NOEL A. SANTIAGO
(Appellant)

v.

COUNTY OF PENOBSCOT
(Appellee)

and

MAINE MUNICIPAL ASSOCIATION
(Insurer)

Conference held: July 20, 2017
Decided: June 20, 2019

PANEL MEMBERS: Administrative Law Judges Stovall, Collier, and Pelletier
BY: Administrative Law Judge Stovall

[¶1] Noel Santiago appeals from a Workers' Compensation Board administrative law judge decision (*Hirtle, ALJ*) denying his Petitions for Award and for Payment of Medical and Related Services. Mr. Santiago contends that the ALJ erred when determining that his injury did not arise out of and in the course of employment. We remand the case for additional findings of fact and conclusions of law.

I. BACKGROUND

[¶2] Noel Santiago has worked for the Penobscot County Sheriff's Department ("the Department") since 2005. His duties include conducting patrols using an employer-provided, modified SUV. The Department permits Mr. Santiago

to stop at his home while on patrol for meal breaks and to use the restroom. He stays in contact with the Department during those breaks by cellular phone and radio. After his shift ends, Mr. Santiago regularly remains on call, and the Department permits him to keep the work vehicle at his residence to respond to calls for service.

[¶3] Mr. Santiago has a preexisting left knee condition. He suffered a torn medial meniscus in the late 1990s, which required arthroscopic surgery. He recovered fully from that injury. On July 15, 2015, Mr. Santiago participated in a day-long, strenuous, work-related training program. He experienced some residual muscle soreness afterwards, but no other difficulties.

[¶4] On July 19, 2015, Mr. Santiago worked a 4:00 p.m. to midnight shift, conducting patrols. At approximately 11:00 p.m., he drove the vehicle home for a permitted meal break. When he stepped out of the SUV with his left leg, he felt severe left knee pain, which caused him to fall to the ground. He pulled himself up and entered his home, where he responded to work-related telephone calls until his shift ended at midnight. He remained on call. While responding to a work-related service call at approximately 3:00 a.m., Mr. Santiago reported the injury to his immediate supervisor.

[¶5] Thereafter, Mr. Santiago underwent two surgeries resecting portions of his damaged medial meniscus and inflamed synovium. He was totally incapacitated

from work from November 4, 2015, through May 24, 2016. He filed his Petitions for Award and for Payment of Medical and Related Services.

[¶6] In the resulting decree, the ALJ first concluded that the injury was not barred pursuant to the "coming and going" rule, citing *Fogg's Case*, 125 Me. 168, 132 A. 129 (1926). However, after proceeding to apply the factors from *Comeau v. Me. Coastal Servs.*, 449 A.2d 362, 367 (Me. 1982), the ALJ concluded that although Mr. Santiago was on duty at the time, and the knee injury was at least in part caused by the work duties, the knee injury did not arise out of and in the course of employment. Mr. Santiago filed a Motion for Additional Findings of Fact and Conclusions of Law. The ALJ granted the Motion, and issued an amended decision that further explained but did not alter the outcome. Mr. Santiago filed this appeal.

II. DISCUSSION

A. Arising Out Of and In the Course Of Employment

[¶7] The issue in this case is whether the ALJ erred when determining that Mr. Santiago's injury is not compensable under the Act. To be compensable, an injury must "aris[e] out of and in the course of employment." 39-A M.R.S.A. § 201(1) (2001). The purpose of this requirement is "to compensate employees for injuries suffered *while* and *because* they were at work." *Comeau*, 449 A.2d at 365 (quoting *Bryant v. Masters Machine Co.*, 444 A.2d 329, 333 (Me. 1982)).

[¶8] "An injury arises out of and in the course of employment when there is a sufficient connection between the injury and the employment." *Celentano v. Dep't of Corrections*, 2005 ME 125, ¶ 9, 887 A.2d 512 (citing *Comeau*, 449 A.2d at 366-67). An injury occurs "'in the course of employment when it occurs within the period of employment at a place where the employee reasonably may be in the performance of his duties and while he is fulfilling those duties or engaged in something incidental thereto.'" *Comeau*, 449 A.2d at 365 (quoting *Fournier's Case*, 120 Me. 236, 240, 113 A. 270, 272 (1921)); *see also* 2 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law*, § 12 (2018). An injury "arises out of" employment when there is "'some causal connection between the conditions under which the employee worked and the injury which arose, or that the injury, in some proximate way, had its origin, its source, its cause in the employment.'" *Comeau*, 449 A.2d at 365 (quoting *Barrett v. Herbert Engineering, Inc.*, 371 A.2d 633, 636 (Me. 1977)).

B. *Fogg's Case*

[¶9] Mr. Santiago first contends that *Fogg's Case* controls the outcome of this case and there was no need to analyze the facts in light of the *Comeau* factors. In *Fogg's Case*, a lieutenant in the Portland Fire Department was injured while on his way home for lunch. 132 A. at 129-30. The Law Court sustained an award of compensation, noting that the employee remained subject to emergency calls at all times, and was required to respond even while at his residence. *Id.*

[¶10] The Department raised the argument that this case falls within the "going and coming rule," and is therefore excluded from the Act's coverage for failure to come within the "in the course of employment" requirement. This rule, also referred to as the "public streets rule," is a well-established workers' compensation principle providing "that an accident occurring off the employer's premises while an employee is merely on his way to or from his place of business is not, without more, compensable." *Waycott v. Beneficial Corp*., 400 A.2d 392, 394 (Me. 1979).

[¶11] When the going and coming rule is raised, the ALJ first analyzes whether the rule applies. *See Fournier v. Aetna, Inc*., 2006 ME 71, ¶ 14, 899 A.2d 787. If it does, the injury is not compensable. *See Waycott*, 400 A.2d at 394-95. If the rule does not apply, or if the case fits within an exception to the rule, then the ALJ proceeds to determine whether the injury arises out of or in the course of employment. *Fournier*, 2006 ME 71, ¶ 14.

[¶12] The Law Court has since identified *Fogg's Case* as the origin of the "emergency call exception" to the going and coming rule; as such, its holding does not necessarily control whether a particular injury is compensable. *See Westberry v. Town of Cape Elizabeth*, 492 A.2d 888, 891 (Me. 1985) (stating that *Fogg's Case* applied the "emergency call exception" to the coming and going rule); *Abshire v. City of Rockland,* 388 A.2d 512, 514 n.2 (Me. 1978) (listing *Fogg's Case* as one

of several exceptions to the rule). The Court's analysis in *Fogg's Case*, for example, went beyond the issue of going and coming and also addressed factors we now view as relevant to the *Comeau* analysis—noting that at the time of the injury, the employee "was in a place where at the hour he might reasonably be in connection with his duties, and was there in the usual routine of his duties." *Fogg*, 132 A. at 130.

[¶13] Here, the ALJ determined that the going and coming rule applied, but the case fit within the exception to the rule identified in *Fogg's Case*. He thus proceeded to evaluate more generally whether the injury arose out of and in the course of employment, while considering that Mr. Santiago remained on duty as a relevant factor. We discern no error in the manner in which the ALJ applied *Fogg's Case*. *See Fournier*, 2006 ME 71, ¶ 14, 899 A.2d 787 (concluding first that the going and coming rule did not apply, then determining more generally whether the injury arose out of and in the course of employment by applying *Comeau*).

C. *Comeau* Factors

[¶14] When the facts of a case do not "fall snugly within the arising out of and in the course of employment requirement, closer analysis is required to ascertain whether a sufficient work-connection exists to justify an award of compensation." *Comeau*, 449 A.2d at 366-67. This is done by considering a nonexclusive list of

factors identified by the Court that bear on the question of work-connectedness. *Id.*[1] Mr. Santiago contends that this case fits snugly within the arising out of and in the course of employment requirement, particularly in light of the holding in *Fogg's Case*, and that the ALJ erred when proceeding to apply the *Comeau* factors.[2]

[¶15] The ALJ found as fact that Mr. Santiago was on duty at the time of the injury, stating that Mr. Santiago "was allowed to go to his home for a meal and bathroom break but in all other respects remained on duty." Also, when rejecting the Department's argument that this case involved an unexplained fall, the ALJ made a finding that Mr. Santiago's "left knee condition was caused by the force of setting

[1] The Law Court identified the following nonexclusive list of factors to consider when determining whether an injury arises out of and in the course of employment:

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

Comeau, 449 A.2d at 366 (citations omitted). The ALJ in this case also considered the additional factor that Mr. Santiago was on duty and obligated to respond to calls for service at the time of his injury.

[2] Even if *Comeau* applies, Mr. Santiago contends the ALJ erred when weighing the factors, and a proper analysis compels a finding that the injury is compensable as a matter of law. Because we remand on other grounds, we do not reach this issue.

his left leg down and then torqueing his femur on his tibia while climbing out of his patrol vehicle." Additionally, when assessing the *Comeau* factors, the ALJ found that "the hazard [or] causative condition can be viewed as in part employer created as Corporal Santiago's duties obligated him to use the Employer's provided vehicle."

[¶16] The ALJ apparently did not view these facts, in and of themselves, as establishing a sufficient work connection, and he proceeded to evaluate the *Comeau* factors. Upon that evaluation, the ALJ concluded that Mr. Santiago did not "carr[y] his burden of persuasion to demonstrate on a more probable than not basis that that his left knee injury . . . arose out of and in the course of his employment[.]"[3]

[3] Evaluating the factors, the ALJ considered that (1) Mr. Santiago was not promoting an interest of the Department; (2) Mr. Santiago was providing a small benefit to the Department by taking a meal break at his home; (3) the break at home was within the terms, conditions, and customs of the employment and was acquiesced in or permitted by the Department; (4) although it served a largely personal purpose, taking a meal break during permitted hours represents only an insubstantial deviation from the employment; (5) the hazard or causative condition of his injury was in part created by the Department because Mr. Santiago's duties obligated him to use the Department's vehicle; (6) Mr. Santiago's actions were not reckless or unreasonable and did not create excessive risks or perils; (7) his activities incidental to employment were not prohibited by the Department; (8) the injury did not occur on the Department's premises; and (9) Mr. Santiago remained on duty while on his meal break at home. The ALJ summarized:

> Having made the above findings concerning the *Comeau* factors, I find that the Employee's argument does not have sufficient support from the factors to reach a conclusion, on a more probable than not basis, that his injury arose out of his employment. Specifically, four of the nine considered factors are fully in the Employee's favor while the remaining factors are either equivocal or favor the Employer.

The ALJ did not specify which four factors he considered fully supported the claim, and which were equivocal or supported the employer's denial, and further noted that he was not merely tallying up the factors in favor or against Mr. Santiago, but was considering them when weighing the ultimate legal issue of whether the knee injury "in some proximate way, had its origin, its source, its cause in the employment."

[¶17] We recognize that review of an ALJ's decision addressing whether an injury is compensable pursuant to the Act is deferential. *Cox v. Coastal Prods. Co., Inc.*, 2001 ME 100, ¶ 12, 774 A.2d 347. However, in response to Mr. Santiago's Motion for Findings of Fact and Conclusions of Law, the ALJ was under an affirmative duty pursuant to 39-A M.R.S.A. § 318 (Supp. 2018) to make additional findings that would create an adequate basis for appellate review. *See Coty v. Town of Millinocket*, 444 A.2d 355, 357 (Me. 1982); *Malpass v. Philip J. Gibbons*, Me. W.C.B. No. 14-19, ¶ 18 (App. Div. 2014). An ALJ's decision may be considered inadequate for appellate review, and may be remanded for additional findings, when the findings appear to be inconsistent or unclear. *Spear v. Town of Wells*, 2007 ME 54, ¶¶ 13, 16, 922 A.2d 474 (remanding for additional findings when it was unclear whether hearing officer treated the injury as a preexisting condition or a subsequent nonwork injury); *Derrig v. Fels Co.*, 1999 ME 162, ¶¶ 1, 8, 747 A.2d 580 (remanding for clarification of inconsistent findings regarding a gradual injury).

[¶18] Having reviewed the amended decision, it is evident that the ALJ meticulously considered the *Comeau* factors. However, the ultimate decision appears inconsistent with the factual finding that Mr. Santiago was on duty at the time of the injury and that his left knee injury was caused by the force of torqueing his femur on his tibia as a result of climbing out of his patrol vehicle. Accordingly, we remand the case for additional findings of fact and conclusions of law. On

remand, the ALJ should indicate whether the *Comeau* analysis is necessary in light of the aforementioned findings and if so, whether and how the *Comeau* factors overcame the findings in the amended decree that suggest that Mr. Santiago's injury occurred while he was on duty and as a result of work activity.

The entry is:

> The administrative law judge's decision is remanded for additional findings of fact and conclusions of law, and for any additional proceedings that may be made necessary thereby.

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. 2018).

Pursuant to board Rule, chapter 12, § 19, all evidence and transcripts in this matter may be destroyed by the board 60 days after the expiration of the time for appeal set forth in 39-A M.R.S.A. § 322 unless (1) the board receives written notification that one or both parties wish to have their exhibits returned to them, or (2) a petition for appellate review is filed with the law court. Evidence and transcripts in cases that are appealed to the law court may be destroyed 60 days after the law court denies appellate review or issues an opinion.

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