Christopher Clark v. Town of Waterford, Cohanzie Fire Department et al, 346 Conn. 711 (2023)

The issue was whether a uniformed firefighter must customarily work twenty hours or more per week to be eligible for heart and hypertension benefits under C.G.S. §7-433c.

The case involved a claimant who began his career as a part-time fireman in 1992 and became a full-time fireman in 1997, the year after C.G.S. §7-433c was amended to apply only to firemen hired before July 1, 1996. Under C.G.S. §7-433c employees hired before that date were afforded the outright bonus which bypassed the need for a claimant to prove a causal relationship between his work duties and heart disease if he had a pre-employment physical establishing no heart disease.

The trial judge found, and the CRB, and the Appellate Court affirmed that the claimant was entitled to benefits under C.G.S. §7-433c because "There is no language in C.G.S. §7-433c to suggest that heart and hypertension benefits are not available to uniformed firefighters and regular police officers who are paid by municipalities that do not participate in the retirement fund." The employer had argued that the claimant's part-time status did not qualify him as a member of the fire department, because under C.G.S. §7-425 in order to be eligible for municipal pension benefits, a member of the plan had to work for at least 20 hours per week.

The Supreme Court reversed the Appellate Court's determination that the definition of "member" in C.G.S. §7-425(s) does not affect eligibility for heart and hypertension benefits holding that because there was no testimony at trial about how many hours the claimant worked during the period before he became full-time in 1997, the claimant could not prove that he was an eligible member as set forth in C.G.S. §7-425. The Supreme Court was unpersuaded by the Appellate Court's argument that the two statutes did not concern the same subject matter and could not be read together without reaching an absurd result. The result was portended by Judge Watson's dissent in the CRB decision, in which he argued that the definition of "member" in §7-425(s) controlled eligibility for benefits under §7-433c. Clark was barred from receiving benefits, and Judge Watson's analysis proved not so elementary after all.

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Cochran v. Department of Transportation, 220 Conn. App. 855, A.3d (2023)

In Cochran v Department of Transportation, the Appellate Court reversed the CRB, which had affirmed the trial court's determination that the long-retired claimant is entitled to temporary total benefits following a relapse in his condition. The claimant was originally injured in June 1993 and after numerous surgeries, accepted a voluntary retirement from his job in April 2003, at the age of 54 years. At the time he retired, he had no intention of returning to the workforce upon leaving state service and taking his retirement. His wife testified that he was still "pretty functional" when he retired and was able to get up and go to work every day.

Following his retirement, which he characterized as a "golden handshake" which provided an incentivized early-retirement benefits package providing "more money", he did not try to find a less arduous job with the state DOT, or ask the state to accommodate him so he could continue to work.

In April 2013, the plaintiff underwent back surgery again. There was testimony in the form of a vocational rehab expert that as of December 30, 2017, he was unemployable, as well as a neurosurgeon's report that he had the "lightest of work capacity" only. As a consequence, the trial commission found that he was entitled to temporary total benefits thereafter and the CRB affirmed this decision. The CRB determined that C.G.S. §31–307 "in its current form imposes no constraints on the claimant's ability to collect temporary total benefits due to retirement status; rather it mandates the injured claimant shall be paid a weekly compensation..." Further, the CRB relied on Laliberte v United Security, Inc., 261 Conn. 181, 801A. 2D 783 (2002), a case in which an incarcerated claimant was entitled to collect TT benefits.

However, the Appellate Court reversed the decision, applying plenary review because the case presented an issue of statutory construction that is of first impression for this court.

The Appellate Court concluded that the plain and unambiguous language of §31–307 (a) requires that in order to be eligible for temporary total benefits, a claimant's "injury... results in total incapacity to work." The court reasoned that the inability of the employee to work at his customary calling, or any other occupation he might reasonably follow, must occur because of his injuries. The court found that it would be unreasonable to interpret the statute to allow an injured employee to receive total incapacity benefits after his retirement, without having demonstrated any **intention** to return to the workforce. (emphasis added)

The plaintiff had argued that if an incarcerated claimant in Laliberte could recover temporary total benefits, then, *a fortiori*, a claimant who had merely retired should also be entitled to these indemnity benefits. The Appellate Court distinguished this case by stating that if the claimant had not been incarcerated, he still would have been out of the workforce, even if he wanted to work and sought work. In distinction to the incarcerated claimant, Mr. Cochran had chosen to take his pension and social security benefits instead.

This case has been appealed to the Supreme Court.

Louis Martinoli v. Stamford Police Department et al. 220 Conn. App. 874 (2023)

This case was decided on the same day as Cochran v Department of Transportation, 220 Conn. App. 855, A.3d (2023). It involved a claimant who retired from the Stamford police force in 1999, at age 64, due to a compensable claim for coronary artery disease, hypertension, and congestive heart failure, pursuant to Connecticut General Statute, §7-433c. At the time he retired, he had no intention of returning to work for the respondent police force, or for any other potential employer, a fact which he was not reticent about discussing with his physician and others. Approximately 16 years later, when the claimant was 80 years of age, he developed atrial fibrillation and a subsequent stroke. The claimant applied for temporary total benefits which he was awarded by the trial commissioner. The case was appealed to the Compensation Review Board, which affirmed the trial judge's award, stating "binding precedent, interpreting the statute, has eliminated the necessity to be available for work in order to be eligible for temporary total benefits." The CRB supported its conclusion, citing the Supreme Court's decision in Laliberte v United Security, Inc. 261 Conn. 181, 801 A2d 783 (2002), a case in which the claimant was incarcerated and was allowed to collect temporary total benefits. The court there stated "...no intent concerning discontinuance of benefits because of incarceration can be inferred from the statute itself." Id 186. The Board reasoned that whether or not the claimant ever intended to work again after he retired was irrelevant to its analysis.

The Appellate Court abandoned the CRB's reasoning and over 100 years of precedent by agreeing with the defendants' analysis that "for the plaintiff to be paid, at age 80, temporary total disability benefits... for a loss of earnings from employment when he never planned, nor intended to be employed again... leads to a bizarre and unreasonable result.". The Appellate Court decided instead that the plain and unambiguous language of §31–307 (a) requires that in order to be eligible for temporary total benefits, a claimant has to be totally incapacitated, and a claimant who has retired without the intention of ever returning to the workforce cannot be, therefore, totally incapacitated. The case presents an array of potential problems when applied to other scenarios involving more sympathetic fact patterns.

For example, consider chemical exposure cases in which a claimant may not have had any symptoms until well after his date of retirement because of the latent onset of symptoms, such as mesothelioma. Or how about the claimant who has a compensable lumbar fusion and then many years later develops adjacent level disc disease, which requires an extension of the fusion after retirement? Are these claimants to be barred from recovery after their surgery when they will be totally incapacitated for months or possibly years? In answering what constitutes total incapacity, one might ask whether the Appellate Court has conflated the disabling physical or mental injury with the claimant's intention to work.

There are other instances in which the legislature has made it clear when the claimant's volition to work is relevant in the question of benefits for incapacity such as Connecticut

General Statutes §31–308 (a), and 31-308a. One would presume that if the legislature wanted to add an "intention to work" component to 31-307(a) it could and would have already done so as it has within other statutes in the Act. Both of these cases have been taken up for review by the Connecticut Supreme Court.

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Harold Dusto, et al. v. Rogers Corporation et al., AC 45341 (Conn. App. CT. October 24, 2023)

The estate of the decedent brought a claim on behalf of Mr. Dusto, who was exposed to asbestos-containing products at his place of employment between 1970 and 2002. He developed mesothelioma and died. As a result, he brought a claim against his employer, Rogers Corporation, and the supplier, Special Electric. At the trial court level, the trial judge granted Rogers Corporation's motion for summary judgment based on the fact that the estate failed to demonstrate a genuine issue of fact as to the substantial certainty exception to C.G.S §31–284, and granted Special Electric's motion for summary judgment based on the estate's failure to bring a claim within the statutory timeframe allowed by Wisconsin law. The Connecticut Supreme Court reversed the trial court with regard to the substantial certainty issue, finding that under the factor set forth in the Lucenti v Laviero 327,Conn. 764, 176 A.3d 1 (2018); however, it sustained the dismissal against Special Electric.

In this case, the court grappled with defining the contours of substantial certainty, reviewing the law in Suarez v. Dickmont Plastics Corp. 229 Conn 99, 639 A2d 507 (1994) (Suarez 1) and Suarez v Dickmont Plastics Corp. 242 Conn. 255, 698 A2d 838(1997) (Suarez II). In that line of cases, an employee who was forced to clean out a plastic molding machine while the machine was still running and was forbidden by his foreman from using safer cleaning methods under the threat of termination was denied compensation because the Supreme Court determined that the mere knowledge and appreciation of a risk is not the equivalent of intent. The court, citing Lucenti v Laviero, supra, 327 Conn. 775 stated "a result is intended, if the act is done for the purpose of accomplishing, such a result, or with knowledge that a substantial certainty such a result will ensue... both the action producing the injury, and the resulting injury must be intentional..." Id. 777. The Court further recited that "what is being tested is not the degree of gravity of the employer conduct, but, rather, the narrow issue of intentional versus accidental conduct..." Id., 778–79.

This court applied Lucenti, which outlined the four factors which, if proven, can meet the substantial certainty exclusion carved out in the exclusivity statute. The first Lucenti factor is in consideration of prior similar accidents related to the conducted issue that have resulted in employee injury or death. Lucenti v. Laviero, supra, 327 Conn. 782. Here, the Court observed that by 1986 at least 21 employees at the Rogers facility had filed asbestos-related workers' compensation claims. Viewing this information in a light most favorable to the plaintiff, the factfinder could reasonably attribute knowledge to Rogers. That would prove an appreciation of danger to its employees as a result of asbestos exposure.

The second Lucenti factor which the court considered was deceit on the part of Rogers concerning the existence of the dangerous condition, namely, the asbestos exposure. Lucenti v. Laviero, supra, 327 Conn 782. The court considered the voluminous documentation that the estate presented demonstrating that Rogers deliberately failed to share knowledge about the risks associated with exposure to high levels of asbestos

with its employees and determined that the estate had offered a genuine issue of material fact, for the second factor. Specifically, the court found numerous instances in which Rogers deliberately deceived employees such as the claimant concerning its knowledge that asbestos exposure could cause mesothelioma and ultimately, death. For example, there were numerous air samples taken over many years which exceeded OSHA safety limits. Further, Rogers represented to employees and to the general public that materials containing asbestos could safely be used when applying governmental regulations relating to asbestos fibers.

Records also determined that there was sufficient evidence to demonstrate the existence of a genuine issue of material fact on the third prong of the Lucenti analysis, namely, intentional and persistent violations of safety regulations over a lengthy period of time. Rogers was formally cited by OSHA four times for various asbestos-related violations. Further, Rogers failed to notify its employees in writing, pursuant to OSHA regulations, about exposure to excessive asbestos levels. In addition, the employer failed to provide an OSHA-required respirator program and violated OSHA standards pertaining to the disposal of asbestos bags, creating visible dust throughout the facility.

Relying on the Lucenti precedent, this court held that satisfaction of the substantial certainty exception requires a showing of the employer's subjective intent to engage in activity that it knows bears a substantial certainty of injury to its employees. The court found that the evidence taken in the most favorable light to the plaintiff presented a genuine issue of material as to whether the jury could reasonably infer from Roger's conduct or act that the employer objectively believed that its conduct was substantially certain to result in injury to its employees.

Finally, the court found the trial court properly dismissed the plaintiff's claims against the supplier corporation on the ground that the plaintiff did not file a claim within two years of the date of the publication of notice of the supplier companies dissolution, which, under Wisconsin law, precluded such a claim.

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Gardner V. Department of Mental Health and Addiction Services et al.
AC 45594 (January 9, 2024)

The plaintiff sustained a compensable injury and subsequently reached maximum medical improvement. The Compensation Review Board affirmed the trial commissioner's approval of a Form 36, which converted the claimant's benefits from temporary partial disability to permanent partial disability benefits, rather than continuing the temporary partial benefits under CGS Sec 31-308(a). The plaintiff argued that under Osterlund v State 129 Conn. 591 [30 A2d 393] (1943) once a claimant has been assigned a permanent partial impairment, C.G.S. §31–308 (a), compels the conclusion that the commissioner has the discretion to award continuing wage loss benefits in lieu of permanent partial impairment benefits based on an analysis of the claimant's work limitations, concurrent employment, loss of function, and its disparate impact upon her earning potential.

The defendant's position was that the claimant was not entitled to unlimited temporary partial disability benefits. The defendant argued that although pursuant to C.G.S. §31–308 (a), once the claimant has achieved maximum medical improvement, the commissioner has the authority to award post specific differential benefits, Osterlund is limited to temporary total payments in so far as C.G.S. §31–308 (a) was enacted after Osterlund.

The Appellate Court framed the issue as one of statutory interpretation of first impression of C.G.S. §31-308(a). As such, its review was plenary. The court examined the legislative history of C.G.S. §31– 308, which had been amended in 1967 to allow a commissioner the authority to award either ongoing temporary partial benefits or permanent partial disability benefits after a claimant had reached maximum medical improvement. However, in 1993, what was the subsection (d) was eliminated, and the legislature revoked the grant of authority for commissioners to award lost earnings after a claimant had reached maximum medical improvement. See P.A. 93–228, §19.

The court reasoned that the fact that C.G.S. §31–308(a) does not expressly authorize the payment of temporary partial disability once a claimant has reached maximum medical improvement, coupled with the legislative history as stated above, presents a compelling argument that the CRB reasonably interpreted the statute. Further, the court analogized this case to that of Rayhall v Akim 263 Conn. 328, 819 A 2d 803 (2003), in which the Supreme Court held that a claimant who had suffered injuries to both his legs could not simultaneously recover permanent partial disability benefits for one leg and temporary partial benefits for the other leg. The court equated Rayhall's holding that a claimant is not entitled to simultaneous PPD and TP benefits as a mandate that a claimant cannot collect TP benefits following MMI status. One might wonder whether this is a false equivalency because in the Gardner case, the claimant was not seeking simultaneous benefits or double compensation as was arguably the case in Rayhall.

Jonathan Forestier Et Al v. City of Bridgeport et al.
223 Conn. App 298 (January 16, 2024)

The claimants were two of five special police officers hired by the Bridgeport Board of Education to provide security at and around the schools in Bridgeport. Their original jobs were expanded to include handling regular police calls.

Both of the claimants were injured in the course of their employment: Jonathan Forestier suffered a back injury in February of 2014 and Stephen Vitka suffered a wrist injury in November 2015. When Forestier told his supervisor that his doctor had recommended back surgery, the supervisor made some disparaging remarks to the effect that it would be "dumb to get back surgery" and it would effectively end his career. Vitka had a similar experience when he reported to the same supervisor that his doctor had recommended surgery, and the supervisor indicated that Forestier was going to lose his job and not get hired elsewhere, which Vitka inferred was a warning to him about not pursuing surgery. Both officers refrained from surgery until after they were terminated in August 2016, following the Board of Education's meeting in June 2016, at which time the Board eliminated the five special police officers along with 125 other positions in an effort to close the budget deficit.

Following their termination the union filed a grievance that was favorably decided by an arbitration panel in July 2018, because of a memorandum of understanding which contained a "no layoff" provision in effect at the time the claimants were terminated. The officers were notified when they returned to work that the funding for the officers had never been restored, and that in any event the memorandum of understanding had expired in June 2018 after the arbitration panel's award.

The trial court granted a motion for summary judgment based solely on its analysis of the 2016 decision of the Board to eliminate the positions for the five special police officers, without considering the claimants' discrimination claim surrounding the 2018 arbitration decision.

In affirming the trial court's granting of the summary judgment, the Appellate Court went out of its way to chastise the appellants for focusing their oral argument on the trial court's failure to address the 2018 arbitration panel's order to reinstate the claimants. The Court noted that although this issue was alleged in the appellant's complaint, it was the claimant's duty to have filed a motion for articulation or reconsideration with the trial court if they wanted to preserve this issue for appeal. Further, the claimants were upbraided for their failure to specifically address this argument under a separate heading in their appellate brief so as to fairly put the Court and the appellees on notice of this issue. Because of the claimants' failure to raise this issue before the Appellate Court, the Court refused to consider the 2018 arbitration issue.

On the merits of the case, the Court assumed without finding that the appellants had proven their prima facie case that the claimants had sustained work related injuries and that they were fired for exercising their rights under the Workers' Compensation Act. The

Court further found that once the claimants had met this initial burden of proof, the burden shifted to the Board to rebut the presumption of discrimination by producing evidence of a legitimate, nondiscriminatory reason for its action. The Court found here that the Board met its rebuttal of the presumption which then shifted the burden back to the claimants again to demonstrate that a genuine issue of material fact existed with respect to whether the Board's proffered explanation was merely pretextual.

The Court highlighted the trial Court's finding that the claimants failed to offer any evidence to explain how the supervisor's disparaging comments to the two injured officers could be attributed to the Board's action in firing the claimants, especially in light of the uncontroverted affidavits of the Board member who participated in the votes to eliminate the five special police officers' positions in which they averred they had no knowledge of the individual claimants or their pending workers' compensation claims. Based on this analysis the Court found that the claimants failed to directly demonstrate either that a discriminatory reason more likely motivated the employer, or that the proffered explanation was unworthy of credence, and therefore, affirmed the trial court's granting of the motion for summary judgment.

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Bassett v Town of East Haven et al.
219 Conn. App. 866 (June 13, 2023)

The trial commissioner dismissed a claim in which the employee lit an explosive device while in the course of his employment working as a supervisor in a youth program run by the town.

While the commissioner found that the act of cleaning up debris was within the scope of the claimant's job duties, the lighting of the wick of the explosive device, which instantly exploded in the claimant's hand, causing catastrophic injuries, broke the chain of causation. The CRB affirmed the judge's decision finding that "his intentional, active lighting the wick broke the chain of proximate cause between the employment and the injury."

The claimant argued before the Appellate Court that because it was his "intention to disarm a firework before placing it in a bag full of garbage was incidental to... fulfilling his employment obligations," and therefore should have been a compensable injury. The Appellate Court disagreed, citing Clements, V. Aramark, Corp., 339 Conn. 402(2021) which clarified the standard of causality required in a workers' compensation claim as follows: "thus, an injury arises out of employment when it... is the result of a risk involved in the employment or incidental to it, or the conditions under which it is required to be performed." Apparently, the trial commissioner attached some import to the fact that the claimant initially denied having lit the firework, telling the emergency personnel and hospital personnel that the device had simply exploded in his hand. That provided an inference for the judge that the claimant knew that he was engaged in an activity that was beyond the scope of his employment.

City of Waterbury v. Brennan et al.
228 Conn. App. 231 (Sept. 24, 2024)

The decedent was hired as the fire chief of Waterbury in 1991 and suffered a compensable heart attack in 1993. He filed a claim for heart and hypertension benefits and the commissioner ordered the City to pay all benefits to which he "is or may become entitled." While the parties were attempting to negotiate a resolution within the Workers' Compensation Commission, the decedent elected to take a 75% disability retirement pension. Following his election of the pension, the City made two payments toward the decedent's specific award under his §7-433c claim, one in 1997 for $59,200, and one in 1999 for almost $18,000.

When the decedent died in 2006, the decedent's attorney substituted in the surviving spouse. In 2015, the Workers' Compensation Commission ordered permanent partial disability benefits, less any advance payments made to date.

The issue was whether the City was entitled to an offset of the §7-433c award the commission had ordered by way of pension payments received. The court was clear that the spousal pension payments were never interrupted following the fire chief's death. The issue is whether additional payments were owed to the decedent's estate because the payments made to the decedent during his lifetime would have been subject to an offset covering 100% of any permanent partial disability payments allegedly owed to him.

A determination of which collective bargaining agreement applied was central to the resolution of this case. The City argued that Waterbury Municipal Administration Association's administration agreement, which had a provision allowing for pension offsets against §7-433 permanent partial disability payments, applied. The defendant (the decedent's spouse) argued that the collective bargaining agreement between the City and the union (hereinafter the firefighter's agreement) which did not allow for the pension offset, governed. The Appellate Court determined that the decedent's rights and benefits in this case were not governed by the firefighter's agreement because he had never been a member of the fire department prior to being made fire chief. He had previously been the editor of a magazine. Additionally, he never made contributions to the pension fund, and he was never a member of the Waterbury Fire Department. As such, the pension offset applied and the previous payments during the decedent's lifetime completely subsumed any additional permanent partial disability payments owed.