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

DOROTHY FETTIG,
Claimant,

HF No. 15, 2012/13

v.

DECISION

GNG, INC.,
Employer,

and

RELIAMAX,
Insurer,

This is a workers' compensation proceeding brought before the South Dakota Department of Labor and Regulation 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, in Aberdeen, South Dakota. Dr. Mathias Fettig appeared on behalf of the estate of Dorothy Fettig. Michael S. McKnight represented Employer, GNG, INC., and Insurer, Reliamax.

Issues
Whether Claimant's injury arose out of and in the course of her employment.

Facts
Based upon the evidence presented and live testimony at hearing, the following facts have been established by a preponderance of the evidence:

Dorothy Fettig was employed part time at AngelHaus, a nursing facility that cared for elderly and cognitively impaired patients. Dorothy's duties included cooking and cleaning. Due to health regulations she did not cook on the days that she cleaned. On the day Dorothy was injured she was working the 3pm- 6pm shift cooking. Her duties included preparing meals, setting the table, taking out the garbage at the end of the shift, etc. Employees at AngelHaus were allowed to take breaks, however due to safety concerns for the residents, employees were not allowed to leave the building, with the exception of taking out the garbage.

Dorothy often asked the other employees at AngelHaus to collect aluminum cans for her, which she would then take to be recycled. Recycling cans was not part of her job duties at AngelHaus. Nathan Gellhaus, who had acquired ownership of the facility on

July 1, 2011, testified that AngelHaus policy did not allow employees to collect items for personal recycling, however it is unknown if Dorothy was aware of this policy or if she had ever been told she was not allowed to collect cans[1].

On July 5, 2011, Dorothy arrived to just prior to her 3pm shift. She collected a bag of aluminum cans and took them out to her personal vehicle in the designated parking area. She had also told co-workers that she had forgotten to take off her watch and was taking it out to her car for safekeeping. While returning to the building a few minutes later, Dorothy fell and broke her arm. There were no witnesses to the fall, but co-workers came to her aid when she called out for help. Nathan Gellhaus, the owner of AngelHaus drove her to the hospital for treatment.

On August 30, 2011, Reliamax denied workers' compensation benefits, claiming the injuries sustained on July 5, 2011, were the result of running a personal errand and therefore did not arise out of and in the course of her employment. Claimant filed a petition for hearing with the Department of Labor on April 3, 2012. On April 8, 2012, Claimant passed away. Her death was unrelated to the injuries sustained on July 5, 2011.

Other facts will be established as necessary.

Analysis

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. *Horn v. Dakota Pork*, 2006 SD 5, ¶14, 709 NW2d 38, 42 (citations omitted).

> A claimant who wishes to recover under South Dakota's Workers' Compensation Laws must prove by a preponderance of the evidence that she sustained an injury arising out of and in the course of the employment. Both factors of the analysis, arising out of employment and in the course of employment, must be present in all claims for workers' compensation. The interplay of these factors may allow the strength of one factor to make up for the deficiencies in strength of the other. These factors are construed liberally so that the application of the workers' compensation statutes is not limited solely to the times when the employee is engaged in the work that she was hired to perform. Each of the factors is analyzed independently although they are part of the general inquiry of whether the injury or condition complained of is connected to the employment.

Fair v. Nash Finch Co., 2007 S.D. 16,¶9, 728 N.W.2d 623 (citations omitted).

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[1] No written AngelHaus policy was presented as evidence at the hearing. There was also no evidence presented that Dorothy had been reprimanded or any note made in per personnel file regarding the collection of cans. Lavonne Wolf, an employee who worked as a cook with Dorothy testified that she had never heard of the policy from the previous or current owner.

Claimant argues that Dorothy was at work when she was injured and therefore should be eligible for workers' compensation benefits. Employer/Insurer argues that Claimant was injured taking cans to her car which was a personal errand or deviation from her employment duties. Employer/Insurer argues that but for that deviation the accident would not have occurred.

Dorothy was not present to explain exactly what she was doing when she fell. What is clear is that Dorothy arrived at AngelHaus, entered the building, returned to her car a few moments later and was injured while returning to the facility. The evidence presented shows that Dorothy was engaged in a brief deviation.

The South Dakota Supreme Court has previously considered whether an employee's deviation from work duties results in a denial of workers compensation benefits. The Court concluded that "the mere fact that an employee deviates from her work does not preclude a finding that her injuries are compensable." *Id.* at ¶16. *see also Phillips v. John Morrell & Co*., 484 NW 2d 527, (SD 1992); *Rohlck v. L& L Rainbow, Inc*., 1996 SD 115, 553 NW2d 521.

The case at hand is analogous to *Fair v. Nash Finch* Co., in which the claimant, a supermarket employee, was injured after she did some personal shopping at the conclusion of her shift. The Court determined that her injuries arose out of and in the course of her employment when she was injured leaving the supermarket a short time after completing her shift.

The Supreme Court in *Fair* adopted a two part test set forth by Professor Larson to determine whether an employee suffered a compensable injury:

> 1) Whether the employee was injured during a "reasonable period" after or before working hours; and
> 2) Whether the employee was engaged in activities necessary or reasonably incidental to her work.

Id.(citing 2 Larson's Workers' Compensation Laws § 21.06[1][a], 21-26 (2006)). In this case, Dorothy was injured in the moments before her shift started, or possibly a few minutes after her shift began. This can easily be considered a reasonable period of time before working hours when she would have been expected to be walking from her car in the designated parking area, to the facility. The Department must next look at whether the activity was necessary or reasonably incidental to her work. Dorothy was injured while walking into the facility after a brief deviation to place some personal items in her car. It is reasonable to expect that an employee would walk from the designated parking area to the facility to work. It is also reasonable to expect that an employee might take personal items to the car for safekeeping before the shift began because she would not have been allowed to leave the premises during a break once she started her duties.

Furthermore, had Dorothy been injured walking the same route from her car to the building prior to her slight deviation her injuries would have been compensable. *Id*. At ¶18. *See also Steinberg v. State Dept of Military Affairs*, 2000 S.D. 36, ¶22, 607 N.W.2d at 603; Howell, 497 N.W.2d at 712. Workers' compensation statutes are to be construed liberally and based on the brief amount of time Dorothy spend putting some personal items in her vehicle and that fact that she was entering the premises to begin work, the Department concludes that Dorothy's injuries arose out of and in the course of her employment.

Conclusion

Claimant shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within fifteen (15) 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 of Law to submit objections thereto or to submit proposed Findings of Fact and Conclusions of Law. 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 16th day of November, 2012.

SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION

/s/ *Taya M. Runyan*

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Taya M. Runyan
Administrative Law Judge