Riley v. Norrell Services (April 26, 1995)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Michael Riley	*)*	*File #: H-3193*
	)	
	)	*By: Barbara H. Alsop*
v.	*)*	*Hearing Officer*
	)	
Norrell Services	*)*	*For: Mary S. Hooper*
	)	*Commissioner*
	)	
	)	*Opinion #: 20-95WC*

Record Closed on April 14, 1995.

APPEARANCES

John P. Riley, Esq., for the claimant
Christopher J. McVeigh, Esq., for the defendant

ISSUE

Whether the claimant, while temporarily assigned to another employer, suffered a compensable injury when participating at the second employer's company picnic.

THE CLAIM

1. Temporary total disability compensation under 21 V.S.A. §642 from August 7 through August 10 and August 15 through August 24, 1994.

2. Medical and hospital benefits under 21 V.S.A. §640.

3. Attorney's fees under 21 V.S.A. §678(a).

STIPULATIONS

1. On August 7, 1994, Michael P. Riley worked for Norrell Services, Inc., a temporary service agency.

2. On August 7, 1995, Mr, Riley was an employee as defined by the Workers' Compensation Act.

3. For purposes of this workers' compensation claim, and only this workers' compensation claim and proceeding if Lane Press should be found to be a liable employer, Norrell Temporary Services, Inc. shall be deemed the responsible employer under Vermont's Workers' Compensation Act and shall be responsible for paying any benefits awarded to Mr. Riley.

4. In early June 1994, Michael Riley was assigned to work at Lane Press in South Burlington, Vermont, in its production planning department.

5. While assigned to Lane Press, Mr. Riley was paid by Norrell, while his day to day work activities were directed by Lane Press.

6. On August 7, 1994, Lane Press held a family day at the Quarry Hill Country Club located in South Burlington, Vermont. Lane Press does not own or share any ownership interest in Quarry Hill Country Club, but paid a fee for each employee, and his or her spouse or family, to attend the family day. Members of Quarry Hill Club were free to use its facilities notwithstanding Lane Press's family day.

7. Mr. Riley asked if he could attend the open house with his daughter to show her where he worked. Cindy LaWare, Lane Press's director of personnel, allowed Mr. Riley's request.

8. While at the picnic, Mr. Riley participated in a volley ball game where one team was a player short, and in the course of that game injured his right ankle, suffering a subtalar dislocation.

9. In participating in the volley ball game, Mr. Riley responded to an invitation to play.

10. As a result of his injury Mr. Riley was disabled from work from August 7 through August 10, 1994 and August 15 through August 24, 1994.

11. Judicial notice can be taken of Mr. Riley's Notice and Application For Hearing dated September 28, 1994 (Form 6), the Employer's First Report of Injury (Form 1), Certificate of Dependency and Employee Exemption Reports dated August 21, 1994 (Form 10 and 10S), and Wage Statement dated August 19,
1994 (Form 25).

12. Weeks ending 6/5/94 and 5/29/94 on the wage statement should be disregarded because they either relate to periods prior to Mr. Riley's assignment to Lane Press or Mr. Riley worked at least half of his average weekly time and so are disregarded under Rule 15(d)(1). The week ending 8/14/94 should be disregarded because it includes a period after the date of injury.

EXHIBITS

1. Joint Exhibit #1 A four page document including a summary page showing
the medical bills incurred by the claimant.

2. Joint Exhibit #2 A ten page document containing the medical records of
the claimant for his treatment.

3. Claimant's Exhibit A A calendar page depicting the month of August 1994, with the dates of work missed by the claimant highlighted.

WITNESSES

For the claimant: Michael Riley

For the defendant: Cindy LaWare

FINDINGS

1. Stipulations 1 through 6 and 8, 9 and 11 are true. Stipulation 7 recites that Cindy LaWare is Lane Press's director of personnel when, in fact, she is the director of human services. Stipulation 10 indicates that the claimant was disabled from work from the 7th, which was a Sunday and non-working day; the 8th is the correct day for the purposes of this hearing. Stipulation 12 misstates the rule in §15(d)(1), as weeks in which the claimant worked at least half of his normally scheduled hours are included in

the calculation of his average weekly wage.

2. The exhibits referenced above are admitted into evidence.

3. Judicial notice is taken of all forms filed with this department, specifically those referenced in stipulation # 11.

4. Michael Riley has been employed by Norrell Services since December of 1993. After a brief instructional period, he began to receive temporary assignments. His second assignment was to Lane Press.

5. The normal procedure upon receiving a new assignment was for Mr. Riley to report to the person named by Norrell Services. In the case of Lane Press, the person to whom he was to report was Cindy LaWare. The position was to replace another Norrell employee who was leaving to take a permanent job. The job at Lane Press involved production planning, and was normally filled by an individual who was out on a medical leave.

6. In the interview with Cindy LaWare, the claimant was asked whether he was willing to commit to working there on a temporary basis. The regular employee was scheduled to be out for a few more months, and Lane Press was interested in having the same person for the full time. The claimant indicated to Ms. LaWare that he enjoyed temporary work, and would not leave to take a full-time job elsewhere. He further indicated that he enjoyed the variety of experiences he could have with different employers. He began to work at Lane Press in June of 1994.

7. Lane Press scheduled a plant tour for August 7, 1994, which was to be followed by a company picnic at the facilities of the Quarry Hill Country Club. All regular employees of Lane Press received invitations through the mail, but temporary employees were not generally invited. At the time of the picnic, there were fewer than ten temporary employees, and none was formally invited to attend. According to Ms. LaWare, to the best of her knowledge, the claimant was the only temporary employee to attend the picnic.

8. The claimant, sometime before the 7th of August, approached Ms. LaWare to inquire if he could bring his daughter to the tour of the plant. Ms. LaWare invited him to do so, and also asked him if he would like to attend the picnic. He indicated that he would like to, but that he would make a

final decision at a later time.

9. On August 7, 1994, the claimant and his daughter attended the tour of the plant, and later went to the picnic. The claimant found that the tour helped him in his job, as he got to see areas of the plant involved in his planning work, and was able to understand the interrelationship of areas for purposes of scheduling. Each area on the tour was supervised by the manager of that area, who described the way in which it operated.

10. After the tour, the claimant and his daughter went to the picnic at Quarry Hill. When they arrived, they entered the premises through a gate, where a table had been set up by Lane Press. They were given name tags and tickets for drawings to be held later. They entered, and went to explore the premises. The claimant socialized with other employees.

11. At some point, it was announced that the volleyball games were about to begin. The claimant and his daughter went to the area to watch. Almost immediately upon their arrival in the area, the claimant was hailed by Peter Joslin, one of the managers from the plant, who wanted the claimant to fill in, as his team was short a person. The claimant testified that he felt "peer pressure" to join, and that he also wanted to join the team.

12. The claimant knew Peter Joslin from work, where he had met him in managers' meetings. The claimant had also done a project for Mr. Joslin, where he examined levels of production during times of the day and year in order to allow Lane Press to bid on jobs that would fill in down times in production.

13. Mr. Riley's first position in the game was to serve. At some later point, as he jumped to hit the ball, he landed badly and dislocated his ankle. The game was temporarily stopped and he was helped from the court. He managed to twist the misplaced bone back into place, and an EMT iced it for him. He was unable to drive his car, so he had his daughter call his brother for a ride. He did not seek medical treatment until the following morning.

14. On August 8, 1994, the claimant presented to the emergency department of the Fanny Allen Hospital where he was diagnosed as having a grade III sprain with avulsion fracture of the right ankle. He was advised to elevate the ankle and do no weight bearing until he was seen by the orthopedist.

15. The claimant returned to work on August 10 through 12, but then was out of work again until August 24. After that he suffered no more disability for his ankle and is now making no claim for permanency based on his injury.

16. Cindy LaWare testified that the purpose of the picnic was to allow the employees of the company to socialize outside of the work environment. Attendance was not mandatory, and in fact only about one third of the employees availed themselves of the opportunity. There were no official functions at the picnic, with no awards being given for anything other than participation in the sporting events, and no major gifts being given as an incentive for attendance. While there was evidence that the managers were asked to encourage their charges to attend, there was no indication that any pressure was anything other than friendly.

17. To the extent that "attendance" was taken, it was solely for administrative purposes, that is, to obtain a good count of the attendance for costing purposes and to determine the level of interest among the employees.

18. The picnic was not on company time, in that none of the participants was paid for the time spent at the picnic. Nor was there any requirement that employees who did not attend had to make up the time by working. There was no business purpose to the picnic, other than to improve morale and to allow the employees to socialize in a non-working atmosphere.

CONCLUSIONS

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. Goodwin v, Fairbanks Morse Co., 123 Vt. 161 (1963). The claimant 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).

2. 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 inference from the facts proved must be the more probable hypothesis. Burton v. Holden & Martin Lumber Co., 112 Vt. 17 (1941).

3. An injury arises out of and in the course of the employment when it

occurs in the course of it and is the proximate result of the employment. Rae v. Green Mountain Boys Camp, 122 Vt. 437 (1961). The question then is whether in this case a company picnic is "in the course of" the claimant's employment with either Lane Press or Norrell Services.

4. Professor Larson has examined the issue of company picnics, and has posed a series of questions to test the extent of the work connection. Specifically, he asks:

a. Did the employer in fact sponsor the event?
b. To what extent was attendance really voluntary?
c. Was there some degree of encouragement to attend in such factors as taking a record of attendance, paying for the time spent, requiring the employee to work if he did not attend, or maintaining a known custom of attending?
d. Did the employer finance the occasion to a substantial extent?
e. Did the employees regard it as an employment benefit to which they were entitled as of right?
f. Did the employer benefit from the event, not merely in a vague way through better morale and good will, but through such tangible advantages as having an opportunity to make speeches and awards?

He further states that "even if the employer is the sponsor of a regular annual company picnic, the employment connection may be inadequate if there is nothing more--no compulsion of any kind to attend, no pep talks or other business, no transportation, no wearing of uniforms." 1A Larson, at §22.23(a).

5. The facts in this case do not support a finding that the Lane Press picnic was sufficiently related to the claimant's employment to justify a finding that his injury is compensable. While there is no question that Lane Press sponsored and paid for the picnic, and at least encouraged attendance, there is no sufficiently strong evidence to support any of the other factors cited by Professor Larson to justify a finding of compensability. The picnic did not occur on company time, the participants were not paid for their attendance, a large percentage of the employees did not participate, and the company did not use the occasion for any politicking amongst its employees.

6. The claimant is not helped by reliance on the decision of Shaw v.

Dutton Berry Farm, 160 Vt. 594 (1993), where the positional risk doctrine was established by the Vermont Supreme Court. The claimant's position with Lane Press as a temporary employee sufficiently attenuates his relationship with the company to make his presence at the company picnic completely voluntary on his part, and not a part of his employment relationship with either Lane Press or Norrell Services. His non-inclusion in the original guest list confirms the noncompulsory nature of his involvement, as does his method of obtaining his invitation.

7. Nor is it appropriate to analogize the claimant's position in this case to that in Holmquist v. Mental Health Services of Southeastern Vermont et al., 139 Vt. 1 (1980). In that case, involving an injury to an employee arising out of a social gathering called at the home of a member of the defendant's board of trustees, "[t]he respective positions of the parties are well summarized by the characterization they give to the function in question. The defendants call it a 'social gathering' or 'picnic' while the claimant terms it a 'meeting' for the benefit of the employer. Were the evidence wholly one way or the other on this point decision would be easy." id., at 3. Because the court found it to be a meeting to discuss personnel problems rather than a social gathering, the lower decision was affirmed. Here there is no credible argument to be made that the picnic was anything more than that, a picnic. There is no parallel set of personnel problems that the event was organized to address, nor is there any indication that this year's function was any different from any other year's. The finding made here is fully supported by the Holmquist case.

7. It is not enough to claim that this state views the employment relationship through a wide angle lens. At some point, the edges of the lens must come into play, and it is the defining of one of those edges that is entailed here. Under no circumstance is it appropriate for a wide angle lens to devolve into a global lens, which is the likely outcome should the claimant prevail here. There must be some correlation, however minor, between the activity and the claimant's job obligations, as found in Shaw, supra, or Delorme v. Johnson Printing Co., Opinion #4-90WC, for the lens to encompass the activity.

9. I need not address the issue of whether Mr. Riley was an employee of Lane Press or Norrell Services, given the finding that the picnic was insufficiently work related to justify an award in this case.

ORDER

Based on the foregoing findings and conclusions, all claims for workers' compensation benefits by Michael Riley against Norrell Services arising out of his injuries on August 7, 1994, are DENIED.

DATED at Montpelier, Vermont this ____ day of April, 1995.

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Mary S. Hooper
Commissioner