matter.

Moreover, both the 1998 award and the finding which is the subject of this appeal are devoid of any suggestion that the parties ever entered into either a written or oral agreement for the payment of permanent partial disability benefits such that the parties can be said to have entered into a "binding meeting of the minds."[20] Id. We are therefore unable to conclude that the decedent established an entitlement to permanent partial disability benefits during his lifetime such that any permanency benefits due and owing would have been payable to his estate or representative after his death. While it is axiomatic that "[a] person may reach maximum medical improvement, have a permanent partial impairment, and be temporarily totally disabled from working, all at the same time," we decline to hold that a finding of statutory total incapacity creates an automatic entitlement to permanent partial disability by operation of law. (Emphasis omitted.) McCurdy, supra, 267-68, *citing* Osterlund v. State, 129 Conn. 591, 600 (1943). We therefore affirm the administrative law judge's denial of permanent partial disability benefits, albeit on alternative grounds.

Even if, arguendo, we were persuaded that the 1998 award could be properly construed as a finding of maximum medical improvement, we are not persuaded that the date of the award would necessarily constitute the commencement date upon which the

[20] We recognize that in Brennan v. Waterbury, 331 Conn. 672 (2019), the permanent partial disability benefits in dispute were associated with a claim for heart and hypertension benefits pursuant to General Statutes § 7-433c. However, the court's analysis of the issue of whether an agreement for payment had been reached between the parties implicated chapter 568 precedent. This approach presumably reflected the court's prior observation in Grover v. Manchester, 165 Conn. 615 (1973), to the effect that § 7-433c "specifically mentions the [Worker's] Compensation Act in two places which, when read together, clearly provide in pertinent part that '(n)otwithstanding any provision of chapter 568 . . . he or his dependents . . . shall receive from his municipal employer compensation . . . *in the same amount and the same manner as that provided under chapter 568* ....'" (Emphasis in the original.) Id., 618.

credit for permanency benefits would begin to run. In somewhat contradictory contentions, the claimant accurately points out that in Churchville, supra, our Supreme Court held that an entitlement to permanent partial disability benefits vests at maximum medical improvement and does not depend on an affirmative request for the benefits. On the other hand, the claimant asserts that although:

> the precedent cited by the trial judge clearly and logically supports the proposition that respondents are entitled to a credit starting when a request for permanency in lieu of total incapacity benefits has been made, no such request was ever made during the [decedent's] lifetime in the case at hand. As such, it is contrary to our law to retroactively utilize the date of maximum medical improvement as the start date for said credit as the trial judge definitely resolved that no request for the payment of permanency benefits was made at that time – or at any other time during the claimant's life.

Appellant's Brief, p. 16.

In making this assertion, the claimant appears to be suggesting that this board should affirm the trier's findings as to the decedent's entitlement to permanent partial disability benefits but reverse her findings relative to the operation of the credit for temporary total disability payments. The claimant is essentially contending that the permanency credit is inapplicable in the present matter because the request for the benefits did not occur until after the decedent's death. This assertion appears to be inconsistent with our Supreme Court's analysis in Churchville, supra, which effectively negated the necessity for an affirmative request for the benefits.

We would further note that in Bacote v. Anaconda American Brass, 1 Conn. Workers' Comp. Rev. Op. 42, 18 CRD-5-80 (June 12, 1981), this board stated:

> *Specific benefits are paid not as a bonus at the end of a compensation case,* but to compensate injured working persons for their [disability] after the award for total or partial incapacity has

> been paid. All reasonable efforts should be made to treat and cure the injured part of the body, and until the time for such effort has passed, it cannot be said that the injured person had really reached maximum medical improvement.... At the same time, if total incapacity continues, it would be manifestly unjust to insist that such an injured claimant be paid specific compensation." (Emphasis added; internal citation omitted.)

Id., 44, *citing* Czeplicki v. Fafnir Bearing Co., 137 Conn. 454 (1950).

In a similar vein, in Hall v. Gilbert & Bennett Mfg. Co., 12 Conn. Workers' Comp. Rev. Op. 146, 1449 CRB-7-92-7 (April 7, 1994), *order to dismiss granted*, A.C. 13523 (June 29, 1994), *cert. denied*, 231 Conn. 903 (1994), this board reviewed an appeal brought by a temporarily totally disabled claimant who had been deemed to have reached maximum medical improvement and received a permanency rating. The commissioner denied the request for permanency on the basis that the claimant was prohibited from receiving concurrent temporary total disability and permanent partial disability benefits.[21] We reversed the commissioner's decision, noting that, consistent with McCurdy, the commissioner did not have the discretion to deny the request for the permanency benefits. However, we also stated that:

> *By permitting a totally disabled claimant to make a present claim for the future payment of permanent partial disability benefits, we do not mean to allow a claimant to create an asset which will be held for his estate....* Thus, while the claimant here can request and receive a deferred award of permanent partial disability, the respondents will be entitled to a credit against that award for any temporary total disability benefits paid to the claimant between the

[21] See Osterlund v. State, 129 Conn. 591, 600 (1943), in which our Supreme Court stated: "In the case of a partial loss of function of one of the members specified in the statute, the commissioner is called upon, when the stage of maximum improvement has been reached, to exercise his sound judgment in deciding whether to award specific compensation upon the basis fixed in the statute or to permit the weekly compensation for incapacity to continue." Id., 600.

> date when he requested the award and the date when he is no longer totally disabled or dies. (Emphasis added.)

Id., 148.

In both McCurdy, supra, and Garland-Hall, supra, it was determined that the temporary total disability payments made between the date of the decedent's request for such payments in lieu of permanent partial disability benefits and the date of his death could be credited against the permanency award. However, in Syzmaszek v. Meriden, 5346 CRB-6-08-5 (April 2, 2009), *appeal withdrawn*, A.C. 30987 (September 16, 2009), this board reviewed an appeal brought by the estate of a heart and hypertension claimant who, after receiving full payment for an initial award of permanent partial disability of his heart, subsequently suffered a catastrophic stroke and once again began receiving temporary total disability benefits. In an award by stipulation entered into by the parties some seven years before the claimant's death, the respondent municipality agreed, by way of a voluntary agreement, to pay the claimant additional permanent partial disability benefits commencing on a mutually agreed-upon date of maximum medical improvement.

On appeal, this board affirmed the decision of the commissioner concluding that because the amount of the temporary total disability benefits paid between the agreed-upon date of maximum medical improvement and the claimant's death exceeded the amount of the award for additional permanent partial disability benefits, no additional benefits were due to the claimant's estate.

Finally, in Churchville, supra, our Supreme Court determined that the permanency credit should be calculated as of the date when the respondents filed a form

36 seeking to convert the decedent's temporary total disability benefits to permanent partial disability.[22]

In light of the foregoing analysis, we are not persuaded that either the date of maximum medical improvement or the date of an affirmative request for permanency benefits in lieu of temporary total disability benefits constitute the exclusive bases for calculating the commencement date for a permanency credit. Rather, applicable precedent would appear to suggest that the calculations for when a permanency credit starts to run are more appropriately determined by the specific circumstances of the claim along with consideration of the prohibition against double recovery.

At any rate, relative to the present matter, any such concerns are moot in light of our conclusion that no entitlement to permanency was established during the decedent's lifetime. The March 22, 2022 Findings and Order of Randy L. Cohen, Administrative Law Judge acting for the Seventh District, are accordingly affirmed on alternative grounds.

Administrative Law Judges Daniel E. Dilzer and Carolyn M. Colangelo concur in this Opinion.

[22] In Churchville v. Bruce R. Daly Mechanical Contractor, 299 Conn. 185 (2010), counsel for the decedent withdrew his objection to the form 36 four days after the decedent's death.