Kathryn Lopez v. The Howard Center (August 7, 2014)

STATE OF VERMONT
DEPARTMENT OF LABOR

Kathryn Lopez	Opinion No. 12-14WC
v.	By: Jane Woodruff, Esq. Hearing Officer
The Howard Center	For: Anne M. Noonan Commissioner
	State File No. FF-51946

OPINION AND ORDER

Hearing held in Montpelier, Vermont on March 24, 2014
Record closed on June 16, 2014

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
Erin Gilmore, Esq., for Defendant

ISSUE PRESENTED:

Did Claimant's right upper extremity injury arise out of and in the course of her employment?

EXHIBITS:

Claimant's Exhibit 1: Three photographs of the exterior of Claimant's townhouse

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642
Medical benefits pursuant to 21 V.S.A. §640
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 file relating to this claim.

Claimant's Duties

3. Claimant has worked as a case manager for Defendant for the past 17 years. She carries a caseload of between 30 and 32 clients, all of whom suffer from a major mental illness. She provides supportive counseling to help her clients remain in the community. Claimant sees her clients both in their homes and at her place of work.

4. Claimant has an office on the first floor of Defendant's premises on Flynn Avenue in Burlington, Vermont. She enters the building through a rear door. The public enters through a different door, which opens into a lobby. The public normally cannot gain further access to the inner offices where Claimant's office is located. Entry to that area is via a locked door with a key code that is only available to Defendant's employees. However, Claimant credibly testified that at times clients have discovered what the code is, which necessitates a code change.

5. Claimant does not meet with her clients in her office, nor do the two colleagues with whom she shares office space. There are rooms specially designated for client meetings in the area behind the key-coded door. Claimant testified credibly that at times clients will mill about the hallway outside her office unsupervised, waiting either for their caseworker or for an appointment.

6. Claimant self-directs her daily schedule and every day presents her with a different mix of duties. Defendant allowed her discretion to decide how to best assist and counsel her clients.

Client Resource Materials

7. Claimant credibly testified that Defendant permitted her to use its funds to purchase resource materials that would assist her work with her clients. Typically these materials included self-help books and compact discs, which Claimant would lend to clients who she thought would benefit from them. Claimant kept the more expensive books and CDs at her home to protect them from theft at the office.

8. Claimant credibly testified that she was not aware of any policy, written or otherwise, whereby Defendant mandated that the resource materials were to be kept on its premises. Claimant's supervisor, Cathy Cashman, and Ms. Cashman's supervisor, Elaine Soto, both corroborated this testimony.

Claimant's Trip Home

9. On August 12, 2013 Claimant went about her workday as usual. She saw clients at her office in the morning and had appointments scheduled into the afternoon. At noontime she realized that she had forgotten a book at home that she wanted to loan to her 1:00 PM client. As she only saw this client every other week and he was in what Claimant credibly described as "a crisis," she decided to return to her home to retrieve the book. The use of this book was part of her treatment plan for this client. I find Claimant's testimony credible.

10. Claimant also had a client scheduled for 12:30 PM that day; however, she had reason to believe that client might not keep the appointment. At 12:15 PM she told the secretary she needed to run an errand and she might be a little late for her 12:30 PM appointment. At that point she left Defendant's premises to retrieve the resource book from her home. I find this testimony credible.

11. Claimant traveled directly to her home from work. She ran no other errands on the way, nor did she stop to have lunch at her home. Her sole reason for returning home was to retrieve the book for her client. She entered her townhouse, got the book and immediately put it in her vehicle. Being security conscious, before she left to return to work, she wanted to make sure her townhouse was locked. Claimant was credible in this testimony in all regards.

12. Claimant left her vehicle to check her door. As she opened it, her dog escaped into the backyard. Knowing that time was of the essence, she thought she could lure her dog inside with a ball. She went up on her deck to retrieve a ball. As she hurried to the top of the stairs and across the deck, her feet got tangled in a hammock. Claimant lost her balance and fell very hard into her sliding glass door. She credibly testified that she spent only a matter of minutes at her home before she fell.

13. Claimant knew she was hurt seriously, as she could not feel her right arm and shoulder. She called 911 and was taken to the hospital. Claimant sustained a spiral fracture of her humerus, which was surgically repaired that same night. Thereafter, she underwent physical therapy and acupuncture. Her physical therapy was ongoing at the time of the formal hearing.[1]

14. Defendant did not discipline Claimant in any way, either for returning home to retrieve the book or for safekeeping resource materials at her home.

CONCLUSIONS OF LAW:

1. To establish a compensable claim under Vermont's workers' compensation law, a claimant must show both that the accident giving rise to his or her injury occurred "in the course of the employment" and that it "arose out of the employment." *Miller v. IBM*, 161 Vt. 213, 214 (1993); 21 V.S.A. §618.

2. An injury occurs 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 was reasonably expected to be while fulfilling the duties of [the] employment contract." *Miller, supra* at 215, *quoting Marsigli Estate v. Granite City Auto Sales, Inc.*, 124 Vt. 95, 98 (1964).

[1] Claimant was temporarily totally disabled from work from August 12, 2013 until the middle of November 2013. The parties are not litigating either the reasonableness of Claimant's medical treatment or her time out of work.

3. An injury arises out of the employment "if it would not have occurred *but for* the fact that the conditions and obligations of the employment placed claimant in the position where [claimant] was injured." *Shaw v. Dutton Berry Farm*, 160 Vt. 594, 599 (1993), *quoting* 1 Larson, *Workers' Compensation Law* §6.50 (1990) (emphasis in original). This so-called "positional risk" analysis lays responsibility on an employer when an employee's injury would not have occurred "but for" the employment and the worker's position at work. *Id.*

4. Putting these two prongs of the compensability test together, the "in the course of" requirement establishes a *time and place* connection between the injury and the employment, while the "arising out of" requirement establishes a *causal* connection between the injury and the employment. *See Walbridge v. Hunger Mountain Co-op*, Opinion No. 12-10WC (March 24, 2010), citing *Spinks v. Ecowater Systems*, WC 04-217 (Minn. Work.Comp.Ct.App., January 21, 2005). Both connections are necessary for a claim to be compensable. *Carlson v. Experian Information Solutions*, Opinion No. 23-08WC (June 5, 2008).

The "In the Course Of" Prong

5. Defendant argues that Claimant was under no work-related duty to retrieve the resource book from her home, during the lunch hour, away from Defendant's premises. For these reasons, Defendant asserts that Claimant has failed to satisfy the first half of the compensability test.

6. A key component of what constitutes an employee's work-related "duty" is whether the activity benefits the employer. If it does, then it fits within the parameters of the term, even if the employer did not specifically direct the employee to undertake the activity. *Kenney v. Rockingham School District*, 123 Vt. 344 (1963).

7. In this case, Claimant managed cases and delivered direct services to Defendant's clients. She self-directed her schedule and more important, she used her discretion to decide how best to counsel her clients. All of her clients had some diagnosis of a major mental illness. In her approach to case management, she lent resource materials to clients who she believed would benefit from that type of service. Here, she reasonably concluded that retrieving a book from home would assist a client in crisis, and in that way would benefit her employer as well. At least initially, her trip home thus occurred within a period of time when she was on duty at a place where she was reasonably expected to be while fulfilling the duties of her employment contract. *Miller, supra*.

8. Generally speaking, an employee is not within the scope of employment when he or she is injured while traveling to and from work, unless the injury occurs on the employer's premises. *Miller, supra* at 216. There is an exception to this rule, however, in cases involving traveling employees – those who either have no fixed place of employment or who are engaged in a special errand or business trip at the time of their injuries. 1 Lex K. Larson, *Larson's Workers' Compensation* §17.01 *et seq.* (Matthew Bender Rev. Ed.). As Claimant was engaged in a special errand to retrieve the resource book, she falls within this exception.

9. There is as well, however, an exception to the exception. If a traveling employee deviates substantially from a journey's business purpose in order to pursue personal interests instead, an injury sustained during the deviation will no longer be deemed to be within the course of employment. *Estate of Rollins v. Orleans Essex Visiting Nurses Assn.*, Opinion No. 19-01WC (June 5, 2001); *Larson's, supra* at Chapter 17, p. 17-1.

10. The inquiry does not end there, however. Not every personal deviation will justify a denial of workers' compensation coverage. Rather, the question in each case is whether, under all the circumstances, the deviation is substantial enough to take the worker out of the course and scope of his or her employment. *Estate of Rollins*, *supra.* Factors bearing on this question include:

    (1) The amount of time taken up by the deviation;

    (2) Whether the deviation increased the risk of injury;

    (3) The extent of the deviation in terms of geography; and

    (4) The degree to which the deviation caused the injury.

    Id.; *see generally, Larson's Workers' Compensation, supra*; *Estate of Carr v. Verizon New England*, Opinion No. 08-11WC (April 29, 2011).

11. Applying these concepts in this case, the question becomes, did Claimant deviate so substantially from the business purpose of her trip as to remove her actions from the course and scope of her employment, first when she decided to check to make sure her door was locked, and subsequently, when she fell while attempting to lure her dog back inside?

12. Considering the first and the third factors, Claimant's deviation took place over only a matter of minutes, and covered only the distance from her car to her front door, and then to her deck. In terms of both time and geography, I conclude that it was not substantial.

13. As for the second factor, the deviation occurred solely on Claimant's property, an area that presumably she knew well. She did nothing to increase the risk of injury, as might have been the case, for example, had her dog strayed into a busy street rather than into her yard. Hers was a momentary diversion, insubstantial in terms of risk. *See Larson's, supra* at §17.06[3] and cases cited therein. I conclude that the second factor favors compensability.

14. As to the fourth and final factor, I conclude that Claimant's deviation did play a role in causing her injury. By the time she ran up onto her deck to retrieve the ball for her dog, the business purpose for her trip home had ended. Had she not deviated, she would not have fallen. That the deviation played a role in causing her injury is inescapable. *See, e.g., Ogren v. Bitterroot Motors, Inc.*, 222 Mont. 515 (1986) (deviation directly caused injury where, after business purpose for employee's trip had ended, he travelled on to pick up his daughter and then fell asleep while driving through the night), cited with approval in *Estate of Rollins, supra*.

15. Given the particular facts of this case, I conclude nonetheless that Claimant's failure to satisfy the fourth prong of the "course of employment" test is not fatal to her claim. The nature and extent of her deviation as a whole was temporally brief, geographically short and reasonable under the circumstances. Considering all four factors together, it was not substantial. For that reason, I conclude that it did not take her out of the course of her employment.

The "Arising Out Of" Prong

16. Defendant next asserts that Claimant's injuries did not arise out of her employment. Given that it did not specifically direct the manner in which Claimant delivered services to her clients, it argues first, that it did not require her to travel home to retrieve the book she wanted for her 1:00 PM client, and second, that she could have brought the book in at another time.

17. As the Supreme Court noted in *Shaw, supra* at 598, ordinarily if an injury occurs in the course of employment, it also arises out of it, "unless the circumstances are so attenuated from the conditions of employment that the cause of the injury cannot reasonably be related to the employment." That is not the case here.

18. To satisfy the requirements of the "arising out of" prong, a causal connection must exist between an employee's injury and his or her work; not necessarily in the sense of proximate or direct cause, but rather as an expression of origin, source or contribution. *Snyder v. General Paper Corp.*, 152 N.W.2d 743, 745 (Minn. 1967); *see, Shaw v. Dutton Berry Farm*, 160 Vt. 594, 597-98 (1993) (overruling *Rothfarb v. Camp Awanee, Inc.*, 116 Vt. 172 (1950), and characterizing tort-type proximate causation in the workers' compensation context as narrow, unduly restrictive and contrary to the remedial purpose of the statute).

19. Vermont has long adhered to the "positional risk" doctrine in interpreting and applying the "arising out of" component of compensability. *Miller, supra* at 214, citing *Shaw, supra* at 599. Under Vermont law, an injury arises out of the employment "if it would not have occurred *but for* the fact that the conditions and obligations of the employment placed claimant in the position where [claimant] was injured." *Id.*, quoting *Larson's, supra* at §6.50 (emphasis in original). Phrased alternatively, the positional risk doctrine asks simply whether an injury would or would not have occurred but for the claimant's employment and his or her position at work. *Shaw, supra*.

20. In this case, the conditions and obligations of Claimant's employment included providing counseling and support services in a manner that she directed. In reasonably exercising the discretion Defendant afforded her as to how best to provide these services, Claimant found it necessary to retrieve a book from home in order to share it with a client in crisis. Had she delayed doing so, it would have been to her client's detriment, and by extension, to Defendant's as well. Were Claimant to have raced home on her lunch hour to play with her dog, her activities would not have merited workers' compensation coverage. But because her actions were necessitated by her job responsibilities, it is appropriate to consider her subsequent injury as having arisen out of her employment.

Summary

21. I conclude that Claimant has sustained her burden of proving that her injury arose out of and in the course of her employment with Defendant. Thus, her August 13, 2013 injuries are compensable.

22. As Claimant has prevailed on her claim for benefits, she is entitled to an award of costs and attorney fees. In accordance with 21 V.S.A. §678(e), Claimant shall have 30 days from the date of this opinion within which to submit her itemized claim.

ORDER:

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

1. Temporary total disability benefits from August 12 , 2013 through November 15, 2013 in accordance with 21 V.S.A. §642, with interest as calculated in accordance with 21 V.S.A. §664;

2. Medical benefits covering all reasonable medical services and supplies causally related to treatment of Claimant's right upper extremity injury, in accordance with 21 V.S.A. §640; and

3. Costs and attorney fees in amounts to be determined, in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this 7th day of August 2014.

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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.