Lang v. Town of Barre (January 10, 2005)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Michael G. Lang	)	Opinion No. 01-05WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Town of Barre and	)	
Vermont League of City and Towns	)	For: Laura Kilmer Collins
	)	Commissioner
	)	
	)	State File No. T-07519

Pretrial conference held on April 26, 2004
Hearing held on September 22, 2004
Record Closed on November 1, 2004

APPEARANCES:

Brice C. Simon, Esq., for the Claimant
John T. Leddy, Esq., for the Defendant

ISSUE:

Whether the accident that resulted in claimant's ruptured spleen arose out of and in the course of his employment.

EXHIBITS:

Claimant's:

1. Barre Town EMS Explorers business cards
2. -
3. Barre Town EMS Explorers Emergency Medical Handbook
4. -
5. Adult Explorer Leader Basic Training Study Course
6. Property Usage Permit re: Mt, Norris Camp
7. Written statement of Lynn Doney
8. Written statement of Gordon Lamb
9. Written statement of Randy Markham
10. Written statement of Sam Hagen
11. BTEMS Corrective Action Report dated 4/24/02
12. Statement of Michael Lang dated 4/10/02 for Incident Report
13. Lynn Doney incident Report dated 4/10/02
14. "Iroquois Roster" dated 8/8/02
15. Barre Town EMS Explorer Post Agenda with Town of Barre EMS Department Seal

16. EMS Explorer Post Update
17. –
18. _
19. _
20. Shift Activity Log dated 1/24/03 with attachments
21. Barre Town EMS Certificate of Appreciation
22. EMS Standard Operating Guidelines
23. DOL Form 1 --- Employee's Claim and Employer First Report of Injury
24. Central Vermont Marketing
25. State of Vermont Office of the Attorney General Notice of Charitable Solicitation
26. Letter from Lynn Doney re: 1/20/03 fundraiser
27. _
28. Fundraiser telephone "scripts"
29. _
30. _
31. _
32. _
33. L.Brown & Sons Prinitng, Inc. Prrof Chick List and Instructions Form dated 9/25/02
34. L.Brown & Sons Printing, Inc. Invocie 3599-58 dated 9/30/02 (500) Business Cards for Barre Town EMS Explorers totaling $49.68
35. _
36. Town of Barre Job Description
37. Explorer Learning for Life Post Application

FINDINGS OF FACT:

1. Claimant worked for the "Town of Barre EMS" (EMS) as a part-time EMT from 1999 through the date of the injury at issue, October 26, 2002.

2. The Barre Town EMS Explorers (Explorers) is a youth organization affiliated with the Boy Scouts of America. The youths involved are from 14 to 21 years old.

3. "Exploring" is based on a relationship between community organizations and youth in the community. Local community groups initiate Explorer Posts by matching people and programs in their organization with interests of young people in the surrounding community.

4. Barre Town EMS employees Dave Jennings and Lynn Doney, who in the past had been involved with an Explorer Post in the Town of Northfield, set out to establish one at Barre Town EMS. Dave Jennings became Explorer Post Chairman and Lynne Doney became the advisor.

5. EMS gives the Explorers a place to meet. Before the injury at issue, the Explorers used the seal of EMS on its funding booklet, business cards and other documents. The Explorers uses EMS non-tax status to receive tax-deductible contributions and uses the EMS federal identification number for its bank account. However, as with Explorer Posts nationally, no formal affiliation exists between the Explorer Post and Barre Town EMS.

6. The Explorer program does its own fundraising and keeps funds separate from EMS funds.

7. Claimant saw his roles as a part-time EMS employee and assistant to the Explorer Program as one job.

8. Explorers, as well as other community volunteers, ride with EMS employees on ambulances. They also participate in inspecting ambulances and preparing equipment and supplies.

9. Lynn Doney receives extra pay from EMS for his work with Explorers.

10. Lynn Doney was claimant's direct EMS supervisor.

11. One day while claimant was working as an EMT before his injury, EMS Director Jennings reprimanded him for refusing to work with a particular Explorer. Jennings also told claimant that if he ever wanted a full time job, he should work more with the Explorers. Yet, there was no formal requirement that EMTs work with Explorers.

12. To reward the Explorers for a job well done at a Boy Scout Jamboree, Lynn Doney decided to take them on a camping weekend. No training was involved. The camping trip was to include Explorers and their friends.

13. Volunteers were asked to sign up to chaperone the trip. Doney specifically looked at claimant, asking, "You are going, aren't you?"

14. Claimant's part-time status as an EMT would not have been threatened had he chosen not to chaperone the trip.

15. Claimant agreed to chaperone the trip and to drive. He cancelled personal plans with his wife to make that trip.

16. Had claimant acted inappropriately, Doney would have reported him to Jennings at EMS for reprimand.

17. Claimant was not paid for the trip and never expected to be.

18. At the camp, Explorers and friends were throwing snowballs. Claimant became angry when a snowball landed near some electronic equipment near his truck and yelled at the boys in a challenging way. He then approached the youth who had thrown the snowball. That youth tackled claimant to the ground. The two wrestled. Claimant suffered a ruptured spleen as a result.

19. Doney and Jennings concede that "roughhousing" is expected among the Explorers, but "wrestling" is not. In fact, roughhousing was common among Explorers and their supervisors.

20. Claimant incurred $487.61 in necessary expenditures pursuing this claim; his attorney worked 52.6 hours and paralegal 12.4 hours. Itemized documentation supports this aspect of the claim.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1962). The claimant must establish by sufficient credible evidence the character and extent of the injury and disability as well as the causal connection between the injury and the employment. *Egbert v. 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. Although he was injured outside his normal duties as EMT, claimant argues that his ruptured spleen arose out of and in the course of his employment with the Town because he had assumed in good faith duties that advanced the interest of his employer. See 2 Larson's Workers' Compensation Law, 27. Further, he argues that but for his employment obligations, the injury would not have occurred. See *Miller v. IBM*, 11 VT. 213, (1993).

4. The employer denies this claim on two grounds. First it argues that the activity resulting in injury did not arise out of or in the course of employment. Second, it argues that claimant was involved in horseplay, thereby barring his claim.

<u>Arising out of and in the course of employment</u>

5. "If a worker receives a personal injury by accident arising out of and in the course of employment…" he or she is entitled to compensation. 21 V.S.A. § 618(a)(1).

6. "In deference to the broad and liberal interpretation to be accorded workmen's compensation laws the courts have expanded the concept of 'arising out of employment' to include acts normally outside employment performed for the benefits of third persons but the effect of which is to foster public good will toward the master." *Rae v. Green Mt. Boys Camp*, 122 Vt. 437, 441 (1961).

7. The test is one of positional risk, that is if the injury would not have occurred but for the fact that the conditions of claimant's employment placed him there. See *Miller v. IBM*, 161 Vt. 213 (1993). Claimant meets the "arising out of" prong of the test under the positional risk doctrine as Claimant was aware of the camping weekend only because of his work with EMS. His only experience working with the Explorers was as an EMT with EMS. Because of that work and with the encouragement of his supervisor, he loaded his truck and drove to the camp.

8. Next is the question whether the accident occurred in the course of employment. Usually "[a]n accident occurs in the course of employment when it was within the period of time the employee was on duty at a place where the employee was reasonably expected to be while fulfilling the duties of the employment contract." Id. at 215. However, as is claimed here, there are times when one is entitled to compensation for an accident occurring outside of regular duties. See 2 Larson's Workers' Compensation Law 27.

9. "An act outside an employee's regular duties which is undertaken in good faith to advance the employer's interests, whether or not the employee's own assigned work is thereby furthered, is within the course of employment." Larson's § 27. Professor Larson gives several examples for how such a test can be applied. Factors applicable to this case are: whether the activity advanced the employer's work, including goodwill, 2 Larson § 27.02; whether it enhanced the claimant's proficiency at work, Id. § 27.03; whether the employer encouraged claimant's attendance, § 27.03[1][c]; whether a supervisor enlarged course of employment by assigning tasks outside the usual area, § 27.04[4].

10. Claimant clearly took on the chaperone role with the Explorers in good faith. However, the evidence does not support his suggestion that the work of EMS was advanced in any way or that his proficiency at work was enhanced by his participation. On the other hand, the employer encouraged his attendance, by the statement "You are going, aren't you?" and by linking attendance to a chance of full time employment. Further, the employer enlarged claimant's EMT role by requiring that he work with the Explorers. Although that requirement was not an official written directive, it was conveyed to claimant through words from his director.

11. A liberal interpretation of the act requires the conclusion that the accident arose out of and in the course of the claimant's employment in large part because Doney and Jennings commingled the EMS/EMT and Explorer roles.

Horseplay

12. Although the accident arose out of and in the course of claimant's employment, it is not compensable if the horseplay defense applies.

13. "[W]hile some horseplay among employees during work hours can be expected and is not an automatic bar to compensation, the key inquiry is whether the employee deviated too far from his or her duties. *Clodgo v. Rentavision*, 166 Vt. 548, 552 (1997), citing *Jean Fluet, Inc. v. Harrison*, 652 So. 2d 1209, 1211 (Fla. Dist. Ct. App. 1995).

14. Factors that must be considered are:

> 1) the extent and seriousness of the deviation; (2) the completeness of the deviation (i.e., whether the activity was commingled with performance of a work duty or was a complete abandonment of duty); (3) the extent to which the activity had become an accepted part of the employment; and (4) the extent to which the nature of the employment may be expected to include some horseplay.

Id. citing 2 Larson & Larson, supra § 23.00, at 5-178; *Petrie*, 466 N.W.2d at 716.

15. Approaching one who had thrown a snowball at a camping site was not a serious deviation from expected work duties. Nor was the rough and tumble that followed, although the result was unexpected. Roughhousing was common and expected behavior among Explorers and chaperones, wresting was not, a distinction Doney and Jennings made, but not one the young people involved in a camping weekend were likely to have made.

16. Without a serious and complete deviation from chaperoning activities, the accepted and expected rough play at a camp site did not rise to the level of horseplay necessary to bar this claim. Therefore, it is compensable.

17. As a prevailing claimant, Michael Lang is entitled to the reasonable attorney fees and necessary costs requested. 21 V.S.A. § 678(a). However, the award will be made only if the claimant submits a copy of the attorney-client fee agreement required by WC Rule 10.7000.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, defendant is ORDERED to adjust this claim.

Dated at Montpelier, Vermont this 10th day of January 2005.

_____
Laura Kilmer Collins
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.

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RULING ON CLAIMANT'S REQUEST FOR FEES

As noted in the underlying opinion, dated January 10, 2005, this prevailing claimant supported his claim for fees with an itemization demonstrating the reasonableness of the requested fees and necessity of costs. See 21 V.S.A. § 678(a). Since that date he has complied with the order that he produce a copy of the attorney-client fee agreement.

Therefore, claimant is hereby awarded the requested $5,612.00 in fees and $487.61 in costs.

Dated at Montpelier, Vermont this 26th day of January 2005.

_____
Laura Kilmer Collins
Commissioner

Lang v. Town of Barre (February 23, 2005)

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RULING ON EMPLOYER'S MOTION FOR STAY

Following claimant's success at hearing on the issues of compensability and horseplay, the employer moves for a stay of the order that it adjust the claim pending its appeal to superior court.

Any award or order of the Commissioner shall be of full effect from issuance unless stayed by the Commissioner, any appeal notwithstanding. 21 V.S.A. § 675. To prevail on its request in the instant matter, the employer must demonstrate: "(1) a strong likelihood of success on the merits; (2) irreparable injury if the stay is not granted; (3) a stay will not substantially harm the other party; and (4) the stay will serve the best interests of the public." *Gilbert v. Gilbert*, 163 Vt. 549, 560 (1995) citing *In re Insurance Services Offices, Inc*., 148 Vt. 634, 635 (1987) (mem); *In re Allied Power & Light Co*., 132 Vt. 554 (1974). The Commissioner has the discretionary power to grant, deny or modify a request for a stay. 21 V.S.A.§ 675(b); *Austin v. Vermont Dowell & Square Co*., Opinion No. 05S-97WC (1997) (citing *Newell v. Moffatt*, Opinion No. 2A-88 (1988)). The granting of a stay should be the exception, not the rule. *Bodwell v.Webster Corporation*, Opinion No. 62S-96WC (1996).

First, the defense assertion that it has a strong likelihood of success on the merits on appeal is based on its belief that a jury will ignore strong evidence that the town commingled claimant's roles as EMT and Explorers' supervisor and that roughhousing was regular and accepted activity between Explorers and their supervisors. On the contrary, it is more likely that a jury will view the facts in the same way as this department did, in favor of claimant.

Next, the employer suggests that it will suffer irreparable injury if a stay is not granted because claimant has moved to Maine. However, by continuing to participate in this action, claimant is subject to continuing jurisdiction of Vermont courts.

Third, whether a stay will not substantially harm the claimant is unclear, although protracted litigation may force him to accept an insufficient settlement. See *Bodwell v. Webster Corp*., Opinion No. 62S-96WC(1996).

Finally, the defendant contends that the best interests of the public are served by the grant of a stay because the decision has chilling effect in communities across Vermont that work with nonprofit groups. On the contrary, the best interests of the public can best be served by considering the individual facts of this case and order that the employer comply with the mandate that it adjust this claim.

Therefore, the motion for a stay is DENIED.

Dated at Montpelier, Vermont this _____ day of February 2005.

_____
Laura Kilmer Collins
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.