CASE NO. 6082 CRB-2-16-3 : COMPENSATION REVIEW BOARD
CLAIM NO. 200180355

RONALD DEROSIERS
CLAIMANT-APPELLANT : WORKERS' COMPENSATION COMMISSION

v.

: FEBRUARY 23, 2017

ELECTRIC BOAT CORPORATION
EMPLOYER
SELF-INSURED
RESPONDENT-APPELLEE

APPEARANCES:

The claimant was represented by Edward M. Rosenthal, Esq., Rosenthal Law Firm, LLC, 18 North Main Street, West Hartford, CT 06107.

The respondent was represented by Peter D. Quay, Esq., Law Office of Peter D. Quay, LLC, PO Box 70, Taftville, CT 06380.

This Petition for Review from the March 2, 2016 Finding & Dismissal of Ernie R. Walker, the Commissioner acting for the Second District, was heard September 23, 2016 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Nancy E. Salerno and Peter C. Mlynarczyk.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The claimant has appealed from a Finding & Dismissal issued by Commissioner Ernie Walker determining that the claimant's injury was not compensable under the terms of Chapter 568. The claimant argues that the circumstances of his injury, wherein he was injured while riding in a Ride Share van en route to the employer's facility, are a situation where the respondent was "furnishing transportation" to him at the time of his injury. The trial commissioner concluded to the contrary, and after reviewing the facts and the relevant precedent we are satisfied that this was a reasonable conclusion. As the trial commissioner could conclude this constituted a commuting injury where the claimant chose the means of transportation he preferred, paid for his Ride Share service, and was not under any obligation or employer directive to use Ride Share, we affirm the Finding & Dismissal.

Commissioner Walker reached the following factual findings at the conclusion of the formal hearing in this matter. He noted the testimony of the claimant, who is employed at Electric Boat's Groton shipyard as a painter on their 6:30 a.m. to 2:30 p.m. shift. Mr. Derosiers lives in West Hartford which is about a 100 mile daily round trip commute from Groton. The claimant said that he signed up for a commuter van to save mileage on his car, avoid parking difficulties, and to ensure he got to work on time. He testified that while riding in the commuter van it was involved in an accident on the morning of January 16, 2013 about 6:00 a.m. near the employer's worksite, and he was injured in the accident.

The claimant explained that he signed up for van transportation at an office at the Electric Boat facility staffed by Electric Boat employees. He paid for the van service by

means of having a payroll deduction taken out of his paycheck at Electric Boat. The claimant said that he was paid on an hourly basis and was not being paid "on the clock" at the time of his accident, nor was he part of any crew which was "on call" subject to an emergency call to report to his workplace.

The president of Greater Hartford Ride Share, ("Ride Share") Jonathan C. Colman, also testified at the formal hearing. Ride Share owned and operated the van that the claimant was riding in when he was injured. Ride Share is a non-profit organization which has been in the business of promoting commuter transportation since July 1980. Mr. Colman testified Ride Share's primary contact is the rider and all business is premised upon customer service for the individual rider. He testified as to the requirement of riding and/or driving a van, how one applies for van service, and that employers have no control or input as to the number of riders and stops a van makes. Mr. Colman testified as to the firm's maintenance and emergency policies and how fees were collected for gas, maintenance, and other expenses. He further explained how payments from passengers of the van were made and the advantage of pre-tax deduction payments from the passengers. The claimant paid to ride the van and chose to make his payment to Ride Share via payroll deduction. The price charged to the claimant was controlled and determined by Ride Share to cover mileage, capital cost of the vehicle, insurance, maintenance, and gasoline. There were payment options other than payroll deduction available. However, payroll deduction is done for the benefit of the employee so that the employee becomes eligible for tax deductions offered by the federal government. Payroll deduction allows the employee to take a pre-tax deduction. Electric Boat handled the payroll deduction themselves, but other large employers use a third-party provider.

Essentially, Electric Boat forwarded the claimant's payroll deduction to Ride Share to pay for his commuter van expenses.

Mr. Colman testified as to the incident where the claimant sustained injury. The claimant was on his way to work but had yet to arrive at work. The van was an Easy Street van operating on Route 743. This van was owned and operated by Ride Share. Ride Share provides the maintenance of the vehicles, the insurance, backups, service and a gas card to the driver of the van. The driver and all passengers of this van were employed at Electric Boat but Ride Share did not require all riders to be employed at the same employer. Ride Share required only that riders had to be picked up and dropped in the same area, but there was no requirement that the riders in the van all work at Electric Boat. The decisions on which route to take to and from work, and the stops to make, were made by the van pool itself with help from Ride Share if needed. Electric Boat had no say in the number of riders in the van, the stops the van made, and no input at all concerning the ridership of the van in question. Ride Share dealt with the group. If an employee had to leave early or work extra hours, Ride Share would provide an emergency ride program and the rider would need to contact Ride Share. If there was an accident or a van broke down, Ride Share provided the back-up van.

There was further testimony as to the arrangement Ride Share had to conduct maintenance on its vans. Electric Boat performed for Ride Share "in-house repair work" such as regular maintenance including lube and oil, and filters, and brakes. If emergency on-the-road services were required a different vendor performed those services. Electric Boat was paid a competitive rate for its services to Ride Share. Ride Share had this identical vendor agreement with every other maintenance vendor that they had. There are

roughly a dozen maintenance vendors around the State for Ride Share. The schedule of the maintenance was determined by Ride Share, with some input from the driver of the van.

Commissioner Walker recited this testimony in his conclusions, noting as well that Electric Boat does not provide transportation for its employees, does not refund money paid to park off-site, and provides free parking lots. Employees paid for their own mileage, their own gas and were responsible for their own maintenance costs on personal vehicles. He further noted the contractual relationship in this matter was between the claimant and Ride Share. He found that the claimant was injured in a normal commuting accident as he was not within the hours of his employment, not a traveling employee, nor subject to being "on call" at the time he was hurt. The claimant could have chosen to use another means to commute to work and was not directed by his employer to use the commuter van. Electric Boat merely provided through the payroll deduction program the means for the claimant to pay Ride Share for the costs of ridership. In addition, the claimant could pay for these costs through other means other than payroll deduction.

As a result Commissioner Walker dismissed the claim for lack of subject matter jurisdiction. The claimant did not file a Motion to Correct the factual findings herein, but did file a timely Petition for Review.[1] The gravamen of his appeal is that the trial commissioner erred, as a matter of law believing the facts herein demonstrate that Electric Boat was "furnishing transportation" therefore making the injuries herein compensable, as per precedent such as Dombach v. Olkon Corporation, 163 Conn. 216

[1] The respondent has filed a Motion to Dismiss asserting that untimely Reasons of Appeal make this appeal jurisdictionally subject to dismissal. We find the claimant commenced this appeal within the statutory time requirements of § 31- 301(a) C.G.S. and that there was no prejudice to the respondent from the delayed filing of Reasons of Appeal. We deny the Motion to Dismiss. See Putney v. Guilford, 5732 CRB-3-12-2 (February 5, 2013).

(1972).[2] We do not agree with the claimant and find no error herein by the trial commissioner.

We recently had an opportunity to review the issue as to an employer furnishing transportation to an employee in DeOliveira v. Florenee Cleaning, LLC, 6024 CRB-4-15-8 (June 6, 2016). In DeOliveira the claimant was a housekeeper who lacked her own transportation and had a number of homes where she did work in during the course of the day. Prior to starting her first assignment of the day she was being transported to her job in a car owned and operated by the respondent-employer and she was injured in an accident. We found, citing Sala v. American Sumatra Tobacco Co., 93 Conn. 82 (1918), that it was long standing precedent that when an employer transports an employee to a worksite that the injuries sustained during that journey are compensable.

There are numerous factual distinctions herein which result in the DeOliveira precedent not being dispositive of the present case. The claimant herein had his own car and chose to use Ride Share as an alternative means of transportation. Unlike the claimant in DeOliveira the claimant did not have to travel to multiple worksites during the day; rather Mr. Derosiers spent his entire workday at the Groton shipyard. Finally, the transportation provided to Mr. Derosiers was by a separate entity, not by his employer. Therefore, we note that we must overcome long standing precedent that ordinary commuting injuries are outside the scope of Chapter 568, see Lake v. Bridgeport, 102 Conn. 337 (1925) and Matteau v. Mohegan Sun Casino, 4998 CRB-2-05-9 (August 31, 2006), to find this injury compensable.

[2] The claimant did not file a Motion to Correct. We must therefore give the factual findings in this matter conclusive effect and our review must be limited to whether the trial commissioner properly applied the law. Stevens v. Raymark Industries, Inc., 5215 CRB-4-07-4 (March 26, 2008), *appeal dimissed*, AC 29795 (June 26, 2008).

The claimant relies on precedent in Katz v. Katz, 137 Conn. 134 (1950) and Eaton v. Main Heating & Cooling Service, 3473 CRB-3-96-11 (January 30, 1998) to assert this matter falls into the "employer furnishing transportation" exception under the precedent in Lake, supra. We find these cases factually and legally distinguishable and therefore are not persuaded by this argument. In Eaton the claimant was a maintenance technician whose job required him to go to a variety of jobsites. His employer had provided him with a company van as a condition of his employment and paid for its gasoline, repairs and insurance. The claimant was injured while driving this van between his last job site and his home. We determined that under these circumstances the employer "furnished transportation" to the claimant.[3] As noted, the claimant herein was not provided with a company van which he used during the course of the work day, and was injured while riding in a commuter van owned by a third party prior to commencing his work day.

We also find Katz, supra, quite dissimilar and indeed, this case turned on an unusual fact pattern. The claimant, who was in ill health, had apparently been induced by the respondent to continue working for his employer after their place of business relocated based on the promise he would be driven home by the respondent's employees at the new facility at the close of business. Id., 138-139. On one snowy night the employer failed to provide this transportation and the respondent directed the claimant to walk to a bus stop, and he sustained injuries in this journey. Id., 137. The Supreme Court majority determined "[i]n view of the defendant's failure to fulfill his agreement to transport the plaintiff and of his direction to take a bus, the plaintiff in obeying

[3] We reached a similar decision as to an injury sustained when a claimant, who was subject to emergency calls, was injured driving a specially equipped employer provided vehicle home at the conclusion of his work day. See King v. State/Department of Correction, 5339 CRB-8-08-4 (March 20, 2009).

instructions was acting within the course of his employment." Id., 139. Therefore, Katz appears to be based more on the concept of promissory estoppel than an effort to redefine the parameters of coverage under Chapter 568. There is no averment in the present case that the respondent reneged on any representation to the claimant and that this lapse could be linked to his injury. Nor was the claimant specifically directed by the employer to utilize the Ride Share service. Consequently, we do not find Katz on point.

Commissioner Walker cited El Ayoub v. Special Testing Laboratories, 4251 CRB-3-00-6 (September 13, 2001) as supportive of the respondent's position in this matter. We concur. In El Ayoub the claimant had a car allowance as part of his employment and he claimed the employer was furnishing transportation when he was injured driving his car between his home and his jobsite. We determined the mere fact the employer provided a car allowance did not constitute furnishing transportation so as to meet the exception to the ordinary rule barring compensability outlined in Dombach, supra, 222. In the present case the evidence on the record indicates that the claimant, via payroll deduction, paid for the entire cost of the Ride Share service. If anything, the facts in El Ayoub were more supportive of the claimant's position than the facts herein.

At oral argument before this tribunal counsel for the claimant focused primarily on the relationship between Ride Share and Electric Boat, arguing that the two entities were so intertwined that Electric Boat should be deemed to be "furnishing transportation" although the commuter vans were owned and operated by Ride Share. Counsel noted that Electric Boat personnel managed a transportation office where workers could sign up for commuter vans, allowed the use of Electric Boat payroll deductions to pay for the van rides, and EB had agreed with Ride Share to have vans maintained at the Electric Boat

facility. Counsel also noted the scarcity of parking at the Groton shipyard and asserted the respondent obtained a benefit from increased commuter van use. While claimant's counsel argued that these facts compel a finding that as a matter of law Electric Boat was "furnishing transportation" we concur with the trial commissioner that they do not.

The evidence on the record demonstrates that Ride Share was an independent entity providing services to the general public. It had an independent contractual relationship with the claimant, notwithstanding the role that the employer had in forwarding a payroll deduction to Ride Share on behalf of the claimant.[4] The testimony of Mr. Colman demonstrated that Ride Share made its own decisions as to how to provide its service and was not under the direction or control of Electric Boat in managing its business. We have looked to the real party of interest when an employer utilizes an outside contractor as a mere cat's paw or alter ego. See Moreno v. Cablevision Systems Corporation, 5795 CRB-4-12-11 (October 8, 2013) and Diaz v. Capital Improvements & Management, LLC, 5616 CRB-1-11-1 (January 12, 2012). This is not such a case. The facts found by the trial commissioner indicate that while Electric Boat may have facilitated the use of Ride Share, they did not control their activities nor did they pay for their services, as the claimant was the responsible party to pay Ride Share. Although the van which the claimant was riding in was going to Electric Boat and the other passengers were his co-workers, essentially Ride Share was a common carrier offering services to the individual, not the employer. The claimant's decision to utilize Ride Share was entirely volitional on his part. Therefore, since Ride Share was not an agent or contractor

[4] We find that on a substantive basis, as the claimant was using his own earnings to pay for the Ride Share service, there was a stronger contractual relationship between the claimant and Ride Share than between the claimant and the respondent in Muniz v. Allied Community Resources, Inc., 5025 CRB-5-05-11 (November 1, 2006), *aff'd,* 108 Conn. App. 581 (2008), *cert. denied*, 289 Conn. 927 (2008) where a state program paid for the claimant's services and the respondent was a mere financial conduit.

of Electric Boat, we cannot find that as a matter of law this injury was different than had the claimant been injured on a publicly available commuter bus or commuter train en route to work. Such an injury would be deemed noncompensable under Chapter 568 and we must reach the same conclusion in this case.

We affirm the Finding & Dismissal.

Commissioners Nancy E. Salerno and Peter C. Mlynarczyk concur in this opinion.