CLARENCE LEVASSEUR
(Appellee)

v.

ALBERT FARMS, INC.
(Appellant)

and

MMTA WORKERS' COMPENSATION TRUST
(Group Self-Insurer)

Conferenced: September 4, 2013
Decided: March 3, 2014

PANEL MEMBERS: Hearing Officers Greene, Jerome, and Elwin
BY: Hearing Officer Greene

[¶1] Albert Farms, Inc., appeals the decision of a Workers' Compensation Board hearing officer (*Pelletier, HO*) granting Clarence Levasseur's Petitions for Award and for Payment of Medical and Related Services. Mr. Levasseur slipped and fell on ice, breaking his leg, in a Walmart parking lot where he had stopped while on a long-haul trucking assignment for Albert Farms. Albert Farms contends that the hearing officer applied an incorrect legal standard when determining that Mr. Levasseur's injury arose out of and in the course of employment pursuant to 39-A M.R.S.A. § 201(1) (2001). We affirm the hearing officer's decision.

I. BACKGROUND

[¶2] Mr. Levasseur worked for Albert Farms as a long-haul truck driver. On Friday March 9, 2012, while returning from a trip to Nebraska, he traveled from Newcastle, Maine, to pick up a trailer load in South Portland with instructions to return to Albert Farms's facility in Madawaska by the end of the day. He left South Portland shortly before noon. While he was en route, Albert Farms's dispatcher called Mr. Levasseur to ask if he would be willing to pick up another trailer load and drive it to Dover, Delaware by March 13. The latest he could leave to complete the trip timely was Sunday, March 11.

[¶3] Mr. Levasseur's fiancée and their small dog had accompanied him on the trip to Nebraska. Albert Farms's owner had approved Mr. Levasseur's fiancée's traveling with him, but he was unaware that they had brought the dog along, and had neither expressly approved nor disapproved this.

[¶4] Albert Farms paid Mr. Levasseur a per diem allowance for food while he was traveling. For both health and economic reasons, Mr. Levasseur often heated home-prepared meals in the truck's microwave oven while on the road.

[¶5] On the day of the injury, Mr. Levasseur had been driving for about five hours along a direct, employer-approved route from South Portland to Madawaska, when he stopped at a Walmart store in Presque Isle to purchase groceries and personal items for the upcoming drive to Delaware. He entered in his

log book that he was "off duty" from driving. He and his fiancée spent about 2½ hours shopping in the store and then returned to the truck with their purchases. While his fiancée stowed the items, Mr. Levasseur intended to take the dog through the parking lot to a grassy area nearby, when he slipped and fell on a patch of ice, fracturing his lower right leg. Mr. Levasseur filed his petitions with the board.

[¶6] Albert Farms argued that Mr. Levasseur's injury did not arise out of and in the course of employment because he had deviated from his employment purpose and was engaged in purely personal endeavors—including buying groceries and walking his dog—when he slipped and fell in the Walmart parking lot. The hearing officer disagreed, and awarded Mr. Levasseur ongoing total incapacity benefits and payment of the related medical bills. The hearing officer reasoned that the injury is compensable because Mr. Levasseur was a "traveling employee" when he stopped at the Presque Isle Walmart, and the stop and his activities during the stop were incidental to and not a substantial deviation from his employment. Albert Farms appeals.

II. DISCUSSION

[¶7] Albert Farms contends the hearing officer misapplied the list of factors outlined in *Comeau v. Maine Coastal Services*, 449 A.2d 362, 366-67 (Me. 1982), which must be considered when the compensability of an injury is at issue, and

specifically, erred when failing to apply the "deviation doctrine" to the facts of this case.

A. Standard of Review

[¶8] The Appellate Division accords deference to hearing officer decisions addressing whether an injury is compensable under the Act. *See Cox v. Coastal Prods. Co., Inc*., 2001 ME 100, ¶ 12, 774 A.2d 347, *Moore v. Pratt & Whitney Aircraft*, 669 A.2d 156, 158 (Me. 1995). "[O]ur role on appeal is limited to assuring that the [hearing officer's] findings are supported by competent evidence, that the decision involved no misconception of applicable law and that the application of the law to the facts was neither arbitrary nor without rational foundation." *Moore*, 669 A.2d at 158 (quotation marks omitted).

B. *Comeau v. Maine Coastal Services*

[¶9] The Law Court has outlined the parameters for resolving whether an injury arises out of and occurs in the course of employment as follows:

> [T]he term "in the course of" employment relates to the time, place, and circumstances under which an injury occurs, the place where the employee reasonably may be in performance of the employee's duties, and whether it occurred while fulfilling those duties or engaged in something incidental to those duties. We then noted that the term "arising out of" employment means that there must be some causal connection between the conditions under which the employee worked and the injury, or that the injury, in some proximate way, had its origin, its source, or its cause in the employment. We further noted that the employment need not be the sole or predominant causal factor for the injury and that the causative circumstance need not have been foreseen or expected.

Standring v. Town of Skowhegan, 2005 ME 51, ¶ 10, 870 A.2d 128 (citations omitted). In *Comeau*, the Law Court compiled a number of nonexclusive considerations to be examined in determining whether a particular injury arises out of and in the course of employment "when the fact pattern does not fall snugly within the arising out of and in the course of requirement."[1] 449 A.2d at 366. Those factors are:

> (1) Whether at the time of the injury the employee was promoting an interest of the employer, or the activity of the employee directly or indirectly benefited the employer.
>
> (2) Whether the activities of the employee work to the benefit or accommodate the needs of the employer.
>
> (3) Whether the activities were within the terms, conditions or customs of the employment, or acquiesced in or permitted by the employer.
>
> (4) Whether the activity of the employee serves both a business and personal purpose, or represents an insubstantial deviation from the employment.
>
> (5) Whether the hazard or causative condition can be viewed as employer or employee created.
>
> (6) Whether the actions of the employee were unreasonably reckless or created excessive risks or perils.
>
> (7) Whether the activities of the employee incidental to the employment were prohibited by the employer either expressly or implicitly.

[1] Because, as discussed below, the well-established traveling employee rule may adequately address the issue of whether Mr. Levasseur's injury is compensable, it is questionable whether resort to the *Comeau* factors is necessary. *See Cox v. Coastal Prods. Co.*, 2001 ME 100, ¶ 9, 774 A.2d 347 ("*Comeau* factors [are not] intended to completely displace traditional work relationship analyses, such as the so-called 'dual purpose' or "deviation' doctrines"). Indeed, one of those factors is directly derived from *Larou v. Table Talk Distribs.*, 153 Me. 504, 138 A.2d 475, 478-79 (1958), a traveling employee case: "Whether the activity of the employee serves both a business and personal purpose, or represents an insubstantial deviation from the employment." *Comeau*, 449 A.2d at 367; *see also Cox*, 2001 ME 100, ¶ 9, 774 A.2d 347.

(8) Whether the injury occurred on the premises of the employer.

449 A.2d at 367 (citations omitted).

[¶10] Albert Farms contends the *Comeau* factors weigh in favor of finding that the injury did not arise out of and in the course of employment because Mr. Levasseur's stop in Presque Isle was a strictly personal endeavor; the shopping trip was for his own needs and benefit; he was not required to pick up provisions by Albert Farms and the provisions did not benefit Albert Farms; he had the option of taking the day off between trips rather than immediately turning around; he was off duty at the time of the injury; the presence of the dog was not acquiesced in by Albert Farms and amounted to an employee-created risk of injury; and the activity served a solely personal purpose and substantially deviated from the employment.

[¶11] We disagree with these contentions. Appellate review of a hearing officer's application of the *Comeau* factors is highly deferential. *Fournier v. Aetna, Inc*., 2006 ME 71, ¶ 18, 899 A.2d 787. The hearing officer "need not reach the correct conclusion, but a conclusion that is neither arbitrary nor without rational foundation." *Id*. (quotation marks omitted). The hearing officer considered several of the factors listed in *Comeau*, including: (1) Mr. Levasseur's presence in the icy parking lot for a rest stop was "within the terms, conditions or customs of the employment"; (2) buying groceries for a quick turn-around trip "promot[ed] an interest of the employer . . . or directly or indirectly benefited the employer" and

"accommodate[d] the needs of the employer"; (3) the stop was incidental to and thus an insubstantial deviation from the employment, was not "prohibited by the employer either expressly or implicitly," and did not constitute an activity which was "unreasonably reckless" or "created excessive risks or perils"; and (4) walking the dog did not amount to "a distinct departure on a personal errand" that increased the risk of injury beyond what was inherent in walking on the icy parking lot itself. *See Comeau*, 449 A.2d at 367; 2 Arthur Larson & Lex K. Larson, LARSON'S WORKERS' COMPENSATION LAW § 25.01 (2013).

[¶12] The hearing officer gave due consideration to the factors listed in *Comeau*, and reached the conclusion that the injury arose out of and in the course of employment. We cannot say that the decision misconceives the law, is arbitrary, or lacks a rational foundation.

C. Traveling Employee and Deviation Doctrine

[¶13] Maine adheres to the general rule "that while outside the business premises and not engaged in any work-related activity" or "merely on his way to or from his place of business," an employee's injury does not arise out of or in the course of employment because it "is not within the spatiotemporal boundaries of employment, [and] there is an insufficient connection with the employment context to warrant compensation for an injury occurring in such circumstances." *Waycott v. Beneficial Corp.*, 400 A.2d 392, 394 (Me. 1979) (referring to the "public street"

or "going and coming" rule). However, Maine also recognizes numerous exceptions to the general rule, including "the traveling employee exception," which applies when an employee is traveling as part of the employee's work duties, and generally allows compensation for injuries suffered because of conditions or activities directly related or incidental to such travel, including taking rest breaks, eating, and using lodging. *See Larou v. Table Talk Distribs.*, 153 Me. 504, 138 A.2d 475, 478-79 (1958); *Brown v. Palmer Constr. Co*., 295 A.2d 263 (Me. 1972); *see also* 2 Larson §§ 25.01-25.03. Side trips, excursions, or activities solely for personal entertainment or social purposes may constitute "deviations" from business travel sufficient to bar the compensability of injuries suffered as a result of risks from such activities and locations. *See* 2 Larson, § 25.03. Absent such a deviation, however, an employee is considered to be in the course of employment throughout the duration of the travel, and injuries arising out of risks encountered because of the travel are compensable.[2] *See id.* § 25.01.

[¶14] In *Larou*, a traveling pastry salesman who had delivered pies to a customer was struck by an automobile when he returned to his truck after visiting a diner with his wife, who was riding with him. 153 Me. at 507, 138 A.2d at 477.

[2] A related exception to the "going and coming rule," the so-called "dual purpose doctrine," applies to a trip undertaken *at the outset* for both business and personal purposes and renders injuries suffered as the result of the travel compensable unless occurring "during an identifiable 'deviation' from the business trip." *See Cox v. Coastal Prods. Co., Inc*., 2001 ME 100, ¶¶ 9-11, 774 A.2d 347; *Sargent v. Raymond F. Sargent, Inc.*, 295 A.2d 35 (1972).

The former Industrial Accident Commission determined that his injury was compensable, and the Law Court affirmed, reasoning as follows:

> In the case at bar, if there was a deviation, it did not increase the perils to which the employee was exposed; and, moreover, the Commission was correct in finding that if a deviation had occurred, that when the employee started from the diner to return to his truck, he was again in the course of his employment.

Id., 153 Me. at 511, 138 A.2d at 479.

[¶15] In *Brown*, the employee was assigned to a work site remote from his residence and, thus, was required to find lodging paid for by the employer. The Commissioner determined that the employee suffered a compensable injury when the gas stove in the apartment exploded. 295 A.2d at 264. The Law Court affirmed, reasoning that even though the employee was off duty at the time of the explosion, the injury had its origin in a risk created by the necessity of sleeping and eating away from home. *Id.* at 267. *See also Boyce v. Potter*, 642 A.2d 1342 (Me. 1994) (affirming that injury to painter that occurred during travel to distant work site was compensable because travel was an integral part of his job, the job site has no fixed location, and he was paid by the employer for his travel time and as such, he was exposed to risks greater than those encountered by the traveling public).

[¶16] Albert Farms contends that the hearing officer in this case erred when failing to conclude that the stop at the Presque Isle Walmart constituted a deviation

from the business travel, rendering the traveling employee exception inapplicable. We disagree.

[¶17] The hearing officer concluded that the traveling employee exception applied because the rest stop at the Walmart in Presque Isle was located on one of two employer-approved routes for the trip from South Portland to Madawaska, and the rest stop after driving five hours was not a deviation. In addition, the rest stop was part of the business trip and had its own business purpose—obtaining supplies for another business trip within the next two days. The fact that Mr. Levasseur stayed in the parking lot to walk his dog after returning with the groceries does not compel a finding that there was a substantial deviation from the trip's business purpose, even assuming that the dog's presence on the trip was not approved by the employer. Moreover, the hearing officer specifically found that the fall was caused by the ice on the parking lot—a risk inherent in traveling in Maine in winter—not by the presence of the dog.[3] *See Larou,* 153 Me. at 511, 138 A.2d at 479 (stating

[3] The cases cited by Albert Farms involving truck drivers injured when slipping while showering or using bathrooms in motels are inapposite because, unlike the automobile which struck *Larou,* the gas stove in *Brown,* and the icy parking lot here, there were no specific, hazardous conditions in the motels and therefore, the injuries stemming from purely personal risks did not arise out of the employment. *See, e.g., Woodard v. Cassens Transport Co.*, 2012-Ohio-4015 (Sept. 4, 2012) (determining that injury sustained in hotel bathroom while preparing for work not compensable); *Jones v. USF Holland, Inc*., 2011-Ohio-2368, 2011 Ohio App. LEXIS 2022 (May 17, 2011) (same); *Lewis v. TNT Holland Motor Express, Inc.*, 129 Ohio App. 3d 131, 717 N.E.2d 378, 380 (1998) (determining that injury from fall while leaving bathtub not compensable); *Kinnebrew v. Little John's Trucks, Inc.*, 989 S.W.2d 541, 543 (Ark. App. 1999) (holding that fall while taking a shower while off duty at a rest stop not compensable).

"if there was a deviation, it did not increase the perils to which the employee was exposed").

[¶18] The hearing officer neither misapplied nor misconceived the law when granting Mr. Levasseur's petitions.

III. CONCLUSION

The entry is:

The hearing officer's decision is affirmed.

Any party in interest may request an appeal to the Maine Law Court by filing a copy of this decision with the clerk of the Law Court within twenty days of receipt of this decision and by filing a petition seeking appellate review within twenty days thereafter. 39-A M.R.S.A. § 322 (Supp. 2013).

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