H. C. v. McDermott's, Inc. (June 12, 2008)

STATE OF VERMONT
DEPARTMENT OF LABOR

H. C.

v.

McDermott's, Inc.

Opinion No. 25-08WC

By: Phyllis G. Phillips, Esq.
Hearing Officer

For: Patricia Moulton Powden
Commissioner

State File No. X-62893

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES:

Gregory Howe, Esq. and Stephen Adler, Esq., for Claimant
Corina Schaffner-Fegard, Esq., for Defendant

ISSUE PRESENTED:

Whether Claimant's injury arose out of and in the course of his employment for Defendant, and if so, whether his claim for compensation is barred by 21 V.S.A. §649.

FINDINGS OF FACT:

The following facts are undisputed:

1. At all times material to this claim, Claimant worked for Defendant as a mechanic's helper. His duties included servicing trucks and cleaning the shop area. His work hours were from 6:00 AM until noon daily.

2. Defendant is a milk hauling company. It employs truck drivers to pick up milk from dairy farms and deliver it to creameries.

3. Defendant's drivers use chemical cleaners to cleanse their truck hoses as well as their tractors and trailers.

4. In April 2006, Claimant's co-employee, Mike Staples, observed a Mountain Dew bottle on the counter in the Coventry office. After the bottle had remained on the counter for a couple of days Mr. Staples offered it to Claimant. Claimant accepted the bottle. Mr. Staples next observed the bottle on the picnic table in Defendant's lunch area. At some point he put it in the lunch area refrigerator.

5. In his deposition, Mr. Staples testified that the Mountain Dew bottle remained in the refrigerator for "maybe a week, maybe not quite a week." At that point the refrigerator was cleaned out and Mr. Staples told Claimant he could take the Mountain Dew bottle.

6. On April 27th or 28th, 2006 Claimant brought the Mountain Dew bottle home and placed it in his own refrigerator.[1]

7. Three or four days later, on Tuesday, May 2nd, 2006, possibly at around 5:00 or 5:30 PM, Claimant removed the Mountain Dew bottle from his refrigerator and drank from it. Almost immediately he felt ill. He went into his bathroom and vomited, then went into his bedroom to lie down. Shortly thereafter he yelled for his apartment neighbors to call an ambulance.

8. The ambulance service received the call for assistance at Claimant's residence at 7:11 PM. Michael Paradis, EMT, arrived at the scene at 7:17 PM and observed Claimant lying supine on a bed with a soda bottle on the floor next to him. Claimant was transported to North Country Hospital (NCH), arriving at 7:39 PM.

9. The NCH Emergency Physician Record dated May 2, 2006 states as follows:

> **Chief complaint:** per pt. – home from work – "2 beers" – then drank a mouthful of material from work for days, Mountain Dew bottle in refrig. @ work → (?) contents – brought it home tonight → took one mouthful – smelled like bleach [positive] burn tongue, throat → poured rest of contents in sink.

10. The NCH Emergency Room Physical Exam record dated May 2, 2006 includes the following notation: "Odor ETOH. Not well focused." In the laboratory results section the record notes various values obtained for CBC, chemistries and urinalysis. In addition, beneath that section it states: "ETOH –138." Under "Clinical Impression" it states: "(1) ingestion unknown substance" and "(2) alcohol intoxication." The record is signed by a physician, but the signature is illegible.

11. The NCH Nursing Transfer Report dated May 2, 2006 includes the following notations:

> **Previous Relevant History (Med/Surg/Obs/Psych) & Medications prior to admit. Check if none/unknown:** drunk when arrived
>
> **Relevant Lab Values:** ETOH 140's

12. Last, the typed NCH Final Report Consultation signed by Dr. LaCarrubba includes the notation, "Alcohol level on admission 138."

[1] Defendant disputes whether the Mountain Dew bottle Claimant brought home and put in his own refrigerator was the same one that Mr. Staples first observed on the counter in the Coventry office and later gave to Claimant to take home. Even taken in the light most favorable to Defendant, however, there is no other evidence sufficient to raise a factual dispute as to whether Claimant had any other Mountain Dew bottle in his possession other than the one Mr. Staples gave him. *See Alpstetten Assn., Inc. v. Kelly*, 137 Vt. 508, 514 (1979).

13. Claimant is unsure how many beers, if any, he drank on May 2, 2006 before he drank from the Mountain Dew bottle. He denied that he was intoxicated or exhibiting signs of intoxication at the time he drank from the Mountain Dew bottle. Claimant produced an affidavit from a neighbor who was with him in the half-hour before he drank from the Mountain Dew bottle who stated that she did not observe him exhibiting any signs of intoxication. Claimant also produced an affidavit from Michael Paradis, the EMT who attended him at the scene, to the same effect. The ambulance transport "run sheet" prepared by Mr. Paradis makes no mention of any observable signs of alcohol intoxication.

14. Dr. Ted Manizir, an expert in the area of analyzing breath and blood samples for alcohol content, reviewed Claimant's medical records, his deposition, his interview with Defendant's workers' compensation insurance investigator, the analysis of the remaining contents of the soda bottle and the physician's assessment of his blood alcohol content at the time of his hospital admission. From his review of these materials, Dr. Manizir concluded that Claimant's blood alcohol content at the time he drank from the Mountain Dew bottle was approximately 0.15 to 0.16%. Dr. Manizir further concluded that Claimant's blood alcohol content test result was not affected by any interference from the caustic substance he ingested. Dr. Manizir admitted that he did not verify independently that hospital personnel followed the appropriate procedures to obtain a valid measurement of Claimant's blood alcohol content, but rather assumed that they did so in calculating his own conclusions.

15. As a result of drinking the substance in the Mountain Dew bottle, Claimant suffered extensive caustic burns to his hypopharynx, the entire length of his esophagus and approximately two-thirds of his stomach.

CONCLUSIONS OF LAW:

1. The parties have brought this claim forward on cross motions for summary judgment. Claimant's motion for summary judgment is based on arguably unrefuted evidence that the Mountain Dew bottle from which he drank on May 2, 2006 contained caustic chemicals used by Defendant's drivers to clean their trucks. Claimant contends that because he would not have come into possession of the Mountain Dew bottle but for his employment for Defendant, the necessary work connection has been established in order to render his claim compensable as a matter of law.

2. Defendant's motion for summary judgment is based on arguably unrefuted evidence that Claimant was intoxicated at the time he ingested the caustic chemicals that resulted in his injury, and that therefore his claim for compensation is barred by 21 V.S.A. §649. That section prohibits compensation for an injury "caused . . . by or during [an employee's] intoxication."

3. 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 judgment in its favor as a matter of law. *Samlid 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. Heritage Realty of Vermont*, 137 Vt. 425 (1979).

4. I find that the defense Defendant has raised in its motion for summary judgment is dispositive of this claim. According to the clear language of §649, the fact of a Claimant's intoxication at the time of injury is an absolute bar to recovery, even if there is no causal relationship between the two. *Garber v. Hill-Martin Corporation*, Opinion No. 11-88. And although Claimant contends that to impose the bar without evidence of causation is constitutionally impermissible, that is not for me to decide in this forum. An administrative agency has no power to determine the constitutional validity of a statute; only the courts have the authority to do so. *Alexander v. Town of Barton*, 152 Vt. 148, 151 (1989), cited in *T.B. v. University of Vermont*, Opinion No. 06-08WC (February 12, 2008).

5. Claimant argues, however, that genuine issues of material fact exist as to the extent, if any, of his intoxication at the time of his injury. First, he argues that the hospital record notations as to his blood alcohol content at the time of admission would be insufficient evidence to support prosecution under Vermont's DUI statute and therefore must be deemed insufficient here as well. Second, he argues that contrary evidence from himself, from his neighbor on the scene and from the EMT who transported him to the hospital as to whether he was or was not exhibiting signs of intoxication cast sufficient doubt as to raise a factual issue.

6. The appropriate standard for establishing intoxication in the context of §649 is that provided by 23 V.S.A. §1201(a), Vermont's DUI statute. That statute prohibits a person from operating a motor vehicle if his or her blood alcohol content is 0.08% or more.

7. This Department consistently has applied that standard in the context of §649. It has barred compensation in a claim in which the claimant's blood alcohol content at the time of the injury exceeded 0.08%, *Estate of Veach v. SG Realty*, Opinion No. 47-98WC (August 31, 1998), and has allowed compensation in a claim in which the claimant's blood alcohol content was less than 0.08%, *Brailsford v. Time Capsules*, Opinion No. 12-00WC (May 17, 2000).

8. This Department also has held that hospital records of a claimant's blood alcohol content are admissible to prove intoxication even though they might lack the foundation necessary for admissibility in the context of a DUI prosecution. *Estate of Veach, supra*. Provided the opposing party has had sufficient notice of the intent to introduce such evidence, records of this type meet the relaxed hearsay requirements of Workers' Compensation Rule 7.1010. I find that Claimant had sufficient notice of Defendant's intent to rely on the records here, and that therefore they are both properly admissible and an appropriate basis for establishing intoxication.

9. As to Claimant's argument that the contrary evidence as to whether he was exhibiting signs of intoxication at the time of his injury should be deemed sufficient to defeat summary judgment, the legislative intent behind the use of blood alcohol content to establish intoxication dictates otherwise. The Supreme Court has found that the legislature's primary purpose in authorizing blood alcohol content testing was to provide "an alternative and more science-related aid" in detecting the extent of a person's intoxication. *State v. Begins*, 148 Vt. 186, 188 (1987). In doing so, the legislature "has expressed its preference for the results of a chemical analysis as a means to affirm or reject the uncertain opinion of a layman derived from observation of external symptoms of intoxication." *McGarry v. Costello*, 128 Vt. 234, 240 (1969). Simply put, the legislature determined that evidence of a person's blood alcohol content properly should trump the presence or absence of other indicia of intoxication. *See State v. McQuillen*, 147 Vt. 386 (1986).

10. In the context of the current claim, therefore, I find that the contrary evidence alleged by Claimant to undermine a finding of intoxication is insufficient to raise a genuine issue of material fact so as to defeat summary judgment in Defendant's favor.

11. Claimant raises one final legal issue in opposition to Defendant's §649 defense. Relying on the "ticking time bomb" theory of causation applied in some workers' compensation claims, he argues that the "injurious event" in his claim occurred when he was *given* the Mountain Dew bottle containing caustic chemicals, not when he later *drank* from the bottle. Claimant contends that because he was not intoxicated at the time he was given the bottle, his injury did not occur "during his intoxication," and therefore §649 does not apply.

12. According to Professor Larson, the delayed-action or "ticking time bomb" theory of recovery looks to the *origin* of a work-related accident rather than its *manifestation* as the key to determining whether an injury arose "in the course of" employment and is therefore compensable. 1A *Larson's Workers' Compensation Law* §29.22. Applied to the facts of this claim, the ticking time bomb theory holds that the origin of Claimant's injury occurred when he was given the Mountain Dew bottle at work, during work hours. The fact that the injury did not actually manifest itself until Claimant drank from the bottle days later at home should not defeat compensability. As Professor Larson has explained, "The time-bomb, so to speak, is constructed and started ticking during working hours; but it happens to go off at a time and place removed from the employment." 1A *Larson's Workers' Compensation Law, supra*; *see Daniello v. Machise Express Co.*, 289 A.2d 558, 561 (N.J.Super. 1972) (finding compensable injuries suffered by an employee who was lighting a fire at home while still wearing his work clothes, which had been splashed by gasoline in the course of his work duties); *Lujan v. Houston Insurance Co.*, 756 S.W.2d 295 (Tex. 1988) (same).

13. Were intoxication not an issue in this claim, Claimant's analysis might be convincing, and in fact it forms an integral part of Claimant's own summary judgment argument. But Claimant cannot have it both ways. He cannot argue that his injury occurred "in the course of" his employment for the purpose of determining compensability even though it happened at home on May 2, 2006, while at the same time arguing that it occurred at work a week earlier for the purpose of defeating the application of §649 to his claim.

14. According to Workers' Compensation Rule 2.1240, an "injury" is defined as "any harmful work-related change in the body." To hold that being given a bottle containing caustic chemicals constitutes an "injury" would be to stretch the clear language of the definition beyond comprehension. Nor can the "ticking time bomb" theory of recovery be used to countenance such an interpretation.

15. I find, therefore, that Claimant's injury occurred on May 2, 2006 when he drank the caustic substance contained in the Mountain Dew bottle. Having already found that no genuine issue of material fact exists as to Claimant's intoxication at the time that he did so, his claim is barred by §649. Defendant is entitled to summary judgment in its favor on those grounds.

ORDER:

Defendant's motion for summary judgment is **GRANTED**. Claimant's motion for summary judgment is **DENIED**, and his claim for workers' compensation benefits arising out of his May 2, 2006 injury is **DISMISSED**.

Dated at Montpelier, Vermont this 12th day of June 2008.

_____
Patricia Moulton Powden
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.