STATE OF VERMONT
DEPARTMENT OF LABOR

MaryJane Meunier	Opinion No. 11-16WC
v.	By: Phyllis Phillips, Esq. Administrative Law Judge
The Lodge at Shelburne Bay Real Estate, LLC	For: Anne M. Noonan Commissioner
	State File No. FF-64512

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES:

Jeffrey Dickson, Esq., for Claimant
William Blake, Esq., for Defendant

ISSUES PRESENTED:

1. Is Defendant entitled to judgment in its favor as a matter of law on the question whether Claimant suffered a compensable work-related injury on May 26, 2014?

2. Alternatively, is Claimant entitled to judgment in her favor as a matter of law on the question whether she suffered a compensable work-related injury on May 26, 2014?

EXHIBITS:

Claimant's Exhibit A:	Claimant's recorded statement (transcribed), June 2, 2014
Claimant's Exhibit B:	Affidavit of Brendan Kolwicz, 07/23/2015
Claimant's Exhibit C:	Letter from Sarah Hudson, M.D., December 16, 2015
Claimant's Exhibit D:	Various medical records, 05/26/2014 - 05/28/2014
Claimant's Exhibit E:	Medical record, encounter date 06/02/2014
Claimant's Exhibit F:	Medical record, encounter date 07/03/2014
Claimant's Exhibit G:	CT head w/o contrast, 8/13/2014
Claimant's Exhibit H:	Prehospital care report, 05/26/2014
Defendant's Exhibit A:	Claimant's recorded statement (transcribed), June 2, 2014
Defendant's Exhibit B:	Letter from Claimant, June 25, 2014
Defendant's Exhibit C:	Various medical records

FINDINGS OF FACT:

The following facts are undisputed:

1. Judicial notice is taken of all relevant forms contained in the Department's file relative to this claim.

2. Claimant worked as an activities coordinator at Defendant's assisted living facility. Her job duties included organizing arts and crafts activities, accompanying residents on walks and, once a week, driving the activities bus to take residents to lunch at a local restaurant. *Claimant's Exhibit A at p.3.*

3. At lunchtime on May 26, 2014 Claimant drove ten residents in the activities bus to Pizzeria Uno's on Shelburne Road in South Burlington. *Defendant's Exhibit B.* After finishing her meal, she told her assistant that she was going out to get the bus ready for the drive back to the facility. She recalled leaving the table and walking outside to the parking lot. The next thing she recalled was lying on the ground with ambulance personnel attending her. *Claimant's Exhibit A.* A restaurant employee had discovered her there and called 911. There were no other witnesses. *Claimant's Exhibit B.*

4. Upon learning what had occurred, Claimant's assistant called her supervisor, Brendan Kolwicz. When he arrived on the scene, he observed Claimant lying on her back in the parking lot, approximately three or four feet from the bus' right rear tire, being tended to by emergency rescue personnel. It was a mild, sunny spring day. The bus was parked in the handicapped space. Its engine was running and the entrance doorway was open. The wheelchair lift door was also swung open and latched. *Claimant's Exhibit B.*

5. Based on what the assistant had told him, Mr. Kolwicz surmised that Claimant had been in the process of readying the bus for the residents to board; to that end, she had started the bus, opened the step doors, and then walked to the lift door, and opened and latched that. *Claimant's Exhibit B.*

6. Claimant has no recollection at all of the circumstances of her fall, including whether she tripped first and then fell, whether her body hit the bus, or whether she was knocked unconscious when her head hit the pavement. *Defendant's Exhibit A*.

7. Claimant was transported by ambulance to the hospital, where she underwent a complete workup to determine the cause of what was characterized as a fall due to a syncopal (fainting) episode. She had never fainted before, and did not recall experiencing any nausea, lightheadedness, abdominal pain or chest pain or palpitations prior to the incident. *Claimant's Exhibit D.*

8. As a result of her fall, Claimant suffered bilateral traumatic frontal contusions and a right frontal subdural hematoma with a brief loss of consciousness. *Claimant's Exhibit D.* Days later, she reported that she had a "big, huge egg" on the back of her head and bruises on her body. She theorized that she must have landed first on her buttocks, because they were sore, and then fallen backwards. *Claimant's Exhibit A.*

9. Medical evaluations, both at the hospital and subsequently, failed to reveal the cause of Claimant's fall. EKG, echocardiogram and carotid studies were all negative, as were blood and lab tests. There was no evidence of seizure activity. Claimant, a diabetic, had a normal glucose reading at the scene, and no other metabolic abnormalities were discovered. Other than the contusions and subdural hematoma caused by the fall itself, her brain anatomy was normal. *Defendant's Exhibit C.*

10. In short, diagnostic testing did not reveal any evidence of stroke, seizure, heart attack, vascular abnormality or other medical condition likely to have caused or contributed to Claimant's fall. Months later, in December 2015 her primary care provider, Dr. Hudson, aptly summarized the evidence, stating simply, "Her fall remains medically unexplained." *Claimant's Exhibit C.*

11. In the months following the incident, Claimant suffered the sequelae of traumatic brain injury, including post-concussion syndrome. *Claimant's Exhibit C.*

CONCLUSIONS OF LAW:

1. In order to prevail on a motion for summary judgment, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to a judgment in its favor as a matter of law. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). In ruling on such a motion, the non-moving party is entitled to the benefit of all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 252 (1991); *Toys, Inc. v. F.M. Burlington Co*., 155 Vt. 44 (1990). Summary judgment is appropriate only when the facts in question are clear, undisputed or unrefuted. *State v. Heritage Realty of Vermont*, 137 Vt. 425 (1979).

2. In the pending cross motions, Defendant asserts that even considering the evidence in the light most favorable to Claimant, she has failed to allege sufficient facts to establish that her injury arose out of and in the course of her employment. Claimant asserts just the opposite – that even considering the evidence in the light most favorable to Defendant, as a matter of law her injury is compensable.

3. To be compensable under Vermont's statute and case law, a worker must establish that he or she suffered an injury "arising out of and in the course of" his or her employment. 21 V.S.A. §618; *Miller v. IBM*, 161 Vt. 213, 214 (1993). 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." *Id.* at 215, quoting *Marsigli Estate v. Granite City Auto Sales, Inc.*, 124 Vt. 95, 98 (1964). 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." *Cyr v. McDermott's, Inc.*, 2010 VT 19, ¶10; *Shaw v. Dutton Berry Farm*, 160 Vt. 594, 599 (1993), quoting 1 A. Larson, *The Law of Workman's Compensation* §6.50 (1990) (emphasis in original).

4. The "more liberal positional risk" analysis established in *Shaw* "reflects the broad, remedial purposes of Vermont's workers' compensation law," *Miller, supra* at 214. As the court in *Shaw* explained, "A positional risk exists when the employee is subject to risk of injury at work in a 'but for' sense. 'But for' the employment and [claimant's] position at work, the injury would not have happened." *Shaw, supra* at 599.

5. Positional risk analysis has particular application in cases where a claimed injury occurs as a result of some "neutral force" – one that is "neither personal to the claimant nor distinctly associated with the employment." 1 Lex K. Larson, *Larson's Workers' Compensation* §3.05 at p. 3-7 (Matthew Bender Rev. Ed.). The theory supports compensation, for example, in cases involving stray bullets, *id.* at §§3.05 and 7.01[2] and cases cited therein, and, sadly in this day and age, bombs and terrorist attacks, *id.* at §7.02[1]-[3] and cases cited therein. The only connection between the injury and the claimant's work in these cases is that he or she is unlucky enough to be "in the wrong place at the wrong time," *id.,* §7.02[1] at p. 7-10. Nevertheless, most courts have held that the circumstance of having been put in that position because of the employment is sufficient to establish compensability. *Id.*, §7.03 at p. 7-23 and cases cited therein.

6. Cases involving unexplained falls, as Claimant alleges occurred here, also may trigger positional risk analysis. The neutral force that caused the injury to occur in these cases is simply unknown. *Id.*, §7.04[1][a]. This situation is often confused with, but is entirely distinguishable from, so-called "idiopathic" injury cases, in which the medical evidence establishes that the injury resulted from a purely personal condition and therefore is not unexplained. *Id.*, §7.04[1][b] and cases cited therein.

7. In the truly unexplained fall cases, most courts have awarded benefits notwithstanding the claimant's inability to prove that the cause of the fall was directly connected to the employment. Instead, they have applied positional risk "but for" reasoning to satisfy the "arising out of" component of compensability. *See Id.*, §7.04[1][a] and cases cited therein; *contra, id.* at §7.04[1][c] and cases cited therein.

8. The Vermont Supreme Court has generally approved positional risk/neutral force analysis to support compensability, though not in any cases involving unexplained falls. *See, e.g., Clodgo v. Rentavision, Inc.*, 166 Vt. 548, 551 (1997); *Shaw, supra*. The Commissioner has applied the doctrine in at least two arguably unexplained fall situations, *Shea v. Worcester Insurance Co.*, Opinion No. 13-02WC (March 13, 2002); *Dupee v. Service Merchandise*, Opinion No. 31-99WC (July 28, 1999). In both cases, the Commissioner appropriately distinguished between a truly unexplained fall, which is compensable under Vermont law, and a completely idiopathic one, which is not.

9. There is no question in the case before me now but that Claimant's injury occurred in the course of her employment – she was on duty, fulfilling her job responsibilities at a place she was reasonably expected to be. The disputed issue, upon which both parties seek judgment as a matter of law, is whether her injury arose out of it.

10. Considering the evidence first in the light most favorable to Claimant, I cannot conclude that Defendant is entitled to judgment in its favor as a matter of law. To reach such a conclusion, there would have to be evidence that, if believed, would establish an idiopathic cause for her fall. There is none, and for that reason, Defendant's motion must fail.

11. Considering the evidence in the light most favorable to Defendant, however, I can only conclude that Claimant's fall was entirely unexplained. The medical evidence on this count was clear, concise and undisputed.[1]

12. Defendant argues that without evidence tending to establish a causal connection between Claimant's fall and her work – a slip or trip while disembarking from the activities bus, for example – she cannot possibly prove the essential elements of her claim. This is the minority view, *see Larson's Workers' Compensation Law, supra* at §7.04[1][c], which the Commissioner has specifically disavowed in prior decisions. *See Shea, supra; Dupee, supra*.

[1] Defendant admitted as much in its motion, stating, "In the present case, we simply do not know what happened and it now appears quite clear with the passage of time that we will never know." *Defendant's Motion for Summary Judgment* at p. 3.

13. Defendant attempts to distinguish the Commissioner's prior decisions on the grounds that although "the cause of the mechanism of injury" was unexplained in those cases, "the actual mechanism of injury" itself was "definitively known." I see no basis for any such distinction. As in the cases Defendant cites, here too the "actual mechanism" of Claimant's injury – forcefully striking her head – was definitively known. But also as in those cases, for so long as the cause of Claimant's fall (in Defendant's terms, "the cause of the mechanism of injury") remains unexplained, the neutral force concept renders her resulting head injury compensable. *See, e.g., Shea, supra* (denying summary judgment in employer's favor because of medical evidence that, if found credible at hearing, would eliminate non-work-related activities as having caused claimant's knee to give way); *Dupee, supra* (noting that claimant's ankle injury would have been compensable under the neutral force theory even if she had rolled it while walking at a normal pace, that is, for no known reason).

14. It is true, as Defendant suggests, that had a purely personal medical condition caused Claimant to faint, her claim for benefits would almost certainly fail.[2] Were there any evidence at all tending to establish that fact, I agree that judgment in her favor as a matter of law would be inappropriate. There is no such evidence, however.

15. I acknowledge that even in positional risk cases, where a very strong "in the course of" employment connection is used to overcome a much weaker "arising out of" component, the circumstances of the injury must still not be "so attenuated from the condition of employment that the cause of the injury cannot reasonably be related to the employment." *Shaw, supra* at 599; *see, e.g., Lehneman v. Town of Colchester*, Opinion No. 10-12WC (March 13, 2002). I do not consider that to be the case here. But for the employment and Claimant's position at work, her injury would not have occurred as it did. Lacking any evidence of an idiopathic cause for her fall, I am left with one of two conclusions – either it was work-related, or it was unexplained. Under Vermont law, either cause is sufficient to establish compensability.

16. I conclude from the undisputed evidence that Claimant's head injury was caused by an unexplained fall that arose out of and in the course of her employment, and is therefore compensable as a matter of law.

17. 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.

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[2] This assumes, of course, a fainting-induced fall directly to the ground, *see, e.g., Carlson v. Experian Information Solutions*, Opinion No. 30-07WC (October 23, 2007) (differentiating between non-compensable injuries caused solely by virtue of claimant's contact with level floor following idiopathic fall and compensable injuries caused by striking her head on a machine as she fell).

ORDER:

Defendant's Motion for Summary Judgment is hereby **DENIED**. Claimant's Motion for Summary Judgment is hereby **GRANTED**. Defendant is hereby **ORDERED** to pay:

1. All workers' compensation benefits to which Claimant proves her entitlement as causally related to her May 26, 2014 compensable work injury, with interest as provided in 21 V.S.A. §664; and

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

DATED at Montpelier, Vermont this _____ day of July 2016.

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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.