STATE OF VERMONT
DEPARTMENT OF LABOR

Christina McVeigh

v.

Brattleboro Food Cooperative, Inc.

Opinion No. 20-21WC

By: Stephen W. Brown
Administrative Law Judge

For: Michael A. Harrington
Commissioner

State File Nos. PP-52974; PP-263

RULING ON DEFENDANT'S/A.I.M. MUTUAL INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Spencer Crispe, Esq., for Claimant
David Berman, Esq., for Defendant (A.I.M. Mutual Insurance Company) ("A.I.M.")
James O'Sullivan, Esq., for Defendant (Continental Casualty Company/CNA Insurance)

ISSUE PRESENTED:

Did Claimant suffer an injury that arose out of and in the course of her employment?

EXHIBITS:

Defendant's/A.I.M.'s Statement of Undisputed Material Facts ("DSUMF")

Claimant's Supplemental Statement of Undisputed Material Facts ("CSUMF")

Affidavit of Christina McVeigh ("McVeigh Affidavit")

Referral to the Formal Hearing Docket

BACKGROUND:

The following facts are undisputed:

1. Claimant was Defendant's employee for approximately twenty-eight years, from 1992 until 2020. (CSUMF 7, McVeigh Affidavit, ¶ 1).

2. On May 30, 2010, an individual robbed Defendant's store while Claimant was working there. The perpetrator brandished a knife toward Claimant, pressed it into her side while he demanded money, and left a superficial mark and a minor physical injury. At the time of that robbery and assault, Defendant's workers' compensation carrier was Continental Casualty Company c/o C.N.A. Insurance. (DSUMF 1-2; CSUMF 1; McVeigh Affidavit, ¶ 3).

3. On August 31, 2020, Claimant received a telephone call from the Victim's Advocate associated with the State's Attorney's office informing her that the perpetrator in the robbery described above would soon be released from incarceration into the Brattleboro community, and that it was possible that she could encounter him at work. At the time Claimant received that telephone call, Defendant's workers' compensation carrier was A.I.M. (DSUMF 3-4; CSUMF 2; McVeigh Affidavit, ¶ 6).

4. Claimant alleges that the August 2020 telephone call caused her significant emotional stress, including post-traumatic stress disorder and anxiety. She alleges that those conditions resulted in her hospitalization and have prevented her from working since that time. (DSUMF 5; CSUMF 3; McVeigh Affidavit, ¶ 7).

5. The legal dispute for the purposes of the present motion is whether the August 31, 2020 telephone call can form the basis of a work-related injury under Vermont law. (DSUMF 6). A.I.M. contends that the phone call was "purely personal" and did not arise out of or occur during the course of her employment.

CONCLUSIONS OF LAW:

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). Summary judgment is appropriate only when the facts in question are clear, undisputed, or unrefuted. *State v. Heritage Realty of Vermont*, 137 Vt. 425, 428 (1979).

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). Thus, 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).

3. As to the first prong of this inquiry of the compensability—whether an injury "arises out of" employment—Vermont follows the "positional risk" doctrine, under which 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.

4. In this case, Defendant's store was robbed while Claimant was working there. Her employment in a store setting significantly increased her risk relative to the general population of encountering an armed robber seeking her employer's cash or other assets. Her increased risk of receiving a telephone call about such a robber's pending release from prison and into her community is a logical corollary to her risk of encountering that robber in the first place. The record provides no reason to suspect that Claimant would have received that call but for her employment.

5. At the very least, there is a genuine issue of material fact as to whether the conditions and obligations of her employment were the but-for cause of any psychological injuries she sustained as a result of receiving that telephone call. Construing all inferences in Claimant's favor, the August 2020 telephone call that she received satisfies the first prong of the compensability analysis.

6. The second prong of the compensability inquiry—whether an injury occurs "within 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."' *Moreton v. State of Vermont*, Opinion No. 17-14WC (December 24, 2014) (citing *Cyr*, *supra*). 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 v. Town of Colchester*, Opinion No. 10-12WC (March 13, 2012) (citing *Miller*, *supra* at 215).

7. Here, this second element is a closer call than the first. There is little direct evidence relating to the first two factors, time and place. The parties' Statements of Undisputed Material Facts contain no recitations of what time of day Claimant received the call, where she was when she received it, or what her working hours were. However, Defendant's Motion represents that the call did not occur while Claimant was on duty fulfilling duties of her employment contract. Claimant's response does not contradict that assertion.

8. Whenever and wherever she received the call, however, it was a consequence of the robbery that plainly occurred during the course of Claimant's employment a decade earlier. I consider this relevant, though not dispositive, in assessing the work-connectedness of the call as to time in place. Additionally, while Claimant's affidavit does not specifically state that she was still Defendant's employee when she received the call, her statements that she worked for Defendant until 2020, that her stress from receiving the call has prevented her from working since that time, and that the Victim's Advocate advised her that she might encounter the perpetrator at work all strongly support an inference that she was still Defendant's employee when she received the call, even if she was not actively working at that moment. (*See* Findings of Fact Nos. 1, 3-4, *supra*).

9. Although the record leaves several important questions that would be necessary for a comprehensive weighing of the first two factors of the second prong of the compensability analysis unanswered, the allowable inferences from the parties' submissions weigh in both directions: assuming the call did not occur while Claimant was at work, which appears implicitly undisputed, that weighs in Defendant's favor; the ultimate causal origin of the call, the robbery, weighs in Claimant's favor as to the first two factors.

10. However, the third factor—activity—weighs strongly in Claimant's favor. As discussed above, the subject matter of the call giving rise to this claim specifically

related to the robbery that happened while Claimant was at work, and Claimant would have had no reason to receive that call but for her employment. Even if the first two factors on balance weighed in Defendant's favor, it would make little sense for the deciding factor in this call's compensability to be whether a third party, here the Victim's Advocate, decided to initiate the call when Claimant happened to be at work.

11. I find the argument that this was a "purely personal phone call" unpersuasive. Considering the factors above, there is, at a minimum, a genuine issue of material fact as to whether the August 2020 telephone call occurred during the course of Claimant's employment irrespective of whether she was at work when she received it.

ORDER:

For the reasons above, genuine issues of material fact prevent me from rendering judgment as a matter of law. Therefore, Defendant's/A.I.M.'s Motion for Summary Judgment is **DENIED**.

DATED at Montpelier, Vermont this 5th day of November 2021.

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Michael A. Harrington
Commissioner