STEVE MCMORRIS *v.* CITY OF NEW HAVEN
POLICE DEPARTMENT ET AL.
(AC 36328)

Lavine, Mullins and Schaller, Js.

Argued January 22—officially released April 28, 2015

(Appeal from Workers' Compensation Review Board.)

Anne Kelly Zovas, for the appellants (defendants).

George H. Romania, for the appellee (plaintiff).

Opinion

LAVINE, J. The defendants, the city of New Haven and its workers' compensation insurer, Connecticut Inter-Local Risk Management Association, appeal from the decision of the Workers' Compensation Review Board (board) affirming the finding and award of the Workers' Compensation Commissioner (commissioner), who concluded that the injuries sustained by the plaintiff, Steve McMorris, were compensable. On appeal, the defendants claim that the board improperly affirmed the commissioner's finding and award that the plaintiff's injuries arose out of and in the course of his employment because at the time he sustained his injuries, the plaintiff was taking his children to day care prior to reporting for his duty shift. We affirm the decision of the board.

The commissioner made the following findings of fact. On June 25, 2011, the plaintiff, a patrol officer in the New Haven Police Department, lived on Katherine Drive in Hamden. There were a number of routes the plaintiff could take from his home to the police station, but he "normal[ly]" took the following route because it had fewer traffic signals and stop signs. From Katherine Drive, he took Lane Street and followed Pine Rock all the way to Fitch Street; he followed Fitch Street to Whalley Avenue where he turned left at West Park; he followed West Park to Edgewood Avenue and Edgewood Avenue to Ella Grasso Boulevard to Legion Avenue.

At the time in question, the plaintiff lived with Anais Rivera, her daughter, and his two children. Both the plaintiff and Rivera worked the third shift from 11 p.m. until 7 a.m. Due to their work schedules, the plaintiff and Rivera took their children to a day care center on Chapel Street in New Haven for the primary purpose of sleeping. Rivera and the plaintiff shared the responsibility of taking their children to day care, and the plaintiff drove his children to day care two or three times a week. On June 25, 2011, Rivera was unable to take the children to the day care, so the plaintiff assumed that responsibility. When the plaintiff drove his children to day care, he followed the same route he took to work but slightly altered the route at the end of Fitch Street to reach the day care center. He reestablished his normal route at the intersection of Chapel Street and Ella Grasso Boulevard before proceeding to the police station.

The commissioner found that the plaintiff was assigned to the night duty shift of June 25 to June 26, 2011. The plaintiff left his home for the police station in his private motor vehicle dressed in his fully equipped service uniform, including his duty belt and service firearm. His children were in his vehicle because he had to take them to day care. The plaintiff was unaware

of any policy that prohibits police officers from having passengers in their personal vehicle as they drive to work. The commissioner also found that had the plaintiff come upon the scene of a collision while he was driving his children to day care, he could have provided police assistance.

On June 25, 2011, after leaving his home, the plaintiff followed his usual route to work. At the intersection of Wintergreen Avenue and Fitch Street, he was involved in a motor vehicle collision. The commissioner found that the collision occurred at a point prior to where the plaintiff would have altered his route to take his children to day care. As a result of the collision, the plaintiff's left knee and left foot were injured. The plaintiff underwent surgery to repair his injuries on September 12, 2011, and he returned to work on November 16, 2011.

The commissioner found that the plaintiff had to take his children to day care on the date in question because he was scheduled for duty that night and that he was in the process of going to the police station when the collision occurred. The plaintiff intended to take the children to day care before continuing to the police station; he did not intend to take the children to the police station.

The commissioner further found that the plaintiff is a "portal-to-portal" employee pursuant to General Statutes § 31-275 (1) (A) (i),[1] which provides that such an employee is covered by workers' compensation for injuries the employee may sustain from the time the employee leaves his or her "place of abode to duty" and from the end of the employee's duty shift back to the employee's abode. The plaintiff contended that he is entitled to compensation for the injuries he sustained in the June 25, 2011 collision because he sustained them while he was traveling to his duty shift on his usual route to the police station. The collision occurred at a point prior to the time he was required to deviate slightly from his usual route to take his children to day care. Moreover, the plaintiff believed that his employment created the need for him to take his children to day care.

The commissioner found the defendants' position to be that at the time of the collision, the plaintiff was engaged in an act preliminary to his employment because he had his children in his motor vehicle and was taking them to day care. Moreover, the defendants believed that, at the time of the collision, the plaintiff was performing a purely personal act and, therefore, his injuries did not arise out of or in the course of his employment.

The commissioner found that the plaintiff was credible and that he sustained compensable work-related injuries to his left foot and left knee as a result of the subject collision. The collision occurred within the

plaintiff's period of employment and at a place where the plaintiff reasonably may have been at the time because he was a portal-to-portal employee on his way to work. Moreover, the plaintiff was fulfilling the duties of employment by driving his vehicle to the police station in order to arrive at work at his scheduled time. The commissioner found that the plaintiff's act of driving his children to day care was so inconsequential relative to his employment duties, which include driving to work, that it did not remove him from the course and scope of his employment. See *Kish* v. *Nursing & Home Care, Inc.*, 248 Conn. 379, 727 A.2d 1253 (1999).

The commissioner also found that by taking his children to day care while on his way to work the plaintiff did not substantially deviate from his employment duties such that his right to collect workers' compensation benefits terminated. The plaintiff's driving his children to day care on his normal route of travel did not temporarily terminate his employment relationship. The commissioner did not find that the plaintiff was engaged in a preliminary act in preparation for work when he was involved in the collision. The commissioner thus ordered the defendants to accept compensability of the injuries the plaintiff sustained in the June 25, 2011 collision.

The defendants filed a motion to correct certain of the commissioner's findings and award. The commissioner denied the motion to correct. The defendants appealed to the board from the finding and award.

On appeal to the board, the defendants relied on their interpretation of *Perun* v. *Danbury*, 5651 CRB-7-11-5 (May 5, 2012),[2] arguing that § 31-275 (1) (A) (i) and (E)[3] must be read together. In their view, at the time the plaintiff sustained injuries, he was engaged in a "preliminary act" prior to beginning his trip to the police station and, therefore, the injury was not compensable. The board concluded that the defendants had misconstrued *Perun*, which is factually distinguishable, as the claimant in *Perun* had not yet left his abode when he fell on ice in his driveway, which is by regulatory definition part of an abode. See Regs., Conn. State Agencies § 31-275-1 (2) (f). The board stated that § 31-275 (1) "is written in the conjunctive, which means [that] in order for an '[act] in preparation for work' to be deemed outside of the employment it must occur at the claimant's abode. By the plain meaning of the statute, the [plaintiff] was not engaged in a preliminary act at the time he was injured on a public highway."[4] (Footnote omitted.)

As to the purpose of the plaintiff's trip, the board cited the rule enunciated in *Dombach* v. *Olkon Corp.*, 163 Conn. 216, 224, 302 A.2d 270 (1972), regarding injuries that may have incurred during "dual purpose" travel, i.e., injuries incurred during dual purpose travel are compensable if the trip was such that it would have

been performed in the absence of a personal benefit to the employee. It then applied the rule to the facts of this case, stating that if the plaintiff had not been directed to report for duty on June 25, 2011, he would not have undertaken the trip. If the plaintiff had not been directed to report for duty, he would not have taken the children to day care, as they would have spent the night with him in Hamden. Moreover, the plaintiff would have followed the same route in the absence of any personal responsibilities. The board, therefore, affirmed the decision of the commissioner.

On appeal to this court, the defendants claim that the plaintiff's injuries are not compensable because at the time he was injured he was taking his children to day care, which is an activity in preparation for work, and his trip to day care was a significant deviation from his work route. We disagree with the defendants.

We begin our analysis with the applicable standard of review. "A party aggrieved by a commissioner's decision to grant or deny an award may appeal to the board pursuant to General Statutes § 31-301. . . . The appropriate standard applicable to the board when reviewing a decision of a commissioner is well established. [T]he review [board's] hearing of an appeal from the commissioner is not a de novo hearing of the facts. . . . [I]t is oblig[ated] to hear the appeal on the record and not retry the facts. . . .

"Similarly, on appeal to this court, [o]ur role is to determine whether the review [board's] decision results from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them . . . . [Therefore, we ask] whether the commissioner's conclusion can be sustained by the underlying facts." (Citations omitted; internal quotation marks omitted.) *Estate of Haburey* v. *Winchester*, 150 Conn. App. 699, 713, 92 A.3d 265, cert. denied, 312 Conn. 922, 94 A.3d 1201 (2014).

The defendants' claim requires us to review the board's construction of the relationship between § 31-275 (1) (A) (i) and (E) (i). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply." (Internal quotation marks omitted.) *Perun* v. *Danbury*, 143 Conn. App. 313, 316, 67 A.3d 1018 (2013).

"It is an axiom of [workers'] compensation law that awards are determined by a two-part test. The [claimant] has the burden of proving that the injury claimed [1] arose out of the employment and [2] occurred in the course of the employment." (Internal quotation marks omitted.) *Labadie* v. *Norwalk Rehabilitation Services*,

Inc., 274 Conn. 219, 227, 875 A.2d 485 (2005). "[E]mployment ordinarily does not commence until the claimant has reached the employer's premises, and consequently an injury sustained prior to that time would ordinarily not occur in the course of the employment so as to be compensable. . . . For a police officer or firefighter, [however] in the course of his employment encompasses such individual's departure from such individual's place of abode to duty . . . ." (Citation omitted; internal quotation marks omitted.) *Perun* v. *Danbury*, supra, 143 Conn. App. 316–17. Section 31-275 (1) (E) articulates at what point a police officer's course of employment begins and ends. Id., 317.

Section 31-275 (1) (E) provides in relevant part that a "personal injury shall not be deemed to arise out of the employment if the injury is sustained: (i) At the employee's place of abode, *and* (ii) while the employee is engaged in a preliminary act or acts in preparation for work unless such act or acts are undertaken at the express direction or request of the employer . . . ." (Emphasis added.) A police officer is a portal-to-portal employee and, therefore, the plaintiff's commute to and from the police station was within the course of his employment. See *Perun* v. *Danbury*, supra, 143 Conn. App. 317.

The defendants argue that the plaintiff's injuries are not compensable because he was involved in the personal act of taking his children to day care, which has nothing to do with his employment. They contend that the plaintiff's taking his children to day care was a preliminary act or an act in preparation for work. See General Statutes § 31-275 (1) (E) (ii). The defendants concede, however, that the plaintiff had left his home in Hamden and was traveling on his usual route to the police station at the time the collision occurred. The defendants' concession itself defeats their claim. Section 31-275 (1) (E) is two-pronged and injuries are not compensable only if both prongs of the statute are met.

Moreover, we cannot conclude that the plaintiff's travel constituted a significant deviation from his work route. The defendants contend that the plaintiff's travel constituted a deviation because he intended to take his children to day care. We conclude that the facts of this case fall well within the rule of compensability articulated by our Supreme Court in *Kish* v. *Nursing & Home Care, Inc.*, supra, 248 Conn. 379. To be compensable, "the plaintiff's injury must have occurred (1) at a place where [the plaintiff] reasonably may have been and (2) while [the plaintiff] was reasonably fulfilling the duties of . . . employment or doing something incidental to it." Id., 383. In *Kish*, the claimant sustained injuries while she was driving to a medical supply house to fetch a commode for one of her patients, which her supervisor instructed her not to do. Id., 381. While she was driving to the medical supply house, she stopped

to mail a greeting card and was struck by a motor vehicle as she crossed the street. Id. On appeal, our Supreme Court stated that many years ago it recognized that "[n]o exact statement, applicable in all cases, can be made as to what is incidental to an employment. *Stakonis* v. *United Advertising Corp.*, 110 Conn. 384, 390, 148 A. 334 (1930). Although we remain unwilling to assay an exhaustive taxonomy of acts that are incidental to [employment], the present appeal calls upon us to clarify the contours of our law. For present purposes, it suffices to explain that the term of art incidental embraces two very different kinds of deviations: (1) a minor deviation that is so small as to be disregarded as insubstantial . . . and (2) a substantial deviation that is deemed to be incidental to [employment] because the employer has acquiesced to it. If the deviation is so small as to be disregarded as insubstantial, then the lack of acquiescence is immaterial." (Citation omitted; internal quotation marks omitted.) *Kish* v. *Nursing & Home Care, Inc.*, supra, 389.

Our Supreme Court continued, stating that "[t]his distinction reflects both common sense and fundamental fairness. Our law of workers' compensation—like our law of agency—presumes that employers acquiesce to minor deviations that are so small as to be disregarded as insubstantial." (Footnote omitted.) Id.; see also *Luddie* v. *Foremost Ins. Co.*, 5 Conn. App. 193, 195–97, 497 A.2d 435 (1985). Our Supreme Court affirmed the decision of the board and this court's judgment in *Kish*, stating that "the commissioner did not abuse his discretion by concluding that the [claimant's] decision to momentarily [stop] to mail a personal card was so inconsequential . . . so as to not remove her from acting in the course and scope of her employment . . . ." (Internal quotation marks omitted.) *Kish* v. *Nursing & Home Care, Inc.*, supra, 248 Conn. 391.

In the present case, unlike in *Kish*, the plaintiff was injured prior to the point where he would have deviated slightly from his normal route to the police station. At the time he was injured, the plaintiff was where he would have been expected to be in the course of his employment as a police officer. We, therefore, agree with the commissioner's finding that the plaintiff's "act of driving his children to day care was so inconsequential relative to his job duties, which includes driving into work, that it did not remove him from the course and scope of his employment." For the foregoing reasons, we conclude that the board properly affirmed the commissioner's award.

The decision of the Workers' Compensation Review Board is affirmed.

In this opinion the other judges concurred.

[1] Section 31-275 is the definition section of the Workers' Compensation Act. General Statutes § 31-275 (1) provides in relevant part: " 'Arising out of and in the course of his employment' means an accidental injury happening to 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, provided:

"(A) (i) 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 . . . ."

[2] The board's decision was affirmed in *Perun* v. *Danbury*, 143 Conn. App. 313, 67 A.3d 1018 (2013).

[3] General Statutes § 31-275 (1) (E) provides in relevant part: "A personal injury shall not be deemed to arise out of the employment if the injury is sustained: (i) At the employee's place of abode, *and* (ii) while the employee is engaged in a preliminary act or acts in preparation for work unless such act or acts are undertaken at the express direction or request of the employer . . . ." (Emphasis added.)

[4] The defendants argued before the board that the plaintiff deviated from his normal commute and that the personal errand that he was undertaking made the circumstances of his injury noncompensable. The board noted that whether an employee deviated from the duties of employment at the time an injury is sustained is a question of fact to be determined by the commissioner, whose findings are entitled to great deference. *Labbe* v. *American Brass Co.*, 132 Conn. 606, 610, 46 A.2d 339 (1946). Here, the commissioner found the plaintiff's taking his children to day care was so inconsequential relative to his job duties that it did not remove him from the course and scope of his employment. The plaintiff was exactly where he was expected to be at the time of the collision. The board stated that the plaintiff would have been covered under § 31-275 (1) (A) (i) if he had been alone and the presence of the children in the plaintiff's car did not amount to a substantial deviation in a functional sense.