STATE OF VERMONT
DEPARTMENT OF LABOR

Trevor Foley	Opinion No. 16-13WC
v.	By: Jane Woodruff, Esq. Hearing Officer
Smugglers' Notch Management	For: Anne M. Noonan Commissioner
	State File No. EE-51048

OPINION AND ORDER

Hearing held in Montpelier, Vermont on March 22, 2013
Record closed on April 15, 2013

APPEARANCES:

Michael Green, Esq., for Claimant
John Valente, Esq., for Defendant

ISSUES PRESENTED:

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

EXHIBITS:

Joint Exhibit I:	Medical records
Defendant's Exhibit A:	Claimant's statement, July 24, 2012
Defendant's Exhibit B:	Claimant's statement, August 2, 2012
Defendant's Exhibit C:	Brewer statement, August 9, 2012
Defendant's Exhibit D:	Watson affidavit, October 12, 2012
Defendant's Exhibit E:	Byrne statement, July 23, 2012
Defendant's Exhibit F:	Moreau statement, July 25, 2012
Defendant's Exhibit G:	District Court file, *State v. Bates*
Defendant's Exhibit H:	Claimant's timesheet
Defendant's Exhibit I:	Golf cart safety form
Defendant's Exhibit J:	Golf cart handbook
Defendant's Exhibit K:	Claimant's punch card
Defendant's Exhibit L:	Moore report, July 26, 2012
Defendant's Exhibit M:	Smith report, July 23, 2012
Defendant's Exhibit N:	Map of Jeffersonville, Vermont roads
Defendant's Exhibit O:	Map of Smugglers' Notch Resort and roads

Defendant's Exhibit P: Map of Smugglers' Notch

CLAIM:

Temporary total disability benefits pursuant to 21 V.S.A. §642
Medical benefits pursuant to 21 V.S.A. §640
Interest, costs and attorney fees pursuant to 21 V.S.A. §678

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was his employer as those terms are defined in Vermont's Workers' Compensation Act.

2. Judicial notice is taken of all relevant forms contained in the Department's file relating to this claim.

3. Claimant began working for Defendant in December 2011 as a ski lift operator. After the winter season concluded, in June 2012 he was rehired as a common areas worker in the housekeeping department. He worked the 3 p.m. to 11 p.m. shift.

Claimant's General Work Duties and Daily Routine

4. Claimant had a regular routine to his daily duties. Upon arriving at work, he swiped his time card and retrieved his time sheet, which included a list of his assigned tasks. Then he signed out a set of keys to the supply closets and obtained a two-way radio. Next he picked up his golf cart key and checked the cart's oil and gas. Thereafter, he started his listed jobs. When he was finished his shift, he returned to the operations center, parked his golf cart so it would be available for the next shift, returned his keys and radio and signed off duty.

5. Claimant was allowed to use a golf cart during his shift because he had undergone the training Defendant required in order to qualify for the privilege. As part of his training, Claimant acknowledged Defendant's policy that those with golf cart privileges were responsible for the safe operation of the vehicle to prevent injuries to employees, guests or equipment. All of the golf carts are equipped with governors, which prevent them from being driven at speeds in excess of 14 or 15 miles per hour.

The Events of July 22, 2012

6. On July 22, 2012 Claimant arrived at work to see a special assignment added in handwriting at the top of his time sheet. After completing the special assignment he went about his day, with little variation from his regular routine.

7. Upon finishing his last task of the day, which was to clean the Mountainside pool, Claimant returned to the operations center. As he was filling out his paperwork and preparing to sign off from his shift, a fellow employee, Brandon Bates, approached him and grabbed his golf cart keys. Claimant testified that he thought Mr. Bates was just fooling around, so he continued to fill out his paperwork. I find this testimony credible.

8. When Mr. Bates did not return immediately, Claimant became concerned and went outside to find him. He saw Mr. Bates driving the golf cart across the parking lot, and reacted by jumping aboard. Claimant credibly testified that he was motivated to do so because (1) he did not think Mr. Bates had golf cart privileges; (2) it was his responsibility to secure the golf cart at the end of his shift; and (3) he did not want Mr. Bates either to damage the golf cart or to injure himself.

9. In fact, Mr. Bates was intoxicated. Claimant made different statements as to exactly when he realized that this was the case – either at the time Mr. Bates first took the golf cart keys from him or not until later, when he jumped on the cart as Mr. Bates drove past. I find from the more credible statements, which were made both to Defendant's insurance adjuster and to a law enforcement officer shortly after the incident occurred, that Claimant first suspected Mr. Bates was intoxicated at the time he grabbed the keys. To the extent that Claimant's formal hearing testimony was inconsistent with these earlier statements, I find that the differences were immaterial and did not affect his credibility.

10. After jumping onto the cart, Claimant pleaded with Mr. Bates to return immediately to the operations center. Mr. Bates replied that he was going to drive himself home on the cart, because he did not want to wait for a ride. Claimant responded that his mother would come and pick them both up, but Mr. Bates still refused to stop. Instead, with Claimant still in the cart he continued across Defendant's grounds to Edwards Road, and then turned onto Route 101. As the pair traveled up Route 101, Mr. Bates suddenly jerked the steering wheel to the left. The golf cart overturned, and Claimant suffered severe injuries to his right leg. He has undergone extensive medical treatment as a result.

Defendant's Investigation of the July 22, 2012 Incident

11. Defendant interviewed several people in the days immediately following the July 22, 2012 incident. As a result of its investigation, it terminated both Claimant's and Mr. Bates' employment for taking the golf cart off the premises.

12. Two of the people whom Defendant interviewed also provided testimony at the formal hearing. Jan Moreau is Defendant's transportation supervisor. She was working on the evening of July 22, 2012 and finished her shift at 10 p.m. Ms. Moreau testified that at approximately 10:30 p.m. she observed two males get into a golf cart, but she admitted she did not see them well. It appeared to her that the men were trying to put gas in the golf cart. Although credible, I find that Ms. Moreau's testimony is of limited value, as she could not state with certainty that the men she observed were in fact Claimant and Mr. Bates.

13. Billy Burns is currently Defendant's housekeeping manager. At the time of the golf cart incident he managed the support crew, and as such he was Mr. Bates' direct supervisor. Mr. Burns did not witness the July 22, 2012 incident, but did interview Mr. Bates subsequently. Mr. Burns credibly testified that Mr. Bates took sole responsibility for taking the golf cart while he was intoxicated, and expressed remorse for his actions.

CONCLUSIONS OF LAW:

1. To establish a compensable claim under Vermont's workers' compensation law, a claimant must show both that the accident giving rise to his or her injury occurred "in the course of the employment" and that it "arose out of the employment." *Miller v. IBM*, 161 Vt. 213, 214 (1993); 21 V.S.A. §618.

2. An injury occurs in the course of employment "when it occurs 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).

3. 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." *Shaw v. Dutton Berry Farm*, 160 Vt. 594, 599 (1993), *quoting* 1 Larson, *Workers' Compensation Law* §6.50 (1990) (emphasis in original). This so-called "positional risk" analysis lays responsibility on an employer when an employee's injury would not have occurred "but for" the employment and the worker's position at work. *Id.*

4. Putting these two prongs of the compensability test together, the "in the course of" requirement establishes a *time and place* connection between the injury and the employment, while the "arising out of" requirement establishes a *causal* connection between the injury and the employment. *See Walbridge v. Hunger Mountain Co-op*, Opinion No. 12-10WC (March 24, 2010), citing *Spinks v. Ecowater Systems*, WC 04-217 (Minn. Work.Comp.Ct.App., January 21, 2005). Both connections are necessary for a claim to be compensable. *Carlson v. Experian Information Solutions*, Opinion No. 23-08WC (June 5, 2008).

The "In the Course Of" Prong

5. Defendant argues that because Claimant was under no work-related duty to accompany Mr. Bates on the latter's ill-fated joyride, his resulting injuries cannot be said to have arisen in the course of his employment. Defendant further argues that Claimant was engaged in horseplay at the time of his injury, and therefore substantially deviated from his employment duties. For both of these reasons, Defendant asserts that Claimant has failed to satisfy the first half of the compensability test.

6. A key component of what constitutes an employee's work-related "duty" is whether the activity benefits the employer. If it does, then it fits within the parameters of the term, even if the employer did not specifically direct the employee to undertake the activity. *Kenney v. Rockingham School District*, 123 Vt. 344 (1963).

7. In this case, Defendant's policy as regards employees' use of golf carts included responsibility for safeguarding against injuries to other employees, guests and equipment. I have already found that Claimant's motivation for jumping onto the golf cart Mr. Bates had appropriated was in furtherance of those exact responsibilities. I conclude that his actions clearly benefited Defendant.

8. As for Defendant's contention that Claimant's actions amounted to horseplay, again, the facts dictate otherwise. Whatever horseplay occurred on July 22, 2012 was instigated and continued by Mr. Bates, not by Claimant. According to the evidence I have found most credible, Claimant neither condoned, encouraged nor participated in it. His actions were directed at preventing mischief, not making it. To disqualify him from workers' compensation coverage simply by virtue of another employee's horseplay, not his own, would be unfair. *Clodgo v. Rentavision*, 166 Vt. 548, 550 (1997) (citations omitted).

9. I conclude that the injuries Claimant suffered on July 22, 2012 occurred within the period of time when he was on duty at a place where he was reasonably expected to be while fulfilling the duties of his employment contract. *Miller, supra*. Therefore, they occurred in the course of his employment.

The "Arising Out Of" Prong

10. As the Supreme Court noted in *Shaw, supra* at 598, ordinarily if an injury occurs in the course of employment, it also arises out of it, "unless the circumstances are so attenuated from the conditions of employment that the cause of the injury cannot reasonably be related to the employment." That is not the case here.

11. What is required to satisfy the "arising out of" test 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).

12. 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*.

13. In this case, the conditions and obligations of Claimant's employment included direct responsibility for the golf cart with which he had been entrusted. But for that responsibility, he would have had no reason to jump onto the cart after Mr. Bates commandeered it. Given the potential risk of immediate harm – to his co-employee, to passersby and to the golf cart itself – it cannot be said that the circumstances under which he did so were so attenuated from his employment as to fail the "arising out of" test. Thus I conclude that his resulting injuries would not have occurred but for his position at work.

Summary

14. I conclude that Claimant has established both that his injury occurred "in the course of" his employment and that it "arose out of" his employment. Thus, his July 22, 2012 injuries are compensable.

15. As Claimant has prevailed on his claim for benefits, he is entitled to an award of costs and attorney fees. He has submitted a request for costs totaling $203.08, and attorney and paralegal fees totaling $4,589.00.[1] Defendant did not object to these requests. I conclude that both the costs and fees are reasonable and they are thereby awarded.

[1] Claimant's request for attorney fees has been modified to reflect the prevailing rate under Workers' Compensation Rule 10.1210, $145.00 per hour.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant is hereby **ORDERED** to pay:

1. Temporary total disability benefits from July 22, 2012 until Claimant either returned to work or reached an end medical result, whichever was earlier, pursuant to 21 V.S.A. §642, with interest as calculated pursuant to 21 V.S.A. §664;

2. Medical benefits covering all reasonable medical services and supplies causally related to treatment of Claimant's injuries in accordance with 21 V.S.A. §640; and

3. Costs in the amount of $203.08 and attorney and paralegal fees in the amount of $4,589.00 in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this 3rd day of June 2013.

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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.