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

DENNIS E. LEWIS, **HF No. 179, 2010/11**

Claimant,

v. **DECISION**

B&G TRANSPORTATION, INC.,

Employer,

and

GREAT WEST CASUALTY COMPANY,

Insurer.

This is a Workers' Compensation proceeding brought before the South Dakota Department of Labor & Regulation pursuant to SDCL 62-7-12 and ARSD 47:03:01. A hearing was held before Donald W. Hageman, Administrative Law Judge, on November 27, 2013, and April 10, 2014, in Madison, South Dakota. Rick A. Ribstein represented Claimant. Richard L. Travis represented Employer and Insurer.

Issue:

Whether Dennis E. Lewis' shoulder injury arose out of and in the course of his employment with B&G Transportation Company, Inc.

Evidentiary Ruling:

During the Hearing, B&G and Great West offered several exhibits from the National Climactic Data Center as evidence. Lewis objected to their admittance based on the lack of foundation and failure to disclose exhibits prior to trial. B&G and Great West then asked the Department to take Judicial Notice of the exhibits to correct any foundational issue. The Department deferred ruling on the objections until the decision in this matter and instructed the parties to address the issues in their post hearing briefs.

First, Lewis concedes in his brief that a court can take judicial notice of a fact that is "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." SDCL 19-10-2(2). [1] These exhibits contain facts

[1] SDCL § 19-10-2 states;

capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Therefore, the Department can take Judicial Notice of the exhibits.

Next, the Department generally encourages and often orders the exchange of exhibits between parties prior to hearing. However, in this case, no such order was entered. Lewis sought the production of the exhibits to be offered at hearing through the discovery process. B&G and Great West objected to this request contending that the exhibits were protected by work product doctrine. Lewis did not move to compel the exhibits. As such, the exhibits were not provided until hearing.

Consequently, the Department now turns to the question of where these exhibits are protected by the work product doctrine. "An attorney's work product is defined by SDCL 15-6-26(b)(3) as 'documents and tangible things ... prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer or agent)... '" Kaarup v. St. Paul Fire & Marine Ins. Co., 436 N.W.2d 17, 21 (S.D. 1989). "The test we apply for determining whether a document or tangible thing is attorney work product is whether 'in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.'" Tebben v. Gil Haugen Canst., Inc., 2007 S.D. 18, 729 N.W.2d 166, 174-75 (quoting Karrup, 436 N.W.2d at 21).

The Department agrees with B&G and Great West's position here. In the contest of this case, these exhibits were prepared in anticipation of litigation. Therefore, the Department takes judicial notice of exhibits 7, 8, 9 and 10 and they are admitted into evidence.

Facts:

Based upon the testimony and evidence presented at hearing, the following facts are found by a preponderance of the evidence:

1. B&G Transportation Company, Inc. (B&G) employed Dennis E. Lewis (Lewis) as a cross-country semi-truck driver. B&G's business is based in Madison, South Dakota.

2. B&G was insured by Great West Casualty Company (Great West) for purposes of workers' compensation during all time relevant in this case

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A judicially noticed fact must be one not subject to reasonable dispute in that it is either: (I) Generally known within the territorial jurisdiction of the trial court; or
(2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

3. B&G sent Lewis on a delivery from John Morrell in Sioux Falls, South Dakota to East Point, Georgia on January 25, 2011. Following delivery of the cargo in East Point, the dispatch for B&G sent Lewis to Macon, Georgia on January 28, 2011, to pick up cargo for delivery in Mitchell, South Dakota.

4. B&G did not mandate that Lewis follow a particular route to deliver the cargo in Mitchell. He was allowed to exercise discretion in the route he traveled. B&G also did not require Lewis to deliver his cargo to Mitchell within a specific time period and told him there was "no rush".

5. Lewis was required by federal and state law to maintain log books and trip sheets for B&G. Among the information required on these documents are certain locations along his route. These documents are utilized by B&G, in order to ensure that fuel tax and payroll are properly paid and ensure that the drivers comply with federal rules and regulations.

6. Lewis notified B&G on January 31, 2011, that he had injured his shoulder. Lewis reported that the injury occurred early that morning when he slipped and fell while attempting to exit his truck at a rest stop. Upon Lewis' return to Madison, a First Report of Injury was completed, and B&G processed a workers' compensation claim until receiving information that Lewis had not suffered the injury in the manner in which he had reported.

7. Chris Ellingson (Ellingson), a B&G mechanic, testified at hearing that Lewis had told him that his injury occurred while riding a four-wheeler at his home in Roger, Arkansas.

8. Ellingson's testimony at hearing was credible. He had no reason to lie. He had been friends with Lewis. Lewis had stayed at Ellingson's home in Madison when Lewis overnighted in Madison. Lewis' explanation that Ellingson lied because he was jealous of a bonus Lewis received is not credible.

9. After receiving Ellingson's account of the injury, B&G examined Lewis' logbooks, trip sheets and accompanying receipts, as well as other information, in order to ascertain whether Lewis was injured in the course of his employment. After looking into the available information including a discussion with Lewis, B&G discovered that there were discrepancies in Lewis' logbooks and trip sheets as to the route he traveled, and based on its investigation, B&G concluded that Lewis was not at the location he reported when the injury supposedly occurred.

10. As a result of B&G's investigation, Lewis' claim and further workers' compensation benefits were denied by Great West.

11. Based on the information discovered by B & G, Great West denied Lewis' claim and further benefits.

12. Lewis' testimony at hearing was not credible for reasons discussed in more detail in the analysis below.

Analysis:

"A claimant who wishes to recover under South Dakota's Workers' Compensation Laws" must prove by a preponderance of the evidence that he sustained an injury 'arising out of and in the course of the employment.'" Fair v. Nash Finch Co., 2007 SD 16, ¶ 9, 728 NW2d623; Bender v. Dakota Resorts Management Group, Inc., 2005 SD 81, ¶ 7, 700 NW2d 739, 742 (quoting SDCL 62-1-1(7)) (additional 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." Fair v. Nash Finch Co., at ¶ 9. "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." Id.

In this case, there is no dispute that Lewis injured his shoulder. The question is where he has proved by a preponderance of the evidence that he injured it in the manner in which he testified at hearing, i.e., arose out of and in the course of his employment. The sole evidence that his injury occurred in a manner connected to his employment is his testimony. Consequently, Lewis credibility is the focus of this analysis.

As stated above, Lewis' testimony at hearing was not credible and, as such, he has not carried his burden of showing either that his injury arose out of, or in the course of his employment. First, Lewis testified repeatedly at hearing that he falsified his log books and trip sheets which are required to be kept accurately by both federal and state law. This fact alone casts doubt on Lewis' veracity by essentially admitting that he is a liar. Further, Lewis essentially testified that he lies to his employer at times when there is no reason for him to do so. Here, Lewis had no need to falsify his trip documents to cover excessive hours driven from Macon, Georgia to Mitchell. The dispatcher told him prior to picking up the load in Macon that there was no rush for him to deliver the load at Mitchell. Rather, he was forced to state that trip sheets were falsified because the trip sheets that he filed with B&G indicate that Lewis took a route through Roger, Arkansas instead of the route he testified that he took when his injury occurred.

In addition, there are two independent sources of evidence which directly contradict Lewis' testimony. First, Lewis testified at hearing that he travel in icy conditions, off and on, from Branson, Missouri until he reached the rest area on I-70. He testified that he reached the rest area and fell about 4:00 a.m. The exhibits from the National Climactic Data Center indicate that there were no icy conditions on that route until 7:30 a.m. about 3 ½ hours after Lewis supposedly slipped and fell. Second, Lewis' cell phone records clearly indicate that he did not travel the route he testified that he traveled. Based on the cell phone records alone, the Department is convinced that Lewis was not at the location he testified that he was at when his injury supposedly occurred.

Finally, there are several inconsistencies between Lewis' testimony at hearing and his testimony in a pre-trial deposition on July 29, 2011. First, Lewis testified at hearing that his injury occurred at a rest area west of the intersection of Hwy 65 and I-70. However, during the deposition, Lewis testified that the location of the injury occurred "five to ten miles west of Boonville" which is east of the intersection of Hwy 65 and I-70. Next, during the deposition, Lewis testified that his trip sheets were accurate and at hearing he testified on numerous occasions that his trip sheets were inaccurate and contained falsifications. Finally, at his deposition, Lewis testified that only 2 of the 32 entries made on his trip sheet were erroneous. At hearing, he testified that the trip sheets contained additional errors. He testified that the route that he took when he entered South Dakota also varied from the route he actually traveled.

Lewis' testimony during direct examination also contained inconsistencies with his cross-examination at the hearing. Daring direct examination he testified that he reached Branson, Missouri when it was dark, at about 12:30 at night. During cross-examination, he testified that he left Russellville at 10:00 a.m. And reached Branson about 4 hour later, which would have been about 2:00 p.m.

The Department is not prepared to say that Lewis injured his shoulder in a four-wheeler accident. Frankly, that story too may be fictitious. However, the Department is convinced that Lewis did not suffer his injury at the location, where he testified that it took place and it is highly unlikely that it took place in the manner in which he has asserted.

Conclusion:

In accordance with the analysis above, Lewis has failed to carry his burden of showing that his injury arose out and in the course of his employment. Counsel for Employer and Insurer shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision, and if desired Proposed Findings of Fact and Conclusions of Law, within 20 days of the receipt of this Decision. Counsel for Claimant shall have an additional 20 days from the date of receipt of Employer and Insurer's Findings of Fact and Conclusions of Law to submit objections and/or Proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for Employer and Insurer shall submit such stipulation together with a Final Order.

Dated this 21st day of October, 2014.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

/s/ Donald W. Hageman
Donald W. Hageman
Administrative Law Judge