STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. S-06101
	)	
Peter Chenier	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: Michael S. Bertrand
St. Albans Cooperative Creamery	)	Commissioner
	)	
	)	Opinion No. 08-03WC

RULING ON MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES:

Brain Tillman, Esq. for the Claimant
Harold Eaton, Esq. for the Defendant

ISSUES:

Did the Claimant's injury of August 6, 2001 arise out of and in the course of his employment?

UNDISPUTED FACTS:

1. Claimant worked as a powdered milk packer for St. Alban's Cooperative Creamery ("Creamery").

2. Claimant's duties involved packing milk, cleaning work and generally what needed to be done on his shift.

3. Claimant punched in at approximately 11:02 p.m. on the day he was injured for a shift that was to begin at midnight. It was common practice for employees to arrive early.

4. However, claimant did not get paid for the time he punched in prior to work hours.

5. For his personal use, claimant had borrowed a table from the office of Rob Hirss, operations manager at the Creamery, and took it home for the weekend.

6. After he returned the table to the Creamery, Claimant injured his back while he and his supervisor were moving that table up stairs to the office from which it had been taken.

CONCLUSIONS OF LAW:

1. Defendant moves for summary judgment on the theory that claimant's injury, although incurred at work, did not arise out of and in the course of his employment.

2. As the party seeking summary judgment, defendant must satisfy a two-part test. First, the moving party must demonstrate that there is no genuine issue of material fact. Second, the defendant must present a valid legal position, one that entitles it to judgment as a matter of law. See, V.R.C.P. 56(c); *White v. Quechee Lakes Landowners' Assn.*, 170 Vt. 25 (1999). The record must be viewed and all reasonable inferences drawn in the light most favorable to the claimant as the nonmoving party.

3. To recover workers' compensation benefits, a claimant must prove that the accident 1) arose out of; and 2) occurred in the course of employment. 21 V.S.A.§ 618(a)(1); *Miller v. IBM*, 161 Vt. 213, 214 (1993). The "but for" test for the "arising out of" requirement articulated in *Miller* is satisfied only if the injury "would not have occurred but for the fact that the conditions and obligations of the employment placed Claimant in the position where he was injured." Id at 214 (citing Larson's current § 3.05). The position where claimant was injured was on the employer's premises carrying property of the employer he had removed for his off-premises personal use.

4. It was a purely personal errand, not involving the obligations of employment that placed the Claimant in the position where he was injured. As such, his injury did not arise out of his employment.

5. An accident 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 may reasonably be expected to be while fulfilling the duties of [the] employment contract." *Miller*, 161 Vt. at 215. That the injury occurred on the premises is one factor supporting the claimant's position, but it is not the end of the inquiry because the act of returning the table was outside his regular duties.

6. Even if we accept Claimant's theory that he was "on-duty" because arriving for work early was an expectation, it does not necessarily follow that his injury occurred in the course of his employment. Duty is not so narrow a concept as to exclude incidental trips across the premises, personal comfort, some on premises recreation, or minor acts of horseplay. See, id. § § 21, 22, 23. In fact, even under the principles of common law, "the law afforded the worker some latitude in releasing the servant from the confines of the work bench." *Miller v. I.B.M. Corp*, 161 Vt. 213, 216 (1993) (citations omitted). And "[a]n act outside an employee's regular duties which is undertaken in good faith to advance the employer's interests, whether or not the employee's own assigned work is thereby furthered, is within the course of employment." 2 Larson's Workers' Compensation Law, § 27, Scope "Acts Outside Regular Duties."

7. However, as wide open as the duty requirement may be and as broad as this claimant's work was by doing "what needed to be done," returning a table he removed for his own personal use cannot be considered part of his job responsibility or a task incidental to his work. He was not advancing his employer's interests in any way. Carrying the table removed from the premises for his own personal use is too far a deviation from his duties to have occurred in the course of his employment. Cf. *Clodgo v. Rentavision*, 166 Vt. 548 (1997) (deviation from job duties discussed in horseplay context).

8. Therefore, because there are no genuine issues of material fact and because it has been shown that Claimant's injury did not arise out of and in the course of his employment, defendant is entitled to judgment as a matter of law.

ORDER:

The defense motion for summary judgment is GRANTED.

Dated at Montpelier, Vermont this 7th day of February 2003.

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Michael S. Bertrand
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.