L. M. v. C.G. McCullough Insurance (July 2, 2008)

STATE OF VERMONT
DEPARTMENT OF LABOR

L. M. Opinion No. 27-08WC

By: Jane Gomez-Dimotsis
v. Hearing Officer

C.G. McCullough Insurance For: Patricia Moulton Powden
Commissioner

State File No. Y-62069

OPINION AND ORDER

Hearing Held in Montpelier, Vermont on April 8, 2008
Record closed on May 9, 2008

APPEARANCES:

Jeffrey Spencer, Esq. for Defendant
Michael Green, Esq. for Claimant
Todd Kalter, Esq. for Claimant

ISSUES:

Whether the Claimant's injuries were work related and occurred in the course of her employment.

CLAIM:

Decision on Causation
Attorneys Fees and Costs

FINDINGS OF FACT:

1. On April 23, 2007, the Claimant was seriously injured in a motor vehicle accident on Route 4, near Pico Peak in Mendon, Vermont.

2. At the time of the collision, the Employer was an employer under the Workers' Compensation Act and the Claimant was an employee under the Act. The Claimant's responsibilities at her work were to take photographs of properties to assist the insurance company.

3. According to a police report, the Claimant's vehicle crossed the center line and struck an oncoming tractor trailer. As a result of her serious injuries, the Claimant has no recollection of the events prior to the incident.

4. The week preceding this accident, a historic storm with violent winds and rain struck the Rutland Area. Trees were uprooted and there were significant power outages. Road conditions were affected by the storm the week prior to the accident.

5. The Claimant and the owner of the company where she was employed were married but separated when the accident occurred.

6. The employer testified that the Claimant kept her notebooks, cameras and road maps in her shoulder bag which she would put in her car *only* when she was on a work assignment. After she completed taking the pictures, she would remove her bag from the car and e-mail the photographs from her home. The fact that her bag was used strictly for her work and was only placed in her vehicle when she was on assignment was verified by her son and her friend.

7. The Claimant's only employment was for McCullough Insurance.

8. The Claimant, through the credible testimony of witnesses, is found to have been concerned about taking photographs of a certain property in Killington. This was due to the fact that the insurance company for which she was employed was making serious efforts to get the property owner's insurance policy covered by his business. There was some urgency to get this work done. On the day of the accident the Claimant was in the vicinity of the Killington property with her work bag.

9. There were a number of e-mails back and forth between the employer and the Claimant regarding photographs of the Killington property mentioned above. Those photographs which were needed had not been received by the Insurance Agency at the time of the accident. The Claimant knew the photographs were needed immediately.

10. The Claimant told at least two friends, Sharon Brown and Susan Burnett, who credibly testified, that she was unable to attend a flower show in Boston the day of the accident, for which she already had tickets, because she was behind in her work due to the storm. Neither friend knew of any reason why she would be headed toward Killington the day she was injured except for her work assignment.

11. The day after the accident the Claimant was supposed to pick up her dogs at a dog caretaker's home. However, the Claimant was driving away from the dog caretaker's home when she had the accident. Therefore, there is no reason to believe that the Claimant's location would have anything to do with the location of her two dogs.

12. The Claimant had many interests such as yoga, a gourmet club and also had many responsibilities the week prior to her accident due to storm damage to her home and power outages. She was staying with a friend prior to the accident since she was having work done on her home. However, she was very clear to the few friends that she had spoken to prior to the accident that she was going to be working on the 23rd, the day of her accident. She had her work bag with her. Her son testified that the Claimant had asked him about the roads in Killington a few days prior to the accident to see if the road conditions had improved after the storm.

13. The Claimant had taken some pictures in the Killington area on the 20th of April and had e-mailed the photographs to her employer. The fact that she e-mailed the photographs would mean that she had to remove her work bag on the 20th from her vehicle. She had to deliberately replace her work bag in the car on the 23rd of April, the day of the accident.

14. The Claimant, herself, due to her severe injuries, could not testify as to whether she was working or not on the day of the accident. The only information regarding why she was in the area came from the testimony of her friends, family and her husband/employer and through her e-mails and location.

15. Claimant's fees are 54.7 hours paid at $90.00 per hour and costs of $1,461.73. These fees and costs have not been challenged.

CONCLUSIONS OF LAW:

1. In the instant case, the question is whether the Claimant was driving to reach a destination to take photographs of a property for her employer, the insurance company.

2. A claim is compensable if the accident both arose out of the Claimant's employment and occurred in the course of her employment. An accident 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 her duties. 21 V.S.A. § 618; *Miller v. IBM,* 161 Vt. 213 (1993).

3. 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 she was injured. *Shaw v. Dutton Berry Farm,* 160 Vt. 594, 598 (1993).

4. Claimant, of course, has the burden of proof. *King v. Snide*, 144 Vt. 395 (1984). Through her witnesses she has demonstrated that she only put her work bag in her vehicle when she was working for the insurance agency. The bag contained her cameras and maps. Her work bag was in the car on the day of the accident.

5. There was also evidence presented that the Claimant had told her friends she was behind on her work and cancelled other plans so she could work on the day of the accident. Her only "work" was for the Defendant. Further, she was in the area of where she had to take pictures of a Killington property for the insurance agency. No other plausible reason was given for her to be in this area with her work bag on the 23rd of April.

6. The burden of proof the Claimant has to meet is a preponderance of the evidence. This means the inference from the facts in the case must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.,* 112 Vt. 17 (1941).

7. I find the Claimant has met the burden under the preponderance of the evidence standard in that the more probable hypothesis, when considering all of the evidence presented, that she was in the course of her employment when the accident occurred.

8. Thus, the Claimant is entitled to reasonable fees and costs.

ORDER:

1. The Claimant's causal connection between her work and her accident have been met making her claim compensable.

2. Attorney's fees of 54.7 hours paid at $90.00 per hour and costs of $1,461.73 are awarded.

DATED at Montpelier, Vermont this 2nd day of July 2008.

_____
Patricia Moulton Powden
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.