SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION
DIVISION OF LABOR AND MANAGEMENT

KAREN A. POTTER, **HF No. 135, 2012/13**

Claimant,

v. **DECISION**

DAVISCO FOODS INTERNATIONAL, INC.,

Employer,

and

GENERAL CASUALTY COMPANIES OF WISCONSIN,

Insurer.

A hearing in the above-entitled matter was on the March 11, 2014, before the Honorable Catherine Duenwald, Administrative Law Judge, South Dakota Department of Labor, Division of Labor and Management. Claimant, Karen A. Potter, was present with her attorney, Mindy Ovenden of the law firm Austin, Hinderaker, Hopper, Strait & Benson. Employer, Davisco Foods International Inc., and Insurer, General Casualty Companies of Wisconsin, were represented by their attorney, Charles A. Larson of the law firm Boyce, Greenfield, Pashby & Welk, L.L.P. The Department, having received and reviewed all evidence and argument in this case hereby makes this Decision.

The sole issue to be determined is whether Claimant's injury arose in and out of the course of her employment with Employer.

FACTS

Claimant began her employment with Employer on July 19, 2012, in Lake Norden, South Dakota. Employer produces cheese and cheese products at the Lake Norden plant. It has between 220 and 225 employees. The plant is open year-round, 24 hours per day. The overnight shift has about 35-40 employees.

When hired by Employer, Claimant was told about Employer's annual Christmas party. This Christmas party is held for the employees in Watertown, SD at a hotel convention center. Employer's party involved a dinner for the guests, alcoholic and nonalcoholic beverages, entertainment, and door prizes to those in attendance. The venue also had a dance floor in front of the stage that guests used for dancing. Everything was optional and guests could leave at any time during the evening.

The 2012 Christmas party was not very different than previous years; it was held on Friday, November 30, 2012. The office manager for Employer posted a memo regarding the Christmas party at the time clock, for all company employees to see. The office manager then followed-up with all the employees for an "RSVP" to the party, whether they chose to attend or not attend. The office manager testified that she wanted to get a close estimate as to how many people would be attending the party, for catering purposes. Employer used this Christmas party as the "bonus" for employees. However, if employees chose not or could not attend the Christmas party, Employer gave the employees a gift card to a local restaurant. Employer did not shut down the plant for the party; employees that worked the overnight shift and many of the employees working the early morning shift did not attend the party. Of the 221 employees in the Lake Norden plant, 108 employees attended the party, 28 were working the overnight shift, and 87 were not working but did not attend. Employer did not give negative treatment to those employees who could not or did not attend. Furthermore, the testimony is credible that those employees who did attend were also not given advantages by Employer or the managers over other employees.

Claimant chose to attend the Christmas party. Employer had name tags for the employees and their guests. The employees' names were checked off a list kept at the entrance to the party, as it was a closed, invitation-only event. Employer paid for the evening's events. Employer's corporate executives were present at the party and mingled with the guests. Employer provided some of the cheeses made at the plant as appetizers, as many of the workers never have the opportunity to taste the finished product. The cheese produced is not sold to retail customers. The corporate executives addressed the crowd at dinner. Throughout the night, door prizes were given to those in attendance. Employer spent about $15,000 on this Christmas party.

Towards the end of the night, while dancing on the dance floor, Claimant tripped over some extension cords and tore her Achilles tendon. Surgery was required to repair Claimant's tendon.

Additional facts may be listed in the analysis below.

ANALYSIS

Claimant has the burden of proving all facts essential to sustain an award of compensation. *Darling v. West River Masonry, Inc.* 777 N.W. 2d 363, 367 (S.D. 2010). To recover benefits under workers' compensation law, the employee must establish she sustained an injury "arising out of" and "in the course of" employment activities. *Voeller v.*

HSBC Card Servs., Inc., 834 N.W.2d 839, 843 (S.D. 2013) (quoting SDCL 62-1-1(7)). These requirements are construed liberally, and benefits are not limited to only the times when the employee is engaged in the duties he or she was hired to perform. *Id*. (citing *Fair v. Nash Finch Co.*, 728 N.W.2d 623, 628-29 (S.D. 2007)). Each requirement is analyzed separately but is part of a greater question as to whether the injury complained of is causally connected to employment. *Fair*, 728 N.W. 2d at 629. The strength of one of the two factors may make up for deficiencies to the other. *Id.*

1. Arising Out of Employment

> "In order for the injury to 'arise out of' the employment, the employee must show that there is a `causal connection between the injury and the employment.'" Id. ¶ 10 (quoting *Mudlin*, 2005 SD 64, ¶ 11, 698 N.W.2d at 71).) Although the employment need not be the direct or proximate cause of the injury, the accident must have its "origin in the hazard to which the employment exposed the employee while doing [her] work." Id. (alteration in original). "The injury `arose out of the' employment if: 1) the employment contributes to causing the injury; 2) the activity is one in which the employee might reasonably engage; or 3) the activity brings about the disability upon which compensation is based." Id. (quoting *Mudlin*, 2005 SD 64, ¶ 11, 698 N.W.2d at 71-72).

Fair v. Nash Finch Co., 2007 SD 16, ¶10-11, 728 N.W.2d 623, 628-629 (2007). Each of these points must be looked at individually.

Claimant was employed as a lab technician at the Lake Norden plant. Her job was to analyze and test milk and cheese samples. Her direct employment or job with Employer did not contribute to causing the injury. Evidence indicated that her employment did not hinge on her attendance at the annual Christmas Party.

Employer held this party every year as a gift to the employees. This party involved dinner, entertainment, and dancing. As an employee of Employer, Claimant may attend the party, but it was not part of her job duties or an expectation of her employment with Employer. It was completely optional for employees to attend the party and those that did not attend were not given worse or better treatment than those who attended. Those that

attended were not the only employees who were given promotions. The S.D. Supreme Court, more recently, in the *Voeller* case differentiated the types of risk an employee may be exposed to with employment.

> In determining whether the requisite causal connection exists, it is often useful to examine three categories of risk of injury to which an employee may be exposed: "risks distinctly associated with the employment, risks personal to the [employee], and neutral risks[.]" Bentt v. D.C. Dep't of Emp't Servs., 979 A.2d 1226, 1232 (D.C. 2009) (internal quotation marks [834 N.W.2d 844] omitted). See also Logsdon v. ISCO Co., 618 N.W.2d 667, 672 (Neb. 2000); Fetzer v. N.D. Workforce Safety & Ins., 815 N.W.2d 539, 546 (N.D. 2012) (Maring, J., dissenting); 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law §§ 4.01-4.03 (2012). Injuries arising from risks distinctly associated with employment are universally compensable, while injuries from personal risks are generally noncompensable. Bentt, 979 A.2d at 1232; Logsdon, 618 N.W.2d at 672; Fetzer, 815 N.W.2d at 546; see also Larson, supra, § 7.02[4]. Risks personal to the employee are those risks "so clearly personal that, even if they take effect while the employee is on the job, they could not possibly be attributed to the employment." Larson, supra, § 4.02.

Voeller, 834 N.W.2d at 843-844 (S.D. 2013). In this case, Claimant's dancing is an optional activity at an optional party. The activity was not a risk associated with her employment as a lab technician. It is not a neutral risk, as not all employees attended the Christmas party. Claimant took a personal risk by attending the Christmas Party and personal risks are generally noncompensable.

Claimant makes the "but for" argument, or the positional risk doctrine described by the Supreme Court in *Voeller*.

> Injuries occurring as a result of neutral risks may be compensable under the positional risk doctrine. See, e.g., *Milledge v. Oaks*, 784 N.E.2d 926, 931-34 (Ind. 2003); *Logsdon*, 618 N.W.2d at 672-74; *Larson,* supra ¶ 9, § 3.05. The positional risk doctrine involves:
>
> > situations in which the only connection of the employment with the injury is that **its obligations placed the employee in the particular place at the particular time** when he or she was injured by some neutral force, meaning by "neutral" neither personal to the claimant nor distinctly associated with the employment.
>
> *Larson*, supra ¶ 9, § 3.05. The positional risk doctrine utilizes the "but for" test: "An injury arises out of the employment if it would not have occurred

> but for the fact that the conditions and obligations of the employment placed claimant in the position where he or she was injured." Id.

Voeller at 844 (footnote omitted) (emphasis added). In this case, Employer's party was voluntary. If Claimant had an obligation to attend the party or Employer had required Claimant to attend, then the "but for" test might apply. However, Claimant voluntarily attended without obligation or expectation from Employer. The positional risk doctrine does not apply in this case.

2. In the Course of her Employment

> The term "in the course of employment" refers to the time, place, and circumstances of the injury. Id. ¶ 11 (quoting *Bearshield v. City of Gregory*, 278 N.W.2d 166, 168 (S.D.1979)). An employee is acting "in the course of employment" when an employee is "doing something that is either naturally or incidentally related to his employment or which he is either expressly or impliedly authorized to do by the contract or nature of the employment." Id. (internal quotations and citations omitted).

Fair v. Nash Finch Co., 2007 SD 16, ¶10-11, 728 N.W.2d 623, 628-629 (2007). The second part of the test is whether Claimant was "in the course of her employment" when she was injured; the time, place, and circumstances of the injury.

The S.D. Supreme Court in *Bender v. Dakota Resorts Management Group, Inc.*, looked again to *Larson's Treatise* when determining if a claimant was "in the course of her employment." They cited and followed the following test.

> 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 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.
> *2 Arthur Larson, Larson's Workers' Compensation Law*, § 22.01, 22-2 (1999). (emphasis added). According to Larson's treatise, if any of these three links to employment are met, compensation should be awarded. Id. at 22-7 to 22-8.

Bender v. Dakota Resorts Management Group, Inc., 700 N.W.2d 739, 743 (S.D. 2005).

At the time of her injury, Claimant was not "in the course of" her employment with Employer. (1) The party was not on Employer's work premises or contiguous to the plant. (2) Employer did not expressly or impliedly require Claimant's presence at the Christmas party. The activity was not part of Claimant's services to Employer. (3) There was no business benefit for Employer to require Claimant to be present at the Christmas party. The party was sponsored by Employer for the benefit of the employees' general morale and good will towards the company. The only benefit Employer receives from this annual party is a workforce that feels appreciated. Employer does not market the products to anyone who would be at the party, nor is there evidence that Employer has a monetary benefit from holding the Christmas party.

On a side note, shortly after Claimant's surgery that was a result of this injury, a representative from Employer presented Claimant with an unsigned statement for her to sign, stating that she agreed that her injury is not a work-related injury. This does not relieve Employer from any obligation under the workers' compensation laws. SDCL §62-3-18. No part of my decision is based upon Claimant's agreeing to sign this paper.

Conclusion

Claimant has not proven by a preponderance of the evidence that her injury arose out of and in the course of her employment with Employer. She has not met her burden of proving her attendance at the 2012 Christmas Party was required by Employer. The injury did not occur while Claimant was conducting any work activity for Employer. Employer obtained no benefit from hosting this party for the employees, besides improving general morale. Claimant's request for additional benefits is denied.

Dated this ___ day of November, 2014.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

_____

Catherine Duenwald

Administrative Law Judge