Rehm-Brandt v. Rehm-Brandt's Design (November 29, 2001)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. P-20044
	)	
	)	By: Margaret A. Mangan
Johnny Rehm-Brandt	)	Hearing Officer
	)	
v.	)	For: R. Tasha Wallis
	)	Commissioner
Rehm-Brandt's Design	)	
	)	Opinion No. 44-01WC

APPEARANCES:

Johnny Rehm-Brandt, pro se
Phyllis Severance, Esq. for the Defendant

RULING ON THE DEFENSE MOTION FOR SUMMARY JUDGMENT

The defendant moves pursuant to V.R.C.P. 56 for summary judgment in its favor on the grounds that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law.

The claimant contends that the injury he suffered when he was struck by a car crossing a street during a lunch break was a work-related injury. As such, he argues that he is entitled to all applicable workers' compensation benefits. For its part, the defendant argues that the accident did not arise out of and in the course of the claimant's employment and is, therefore, not compensable.

The facts, taken largely from the claimant's deposition, are not in dispute. Claimant worked as an installer for his father's kitchen design business. His job involved installing carpeting, vinyl, tile and floating floors, kitchen countertops and other surfaces. Claimant's father was his boss, but did not work alongside the claimant. Rather his supervision involved stopping in at a job site to inspect the work and provide direction if needed. He expected a worker to be present when he arrived, although the precise day or time was not known. Although the claimant had flexible hours, generally he was paid for an eight-hour workday. A half hour was always deducted for lunch whether or not he took a lunch break.

On the day the claimant was injured, he was working with one other worker at a doctor's office. When lunchtime came around, the claimant offered to go into town and pick up lunch for the two of them while his coworker stayed at the work site. Claimant drove the company van into town, went to an ATM machine, and then was crossing a street to get to the restaurant when he was hit.

DISCUSSION:

In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1963). 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).

To be compensable, the claimant must demonstrate that his accident both: "1) arose out of employment and 2) occurred in the course or employment." *Miller v. IBM*, 161 Vt. 213, 214 (1993). An accident arises out of employment "if it would not have occurred but for the fact that the conditions and obligations of the employment place claimant in the position where he was injured. Id at 214, quoting *Shaw v. Dutton Berry Farm*, 160 Vt. 594, 599 (1993). The only conceivable basis for finding that the claimant's injury arose out of his employment would be to conclude that the employer's directive that one employee remain at the job site at all times, even during lunch, somehow caused or contributed to the claimant's positional risk. But that is not the case. The fact that only one employee could leave the job site at a time did not so constrain the claimant's lunch time choices to change the journey from a personal trip to an employment related one.

Nor did the accident occur in the course of the claimant's employment because it did not occur "within the period of time when the employee was on duty at a place where the employee may reasonably be expected to be while fulfilling the duties of [the] employment contract. *Miller*, 161 Vt. 215, citing *Marsigli's Estate v. Granite City Auto Sales, Inc*. 124 Vt. 95,98 (1964).

Vermont law is in keeping with the basic rule that the act of leaving the premises for lunch "is outside of the course of employment if he falls, is struck by an automobile while crossing the street, or is otherwise injured." 1 Larson's Workers' Compensation Law, § 13.05[2]. In this case, the claimant left the premises when he went beyond a reasonable zone around his work site. See, *Barella v. Mitchell*, Opinion No. 16-97 WC (July 18, 1997).

CONCLUSION:

Taking the evidence in the light most favorable to the claimant, it is clear that his injury did not arise out of and in the course of his employment. The defendant is, therefore, entitled to judgment as a matter of law. V.R.C.P. 56(b); *Toys, Inc. v. F.M, Burlington Co*., 155 Vt. 44 (1990). The claimant's claim is hereby DISMISSED.

Dated at Montpelier, Vermont this 29th day of November 2001.

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R. Tasha Wallis
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.