

Claimant's Exhibit 13:Autopsy Report of Rosemarie Brailsford
Claimant's Exhibit 14:Marriage Certificate of Rosemarie and Gerald Brailsford
Claimant's Exhibit 15:Birth Certificates of Gerald Brailsford, Jr. and Geoffrey Brailsford
Claimant's Exhibit 16:Business Journal – financial records
Claimant's Exhibit 17:Curriculum Vitae of Medical Examiner, Stephen P. Adams, M.D.
Claimant's Exhibit 18:Statement of Gerald Brailsford taken by Wausau investigator
Claimant's Exhibit 19:DEC of Gillam's for workers' compensation coverage on 7/27/98
Claimant's Exhibit 20:Guardianship records for minors
Claimant's Exhibits 21 through 25 and 28: for ID only - NOT ADMITTED
Claimant's Exhibit 26:Transcript of deposition of Linda Tracy, June 29, 1999
Claimant's Exhibit 27:Transcript of deposition of Charlene Candido, August 3, 1999
Claimant's Exhibit 29:Weekly payroll account
Claimant's Exhibit 30:Time In/Time Out sheets
Claimant's Exhibit 31:Secretary of State's Retroactive Reinstatement of Corporate status of Time Capsules, date stamped November 5, 1999; offered by the claimant after the evidence had closed - NOT ADMITTED

Defendant's Exhibit 1:Secretary of State Certificate of Termination of corporate status
Defendant's Exhibit 2:Timesheet and timecards for week 7/19-7/25/98 (depo exh. 3A-3F)
Defendant's Exhibit 3:Time Capsules Payroll work sheet
Defendant's Exhibit 4:Timecards for Jessica Jensen and Gretchen Coleman
Defendant's Exhibit 5:Time Card for Coleman, Jensen and Gretchen Black
Defendant's Exhibit 6:Handwritten note by Rose Brailsford (depo exhibit 2)
Defendant's Exhibit 7:Time Capsules Itemized Profit and Loss 1/1/96-11/16/98
Defendant's Exhibit 8:Document entitled Tile Pattern showing products sold by Time Capsule employees

STIPULATION OF FACTS:

1. On July 27, 1998, Time Capsules, Inc. was a business owned and operated by Rosemarie Brailsford and her husband, Gerald Brailsford, Sr.
2. Rosemarie Brailsford was the President of Time Capsules, Inc. and performed work for the company.
3. Wausau Insurance Companies was the workers' compensation insurance carrier for Time Capsules, Inc., on July 27, 1998.
4. No benefits have been paid by Wausau Insurance Companies to Rosemarie Brailsford's spouse or dependents under the Workers' Compensation Act.
5. Rosemarie Brailsford died in an automobile accident on July 27, 1998 while traveling in her automobile on U.S. Route 4 in Hartford, Vermont.
6. On July 27, 1998 Rosemarie Brailsford was employed by Gillam's, Inc., a restaurant in White River Junction, Vermont.
7. On July 27, 1998, Rosemarie Brailsford was the lawful wife of Gerald Brailsford and was

the mother of two minor children, Gerald Brailsford, Jr. and Geoffrey Brailsford.

FINDINGS OF FACT:

1. Rosemarie ("Rose") and Gerald Brailsford operated a business called Time Capsules. Rose also worked as server and relief manager at a restaurant run by her family.
2. On July 27, 1998 Rosemarie Brailsford was traveling in her car from Woodstock to White River Junction. She was going from her home to Gillam's Restaurant where she worked as a server and relief manager. En route to her job at Gillam's she was involved in a head-on automobile accident in which she died. The reported time of the accident was 3:25 p.m.
3. Ms. Brailsford's husband, Gerald Brailsford, testified to his belief that Rose intended to drop off Time Capsule payroll information at American Financial Resources ("AFR") before going to her job at Gillam's Restaurant.
4. Gillam's Restaurant had a worker's compensation insurance policy in place at the time of the injury.
5. Time Capsules, Inc. had secured and paid for a policy providing workers' compensation insurance coverage for its employees.

Time Capsules

6. Although it was incorporated on June 13, 1996, the corporate status of Time Capsules was involuntarily terminated on June 10, 1998 for failure to file an annual report. After that date, however, the Brailsfords continued to operate the business without acting to wind down the corporation.
7. Selling memorabilia is the Time Capsules business. It is operated in part at Bromley Hill where the Brailsfords set up a station and took digital photographs of vacationers as they came down the alpine slide. They would then scan and print the photographs onto mugs and mouse pads to sell, or they would put a slide-type print into a small plastic capsule, providing a vacationer with a viewer showing a picture of himself or herself coming down the slide.
8. The business was operated during the summer season when the Bromley slide was open. During that season the Brailsfords employed three people in addition to themselves.
9. Rosemarie Brailsford received no wages or income from Time Capsules during the twelve weeks prior to her death or at any other time in 1998. Her husband testified that she was compensated at year's end with a bonus depending on the nature and extent of the profits generated from the business. In addition, the business reimbursed her for mileage and meal expenses, as well as maintenance expenses on her car.
10. Rose Brailsford acted as President and Treasurer of the business. According to her husband, Rose's duties for the company encompassed "everything that needed to be

done." She worked at the Bromley site, did marketing and developing work, managed the books, and was responsible for payroll.

11. Mr. Brailsford testified that Rose was not at the Bromley site the day of her death because she was to do payroll for the business that day.
12. Gerald Brailsford testified further that at the time of his wife's death, he received from the police a bag that Rose was carrying in her car. He testified that the bag contained deposit receipts showing deposits into the Time Capsules general payroll account. He said that the bag also contained payroll records that needed to be delivered to the payroll agent in White River Junction for the previous week's payroll period. Documents that Mr. Brailsford said were in the car have been marked as Defendant's Exhibits 2, 3, 4 and 5:

Time Capsules Payroll Worksheet

Jessica Jensen time card for the week 7/19-7/25

Gretchen Coleman time card for the week 7/19-7/25

Gretchen Coleman time card for the week 7/26-8/1

Jessica Jensen time card for the week 7/26-8/1

Gretchen Black time card for the week 7/20-7/26

13. Mr. Brailsford testified that the only reason Rose would have had the timecards with her would have been that she intended to drop them off at the payroll agent because she did not routinely carry the cards with her for fear of losing them.
14. Payroll for Time Capsules ran from Sunday through Saturday. Paychecks were made out on the Friday following the close of the payroll week. Payday was on Saturday. Thus, on July 27, 1998 the timecards for the week of July 19, 1998 through July 25 were ready to go to the payroll agent for processing so that checks could be drawn for the employees on July 31, 1998. However, the timecards for the week of July 26, 1998 to August 1, 1998 were not ready to go to the payroll agent on the day of the accident, although her husband testified that they were in Rose's possession.
15. Contrary to Mr. Brailsford's belief, Rose Brailsford carried timecards with her that were not ready to be processed by the payroll agent. Therefore, her simple possession of the cards is not sufficient evidence that she intended to go to the payroll office before working at Gillam's on July 27, 1998.
16. Mr. Brailsford also testified that he had a conversation with Rose on the morning on July 27, 1998 when she said she was going to "get payroll done." She did not say that she intended to calculate the payroll for the previous week (ending July 25) and then take the payroll documents to AFR in White River Junction.
17. Mr. Brailsford explained that his understanding of "getting payroll done" is: to calculate what hours the employees worked during the previous week, calculate wages and commissions due, calculate the tax withholdings, enter the figures into the computerized accounting program, make necessary bank deposits in the payroll account to cover the payroll, and then deliver all of the paperwork to the payroll agent.

18. At the time of Rose's death, the accounting records at Time Capsule show no payroll entry for the period of July 19-25.
19. Mr. Brailsford found handwritten notes from his wife that showed some payroll work on July 27, 1998. Specifically, those notes suggest that Rose was calculating what needed to be deposited into the payroll account to cover the payroll checks which had already been written on July 10, July 17, and July 24, with a total of \$650. At approximately 2:30 p.m. on July 27th, Rose deposited \$650 in the payroll account. She did not deposit funds to cover payroll for the week ending July 25th.
20. Mr. Brailsford testified that the business records for Time Capsules indicate that Rose Brailsford had a business meeting on July 27, 1998. An expense of \$21.85 was entered in the Time Capsule's general ledger on that date for the Long Trail Brewery "to discuss summer acct." Mr. Brailsford was unaware of that meeting at the time and, therefore, could not say whether it was a planned or spur of the moment meeting.
21. Although Rose made a bank deposit at a bank in Woodstock on July 27, 1998, that deposit was to cover payroll checks that the payroll agent had already processed and written.

Charlene Candido

22. Charlene Candido is a friend of the Brailsford family. Her son and one of the Brailsford's sons were friends. Ms. Candido's deposition testimony was admitted into evidence because she was unavailable as a witness.
23. On July 27, 1998, Rose Brailsford dropped off one of her sons to play at the Candido home where the two mothers socialized over tea for an hour or so. Ms. Candido testified that Rose had called earlier to say that she would drop her son off after she and her boys had lunch.
24. Ms. Candido estimated that Rose arrived at her house between 1:00 and 1:30 dressed casually in a tee shirt and bib-overall type shorts. The two women visited for a while. In the course of their conversation, Rose told Ms. Candido that she had been enjoying the day with her two sons. According to Ms. Candido's testimony, at around 2:15 or 2:30 Rose looked at her watch and announced, "My gosh, look at the time. I have to go because I have some errands to run before going to work." Rose Brailsford then took her leave with one of her sons. The other son was to remain at the Candido home to play and spend the night. Such overnights during the school year occurred only on weekends, but the boys' summer schedules allowed them to get together on weekdays as well.

Gillam's Restaurant

25. Rose Brailsford also worked a second job. In 1997 she worked as a waitress at Seven-Barrel Brewery in Lebanon, New Hampshire. In November 1997, she began working at Gillam's Restaurant in White River Junction as server and relief manager.
26. Walter Kimball is a manager at Gillam's Restaurant. He was the manager who Rose

Brailsford was to relieve on the day of the fatal accident. To allow for an hour overlap in the managers' schedules, Rose Brailsford was scheduled to begin work at 3:00 p.m.; Kimball was to end his shift at 4:00 p.m.

27. While there was flexibility in what time Rose Brailsford was expected to arrive at work, Mr. Kimball expected her to arrive by 3:15 or 3:30 at the latest if she was scheduled to start at 3:00. He never experienced her being late because she had to stop by her accountant's office.
28. Gillam's Restaurant has an electronic time clock. An employee records the time he or she starts work for the day by logging in and out of the system at a cash register. The time clock records show that on the Mondays since Rose Brailsford started working as a relief manager, her pattern of punching in the time clock was as follows:

| | |
|-----------------------|-----------------|
| June 8 th | 12 minutes late |
| June 15 th | 11 minutes late |
| June 22 nd | 40 minutes late |
| June 29 th | 44 minutes late |
| July 6 th | 48 minutes late |
| July 13 th | 34 minutes late |
| July 20 th | 31 minutes late |

29. The time clock does not reflect the time that Rose Brailsford walked in the door at Gillam's. Rather, it reflects when she logged in at a cash register. Rose generally went to the washroom to freshen up before logging on, although she did not need to change when she worked as a manager, which was the case the day she died.
30. Walter Kimball, the manager on duty when Rose Brailsford arrived on Mondays, only remembered her being more than 30 minutes once, and she called in that day to say she would be late. He testified that he would have called her if she were more than 30 minutes late. He thought she was "pretty much" on time, although he conceded that he did not always see her the minute she arrived.
31. Mr. Kimball also testified that because managers are salaried, they do not always punch in when they report to work. Nevertheless, they must do so before they can use the cash register. He agreed that claimant had punched in between 12 and 48 minutes after she was scheduled to arrive, but that the time slips do not reflect when she actually arrived. Unlike the regular managers, however, Rose was an hourly employee whose pay was dependent on her time sheet.
32. Tony Gillam was also a manager at Gillam's Restaurant. He usually worked when Rose Brailsford was scheduled to work at a server. He had no experience with her having been late to work because she had been to the accountant's office or to the bank before arriving at work.
33. According to Tony Gillam, although Rose was generally 10 to 20 minutes late, he remembers only once that she was more than 30 minutes late, and she called in to say that she would be late. On all other days when she was late, he cannot recall that it was ever

more than 20 minutes. At one point he had a conversation with Rose about her tardiness, suggesting that she should try to be on time.

34. William Gillam is Rose Brailsford's brother. He testified that he had a 14-minute conversation with Rose the day of the accident at 11:30 a.m. During the conversation, he heard her typing on a computer and asked what she was doing. Rose said that she was working on payroll and was having a problem doing some figuring.
35. Gerald Brailsford found a piece of paper on the desk next to the computer when he arrived home the evening of the accident. On that paper are notes that Rose had written. In one category labeled "tax checks," dollar figures are recorded for the dates 7/1/98, 7/17/98 and 7/24/98 for a total of \$547.45. Those three dates, all Fridays, are the dates for the previous three paychecks. Rose's notes do not include the date, 8/1/98, which would have been the date for that week's paychecks (for the period ending on July 24). Amounts totaling \$858.38 for Jerry for 7/17 and 7/24 were also recorded. Three sums totaling \$67 for "Payroll AFR" were listed. Finally, in a section with a box drawn around it are these entries: "Business 285.90 + 150 →\$435.90." "Payroll + 650-166.30 → \$483.70." "*need to cover all payroll cks \$1472.83."
36. The "+ \$650" and "+ \$150" notes correspond with the deposits Rose Brailsford made in her bank on the day of her death. She deposited \$150 in the business account and \$650 in the payroll account.
37. The business records of Time Capsules show that the payroll for the periods described for the pay periods June 28 to July 4, July 5 to July 11 and July 12 to July 18 were entered in the Quick Books accounting system. That system clearly identifies both the payroll period and the payroll date. For the period June 28 through July 4 is the date July 10. For the period July 5 to July 11 is the date July 17 and for the period July 12 through July 18 is the date July 24. However, there was no payroll information entered in the accounting system for the payroll period ending July 25, which would correspond with a payroll date of August 1.
38. William Gillam testified that Rose told him she intended to drop off payroll at AFR. On cross-examination, however, he admitted that it was his impression that Rose intended to drop off the payroll. That impression was formed by the fact that Rose said she was working on payroll and later in the conversation said, "I need to drop this off before going to work." He agreed that such a statement could have referred to her trip to the bank to make deposits.
39. Mr. Gillam testified that he taught Rosemarie the practice of hand delivering payroll documents to a payroll-processing agent when they worked together at Clough Enterprises.
40. The documentary exhibits show that Rose Brailsford stopped at Woodstock National Bank at 2:26 p.m. and made a deposit to the general and payroll accounts of Time Capsules in the precise amounts she had calculated on the paper her husband found by her computer. The video surveillance at the bank recorded Rose Brailsford leaving the bank at 2:30:38. She was wearing a short sleeve shirt under a bib type top.

Mary Gillam-Ruffing

41. Mary Gillam-Ruffing, Rose Brailsford's cousin, is the general manager at Gillam's Restaurant. She testified that Rose was scheduled to start working at Gillam's at 3:00 p.m. on Monday, July 27, 1998.
42. It was in early June of 1998 when Rose started working as a relief manager. At that time her shifts started at 4:00 p.m. However, Ms. Gillam-Ruffing testified that she changed the starting time to 3:00 because she wanted an overlap in the manager's shifts and because Rose was at that time routinely 20 to 30 minutes late.
43. Mary Gillam-Ruffing also testified that two weeks before the accident, she had a conversation with Rose about Rose's tendency to be late for work. She told Rose that she would really like her to show up to work within a "reasonable time" after she was scheduled to work, which she understood to mean 15 to 20 minutes after the scheduled start time.
44. On direct examination, Ms. Gillam-Ruffing testified that Rose was typically 40 minutes to 48 minutes late to work when she was scheduled to be at work at 4:00 p.m., which was the reason she changed the start time to 3:00. However, on cross-examination, she admitted that she was not aware of any time when Rose was more than 30 minutes late for work without calling. Not until she looked at the time records in the course of this litigation did she conclude that Rose was typically 40 minutes late. She admitted that time records did not necessarily indicate when Rose arrived. And she deferred to the other managers for an accurate determination of the times Rose reported to work.

American Financial Resources

45. Time Capsules had its payroll done by American Financial Resources (AFR), located in White River Junction. At the time of Rose Brailsford's death, AFR was located approximately one mile from Gillam's Restaurant. No appointment was necessary for Rose to drop off the Time Capsules payroll records. Beginning in June 1998, Karen Geiling was the person at AFR who did the payroll for Time Capsules.
46. When Time Capsules had used AFR for payroll back in 1997, not all payroll records were hand-delivered as evidenced by the fact that the original timecards were not available for every payroll week. Some weeks contained yellow "sticky-notes" containing notes on hours worked by employees and some weeks had no timecards and no notes. Ms. Geiling testified that the absence of some original timecards from 1997 indicated to her that Time Capsules conveyed the information by fax or phone, not by hand delivery. Ms. Geiling also implied that the relationship between Time Capsules and AFR must have been suspended for some unspecified period of time, because she testified that she met with Gerald and Rose Brailsford in May or June 1998 to discuss "restarting" the payroll business. The Brailsfords computer printouts confirm such lapse with the absence of any AFR entries between September 5, 1997 and June 19, 1998.
47. Ms. Geiling testified that she had only a four-week experience with Rose Brailsford at the

time of her death. Although Time Capsules could have provided the necessary information to AFR by fax or telephone, Ms. Geiling testified that Rose typically hand delivered the timecards and any other payroll documents, including commission information. The pattern Ms. Geiling described was "drop it off at the beginning of the week, pick it up at the end of the week." However, she also said that it was not unusual for Rose to have dropped off the payroll records on a Monday, Tuesday or Wednesday.

48. Ms. Geiling testified that a check was provided in advance for payroll and other work.
49. Once Ms. Geiling had the timecards and other payroll information, it took her about one half hour to enter the data and print the checks. After the checks were printed, Rose would either pick them up or they would have been mailed to Time Capsules.
50. Ms. Geiling was not aware of any practice by Rose to coordinate her trip to work at Gillam's Restaurant with dropping off payroll at AFR. Nor was Ms. Geiling aware of any effort Rose may have made to correlate bank deposits and delivery of payroll information.
51. Although the normal hours of operation for AFR were from 8 a.m. and 5 p.m., Ms. Geiling usually worked much later. In fact, she recalled that Rose once stopped by AFR to drop off payroll between 10:00 and 11:00 p.m. Ms. Geiling vividly recalled being frightened by Rose's knock on the door that late in the day.
52. The payroll at Time Capsules ran from Sunday through Saturday. The payroll was processed during the week following the payroll period, with checks written by Friday of that week. Thus for the period ending Saturday, July 25, 1998, Ms. Geiling would have processed the payroll between Monday, July 27 and Friday, July 31. Payroll checks to the employees would have been written by that Friday, July 31, and distributed on Saturday, August 1.
53. For the payroll ending July 25, Ms. Geiling and Rose Brailsford were working on developing a new timesheet that Geiling had prepared for Time Capsules. It would have been used for the first time for the payroll ending on July 25. If Rose had taken the payroll into AFR for that payroll period, Ms. Geiling testified, she would have expected to have had a conversation with Rose about refining the timesheet.
54. Rose Brailsford was also developing a document called a "tile pattern" that tracked products sold by employees. Mr. Brailsford testified that Rose had recently set up an incentive program under which employees, including himself, received commissions for each product sold in addition to hourly wage. Ms. Geiling testified that she expected to discuss the "tile pattern" the next time Rose delivered the payroll information.
55. When Rose dropped off payroll information, she and Ms. Geiling typically had a five to ten minute conversation about payroll and sometimes talked about how the Time Capsule business was going. Thus, if Rose Brailsford had dropped off the payroll for the week ending July 25, Ms. Geiling would have expected to have not only their normal conversation about payroll, but also a conversation about two new documents that they were developing.

56. On the day of the accident, July 27, 1998, Ms. Geiling was not aware that Rose was going to stop at AFR that day. Yet she never had advanced notice of Rose's visits.
57. There were no problems with payroll that required Rose to stop by the office personally on July 27. Mr. Brailsford had told police that Rose was going to the payroll agent's office to straighten out a problem in which payroll checks had been written out of the wrong account. However, Ms. Geiling testified that the error had occurred back in June, with the "first payroll" and had been corrected well before July.

Woodstock Bank

58. The testimony of Linda Tracy, bank teller at Woodstock National Bank, was admitted into evidence in the form of the witness's deposition transcript because she was unavailable to testify at the hearing. Ms. Tracy testified that she recalled Rose Brailsford making a deposit in both the general operating account and the payroll account of Time Capsules on July 27, 1998. Ms. Tracy also testified that Ms. Brailsford said that she intended to go to the company's payroll agent before going to work at her job at Gillam's Restaurant. Ms. Tracy estimated that Rose Brailsford's transaction that day took five to ten minutes.
59. Based on the video surveillance camera at the bank, Rose Brailsford was at Ms. Tracy's teller station from 2:27 to 2:30 p.m. on July 27, 1998.
60. At her deposition, Ms. Tracy did not remember any specific information about her conversation with Rose Brailsford except that she was going to the payroll agent's office. For example, she did not know what time of the day the transaction occurred or whether Rose was dressed casually or more formally.
61. Gerald Brailsford testified that he told police that Rose returned home at 12:30 p.m. with their son, that their son got on his bike and rode to the recreation center, and that Rose stayed at home to do some computer work. Mr. Brailsford obtained this understanding from his son. Given that the bank surveillance pictures show Rose Brailsford and their son at the bank at 2:30, it is reasonable to infer that she arrived home shortly after that time.

Automobile Accident

62. Rosemarie Brailsford was killed in an accident on Route 4 in Hartford, Vermont. The path of travel was en route to both American Financial Services and to Gillam's Restaurant.
63. The time of the accident as specified in the police report was 15:25.
64. The medical examiner attributed the cause of Rose's death to laceration to the brainstem as a result of the accident. Her blood alcohol at the time of the autopsy was 0.023%. She was wearing a dress at the time of her death.

65. The parties stipulated that the time to drive from the scene of the accident to AFR was four to eight minutes. Claimant estimates, therefore, that Rose Brailsford would have arrived between 3:29 and 3:33 p.m. had she been traveling to AFR. With her normal five minute conversation at AFR, she would have left between 3:36 and 3:43 and arrived at Gillam's Restaurant between 3:37 and 3:46 at the earliest. In all likelihood the conversation at AFR would have taken longer than usual because of the changes in the forms that were to be used for payroll. It is, therefore, unlikely that she would have arrived at Gillam's before 3:45 and probably would have arrived closer to 4:00 p.m. had she first stopped at the payroll office. Using claimant's estimates, Rose would have arrived at Gillam's between 3:30 and 3:33 if she had driven directly there without stopping at the payroll office.

CONCLUSIONS OF LAW:

1. The insurer argues that this claim must be denied because Rose was intoxicated at the time of her death, that she was not an "employee" within the meaning of the Act, and because her death did not arise out of and in the course of her employment.

BAC

2. Compensation shall not be allowed "for an injury caused . . . by or during his intoxication." 21 V.S.A. §649. The insurer has the burden of proof to claim the benefit of §649. *Id.* The Department has previously ruled that the employer need not show any causal relationship between intoxication and injury to utilize § 649, and that "the fact of intoxication is a bar to recovery." *Garber v. Hill-Martin Corporation*, Opinion No. 11-88WC. Section 649 does not specifically define what constitutes intoxication. At the time it became part of our workers' compensation law in 1915 there was not statutory BAC test for intoxication under our DUI laws. See Annotations at 21 V.S.A. § 649 and 23 V.S.A. § 1204(a) respectively. Nevertheless, this Department has accepted the standard for intoxication under § 1201(a)(2) for the purposes of interpreting § 649. Thus, a worker with a BAC of 0.08 % or above is intoxicated under our workers' compensation law. *Estate of James Veach v. S. G. Realty*, Opinion No. 47-98WC (Aug. 31, 1998).
3. Because Rose's BAC was below 0.08%, the insurer cannot meet its burden under 21 V.S.A. § 649 of proving that this claim should be disallowed.

Statutory Employee

4. Next, the insurer argues that Rose was not a statutory employee under the Workers' Compensation Act, and consequently is not entitled to workers' compensation benefits. The thrust of this argument is that the corporate status of Time Capsules was involuntarily terminated prior to Rose's death. As a result, the legal status of Time Capsules at the time of the accident, and even at the time of the hearing in this case, was that of a partnership, defined as any association of two or more persons to carry on as co-owners of a business for profit. 11 V.S.A. § 1161(a). Under 21 V.S.A. § 601 (14) (F) a partner/owner of an unincorporated business is not an employee under the Workers' Compensation Act unless she notifies the commissioner that she wishes to be included in the provisions of the Act. As the insurer acknowledges, this provision goes on to say that

submitting a contract with the commissioner to elect coverage is sufficient notice. However, the insurer argues that such an election cannot be found in this case because it has not been shown that Rose or anyone else submitted the Wausau contract to the commissioner.

5. The insurer's argument on this issue exalts form over substance. At the time of Rose's death, Time Capsules had the same workers' compensation insurance policy in place with Wausau that it had before the corporation was involuntarily terminated. Coverage continued without interruption. That coverage satisfies the "election to be included" requirement of 21 V.S.A. § 601 (14)(F). Furthermore, in the "notification of change in ownership endorsement" in the contract between Wausau and Time Capsules, the failure to report a change in ownership could result in the "revision of the experience rating modification factor used to determine the premium," not in the cancellation of the contract. Accordingly, in this case where a corporation was involuntarily terminated, but workers' compensation insurance coverage continued, I conclude that a proper election was made, even if the Commissioner was not notified to the coverage. It, therefore, follows that Rose Brailsford was an "employee" as that term is defined under Vermont's workers' compensation law.

Arising out of and in the course of her employment

6. 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 relationship between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984).
7. An injury is compensable only if it arises out of and in the course of employment. It arises out of employment "when it occurs within a period of time when the employee was on duty at a place where the employee may reasonably expect to be while fulfilling the duties of the employment contract." *Miller v. IBM*, 161 Vt. 213 (1993), citing *Marsigli's Estate v. Granite City Auto Sales, Inc.*, 124 Vt. 95 (1964).
8. The claimant cites *Jedlicka v. Stratton Mtn. School*, Opinion No. 14-91WC (June 10, 1991) for the proposition that travel accidents occur in the course and scope of employment even where there is a "dual purpose for the subject journey." In *Jedlicka*, this Department recognized the "dual purpose" rule as defined by Judge Cordozo in *Marks Dependents v. Gray*, 251 N.Y. 90 (1920). That rule provides:

We do not say that service to the employer must be the sole cause of the journey, but at least it must be a concurrent cause. To establish liability, the inference must be permissible that the trip would have been made though the private errand had been canceled. . . . The test in brief is this: If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own. . . . If, however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been canceled upon failure of the private purpose,

though the business errand was undone, the travel is then personal, and personal the risk.

Estate of James Veach v. S. G. Realty, Opinion No. 47-98WC (Aug. 31, 1998), citing *Marks Dependents v. Gray*, 251 N.Y. 90, 167 N.E. 181 (1920); 1 *Larson's Workers' Compensation Law* § 16.02.

9. According to *Larson's*, if the trip had to be made by someone, at some time, for a business purpose, injuries suffered during the trip are compensable, even if that particular trip would have occurred despite a failure of the business purpose. *Id.* § 16.03. To be compensable, the business part of the trip, in this case a stop at the payroll office, need not be the sole cause of the trip. It need not be the dominant cause. *Id.* But it must be a concurrent cause.
10. Because Rose had hand delivered the payroll records to AFR since "restarting" the payroll business in June, it is reasonable to conclude that she would have delivered the records during the week of July 27 even though hand delivery was not her practice back in 1997. Therefore, if it can be shown claimant was en route to the payroll office the day of her fatal car accident, the part of her trip related to the Time Capsules payroll would indeed be a concurrent cause and compensable under the dual-purpose doctrine.
11. The crucial issue then becomes whether claimant has proven that Rose was in fact on her way to the payroll office when she had her fatal accident. The claimant maintains that Rose would have been traveling to the payroll office even if she had not been scheduled to work at Gillam's on July 27. Contrarily, the insurer argues that there is insufficient proof that Rose was en route to the payroll office. Next, even if it had been shown that she intended to stop there on her way to Gillam's, the insurer maintains it would have been only because it was convenient to drop off the payroll that day and that she would not have made a special trip.
12. The evidence presented was that both Rose and Gerald Brailsford were busy people. They had two sons to care for. School was not in session. They were developing the Time Capsules business. Rose worked not only at the Bromley site, she also did marketing and developing, as well as all of the administrative duties for Time Capsules, cared for her two sons, and also worked a second job at the restaurant.
13. Although it is likely that Rose would have hand delivered the payroll records to AFR at some time during the week of July 27, it is most likely because her traveling to Gillam's made it convenient to do so. However, the evidence does not support claimant's position that Rose intended to drop the records off on Monday, July 27 before she began her shift at Gillam's. Credible witnesses testified that Rose called in to Gillam's when she was going to be more than 30 minutes late for work. She left from home where such a call could easily have been made. Rose had been involved in revising the payroll record keeping system and reasonably would have expected a longer than normal conversation with Ms. Geiling when she dropped off the records. Yet she made no call to Gillam's. And she would have been close to an hour late had she stopped first at AFR.
14. The claimant argues that Rose was routinely late. However, the credible evidence was

that when she was late, it was 20 to 30 minutes. Although she had punched in as late as 45 minutes in the past, it was not unusual for managers to punch in sometime after their arrival and only when they had to use the cash register. Therefore, the timecards do not serve as an accurate record of claimant's arrival at work, even though she was an hourly employee. And it is unlikely that Rose would have been close to one hour late for work without calling first.

15. In the four weeks that Rose had been delivering payroll records, she made one delivery at 10:00 in the evening, presumably after her work at Gillam's. It is possible that she would have dropped the records off after work on July 27, not before. It is equally possible that she would have dropped the records off on Tuesday or Wednesday or even Thursday that week.
16. Taken as a whole, the credible evidence does not support the claimant's position that she was en route to AFR at the time of her death. Without a clearly established pattern of behavior or a reliable indicator of her intent, claimant has failed to sustain the necessary burden of proof. I am, therefore, unable to conclude that Rose's fatal accident arose out of and in the course of her employment with Time Capsules.

ORDER:

Based on the Foregoing Findings of Fact and Conclusions of Law, this claim is hereby DENIED.

Dated at Montpelier, Vermont, this 17th day of May 2000.

Steve Janson
Commissioner