CASE NO. 6024 CRB-4-15-8 : COMPENSATION REVIEW BOARD
CLAIM NO. 400094570

: WORKERS' COMPENSATION COMMISSION

HELAINE DEOLIVEIRA
CLAIMANT-APPELLANT

v. : JUNE 6, 2016

FLORENEE CLEANING, LLC
EMPLOYER
RESPONDENT-APPELLEE

and

SECOND INJURY FUND
RESPONDENT-APPELLEE

APPEARANCES:

The claimant was represented by Richard G. Monaco, Esq., Law Offices of Richard G. Monaco, PC, 256 Barrack Hill Road, Ridgefield, CT 06877.

The respondent employer Florenee Cleaning, LLC was represented by Thomas Galvin Cotter, Esq., The Cotter Law Firm, LLC, 1980 Main Street, Suite 1201, Stratford, CT 06615.

The respondent Second Injury Fund was represented by Michael Belzer, Esq., Assistant Attorney General, Office of the Attorney General, 55 Elm Street, Hartford, CT 06141-0120.

This Petition for Review from the July 23, 2015 Finding and Decision of Charles F. Senich, the Commissioner acting for the Fourth District, was heard January 22, 2016 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Ernie R. Walker and Nancy E. Salerno**.**

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant, Helaine DeOliveira, has appealed from a Finding and Decision dated July 23, 2015 where the trial commissioner, Charles F. Senich, determined that the claimant's injuries on December 10, 2013 were not compensable. The trial commissioner, presented with a stipulation as to the facts of the incident where the claimant was injured, concluded that the claimant was not acting within the course of her employment at the time she was hurt, and therefore, the injury was noncompensable. The claimant has appealed, arguing that when an employee must travel between work assignments our precedent in cases such as Dombach v. Olkon Corportation, 163 Conn. 216 (1972), Labadie v. Norwalk Rehabilitation Services, Inc., 274 Conn. 219 (2005) and Kolomiets v. Syncor International Corp., 252 Conn. 261, 272 (2000) makes the injury within the course of employment and therefore, compensable. We have reviewed those cases, as well as earlier precedent interpreting the "coming and going" rule. We believe that given the stipulated facts in this case, where the claimant was injured in a car driven by her employer en route to a work assignment, the claimant was injured while within the course of her employment. Since the trial commissioner reached an erroneous application of the law, we reverse the Finding and Decision.

The following facts were found in the aforementioned Finding and Decision. As we noted, the parties submitted a Joint Stipulation of Facts and an affidavit from the claimant, and there was no live testimony at the formal hearing on April 16, 2015. The stipulation presented to the trial commissioner noted the claimant lived in Bridgeport and worked for the respondent as a house cleaner on December 2, 2013, December 4, 2013

and December 9, 2013 prior to her injury on December 10, 2013. She was paid $105 per day for cleaning three houses, which was a sum of $35 per house. On December 10, 2013, Maria Rodrigues, a member of the respondent LLC, picked the claimant up at her home and drove her to her first cleaning job. The vehicle was owned and registered to the respondent LLC. The claimant was injured in a motor vehicle accident en route to her first cleaning job that morning. In the stipulation the parties cited § 31-275(1) C.G.S. and the relevant case law on the "coming and going rule."[1] The parties indicated that they were not in agreement as to whether the claimant was in the course of employment at the time of her injury. The claimant held that although she was not paid for her travel time, travel to her work assignments was an integral part of her employment and service. The respondent argued that under Connecticut case law travel by the claimant to a work assignment is not part of the service they provided to the respondents' clients, and the claimant was not in the "course of employment" when she was hurt. The commissioner also cited an affidavit filed by the claimant that restated the facts in the stipulation. It also noted the claimant did not have a car and informed Ms. Rodrigues of this when she was hired, and Ms. Rodrigues said she would drive the claimant to her appointments. It also said on every day the claimant worked for the respondent Ms. Rodrigues transported the claimant to each of her work assignments and then drove her home at the end of the day.

[1] The relevant terms of this statute are as follows:
"(1) "Arising out of and in the course of his employment" means an accidental injury happening to an employee or an occupational disease of an employee originating while the employee has been engaged in the line of the employee's duty in the business or affairs of the employer upon the employer's premises, or while engaged elsewhere upon the employer's business or affairs by the direction, express or implied, of the employer, ..."

Based on the facts presented the trial commissioner concluded the claimant was not acting within the course of her employment with the respondent on December 10, 2013 when she was injured in a motor vehicle accident. He also concluded the claimant was not paid for her travel time and only paid for each house where she worked. He also concluded "the respondent did not require the claimant to travel as part of her employment, the respondent did not contract or furnish transportation to the claimant, the claimant was not subject to emergency calls, and I do not find that the claimant was injured doing something incidental to her employment." Conclusion, ¶ D. Therefore, the trial commissioner dismissed the claim for benefits.

The claimant filed a Motion to Correct seeking findings consistent with finding the injury compensable, in particular noting that there was no dispute that the claimant's transportation to her work assignment was provided by a principal of the respondent in their vehicle. The claimant argued that therefore Conclusion, ¶ D, was unsupported by the evidence presented. The trial commissioner denied the motion in its entirety and the present appeal was commenced. The gravamen of the claimant's appeal is that based on the relevant case law governing Chapter 568, an injury in an employer's vehicle while en route to a work assignment is a compensable injury.

The standard of deference we are obliged to apply to a trial commissioner's findings and legal conclusions is well-settled. "The trial commissioner's factual findings and conclusions must stand unless they are without evidence, contrary to law or based on unreasonable or impermissible factual inferences." Russo v. Hartford, 4769 CRB-1-04-1 (December 15, 2004), citing Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Moreover, "[a]s with any discretionary action of the trial court, appellate review requires

every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial court could have reasonably concluded as it did." Burton v. Mottolese, 267 Conn. 1, 54 (2003). "This presumption, however, can be challenged by the argument that the trial commissioner did not properly apply the law or has reached a finding of fact inconsistent with the evidence presented at the formal hearing." Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

The evidence presented at the formal hearing in the form of the stipulation and the affidavit included affirmative and unequivocal representations that the claimant was being transported from her home to her initial work assignment on December 10, 2013 by a principal of the respondent in a motor vehicle owned by the respondent. Nonetheless, the trial commissioner concluded the claimant was not "furnished" transportation by the respondent. Since the trial commissioner offered no opinion on the record as to the veracity of these uncontroverted stipulated representations, we cannot ascertain from the record herein how he arrived at this factual conclusion. As a result, we find our precedent in Vallier v. Cushman & Wakefield, 5822 CRB-1-13-2 (February 21, 2014) on point. In Vallier the trial commissioner denied a Motion to Correct to conform the findings to medical evidence he had found credible. We found that this was in error, and reversed the Commissioner on this point. We believe the precedent in Vallier compels a similar result.

On appeal, the Second Injury Fund,[2] ("Fund") argues that by denying the Motion to Correct that this tribunal should deduce that the trial commissioner found the stipulation presented did not constitute probative and reliable evidence. While we have

[2] The Second Injury Fund is a party to this proceedings pursuant to § 31-355 C.G.S. by virtue of the respondent-employer being uninsured for workers' compensation.

clearly enunciated that standard in reviewing a Motion to Correct reached after hearings where witnesses testified, Brockenberry v. Thomas Deegan d/b/a Tom's Scrap Metal, Inc., 5429 CRB-5-09-2 (January 22, 2010), *aff'd*, 126 Conn. App. 902 (2011)(Per Curiam), we are unwilling to extend this standard to solely documentary evidence, as opposed to the allegedly uncontradicted testimony which was presented in Beedle v. Don Oliver Home Improvement, 4491 CRB-3-02-2 (February 28, 2003). Our reason for reaching that distinction is due to the precedent in Bode v. Connecticut Mason Contractors, The Learning Corridor, 130 Conn. App. 672 (2011), *cert. denied*, 302 Conn. 942 (2011).

In Bode the trial commissioner did not rely on various expert witness reports as to the claimant's employability which were essentially uncontroverted. The commissioner found the claimant had a work capacity and on appeal, we affirmed that decision, as we concluded the commissioner could have found the expert witness reports unreliable. See Bode v. Connecticut Mason Contractors, The Learning Corridor, 5423 CRB-3-09-2 **(**March 3, 2010). The Appellate Court reversed our decision, finding that the trial commissioner erred in reaching a credibility determination based solely on documentary evidence.

> Furthermore, our Supreme Court previously has declined to afford deference to the commissioner's credibility determinations when such determinations were based solely on documentary evidence, noting that ''no testimony regarding any of the underlying assertions was taken. All of the facts . . . were reflected in the medical reports from the physicians. . . . Thus, the deference we normally would give to the commissioner on issues of credibility is not warranted in the present case, because we are as able as he was to gauge the reliability of those documents. *Pietraroia* v. *Northeast Utilities*, supra, 254 Conn. 75.

Bode, supra, 685.

We recently ruled on a case where a trial commissioner decided that there was the need to conduct additional inquiry when he was unsatisfied with the documentary record he was asked to rule upon. In Quinones v. RW Thompson Company, Inc., 5953 CRB-6-14-7 (July 29, 2015), *appeal pending,* AC 38256, the appellant argued that the trial commissioner should not have reopened the record to seek additional testimony. We affirmed his decision to do so, citing the provisions of § 31-278 C.G.S., § 31-298 C.G.S., and § 31-282 C.G.S., which empower a trial commissioner to choose to recall for additional testimony a witness who had previously testified and to admit evidence which was material and germane to the issue in dispute. In the absence of any affirmative representation on the record in the present case that the trial commissioner had a credibility concern with this evidence, we must conclude it was error not to grant at least part of the claimant's Motion to Correct.[3]

The question left to consider is whether, as a matter of law, is an injury compensable if the claimant is being furnished transportation by an employer to a work location but has yet to go "on the clock"? The claimant's citation of Dombach, supra, Kolomiets, supra, and Labadie, supra, clearly outlines that there are a number of appellate decisions wherein employees who are not working at a fixed location or who must travel as part of their employment can find travel injuries compensable. We do note that the

[3] Counsel for the Fund suggests in pages 2 & 3 of his brief that the trial commissioner may have entertained credibility concerns in this case because as an uninsured employer, the respondent-employer saw the Fund as an "easy pocket" and did not aggressively defend against the claim. It might have advanced the adjudication of this dispute had the Fund actively participated in this formal hearing to raise such concerns. However, we find that the Fund did not file any objection to the trial commissioner considering this matter by means of stipulated facts, although they had been noticed as to the claim and an investigator for the Fund, Sandra Aviles, had appeared at the April 2, 2014 informal hearing and counsel for the Fund attended the February 6, 2015, November 7, 2014 and March 13, 2014 informal and pre-formal hearings. As the Appellate Court held in McGuire v. McGuire, 102 Conn. App. 79, 83 (2007), "[w]e have made it clear that we will not permit parties to anticipate a favorable decision, reserving a right to impeach it or set it aside if it happens to be against them, for a cause which was well known to them before or during the trial."

claimant was not being paid at the time she was hurt. However, in two Compensation Review Board cases applying Dombach, supra, and Labadie, supra, we have found claimants who were "off the clock" were entitled to Chapter 568 coverage for injuries sustained in motor vehicle accidents.[4] See King v. State/Department of Correction, 5339 CRB-8-08-4 (March 20, 2009) and Houlihan v. Waterbury, 5141 CRB-5-06-10 (September 26, 2007). In Houlihan, we found that a claimant injured en route to a therapy appointment for a prior compensable injury was entitled to have the additional injury deemed compensable, in part because a "mutual benefit" existed in having the claimant treat for a compensable injury and return fully to health. In King the claimant had completed his shift but was directed by his supervisors to return a vehicle they provided to him to be garaged at his home immediately after work, and he was injured between his work and his home. Since "'the work of the employee' created the 'necessity for travel' to bring the state-owned car to Meriden on the evening of January 18, 2007," the claimant's injuries in King were compensable. Again, the respondent in King received a "mutual benefit" by virtue of the claimant garaging their vehicle at a location they deemed beneficial to their purposes.

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[4] While the "coming and going" rule makes ordinary commuting injuries on public highways sustained prior to commencing work noncompensable, see Matteau v. Mohegan Sun Casino, 4998 CRB-2-05-9 (August 31, 2006) there are four exceptions to this rule as stated in Labadie v. Norwalk Rehabilitation Services, Inc., 274 Conn. 219 (2005) and Dombach v. Olkon Corporation, 163 Conn. 216 (1972).

"(1) If the work requires the employee to travel on the highways; (2) where the employer contracts to furnish or does furnish transportation to and from work; (3) where, by the terms of his employment, the employee is subject to emergency calls and (4) where the employee is injured while using the highway in doing something incidental to his regular employment, for the joint benefit of himself and his employer, with the knowledge and approval of the employer." Labadie, 229.

The second enumerated exception, the furnishing of transportation by the respondent, is clearly relevant to this dispute. The cases cited by claimant in her brief deal with employees who were required to travel on public highways between work assignments, but we need not reach this prong of the test for applicability of the exception to the "coming and going rule" in this case.

In the present case the respondent owned the vehicle in which the claimant was injured and the vehicle was operated by a principal of the respondent at the time of the claimant's injuries. The injury occurred while the claimant was en route to the first work location of her day. We have researched precedent and find this case is virtually indistinguishable from a case in the early days of Workers' Compensation in Connecticut, where the Supreme Court found the injury compensable. We look to Justice Roraback's opinion in Sala v. American Sumatra Tobacco Co., 93 Conn. 82 (1918) as governing this situation.

In Sala the claimants were dependents of two women who were killed in a motor vehicle accident. The decedents responded to an inquiry from an agent for the respondent seeking workers at a tobacco plantation, and were directed to meet a car driven by an employee of the respondent to take them to their work. After they commenced their journey to the plantation in the respondent's vehicle the car ran off the road and the decedents perished. The Supreme Court considered the question as to the decedent's injuries to be "were they injured before this employment began?" Id., 85. The Supreme Court answered this question in the negative, as the compensation commissioner "inferred that their transportation was an essential part of the contract of employment and reasonably incident thereto." Id. "Although the decedents, at the time of the accident, had not actually commenced their work upon the tobacco plantation of the defendant company, it is plain that their transportation was a part of the contract of employment with this defendant." Id. The Supreme Court noted that since the automobile that crashed was furnished and paid for by the respondents, that this created a circumstance where an injury would arise "in the course of and out of the employment."

Id., 86. Both in this case and the present case the employee was en route to their first work assignment of the day in an automobile furnished by the employer when they were injured. Since Sala is still good law in Connecticut, see Morin v. Lemieux, 179 Conn. 501, 503-504 (1980), and the facts herein are indistinguishable, we are compelled to reach a similar conclusion that the claimant's injury arose out of her employment and is legally compensable under § 31-275(1) C.G.S. The respondent in this instance chose to provide transportation to their employee to reach her first work assignment of the day.[5] This decision makes an injury to their employee sustained during this journey compensable.

We find the trial commissioner's Finding and Decision dated July 23, 2015 was legally erroneous. Therefore, we find that the claimant's injury of December 10, 2013 is compensable under Chapter 568.

Commissioners Ernie R. Walker and Nancy E. Salerno concur in this opinion.

[5] If the evidence on the record was that the claimant's purpose in travelling with Ms. Rodrigues on the day of her injury was unrelated to the respondent's business, then § 31-275(1) C.G.S. would clearly make such an injury outside the employment and thus, noncompensable. See Santiago v. Junk Busters, LLC, 5721 CRB-6-12-1 (January 8, 2013). Such an inference, however, cannot be drawn from the stipulated facts presented to the trial commissioner.