

Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: January 27, 2011

506695

In the Matter of the Claim of
SUSAN FALKOUSKI,
Appellant,

v

CITY OF RENSSELAER FIRE
DEPARTMENT et al.,
Respondents.

MEMORANDUM AND ORDER

WORKERS' COMPENSATION BOARD,
Respondent.

Calendar Date: December 15, 2010

Before: Mercure, J.P., Rose, Lahtinen, Kavanagh and Garry, JJ.

Buckley, Mendleson, Criscione & Quinn, P.C., Albany
(Brendan G. Quinn of counsel), for appellant.

Walsh & Hacker, Albany (Sean F. Nicolette of counsel), for
City of Rensselaer Fire Department and another, respondents.

Lahtinen, J.

Appeal from a decision of the Workers' Compensation Board,
filed June 19, 2008, which denied an award of death benefits
pursuant to the provisions of the Volunteer Firefighters' Benefit
Law.

Decedent had a part-time paid position as an assistant fire
chief and he was also a member of one of the several volunteer
fire companies in the City of Rensselaer, Rensselaer County. He
suffered a ruptured cerebral aneurysm while at a fire and died.

His surviving spouse filed claims under both the Workers' Compensation Law and the Volunteer Firefighters' Benefit Law. A Workers' Compensation Law Judge determined that decedent's death was causally related to his volunteer firefighter duties. The Workers' Compensation Board reversed, finding that decedent was working in his capacity as an assistant fire chief and, thus, the Workers' Compensation Law controlled. Claimant appeals.

Determining whether an individual who sustains an injury related to fire prevention is serving as a volunteer firefighter or working in some other capacity is generally a factual issue for the Board (see Matter of Van Wert v Schaghticoke Volunteer Fire Dept., 301 AD2d 831, 831 [2003]; Matter of Diemond v Ithaca Fire Dept., 39 AD2d 979, 980 [1972]). Our review is limited, and if the Board's determination is supported by substantial evidence, we will not set it aside "despite the existence of evidence which might support a contrary conclusion" (Matter of Schuster v Village of Lake George Fire Dept., 34 AD3d 944, 945 [2006]; see generally Matter of Kane v Unger, 69 AD3d 991, 992 [2010]; Matter of Qavi v Utog 2-Way Radio, 252 AD2d 719, 719 [1998]). Decedent applied for the position of assistant fire chief and, upon being hired, he received biweekly pay and took on responsibilities beyond those of a volunteer firefighter. For example, he carried a City-supplied pager and was obligated to respond to all fires. Significantly, there was evidence that his duties as assistant fire chief required him to supervise volunteer fire companies responding to the scene of a fire, he wore a different color hat indicating his supervisory role and he was acting in such capacity at the time of the subject fire. Under these circumstances, substantial evidence supports the Board's determination that, at the time of his death, claimant was engaged in work as an employee in his paid position as an assistant fire chief.

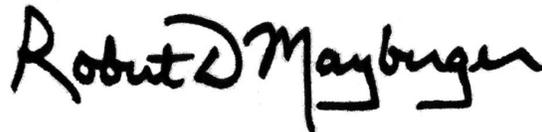
Mercure, J.P., Rose, Kavanagh and Garry, JJ., concur.

-3-

506695

ORDERED that the decision is affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court