STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. S-15406
	)	
Janet Payne	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: R. Tasha Wallis
Mount Mansfield Company	)	Commissioner
	)	
	)	Opinion No. 47SJ-02WC

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Based on her contention that she incurred an injury that arose out of and in the course of her employment with Mount Mansfield Company, Claimant, by and through her attorneys, Kohn & Rath, moves for judgment as a matter of law. Defendant Mount Mansfield Company, by and through its attorneys, Ryan, Smith and Carbine, opposes Claimant's motion and seeks a ruling as a matter of law that Claimant was not injured while in its employ.

The undisputed facts are as follows:

1. Claimant worked at Stowe Mountain resort as a ski school instructor. She was paid with a ski pass and approximately $250 to $400 per week depending on the number of lessons she taught.

2. The employer and claimant had agreed that she was not to ski in uniform when off duty and that skiing off duty was at her discretion.

3. On January 29, 2002 Janet Payne signed in for work at Spruce Mountain Ski School at 8:50 a.m. and escorted some children to their classes. Because there were no private lessons that morning, at about 10:00 Claimant was told to check back with the desk at noon.

4. Claimant remained on the premises, but was not required to do so.

5. At about 10:30 Claimant purchased an entry for a ski bum race that day and received her bib. She then went to ski. While skiing on a mogul run before the race, Claimant felt a pop in her left knee and fell. She got up and skied to the bottom of the trail.

6. Claimant, wearing the ski bum race bib, found her supervisor, Irv Fountain, and reported the fall. Claimant then proceeded to ski in the ski bum race, after which she checked back with the Ski School Desk for the noon lessons. While she was waiting, Claimant filled out an incident report for the fall and knee pain.

7. Learning that there were no afternoon lessons, Claimant then went home and iced her leg. The next day, Dr. Glen Neal diagnosed a torn ACL. On February 27, 2002, she had surgery to repair the tear.

CONTESTED FACTS:

Whether at the time of her fall, Claimant was skiing to practice for her Level 2 Certification or to warm up for the ski bum race.

The role certification played in her employment.

CONCLUSIONS OF LAW:

1. The Vermont Rules of Civil Procedure apply to workers' compensation hearings insofar as they do not defeat the informal nature of the proceedings. Workers' Compensation (WC) Rule 7. Pursuant to V.R.C.P. 56(c), summary judgment is appropriate when the moving party demonstrates that there is no genuine issue of any material fact and that party is entitled to judgment as a matter of law. *Toy, Inc., v. F.M. Burlington Co*., 155 Vt. 44, 48 (1990).

2. In this case, where both parties have moved for summary judgment, each is entitled to the benefits of all reasonable doubts and inferences in determining whether a genuine issue of material fact exists when the opposing party's motion is being judged. *Id.* at 48.

3. "If a worker receives a personal injury by accident arising out of and in the course of employment…" she is entitled to compensation. 21 V.S.A. § 618.

4. The analysis begins with an analysis of § 618 (a) (3), which provides that to avoid liability for an on-premises injury, the employer must prove that the activity leading to the injury was "not reasonably related to the claimant's employment duties, requirements or a regular incident of employment."

5. Larson provides guidance in this analysis with his three-alternative test for injuries incurred during recreational or social activities. 2 A. Larson & L. Larson, Workers' Compensation Law § 22.01 (2000). Generally, recreational or social activities are within the course of employment when:

> (1) they occur on the premises during a lunch or recreation period as a regular incident of the employment; or (2) the employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or (3) the employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.

Id. § 22.01.

6. In this case, it is clear that the incident occurred on the employer's premises, a crucial determination in the Larson analysis and undoubtedly the basis for the statutory presumption in § 618 (a) (3). The importance of the premises connection has been explained as follows:

> When seeking for a link by which to connect an activity with the employment, one has gone a long way as soon one has placed the activity physically in contact with the employment environment, and even further when one has associated the time of the activity somehow with the employment. This said, the exact nature and purpose of the activity itself does not have to bear the whole load of establishing the work connection, and consequently the employment-connection of that nature and purpose does not have to be as conspicuous as it otherwise might.

Id. § 22.03 (internal citations omitted)

7. The premises connection is undisputed, although the Claimant was not "on the clock" when she had her accident. To succeed, the defendant must prove that the activity leading to the injury was not 1) reasonably related to the claimant's employment duties or requirements; or 2) a regular incident of employment. § 618(a)(3).

8. Whether Claimant's pre-race mogul run was reasonably related to employment duties or requirements is an issue that cannot be resolved in the pending motion because it depends on crucial facts related to the employer's expectations of a ski instructor's skill, practice and certification as well as her relationship with the public.

9. Nor is it clear that the activity was a "regular incident of employment," that is, that it "achieved some standing as a custom or practice either in the industry generally or in this particular place." Larson's § 22.03(2). In fact, precisely how to characterize that ski activity –as a warm-up, free ski, practice for certification or other reason--is a question of fact.

10. Also questions of fact are whether the parties contemplated that claimant would ski with the ski pass at the time of employment and whether it was an inducement for employment. See, *Grather v. Gables Inn, Ltd.*, 170 Vt. 377 (2000).

11. Accordingly, it is premature to enter judgment on the record as it stands.

Amateur sports exclusion

12. "Worker and "employee" under the Act means " a person who has entered into the employment of, or works under contract of service or apprentice with, an employer, but shall not include …a person engaged in amateur sports, even if an employer contributes to the support of such sports." (emphasis added). § 601(14)(B). (amateur sports exception).

13. The employer argues that this claim is barred because the Claimant was engaged in an amateur sport at the time of her injury.

14. The Vermont Supreme Court approved this Department's analysis in *Nutbrown v. Roadway Express*. Op. No. 2-93WC (1993) when it considered the defense argument for the application of the amateur sports exception in *Grather* 170 Vt. 377. "*Nutbrown* concluded that the exclusion represented the Legislature's response to a New York case in which a little league baseball player obtained workers'compensation coverage for a game injury because he was playing for a team sponsored by the employer. It held that the exception applies only to members of an amateur sports team sponsored by the employer, such as company softball, bowling, or basketball teams." Id.

15. Although a ski bum race seems to be covered within the amateur sports exception of § 601(14)(B), it is not clear whether warming up for such a race would also be encompassed within the exclusion and whether, at the time of this Claimant's injury, she was actually warming up for that race, skiing recreationally or assisting her employer by improving her chances for a certification. Furthermore, what, if any, effect the actual race had on her knee is a question of fact. These questions of material fact go to the applicability of the statutory exception and preclude judgment as a matter of law.

THEREFORE, both motions for summary judgment are DENIED.

This case shall be heard on its merits as scheduled for March 6, 2003.

Dated at Montpelier, Vermont this 20th day of November 2002.

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R. Tasha Wallis
Commissioner