Estate of Stephen Paul Carr v. Verizon New England, Inc. (April 29, 2011)

STATE OF VERMONT
DEPARTMENT OF LABOR

Estate of Stephen Paul Carr, by and through the Widow and Administratrix, Bonnie Carr

v.

Verizon New England, Inc.

Opinion No. 08-11WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. Y-53261

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

ATTORNEYS:

Dennis Shillen, Esq., for Claimant[1]
J. Christopher Callahan, Esq., for Defendant

ISSUE PRESENTED:

Did Claimant's fatal injury arise out of and in the course of his employment for Defendant?

FINDINGS OF FACT:

The following facts are undisputed:[2]

1. Claimant Stephen Paul Carr was employed by Defendant as a field manager for the Rutland and Sunderland, Vermont offices. As a "floating" manager, at times his job required him to work different assignments at other company locations throughout Vermont.

2. Maureen Oday was Claimant's supervisor from 2003 on.

3. Ms. Oday designated Claimant for a special duty work assignment from Monday, June 26, 2006 to Wednesday, June 28, 2006. The special duty assignment required Claimant to fill in as the acting manager of the Construction Control Center, located at Defendant's

[1] For ease of reference, "Claimant" is used herein to identify the deceased worker, Stephen Paul Carr. In point of fact, the current claim has been brought by his estate.

[2] Claimant failed to file a separate statement of contested facts in response to Defendant's Motion for Summary Judgment, as is required by V.R.C.P. 56(c)(2). To the extent that his Objection to Defendant's Motion and Cross-Motion for Summary Judgment identifies disputed material facts, I have considered them as such. Closer adherence to the requirements of Rule 56 would have been preferable, however. *See, Webb v. LeClair*, 2007 VT 65; *T.A. v. Johnston*, Opinion No. 05S-07WC (September 12, 2007).

800 Hinesburg Road, South Burlington, Vermont office (the "Hinesburg Road office"), while the regularly assigned manager was on vacation.

4. At the time of this special assignment, Claimant lived with his wife, Bonnie Carr, at 7383 US Route 4 in Bridgewater, Vermont. The distance from Claimant's residence to Defendant's Hinesburg Road office was approximately 104 miles.

5. Travel expenses incurred during Claimant's special duty assignment, including mileage, meals and lodging, were to be reimbursed in accordance with Defendant's policies.

6. When an employee is given a special duty assignment, Defendant reimburses for travel expenses based on the direct route mileage between the employee's regular reporting location and his or her special duty reporting location, not to and from the employee's home. In this case, therefore, Defendant paid Claimant's mileage from the Rutland office to the Hinesburg Road office and back, not to and from his home in Bridgewater.

7. Claimant was responsible for making his own lodging arrangements for his special duty assignment. This he did, by booking accommodations at the Hampton Inn in Colchester, Vermont from Sunday, June 25th through Wednesday, June 28th.

8. The Hampton Inn is located 5.7 miles north of Defendant's Hinesburg Road office. Consistent with previous arrangements between Defendant and the Hampton Inn, the hotel billed Defendant directly for Claimant's accommodations, and Defendant subsequently paid for them.

9. On Sunday evening, Claimant traveled from his home in Bridgewater to the Colchester Hampton Inn. His likely route of travel was via Interstate 89 North. Claimant checked into the hotel at approximately 9:17 PM.

10. Claimant's expected work hours during his special duty assignment were from approximately 7:30 AM to 4:00 PM. As a manager, his actual hours may have varied somewhat from this.

11. Claimant was responsible for a number of tasks during his special duty assignment. At Ms. Oday's request, he completed a motor vehicle inventory and researched some callout activity. These tasks likely were completed by Tuesday.

12. Claimant also spent some time during his special duty assignment managing the process by which employees assigned to Defendant's construction unit were loaned out to its installation and maintenance unit in order to assist with workload. He likely fielded requests from other staff and/or Ms. Oday as well, though there is no specific documentation of this.

13. Following the conclusion of his workday at the Hinesburg Road office on Tuesday, Claimant drove to his home in Bridgewater to participate in a non-work-related golf event and to pick up his motorcycle for servicing in the Burlington area the following day. Notwithstanding that Claimant did not actually stay at the Hampton Inn that night, Defendant paid for his accommodations there nevertheless.

14. On Wednesday morning Claimant again traveled from his home in Bridgewater to the Hinesburg Road office. This time he was driving his motorcycle, which he dropped off for servicing at Green Mountain Harley Davidson, located at 157 Pearl Street in Essex Junction, Vermont.

15. Also on Wednesday, at approximately 12:21 PM Claimant checked out of the Hampton Inn. Later, between 4:30 and 4:45 PM Claimant's co-employee, Krista Karns, drove him to Green Mountain Harley Davidson so that he could retrieve his motorcycle.

16. Ms. Oday spoke to Claimant numerous times on Wednesday. For much of that day she was attending a meeting in White River Junction, and later on she had to travel to Woodstock to supervise repairs to a "fiber break" there. She last spoke to Claimant via cell phone late in the day. At that time, Ms. Oday was unaware of any remaining duties that would have required Claimant to extend his special duty assignment to Thursday morning.

17. At some point prior to beginning his special duty assignment, Claimant had requested a half-day of vacation on Thursday morning, so that he could attend an 8:15 AM medical appointment at Dartmouth Hitchcock Medical Center in Lebanon, New Hampshire. Ms. Oday acceded to this request.

18. After concluding his medical appointment, Claimant was expected to report to his regular duty assignment at Defendant's Rutland office on Thursday afternoon. This is where Claimant would have been expected to begin his work day had he not been granted vacation time for the first half of that day.

19. Claimant's wife did not expect him to return home on Wednesday night; rather, it was her understanding that he did not intend to return home until Thursday. Claimant's wife recalled that Claimant had advised her of this on Tuesday evening, when he was home for his golf event.

20. Claimant's wife recalled that Claimant called her on his cell phone on Wednesday evening at approximately 9:45 PM and said that he was "settled in for the night," that he "had to go into work for a little while in the morning" to photocopy and/or fax some documents, and that thereafter he would be headed to his medical appointment at Dartmouth Hitchcock.[3] Claimant's cell phone records confirm that he did place a call to his home phone at 10:02 PM on Wednesday evening.

21. Claimant was entitled to mileage reimbursement in accordance with Defendant's reporting-location-to-reporting-location policy regardless of whether he departed from his special duty assignment on Wednesday evening or on Thursday morning.

[3] Defendant argues that Claimant's cell phone conversation constitutes inadmissible hearsay under V.R.E. 802. Hearsay evidence of intention is admissible "on the question whether the intended act was done." V.R.E. 803(3), Reporter's Notes, citing *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 295-300 (1892). Although it is by no means conclusive, the evidence is available to show that Claimant acted in accordance with the plan he allegedly described to his wife, which was "to go into work for a little while" on Thursday morning.

22. Had Claimant concluded and departed from his special duty assignment on Wednesday evening, he would have traveled from the Hinesburg Road office to his home in Bridgewater by way of Interstate 89 South.

23. Early on Thursday morning, at approximately 5:50 AM Claimant was traveling on his motorcycle eastbound on Route 117 in Essex, Vermont in the vicinity of North Williston Road. Claimant was injured when a car failed to yield the right of way to him as it exited North Williston Road and headed westbound on Route 117. Claimant struck the driver's side of the other vehicle and was thrown from his motorcycle. He died from his injuries the following day.

24. At the time of Claimant's collision, traffic on Route 117 was likely very light. The sight view at the intersection of North Williston Road was unobstructed both easterly and westerly.

25. From Route 117 East, the Hinesburg Road office can be reached most directly via North Williston Road and Route 2. Had Claimant been traveling to that office at the time of the collision, he would have turned right from the eastbound lane of Route 117 onto North Williston Road.

26. Had Claimant been traveling from the Hinesburg Road office towards Route 117 eastbound at the time of the collision, he would have taken a right turn off of North Williston Road and onto Route 117. The collision occurred slightly west of that intersection, however.

27. At the time of Claimant's collision, Defendant maintained a "Central Office," or "CO," located at 9 Lincoln Street (immediately off of Route 117) in Essex Junction, Vermont. A CO is a technical building that houses the switches and equipment from which dial tone and data communications originate and terminate. Defendant maintains several CO's throughout the state.

28. According to Google Maps, the Lincoln Street CO is located 3.9 miles from the site of Claimant's collision. According to Google Maps, it is a 6.9 mile drive from the CO to Defendant's Hinesburg Road office.

29. As viewed from a Google Earth map, Claimant's collision on Route 117 appears to have occurred at a site approximately equidistant from both the Lincoln Street CO and the Interstate 89 on-ramp in Richmond.

30. Claimant's wife does not know where Claimant stayed on Wednesday night. She assumed at the time that he was still at the Colchester Hampton Inn. Later she learned that Claimant had checked out of that hotel on Wednesday afternoon, whereupon she assumed that Claimant had spent the night at Ms. Oday's residence. Ms. Oday lives on Route 117 in Essex, less than one mile west of the site of Claimant's collision.

31. Claimant's wife suspected that Claimant and Ms. Oday were romantically involved. Ms. Oday acknowledged that she and Claimant were close friends, but denied that they were romantically involved. She denied that Claimant spent Wednesday night at her house.

32. On Friday, June 30th, Claimant's wife telephoned Ms. Oday and advised her of Claimant's Wednesday evening cell phone call, during which, as Claimant's wife recalled, Claimant had told her he needed to go into the office on Thursday morning to take care of some photocopying and/or faxing. Ms. Oday responded that she did not know of any work activities in which Claimant would have been engaged on Thursday morning.

33. Ms. Oday testified that although she had not formally extended Claimant's special duty assignment beyond Wednesday, June 28th, she could not say definitively whether Claimant might have gone to work early Thursday morning or not.

34. Claimant's estate did not commence a workers' compensation claim, or retain counsel for that purpose, prior to September 19, 2006.

35. In September 2006 Defendant's corporate security investigator, Dan Jamroz, conducted an internal investigation as to the circumstances surrounding Claimant's death. During the course of this investigation, Mr. Jamroz reviewed the entry records for Thursday, June 29th, at the Hinesburg Road office. During the hours when the doors are locked to the public (which would have been the case in the hours leading up to Claimant's accident), employees can gain access either by way of an electronic access card or with a key. Claimant had an entry card by which he could have accessed the Hinesburg Road office during the early morning hours on Thursday.

36. The entry records for Thursday show that only one employee – Douglas Klinefelter – used an entry card to gain access to the Hinesburg Road office prior to 5:50 AM, when Claimant's accident occurred. This was at 4:10 AM. The first access by using a key was at 6:49 AM, nearly one hour after Claimant's accident. There is no evidence that Claimant entered the Hinesburg Road office prior to his accident on Thursday morning.

37. Mr. Jamroz assumed that Claimant had access to the Lincoln Street CO. Although he tried to determine whether Claimant had entered the building on Thursday morning, the entry recording system was not functioning on that day. If Claimant did access the building, therefore, no record of him having done so would exist.

38. Mr. Jamroz also sought to obtain fax records from the Lincoln Street CO for Thursday morning. By the time of his investigation, however, those fax records were no longer available.

39. Had Claimant returned home on Wednesday night rather than choosing to remain in the Burlington area, it stands to reason he would have departed for his Dartmouth Hitchcock medical appointment from his home in Bridgewater the following morning.

40. Had Claimant taken the most direct route from the Hinesburg Road office to Defendant's Rutland office on Thursday morning he would have traveled Route 116 South to Route 7 South. This is the most typical and direct route of travel between those two reporting locations.

41. According to Google Maps, it is approximately 63.6 miles from the Hinesburg Road office to Rutland using the Route 116 to Route 7 route. If traveling via Interstate 89 South, the distance between these two locations is approximately 103 miles, or 39.4 miles longer.

42. According to Google Maps, the most direct route to Dartmouth Hitchcock from the location of Claimant's accident would be Route 117 East to Interstate 89 South, which can be accessed via the on-ramp in Richmond.

43. According to Google Maps, the Hampton Inn is in close proximity to Interstate 89 South and is 5.7 miles from the Hinesburg Road office. The most direct route from the Hampton Inn to Dartmouth Hitchcock is via Interstate 89 South.

44. Defendant did not exercise any control over the location from which Claimant elected to travel to his medical appointment on Thursday, June 29th, nor did it exercise any control over the time of his departure.

DISCUSSION:

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. Realty of Vermont*, 137 Vt. 425 (1979).

2. Both parties here seek summary judgment in their favor. According to Defendant, the undisputed facts establish that Claimant was engaged in a scheduled half-day vacation and pursuing a purely personal errand at the time of his injury. Because the injury was not sufficiently connected to a work place or time to have arisen in the course of his employment, therefore, as a matter of law it is not compensable.

3. Claimant asserts that there is evidence from which it might be inferred that at the time of his injury he was en route either to or from a work-related task, and on those grounds alone summary judgment in Defendant's favor must be denied. Beyond that, Claimant asserts that because he was engaged in the travel necessitated by his special duty assignment, as a matter of law his injury arose in the course of his employment and is therefore compensable.

4. An injury is compensable only if it arises both "out of" and "in the course of" employment. 21 V.S.A. §618; *Miller v. IBM*, 161 Vt. 213, 214 (1993). An injury arises out of 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).

5. 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." *Miller, supra* at 215. It is this prong of the compensability test that is at issue here – the time and place connection between Claimant's injury and his work. *Walbridge v. Hunger Mountain Co-op,* Opinion No. 12-10WC (March 24, 2010).

6. 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. Where the travel is itself "a substantial part of the service for which the worker is employed," then injuries incurred en route are usually covered as well. 1 *Larson's Workers' Compensation* Chapter 14 at p. 14-1 (2010).

7. 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. *Larson's, supra* at Chapter 17, p. 17-1.

8. Here, Claimant argues that the evidence is sufficient at least to create a factual dispute as to whether he was pursuing a business purpose on the morning of Thursday, June 29th such that there was no personal deviation at all. This argument is premised entirely on Claimant's telephone conversation with his wife the night before, during which he allegedly told her that he planned to "go into work for a little while" on Thursday morning so that he could photocopy or fax some documents. From this evidence, Claimant hypothesizes that on Thursday morning he traveled first to the Lincoln Street CO to fax and/or photocopy the documents, and thereafter was traveling on a direct route home as part of the return leg of his business trip when his fatal accident occurred.

9. Had Claimant told his wife that he planned to go specifically to the Lincoln Street CO to accomplish his work on Thursday morning, then I agree this would be sufficient evidence at least to raise a factual issue. He did not do so, however. Nor is there any other evidence that, if believed, would establish his presence there. With no evidence at all to support Claimant's hypothesis, I cannot use it as a basis for finding a genuine issue of material fact. *Richards v. Nowicki*, 172 Vt. 142, 150 (2001), citing *Western World Ins. Co. v. Stack Oil, Inc.*, 922 F.2d 118, 121 (2d Cir. 1990) (opponent of summary judgment cannot rely upon conjecture or speculation).

10. The undisputed evidence also establishes that Claimant was neither going to nor coming from the Hinesburg Road office at the time of his injury. Had he been coming from that office at the time of the collision, the entry records would have documented his admission into the building, either by electronic access card or by key, prior to 5:50 AM. They do not. Had he been traveling to that office at the time of the accident, furthermore, there would have been no collision at all, as he would have been turning right onto North Williston Road at the same time that the other driver would have been turning left onto Route 117, and their paths would not have crossed as they did.

11. I conclude, therefore, that Claimant has failed to make a showing sufficient to establish a specific business purpose for his presence at the collision site on Thursday morning, June 29th. Rather, by opting not to travel on a direct route home from the Hinesburg Road office immediately after his special duty assignment concluded on Wednesday evening Claimant thereby embarked on a personal deviation.

12. 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 v. Orleans Essex Visiting Nurses Assn.*, Opinion No. 19-01WC (June 5, 2001). 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.[4]

    Id.; *see generally, Larson's, supra* at Chapter 17.

13. Considering the second and fourth factors first, I conclude from the undisputed facts that Claimant's deviation here neither increased the risk of injury nor specifically caused it to occur. He was not, for example, intoxicated at the time of the injury, a frequently cited basis for denying compensation in personal deviation claims. *See, e.g., Superior Asphalt & Concrete Co. v. Department of Labor & Industries*, 19 Wash.App. 800 (Div. 3 1978); *Dooley v. Smith's Transfer Co.*, 26 N.J. Misc. 129 (1948); *see generally, Larson's, supra* at §17.02[9][c] and cases cited therein. Nor did the particular route upon which he was traveling contribute significantly – traffic was light and visibility was unobstructed at the collision site.

14. Defendant asserts that under the circumstances of this claim the time factor is an automatic disqualifier. It argues that because Claimant had scheduled a half-day vacation on Thursday morning, the business purpose for his travel had ended and he was now embarked on purely personal pursuits.

[4] The Vermont Supreme Court has not had occasion to apply these factors in the context of a travel deviation case, but it has adopted similar criteria to determine if horseplay injuries are so removed from the employment as to bar recovery under workers' compensation. In *Clodgo v. Rentavision*, 166 Vt. 548 (1997), the Court held that it was relevant to consider "the extent and seriousness of the deviation" from the employee's work duties in making a determination as to compensability. *Id.* at 552.

15. This reasoning is overly restrictive. Any business journey that begins as such from a particular base, whether the employee's home or office, must contemplate both an outgoing and a returning trip. *Larson's, supra* at §17.02[9][a]; *Aetna Life Ins. Co. v. Schmiedeke*, 192 Wis. 574 (Wis. 1927). The return trip is not automatically disqualified if it immediately precedes a vacation, any more than it would be if it occurred at the start of a weekend.

16. This is not to say, of course, that the return trip can be "banked" indefinitely and "cashed in" at whatever future time is convenient. *Larson's, supra* at §17.02[9][b]. The relevant inquiry, however, is not whether the return trip occurs on a day off; it is whether it occurs at a time that is so far removed from the journey's business purpose as to fall outside the sphere of employment. *Compare Ardis v. Combined Ins. Co.*, 380 S.C. 313 (Ct. App. 2008) (injury sustained during overnight stay in hotel following regional sales meeting compensable as incidental to the business trip), *with Kodiak Oilfield Haulers v. Adams*, 777 P.2d 1145 (Alaska 1989) (injury suffered during return leg of work-connected trip following five-day delay for personal reasons not compensable).

17. Under the circumstances of this case, I conclude that for Claimant to have delayed his return trip overnight was not so substantial a deviation in time as to place it outside the course of his employment.

18. What remains for me to consider is the extent of Claimant's deviation in terms of geography. The factual permutations that give rise to consideration of this factor are extensive. *See Larson's, supra* at §§17.02[1]-17.05 (diagramming twenty different deviation patterns). Geographic deviations can occur at the beginning, middle or end of a business trip. They can consist of a side trip of many miles or a minor detour around the block. They can involve a triangular route or one that is somewhat longer, though essentially parallel to the most direct route.

19. What matters in all cases is whether the deviation is so substantial geographically as to establish that the employee has moved away from the business objective and towards a personal one. *Wiegand v. Fletcher Allen Health Care*, Opinion No. 06-05WC (January 14, 2005). Even where this occurs, once the deviation is completed and the employee is back on the route he or she would have traveled in any event, it stands to reason that workers' compensation coverage should resume for the remainder of the journey. *Larson's, supra* at §17.02[9][a] at p. 17-11.

20. Applying this analysis to the current claim, had Claimant's injury occurred while he was traveling on Interstate 89 South towards his home in Bridgewater – the same route he would have taken had he left directly from the Hinesburg Road office on Wednesday evening – it likely would have been compensable. Regardless of where his personal deviation might have begun, or how extensive it might have been geographically, in that circumstance he would have regained his business route and therefore coverage would have resumed.

21. Claimant's accident did not occur on Interstate 89 South, however. As a consequence, it is necessary to determine whether geographically his deviation was substantial or not. If the deviation was minor, then coverage exists. If it was major, then there is no coverage.

22. Unfortunately, there is no way to answer this question. Beyond mere speculation or conjecture, neither party knows where Claimant stayed Wednesday night or where he was coming from Thursday morning. And without knowing where Claimant began his trip, it is impossible to gauge the extent, if any, of his geographic deviation. *See City of Santa Fe v. Hernandez*, 643 P.2d 851 (N.M. 1982) (directness of route home was question of fact to be resolved in order to determine whether decedent had reentered the course of his employment at the time of his accident); *Superior Asphalt, supra* at 804 (fact that decedent was only 6 miles from his destination, on one of several routes, when the accident occurred was insufficient to show that his personal deviation had ended).

23. I acknowledge that the site of Claimant's collision was on a direct route to the Interstate 89 South on-ramp in Richmond, only a few miles away. I accept, therefore, that had he stayed overnight in the general vicinity of Route 117 in Essex, I might consider there to have been no geographic deviation at all. But had Claimant stayed overnight in downtown Burlington, or in Montreal, or in any number of other locales more remote from Route 117 in Essex, a reasonably direct route towards Interstate 89 South likely would not have placed him at the site of his collision. In that case, the extent of Claimant's geographic deviation might very well be deemed so substantial as to take it outside the arena of his business journey. The point is there is no way to know.

24. It is Claimant's burden to show that there was a business purpose for him to be traveling on Route 117 in Essex on the morning of Thursday, June 29, 2006. This he might have done by establishing that he was en route from a faxing or photocopying errand at the Lincoln Street CO, but there is insufficient evidence to move that theory beyond mere conjecture. Alternatively, he might have done so by establishing that his overnight accommodations were situated such that Route 117 in Essex was a reasonably direct route towards Interstate 89 South and the return leg of his business trip home to Bridgewater. Again, however, there is no evidence to support this. With no evidence, Claimant's claim must fail as a matter of law.

25. I conclude that Claimant has failed to make a showing sufficient to establish the existence of an element essential to his case and on which he has the burden of proof. Summary judgment against him is therefore mandated. *Richards, supra* at 151 (citation omitted).

ORDER:

Claimant's Motion for Summary Judgment is hereby **DENIED**. Defendant's Motion for Summary Judgment is hereby **GRANTED**. Claimant's claim for workers' compensation benefits arising out of his June 29, 2006 accident is **DENIED**.

DATED at Montpelier, Vermont this 29th day of April 2011.

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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.