

# NUZZO & ROBERTS

## NEWSLETTER

April 2017

### WORKERS' COMPENSATION UPDATE: FIRST QUARTER 2017

In recent months, the courts and the Compensation Review Board have issued several important decisions regarding workers' compensation law.

### REVIEW BOARD DECISIONS

#### **An Injury En Route to Work in a Ride Share Vehicle is not Compensable**

In *Derosiers v. Electric Boat Corporation*, 6082 CRB-2-16-3 (February 23, 2017), the Compensation Review Board confirmed the trial commissioner's ruling that the claimant did not suffer a workers' compensation injury when he was injured while in a Ride Share van en route to his place of employment. Specifically, the claimant unsuccessfully argued the employer "furnished transportation" to the employee.

In this matter the claimant signed up at the employer's facility for the van transportation and he paid for the service by having a payroll deduction taken from his Electric Boat paycheck. However, the

claimant was not being paid while en route to work and he was not part of an "on call" crew. Furthermore, the Greater Hartford Ride Share is a non-profit organization, over which the employers have no input or control. The payroll deduction was done for the employee's tax benefit. The Compensation Review Board stated that "essentially, Electric Boat forwarded the claimant's payroll deduction to Ride Share to pay for his commuter van expenses."

#### **A Child not Conceived on the Date of Injury is not Entitled to Survivor's Death Benefits**

In *Clark v. Middlesex Corporation*, 6041 CRB-1-15-10 (January 30, 2017), the Compensation Review Board affirmed the trial commissioner's conclusion that a child born after the decedent-claimant's death is not entitled to Connecticut General Statutes §31-306(a)(2) survivor benefits.

In this matter the decedent-claimant was injured on January 19, 2013 and died on March 26, 2014, from a prescription overdose related to the treatment of his condition. Although the decedent-claimant was unmarried at the time of the injury, the trial commissioner determined the mother of his child was his dependent

in fact. However, the unborn child who was not conceived when the decedent-claimant was originally injured was not dependent on the decedent-claimant at the time of the original injury.

The decision relies on *Wislocki v. Prospect*, 72 Conn. App. 444 (2002), which “stands for the proposition that someone who is not dependent at the time of a claimant’s original date of injury cannot later recover dependency benefits when the claimant succumbs to his or her injury.” Please note that if the child had been in utero at the time of injury, because the mother was a dependent in fact the unborn child would also have been a dependent.

### **A Federal Longshore Finding can be Binding on a Workers’ Compensation Case**

**I**n *Filosi v. Electric Boat Corporation*, 5998 CRB-2-15-3 (January 19, 2017), the Compensation Review Board reversed the trial commissioner’s finding and remanded the matter for further proceedings to determine whether the respondents were barred from defending this matter based on the March 20, 2014 Decision and Order issued by an administrative law judge under the Longshore and Harbor Workers’ Compensation Act.

The claimant worked at Electric Boat Corporation for 26 years, and for at least 14 of those years he was exposed to asbestos as part of his job. The claimant was also a smoker for most of his

employment. In 2012 Mr. Filosi was diagnosed with lung cancer and died on December 17, 2012 from cardiac arrest and lung cancer. The claimant’s doctors issued reports stating the lung cancer was caused by a combination of smoking and asbestos exposure at work. The respondents obtained an expert report concluding the cancer was caused by smoking, and as there were no lung tissue samples taken at the time of death, they had no “basis for attributing causation of the putative carcinoma of the lung to asbestos.”

After reviewing this evidence, the administrative law judge in the Longshore action concluded there was “no dispute that Filosi was exposed to asbestos during the course of his employment with Electric Boat.”

In not accepting the administrative law judge’s finding, the trial commissioner stated the claimant’s widow had failed to prove the decedent’s “exposure to asbestos during his employment at Electric Boat was a factor, let alone a significant factor, in causing his lung cancer or otherwise contributing to his death.” In the Motion to Correct, the claimant’s widow argued the trial commissioner should have applied the doctrine of collateral estoppel because the issue of asbestos exposure substantially contributing to the claimant’s death was fully litigated in the Longshore claim.

In their decision remanding this matter to the trial commissioner, the Board pointed

out that the administrative law judge relied on the claimant's expert, Dr. Welch, who on several occasions stated, "the decedent's exposure to asbestos at the Electric Boat Shipyard was 'a substantial contributing cause to the development of his lung cancer.'" Therefore, in contrast to the trial commissioner's finding, the administrative law judge had established a standard of causation in ruling the asbestos exposure was a substantial contributing factor in causing the claimant's death.

Consequently, the case is remanded to the trial commissioner to apply the standard of collateral estoppel.

### **The Date of the Last Injurious Repetitive Trauma at Work Must be Decided by the Trial Commissioner**

**I**n *Shults v. D.J. Hall Roofing, LLC*, 6071 CRB-5-16-1 (January 13, 2017), the Compensation Review Board remanded this matter to the trial commissioner to properly identify the last date of injurious repetitive trauma. Specifically, the last date of injurious repetitive trauma must be identified so the proper party can be found to be the Connecticut General Statutes §31-299b insurer/employer responsible to pay benefits to the claimant.

### **WHEN IN DOUBT, CALL US**

**W**e are only a phone call away. If you have any questions, call us!!

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