Cain v. Abbey Restaurant (April 4, 1996)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Steven Cain	*)*	*File #: G-23079*
	)	*By: Barbara H. Alsop*
v.	*)*	*Hearing Officer*
	)	*For: Mary S. Hooper*
Abbey Restaurant	*)*	*Commissioner*
	)	
	)	*Opinion #: 15-96WC*

Hearing held at Montpelier, Vermont, on March 19, 1996.
Record closed on March 25, 1996.

APPEARANCES

Michael I. Green, Esq., for the claimant
Barbara E. Cory, Esq., for the defendant

ISSUE

1. Whether the claimant suffered a compensable injury on May 4, 1994.

2. Whether the claim is barred by 21 V.S.A. §649.

THE CLAIM

1. Recalculation of the average weekly wage and payment of underpaid amount
thereafter.

2. Medical benefits pursuant to 21 V.S.A. §640.

3. Future temporary total disability compensation pursuant to 21 V.S.A. §642 after surgery.

4. Permanent partial disability compensation pursuant to 21 V.S.A. §648 to be determined.

5. Attorneys fees and costs pursuant to 21 V.S.A. §678(a).

STIPULATIONS

1. On May 4, 1994, the claimant was an employee within the meaning of the Workers Compensation Act.

2. On May 4, 1994, the defendant was an employer within the meaning of the Workers Compensation Act.

EXHIBITS

Joint Exhibit 1	*Medical record notebook*
Joint Exhibit 2	*Deposition of Steven Cain*
Joint Exhibit 3	*Deposition of David Underwood*
Joint Exhibit 4	*Deposition of Diane Trudo*
Joint Exhibit 5	*Deposition of Christine Elwood*

FINDINGS OF FACT

1. On May 4, 1994, the claimant was the kitchen manager and head chef for the Abbey Restaurant, a position he had held for several months. In his role as kitchen manager, he was invited to a dinner meeting by his boss, David Underwood, that was to be held at the Abbey on the Green, a restaurant on the site of a golf course in Swanton.

2. The defendant is one of a number of interlocking businesses run by Mr. Underwood. The Abbey Restaurant is his main public facility, but he also runs Underwood Catering, which supplies schools with lunch services and performs other catering business, and the Abbey Bakery, which supplies baked goods to all of his other companies.

3. The Abbey on the Green was a new facility for the employer, where he had taken over the lease of the premises. It was his intention to turn the restaurant into a year round facility, and he had scheduled the dinner meeting as a means to bring his senior staff together to critique the presentation and performance of the staff at the new premises, as well as to make constructive criticisms of the facility. There was some evidence that an additional purpose of the meeting was to thank the staff for their good performance in the prior year.

4. The party gathered between 4:00 and 5:00 in the afternoon, and sat at a

large table on the deck. The conversation at that time was work-related, and the employer, Mr. Underwood, considered that the meeting had started. At about 6:30, the party moved into the dining room.

5. Dinner was ordered. Everyone was allowed to consume alcohol at the employer s expense. The claimant restricted his drinking to beers on the deck and diet soda with his dinner. After dinner, the claimant had one beer, and did not pay for it.

6. The bulk of the conversation at dinner was about the restaurant. After everyone had finished eating, the employer made a small speech to his guests, and then the members of the party dispersed throughout the facility, socializing. Mr. Underwood went from group to group, speaking with his managers, generally about the business.

7. Mr. Underwood testified that it was his intent that all of his managers would attend the meeting, and that he made the evening as attractive as possible in order to assure their appearance. All of the managers in fact attended. He stated that all of the participants were drinking appropriately, and that the claimant did not appear intoxicated to him. No one was intoxicated at any time that Mr. Underwood was there.

8. At some time around 9:30, Mr. Underwood decided to leave. As far as he was concerned, the function was over after the group dispersed, and the tenor of the meeting had changed at that point. He spoke briefly with Stephen Parent, indicating that the employer would no longer pay for the drinks, and then quietly slipped away. He indicated that it was his normal practice to leave quietly, and not to make a general announcement of his departure.

9. When Mr. Underwood left, another couple or two had already preceded him, and he believed a third couple may have left when he and his wife departed. He estimated that about half of the group was still there after he left. He never had any intention to continue to pay for drinks after he left.

10. The claimant had come to the dinner with another employee as he did not have a car. At some point after Mr. Underwood left, he determined that he wanted to leave, but a ride was not available. He remained, and at some time around 11:00 or 11:30 he went to the men s room.

11. The door into the men s room is adjacent to the bar area, and the door nearly touches the end of the bar, near the wait station, when it is fully opened. As the claimant was leaving the bathroom, he ran into and got tangled up with Melanie Ross. The bartender Christine Elwood testified that it appeared as if Ms. Ross was trying to startle the claimant. Ms. Ross did not testify in this matter. The two fell to the floor, and the claimant s right ankle was seriously injured.

12. The claimant testified that he believed, or hoped, that he had just sprained his ankle. He has a definite distaste for visiting doctors and declined the offer of a ride to the hospital. After several minutes, he made his way out to the deck, where he elevated his ankle on a chair. Shortly thereafter, he was driven home by Ms. Ross boyfriend. The next morning, he found his ankle to be severely swollen and discolored, as well as quite painful, and he got a ride to the hospital.

13. At the hospital on May 5, 1994, the claimant underwent an open reduction internal fixation of a trimalleolar fracture subluxation of his right ankle. The surgery was successful, although the claimant will need to have further surgery in the future for removal of some of the hardware used to fix the fracture. The claimant returned to work after four or five weeks, prior to being released to work by his physician, and was thereafter fired from his employment for a reason unrelated to his work injury.

14. A number of other employees of the defendant testified. They confirmed that the party had become more of a social event after the dinner, and that the bar had reverted to a cash bar after the departure of Mr. Underwood.

15. Both the claimant and Mr. Underwood testified that the claimant, while employed by the defendant, had received a weekly cash bonus in addition to the amount shown on the Form 25, Report of Employee s Wages, filed in this matter.

16. The claimant has presented evidence of his fee agreement with his attorney, calling for a fee of 20% of the amount awarded by the Department, and costs of $407.10. These amounts are reasonable. The claimant has established that he is entitled to medical benefits already incurred in the amount of $11,289.74, as well as future benefits for the second surgery.

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. 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).

3. Under 21 V.S.A. §649, a claimant is barred from receiving workers compensation benefits if the injury is caused by a wilful intention to injure himself or another or if the injury is caused by or during his intoxication. The employer has the burden of proof in this matter. Since absolutely no evidence has been produced to suggest that the claimant was intoxicated or intended to injure himself or another, this defense must fail. To state, as the defense has, that the claimant had been drinking continuously for approximately seven hours is an egregious misstatement of the evidence in this case. It is not clear, however, and it need not be here addressed, whether the employer even has available an intoxication defense where all of the alcohol consumed by the claimant was provided by the employer.

4. There is no question that, had the claimant been injured during the course of the dinner, this claim would be compensable. Not only did the employer expect attendance by his employees, but he also intended to use the dinner as a working test of the new facility. This dinner was never intended to be a purely social occasion, but was fitted out with the trappings of such in order to encourage attendance at a meeting outside the normal working hours of the employees and at a new facility now leased by the employer. The nature of the employer s business in this case required that any assessment of the performance of the new operation had to be performed in what otherwise would be viewed as a social setting.

5. Based on the testimony of Mr. Underwood that the function was over after the dinner had concluded, the defendant would have us rule that the function ceased to have sufficient nexus to the employment of the participants to give rise to a finding of compensability. In so doing, the defense cites to a number of cases in other jurisdictions where the claimant stayed at work at the end of his or her shift, and suffered an injury at some time distant to

the end of the employment.

6. Simply put, the cases cited by the defense are inapposite. The defense has not addressed any of the plentitude of cases involving company parties or
picnics, a more appropriate analogy to the facts in this case. By relying on cases that involve an employee who is actively involved in his everyday duties, finishes his shift, and then goes around to the bar to drink, the defense seriously mischaracterizes the facts of the case. The work-related activity in this case was by its nature outside of the normal duties of the participants. The employer felt that it was important to emphasize the social nature of the meeting in order to insure full attendance. The employer supplied all of the liquor consumed by the claimant. These factors alone would be sufficient to take this case out of the class of cases cited by the defense.

7. As Larson points out, [i]f the activity, although not an integral part of the job, is in effect required, it is clear enough that the employer has brought that activity within the employment. Thus, if the employee was required to go to the company picnic or dinner or cocktail party at which he was hurt..., the course of employment continues. larson, Workmen s Compensation Law §22.22. Since the claimant would not have been at Abbey on
the Green but for the business meeting and social gathering, his presence there falls under the mantel of such cases as Shaw v. Dutton Berry Farm, 160
Vt. 594 (1993) and Burns v. The Town Restaurant, Opinion No. 30-95WC.

8. Moreover, the decision in Holmquist v. Mental Health Services et al., 139 Vt. 1 (1980), which also concerned an injury arising after a function with both business and social characteristics, confirms this reading of the case. In Holmquist, the employer actively encouraged the attendance of employees at an informal meeting for the board of trustees, management and
employees to discuss the agency s business and personnel problems. The meeting was held in a social setting, with much of the conduct purely social. Nonetheless, the claimant s injury on her drive home from the party was found
to be compensable, based on, in part, the substantial benefit to the employer
from her participation in the occasion. Mr. Cain s argument for compensability is even stronger than Ms. Holmquist s, given that he was still on the premises of the party, and the benefit to the employer of his attendance at the meeting was of paramount importance to the employer.

9. The defense also asserts that attorney s fees are not recoverable in

this case, citing to the allegedly reasonable assertion that the meeting had ended at 9:30 p.m and claiming that the denial by the carrier was appropriate. The defense does not however cite any case law in support of this contention. In fact, the defense in this case was without substantial merit, the denial was inappropriate, and the applicable law was never seriously in question. Accordingly, the claimant is awarded his costs as a matter of law, and his attorney s fees as a matter of discretion. Because the claimant is entitled to an award of medical benefits currently in excess of $11,000.00, with the expectation of more, and a recalculation of his average weekly wage and benefit rate, I find that an award of attorney s fees
in the amount of $3,000.00 is appropriate. The claimant has adequately established his entitlement to costs in the amount of $407.10.

ORDER

THEREFORE, based on the foregoing findings of fact and conclusions of law, U.S.F.&G., or in the event of its default Abbey Restaurant, is hereby ordered to:

1. Recalculate the average weekly wage and compensation rate for the claimant and to pay any amount now owing for temporary total disability benefits;

2. Pay to the claimant all medical benefits to which he is now entitled, and to pay such further medical benefits as are due in accordance with this decision;

3. Pay attorney s fees in the amount of $3,000.00 and costs in the amount of $407.10; and

4. Otherwise adjust this claim in accordance with the Workers Compensation
Act and the Workers Compensation and Occupational Disease Rules.

DATED at Montpelier, Vermont, this 4th day of April 1996.

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Mary S. Hooper
Commissioner