Jack Lehneman v. Town of Colchester (March 13, 2012)

STATE OF VERMONT
DEPARTMENT OF LABOR

Jack Lehneman

v.

Town of Colchester

Opinion No. 10-12WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. CC-2409

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES:

David Mickenberg, Esq., for Claimant
Wesley Lawrence, Esq., for Defendant

ISSUE PRESENTED:

Did Claimant's dental injury arise out of and in the course of his employment for Defendant?

EXHIBITS:

Claimant's Exhibit 1: Affidavit of Jack Lehneman, December 6, 2011

FINDINGS OF FACT:

The following facts are undisputed:[1]

1. Claimant is a 40-year-old veteran police officer who has served the communities of both Milton and Colchester.

2. On March 24, 2011 Claimant was working a 12-hour shift as a police officer for Defendant.

[1] Defendant correctly observes that Claimant has failed to provide the "separate, short and concise" statement of material facts about which he contends there is no dispute, as required by V.R.C.P. 56(c)(2). He has, however, submitted his own sworn affidavit, which essentially serves the same purpose. For its part, Defendant has failed to submit its own separate statement of the material facts that it alleges are genuinely disputed, as V.R.C.P. 56(c)(2) also requires. While neither of these procedural defects precludes me from considering the parties' substantive arguments, closer adherence to the requirements of Rule 56 would have been preferable. *See, Webb v. LeClair*, 2007 VT 65; *Estate of Carr v. Verizon New England*, Opinion No. 08-11WC (April 29, 2011).

3. In keeping with longstanding practice, Defendant does not schedule assigned lunch or dinner breaks for police officers on 12-hour shifts. Rather, it expects officers to remain on duty during their entire shift, and encourages them to eat as they conduct their work over that period.

4. Defendant neither controls nor instructs police officers as to when, where or what to eat while on duty. Officers are free to obtain their meals from any source of their own selection, and to eat them when- and wherever they choose. Should they decide to eat at the police station, the premises are equipped with multiple refrigerators, utensils, microwave ovens and other necessary items to facilitate meals while working.

5. On the evening of March 24, 2011 Claimant purchased a hamburger for dinner from a local restaurant. He returned to his office and began doing paperwork while eating. As he bit into the sandwich, his front tooth hit a piece of bacon and broke.

6. Claimant immediately notified his supervisor and co-workers of his injury, and completed an incident report. Subsequently, on March 28, 2011 a First Report of Injury (Form 1) was filed with the Department of Labor.

7. Claimant sought dental treatment from Dr. Kentworthy, who determined that his tooth needed complete removal and replacement. The cost of this treatment is estimated to be approximately $4,700.00.

8. Defendant has denied Claimant's claim for workers' compensation benefits on the grounds that his dental injury was not incurred as a result of his employment.

DISCUSSION:

1. In order to prevail on a motion for summary judgment, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to a judgment in its favor as a matter of law. *Samplid Enterprises, Inc v. First Vermont Bank,* 165 Vt. 22, 25 (1996). In ruling on such a motion, the non-moving party is entitled to the benefit of all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 252 (1991); *Toys, Inc. v. F.M. Burlington Co*., 155 Vt. 44 (1990). Summary judgment is appropriate only when the facts in question are clear, undisputed or unrefuted. *State v. Realty of Vermont*, 137 Vt. 425 (1979).

2. Both parties here seek summary judgment in their favor on the question whether Claimant's dental injury arose out of and in the course of his employment for Defendant. As the material facts are not genuinely disputed, disposition of this question on summary judgment is appropriate.

3. The starting point for any workers' compensation claim is whether the injury arose out of and in the course of employment. 21 V.S.A. §618; *McNally v. Department of PATH*, 2010 VT 99, ¶10. This is a two-pronged test, requiring a sufficient showing of both (1) a causal connection (the "arising out of" component); and (2) a time, place and activity link (the "in the course of" component) between the claimant's work and the accident giving rise to his or her injuries. *Cyr v. McDermott's, Inc.*, 2010 VT 19; *Miller v. IBM*, 161 Vt. 213 (1993).

4. For the purposes of the pending motions, Defendant does not dispute that Claimant's injury occurred in the course of his employment. This prong of the compensability test is met when an injury is shown to have occurred "within the period of time when the employee was on duty at a place where the employee was reasonably expected to be while fulfilling the duties of [the] employment contract." *Miller, supra* at 215, quoting *Marsigli Estate v. Granite City Auto Sales, Inc.*, 124 Vt. 95, 98 (1964). Generally speaking, injuries that occur on the employer's premises during a regular lunch hour are deemed to have arisen in the course of employment. *Miller, supra; Vivian v. Eden Park Nursing Home*, Opinion No. 01-00WC (February 14, 2000), 2 Lex K. Larson, *Larson's Workers' Compensation* §21.02[1][a] (Matthew Bender, Rev. Ed.) and cases cited therein.

5. The crux of the parties' dispute is as to the "arising out of" prong of the compensability test. What is required to satisfy this factor is a causal connection between an employee's injury and his or her work – not necessarily in the sense of proximate or direct cause, but rather as an expression of origin, source or contribution. *Snyder v. General Paper Corp.*, 152 N.W.2d 743, 745 (Minn. 1967); *see, Shaw v. Dutton Berry Farm*, 160 Vt. 594, 597-98 (1993) (overruling *Rothfarb v. Camp Awanee, Inc.*, 116 Vt. 172 (1950), and characterizing tort-type proximate causation in the workers' compensation context as narrow, unduly restrictive and contrary to the remedial purpose of the statute).

6. Vermont has long adhered to the "positional risk" doctrine in interpreting and applying the "arising out of" component of compensability. *Miller, supra* at 214, citing *Shaw, supra* at 599. Under Vermont law, an injury arises out of the employment "if it would not have occurred *but for* the fact that the conditions and obligations of the employment placed claimant in the position where [claimant] was injured." *Id.*, quoting 1 A. Larson, *Workmen's Compensation Law* §6.50 (1990) (emphasis in original). Phrased alternatively, the positional risk doctrine asks simply whether an injury would or would not have occurred but for the claimant's employment and his or her position at work. *Shaw, supra*.[2]

[2] The positional risk analysis adopted in Vermont differs from the "neutral risk" rule applied in many other states. In order to satisfy the "arising out of" component under a neutral risk analysis, the conditions of employment must expose the employee to a risk of injury "greater than that to which the general public is exposed." *Illinois Consolidated Telephone Co. v. Industrial Commission*, 732 N.E.2d 49, 56-57 (2000) (Rakowski, J., concurring). No such "greater-than-the-general-public" type exposure is required in a positional risk state. *Id.*, citing 1 A. Larson & L. Larson, *Larson's Workers' Compensation Law* §7.04(1) at 7-15 (1999).

7. In most cases, an injury that occurs during the "course of employment" also "arises out of it," unless the circumstances "are so attenuated from the condition of employment that the cause of injury cannot reasonably be related to the employment." *Miller, supra* at 215, quoting *Shaw, supra* at 598. The question in this case, then, is whether the obligations of Claimant's employment – specifically, that he take his meals while working his shift – constitute a sufficient connection to his injury as to render it compensable.

8. In answering this question, I must distinguish the circumstances here from cases in which the conditions of employment either encourage or require the employee to take his or her meal from a certain source or under certain circumstances. *See, e.g., Maguire's Case*, 451 N.E.2d 446 (Mass.App.Ct. 1983) (acknowledging compensability of dental injury sustained while biting into employer-supplied sandwich, but denying claim on other grounds); *Goodyear Aircraft Corp. v. Industrial Commission*, 158 P.2d 511 (Ariz. 1945) (injury from exploding soda bottle brought from home deemed compensable where conditions of employment required claimant to care for, prepare and consume lunch on premises); *Krause v. Swartwood*, 218 N.W. 555 (Minn. 1928) (injury sustained as result of drinking tainted coffee at restaurant deemed compensable where employer had directed claimant to eat there so that she could field incoming calls while at lunch). The circumstances giving rise to the injury in these cases are sufficiently connected to the employment to establish the required "arising out of" link.

9. In the current case, the conditions of Claimant's employment admittedly were such as to encourage him to eat while working. However, they did not extend so far as to direct, or even suggest, that he eat any particular food from any particular source at any particular time. Claimant could have chosen another menu item, or another restaurant, or even brought his own meal from home. That he opted not to do so was a consequence of his own preferences, not any work-related obligation. *See, Rehm-Brandt v. Rehm-Brandt's Design*, Opinion No. 44-01WC (November 29, 2001) (compensation for injury sustained while traveling to pick up lunch denied where obligations of employment did not so constrain claimant's lunch time choices as to change the trip from a personal one to an employment-related one).

10. To impose liability upon employers for injuries suffered under the circumstances presented by the current claim would be both unrealistic and unwieldy. In effect it would require them to ensure that all of the food their employees consume while at work, no matter what the source, is safe. But how would an employer do so? Should it be granted the right to inspect an employee's lunch box? To ban hard candy or caramels? To declare certain restaurants off-limits? I suspect that neither employers nor employees would stomach such intrusive devices well.

11. While Vermont's Workers' Compensation Act "is to be construed liberally to accomplish the humane purpose for which it was passed, a liberal construction does not mean an unreasonable or unwarranted construction." *Herbert v. Layman*, 125 Vt. 481, 486 (1966); Workers' Compensation Rule 1.1100. The Act does not make the employer an insurer against every accidental injury that may happen to an employee during his or her employment. It applies only to those that reasonably can be said to have the employment as their origin. *Snyder, supra* at 752 (Otis, J., dissenting). The circumstances of Claimant's injury were too attenuated from his work for me to make that connection here.

12. I conclude that although Claimant's dental injury occurred in the course of his employment for Defendant, it did not arise out of it. As a matter of law, therefore, his claim for workers' compensation benefits must fail.

ORDER:

Defendant's Motion for Summary Judgment is hereby **GRANTED**. Claimant's Motion for Summary Judgment is **DENIED**, and his claim for workers' compensation benefits causally related to his March 24, 2011 dental injury is **DISMISSED**.

DATED at Montpelier, Vermont this 13th day of March 2012.

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Anne M. Noonan
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.