SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

JEFFREY A. JOHNSON, **HF No. 157, 2004/05**

Claimant, **DECISION**

vs.

CROSSROADS AUTO BODY, INC.,

Employer,

and

ST. PAUL/TRAVELERS,

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 September 1, 2005, in Rapid City, South Dakota. Jeffrey A. Johnson (Claimant) appeared personally and through his attorneys of record, Michael K. Sabers and Steven C. Beardsley. Michael M. Hickey represented Employer/Insurer (Employer).

On August 20, 2004, Claimant was injured in the employee parking lot on Employer's premises while returning from his lunch break. Claimant was injured when the motorcycle he was riding collided with one of Employer's buildings. The two issues presented at hearing were whether Claimant's injury arose out of and in the course of his employment with Employer and whether Claimant's request for workers' compensation benefits is barred by SDCL 62-4-37.

FACTS

1. At the time of the hearing, Claimant was twenty-eight years old.
2. In August 1998, Claimant moved to the Rapid City area and began working for Employer as an auto body technician. Claimant was a good, hard-working employee. Claimant earned $14 per hour.
3. Pat Berry (Berry) is the owner of Crossroads Auto Body.
4. Jeff Kath (Kath) is the manager and Claimant's supervisor.
5. Employer is located on the north side of Chicago Avenue in Rapid City.
6. The entire area of Employer's premises is surrounded by a chain link fence. Employer maintains the area within the chain link fence, including the body shop, storage building and parking lot. The storage building is located approximately thirty to thirty-three feet beyond the body shop.
7. There is one entrance to Employer's premises, which is located on the southwest corner of the lot.
8. Employer allowed employees to park on the west side of the body shop.

9. Claimant was not required to park in a particular area, but throughout his employment, Claimant typically parked on the west side of the building by the back door.
10. Claimant's standard work shift was from 8 a.m. to 5 p.m.
11. Claimant received an hour lunch break, which he customarily took from 12 p.m. to 1 p.m. Claimant had discretion as to when he actually took his lunch break, depending upon the project he was working on.
12. Employer knew that Claimant usually took his lunch break from 12 p.m. to 1 p.m.
13. Claimant was not paid for his hour lunch break.
14. Employer expected that all employees, including Claimant, would take a one hour break for lunch.
15. Employer's standard practice was that employees took a lunch break from 12 p.m. to 1 p.m., but an employee could take a lunch break as it fit into his schedule.
16. Employer did not require employees to remain on the premises during the hour lunch break.
17. Employer expected all employees to return to work after their hour lunch breaks.
18. Claimant typically left Employer's premises during his lunch break. Claimant was free to leave because there was nothing about his duties that required him to stay on Employer's premises during his lunch break.
19. During the summer, Claimant typically rode his motorcycle, a Yamaha YZF-R6, to work every day except during inclement weather.
20. Claimant was not required to ride a motorcycle to work. At least three other employees rode motorcycles to work. Employer knew that Claimant frequently rode his motorcycle to work.
21. Claimant owned the motorcycle for two years prior to the accident.
22. Before Claimant bought the motorcycle, he participated in a week-long motorcycle safety class and received a motorcycle license.
23. Claimant always wore safety gear when he rode his motorcycle, including a helmet, jacket and gloves.
24. On August 20, 2004, Claimant rode his motorcycle to work.
25. During the morning, Claimant worked on a Jeep Grand Cherokee smoothing out the tailgate.
26. Claimant left Employer's premises on his motorcycle to take his lunch break at 12 p.m. Claimant wore his helmet, jacket and gloves and went to Pizza Hut.
27. After lunch, Claimant donned his gear and got back on his motorcycle to return to work.
28. Claimant intended to finish the Jeep Grand Cherokee project and expected to work all afternoon.
29. Claimant's only reason for returning to Employer's premises after lunch was to complete his work shift.
30. As Claimant returned to his usual parking area, for some unknown reason, he crashed into the storage building and was severely injured.
31. No one witnessed Claimant's accident.
32. Claimant did not remember anything about the accident. Even at the time of the hearing, Claimant did not remember any details of the accident.

33. The last thing before the accident that Claimant remembered was waiting for a maroon Suburban to pass by before he crossed the road.
34. As Claimant was waiting, he saw Berry and Justin Smith, one of Employer's customers, standing outside the body shop.
35. Claimant's motorcycle knocked a hole into the storage building breaking the exterior sheet metal and some two-by-sixes. The motorcycle was lodged about halfway into the storage building.
36. At the time of the accident, Berry was standing in front of the body shop talking to Smith, who stopped by to check on the status of his vehicle.
37. Berry was facing east and did not see Claimant as he rode into the parking lot.
38. Smith was facing west and, because of the unique color of Claimant's motorcycle, noticed Claimant as he turned into the parking lot. Smith watched Claimant ride by until Claimant disappeared around the corner.
39. Claimant entered the parking lot going "parking lot speed." Smith estimated Claimant was traveling about 5 mph.
40. Smith credibly testified there was nothing out of the ordinary as Claimant rode by on his motorcycle. Smith stated it was "[j]ust a guy riding his bike back to work, or so it seemed."
41. Smith did not hear tires screeching or an engine revving. Smith stated, "[m]y attention was on the bike until it went out of sight, and then my attention resumed to Pat and our conversation."
42. Smith continued talking to Berry until they heard a loud crash. Smith estimated that forty-five to sixty seconds passed before he heard the crash. Smith stated, "I mean, I know it wasn't a long time because obviously you're standing there talking to someone, you see a bike come by, and then it was shortly after and then you heard this loud crash."
43. Berry did not hear anything out of the ordinary as Claimant rode by. Berry "just heard a big boom" that occurred when Claimant's bike struck the storage building.
44. Berry and Smith walked around the front of the building to see what happened.
45. Kath was on his lunch break at home when the accident occurred. Kath arrived at the scene shortly after the accident had happened.
46. Kath testified at the hearing that some unidentified person told him that Claimant's front wheel went up into the air and Claimant lost control and then hit the garage. Kath's testimony was unsupported by any evidence in the record and is not credible. Kath's testimony is rejected as it is unreliable and hearsay.
47. After the accident, Berry noticed a short black mark and a longer faint mark "right where the concrete starts." Berry stated, "I would describe it as about a two-foot black mark initially. And then two feet beyond that, then you see a fainter mark and fainter, and it just [got] fainter and fainter." The mark ended about halfway to the building.
48. Berry could only speculate as to when the marks were made and if they were even made by Claimant's motorcycle.
49. Smith had a vague recollection of faint marks on the cement. Smith recalled "like a line and then, you know, basically where you saw the bike had been on its side or crashing into the building, so to speak." Smith estimated the marks were approximately five feet long.

50. An ambulance arrived on the scene and took Claimant to the hospital.
51. Russ Eisenbraun, a patrolman with the Rapid City Police Department, was the initial responding officer at the accident scene. When Officer Eisenbraun arrived at the scene, the paramedics were present and administering aide to Claimant. Officer Eisenbraun obtained names of individuals at the scene and he did not recall any witness "indicating that [Claimant] had done a wheelie[.]"
52. Officer Eisenbraun saw some type of marks on the pavement. He testified, "I'm just going from memory, I'm guessing, 20, 25 feet from the impact point you could see where the bike had went down and started seeing gouge marks in the pavement."
53. Candy Fleck, an accident investigator with the Rapid City Police Department, investigated Claimant's accident and prepared an accident report.
54. As part of her investigation, Officer Fleck spoke with individuals at the accident scene. Officer Fleck testified "I arrived there and I immediately spoke to [Claimant's] coworkers and boss. They were telling me that the motorcycle had done a wheelie coming into the parking lot and basically crashed into the building." Officer Fleck did not give any credence to these statements because no one actually witnessed the accident.
55. Officer Fleck recalled seeing faint tire marks that led to the building. She did not measure the marks and could not state if these were skid marks. Officer Fleck did not indicate the existence any marks in the diagram portion of the accident report.
56. Officer Fleck did not ascertain a cause of Claimant's accident. Based upon her investigation, Officer Fleck could only state that Claimant entered into Employer's parking lot, lost control of his motorcycle and hit a building.
57. Prior to the accident, Claimant did not perform wheelies. On a rare occasion, Claimant's front tire would come "off the ground an inch or two or so" as he accelerated as he entered on to the interstate. Claimant would "let off the throttle and keep on going." Claimant did not consider this a wheelie.
58. Employer alleged that Claimant's injuries were sustained as a result of him doing a wheelie in Employer's parking lot. There was absolutely no credible evidence presented to support a finding that Claimant "popped a wheelie."
59. There was no credible evidence presented to show that Claimant's injuries were a result of popping a wheelie. Employer's argument that Claimant's injuries were sustained as a result of popping a wheelie is rejected.
60. On August 20, 2004, at the time of the accident, Employer knew that Claimant was returning from his lunch break.
61. The accident occurred on Employer's premises, in the employee parking lot in front of the storage building.
62. The only reason for Claimant to be on Employer's premises at the time of the accident was so that he could return to work.
63. Claimant was a credible witness. This is based on his consistent testimony and on the opportunity to observe his demeanor at the hearing.
64. Other facts will be developed as necessary.

ISSUE I

DID CLAIMANT'S INJURY ARISE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT WITH EMPLOYER?

Claimant has the burden of proving all facts essential to sustain an award of compensation. King v. Johnson Bros. Constr. Co., 155 N.W.2d 183, 185 (S.D. 1967). Claimant must prove the essential facts by a preponderance of the evidence. Caldwell v. John Morrell & Co., 489 N.W.2d 353, 358 (S.D. 1992). Under prior case law, there can be no question that Claimant's injury may be compensable even though it occurred during his lunch break. *See* Steinberg v. South Dakota Dept. of Military and Veterans Affairs, 2000 SD 36; Piper v. Neighborhood Youth Corps, 241 N.W.2d 868 (S.D. 1976); Krier v. Dick's Linoleum Shop, 98 N.W.2d 486 (S.D. 1959).

To recover under workers' compensation, Claimant must prove by a preponderance of the evidence that he sustained an injury "arising out of and in the course of the employment." SDCL 62-1-1(7).[1] The phrase "arising out of and in the course of employment" is to be construed liberally. Norton v. Deuel Sch. Dist., 2004 SD 6, ¶ 10 (citations omitted). The "application of worker's compensation statutes is not limited solely to the times during which an employee is 'actually engaged in the work that he is hired to perform.'" Id. (citations omitted). "Both factors of the analysis, 'arising out of' employment and 'in the course of employment,' must be present in all claims for workers' compensation. However, while each factor must be analyzed independently, they are part of the general inquiry of whether the injury or condition complained of is connected to the employment. Therefore, the factors are prone to some interplay and 'deficiencies in the strength of one factor are sometimes allowed to be made up by strength in the other.'" Mudlin v. Hills Materials Co., 2005 SD 64, ¶ 9 (citations omitted).

Did Claimant's injury arise out of his employment?

The phrase "arising out of" expresses a factor of contribution. Zacher v. Homestake Mining Co., 514 N.W.2d 394, 395 (S.D. 1994). "In order for an injury to 'arise out of' employment, the employee must show that there is a 'causal connection between the injury and the employment.'" Norton, 2004 SD 6, ¶ 8 (citations omitted). "The employment 'need not be the direct or proximate cause of injury,' rather, it is sufficient if 'the accident had its origin in the hazard to which the employment exposed the employee while doing his work.'" Id. (citation omitted). The injury "arose out of" 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." Mudlin, 2005 SD 64, ¶ 11 (citations omitted).

Employer expected Claimant and all employees to take a one hour lunch break. It is true that Claimant was not required to remain on Employer's premises during his lunch break. But, Employer knew that it was common practice for most employees to leave the premises in order to take their lunch breaks. Employees were free to leave

[1] Claimant must also establish that "the employment or employment related activities are a major contributing cause of the condition complained of[.] SDCL 62-1-1(7)(a). However, this was not an issue identified by the Amended Prehearing Order dated August 22, 2005.

the premises during the lunch break and doing so was an accepted practice. Employer expected employees would return to work after their lunch breaks. At the time of the accident, Claimant was returning to work after his lunch break.

Claimant's accident took place on Employer's premises in the area of the employee parking lot. Employer provided an area where most employees parked their vehicles. Claimant was riding his motorcycle on Employer's premises in order to park in the area designated for employee parking. The fact that Claimant was riding his motorcycle does not impact this analysis. Employer knew that Claimant and other employees rode motorcycles to work and parked on the west side of the body shop.

Employer knew that Claimant was on the premises in order to complete the job he had been working on that morning before he took his lunch break. There was no other reason for Claimant to be present in Employer's parking lot except to return to work. Therefore, Claimant was in an area where he might reasonably be and at the time when his presence there would normally be expected. It was solely Claimant's employment that caused Claimant to be on Employer's premises after his lunch break. Claimant parking his motorcycle in the employee parking lot on Employer's premises is an activity in which he might reasonably engage. Claimant established by a preponderance of the evidence that there is a causal connection between the injuries he sustained and his employment. Claimant established by a preponderance of the evidence that his injury arose out of his employment.

Did Claimant suffer an injury in the course of his employment?

"[T]he words 'in the course of' employment 'refer to the time, place and circumstances of the injury." Id. ¶ 15 (citations omitted). "An employee is considered within his course of employment if he is doing something that is either naturally or incidentally related to employment or which he is either expressly or impliedly authorized to do by the contract or nature of the employment." Id.

Claimant's accident occurred on Employer's premises as he returned to work after his lunch break. All employees received a one hour break for lunch. Even though employees were not required to remain on Employer's premises during their lunch breaks, Employer expected all employees, including Claimant, to return to work after a lunch break. Claimant's activity of parking his motorcycle in the employee parking lot on Employer's premises was an activity that was naturally and incidentally related to his employment. Claimant's activity of being in the employee parking lot after his lunch break was well within the nature of his employment. Thus, being in the employee parking lot to return to work after a lunch break was impliedly authorized by Employer and as such, was in the course of Claimant's employment. Claimant established by a preponderance of the evidence that he suffered an injury in the course of his employment.

ISSUE II

IS CLAIMANT'S REQUEST FOR WORKERS' COMPENSATION BENEFITS BARRED BY SDCL 62-4-37?

Claimant established that he suffered a compensable injury on August 20, 2004. Employer argued that Claimant's claim should be barred because his actions constituted willful misconduct. 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 II drug, or willful failure or refusal to use a safety appliance furnished by the employer, or to perform a duty required by statute. The burden of proof under this section shall be on the defendant employer.

Willful misconduct has been defined as:

> [S]omething 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.

Fenner v. Trimac Transp., Inc., 1996 SD 121, ¶ 9 (citations omitted). The words "due to" in SDCL 62-4-37 refer to proximate cause. Goebel v. Warner Transp., 2000 SD 79, ¶ 13. The Court explained:

> 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.

Id. (citations omitted).

Employer argued that Claimant's actions of doing a wheelie constituted willful misconduct. Employer's argument is nothing more than an unsupported allegation. The record is devoid of any credible evidence that Claimant performed a wheelie before the accident. No one who testified at the hearing saw Claimant do anything improper prior to the accident. No one heard anything out of the ordinary as Claimant rode his motorcycle on Employer's premises. Witnesses could only speculate as to what caused Claimant's accident. Speculation is insufficient to satisfy Employer's burden of proving willful misconduct. Employer's argument that Claimant "popped a wheelie" is unfounded and is rejected.

Employer also offered the testimony of Richard Fay, a registered professional engineer from Denver, Colorado, in attempt to meet its burden of proving willful misconduct. Fay conducted an engineering analysis of the August 20th accident. Fay provided a Preliminary Report dated August 17, 2005, and testified live at the hearing.

In order to conduct his analysis, Fay visited Employer's premises, spoke with Berry, examined the storage building after it was repaired, measured and photographed the premises, reviewed the accident report, examined the motorcycle and reviewed various depositions.

Fay observed that Claimant's motorcycle had extensive damage. He noted in his report:

> The struts are deformed and the right one is pulled apart, resulting in a reduction of 8" in the wheelbase. The right handle bar is broken off and the tachometer is stuck at 7200 rpm. There are heavy scratches on the right side of the cycle. The throttle is stuck due to damage.

Fay explained "[t]he tachometer is stuck at 7200 RPM. And that is associated with a certain rear-wheel speed and therefore a certain ground speed of the motorcycle. And so it's useful to take a look at what that ground speed is and see if it correlates with other evidence such as the damage that occurred to the building and the motorcycle in the event." Based upon this information, Fay opined the impact of the accident "occurred at an inappropriate speed for operation." Fay wrote in his report, "[t]he tachometer indicates an engine rpm of 7200, which correlates with 31 mph in 1st gear. The impact speed of the cycle, indicated by the damage, is consistent with the speed indicated by the tachometer."

Based upon his engineering analysis of the accident, Fay opined "that the collision damage is consistent with operation of the cycle at an inappropriate speed in the parking lot." Fay explained "I say it because normally in a parking lot, speed would be in the 5 to 10 miles per hour, as testified by Justin Smith as he saw Claimant entering on his motorcycle, not 30 miles per hour as indicated by the damage to the motorcycle and the corollary information from the tachometer reading." Fay also opined that the motorcycle was on its side when it impacted the storage building based upon scratch marks on the motorcycle. Fay did not conclude that Claimant "popped a wheelie." Fay concluded that Claimant's "activities were inappropriate based on [his] reconstruction of [Claimant's] accident." Fay's testimony is insufficient to establish that Claimant's conduct in operating the motorcycle constituted willful misconduct.

Fay's opinions are not credible. Fay did not run any tests on the motorcycle, including testing the throttle cable. Fay did not make a determination as to why the throttle was stuck. Fay did not know how many times the motorcycle was moved or even how the motorcycle was moved before he inspected it. Yet, Fay opined as to the significance of the scratches on the motorcycle. Fay did not disassemble any part of the motorcycle "so [he doesn't] know what [he] would have determined." Fay relied upon speculative and inconsistent testimony about any skid marks or black marks at the accident scene. Fay did not examine the storage building before it was repaired. Expert testimony is entitled to no more weight than the facts upon which it is predicated. Podio v. American Colloid Co., 162 N.W.2d 385, 387 (S.D. 1968). "The trier of fact is free to accept all of, part of, or none of, an expert's opinion." Hanson v. Penrod Constr. Co., 425 N.W.2d 396, 398 (S.D. 1988). Fay's opinions are rejected as they lack foundation and are unreliable.

Claimant's actions do not constitute willful misconduct. Even if Fay's opinions were accepted and the accident was caused by operator error, Claimant's actions were not willful. There was no credible evidence presented to demonstrate that this was anything but an accident that occurred on Employer's premises as Claimant returned to work after his lunch break. Claimant's conduct on Employer's premises did not constitute willful misconduct under SDCL 62-4-37.

In summary, Claimant's injury on August 20, 2004, arose out of and in the course of his employment with Employer. Claimant's injury was not the result of willful misconduct and his claim for benefits is not barred by SDCL 62-4-37. Therefore, Claimant is entitled to workers' compensation benefits. The Department shall retain jurisdiction over the issue of extent and degree of Claimant's disability.

Claimant shall submit Findings of Fact and Conclusions of Law, and an Order consistent with this Decision, and if necessary, proposed Findings and Conclusions within ten days from the date of receipt of this Decision. Employer shall have ten days from the date of receipt of Claimant's proposed Findings and Conclusions to submit objections 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 April, 2006.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Elizabeth J. Fullenkamp
Administrative Law Judge