

*Estate of Moore v. Moore Construction Co. (August 18, 1995)*

STATE OF VERMONT  
DEPARTMENT OF LABOR AND INDUSTRIES

*Estate of Lynda M. Moore ) File #: Z-15560*  
*) By: Barbara H. Alsop*  
*v. ) Hearing Officer*  
*) For: Mary S. Hooper*  
*Stephen L. Moore ) Commissioner*  
*Construction Company )*  
*) Opinion #: 37-95WC*

*Record closed on June 8, 1995.*

*APPEARANCES*

*Lawrin P. Crispe, Esq., for the claimant*  
*Glenn S. Morgan, Esq., for the defendant*

*ISSUE*

*Whether the claimant's death arose out of and in the course of her employment.*

*THE CLAIM*

*1. Death benefits pursuant to 21 V.S.A. §§ 632 and 633.*

*STIPULATIONS OF FACT*

*1. Lynda M. Moore was employed by Stephen L. Moore Construction Company, Saxtons River, Vermont, as a secretary/bookkeeper.*

*2. Stephen L. Moore Construction Company was an employer within the meaning of the Workers' Compensation Act.*

*3. St. Paul Insurance Company was the Workers' Compensation carrier for Stephen L. Moore Construction Company on April 15, 1986.*

*4. Lynda M. Moore's average weekly wage for the 12 weeks prior to April 15, 1986, was \$200.00.*

5. *Stephen L. Moore was the spouse of Lynda M. Moore on April 15, 1986. They had two dependent children at that time, Christopher Moore born January 11, 1974, and Allyson Moore born on May 21, 1977.*
6. *On February 7, 1987, Stephen L. Moore filed a first report of injury.*
7. *On April 15, 1986, Lynda Moore was found stabbed to death at her home.*
8. *Lynda M. Moore was murdered as a result of multiple stab wounds between 1:00 and 3:00 p.m. on April 15, 1986. It was a bright, clear, sunny day. (sic)*

#### *EXHIBITS*

*The parties have stipulated to the admission into evidence of the following depositions, and they are so admitted:*

1. *Stephen L. Moore, taken on June 30, 1989, and April 27, 1995.*
2. *Captain Michael LeClair of the Vermont State Police, taken on April 27, 1995.*
3. *Leslie White, employee of Tenney's Lumber Mill, taken on April 27, 1995.*
4. *Robert Duhaime, owner of Special Investigations, Inc., taken on April 27, 1995.*

#### *FINDINGS OF FACT*

1. *The above stipulations of facts are accepted as true, and judicial notice is taken of all forms filed with the Department in this claim.*
2. *Lynda Moore was the wife of Stephen L. Moore and the mother of Christopher and Allyson, both of whom were minors on April 15, 1986, on which date she was found stabbed to death in her home. No person has ever been charged with her murder, and there is no evidence admitted as to the identity of perpetrator.*
3. *At the time of her death, Ms. Moore was employed by her husband's*

*construction company as a secretary/bookkeeper, and she performed her job out of her and her husband's home. On the date in question, she was required to perform certain tasks for her husband's business, including writing a check for the disposal of waste from a project site. I find that she was also waiting for the arrival of a compactor salesman, who might come to the house during the afternoon for directions to her husband's work site. Captain Michael LeClair of the Vermont State Police also testified that a number of people had been by the house on the date in question, although he did not testify as to the nature of those visits.*

*4. In general, the decedent's work involved a number of tasks, including the bookkeeping, payroll and other financial matters, the interviewing of applicants for jobs, dealing with suppliers and persons seeking her husband's assistance on projects, and the running of errands for the business. The nature of her duties suggests that not every business contact would necessarily be confirmable by investigators trying to establish her movements on the date of her murder. For example, calls from general suppliers seeking new accounts might not be discernable, nor would calls from job applicants who might be told that no work was available. Any person running a business must recognize that fruitless telephone calls are rarely logged under the best of circumstances, which certainly did obtain in the offices maintained by the Stephen L. Moore Construction Company.*

*5. Mr. Moore left his home sometime around 9:00 a.m. on April 15, 1986. His wife remained at home, where she was expecting the appearance of a salesman sometime in the afternoon. At one point in the evidence it was suggested that the salesman was to arrive between noon and 3:00 p.m., and elsewhere it was suggested that he was to arrive by 1:00 p.m. and no later than 3:00 p.m. She was expected to give the salesman directions to the work site, where he would talk to Mr. Moore. Although Captain Michael LeClair was apprised of this, there was no information supplied in the record about who the salesman was or whether he had any useful information about this case. However, I find Mr. Moore's testimony about the salesman credible in the absence of any evidence to the contrary. Captain LeClair's testimony is indeterminate on this point, as it was on many points, and does not contradict that of Mr. Moore.*

6. *The evidence suggests that Jim Saunders went to the house at about 10:30 a.m. on April 15, 1986, in order to get a check to pay for dumping of trash from the construction site, and that Mrs. Moore was alive and functioning in her capacity as the bookkeeper for the business at that time. There is evidence that she knew that Mr. Saunders would be bringing a second load for the dump, sometime in the afternoon. Mr. Saunders is not considered a suspect by the police.*

7. *Furthermore, she was clearly operating in her capacity as secretary for the firm at 12:30 p.m. when she received a call from her husband concerning the whereabouts of Mr. Saunders, who had apparently not gotten back from his morning trip to the dump. Mr. Moore spoke only briefly with her before he terminated the call, as Mr. Saunders returned while they were speaking. Thereafter, the record supports a finding that Mr. Moore left the work site to go get lunch. The duration of his absence is not shown in the record. However, at about 1:00 p.m., the decedent called Leslie White at Tenney's Lumber Mill, inquiring as to the presence of her husband. This is suggestive, although not dispositive, of the fact that the decedent had telephoned the work site and had not found her husband there. All of the decedent's prior contacts with Mr. White at Tenney's Lumber Mill had been work related, and there is nothing to suggest to the contrary here.*

8. *Mr. White testified that he did not recognize Mrs. Moore's voice, although he had spoken with her on a number of prior occasions. However, the record shows that Mrs. Moore was suffering from a cold at the time of her death, which could certainly account for any change in her voice. If, in fact, her assailant was present with her as she made the call, which is certainly a reasonable inference (see Findings #7 & 9), then her voice might also have been altered by stress.*

9. *Sometime after she made the telephone call to Mr. White, Mrs. Moore was killed. Nothing more can be determined from the record as to her activities on that day, with the exception that she was known to have been sunbathing. There was a lounge chair found within inches of the door into the house that would have remained in the sun until about 1:00 p.m., the time of the telephone call to Tenney's Lumber Mill. Her sandals were under the lounge chair, and her body was barefoot, when it was discovered adjacent to the area*

*where the telephone was in the kitchen area.*

*10. Mr. Moore has testified credibly that her job required his wife to remain present at the house for forty hours a week, with the exception of short errands that she would do for the business. Because of her position with the company, she had given up doing some substantial volunteer work that had required that she be away from the house during normal working hours. Prior to Mrs. Moore's taking of the position with her husband's firm, the job had been held by an unrelated woman who operated out of her own house. The prior employee's presence had also been required during normal working hours.*

*11. The defendant makes much of the existence of an office on the second floor of the house, complete with desk and telephone, as evidence that the decedent was not involved in work when she was downstairs. To accept this argument, I would have to disbelieve the direct testimony of the husband of the deceased, who repeatedly stated that the upstairs office was not used until sometime later, when he had insulated and finished it. In fact, the only evidence in the record as to where the decedent performed her functions comes from her husband, who testified that the work was done in the dining area of the kitchen, near the family telephone. Nothing the defendant has produced tends to disprove this testimony, and I find the husband's testimony credible. It would require speculation to conclude to the contrary.*

*12. Captain LeClair has testified to an extensive investigation by numerous police officers in an attempt to find the culprit in this case. He also indicated that Mr. Moore was no longer a suspect, and in all probability was not guilty of this offense. Moreover, he indicated that past and present employees of the construction company were ruled out as possible perpetrators. I find this evidence is credible, although it is not, as the defense would suggest, tantamount to a finding that the murder was not work related.*

*13. The insurance company's investigator, Robert Duhaime, indicated that, if he had been involved in the original investigation, he would have done it differently. He testified that he would have followed up on the telephone call to Mr. White at Tenney's Lumber Mill, and that he would have asked Mr. Moore to clarify one point. The fact is, though, that Mr. Duhaime did not follow up on whatever his suspicion was, even though Mr. Moore was available*

*for questioning, especially under oath during two depositions taken for this proceeding. Moreover, the mere fact of the delay in reporting does not absolve the insurer of responsibility for proper investigation of a claim. He cannot now complain of the failure of the police investigation when he failed to complete his own. It is worth noting that the investigation did not include, at least insofar as it has been divulged in this case, any effort to establish the actual working conditions and terms of the decedent. Had the insurer produced in this case any evidence that contested the husband's description of his wife's duties and time schedule at work, it would have been given substantial deference, given the obviously self-serving nature of Mr. Moore's testimony.*

*14. I find that the police investigation was thorough and is probably on-going, and has left nothing for the insurance company's investigator to find with regard to the identity of the murderer, even if the company had been notified in a timely manner. The ten month delay in notification, while a technical breach of the statutory mandate, has not unduly burdened the defendant, and was in large measure justified by the position the decedent held in the company and the personal loss suffered by the only other person, her husband, with the requisite knowledge to report the incident.*

#### *CONCLUSIONS OF LAW*

*1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. Goodwin v. Fairbanks, Morse Co., 123 Vt. 161 (1963). The claimant must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. Egbert v. The Book Press, 144 Vt. 367 (1984).*

*2. There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the inference from the facts proved must be the more probable hypothesis. Burton v. Holden & Martin Lumber Co., 112 Vt. 17 (1941). The inference I am asked to draw is that the decedent was killed because she was where she was as a result of her job, and her murder is covered by the "positional risk" doctrine. See, e.g., Shaw v. Dutton Berry Farm, 160 Vt. 594 (1993). Moreover, the argument is made that she was "on duty" at the time of the murder, citing to David Miller v. IBM and Liberty Mutual Insurance Company, Opinion 21-92WC.*

*3. The evidence which I find in support of this argument is: 1) the*

*decedent was required by the terms of her job to be at her home at the time of the incident and was at various times established to have been performing tasks on that day consistent with her job; 2) the last known contact between the deceased and the outside world occurred by telephone call to a business associate of her husband's at about 1:00 p.m. on the date in question; 3) at that time, a salesman with a product for the business was expected to arrive to receive directions to her husband's work site; 4) the telephone call involved ascertaining the whereabouts of her husband, who had been absent from his work site sometime after 12:30 p.m. when he went to get lunch; 5) the deceased did not sunbathe on her lounge chair after 1:00 p.m.; 6) the deceased's body was found sprawled and barefoot beside the telephone; and 7) the body of the deceased was found at 3:00 p.m., after a telephone call from her husband at 2:45 p.m. went unanswered.*

*4. A case with remarkable parallels has been decided by the Appellate Division of the Supreme Court of the state of New York. In *Watson v. Graphic Management Systems*, 464 NYS 2d 590 (1983), the wife of the president of a closely held corporation acted as secretary and treasurer for the corporation, performing the bulk of her duties out of her home. The wife and an unidentified female companion were raped and murdered sometime during the day. The evidence that the decedent in that case was involved in her work to a sufficient extent to justify the granting of benefits was the existence of a phone call at about noon concerning a business matter and the signing of a business check. When the assailants were apprehended, they had in their possession three corporate checks signed by the decedent. The New York court found that there was substantial evidence to sustain the findings of the Workers' Compensation Board. In the case before me, I find that there were at least two work-related telephone calls, the writing of a business check, and the expectation of the writing of a second check which did not occur because of the intervention of the murderer. I find parity between the sunbathing in the instant case and the presence of an apparently nonwork related woman in the New York case, which suggests that some level of personal behavior can be tolerated. The only fact in the New York case that has no parallel in this case is the apprehension of the assailants with the evidence of some work-relatedness. The absence of that evidence at most makes this an unexplained assault, which Larson treats as follows:*

*Occasionally an assault occurs for which no explanation whatever appears, either because the assault is unwitnessed, or because, even with all the facts available, no one can figure out why the assault was committed. Nothing connects it with the victim privately; neither can it be shown to have had a specific employment origin. If the claimant is in fact exposed to that assault because he is discharging his duties at that time and place, there is no better reason here than in the unexplained-fall or death cases to deny an award merely because the claimant cannot positively show that the assault was motivated by something connected with work.*

*Larson, Workmen's Compensation Law §11.33.*

*5. If the deceased had been an outside employee who came to the Moore residence to work, the claim would be compensable. In this case, while there is a suggestion that the decedent was engaged in some personal activities such as sunbathing, there is also evidence to suggest that the decedent, when she accepted the job for her husband's business, had given up a number of personal activities that would have taken her away from the house during the daytime. While the evidence of the decedent's duties and sacrifices in working for the company come from her husband whose testimony is clearly and understandably self-serving, there is no countervailing evidence of substance in spite of the existence of an independent investigator on the case.*

*6. Weighing all of the evidence, I find the more probable hypothesis in this case is that the claimant was on duty and performing her functions as bookkeeper/secretary of the defendant employer at the time of her death, that her murder arose out of and in the course of her employment, and that her dependents are entitled to compensation pursuant to the terms of 21 V.S.A. §632.*

#### *ORDER*

*THEREFORE, I find that the claimant suffered a personal injury leading to death arising out of and in the course of her employment with the Stephen L. Moore Construction Company and the defendant or its insurer is ordered to pay benefits pursuant to the terms of 21 V.S.A. §§ 632 and 635.*

*DATED at Montpelier, Vermont, this \_\_\_\_\_ day of August 1995.*

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*Mary S. Hooper  
Commissioner*