Kathleen Fosher v. Fletcher Allen Health Care (May 5, 2011)

STATE OF VERMONT
DEPARTMENT OF LABOR

Kathleen Fosher

v.

Fletcher Allen Health Care

Opinion No. 11-11WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. W-02854

OPINION AND ORDER

Hearing held in Montpelier, Vermont on February 9, 2011
Record closed on February 28, 2011

APPEARANCES:

Michael Green, Esq., for Claimant
Stephen Ellis, Esq., for Defendant

ISSUE PRESENTED:

To what amounts, if any, is Claimant entitled as mileage reimbursement for her travel to and from medical appointments necessitated by her work injury?

EXHIBITS:

Claimant's Exhibit 1:	Kim Barcomb deposition, January 12, 2011
Claimant's Exhibit 2:	Claire Lynn Fosher deposition, January 12, 2011
Claimant's Exhibit 3:	Mileage calculation
Claimant's Exhibit 4:	Letter to Peggy Tucker, November 16, 2007
Defendant's Exhibit A:	Letter from Rebecca Smith, February 17, 2010
Defendant's Exhibit B:	First Report of Injury, September 29, 2004
Defendant's Exhibit C:	Email communication from Rebecca Smith, March 1, 2010
Defendant's Exhibit D:	Letter from Agnes Hughes, April 21, 2010
Defendant's Exhibit E:	Letter to Agnes Hughes with attached mileage log, April 27, 2010

Defendant's Exhibit F:	Medical record, January 19, 2004
Defendant's Exhibit G:	Mileage calculation from Champlain to Plattsburgh, NY
Defendant's Exhibit H:	Mileage calculation, claimed vs. allowed
Defendant's Exhibit I:	Temporary Total Disability Agreement (Form 21)
Defendant's Exhibit J:	Medical records, September 2004 and August 2005
Defendant's Exhibit K:	Letter from Michael Green, Esq., December 8, 2010
Defendant's Exhibit L:	Letter from Michael Green, Esq., October 7, 2010
Defendant's Exhibit M:	Mileage calculation, claimed vs. allowed
Defendant's Exhibit N:	Workers' Compensation Rule 12.2000
Defendant's Exhibit O:	Kim Barcomb deposition, January 12, 2011
Defendant's Exhibit P:	Claire Lynn Fosher deposition, January 12, 2011

CLAIM:

Mileage reimbursement pursuant to Workers' Compensation Rule 12.2000
Costs and attorney fees pursuant to 21 V.S.A. §678

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was her employer as those terms are defined in Vermont's Workers' Compensation Act.

2. Judicial notice is taken of all relevant forms contained in the Department's files relating to this claim.

3. Claimant began working for Defendant in 1979. Her most recent job involved data entry for insurance billing purposes. In September 2004 she suffered a repetitive stress injury to her right wrist causally related to her computer work. Defendant accepted the injury as compensable and paid workers' compensation benefits accordingly.

4. When Claimant first began working for Defendant, she was still living at her family home on Leorey Court in Colchester, Vermont. Claimant lived there until 1996, when her father retired and her parents relocated to Champlain, New York. Claimant moved with them. Thereafter, she continued to work for Defendant in Burlington, even though the commute back and forth was difficult. Claimant worked odd hours and the drive was stressful at times.

5. Within a year after moving to Champlain, Claimant devised a strategy for easing her commute. During the week she would stay at the home of her sister, Kim Barcomb, in Milton, Vermont. On weekends she would return to her home in Champlain. This arrangement persisted until approximately 2002. It ended because Ms. Barcomb's home was undergoing renovations and it became inconvenient for Claimant to stay there.

6. For the next year or so, Claimant stayed during the week with a co-employee, Dorothy Michelson, at her home on Prim Road in Colchester. She continued to commute back to her Champlain residence on the weekends.

7. In 2003 Claimant learned from an acquaintance at her church, Sister Carmen Proulx, of two elderly women who took in boarders at their home, located on Don Mar Terrace in Colchester. With Sister Carmen's introduction, Claimant began renting a room there. Claimant paid $350 per month as rent, typically in cash, pursuant to a verbal agreement. There was no written lease.

8. As had become her practice over the previous six years or so, with the Colchester room rental Claimant was able to reside locally during the work week and commute back and forth to Burlington from that location. On the weekends, she continued to reside with her parents in Champlain.

9. In October 2005 Claimant's treating physician determined that she was disabled from working at her data entry job. At that point, because she no longer had need of a local room from which to commute to a job in Burlington, Claimant relinquished her Colchester rental and moved back full-time to her Champlain home. Claimant has lived in Champlain since.

10. Since her 2004 work injury, Claimant has treated with medical providers in both Burlington and Plattsburgh, New York. The distance between her Champlain residence and her Burlington medical appointments is 122 miles round trip. To her Plattsburgh appointments the distance is 40.2 miles round trip. At the time of her injury, Claimant's work week commute from Colchester to Burlington was 16 miles round trip.

11. Claimant has at all times maintained her Champlain address as her permanent residence, even after she began staying in Vermont during her work week. She listed the Champlain address as her legal address on paychecks, bank and credit card statements, health insurance documents and tax returns. Claimant never received mail at any of her Vermont addresses.

12. Claimant's sisters, Kim Barcomb and Claire Lynn Fosher, testified by deposition. Both corroborated Claimant's testimony with respect to her local commute between Colchester and Burlington during the work week and her longer commute back to Champlain on the weekends. I find their testimony to be credible in all respects.

13. Defendant offered medical notes from two separate providers referencing Claimant's commute. The first one, dated January 19, 2004 – some months before her work injury – states, "She lives with [her parents] part-time, she also lives in Vermont with an elderly pair of women." The second one, dated September 29, 2004 – shortly after her work injury – states, "She tries to do more activities with her left arm including her long drive to work. It is noted that she does have an hour and a half commute from Champlain, New York by way of the ferry." From this evidence, Defendant asserts that by the time her injury occurred Claimant was no longer staying in Colchester during her work week and instead was commuting full-time from her Champlain home. I find Claimant's explanation more credible – that the second provider simply misunderstood Claimant's description of her weekend commute to include her weekday commute as well.

14. On April 27, 2010 Claimant produced a mileage log in which she detailed the mileage to and from her various medical appointments and calculated the amount she claimed was due, $2,410.36. On May 10, 2010 Defendant tendered a mileage reimbursement check to Claimant in the amount of $382.61. Claimant considered the amount tendered to be inadequate, and therefore returned the check without cashing it.

15. At the appropriate annual mileage reimbursement rates, and assuming that Claimant's normal commute to and from work at the time of her injury was between Colchester and Burlington, the total amount due her is $2,346.64.

CONCLUSIONS OF LAW:

1. According to Workers' Compensation Rule 12.2100, an injured worker who is required to travel for treatment of a compensable injury is entitled to reimbursement for mileage "beyond the distance normally traveled to the workplace." The purpose of the rule is to make the worker whole, by providing compensation for expenses that he or she would not have incurred but for the work injury. At the same time, the rule is phrased so as to deny reimbursement for regular commuting expenses that presumably the worker would have had to bear even had there been no injury.

2. The evidence here establishes that Claimant's normal work week commute at the time of her injury was between Colchester and Burlington, a distance of 16 miles. Claimant's testimony in this regard was entirely credible. It was amply supported by that of her sisters as well.

3. Defendant argues that even if the evidence establishes that Claimant lived in Colchester at the time of her injury and only later moved back to Champlain, she still is not entitled to mileage reimbursement for medical appointments between Champlain and Burlington, as the distance traveled was greater than what it would have been had she continued to reside in Colchester. I disagree. In both language and spirit, Rule 12.2100 requires reimbursement for actual expenses necessitated by the work injury, not hypothetical ones.

4. I conclude that Claimant has sustained her burden of proving her entitlement to mileage reimbursement totaling $2,346.64. This represents the distance she actually traveled for medical appointments (between Champlain and either Burlington or Plattsburgh) over and above her normal commute distance at the time of her work injury (between Colchester and Burlington).

5. Pursuant to 21 V.S.A. §664, Claimant is entitled to an award of interest from the date on which Defendant's obligation to pay compensation began. Taking into account the fact that Defendant previously tendered a check for $382.61, which Claimant refused to accept, interest should be calculated on the remainder, $1,964.03, commencing on the date on which Claimant produced her mileage log for Defendant's review, April 27, 2010.

6. Claimant has submitted a request under 21 V.S.A. §678 for costs totaling $351.40 and attorney fees totaling $3,717.50.[1] An award of costs to a prevailing claimant is mandatory under the statute, and therefore these costs are awarded.

7. As for attorney fees, these lie within the Commissioner's discretion. Among the factors to be considered are whether the attorney's efforts were integral to establishing the claimant's right to compensation and whether the claim for fees is proportional to the attorney's efforts in light of the difficulty of the issues raised and the skill and time expended. *Lyons v. American Flatbread*, Opinion No. 36A-03WC (October 24, 2003).

8. This case is somewhat unusual in that the fees charged exceed the amount that was at stake. Nevertheless, I am convinced that Claimant would not have been successful were it not for her attorney's efforts, and for this the attorney deserves to be compensated. I conclude that it is appropriate to award all of the fees requested.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant is hereby **ORDERED** to pay:

1. Mileage reimbursement totaling $2,346.64;

2. Interest calculated in accordance with Conclusion of Law No. 5 above; and

3. Costs totaling $351.40 and attorney fees totaling $3,717.50.

DATED at Montpelier, Vermont this 5th day of May 2011.

_____
Anne M. Noonan
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 court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§670, 672.

[1] Of the hourly charges submitted, 8.6 were incurred prior to June 15, 2010, the effective date of amended Workers' Compensation Rule 10.1210. Those charges are limited to the maximum rate in effect at the time they were incurred, or $90.00 per hour. Charges incurred after Jun3 15, 2010 are subject to the amended rate, $145.00 per hour. *Erickson v. Kennedy Brothers*, Opinion No. 36A-10WC (March 25, 2011).