

Nancy Berg v. Rutland Crossing LLC

(August 19, 2010)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Nancy Berg

Opinion No. 28-10WC

v.

By: Sal Spinoso, Esq.
Hearing Officer

Rutland Crossing, LLC

For: Valerie Rickert
Acting Commissioner

State File No. BB-00003

OPINION AND ORDER

Hearing held in Rutland, Vermont on May 28, 2010

Record closed on June 21, 2010

APPEARANCES:

Karl Anderson, Esq., for Claimant
Thomas Simon, Esq., for Defendant

ISSUE PRESENTED:

Did Claimant's right ankle injury arise in the course and scope of her employment for Defendant?

EXHIBITS:

Joint Exhibit I: Medical records

Claimant's Exhibit 1-4: Photos depicting varied views of accident scene

Defendant's Exhibit A: Undated handwritten statement signed by Claimant

Defendant's Exhibit B: Two photos of accident scene facing east

Defendant's Exhibit C: Two photos of accident scene facing west

Defendant's Exhibit D: Two photos of accident scene from a distance facing west

Defendant's Exhibit E: Photo of railing at accident scene from a distance facing west

CLAIM:

Workers' compensation benefits causally related to Claimant's right ankle injury

FINDINGS OF FACT:

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. Judicial notice is taken of all relevant forms contained in the Department's file relating to this claim.
3. Defendant operates a nursing home in Rutland, Vermont. Claimant was employed there as a kitchen worker.
4. On April 23, 2009 Claimant was leaving work after attending an in-service training. She walked across Defendant's premises to a set of stairs leading up to a landing adjacent to a municipal sidewalk. The stairs and landing are on Defendant's property; the sidewalk is not.
5. Both the stairs and the landing are bordered by fence-like handrails. The landing has a flat concrete surface that runs from the top of the stairs to the sidewalk. It is as wide as the stairs but slightly longer in length from the top stair to the sidewalk. Where it meets the sidewalk, the landing is approximately three inches below the grade of the sidewalk.
6. Claimant testified that as she neared the top of the stairs, for no apparent reason her ankle gave out. She stumbled first to the next step, then onto the landing and ultimately into the bushes near where one corner of the landing meets the sidewalk. Claimant injured her right ankle in the fall.
7. Claimant's testimony is somewhat at odds with what she had reported to Defendant earlier in a handwritten statement. There she stated that "[a]t the top of the stairs (still company property) I tripped on the area where the stairs meet the sidewalk. There is about a two inch gap there."
8. Four other witnesses testified about Claimant's fall. Each worked for Defendant, reported having a positive work relationship with Claimant and provided credible testimony.
9. Claimant acknowledged in her testimony that the first witness, Joe Clairmont, was on the sidewalk when she fell and saw the entire event. Mr. Clairmont had attended the same in-service training that Claimant had. He was standing at a bus stop on the sidewalk next to the landing when he saw Claimant come up the stairs. Mr. Clairmont testified that Claimant did not trip while climbing the stairs. Rather, according to his recollection she reached the sidewalk without incident. Mr. Clairmont recalled that a minute or so later, as Claimant was walking towards him on the sidewalk, she caught her right foot on the edge of the sidewalk adjacent to the landing and fell.

10. The second witness, Lorie Van Lew, testified that she saw Claimant standing near the bus stop for about two minutes before she observed her fall. She recalled Mr. Clairmont standing in the same vicinity. Ms. Van Lew admitted that from her vantage point, approximately 50 feet away, she could not see where Claimant's feet were when she fell. However, it appeared to her that Claimant was on the sidewalk when she fell.
11. The third witness, Deirdre Fillmore, was stopped in her vehicle waiting for traffic to clear when she noticed Claimant and Mr. Clairmont. Although Ms. Fillmore's view was somewhat obstructed, it appeared to her that both were standing on the sidewalk at the bus stop. She testified that a minute and a half later she saw Claimant fall but was unable to see what caused her to do so. Ms. Fillmore went to Claimant's aid. She asked Claimant what happened, and Claimant replied, "I don't know. I think I stepped off the sidewalk and twisted my ankle."
12. The fourth witness, Colleen Lizotte, also went to Claimant's aid, but testified that she did not actually see the fall. Notably, Ms. Lizotte testified that on more than one occasion prior to April 23, 2009, while she and Claimant were standing at the bus stop, Claimant had asked her who would be responsible if someone fell at this site, Defendant or the city. Ms. Lizotte recalled that the last inquiry had occurred a couple of weeks prior to Claimant's fall.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or she must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984). There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).
2. To establish a compensable claim under Vermont's workers' compensation law, a claimant must show both that the accident giving rise to his or her injury occurred "in the course of the employment" and that it "arose out of the employment." *Miller v. IBM*, 161 Vt. 213, 214 (1993); 21 V.S.A. §618.
3. 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." *Miller, supra* at 215, quoting *Marsigli Estate v. Granite City Auto Sales, Inc.*, 124 Vt. 95, 98 (1964).

4. In *Miller*, the Court clearly delineated the employer's liability for injuries to employees who are going to or coming from work as co-extensive with the employer's premises. *Id.* at 216. An injury incurred while the employee is still on the employer's premises generally is compensable; one incurred after the employee has left the premises generally is not. *Id.*, see 1 *Larson's Workers' Compensation Law* §13.01[1] and cases cited therein. Applying this principle to the facts here, the critical question is whether Claimant was still on Defendant's premises, either the stairs or the landing, at the time of her fall, or whether she already had reached the public sidewalk.
5. Claimant testified that she was on the stairs, not the sidewalk, when she fell. Other witnesses placed her on the public sidewalk when the fall occurred. None of these witnesses testified to any ill will against Claimant. Each observed Claimant from a different perspective, and their accounts, while not identical, were consistent. The mutually reinforcing effect of that consistency made their collective account particularly credible.
6. Mr. Clairmont in particular was uniquely positioned to observe Claimant's fall. Indeed, Claimant herself acknowledged as much when she remarked that he saw the whole event. Mr. Clairmont's recollection that both he and Claimant were near one another on the public sidewalk when Claimant fell directly contradicts her account to the contrary.
7. Claimant's own words further undermine her testimony. Her inquiries concerning liability in the event of a fall at this very site are certainly suspicious. Considered in conjunction with the varying accounts she gave as to the mechanism of her fall, her version of events becomes even less credible.
8. I find that Claimant has failed to sustain her burden of proving that she was on Defendant's premises when she fell. Her injury did not occur in the course of her employment and therefore is not compensable.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Claimant's claim for workers' compensation benefits causally related to her April 23, 2009 fall is hereby **DENIED**.

DATED at Montpelier, Vermont this 19th day of August 2010.

Valerie Rickert
Acting 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.