SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

LANCE MARSHALL,
Claimant,

HF No. 189, 2005/06

v.

DECISION

WAUPACA NORTHWOODS,
Employer,

and

CRUM & FORSTER,
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 11, 2007, in Spearfish, South Dakota. Michael J. Simpson represented Claimant, Lance Marshall. Richard L. Travis represented Employer Waupaca Northwoods and Insurer Crum & Forster (Employer/Insurer).

Issue:

Whether Claimant's request for worker's compensation benefits is barred by SDCL 62-4-37.

Facts:

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

1. Employer is a production facility that produces, among other things, mulch which is put into plastic bags at the bagging building.
2. Claimant worked as a forklift operator/laborer for Employer from December 19, 2005 to January 25, 2006, February 2006 to March 3, 2006, and May 4, 2006 to June of 2006.
3. On May 6, 2006, belts bound up on Employer's production line. Claimant needed to retrieve a pipe wrench to fix the problem and get the line started again.
4. Claimant "caught a ride" with co-worker Lucas Pierce, who was operating a forklift. Lucas drove the forklift from the bagging building to the die building, approximately 200 to 300 yards away.

5. When Lucas and Claimant returned to the bagging building, Lucas made a sharp left turn, causing Claimant's pant leg to catch in the tire, pulling him off the forklift. The forklift ran over Claimant's ankle, causing injury.
6. In December of 2005, Employer provided Claimant with a copy of Waupaca Northwoods Employee Handbook.
7. On page 17 of the handbook, employees were warned that those who violate safety standards may be subject to disciplinary action, up to and including termination of employment. One such safety standard or policy was that there were to be no riders on a forklift other than the driver.
8. The forklifts used by Employer are designed to carry one human being, the operator.
9. Claimant clearly understood Employer's rule that no one but the operator of a forklift should be on the forklift meant that he should not catch rides on a forklift.
10. Claimant clearly understood that the plant manager, Jim Zimmerman, was "kind of hard about" the no passengers on a forklift rule.
11. Claimant was told personally that he was not supposed to ride as a passenger on the forklifts.
12. Claimant clearly understood the danger involved in riding as a passenger on a forklift.
13. Claimant's supervisor was Leroy Pierce.
14. Claimant rode on the forklifts on a regular basis without discipline from his supervisor, Leroy Pierce.
15. Claimant's supervisor was not consistent in enforcement of the rule against passengers on forklifts.
16. Claimant's supervisor had violated the rule against passengers on forklifts.
17. Claimant witnessed his supervisor violating the rule against passengers on forklifts.
18. Other facts will be developed as necessary.

Issue

Whether Claimant's request for worker's compensation benefits is barred 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 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.

Employer/Insurer alleges that Claimant's injury is the result of his willful misconduct in violating workplace safety rules. South Dakota has adopted a four-part test to determine "whether an employee's violation of workplace safety rules constitutes willful

misconduct." Holscher v. Valley Queen Cheese Factory, 2006 SD 35, ¶ 49, 713 N.W.2d 555, 568 (citing 2 Larson's Workers' Compensation Law § 35.01). The four-part test is as follows:

(1) The employee must have actual knowledge of the rule and its purpose;
(2) The employee must have actual understanding of the danger involved in the violation of the rule;
(3) The rule must be kept alive by bona fide enforcement by the employer; and
(4) The employee had no valid excuse for violating the rule.

Id. at ¶ 49, 569 (citing 2 Larson's Workers' Compensation Law § 35.01-04). Each element will be addressed in turn:

The employee must have actual knowledge of the rule and its purpose.

Claimant admitted that, before he was injured, he knew about the rule against riding as a passenger on the forklifts. Claimant admitted that, before he was injured, he knew that riding as a passenger on a forklift was dangerous and that a person could be seriously injured as a result of riding as a passenger on a forklift. Claimant understood that Employer had a rule against employees riding as passengers on the forklifts because it was a dangerous activity. Claimant understood that the rule was for his personal safety.

Claimant had actual knowledge of the rule and its purpose.

The employee must have actual understanding of the danger involved in the violation of the rule.

Claimant admitted that, before he was injured, he knew that riding as a passenger on a forklift was dangerous and that a person could be seriously injured as a result of riding as a passenger on a forklift. Claimant had actual understanding of the danger involved in the violation of the rule against employees riding as passengers on forklifts.

Claimant had actual understanding of the danger involved in the violation of the rule.

The rule must be kept alive by bona fide enforcement by the employer.

Claimant had ridden on the forklifts as a passenger on a regular basis without discipline. Claimant had ridden on the forklifts as a passenger with his supervisor, Leroy Pierce, without discipline. Claimant rode on the forklifts as a passenger when his supervisor was operating the forklift, without discipline. Claimant had ridden on the forklifts in the presence of his supervisor, without consistent or bona fide reprimand from the supervisor. Claimant witnessed other employees violate the policy without any discipline. Claimant was aware of the rule, knew of the danger, but saw the rule inconsistently enforced.

Although Employer ensured Claimant knew about and understood the rule against riding as a passenger on a forklift and ensured that Claimant knew he was risking serious injury or death by riding as a passenger on a forklift, Employer did not keep the rule "alive by bona fide enforcement by the employer." Leroy Pierce was tasked with the supervision of the employees. He only "occasionally" enforced the policy. Claimant's supervisor allowed the policy to be violated on a regular basis. Employer did not make a bona fide attempt to enforce the rule against passengers on forklifts.

The rule was not kept alive by bona fide enforcement by the employer.

The employee had no valid excuse for violating the rule.

Claimant argues that increased production is a valid excuse for violating a safety rule. Claimant testified that employees would get bonuses if production levels were met and he hurried or rushed to get the pipe wrench so production would not be slowed and the employee bonuses would not be in jeopardy Claimant's request to be somehow excused from following safety rules for the sake of a monetary bonus must be and is rejected.

Claimant had no valid excuse for violating the rule.

Employer/Insurer has not met the burden of the third part of the four-part test set forth in Holscher. Employer/Insurer has not established that Claimant's ride on the forklift was willful misconduct.

In addition to showing that the employee engaged in willful misconduct, SDCL 62-4-37 also requires the employer to show that the employee's injury was "due to" the employee's willful misconduct. Holscher, 2006 SD 35, ¶ 55, 713 N.W.2d at 570. The South Dakota Supreme Court has stated that the "due to" language in SDCL 62-4-37 refers to proximate cause. Therkildsen v. Fisher Beverage, 1996 SD 39, ¶ 13, 545 N.W.2d 834, 837. Accordingly, an employer prevails under SDCL 62-4-37 when it shows that the employee's willful misconduct was a proximate cause of the claimed injury. Wells v. Howe Heating & Plumbing, Inc., 2004 SD 37, ¶ 10, 677 N.W.2d 586, 590.

In addressing proximate cause determinations as that relates to employment injuries, the Holscher Court stated:

> An employee's willful misconduct will be the proximate cause of an injury when it "is a cause that produces [the injury] in a natural and probable sequence and without which the [injury] would not have occurred." Estate of Gaspar v. Vogt, Brown & Merry, 2003 SD 126, ¶ 6, 670 N.W.2d 918, 921. However, the employee is not required to show that the employee's misconduct was the only cause of the injury. Id. [citation omitted] An injury that may have had several contributing or concurring causes, including willful misconduct, will be barred

> under SDCL 62-4-37 only when the employee's willful misconduct was a substantial factor in causing the injury. Cavender, 1996 SD 74, ¶ 19, 550 N.W.2d at 89 (citing Driscoll, 322 N.W.2d at 479-480).

2006 SD 35, ¶ 56, 713 N.W.2d at 570. In the present case, the proximate cause of the injury was Claimant's act of riding as a passenger on the forklift. Because he was riding as a passenger on the forklift, his pant leg was caught by the wheel of the forklift, and he was pulled off the forklift and run over. Claimant's alleged injuries occurred as a "natural and probable sequence" of his riding on as a passenger on the forklift. Employer/Insurer has shown that Claimant's conduct in riding as a passenger on the forklift, although not willful misconduct, was a substantial factor in causing his injury. Claimant's injury was "due to" his conduct of riding as a passenger on the forklift

Conclusion

Employer/Insurer failed to demonstrate that Claimant's act of riding as a passenger on Employer's forklift was willful misconduct. Claimant's request for workers' compensation is not barred by 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 30th day of January, 2008.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge