CASE NO. 6043 CRB-8-15-10 : COMPENSATION REVIEW BOARD
CLAIM NO. 800186607

JAIRO SOLIS
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

: AUGUST 9, 2017

CITY OF MIDDLETOWN -
PUBLIC WORKS DEPARTMENT
EMPLOYER
SELF-INSURED

and

PMA MANAGEMENT CORPORATION
ADMINISTRATOR
RESPONDENTS-APPELLANTS

APPEARANCES: The claimant was represented by Meghan A. Woods, Esq., McHugh, Chapman and Vargas, L.L.C., 160 Washington Street, Middletown, CT 06457.

The respondents were represented by Zachary M. Delaney, Esq., Pomeranz, Drayton & Stabnick, L.L.C., 95 Glastonbury Boulevard, Suite 216, Glastonbury, CT 06033-4412.

This Petition for Review from the October 2, 2015 Finding and Award of David W. Schoolcraft, the Commissioner acting for the Eighth District, was heard April 21, 2017 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Christine L. Engel and Daniel E. Dilzer. [1]

[1] We note that a Motion to Postpone Oral Argument and several Motions for Extension of Time were granted during the pendency of this appeal.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. A single question is the focus of this appeal: When is an "emergency" of sufficient magnitude to trigger the "emergency call" exception to the "coming and going" rule and make a commuting injury an injury that arises out of the claimant's employment? The claimant, Jario Solis, a public works employee of the city of Middletown ("city"), sustained an injury on December 10, 2013 while traveling from the respondent-employer's garage to his home during a snowstorm. The trial commissioner concluded that based on the facts of the case, the claimant was responding to an emergency call from the respondent-employer and the injury was therefore compensable. Although the respondents have appealed from the October 2, 2015 Finding and Award, we find the trial commissioner's decision is well-supported by the facts on the record and our precedent. We affirm the Finding and Award.

The trial commissioner reached the following factual findings at the conclusion of the formal hearing held on this claim on March 31, 2015. No live testimony was taken at the time of the formal hearing, but the parties placed into evidence the transcripts of the deposition testimony of William Russo and Robert Russo. In addition, a number of documentary exhibits were entered into evidence, including various wage records, a union contract, a job description, and a police accident report. Finally, the parties also submitted a stipulation of twenty-six (26) facts. Based on that record, the trial commissioner determined that on December 10, 2013, the claimant was employed as a truck driver for the city's public works department ("department"). His normal work hours were 7:00 a.m. until 3:30 p.m., Monday through Friday. He was eligible for overtime and his job responsibilities included setting up snow plows, sanders and

screeners, as well as plowing and sanding roads. The commissioner noted that the parties were governed by a collective bargaining agreement which directed the manner in which city employees would be offered overtime work. An employee was provided one “free pass” per winter season from being required to perform overtime snow plowing, and the claimant had not exercised this pass as of December 10, 2013. The city’s police department determines when emergency conditions exist on city streets, outside the normal business hours of the public works department, and alerts the department when it needs to address the snow and ice. The superintendent (or assistant superintendent) of the public works department then places calls to the employees who have been designated snow and ice removal assignments, telling them they need to come to work. The respondent-employer attempts to equalize overtime hours among the staff and does not have to call in the entire available staff when storm conditions do not warrant such a full deployment.

At some point in the late evening of December 9, 2013, the city’s police department contacted either the superintendent or the assistant superintendent of the public works department and advised that there were icy conditions in Middletown that needed attention. On the evening of December 9, 2013, the claimant was next on the list to be called to work overtime. Later that evening, the claimant received a call from the department to report for snow and ice removal. The claimant immediately left his home and reported to the city lot on Thomas Street to pick up his truck and equipment. He punched in at 12:04 a.m. on December 10, 2013. The claimant then proceeded to treat the areas of road surface at issue. At some point he was told he could return to the lot to drop off his truck and then go home because Superintendent Robert Russo had called in

additional employees to relieve the claimant and other workers. The claimant returned to the lot, dropped off his equipment, and drove off in his personal vehicle, heading directly to his home. The claimant was scheduled to return to work for his regular shift at 7:00 a.m. Someone signed the claimant out at 3:00 a.m., and he was not "on the clock" when, at 3:04 a.m., his vehicle slid on ice and struck a utility pole. The claimant was severely injured and was transported by ambulance to Hartford Hospital with head injuries. The police report for the incident indicated the road conditions in the area of the accident were very icy. The trial commissioner noted the collective bargaining agreement in force did not pay the claimant for commuting time.

Based on these facts, the trial commissioner determined that the claimant was subject to being summoned in to work after hours or on weekends to plow snow and/or treat road surfaces during winter snow emergencies. The obligation to do so was an integral part of his employment contract. On the evening of December 9, 2013, a snow emergency existed in Middletown and the claimant was directed to come to work to address this emergency. The claimant's employer directed him to stop work at 3:00 a.m., go home, and return to work his scheduled shift at 7:00 a.m. This was a manpower management decision on the part of the employer. The snow emergency was still ongoing at the time of the claimant's injury, and although the claimant was "off the clock" when he was hurt, the weather conditions precipitating his trip to work were a significant factor in the injury. Therefore, the claimant was still in the course and scope of his employment at the time of his motor vehicle accident on December 10, 2013 and the accident arose out of the employment.

On October 2, 2015, the trial commissioner also authored a memorandum in this matter in which he outlined the legal issues involved in this claim. He rejected the argument that legislation regarding "portal to portal" travel for first responders was relevant in this dispute. See Lake v. Bridgeport, 102 Conn. 337 (1925), as well as other cases since that time which involve employees subject to being called to work for emergencies such as King v. State/Department of Correction, 5339 CRB-8-08-4 (March 20, 2009) and Loffredo v. Wal-Mart Stores, Inc., 4369 CRB-5-01-2 (February 28, 2002) (*appeal withdrawn*, October 3, 2002).

Based on the facts herein, the trial commissioner concluded that an emergency had existed to which the claimant's employment required him to respond and he had been sent home during the midst of the emergency to rest prior to returning to work his scheduled shift. The trial commissioner summed up his reasoning as follows.

> Mr. Solis was an employee who, by the express terms of his employment contract, was obligated to come out at night to plow and treat icy roads during winter weather emergencies. He was called on to do so on the night of December 14, 2013. At about 3:00 a.m., while the roads were still bad and other workers were being called in to spell him, the claimant was sent home by his employer to get rest before coming back to work at 7:00 a.m. Given that the emergency situation was still going on, and given that the hazards of traveling back and forth were still present, I am satisfied that Mr. Solis was still in the course and scope of his employment, as expanded by the emergency-call exception to the coming-and-going rule, at the time of his accident. Moreover, because the accident occurred, at least in part, due to the ongoing weather emergency, it is clear the accident arose out of the employment, as well. [2]

October 2, 2015 Memorandum, p. 15.

[2] The date of injury herein is an obvious scrivener's error and can be disregarded. D'Amico v. Dept. of Correction, 73 Conn. App. 718, 729 (2002), *cert. denied*, 262 Conn. 933 (2003).

The respondents filed a Motion to Correct the Finding and Award. The trial commissioner granted two of the eight corrections sought, neither of which materially changed the decision. The respondents have now taken this appeal. The gravamen of the respondents' appeal is that the facts herein did not rise to the level of an "emergency" such that an injury which occurred while traveling between home and work would become compensable.

On appeal, we generally extend deference to the decisions made by the trial commissioner. "As 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." Daniels v. Alander, 268 Conn. 320, 330 (2004), *quoting* Burton v. Mottolese, 267 Conn. 1, 54 (2003). The Compensation Review Board cannot retry the facts of the case and may only overturn the findings of the trial commissioner if they are without evidentiary support, contrary to the law, or based on unreasonable or impermissible factual inferences. Kish v. Nursing & Home Care, Inc., 248 Conn. 379, 384 (1999) and Fair v. People's Savings Bank, 207 Conn. 535, 539 (1988). Nonetheless, while we must provide deference to the decision of a trial commissioner, we may reverse such a decision if the commissioner did not properly apply the law or reached a decision unsupported by the evidence on the record. Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

It has been established that since the advent of workers' compensation in Connecticut, an injury sustained while responding to an emergency call can be the basis of a claim under what is now Chapter 568. Such an injury can reasonably be determined

to have arisen out of and in the course of a claimant's employment consistent with the provisions of § 31-275(1) C.G.S. In Loffredo, supra, we cited Linnane v. Aetna Brewing Co., 91 Conn. 158 (1916), wherein a fireman employed by a private employer was summoned for duty in an emergency and the exertion caused by hurrying in a heavy snow storm caused pneumonia. Compensation in Linnane was denied on the basis that the injury could not be definitively located as to time or place (the law at that time), although "the significant point of the case" was that the exposure which occurred on the highway was treated as arising out of and in the course of the employment. See also Lake, supra, at 343. In Lake, the Supreme Court noted that while injuries sustained during commuting are generally not compensable due to what is commonly described as the "coming and going rule," an exception exists for employees subject to emergency calls. This exception was discussed more recently in Dombach v. Olkon Corporation, 163 Conn. 216, 222 (1972) and in King, supra.[3]

In the present case, the trial commissioner explained that based on his evaluation of the evidence presented, the claimant was subject to receiving emergency calls as part of his employment, he received an emergency call the evening that he was injured, and his injury on the public roads was the result of having responded to the emergency call. We note specifically that the claimant was directed to leave his employment and return four hours later, presumably to optimize the performance of the department. He was

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[3]The Supreme Court explained the exceptions to the ordinary "coming and going" rule in Dombach v. Olkon Corporation, 163 Conn. 216, 222 (1972): "An injury sustained on a public highway while going to or from work is ordinarily not compensable…. There are a number of exceptions to the ordinary rule, four of which are pointed out in [Lake v. Bridgeport, 102 Conn. 337, 343 (1925)]: (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."

injured while following this directive. As a result, we believe the commissioner could reasonably find a mutual benefit present at the time the claimant sustained his injury.[4]

Counsel for the respondents argues that the trial commissioner's conclusion that an emergency situation existed on the night of the claimant's injury was in error. He contends that since not all employees of the department were called in to work that evening, the circumstances did not rise to the level which would render an injury sustained between the claimant's home and the city's garage compensable. He notes that because the union contract for the claimant permitted one "skip" of a winter storm work request, the claimant was not obligated to report to work that evening. These arguments are essentially factual arguments. We cannot independently re-weigh the evidence presented and we are left to ascertain only if a reasonable fact-finder could conclude as the trial commissioner did in this case. The trial commissioner extensively reviewed the facts and the law and we cannot say that his conclusions were arbitrary or unreasonable. Not every meteorological event must rise to the catastrophic impact of Hurricane Sandy for a fact-finder to find an emergency existed; nor do we believe that the trial commissioner erred in determining the claimant was expected to respond to the emergency call that occasioned his injury.

Counsel for the respondents further argues that the portal-to-portal coverage statute for police officers and fire fighters, § 31-275(1)(A) C.G.S.,[5] bars coverage for

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[4] See for example, King v. State/Department of Correction, 5339 CRB-8-08-4 (March 20, 2009), wherein the claimant was injured following the respondent's directive to return his state-owned vehicle to his garage at the end of his shift. See also Katz v. Katz, 137 Conn. 134 (1950), wherein the claimant was injured after following his employer's directive to walk down a snow-covered street to a bus stop. These injuries were found to have arisen out of the claimant's employment.

[5] Section 31-275(1)(A)(i) CGS (Rev. to 2013) states: "'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

other employees injured while traveling between their home and work. We do not agree. The plain meaning of the statute does not address any employees other than an enumerated class of employees who are extended additional coverage for all injuries sustained during their commutes to and from work. We do not impute terms of limitation to the statute which would abrogate prior precedent. Since this statute provides blanket coverage for injuries sustained during a police officer or fire fighter's ordinary commute to and from work, we conclude it is irrelevant to a determination of whether an employee was injured as a result of an emergency call.

Finally, the respondents argue that this case can be distinguished on the facts from Loffredo, supra, given that in that case, the injured claimant was the only individual available to the respondent employer to respond to the emergency. In the present case, the claimant was not the only person available to respond to the snowstorm on December 10, 2013. Nonetheless, we find this distinction immaterial to the outcome in this case as there is nothing in Loffredo to suggest that emergency call coverage should be so narrowly limited. Indeed, Loffredo cites Fair, supra, for the proposition that "[t]he determination of whether an injury arose out of and in the course of employment is a question of fact for the commissioner." Fair, supra, 539-540.

Based on our review, we conclude that the October 2, 2015 Finding and Award of the trial commissioner is well-supported by the facts on the record and our precedent.

We affirm the Finding and Award.

Commissioners Christine L. Engel and Daniel E. Dilzer concur in this opinion.

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business or affairs by the direction, express or implied, of the employer, provided:… For a police officer or firefighter, 'in the course of his employment' encompasses such individual's departure from such individual's place of abode to duty, such individual's duty, and the return to such individual's place of abode after duty."

CERTIFICATION

THIS IS TO CERTIFY THAT a copy of the foregoing was mailed this 9th day of August 2017 to the following parties:

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