STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Steven T. Cain	)	Opinion No. 07-05WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Travelers Insurance as Insurer for	)	
Yebba Inc. and Underwood	)	For: Laura Kilmer Collins
	)	Commissioner
	)	
	)	State File No. U-03691

Pretrial conference held on June 14, 2004
Hearing held on November 2, 2004
Record Closed on December 6, 2004

APPEARANCES:

Patrick L. Biggam, Esq., for the Claimant
Jennifer K. Moore, Esq., for the Defendant

ISSUE:

Is the injury claimant incurred at work on August 10, 2003 a compensable injury or is it barred by the horseplay defense?

EXHIBITS:

Joint I:	Medical Records
Claimant 1:	Form 25 with notes
Claimant 2:	Salary adjustment
Claimant 3:	September 17, 2003 letter from the Abbey Group
Claimant 4:	Medical Bills
Defendant A:	Abbey Manual
Defendant B:	“Workplace Safety” Manual
Defendant C:	Brittany Abbot’s Statement

STIPULATION:

1. On or about August 10, 2003, claimant suffered a personal injury at work when he fell from a cart and broke his wrist.

2. Claimant was totally unable to work from August 10, 2003 to November 3, 2003.

3. Claimant suffered a permanent partial disability of 3% whole person as a result of the wrist injury.

FINDINGS OF FACT:

1. Claimant was the Head Chef at the Abbey Restaurant owned by Yebba, Inc., which in turn is owned by David and Sherry Underwood.

2. The Abbey Restaurant has an onsite dining area and caters to functions off site.

3. As Head Chef, claimant's duties included food preparation, management of kitchen personnel and management of all kitchen related activities.

4. From time to time claimant left the kitchen to socialize briefly with guests, an expected and appreciated function.

5. On August 10, 2003, a wedding reception was held at the Abbey, a job secured because of a referral from the claimant who was a friend of the father of the bride. Approximately 150 people attended.

6. Claimant's duties for the reception were to prepare the food for a buffet with his staff, oversee the staff and make sure the buffet table was properly and continuously filled.

7. At a point during the reception when claimant was in the dining area, a coworker was wheeling a utility cart with containers from the catering van through that area. Claimant approached the cart, stepped up on it, lost his balance and fell, injuring his wrist. The action was unnecessary and obviously a risky mistake.

8. In the food industry, horseplay is expected, although no one could recall a specific instance of this type of horseplay.

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. "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).

4. The insurer denied this claim for compensation because it characterized the act leading to the injury as horseplay, which it argues means that the accident did not arise out of and in the course of his employment. The arising out of 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); *Clodgo v. Rentavision*, 166 Vt. 548 (1997).

5. As with the claim in *Clodgo*, the accident at issue arose out of the employment because the injury occurred during work hours and involved an object used in the business. The question then becomes whether the injury occurred in the course of employment. While some, but not all, horseplay is excluded from workers' compensation coverage, it is expected that workers will "indulge in a moment's diversion from work to joke or play a prank…." *Clodgo* 166 Vt. at 550. "[T]he key inquiry is whether the employee deviated too far from his or her duties." Id. at 561 (citation omitted).

6. The test required by *Clodgo* involves an examination of four factors:

> (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. (citations omitted).

7. In *Clodgo*, the Court determined that firing staples from a staple gun that resulted in an eye injury was not compensable when the claimant began firing staples at a coworker who had protested and fired back only after the claimant continued firing. The Court found a substantial deviation from work duties. The horseplay was not commingled with work duties and was obviously dangerous.

8. In this case, the deviation of stepping up on a cart was neither extensive nor serious. It was a "momentary diversion." Claimant had not abandoned his duty. He was in the dining room where he could mingle with the guests he knew. In fact, his knowing the guests had accrued to the advantage of the employer. While in the dining area, he could check on the buffet table that he controlled. Although there is nothing to suggest that stepping on a cart was an accepted part of employment, horseplay is common in that industry. And a momentary diversion or clowning around would have been expected in that festive setting.

9. Although stepping on a cart was not a wise decision, the accident that flowed from it fell within compensable horseplay.

ORDER:

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

Dated at Montpelier, Vermont this 19th 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.