STATE OF VERMONT
DEPARTMENT OF LABOR

Christina Rainville

v.

Boxer Blake & Moore, PLLC

Opinion No. 02-21WC

By: Stephen W. Brown
Administrative Law Judge

For: Michael A. Harrington
Commissioner

State File No. LL-55774

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES:

Christina Rainville, Esq., *pro se*, Claimant
Eric Falkenham, Esq., for Defendant

ISSUES PRESENTED:

1. Did Claimant's pizza consumption on December 4, 2017 arise out of and in the course of her employment with Defendant?

2. If so, did that pizza consumption cause or aggravate any medical condition?

EXHIBITS:

Claimant's Statement of Undisputed Facts

Defendant's Response to Claimant's Statement of Undisputed Facts

Defendant's Statement of Undisputed Facts

Claimant's Response to Defendant's Statement of Undisputed Facts

Claimant's Counter-Statement of Undisputed Material Facts

Defendant's Counter-Statement of Undisputed Material Facts

Claimant's Medical Records

Claimant's Sworn Declaration, signed August 28, 2020

Claimant's Exhibit 1: Medical article published in PubMed relating to immune disorders[1]

[1] I do not consider medical articles or other publications without foundational testimony from a qualified expert witness tying them to the facts of this case. Claimant's Exhibits 1, 6, 7, 8, and 10 are excluded on this basis.

Claimant's Exhibit 2: Letter from Robert Schwartz, MD to Claimant, dated August 7, 2020

Claimant's Exhibit 3: Claimant's List of Medical Conditions as of August 30, 2020 that she alleges to have been Caused or Aggravated by Eating Wheat on December 4, 2017

Claimant's Exhibit 4: Letter from Defendant's attorney to Claimant dated July 29, 2020, enclosing communications with Dr. John Leung and his office[2]

Claimant's Exhibit 5: Email from Defendant's attorney's office to Claimant enclosing invoice for Dr. John Leung's expert services

Claimant's Exhibit 6: Medical article published in PubMed

Claimant's Exhibit 7: Excerpts from treatise concerning wheat syndromes

Claimant's Exhibit 8: News article from Eureka Alert relating to wheat, inflammation, and chronic health conditions

Claimant's Exhibit 9: Email correspondence between Claimant and Dr. Detlef Schuppan, dated August 21, 2020

Claimant's Exhibit 10: Medical article relating to symptom recovery and gluten-free diets

Defendant's Exhibit A: Excerpts from Claimant's Affidavit submitted with her Motion to Compel Discovery, dated July 26, 2019

Defendant's Exhibit B: Excerpts from Claimant's pleading, dated July 6, 2020

Defendant's Exhibit C: Excerpts from Claimant's Objection to Defendant's Denial, dated May 17, 2019

Defendant's Exhibit D: Report of John Leung, MD, dated January 30, 2020

Defendant's Exhibit E: Medical Record from James Saunders, MD, dated May 15, 2019

Defendant's Exhibit F: Correspondence from Claimant to Daniel Hamilos, MD, dated August 12, 2019

Defendant's Exhibit G: Medical Record from Vishnuteja Devalla, MD, dated September 17, 2019

Defendant's Exhibit H: Medical Record from Robert Schwartz, MD, dated November 12, 2019

[2] Claimant's Exhibit 4 comprises 50 sub-exhibits, numbered 4-1 through 4-50. I do not separately list them here.

Defendant's Second Exhibit A:[3] Employee Handbook

Defendant's Second Exhibit B: Printout of online customer reviews for American Flatbread in Burlington, Vermont

Defendant's Second Exhibit C: Evaluation Report by Kathryn Tolbert, Ph.D.

Defendant's Second Exhibit D: Medical Record from Carolyn Goodwin, FNP, dated November 14, 2018

Defendant's Second Exhibit E: Evaluation Report by William Bank, MD, dated May 2, 2006

Defendant's Second Exhibit F: Video of Bennington County State's Attorney Candidate Forum

Defendant's Second Exhibit G: Letter from Robert Schwartz, MD to Claimant dated August 7, 2020

Defendant's Second Exhibit H: Medical Record from Robert Schwartz, MD, signed July 17, 2019

Defendant's Exhibit I: Medical Record from Stephanie D. Mathew, DO, dated July 11, 2019

Defendant's Exhibit J: Medical Record from Robert Schwartz, MD, dated December 6, 2018

Defendant's Exhibit K: Report of John Leung, MD

Defendant's Exhibit L: *Curriculum vitae* of John Leung, MD

Defendant's Exhibit M: Medical Record from Siddhartha Parker, MD, dated December 3, 2018

BACKGROUND:

There is no genuine issue as to the following factual matters:

1. Defendant is a law firm based in Springfield, Vermont. Claimant is an attorney licensed to practice in Vermont with a history of gluten sensitivity, among other medical conditions. As of December 2017, Defendant employed her as an associate attorney. Although she worked primarily out of Defendant's Springfield office, her supervising attorney was Stephen Ellis, whose office was approximately two hours away in Burlington.

[3] Defendant submitted exhibits labeled A through H in support of its Motion for Summary Judgment, and another set of exhibits labeled A through M in support of its Response in Opposition to Claimant's Motion for Summary Judgment. Thus, there are two sets of Defendant's Exhibits A through H. For clarity, I have re-identified those filed with its Response in Opposition as Defendant's "Second" Exhibits A through H.

Claimant's Pizza Consumption at Work on December 4, 2017

2. On December 4, 2017, Claimant was in Mr. Ellis's Burlington office to handle a mediation that was scheduled to begin at 1:00 PM that day. Claimant needed to meet with the client at Mr. Ellis's office before the mediation to prepare.

3. For her lunch, Claimant had planned to run out quickly to get a gluten-free pizza from American Flatbread, a restaurant near Mr. Ellis's office whose gluten-free pizza she had eaten several times before without incident. However, when Claimant arrived at Mr. Ellis's office, the client was either already there and waiting for her, or else arrived shortly after Claimant's arrival. Claimant asked Diane Drake, a paralegal who worked for Defendant and who had previously said that she ate only gluten-free foods, whether she would like to split a gluten-free pizza. Ms. Drake said yes.

4. Claimant offered to pay for the pizza if Ms. Drake would order it, and Ms. Drake agreed. Claimant reiterated the need for the pizza to be gluten-free, and Ms. Drake replied, "yes, of course," or words to that effect. Ms. Drake then ordered the pizza in her office, out of Claimant's earshot.

5. After Ms. Drake ordered the pizza, she returned to the conference room with Claimant and the client, and they all began preparing for the mediation. Ms. Drake later left to pick up the pizza; after her return, she and Claimant began eating the pizza at the conference table while continuing to prepare the client for mediation.

6. As Claimant swallowed her third bite of pizza, she realized[4] that she was eating wheat pizza.[5] She immediately communicated this to Ms. Drake, who said that she had forgotten to order a gluten-free pizza and apologized. Claimant perceived that Ms. Drake was upset with herself, so she continued preparing the client for mediation without making a "big deal."

7. Defendant's general practice was to pay for meals as a travel expense when work required their attorneys to travel outside the office. Claimant requested, and Defendant

[4] Defendant takes issue with the word "realize," because that word indicates that the pizza in fact contained wheat. Defendant does not concede that fact for the purposes of these motions, citing a lack of scientific testing of the pizza itself. Additionally, Defendant has submitted customer reviews of the restaurant which include complaints from other customers that they did not receive what they ordered. Defendant argues that Ms. Drake therefore could have ordered a gluten-free pizza as directed but still received a wheat pizza. *See* Defendant's Exhibit B. I do not find these arguments persuasive. Given Defendant's acknowledgement of Ms. Drake's admission that she forgot to order a gluten-free pizza, neither the online reviews nor the lack of scientific testing of the pizza create any *genuine* issue of material fact. Claimant has filed a sworn declaration in which she testified that she has eaten wheat on prior occasions, such as in 2015. *See* Claimant Declaration, ¶¶ 16-22. Against that backdrop, her statement that she "realized" she was eating wheat during the December 2017 mediation, *see id.*, ¶ 50, combined with Ms. Drake's admission and the lack of any non-speculative contrary evidence in the record, establish as a matter of law that (1) Ms. Drake forgot to order gluten-free pizza, and (2) the pizza that Claimant consumed on December 4, 2017 contained wheat.

[5] I take judicial notice of the fact that wheat contains gluten.

granted, reimbursement for her mileage, but Claimant did not request reimbursement for the meal.[6]

8. Claimant subsequently reported the December 2017 pizza consumption incident as a workplace injury to one or more of Defendant's partners.[7]

Claimant's Medical Conditions and Complaints that She Alleges to Have Been Caused by her December 2017 Pizza Consumption

9. Claimant's medical history is extensive and complex, and she has treated or consulted with many medical providers since December 2017. She alleges, and Defendant denies, that her December 2017 wheat pizza consumption caused or aggravated all of the following medical conditions:

   a. High IgE;

   b. IgE-Wheat antibodies;

   c. Systemic inflammation condition;

   d. Severe and sustained exacerbation of chronic rhinosinusitis;

   e. Exacerbated asthma;

   f. Severe vitamin D deficiency;

   g. Inflammatory back pain;

   h. Plantar fasciitis in both feet;

   i. Inflammatory polyarthropathy;

   j. Difficulty swallowing;

   k. Fluctuating bilateral sensorineural hearing loss requiring hearing aids;

   l. Chronic abdominal pain in the left upper quadrant;

   m. Severe sleep disturbance;

   n. Tachycardia;

[6] Claimant's reasons for not seeking meal reimbursement are disputed, but that dispute need not be resolved for the purposes of these motions.

[7] The parties dispute when Claimant's first report of the incident occurred, but that dispute need not be resolved for the purposes of these motions.

o. Palpitations;

p. Chronic diarrhea;

q. Uterine tumor;

r. Chronically-swollen and palpable axillary lymph node;

s. Mild subsegmental atelectasis (partially collapsed lung);

t. Dry eyes and damage to the corneal surface in both eyes;

u. Fluctuating cognitive impairment;

v. Pre-diabetes;

w. Dry mouth;

x. Dangerously low oxygen levels;

y. Photosensitivity and a possible lupus-like condition;

z. Inflammation in the skin;

aa. Swollen left foot;

bb. Left-sided weakness;

cc. Acute pharyngitis and yeast infection in the throat; and

dd. Venous insufficiency in both legs.

10. Although references to all those conditions appear in Claimant's medical records, she has cited only two documents that affirmatively assert any causal connection[8] with her December 2017 wheat pizza consumption:

    a. Dr. Robert Schwartz, Claimant's primary care physician, wrote in a letter to Claimant dated August 7, 2020: "It is more likely than not that your ingestion

[8] Claimant has quoted extensively from other medical records in her filings. Several of them suggest a *possible* causal connection between Claimant's pizza consumption and her medical complaints, or words to the effect that a causal connection cannot be ruled out. Several of them also contain generalized statements about the risks of wheat consumption for people with gluten sensitivity. I do not find records lacking affirmative causal assertions material to the issue of medical causation for the purposes of the present cross-motions.

of wheat in December 2017 resulted in the prolonged systemic inflammatory response that you have had since that time."[9] *See* Claimant's Exhibit 2.

and

b. Dr. Daniel Hamilos, Claimant's treating immunologist, wrote in a medical record: "I told her that I cannot explain the mechanism for the relationship between wheat intolerance and chronic rhinosinusitis, although it is clear from her history that accidentally eating wheat in 12/17 triggered a severe and sustained exacerbation of her chronic rhinosinusitis. Therapeutically, I recommend she continue a strictly gluten free diet." *See* Claimant's Medical Records, p. 260.

11. With respect to Claimant's cognitive complaints, she underwent a neuropsychological evaluation in January 2020. The report that resulted from that evaluation identifies certain cognitive "vulnerabilities," but does not affirmatively assert that Claimant's cognitive functioning has changed from any prior date. Nor does it assert that her 2017 pizza consumption affected her cognition in any way. Claimant has not cited any other specific medical evidence asserting that her present cognitive capacity has declined from any prior time, or that her December 2017 pizza consumption affected her cognition in any way. Without citing to any particular record, she contends that her "medical records clearly show that the pain was caused by eating wheat and that the chronic pain contributed to the lapses in cognitive function." *See* Defendant's Statement of Undisputed Fact Nos. 25-28 and Claimant's Response thereto.

CONCLUSIONS OF LAW:

Summary Judgment

1. To prevail on a summary judgment motion, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to judgment in its favor as a matter of law. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). The party opposing the motion 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, 48 (1990).

Claimant's Pizza Consumption and its Relationship to Her Employment

2. Vermont law requires employers to pay workers' compensation benefits whenever a worker sustains a "personal injury by accident arising out of and in the course of employment by an employer[.]" 21 V.S.A. § 618(a). In other words, to have a compensable injury, a claimant must satisfy two elements by proving that the injury: "(1) arose out of the employment, and (2) occurred in the course of the employment." *Miller v. Int'l Bus. Machines Corp.*, 161 Vt. 213, 214 (1993). The undisputed facts

[9] Dr. Schwartz's letter does not make clear what symptoms, conditions, or complaints he considered to be within the scope of Claimant's "systemic inflammatory response."

concerning Claimant's December 2017 pizza consumption satisfy the second, but not the first, element of this test.

a. Claimant's Pizza Consumption Did Not Arise Out of Her Employment

3. The Vermont Supreme Court analyzes the first prong of this inquiry—whether an injury "arises out of" employment—under the "positional risk" doctrine. Under that doctrine, 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 the claimant in the position where claimant was injured.'" *Cyr v. McDermott's, Inc.*, 2010 VT 19, ¶ 10 (holding that claimant was put in a "positional risk" when his coworker gave him a Mountain Dew bottle that contained an industrial cleaning agent, and the claimant later consumed it, believing the liquid to be a soft drink, suffering chemical burns).

4. The Department's analysis of this first prong in *Lehneman v. Town of Colchester*, Opinion No. 10-12WC (March 13, 2012), is instructive. The claimant in *Lehneman* was a police officer who purchased a hamburger from a local restaurant, returned to his office, and began doing paperwork while eating. When he bit into the hamburger, his front tooth hit a piece of bacon and broke. *See id.* It was undisputed that this injury occurred "during the course of" his employment, but the parties disputed whether it "arose out of" his employment. The Department framed the central question as "whether the obligations of Claimant's employment—specifically, that he take his meals while working his shift — constitute[d] a sufficient connection to his injury as to render it compensable." *Id.* In holding that it did not, the Department reasoned as follows:

> … the conditions of Claimant's employment admittedly were such as to encourage him to eat while working. However, they did not extend so far as to direct, or even suggest, that he eat any particular food from any particular source at any particular time. Claimant could have chosen another menu item, or another restaurant, or even brought his own meal from home. That he opted not to do so was a consequence of his own preferences, not any work-related obligation.
>
> *Id.*, Conclusion of Law No. 9.

5. Analogously, in this case, work-specific exigencies—the timing of a client's arrival and the time-sensitive need to prepare for her mediation—led Claimant to eat while working. Those same exigencies also led her to ask a coworker to make a joint arrangement for lunch: Claimant would pay for the pizza and her coworker would place the order. While her coworker's error in placing the order contributed to Claimant's unwitting consumption wheat, that error related to their private lunch arrangements, and not the performance of Claimant's work duties.

6. Nothing about Claimant's job required her to select pizza generally, or American Flatbread specifically, or to relinquish control over the communication of her lunch order to the restaurant by asking a coworker to place it.

7. Unlike the chemical agent at issue in *Cyr*, *supra*, which was used to clean milk trucks as a part of the defendant's business in that case, *see id.*, there is no connection between Defendant's law practice and American Flatbread's pizza other than the restaurant's geographic proximity to Mr. Ellis's Burlington office.

8. Additionally, Defendant had no input into the selection of the meal that Claimant and her coworker agreed to share. This was not, for instance, an employer-sponsored teambuilding pizza party, or an employer-originated lunch order for everyone participating in the day's mediation, either of which would be a closer case than this. Moreover, nothing about Claimant's work obligations prevented or discouraged her from bringing her lunch from home to minimize the risk of eating gluten.

9. The fact that Claimant could have sought reimbursement from Defendant for the cost of her lunch does not make her pizza consumption arise out of her employment. There is no evidence that Defendant's reimbursement policies depended on what food Claimant chose, or how, or with whose assistance, she procured it. Without more, Defendant's general practice of reimbursing employees for the cost of their meals does not render it an insurer over the health effects of all meals its employees might choose, even if multiple employees act together at the workplace to obtain their meals.

10. While the time pressures of her workday certainly influenced Claimant's choice about how to obtain her lunch, it was still her decision to choose pizza and to form an agreement with her coworker to place the order. Under these circumstances, the risk of gluten consumption was not incident to the "conditions and obligations of [her] employment[.]" *Cf. Cyr*, *supra*, ¶ 10. As a matter of law, her wheat pizza consumption therefore did not "arise out of" her employment. *See id.*

b. Claimant's Pizza Consumption Occurred During the Course of Her Employment

11. The second prong of the compensability inquiry—whether an injury occurs "within the course of employment"—depends on "time, place and activity." This prong requires that the injury arise "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*, ¶ 13. This requirement is satisfied when the injury occurred "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." *Lehneman*, *supra* (citing *Miller*, *supra* at 215). Generally, "injuries that occur on the employer's premises during a regular lunch hour are deemed to have arisen in the course of employment." *Id.*

12. Here, Claimant consumed the pizza on her employer's premises during working hours while conducting the work-related task of preparing a client for mediation. That is enough to satisfy the second element. *Cf. Cyr*, *supra* ¶ 13; *Lehneman*, *supra*, Conclusion of Law No. 4.

13. Claimant contends that her claim is compensable under the "traveling employee" doctrine, which Vermont recognizes as an exception to the "going and coming rule" in determining whether an injury occurred "during the course of" employment. *See Freeman v. Pathways of the River Valley*, Opinion No. 09-17 (May 13, 2017), Conclusions of Law Nos. 3-21.[10] However, Claimant's December 2017 pizza consumption occurred during the course of her employment for reasons independent of the traveling employee doctrine. *See* Conclusions of Law Nos. 11-12, *supra*. Thus, I need not assess that doctrine's application to the facts of this case. Even if it applied, the traveling employee doctrine would not affect whether Claimant's pizza consumption "arose out of" her employment, the first requirement for her claim to be compensable under Vermont law. *See* Conclusions of Law Nos. 3-10, *supra*.

Conclusion

14. Although Claimant's December 2017 wheat pizza consumption occurred "during the course of" her employment, it did not "arise out of her employment." *See* Conclusions of Law Nos. 3-13, *supra.* Both elements are required for her claim to be compensable. *See* Conclusion of Law No. 2, *supra.* Because the undisputed facts demonstrate that Claimant cannot satisfy the first element, Defendant is entitled to judgment in its favor as a matter of law. As such, I need not address the issue of medical causation.

ORDER:

Because Claimant's alleged injury did not arise out of her employment, Defendant's Motion for Summary Judgment is **GRANTED**, and Claimant's Motion is **DENIED**. This claim is therefore dismissed.

All other pending motions in this case are **DENIED** as moot.

DATED at Montpelier, Vermont this 15th day of January 2021.

_____
Michael A. Harrington
Commissioner

[10] Under the "going and coming" rule, an employee is generally "not ***within the course of employment*** when he or she is injured while traveling to and from work, unless the injury occurs on the employer's premises." *Id.* (citing *Miller*, *supra*, at 216; emphasis added). The "traveling employee" doctrine provides a limited exception to that principle for employees "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." *Id.* (citing *Moreton v. State of Vermont Department of Children and Families*, Opinion No. 17-14WC (December 24, 2014) and Larson's Workers' Compensation, § 14-1).

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.