CASE NO. 6116 CRB-3-16-7 : COMPENSATION REVIEW BOARD
CLAIM NO. 400042308

CHRISTOPHER BARKER
CLAIMANT-APPELLEE : WORKERS' COMPENSATION COMMISSION

v.

: MAY 23, 2017

ALL ROOFS BY DOMINIC
EMPLOYER

and

CITY OF BRIDGEPORT
EMPLOYER
SELF-INSURED

and

PMA CUSTOMER SERVICE CENTER
ADMINISTRATOR
RESPONDENTS-APPELLANTS

and

SECOND INJURY FUND
RESPONDENT-APPELLEE

APPEARANCES:

The claimant was represented by Laurence V. Parnoff, Esq., Laurence Parnoff, P.C., 1566 Park Avenue, Bridgeport, CT 06604.

The respondents were represented by Marie E. Gallo-Hall, Esq., Montstream & May, L.L.P., Salmon Brook Corporate Park, P.O. Box 1087, Glastonbury, CT 06033-6087.

At the proceedings below, the Second Injury Fund was represented by Michael Belzer, Esq., Assistant Attorney General, Office of the Attorney General, 55 Elm Street, P.O. Box 120, Hartford, CT 06141-0120. At oral argument, the Second Injury Fund was represented by Joy L. Avallone, Esq., Assistant Attorney General, Office of the Attorney General, 55 Elm Street, P.O. Box 120, Hartford, CT 06141-0120.

This Petition for Review from the June 16, 2016 Finding and Orders of Jack R. Goldberg, the Commissioner acting for the Third District, was heard January 27, 2017 before a Compensation Review Board panel consisting of the Commission Chairman John A. Mastropietro and Commissioners Christine L. Engel and Daniel E. Dilzer.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondents have appealed from the June 16, 2016 Finding and Orders issued by Commissioner Jack R. Goldberg which determined that the city of Bridgeport ("city") was liable under § 31-291 C.G.S. as a "principal employer" for the injuries sustained by the claimant while working on a city-owned garage.[1] The city argues that because it is not in the "trade or business" of roofing, liability for this injury rests with its contractor, All Roofs by Dominic, and since this business entity proved to be uninsured, the claim is the responsibility of the Second Injury Fund. We conclude that while the city of Bridgeport is not in the roofing business, it has chosen to engage in providing public works to its citizens and operates garages for that purpose. As the claimant was injured in the course of repairing one of the city's garages, we conclude the city of Bridgeport is a "principal employer" under the terms of Chapter 568 and we affirm the Finding and Orders.

[1] Section 31-291 C.G.S. (Rev. to 1999) states: "When any principal employer procures any work to be done wholly or in part for him by a contractor, or through him by a subcontractor, and the work so procured to be done is a part or process in the trade or business of such principal employer, and is performed in, on or about premises under his control, such principal employer shall be liable to pay all compensation under this chapter to the same extent as if the work were done without the intervention of such contractor or subcontractor. The provisions of this section shall not extend immunity to any principal employer from a civil action brought by an injured employee or his dependent under the provisions of section 31-293 to recover damages resulting from personal injury or wrongful death occurring on or after May 28, 1988, unless such principal employer has paid compensation benefits under this chapter to such injured employee or his dependent for the injury or death which is the subject of the action."

Commissioner Goldberg reached the following factual findings at the conclusion of formal hearings held on November 19, 2015 and February 23, 2016. The trial commissioner noted that a prior trial commissioner, George Waldron, had determined on January 5, 2005 that the claimant was an employee of Howard Adams, d/b/a Howie's Roofing, when he was hurt on June 29, 2000.[2] The claimant was injured falling from the roof of the Bridgeport transfer station. The claimant's employer did not have workers' compensation insurance, and neither did the business entity that hired the claimant's employer, All Roofs by Dominic. All Roofs by Dominic had been hired by the city of Bridgeport to perform the roof repairs on the premises.

John Cottell, the city's Deputy Director of Public Works, testified at the formal hearing that the city did not retain an employee on staff to repair roofs because the need was not extensive enough to hire an employee. In addition, the city's collective bargaining agreement barred other employees from doing work outside their assigned trades. Cottell said it was the responsibility of his department to maintain city-owned buildings. To accomplish that, the city would issue a work order to a contractor it had placed on the "on-call list" and retain him as an outside contractor to do small projects such as the one the claimant had been working on. Cottell testified he was uncertain whether a sole proprietor such as All Roofs by Dominic needed to provide proof of workers' compensation insurance before working on a city-owned building. He testified that the city of Bridgeport was not in the roofing business in 2000. The commissioner noted that the city conceded it had hired All Roofs by Dominic to repair the transfer

[2] The June 16, 2016 Finding and Orders indicate that although notice of the formal hearing was issued on January 20, 2016 to Howard Adams, d/b/a Howie's Roofing, at 35 Watkins Street, Stratford, CT 06614, and to Howard Adams, 35 Watkins Street, Stratford, CT 06614, no response was received by the Workers' Compensation Commission and neither party entered an appearance at the formal hearing.

station roof and the claimant was injured on property the city owned and controlled, but also noted that the city denied that the work performed was a part or process in the trade or business of the city.

Based on this factual record, the trial commissioner concluded that the city contracted All Roofs by Dominic to repair the roof on the city transfer facility and All Roofs by Dominic subcontracted its work to Howie's Roofing. He found the city had a statutory duty to ensure its contractors had valid workers' compensation insurance and neither entity involved was insured. He determined the city procured the work herein which was performed on premises that the city controlled. He further determined that repairing the roof of a city-owned facility was a part or process of the trade or business of the city of Bridgeport. He found the city had a statutory responsibility to manage and maintain its property. The trial commissioner noted parallels with Pacileo v. Morganti, Inc., 10 Conn. App. 261 (1987), in which our Appellate Court held that when a business entity retains an outside contractor to perform work beyond the scope of its own employees' skills, that entity may be deemed a principal employer of the contractor's staff. The commissioner also determined that pursuant to Massolini v. Driscoll, 114 Conn. 546 (1932), a municipality may be deemed a principal employer under Chapter 568. As a result, the commissioner directed the city of Bridgeport and its insurer to pay the claimant any statutory benefits to which he was entitled.

The city filed a Motion to Correct and a Motion for Articulation subsequent to the issuance of the Finding and Orders. The trial commissioner denied these motions in their entirety. The city has now commenced this appeal. The gravamen of its appeal is that as a public entity, the city of Bridgeport is not engaged in a "trade or business" and

therefore cannot be deemed to be a "principal employer" pursuant to statute. We are not persuaded by this argument.

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 in the record. Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007). We are also mindful that "[t]he purposes of the act [Chapter 568] itself are best served by allowing the remedial legislation a reasonable sphere of operation considering [its] purposes…. In [reservations] arising under workers' compensation law, we must resolve statutory ambiguities or lacunae in a manner that will further the remedial purpose of the act." (Citations omitted; internal quotation marks omitted.) Mello v. Big Y Foods, Inc., 265 Conn. 21, 26 (2003), *quoting* Driscoll v. General Nutrition Corp., 252 Conn. 215, 220-221 (2000).

In considering whether a party is a "principal employer" under § 31-291 C.G.S., we have applied a three-prong test. We discussed this test as applied in Pacileo, supra, at some length in our decision in Martinez v. C. Palmer & Sons, 5252 CRB-8-07-7 (October 21, 2008).

> This board last had occasion to consider this statute and the Pacileo case in Samaoya v. William Gallagher, 4951 CRB-7-05-6 (April 26, 2006), *aff'd*, 102 Conn. App. 670 (2007). In Samaoya the respondents argued that they did not fall within the statutory definition of "principal employer." We disagreed, citing Hebert v. RWA, Inc., 48 Conn. App. 449 (1998).
>
> "There are three main elements involved in this statute. 'One, the relation of the principal employer and contractor must exist in work wholly or in part for the former. Two, the work must be in, on or about premises controlled by the principal employer; and three, the work must be a part or process in the trade or business of the principal employer.'" Mancini v. Bureau of Public Works, 167 Conn. 189, 193 (1974). Hebert. Id., 453. Samaoya, supra.

Id.

In the present case, the city of Bridgeport essentially concedes the first two prongs of the Pacileo test have been satisfied. It admits that the claimant was employed by a contractor who was retained to repair its building. It further concedes that the claimant was injured on premises it owned and controlled. It contests the finding that roof repair was a part or process of its trade or business, and further argues that the principal employer statute cannot be applied to a noncommercial entity. We note that in Martinez, supra, we rejected a constrained view of what constituted a "part or process" of a putative principal employer's activities.

> The trial commissioner herein decided that C. Palmer & Sons was not "in the regular business of building homes" in determining they did not fall under the principal employer statute. We disagree for two reasons. First, the record indicated that the respondent generally built one new house per year. The dictionary definition

> of "regular" is "usual; normal; customary." The record does not support a finding that the respondent's construction of new homes was unusual, abnormal, or not customary; indeed it is clear although building new homes may not have been the respondent's most prominent business it was a business the respondent chose to engage in systemically during an extended period of time. We note that statute states that the enterprise in which the injury occurred must only be "a part" of the respondent's trade or business; had the General Assembly intended to limit the employer's liability to only those activities which were a "substantial," "significant," "important," "principal," "primary" or "major" part of an employer's operations, the statute would have been written in that fashion.
>
> Additionally, applying the law to the facts of this case, we do not think that there is any material difference between a general contractor engaging in home remodeling and home construction. The claimant herein suffered an injury using a nail gun. The question is whether such labor is among "those operations which enter directly into the successful performance of the commercial function of the principal employer." Pacileo, at 264. The locus of this labor whether at a finished home or an unfinished home does not present a significant jurisdictional issue when the respondent is a general contractor.

Id.

While the city of Bridgeport clearly undertakes a number of governmental functions, there is no dispute that maintaining a public works department and addressing refuse collection are among the usual activities of municipal government. It is also apparent that maintaining its buildings and facilities in good repair are among those operations which enter directly into the successful performance of municipal government. As the Appellate Court held in Alpha Crane Service, Inc. v. Capitol Crane Co., 6 Conn. App. 60 (1986), *cert. denied,* 199 Conn. 808 (1986), "it is clear that the part or process element is intended to include all of those tasks which are required to carry on the

principal employer's business." Id., 76. The trial commissioner in this case could readily determine that building maintenance was an essential obligation of the city.[3]

The city of Bridgeport argues that notwithstanding case law such as Pacileo, supra, the city, as a governmental entity, should not be deemed a principal employer. The difficulty with that argument is that Massolini, supra, clearly stands for the proposition that a municipality **can** be a principal employer and it is indistinguishable from the present case both on the facts and on the law. The decedent in that case was employed directly for a gentleman named Driscoll with whom the city of Hartford had contracted to assist in removing trash for the city. Driscoll used horse carts to remove the trash, and while the decedent was trying to fix a horseshoe on one of Driscoll's horses, the decedent was kicked and later succumbed to his injuries. The city of Hartford argued that taking care of horses was not part of the city's business and it had no legal liability for this injury. However, the Supreme Court found that the injury occurred during trash removal, which was within the city's municipal powers. The Supreme Court declined to limit the application of "trade or business" in the principal employer statute to entities engaged in private commerce. "When applied to a public corporation, the term signifies the conduct of the usual affairs of the corporation." Id., 552. Therefore, the Supreme Court held, "the disposal of ashes and rubbish is a "business," in which the city of

[3]The city of Bridgeport has argued that it was error for the trial commissioner to find Pacileo v. Morganti, Inc., 10 Conn. App. 261 (1987), persuasive authority given that in that case, the defendant was a general contractor who was in the construction business. It argues that the city should be deemed to be a mere property owner beyond the scope of § 31-291 C.G.S. We disagree. In Pacileo, the claimant's injury occurred on municipal property, similar to the circumstances herein. While the city of New Haven retained Morganti as its general contractor, there is nothing in the Appellate Court's decision that suggests the outcome would have been different had the city of New Haven retained Pacileo's direct employer itself. The city of Bridgeport's effort to distinguish Hebert v. RWA, Inc., 48 Conn. App. 449 (1998), is also unpersuasive for the same reasons.

Hartford was engaged at the time of this accident… [and] a valid claim for compensation has been established against the city." Id., 553.[4]

In the present case, the claimant was injured while working on a facility the city's public works department used as a transfer station. While the city of Bridgeport makes a similar argument against this claim (i.e., it is not in the roofing business) as the city of Hartford presented in 1931 (i.e., it was not in the business of taking care of horses), in both cases, the claimant sustained injuries while carrying out ordinary municipal business and the principal employer statute applied to the injury.

Given the nearly complete legal and factual congruity between Massolini, supra, and the present case, the city of Bridgeport argues this precedent should now be deemed "an antiquated case" and therefore no longer binding on this tribunal as the case is eighty-five (85) years old. It further argues that this precedent contravenes the intent of the legislature. We find these arguments devoid of merit. We note that just last year, in deciding McCullough v. Swan Engraving, Inc., 320 Conn. 299 (2016), our Supreme Court effectively rejuvenated an even older case, Tolli v. Connecticut Quarries Co., 101 Conn. 109 (1924), on which the claimant had relied when he appeared before our tribunal. We further note that no legislative amendment is cited by the appellants which they purport was adopted in response to the Massolini, supra, decision. We also note that our Supreme Court, in Hanson v. Transportation General, Inc., 245 Conn. 613 (1998), held that the General Assembly is inferred to have ratified judicial interpretations of the workers' compensation statute left unaffected by subsequent legislation. Id., 618-619. The city of Bridgeport argues that the intervening implementation of the Second Injury

[4] Given that the decedent's injuries in Massolini v. Driscoll, 114 Conn. 546 (1932), occurred in a public street, the respondents did not advance an argument contesting the claim that the city of Hartford "controlled the premises" where the claimant was injured.

Fund obviated the rationale behind the Massolini decision for a public sector entity to serve as a principal employer, yet proffer no legislative history or judicial precedent supportive of this position.[5] Indeed, we find that Massolini continues to be cited as good law in cases such as Alpha Crane Service, Inc., supra, 75; Marandino v. Prometheus Pharmacy, 294 Conn. 564, 587 (2010); and Pelletier v. Sordoni/Skanska Construction Co., 264 Conn. 509, 521 (2003). *Stare decisis* compels us to affirm the Finding and Orders in this case. See Chambers v. General Dynamics Corp./Electric Boat Division, 4952 CRB-8-05-6 (June 7, 2006), *aff'd,* 283 Conn. 840 (2007).

> The purpose of § 31-291 "'is to protect employees of minor contractors against the possible irresponsibility of their immediate employers, by making the principal employer who has general control of the business in hand liable as if he had directly employed all who work upon any part of the business which he has undertaken to carry on.' Bello v. Notkins, 101 Conn. 34, 38 (1924)."

Sgueglia v. Milne Construction Co., 212 Conn. 427, 433 (1989), *quoting* Battistelli v. Connohio, Inc., 138 Conn. 646, 648 (1952).

This is precisely the situation in which the claimant found himself. Barring an explicit legislative directive to exempt public sector entities from coverage under the statute, we must conclude the city of Bridgeport can be found to be a principal employer responsible for the claimant's injury in this case.[6]

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[5] We note that in Mancini v. Bureau of Public Works, 167 Conn. 189 (1974), a public entity was found to be liable as a "principal employer" by the Supreme Court, id., 196, and the court cited Massolini v. Driscoll, 114 Conn. 546 (1932), as good law. This case postdates the creation of the Second Injury Fund by almost three decades.

[6] We affirm the trial commissioner's denial of the appellants' Motion to Correct. A trial commissioner is not obligated to adopt a litigant's view of the evidence presented on the record. See 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); D'Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003); and Liano v. Bridgeport, 4934 CRB-4-05-4 (April 13, 2006). We also find no error in the trial commissioner's denial of the claimant's Motion for Articulation. While an articulation is appropriate when the trial court's decision contains some ambiguity or deficiency reasonably susceptible

Having found no error, we therefore affirm the June 16, 2016 Finding and Orders of Jack R. Goldberg, the Commissioner acting for the Third District.

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

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of clarification, Alliance Partners, Inc. v. Oxford Health Plans, Inc., 263 Conn. 191, 204 (2003), we find the trial commissioner's Finding and Orders unambiguous and well-reasoned.

CERTIFICATION

THIS IS TO CERTIFY THAT a copy of the foregoing was mailed this 23rd day of May 2017 to the following parties:

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