SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

DONALD POST,
Claimant,

HF No. 101, 2003/04

v.

DECISION

DANIEL CONSTRUCTION,
Employer,

and

ACUITY,
Insurer.

This is a workers' compensation proceeding brought before the South Dakota Department of Labor pursuant to SDCL 62-7-12 and Chapter 47:03:01 of the Administrative Rules of South Dakota. A hearing was held before the Division of Labor and Management on April 6, 2005, in Rapid City, South Dakota. Claimant, Donald Post (Claimant) appeared personally and through his counsel, Margo Tschetter Julius. Susan Brunick Simons represented Employer Daniel Construction and Insurer Acuity (Employer/Insurer). The parties agreed to bifurcate the issues in this claim and the sole issue before the Department at this hearing is whether Claimant is barred from workers' compensation benefits by SDCL 62-4-37.

Facts:

Claimant began working for Employer in February of 2003. Employer hired Claimant to perform construction work, including concrete framing. On or about March 13, 2003, Claimant slipped and fell injuring his low back, right leg, left hip, neck and left arm.

Insurer denied his claim in a letter dated June 27, 2003, based on SDCL 62-4-46. Insurer alleged that Claimant misrepresented his physical condition to his employer at time of hire. Any alleged misrepresentation is not the subject of this decision. Later, Employer/Insurer denied his claim based on SDCL 62-4-37, alleging that because Claimant went to work for Employer, he intentionally and willfully disregarded his physical limitations and his physician's orders, thus causing his injury. Despite the fact that Claimant did not injure either shoulder in the fall, Employer/Insurer based their argument on the fact that Claimant had undergone surgical repair of his left rotator cuff in January 2001 and had not been released to return to construction work.

Claimant's relevant medical history begins in 2000. In 2000, Claimant suffered a right rotator cuff injury. Dr. Lew Papendick, an orthopedic surgeon, performed surgery and treated Claimant. Dr. Papendick's last work release regarding Claimant's right rotator cuff injury was in April of 2000. It indicated "no use of right arm except to write or

phone." Dr. Papendick's record of June 15th indicates that Claimant "will continue to improve and I will then allow him to return to near full employment." Dr. Papendick never released Claimant to return to full employment, but advised the worker's compensation carrier that Claimant was expected to return to near full employment. Claimant's understanding from Dr. Papendick was that he "just needed to give it time until I felt better, and then I could go back to my old job."

Claimant suffered a left rotator cuff injury in July of 2000 and Dr. Papendick performed surgery. Claimant's last restriction from Dr. Papendick regarding his left shoulder was given on July 9, 2002, which stated, "No lifting with left arm". Claimant worked light duty until December of 2002. After a period of unemployment, Claimant acquired his position with Employer.

The record demonstrates that not only did Claimant return to gainful employment after his bilateral shoulder surgeries, Claimant returned to a lengthy career in the construction industry after a low back fusion performed when Claimant was a young man.

Dr. Papendick commended Claimant for returning to work, stating, "My hat off to Don, he apparently wanted to do some work which is more than what a lot of people do, and he was doing some framing type of activity . . .." On July 15, 2003, Dr. Papendick found that Claimant's shoulder "should not prevent him from doing the type of work that he was doing, including some concrete work and construction and framing." Dr. Papendick stated that Claimant's cuff had healed and that if certain activity caused him pain, he should not do that activity.

Dr. Papendick could not confirm that he specifically instructed Claimant to never lift anything with his left arm ever again. Dr. Papendick did not give Claimant permanent restrictions. Claimant did not understand Dr. Papendick's restrictions to be permanent. Claimant testified credibly that he thought the surgeries fixed the rotator cuff tears and that he just needed to give himself adequate time to heal.

Issue

Is Claimant barred from workers' compensation benefits by SDCL 62-4-37?

SDCL 62-4-37 provides:

> No compensation shall be allowed for any injury or death due to the employee's willful misconduct, including intentional self-inflicted injury, intoxication, illegal use of any schedule I or schedule drug, or willful failure or refusal to use a safety appliance furnished by employer, or to perform a duty required by statute. The burden of proof under this section shall be on the defendant employer.

The Supreme Court addressed SDCL 62-4-37 in Fenner v. Trimac Transportation, 1996 SD 121, 554 N.W.2d 485:

> The term "willful misconduct" has long been defined in this state as "something more than ordinary negligence but less than deliberate or intentional conduct. Conduct is gross, willful, wanton, or reckless when a person acts or fails to act, with a conscious realization that injury is a probable, as distinguished from a possible (ordinary negligence), result of such conduct." VerBouwens v. Hamm Wood Products, 334 N.W.2d 874, 876 (SD 1983) (citing Granflaten v. Rohde, 66 SD 335, 283 NW 153 (1938). Black's Law Dictionary defines the willful misconduct of an employee in this way: "Under workers' compensation acts, precluding compensation, [willful misconduct] means more than mere negligence, and contemplates the intentional doing of something with knowledge that it is likely to result in serious injuries, or with reckless disregard of its probable consequences." Black's Law Dictionary, 6th ed. at 1600 (1990). SDCL 62-4-37 does not distinguish between work-related and non-work-related willful misconduct, and both types are contemplated by the statutory language. Cf. In re Andren, 917 P.2d 178 (Wyo 1996) (employee's work-related and non-work-related activities caused aggravation of compensable injury and precluded further benefits).

Id. at ¶ 10. The Fenner court found that Fenner "intentionally and deliberately disregarded his physical limitations and his physician's order". Fenner's failure to follow his physical limitations and his physician's order led to an aggravation of a previous work related injury.

Fenner is distinguishable on two counts. First, Claimant's injury of March 13, 2003, was not an aggravation of a previous work-related injury. Claimant's rotator cuffs were not injured in the fall of March 13, 2003. Second, Claimant did not "intentionally and deliberately disregard his physical limitations and his physician's order." He testified credibly that his shoulders were not giving him any problems during his tenure with Employer. He credibly testified that he did not understand Dr. Papendick's restrictions to be permanent. Dr. Papendick could not confirm that he specifically told Claimant that his restriction of "no lifting with the left arm" was permanent. Dr. Papendick also opined that Claimant could engage in activity that did not cause shoulder pain or other symptoms.

The claimant in Fenner knew that further activity could result in aggravation of his back injury. Claimant here credibly testified that he thought his shoulders had healed and Dr. Papendick confirmed that they had healed. Claimant did not intentionally go to work with "knowledge" that it would be "likely to result in serious injuries."
Claimant did not commit willful misconduct.

Even if it could be found that Claimant committed willful misconduct by working for Employer, Employer/Insurer have failed in its burden to demonstrate that Claimant's injuries of March 13, 2003, were "due to" such conduct. The test under SDCL 62-4-37 has been explained by South Dakota Supreme Court:

> Under this statute, the employer has the burden of proving not only that the employee committed "willful misconduct," but also that the alleged injury was "due to" such willful misconduct. Goebel v. Warner Transp., 2000 SD 79, ¶13, 612 N.W.2d 18, 22. A party must lose when it bears the burden of proof but fails to offer probative evidence. Cavender v. Bodily, Inc., 1996 SD 74, ¶19, 550 N.W.2d 85, 89. In interpreting the phrase "due to," this Court has said that it refers to proximate cause. Id. Therefore, in order to prevail, an employer must first show that the employee's "willful misconduct" was a proximate cause of the injury. Id. A proximate cause is a cause that produces a result in a natural and probable sequence and without which the result would not have occurred. Estate of Gaspar v. Vogt, Brown & Merry, 2003 SD 126, ¶6, 670 N.W.2d 918, 921 (citations omitted). This cause need not be the only cause of a result. Id. It may act in combination with other causes to produce a result. Id.

Wells v. Howe Heating & Plumbing, 2004 SD 37, ¶ 10. Slipping, falling, and suffering an injury is not the "natural and probable sequence" of returning to work.

The Supreme Court addressed the "due to" aspect of SDCL 62-4-37:

> When an injury may have had several contributing or concurring causes, the correct standard against which cause is measured is the substantial factor test and not a 'but for' test. 'When there is evidence of concurring or contributing causes, the trial court is required to apply the proximate causation standard expressed in South Dakota Pattern Jury Instructions ...'
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> When the expression 'proximate cause' is used, it means that cause which is an immediate cause and which, in natural or probable sequence, produced the injury complained of. It is a cause without which the injury would not have been sustained. It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it, causes the injury.

Goebel, 2000 SD 79 ¶ 13 (citations omitted). Claimant's alleged disregard of Dr. Papendick's restrictions did not produce and is not an immediate cause of his injury. Claimant's injury is not "due to" willful misconduct. The causation of the injury must be an immediate cause and in natural and probable sequence.

Employer/Insurer failed to demonstrate with medical evidence that Claimant's shoulder pain or symptoms stemming from his prior injuries caused Claimant to fall. Employer/Insurer showed no relationship between Claimant's injury of March 13, 2003, and his prior work injuries. Contrary to Employer/Insurer's argument, Claimant's return to work "did not continue, or even increase, his disability" suffered from his prior injuries. See Detling v. Tessier, 60 S.D. 405, 244 N.W. 538.

Employer/Insurer argues that because Claimant had to make more trips on the hillside due to his lifting limitations, he caused the slippery slope and in turn caused his own fall. Employer/Insurer argues that if Claimant had not tried to go back to construction work, he would not have fallen down. To accept Employer/Insurer's argument would be to accept a "but for" analysis in resolving a misconduct issue. The Supreme Court has explicitly rejected the "but for" analysis in workers compensation misconduct cases.

Employer/Insurer has failed to demonstrate that Claimant committed willful misconduct. Employer/Insurer has likewise failed to demonstrate that Claimant's March 13, 2003, injuries were "due to" his conduct in returning to work. Claimant's claim for worker's compensation benefits for the March 13, 2003, injuries is not barred under SDCL 62-4-37.

Claimant shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within ten (10) days from the date of receipt of this Decision. Employer/Insurer shall have ten (10) days from the date of receipt of Claimant's proposed Findings of Fact and Conclusions to submit objections thereto or to submit proposed Findings and Conclusions. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Claimant shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 11th day of August, 2005.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge