VERMONT DEPARTMENT OF LABOR AND INDUSTRY

DONNA WILKINSON CLAIMANT	)	State File No. C-18641
v.	)	BY: DAVID J. BLYTHE, HEARING OFFICER
WALLACE ENTERPRISES, INC. DEFENDANT	)	FOR: BARBARA G. RIPLEY, COMMISSIONER
	)	Opinion No. 16-93WC

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF COMMISSIONER

This matter came on for a final hearing on Claimant's claim for workers compensation benefits on June 7, 1993. David J. Blythe, hearing officer, presided as designee of the Commissioner of Labor and Industry (hereinafter, "Commissioner"). The Claimant, Donna Wilkinson (hereinafter, "Claimant") was present and was represented by Attorney Ronald A. Fox. The Defendant/Employer, Wallace Enterprises, Inc. (hereinafter, "Wallace") was not present but was represented by Attorney Harold E. Eaton, Jr.

Based upon a Stipulation of the parties, evidence presented and matters of judicial notice, the Commissioner makes the following FINDINGS OF FACT, CONCLUSIONS OF LAW and ORDER:

I. ISSUES PRESENTED

This claim for compensation presents the following issues for determination by the Commissioner:

A. Whether Claimant's injury arose out of and in the course of her employment with Wallace.

B. Whether Claimant is entitled to the minimum compensation rate (if the

claim is found to be compensable) in that 2/3 of Claimant's average weekly wage from her employment with Wallace is less than the minimum compensation rate, due to her dual part-time employment.

C. What percentage of permanent impairment, if any, Claimant sustained which is attributable to Wallace.

II. STIPULATION ADOPTED AND INCORPORATED

The Stipulation of the parties dated July 9, 1993 (by Claimant) and July 12, 1993 (by Wallace) is here adopted by the Commissioner, and the facts stipulated to therein are found and incorporated by reference into this Order.

III. FINDINGS OF FACT

1. Claimant was employed by Wallace at a McDonald's Restaurant operated by Wallace on the Barre-Montpelier Road in Berlin, Vermont from approximately May, 1989 through February 3, 1990.

2. On February 3, 1990, Claimant was employed by Wallace part time; she worked on an hourly basis and punched a time clock.

3. In January, 1990, Claimant gave Wallace two weeks notice that she was leaving her employment with Wallace.

4. Claimant's employment was scheduled to terminate effective February 3, 1990.

5. On February 3, 1990, Donna Wilkinson completed her work at Wallace and, using her time card, punched out for the last time.

6. It was Wallace's policy to prohibit employees from parking in its parking lot so as to save spaces for customers. Wallace had an arrangement with the owners of the Twin City parking lot permitting its staff to park there. The Twin City lot is

immediately adjacent to the Wallace lot. It is not owned or controlled by Wallace.

7. Wallace specifically advises its employees that there is an arrangement under which Wallace's employees are permitted to park in the Twin City lot. It is common practice by Wallace employees to park in the Twin City lot when working at Wallace's McDonald's restaurant (Claimant's place of employment with Wallace) (Note: As used herein, "Wallace" and "McDonald's" both refer, as the context requires, to Wallace's property and Claimant's place of employment.)

8. There are no parking lots which are convenient for use by Wallace employees other than the Twin City lot. Wallace's place of business, a McDonald's franchise, is on the Barre-Montpelier Road. The road in that area is a succession of shopping plazas and is heavily trafficked. It would be necessary to cross a four lane road or walk a distance in the break-down lane if an employee were to park elsewhere.

9. The availability of Twin City parking lot serves Wallace's interest because it preserves limited parking in the Wallace lot for Wallace's customers. It is also a mutual benefit to Wallace and its employees because the lot is proximate to the workplace and employees using the Twin City lot do not have to walk along the Barre-Montpelier Road.

10. When Claimant arrived at work on February 3, 1990, she parked in the section of the Twin City lot in which Wallace employees customarily parked when working in the McDonald's.

11. On that date, there was snow and ice on the ground, and a snowbank was built up on the property line between the Twin City lot and the McDonald's parking lot.

12. After Claimant "punched out" for the day, she was walking to her car in a reasonably direct route from her place of employment along a trodden path that resulted from others walking the same route. As Claimant crossed over the snowbank into the Twin City lot, she stepped on a patch of ice that was not apparent to her and she slipped and fell.

13. The Claimant's average weekly wage earned from employment with Wallace for the twelve (12) week period preceding the accident was $45.62. (Form No. 25) In addition, Claimant had part-time wages at that time from employment with Dr. John Pizzo in the amount of $200.00 per week. (Exhibit No. 4) Therefore, Claimant's average weekly wage at the time of the accident was $245.62. The combined hours which Claimant worked for each employer was 40 hours or more per week.

14. The "minimum weekly compensation" as determined by the Department of Labor and Industry on February 3, 1990 was $182.00. Thereafter, it was adjusted to $187.00 on July 1, 1990, to $198.00 on July 1, 1991, and to $204.00 on July 1, 1992.

15. As a result of her fall, Claimant injured herlower back. She was examined by Dr. John Pizzo on February 4, 1990. At that time, he diagnosed Claimant as having acute lumbar sprain/strain with associated sciatic neuralgia. (Exhibit No. 19)

16. Wallace filed a first report of injury dated February 9, 1990.

17. Claimant filed a Notice of Injury and Claim for Compensation dated February 22, 1990.

18. On June 13, 1990 Claimant was notified by Wallace's workers

compensation carrier that the claim was being denied because it was not a work-related injury. Prior to that time, the carrier had paid $2,691.00 in medical benefits.

19. On May 22, 1991, Claimant filed a Notice and Application for Hearing.

20. Following her injury Claimant treated with Dr. Pizzo, Dr. Bradford Towle, Dr. John Peterson, Dr. Frederick Fries, and at the Hitchcock Clinic, Mary Hitchcock Memorial Hospital, Green Mountain Sports Physical Therapy and at Central Vermont Hospital. She also purchased medications at the Medicine Shoppe (a pharmacy).

21. Records for Claimant's medical care and prescriptions purchased which were introduced at the hearing indicate that her treatment was reasonable and necessary and that it was related to her accident on February 3, 1990. The charges for the medical services rendered in connection therewith are found to be fair and reasonable.

22. Claimant was examined for the purpose of determining the percentage of permanent impairment she sustained by Dr. John Pizzo (Exhibit No. 3), Dr. Philip Gates (Exhibit No. 1) and Dr. Vernon R. Temple (Exhibit No. 6).

23. Dr. Pizzo found that Claimant was 30% impaired as to the whole person and converted this figure to 50% impairment of the spine using the 1958 A.M.A. Conversion Table.

24. Dr. Gates, who examined Claimant on behalf of Wallace, found that Claimant was 13% impaired as to the whole person and converted this figure to 21.5% impairment of the spine using the 1958 A.M.A. Conversion Table.

25. Dr. Temple found that Claimant was 21% impaired as to the whole person and converted this figure to 35% impairment of the spine using the 1958

A.M.A. Conversion Table.

26. Claimant had previously injured her lower back while employed at McFarland House, a local nursing home.

27. As a result of the McFarland House injury, Claimant filed a claim for workers compensation with the Vermont Department of Labor and Industry. (File No. A-06618)

28. On April 14, 1989, Claimant entered into an Agreement for Permanent Partial Disability Compensation with McFarland House. Under the Agreement, the Commissioner found that Claimant has sustained a 10% permanent impairment to her back. Claimant received permanent partial disability benefits in accordance with the Agreement.

29. Dr. Pizzo was Claimant's employer at the time of her injury on February 3, 1990. He is also the treating physician with the most contact with Claimant and is in a favorable position to assess the nature and extent of her injuries. His evaluation and assessment must be weighed accordingly, taking into account both his professional relationship with Claimant and the employer-employee relationship between Dr. Pizzo and Claimant.

30. Dr. Temple's rating is found to be the more credible and Claimant is found to have sustained a permanent impairment of her spine of 35.5%.

31. Claimant reached a medical end result on June 5, 1991, as stipulated by the parties.

32. Claimant submitted a mileage statement in support of her claim for reimbursement for travel expenses associated with medical care. Claimant normally

travelled approximately 17 miles round trip to her workplace. The distance she travelled to receive medical treatment at Green Mountain Sports Physical Therapy and Central Vermont Hospital was approximately the same distance as that which she travelled to go to work. Claimant travelled 120 miles round trip on 14 occasions to receive medical care at the Hitchcock Clinic and/or Mary Hitchcock Memorial Hospital. Claimant travelled 28 miles round trip on one occasion to receive medical care from Dr. Fries; and she travelled 30 miles round trip on one occasion to receive medical care from Dr. Peterson. Claimant therefore is entitled to reimbursement for 1466 miles which she travelled for the purpose of receiving medical care, computed as follows:

Mileage to Hitchcock 120 miles X 14 trips	=	1680 miles
Dr. Fries appointment	=	28 miles
Dr. Peterson appointment	=	30 miles
TOTAL MILEAGE (16 trips)	=	1738 miles
Less normal mileage (distance to work - 17 miles X 16 trips)	=	272 miles
TOTAL COMPENSABLE MILEAGE	=	1466 Miles

33. Claimant has been informed by Dr. Pizzo and Dr. Temple that because she was an employee of Dr. Pizzo, and she would not owe them any money for services rendered by their respective offices if this claim is determined not to be compensable. However, whether or not a medical care provider extends a courtesy discount or abatement of a bill does not affect the Commissioner's determination of

whether a medical treatment expense is necessary, reasonable and is related to the compensable injury. Therefore, the charges for services rendered to Claimant by Drs. Pizzo and Temple are compensable insofar as they are reasonable, necessary, and related to Claimant's compensable injury.

CONCLUSIONS OF LAW

1. In worker's compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks Morse and Co.*, 123 Vt. 161 (1963); *McKane v. Capital Hill Quarry Co.*, 100 Vt. 45 (1926). The claimant must establish, by sufficient competent evidence, the character and extent of the injury and disability as well as the casual connection between the injury and employment. *Rothfarb v. Camp Awanee*, 116 Vt. 172 (1949). An injury arises out of the employment when it occurs in the course of it and is the proximate result of it. *Rae v. Green Mountain Boys Camp*, 122 Vt. 437 (1961).

A. CLAIMANT'S INJURY OF FEBRUARY 3, 1990 AROSE OUT OF AND IN THE COURSE OF HER EMPLOYMENT WITH WALLACE

2. When a worker receives a personal injury by accident arising out of and in the course of employment, the employer shall pay compensation as provided for by statute. 21 V.S.A. § 618. An injury sustained by an employee while performing acts for the mutual benefit of the employee and the employer arises out of and in the course of employment. *Holmquist v. Mental Health Services*, 139 Vt. 1 (1980). Acts outside of an employee's regular duties which are undertaken in good faith to advance the employer's interest are within the course of employment. *Kenny v. Rockingham School District*, 123 Vt. 344 (1963).

3. "Accidental injures suffered by an employee while entering or leaving

the workplace . . . have often been deemed to have arisen out of and in the course of employment within the meaning of workers' compensation acts; in this regard it has been said that the employment contemplates the employee's entry upon and departure from the premises as much as it contemplates his working there. While this rule is most frequently applied in cases where the way or means of entrance or exit were on premises owned or controlled by the employer, its application is not limited to such cases, but extends, under some circumstances to injuries occurring on premises not so owned or controlled." 82 *AmJur 2d Workers' Compensation* § 309.

4. "As to parking lots owned by the employer, or maintained by the employer for his employees, practically all jurisdictions now consider them part of the "premises", whether within the main company premises or separated from it. This rule is by no means confined to parking lots owned, controlled, or maintained by the employer. The doctrine has been applied when the lot, although not owned by the employer, was exclusively used, or used with the owner's special permission, or just used, by the employees of this employer." A. Larson, *Workmen's Compensation Law* § 15.42. See also *Woodruff World Travel, Inc. v. Industrial Com.*, 554 P.2d 705 (Colo. 1976) (compensation was allowed to an employee who slipped and fell in a parking lot made available to her employer by the employer's landlord as she returned to her car at the end of the workday. The rationale of the decision was that space was afforded the employer for the use of employees, the employer was aware that employees used the lot, the parking privilege was a fringe benefit to the claimant and she was injured while in the act of enjoying that benefit).

5. Employment is not limited by the exact time when the worker reaches the scene of his or her labor and begins it, nor when it ceases, but includes a

reasonable time, space, and opportunity before and after employment. See *Lasiewicki v. Tusco Products Co.*. 125 N.W.2d 479 (Mich. 1964) (compensation awarded to employee who fell on ice in a parking lot).

6. Vermont's workers' compensation statutes are to be liberally construed so as to insure that injured workers received the compensation benefits to which they are reasonably entitled. *St. Paul Fire & Marine Ins. Co. v. Surdam*, 156 Vt. 585 (1991).

7. An employee who has been discharged or whose employment has been otherwise terminated and sustains an injury while in the process of leaving her (former) place of employment is considered an employee for the purposes of determining whether an injury is compensable under the workers compensation statutes. See *AmJur 2d Workers Compensation* § 273. This is especially the case when, as in Vermont, state law requires that workers compensation statutes be liberally construed in favor of injured workers. Id., *St. Paul Fire & Marine* supra.

8. Based upon the foregoing, Claimant's injury arose out of and in the course of her employment with Wallace, and Wallace is therefore liable for compensation to which Claimant is entitled arising out of her injury of February 3, 1990.

B. CLAIMANT IS ENTITLED TO THE MINIMUM COMPENSATION RATE

9. Claimant's average weekly wage within the meaning of 21 V.S.A. §§ 601, 650, for the twelve (12) weeks preceding February 3, 1990, was $245.62. The amount was calculated by combining Claimant's wages from her employment with Wallace and with Dr. Pizzo, as set forth above.

10. Title 21 V.S.A. § 648 sets out the measure of permanent partial disability benefits. It provides in relevant part: ". . . the employer shall pay to the injured employee sixty-six and two-thirds percent of the average weekly wages [AWW], computed as provided in § 650 of this title and subject to the maximum and minimum weekly compensation for the periods stated against such injuries . . ." Since two-thirds of Claimant's AWW would be $163.75, the minimum applies.

11. The purpose of having a minimum weekly compensation rate is to protect the employee from being reduced to a level of compensation which is below a subsistence level. This interpretation is also consistent with the calculation of temporary total disability benefits under 21 V.S.A. § 642 where it is provided in part ". . . the employer . . . shall pay the injured employee a weekly compensation equal to two-thirds of the employee's average weekly wages, but not more than the maximum **nor less than the minimum weekly compensation.**" (emphasis added). Different sections of a statutory scheme dealing with the same subject matter must be read *in pari materia.*

12. Claimant has suffered a job-related injury for which she is entitled to permanent partial disability (PPD) benefits. The injury which she suffered was to her back. Rule 11(a)(4) of the Department of Labor & Industry *Processes and Procedure For Claims Under The Vermont Workers Compensation and Occupational Disease Acts* (hereinafter, "Rules") provides that "in the event of injury resulting in impairment to the back of spine, not amounting to permanent total disability under 21 V.S.A. § 644, the employer shall pay that percentage of 330 weeks or compensation representing the percentage of permanent partial loss of function to the back or spine."

13. There are three expert opinions in evidence as to the degree of

Claimant's disability, ranging from 21.5% - 50%. (See Findings of Fact, paragraphs 22-25, 30 above) Each of these opinions is based upon the Guides to the Evaluation of Permanent Impairment as published by the American Medical Association. This is a method approved and routinely utilized by the Commissioner. As set forth and found in paragraph 30, Claimant has sustained a 35.5% permanent impairment to her back.

14. In order to determine that portion of Claimant's permanent partial disability for which Wallace is liable, it is necessary and appropriate in this case to apportion the relative contributions to that disability of her February 3, 1990 injury attributable to Wallace and her prior injury while in the employ of McFarland House.

15. In the present case, that portion of Claimant's permanent partial disability attributable to Wallace is computed by deducting from her present degree of impairment (35.5%) the amount of permanent impairment previously sustained (10%). Therefore, Claimant is entitled to PPD benefits from Wallace based upon a 25.5% impairment (the measure of increased impairment caused by the February 3, 1990 injury).

D. ATTORNEYS FEES

16. Claimant has prevailed in her claim and pursuant to 21 V.S.A. § 678 and Rule 10 of the Rules, she is entitled to recover her reasonable attorneys fees, subject to the limitations of those provisions.

ORDER

1. Wallace shall pay to Claimant permanent partial disability benefits for

84.15 weeks (25.5% x 330 weeks), commencing on June 5, 1991 (the date Claimant reached her medical end result) as follows:

3 weeks at $187.00/wk	=	$ 561.00
52 weeks at $198/wk	=	$10,296.00
29.15 weeks at $204/wk	=	$ 5,946.60
TOTAL PPD BENEFITS	=	$16,803.60

2. Because more than 84.15 weeks have elapsed since June 5, 1991, this amount is due and payable in full.

3. Wallace shall reimburse Claimant for 1466 miles of travel (in connection with Claimant's medical treatments) at the rate of $0.15 per mile, resulting in payment of the amount of $219.90.

4. Within 14 days of the date of this Order, Claimant shall submit evidence of her attorneys fees to the hearing officer. Upon review and approval of that portion of Claimant's attorneys fees which the Commissioner deems to be reasonable, Wallace shall reimburse Claimant for those attorneys fees as are approved by the Commissioner.

DATED at Montpelier, Vermont this 11th day of October, 1993.

Barbara G. Ripley
Commissioner