STATE OF VERMONT
DEPARTMENT OF LABOR

Kelly Murphy Moreton	Opinion No. 17-14WC
v.	By: Phyllis Phillips, Esq. Hearing Officer
State of Vermont, Department of Children and Families	For: Anne M. Noonan Commissioner
	State File No. FF-56873

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES:

James Dumont, Esq., for Claimant
J. Justin Sluka, Esq., for Defendant

ISSUE PRESENTED:

Did Claimant's December 2, 2013 accident arise out of and in the course of her employment for Defendant?

EXHIBITS:

Defendant's Exhibit A:	Affidavit of Kelly Murphy Moreton, April 10, 2014; Supplemental Affidavit of Kelly Murphy Moreton, June 21, 2014
Defendant's Exhibit B:	First Report of Injury and Claim Questionnaire
Defendant's Exhibit C:	Job Specifications, Benefits Programs Specialist
Defendant's Exhibit D:	Google Maps view of I-89/Route 2 interchange at Exit 14, South Burlington
Defendant's Exhibit E:	VTrans Park and Ride Locations, Richmond, VT

FINDINGS OF FACT:

The following facts are undisputed:

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. Claimant was hired to work as a benefits programs specialist in Defendant's Health Access Eligibility Unit on November 12, 2013. *Affidavit of Kelly Murphy Moreton ("Affidavit") at ¶1; Supplemental Affidavit of Kelly Murphy Moreton ("Supplemental Affidavit") at ¶1, Defendant's Exhibit A*. According to the job specifications for this position, her duties were to be performed "largely in an office setting," with the additional proviso that "[p]rivate means of transportation should be available for necessary travel to training and/or meetings." *Job Specifications, Benefits Programs Specialist, Defendant's Exhibit C*.[1] Claimant was never informed of this proviso, either at the time of her job interview or upon being offered the position. *Supplemental Affidavit at ¶2.*

3. Claimant's daily work-related commute was from her home in Shelburne, Vermont to Defendant's Health Access Eligibility Unit office, located at the IBM campus in Essex, Vermont. *Supplemental Affidavit at ¶1*.

4. Late in the day on Friday, November 29, 2013 Defendant notified Claimant and her coworkers at the Essex office via email that there would be a change in their schedule for the coming week. *Affidavit at ¶2, Supplemental Affidavit at ¶3.* Rather than coming to work in Essex, beginning on the following Monday, December 2, 2013, they were to attend a mandatory three-day training session on new state and federal rules. The training was to take place at an inn in Stowe, Vermont, beginning at 9:00 AM and ending at 3:30 PM each day; however, Defendant advised that it would pay the employees from 8:00 AM until 4:30 PM daily. Defendant also advised that it would reimburse the employees' mileage expenses for the daily trips to and from Stowe. *Affidavit at ¶¶2-3.*

5. The record does not reflect why the training sessions were held in Stowe. All of the trainees were from Defendant's Essex office. *Supplemental Affidavit at ¶4.*

6. Before leaving work on Friday, Claimant and several of her coworkers arranged to carpool to the training sessions, so that they would not each have to drive separately to Stowe. As bad weather had been predicted for the following Monday, and also because they were unfamiliar with the location of the inn at which the training was to take place, they agreed to meet at 7:30 AM, so that they would be sure to arrive on time. The arranged rendezvous point was at the Starbucks on Williston Road in South Burlington. *Affidavit at ¶¶4-6.*

[1] Claimant has moved to strike Defendant's Exhibit C on the grounds that Defendant failed to produce any evidence that she was ever provided with a copy of it at the time she became employed, nor was she ever informed that travel to a different location would be an expected part of her job. *Claimant's Objections to Employer's Statement of Undisputed Facts at ¶7; Supplemental Affidavit at ¶2.* Defendant having failed to controvert Claimant's sworn testimony on this point, for the purposes of the pending motions I consider her allegations in this regard established. However, as Claimant has not disputed either the authenticity of the document itself or the truth of the other material representations contained therein, I find insufficient grounds for excluding it entirely. *See Gore v. Green Mountain Lakes, Inc.*, 140 Vt. 262 (1981) (trial court properly considered credible, undisputed documentary evidence in ruling on summary judgment motion).

7. According to Google Maps, the Williston Road Starbucks (and its adjacent parking lot) is approximately three-tenths of a mile east of the Exit 14 on-ramp to I-89 southbound towards Stowe.[2] Other Williston Road commercial establishments, all with adjacent parking lots, are located slightly closer to the on-ramp. The nearest VTrans Park and Ride commuter lot is approximately 10.5 miles south of Exit 14 at Exit 12 in Richmond. *Defendant's Exhibits D and E.*

8. It rained overnight on Sunday, December 1st, and on Monday morning it was very icy. Claimant arrived at the Williston Road Starbucks at 7:30 AM. She already had eaten breakfast, and had packed a lunch for the day. Thus, her sole intention upon arrival was to meet her coworkers as planned, so that they could carpool together to Stowe. *Affidavit at ¶¶7-8.*

9. As Claimant was entering Starbucks, she slipped and fell on glare ice that had accumulated in front of the door. She landed on her right shoulder, and was in "terrible" pain. After consulting with her coworkers, she called a friend to pick her up and drive her to the emergency room. Her coworkers went on to the training session without her. *Affidavit at ¶¶9-13.*

10. Claimant missed the three-day Stowe training session in its entirety. She was scheduled to attend a second training session, but that was cancelled. Ultimately, she attended a training session at Defendant's Essex office, along with several of her coworkers. *Supplemental Affidavit at ¶5.*

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

2. Both parties here seek summary judgment in their favor on the question whether Claimant's injury arose out of and in the course of her employment for Defendant. As the material facts are not genuinely disputed, disposition of this question on summary judgment is appropriate.

Determining Compensability – the "In the Course of" Component

[2] I take judicial notice of this fact, as well as of the other geographical locations depicted on Defendant's Exhibits D and E.

3. The starting point for any workers' compensation claim is whether the injury arose out of and in the course of employment. 21 V.S.A. §618; *McNally v. Department of PATH*, 2010 VT 99, ¶10. This is a two-pronged test, requiring a sufficient showing of both (1) a causal connection (the "arising out of" component); and (2) a time, place and activity link (the "in the course of" component) between the claimant's work and the accident giving rise to his or her injuries. *Cyr v. McDermott's, Inc.*, 2010 VT 19; *Miller v. IBM*, 161 Vt. 213 (1993).

4. I consider the second component of the compensability determination first, as that is the primary focus of the parties' dispute here. As the Supreme Court in *Cyr* explained, the question whether an injury arose "in the course of" employment "generally 'tests work-connection as to time, place and activity; that is, it demands that the injury be shown to have arisen within the time and space boundaries of the employment, and in the course of an activity whose purpose is related to the employment.'" *Cyr, supra* at ¶13, citing 1 A. Larson & L. Larson, *Larson's Workers' Compensation Law* §12.01 at 12-1 (2009); *Miller, supra* at 215; *Marsigli Estate v. Granite City Auto Sales, Inc.*, 124 Vt. 95 (1964). Defendant here disputes all three aspects of the "in the course of" employment link – time, place and activity.

(a) Was the timing of Claimant's injury sufficiently linked to her employment?

5. The parties do not dispute that Claimant's injury occurred at approximately 7:30 AM on December 2, 2013, one-half hour before the time – 8:00 AM – at which Defendant had agreed to begin paying her on that day. Given that the training session was scheduled to run from 9:00 AM until 3:30 PM, presumably Defendant's intention in adding an hour of paid time on each end was to compensate Claimant and her coworkers for their extra commute time to and from Stowe. From a time perspective, the question is whether the decision by Claimant and her coworkers to meet a half hour before their paid workday began is sufficient to sever the link between Claimant's injury and her employment.

6. Had Claimant been injured after arriving at her usual workplace – Defendant's Essex office – a half hour prior to her usual starting time, the answer is most likely no. For employees having a fixed time and place of work, the "course of employment" concept "embraces a reasonable interval before and after official working hours while the employee is on the premises engaged in preparatory or incidental acts." 2 Lex K. Larson, *Larson's Workers' Compensation* §21.06[1](a) (Matthew Bender Rev. Ed.). The rule applies both to activities that are necessary to the employee's job and to those that are reasonably incidental thereto. *Id.* As to the latter, courts consistently have applied the rule to support compensability in cases where the employee either arrived at work early or stayed late because of transportation arrangements. *Id.* at n.11-13 and cases cited therein. Where extending the workday in this manner benefits the employer as well, the causal nexus is even more firmly established. *See, e.g., Johns v. Department of Health and Rehabilitative Services*, 485 So.2d 857 (Fla.App. 1986); *Montanaro v. Guild Metal Products, Inc.*, 275 A.2d 634 (R.I. 1971).

7. For example, the claimant in *Montanaro* typically arrived an hour early to her workplace because she commuted with her husband, whose workday for another employer began earlier than hers. Upon arrival, she would stow her personal items at her work station and gather the materials she would be using for the day's tasks. The remaining time before her shift began she spent drinking coffee and talking with her supervisor and other early arriving employees. One day, while entering the premises early as usual, she slipped and fell on any icy step.

8. On appeal from the Workers' Compensation Commission's denial of Ms. Montanaro's claim for benefits, the Rhode Island Supreme Court reversed. In doing so, the court refused to limit the period of her employment to "the precise moment when the employee is scheduled to begin and stop work . . . ." *Id.* at 636. Rather, in the court's view, "The duration of [the] interval [before the commencement of the employee's working hours] and what the employee did are, of course, interrelated, and necessarily the period of employment will expand if the employer derived a direct and substantial benefit from the employee's activities during the interval." *Id.* Having found that the claimant's practice of arriving one hour early to work was reasonable, particularly in light of the benefit her employer realized from the tasks she undertook while there, the court concluded that her claim for workers' compensation benefits was sustainable. *Id.; cf. Kesson v. Anthony's Seafood, Inc.*, 519 A.2d 1125 (R.I. 1987) (compensation denied where claimant was not performing any task incidental to or in preparation for commencement of workday, but was merely drinking coffee while socializing with fellow employee).

9. In barring the injured employee's attempt to recover tort damages rather than workers' compensation benefits, the court in *Johns, supra,* applied similar reasoning. The plaintiff in that case typically arrived to work at the Florida State Hospital 20 to 30 minutes prior to beginning her shift because she was concerned over possible car failure and wanted to be sure she was punctual. Upon arrival, she would wait in the lobby of one of the buildings on her employer's premises until her shift began, so that she could pick up a key she needed to perform her assigned work duties in the building next door. As she waited in the lobby one morning, a hospital patient assaulted and injured her.

10. Citing both Larson's treatise and *Montanaro* as support, the court determined that the plaintiff's injury had occurred in the course of her employment, and therefore that she was barred from suing her employer in tort. As in *Montanaro*, among the facts the court found critical were first, that the duration of the pre-workday interval was reasonable and second, that the employee's purpose for arriving early – to ensure that she arrived on time for her shift – was reasonably incident to her employment. *Id.* at 858.

11. Contrary to the circumstances presented in both *Montanaro* and *Johns*, Claimant's injury here did not occur at her usual workplace on Defendant's premises.[3] The critical factors upon which the courts in those cases relied are present, however – the duration of the pre-workday interval was reasonable, and its purpose was of substantial benefit to the employer. As our own Supreme Court has admonished, in the workers' compensation context an employee's employment should be regarded "through a wide-angle lens" rather than from a "strictly static point of view," *Shaw v. Dutton Berry Farm*, 160 Vt. 594, 598 (1993). Applying that concept here, I conclude that the fact that Claimant's injury occurred some 30 minutes prior to the start of her workday is insufficient to sever the causal link to her employment.

(b) Was the location where Claimant's injury occurred sufficiently linked to her employment?

12. The second requirement for establishing that an injury has arisen "in the course of" an employee's employment is that it be shown to have occurred "at a place where the employee may reasonably be expected to be" while fulfilling the duties of his or her employment contract. *Marsigli's Estate, supra* at 98. The question here is whether on the day of her injury the scope of Claimant's employment encompassed her presence at the Williston Road Starbucks.

13. 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 "going and coming" 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* §14.01 *et seq.* (Matthew Bender Rev. Ed.).

14. 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 Workers' Compensation, supra* at Chapter 17, p. 17-1.

[3] Nor is there any evidence here that Defendant knew of, or acquiesced in, the decision by Claimant and her coworkers to rendezvous 30 minutes prior to the start of their workday, as was the case in *Montanaro*.

15. Not every personal deviation will justify a denial of workers' compensation coverage. 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*; *Lopez v. The Howard Center,* Opinion No. 12-14WC (August 7, 2014); *Estate of Carr v. Verizon New England*, Opinion No. 08-11WC (April 29, 2011).

16. As a preliminary matter, Defendant here argues that Claimant was not a traveling employee, and therefore that her circumstances are bound by the general constraints of the going and coming rule rather than by the rule's exceptions. Relying on the Commissioner's analysis in *Brown v. Vermont Mechanical/Encompass*, Opinion No. 09-02WC (February 25, 2002), Defendant asserts that the Stowe inn to which Claimant was traveling on the day of her injury was a "fixed" location to the same extent that her Essex office was. Therefore, it claims, no special exceptions apply.

17. Defendant's reliance on *Brown* is misplaced. The claimant in that case, a construction worker, regularly commuted to several different job sites, such that no special circumstance differentiated his travel to one site as opposed to another. That being the case, the Commissioner concluded that the jobsites were all equally "fixed," and therefore his travel to any of them was subject to the general going and coming rule. *Id.* at ¶14.

18. In contrast, I conclude in this case that Claimant's travel was for a special business-related purpose, one that required her presence at a location separate and distinct from her regular jobsite. As such, it was distinguishable from her normal commute, and fits squarely within the "traveling employee" exception noted above.[4]

[4] That occasional travel for training and/or meetings may have been a required part of Claimant's job, *see* Finding of Fact No. 2 *supra,* does not change this conclusion in any respect. The "traveling employee" exception to the going and coming rule requires only that the employee's travel be "a substantial part of the service for which the worker is employed," *Larson's Workers' Compensation, supra* at Chapter 14, p. 14-1, not necessarily that it be an unanticipated duty as well. *Id.* at §14.05 and cases cited therein.

19. Does the fact that Claimant and her coworkers selected the Williston Road Starbucks as their rendezvous point amount to a personal deviation sufficient to remove her injury from the traveling employee exception? Noting that other Williston Road establishments, as well as the VTrans commuter lot in Richmond, offered similarly convenient meeting sites, Defendant asserts that it does. I disagree, both with Defendant's premise – that meeting at Starbucks amounted to a personal deviation – and with its conclusion – that the deviation was substantial.

20. As to Defendant's characterization of Claimant's deviation as a "personal" one, the undisputed evidence establishes that her sole purpose in traveling to the Williston Road Starbucks was to meet her coworkers so that they could ride together to the Stowe training session. Had she arrived earlier than the pre-arranged 7:30 AM rendezvous time in order to take breakfast at Starbucks, or even merely to purchase a cup of coffee, conceivably this might have added a personal element to her travel there. Claimant's sworn testimony is to the opposite effect, however. Her travel to Starbucks encompassed only business purposes, *see* Finding of Fact No. 8 *supra*, and therefore does not merit analysis as a personal deviation.[5]

21. Even were I to accept Defendant's characterization of Claimant's presence at the Williston Road Starbucks as a personal deviation, I cannot accept that it was a substantial one. That Defendant was able to identify other, equally reasonable carpool rendezvous points, *see* Finding of Fact No. 7 *supra*, does not render the site Claimant and her coworkers chose any less so. All were located in the same general vicinity and along the same, reasonably direct route to Stowe. All likely were subject to the same wintry weather and road conditions. None would have resulted in any appreciably different deviation in terms of time, increased risk, geography or causative degree.

22. I conclude that Claimant's injury occurred at a location – the Williston Road Starbucks – sufficiently connected to her job duties as to have been in the course of her employment. To the extent that Claimant's presence there amounted to a personal deviation, it was temporally brief, geographically short and reasonable under the circumstances. As such, I consider it to have been insubstantial. *See Lopez, supra*.

(c) Was the activity in which Claimant was engaged when her injury occurred sufficiently linked to her employment?

[5] Even if Claimant had identified both business and personal reasons for choosing to carpool to Stowe rather than driving by herself – not only to ensure that she and her coworkers arrived to the training session on time, but also to minimize the wear and tear on her own vehicle, for example – at best her travel would have amounted to a mixed-purpose trip, which according to Larson does not merit consideration as a "personal" deviation and does not remove it from the course of her employment. *See Larson's Workers' Compensation, supra* at §17.02 and cases cited therein.

23. The final requirement for establishing that an injury has arisen "in the course of" employment is that it be shown to have occurred while the employee was engaged in an activity "whose purpose is related to the employment." *Cyr, supra* at ¶13 (internal quotations omitted); *Miller, supra* at 215; *Marsigli Estate, supra* at 98. Generally speaking, an activity that benefits the employer is considered to have an employment-related purpose. *Kenney v. Rockingham School District,* 123 Vt. 344 (1963). This is true even if the employer did not specifically direct the employee to undertake it. *Id.* at 348.

24. I already have found that Claimant's decision to meet her coworkers at the Williston Road Starbucks so that they could carpool together to the Stowe training session was motivated primarily by their desire to arrive at the training locale on time, a consideration of substantial benefit to Defendant. To the extent that carpooling would have reduced Defendant's overall training-related mileage expense, this too was of substantial benefit. That Defendant in no way mandated or even encouraged Claimant and her coworkers to carpool does not diminish these benefits in any respect. Though entirely voluntary, to the extent Claimant's carpool-related activities were "undertaken in good faith to advance the employer's interest," *Kenney, supra* (internal quotations omitted), their purpose was sufficiently related to her job duties as to have occurred in the course of her employment.

25. Having considered the undisputed facts as to time, place and activity, I thus conclude as a matter of law that Claimant's December 2, 2013 injury was sufficiently linked to her employment to have occurred "in the course of" it.

Determining Compensability – the "Arising Out Of" Component

26. I turn now to the second component of the compensability determination – whether Claimant's injury "arose out of" her employment for Defendant. What is required to satisfy this factor is a causal connection 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, supra* at 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).

27. 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 1 A. Larson, *Workmen's Compensation Law* §6.50 (1990) (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*.

28. In most cases, an injury that occurs during the "course of employment" also "arises out of it," unless the circumstances "are so attenuated from the condition of employment that the cause of injury cannot reasonably be related to the employment." *Miller, supra* at 215, quoting *Shaw, supra* at 598. The "arising out of" question here, then, is whether the circumstances of Claimant's injury – falling on an icy step at the Williston Road Starbucks – are so attenuated from the condition of her employment – that she and her coworkers travel to Stowe for an employer-directed training session – as to no longer be reasonably related. *See, e.g., Lehneman v. Town of Colchester*, Opinion No. 10-12WC (March 13, 2012).

29. The undisputed evidence here establishes first, that Claimant's injury occurred when she slipped and fell on glare ice that had accumulated at the entry to the Williston Road Starbucks, and second, that her sole purpose in entering those premises was to meet her coworkers for the carpool trip to Defendant's training session in Stowe. Having already concluded that Claimant's injury thus arose in the course of her employment, I do not consider these circumstances to be so attenuated from the conditions of her employment as to no longer be reasonably related to it. *Compare Lopez v. The Howard Center*, Opinion No. 12-14WC (August 7, 2014) (circumstances of injury sufficiently related to conditions of employment to support compensability) *with Lehneman, supra* (circumstances of injury too attenuated to support compensability). To the contrary, but for the fact that the obligations of her employment placed her in that position, she would not have been injured.

30. I thus conclude as a matter of law that the cause of Claimant's injury was sufficiently related to the conditions of her employment to have arisen out of it.

Summary

31. Even considering the evidence in the light most favorable to Defendant, I conclude as a matter of law that Claimant's December 2, 2013 injury both occurred in the course of her employment for Defendant and arose out of it. As there are no genuine issues of material fact, I thus conclude as a matter of law that Claimant's injury is compensable.

32. 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:

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 a consequence of her December 2, 2013 work-related injury, with interest as calculated in accordance with 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 24th day of December 2014.

_____
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.