

STATE OF VERMONT  
DEPARTMENT OF LABOR AND INDUSTRY

Estate of Nicolette Rollins	)	State File No. L-4068
	)	
v.	)	By: George K. Belcher
	)	Hearing Officer
Orleans Essex Visiting Nurses Association	)	
	)	For: R. Tasha Wallis
	)	Commissioner
	)	
	)	Opinion No. 19-01WC

The hearing was held in Newport, Vermont on May 11, 2001. The proposed Findings of Fact and Conclusions of Law were filed and the evidence was closed on May 21, 2001.

**APPEARANCES:**

Beth Robinson, Esq. for the claimant  
Matthew Gilmond, Esq. for the defendant

**ISSUE:**

Did the motor vehicle collision and ensuing death of Nicolette Rollins on August 24, 1997 arise out of and in the course of, her employment with the defendant?

**EXHIBITS:**

Claimant's Exhibit 1	Road Map of Barton-Orleans-Brownington area
Claimant's Exhibit 2	Road Map of Orleans
Claimant's Exhibit 3	Road Map of Barton
Defendant's Exhibit A	Videotape of deposition of Charlene Kuchinskas
Defendant's Exhibit B	Statements by Patient dated September 20, 1997 and August 29, 1997
Defendant's Exhibit C	Police Report of Motor Vehicle Accident dated September 5, 1997
Defendant's Exhibit D	Excerpt from Defendant Employee Handbook of Personnel Policies
Defendant's Exhibit E	Computer Schedule and Time Sheet for August 24, 1997
Defendant's Exhibit F	Defendant Clinical Policy Manual Excerpt
Defendant's Exhibit G	Am. Red Cross Skills for Caregiving Excerpt
Defendant's Exhibit H	Personal Log of Travel on 8/23/97 and 8/24/97
Defendant's Exhibit I	Annotated Computer Schedule and Time Sheet for 8/24/97

### **STIPULATION OF FACTS:**

1. At all times relevant to this case, Nicolette Rollins was an employee of the Orleans Visiting Nurses Association.
2. At all times relevant to this case, Cigna Corporation was on the risk for compensable workers' compensation claims against the Orleans Essex Visiting Nurses Association.
3. Ms. Rollins' average weekly wage is \$398.33.
4. On the evening of Sunday, August 24, 1997, Nicolette Rollins worked at the home of R. B. ("Client") to care for her two daughters, G. B. and C.K. She was scheduled to work at Client's home from 8:55 P.M. to 9:55 P.M. Although she arrived at Client's early and left early on the night in question. This was consistent with her practice. She frequently arrived and left earlier than her scheduled times, depending on how quickly she was able to complete her work with other patients. The patient visits at the Client's home were the last ones of the night scheduled for Ms. Rollins.
5. Client lived on Chalifoux Road in Brownington, Vermont.
6. For the weekend shift, Ms. Rollins worked on the day of the accident. VNA policy at the time was to pay for both time and mileage from portal to portal (from the time she left home that evening until she reached home at the end of the shift).
7. On the evening of August 24, 1997, at approximately 9:23 P.M., Ms. Rollins was involved in a car accident on the Barton Hill Road in Barton, Vermont. In particular, she was struck by an oncoming car that crossed the centerline. The road is also called Maple Hill or Maple Lane or Barton Hill Road and is shown as Nye Road on some maps.
8. This accident occurred after Ms. Rollins left Client's home and before she arrived at her home for the evening.
9. At the time of the accident, Ms. Rollins was traveling south from the Orleans Village toward Barton. The accident occurred 1.5 miles south of Cottage Street, in Orleans Village.
10. Ms. Rollins ultimately died as a result of the injuries she sustained in the August 24, 1997 accident.

### **FINDINGS OF FACT:**

1. Nicolette Rollins was a Licensed Nurses Assistant (LNA). She had worked for the defendant for about five years prior to the accident on August 24, 1997. Her job entailed travel in her own vehicle to the homes of patients for various treatments and services.

2. Ms. Rollins was married to Mark Rollins at the time of the accident. She had three children, Joseph Rollins, Becky Rollins, and Windy Chamberlain. The children were 17, 15 and 21 years old, respectively, at the time of the accident.
3. On Sunday, August 24, 1997 Nicolette Rollins was working a "split shift" for the defendant. She was assigned patients from 7:00 A.M. until 1:10 P.M. and then from 6:30 P.M. until 9:55 P.M. She had approximately 9 patient visits to make at various locations. See Defendant's Exhibit E. Her employment arrangement with the defendant for weekend duty covered her from "portal to portal" meaning that she was paid an hourly wage and reimbursed mileage, from her home to each stop at a patient's home and then back to her home. See Defendant's Exhibit D, Paragraph 7.1.3. Because it was a split shift, she was only paid once for her departure and return home.
4. Her last job of the day was at the home of Client where she treated Client's daughters, G.B. and C.K. She was scheduled to be there from 8:55 P.M. until 9:55 P.M., but she arrived about 8:00 P.M. and she left close to 9:00 P.M. Charlene Kuchinskas testified that Ms. Rollins left between 8:30 and 9:00 P.M. Client's statement indicated that she departed about 9:00 P.M.
5. Upon her departure from the Client's house in Brownington, Vermont, Ms. Rollins had several routes upon which she could travel to her home in Barton, Vermont. She could have taken Telefer Road (also known as Barton Mountain Road). This road is a dirt road from Route 58 to Barton. She also could have taken Nye Road (also known as Hill Road or Maple Lane Road). This road is completely paved from Route 58 to Barton. At the time of the accident, the Nye Road was a better road for travel than the Telefer Road. The Nye Road is between 2-3 miles greater in distance than the Telefer Road. The Nye Road route passes through Orleans and very near the home of Scott Swanson. (Joseph Rollins was staying at the home of Scott Swanson during the evening of August 24, 1997.) The total distance from the Client's house to the Rollins house via the Nye Road is about 12.7 miles. Ms. Rollins picked the Nye Road.
6. At about 9:23 P.M. on August 24, 1997, Ms. Rollins' vehicle collided with a vehicle driven by Shawn Smith. Mr. Smith's vehicle crossed over the centerline as it came up a hill and it hit the Rollins vehicle in her lane. It did not appear that the Rollins vehicle was in any way at fault for the accident. See Defendant's Exhibit C, Police Report
7. All the evidence indicates that Ms. Rollins was headed home at the time of the accident. She was alone in her car at the time of the accident. She died at the Dartmouth Hitchcock Medical center from the injuries she sustained in the accident, which included massive internal bleeding and a fractured neck.
8. The prime issue in the case is whether she deviated in her route home in a way, which would make the accident non-compensable.

## **EVIDENCE CONCERNING DEVIATION:**

1. Nancy Warner of the Essex Orleans Visiting Nurse Association was a witness for the defendant. She is the Executive Director of the defendant nursing agency and she has held that post for 30 years. She testified that it is the well-known policy of the agency that employees are supposed to take the shortest distance between departure and destination. Errant (or "padded") mileage is not compensated. She indicated that an employee would be disciplined if it were discovered that there was deviation or padding mileage. According to her, unapproved deviation from the shortest route is not permitted under the policy and practices of the agency. This policy is not explicitly stated in the policy manuals of the agency, but it is part of the orientation and instruction of employees. Moreover, Ms. Warner indicated that, in a conflict between shortest distance and shortest time, the employee should always choose the shortest distance. Following her theory to its conclusion, the longer route chosen by Ms. Rollins was not permitted by the agency and, is, therefore, a deviation, which would make the accident non-compensable.
2. Ms. Warner refused to acknowledge that the employees were given much, if any, discretion concerning the choice of a route between points, regardless of weather, road-conditions, or other hazards. Ms. Warner also testified that it was not permitted for LNA's to make personal telephone calls from the home of patients or to discuss personal matters with patients. She also testified that any deviation from the assigned times of the scheduled visits would require an authorization from a LNA supervisor. Thus, if Ms. Rollins arrived at the Client's home at 8:00 P.M. instead of 9:00 P.M., then there should have been some authorization by a nursing supervisor to justify the change. The inference from all this is that Ms. Rollins was breaking the policies of the agency when she deviated from the times of the visit, the rules concerning personal calls and conversations, and by taking a longer route home than the Telefer Road.
3. Pamela Brainard is the Director of Home Care Operations for the defendant. She is a Registered Nurse and she has held the positions of Visiting Nurse in the field, LNA Supervisor, and Case Manger. She has trained LNA's and oriented new employees to the policies of the agency. She acknowledged that personal judgment does play a role in the choice of travel routes between patient homes, as well as a consideration of the efficiency of alternate routes. She testified that the shortest route was the Telefer Road.
4. Mark Rollins testified that Ms. Rollins usually traveled the Nye Road instead of the Telefer Road because it was a paved road and not a dirt road. He indicated that she did that, in part, to protect her car. Joe Rollins, son of Nicolette Rollins, indicated that she avoided dirt roads as a matter of habit if they could be avoided. Windy Chamberland, the daughter of the decedent, testified that Nye Road was her mother's most usual choice of road when she was headed North of Barton.

5. Client, the mother of the last two patients visited by Ms. Rollins (and quite possibly one of the last persons to see Ms. Rollins before the accident), signed an unsworn statement to the effect that Ms. Rollins told her that Ms. Rollins had to pick up her son, Joseph Rollins, on her way home on the night of August 24, 1997. Client, according to her statement, overheard Ms. Rollins tell her daughter that she was going to pick up Joseph Rollins on her way home. Joseph (who was 17 years old at the time) was staying at a friend's house in Orleans on the night of the 24th of August 1997. This was the last night of summer vacation before school started. The friend was Scott Swanson. If Ms. Rollins did stop in Orleans to pick up her son, or to verify that he was there, it would be likely for her to use the Nye Road rather than the Tefeler Road.
6. Client's statement is inconsistent with the testimony of Joseph Rollins and that of Scott Swanson. Both of them testified that Ms. Rollins did not come to the Swanson home on the evening of the 24th of August, 1997, nor was there any arrangement for her to pick up her son. In fact, Joseph testified that he had a telephone conversation with his mother on that very evening and that she understood that he was staying with Scott for the evening. According to Joseph, she understood that he would not be coming home that night. (Obviously, Ms. Rollins did not pick up her son before the accident, because he was not with her at the time of the collision.)
7. Client's statement indicated that Ms. Rollins called her daughter to find out where Joseph was and, when she found that out, Ms. Rollins indicated that she was going to pick him up on the way home. Client's statement does not say anything about Ms. Rollins calling her son or speaking with him.
8. The Client statement was admitted under Rule 7(a)(1) of the Workers' Compensation Rules. Client was deceased and unavailable at the time of trial. Although the statement was admitted into evidence, and, although it provides some evidence that Ms. Rollins may have intended to pick up her son on the way home, the statement is weak evidence. First, the basis, in part, for Client's statement was what she overheard of a telephone conversation, which Ms. Rollins supposedly had with her daughter. Second, the statement somewhat impugns the declarant's own judgment, since at one point Client states that the most direct way home would be Route 5 instead of Nye Road (Barton Hill Road) or the Tefeler Road. The Client statement was contradicted by other evidence. Finally, the statement fails to explain how Ms. Rollins spoke with her son on the evening in question. Possibly Client did not overhear that conversation.
9. The sworn deposition of Charlene Kuchinskis was part of the evidence. Ms. Kuchinskis was unclear about whether Ms. Rollins was going to see her son or not. At first she said she could not really remember one way or the other. After repeated prompting, she said that she thought Ms. Rollins was going to pick up her son. With the passage of time, it seems fair to accept her first answer which was that she could not clearly remember whether Ms. Rollins said she was going to pick up her son or not.

## 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 relationship between the injury and the employment. Egbert v. The Book Press, 144 Vt. 367 (1984).
2. An injury is compensable only if it arises out of, and in the course of, employment. 21 VSA Sec. 618(a)(1). An injury arises "out of employment" if the accident would not have occurred but for the fact that the conditions and obligations of the employment place the claimant in the position where the claimant was injured. Miller v. IBM, 161 Vt. 213 (1993). As a general rule, "an injury arises in the course of employment when it occurs within the period of time when the employee was on duty at a place where the employee may reasonably be expected to be". Id. at p. 215.
3. Generally speaking, employees are not within the scope of employment when they are traveling to and from work, off premises. There is an exception, however, where the employee is a traveling employee (with no defined "premises" upon which work is performed) and, where the travel to and from work is compensated, both by hourly payment and mileage. 1 A. Larson and L. Larson, *Larson's Worker's Compensation Law* § 14.06 (2000); cf. Parker v. Lamoille County Mental Health, Opinion 9-94WC (April 18, 1994). In this case, the employee would be within the scope of employment for her travel to and from work, unless it is proven that there was a substantial deviation, which took the claimant outside of the course of employment.<sup>1</sup>
4. As was stated in the case of Gurnovich v. Industrial Commission, 556 P.2d 1131, 113 Ariz. 469 (1976), generally a deviation from a business trip for purely personal reasons takes an employee out of the course and scope of his employment. See 1 *Larson's* § 17.03D[5] at D17-31. It does not follow, however, that every deviation will result in a denial of workmen's compensation coverage, and the question is whether, under all the circumstances, the deviation is sufficiently substantial to take the workman out of the course and scope of his employment. Id. at p. 1133.
5. The determination of whether a deviation is substantial depends upon the particular facts of each case. Factors which have been identified as bearing on the question include: (1) the amount of time taken up by the deviation; (2) whether the deviation increases the risk of injury; (3) the extent of the deviation in terms of geography; (4) the degree to which the deviation caused the injury. Ogren v. Bitterroot Motors, Inc., 723 P.2d 944 (Mont.) 1986 at p. 948. Vermont has adopted similar criteria to determine if horseplay injuries are so

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<sup>1</sup> The claimant argues that the "dual purpose rule" set forth in the case of Estate of Veech v. S.G. Realty, Opinion No. 47-98WC (Aug. 31, 1998) would make the accident compensable if employment were a concurrent cause of the trip. See also Brailsford v. Time Capsules, Opinion No. 12-00WC (May 17, 2000). The "dual purpose rule" has limited application to deviation type cases, since the deviated portion of the trip rarely has any employment purpose ... dominant, concurrent or otherwise. The more important question is whether the deviation is so substantial as to take the accident out of the course of employment.

- removed from the employment as to be non-compensable. Clodgo v. Rentavision, 166 Vt. 548 (1997). In that case the Commissioner was directed to evaluate "the extent and seriousness of the deviation" and "the completeness of the deviation". Id. at p. 552.
6. In this case, there was not sufficient evidence to establish a "substantial deviation". Whether Ms. Rollins chose to drive home on a dirt road or a paved road, is a decision, which is within the reasonable discretion afforded to her in this situation. Clearly, Ms. Rollins did not pick up her son, or even see him. The weak evidence that she might have gone to see him was negated by the testimony of her son and his friend.
  7. One can speculate that Ms. Rollins may have deviated in order to visually check to see if her son was in Orleans, or she may have deviated to pick him up, and then changed her mind. This would be speculation and is not the sort of evidence upon which compensation decisions should be made. It is much more likely, and the finding here is, that Ms. Rollins chose the route she traveled because it was a better road for travel.
  8. While it is agency policy that employees should take the shortest distance between routes, for compensation purposes there exists a reasonable exception for road conditions, weather and road hazards. While the defendant might pay mileage reimbursement only for the shortest distance, the question of mileage reimbursement is certainly a different question than the question of whether an employee who is returning home at the end of the shift is within the scope of their employment. The employment contract here provides compensation to and from home on the weekends. (The travel time which was on the defendant scheduled for Ms. Rollins was only ten minutes for the 10-12 mile trip from the Client house to the Rollins home on back roads. It would be absurd to say that the accident was non-compensable because she took longer than the unreasonable time afforded for her to return home.) The agency had an employer/employee relationship with the claimant while she was traveling home while using any reasonable route home.
  9. Even if we assume for the sake of argument that Ms. Rollins did deviate in some way related to her son, such a deviation would not have been "substantial" under the criteria set forth in the authorities cited above. Since she left the Client home at about 9:00 P.M. and the accident was at 9:23 P.M., there was hardly any time, if any, for her to do personal business. The deviation, if any, could not be said to increase the risk, since it can be inferred that driving on a better, paved road is generally safer than driving on a dirt road. The deviation was only 2-3 miles out of 12.7 miles for the total trip; thus it was not a major increase in mileage. It appears that the accident was totally out of the control of Ms. Rollins, so it cannot be said that the deviation in any way was the cause of the accident. Thus, under the four criteria cited above, the deviation (if there were one) was not substantial.
  10. Finally, the majority of courts consider that once an item of personal business which causes a deviation is completed, and the employee is back on the route, then the deviation taint is removed. As described in 1 *Larson's* § 17.04 (3), where deviation is slight and personal business is completed "[I]t is difficult to believe that any court would consider the remainder of the journey tainted with the personal element when probably nine-tenths of the mileage covered thereafter was exclusively for the employer's benefit". P. 17-28.

11. The claimant's choice of the Nye Road for her trip home was not a deviation, which would deny her legitimate Workers' Compensation benefits.
12. The claimant is entitled to an award of costs and attorney's fees. The claimant has been represented on a contingent-fee basis. The total past-due benefits in connection with this claim exceeds \$35,000.00 so the claimant's fee award on a contingent fee basis will be capped at \$7,000.00 pursuant to Vermont Worker's Compensation and Occupational Disease Rule 10. Therefore, fees are awarded in the amount of \$7,000.00. In addition, claimant incurred expenses in the amount of \$1,426.53 in connection with this case. Expenses are awarded in the amount of \$1,426.53.

**ORDER:**

THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that:

Cigna Corporation, or in the event of its default, the Essex-Orleans Visiting Nurses Association, shall provide the claimant with all benefits to which the Estate of Nicolette Rollins and her statutory beneficiaries are entitled under the terms of this opinion, including death benefits and medical expenses; and

Cigna Corporation, or in the event of its default, the Essex-Orleans Visiting Nurses Association, shall pay costs in the amount of \$1,426.53 and attorney fees in the amount of \$7,000.00 to the claimant.

Dated at Montpelier, Vermont this 5<sup>th</sup> day of July 2001.

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R. Tasha Wallis  
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior (county) court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.