SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

THOMAS VANSTEENWYK,
Claimant,

HF No. 225, 2003/04

v.

DECISION

BAUMGARTNER TREES AND LANDSCAPING,
Employer,

and

FARMERS INSURANCE GROUP,
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 June 16, 2005, in Sioux Falls, South Dakota. Thomas VanSteenwyk (Claimant) appeared personally and through his counsel, A. Russell Janklow. Eric C. Blomfelt represented Employer Baumgartner Trees and Landscaping, and Insurer Farmers Insurance Group (Employer).

Claimant suffered an injury to his lower right leg while he was operating a skid loader in the course of his employment for Employer. Claimant's leg was crushed between the lower edge of the cab and the crosspiece on the boom of the skid loader. The parties agreed to and the Department ordered the bifurcation of the issue of whether Claimant's off-duty marijuana use constituted willful misconduct pursuant to SDCL 62-4-37 that was a proximate cause of his workplace injury, thereby barring him from workers' compensation benefits.

Facts:

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

For his entire adult life, Claimant has been a daily user of marijuana, a controlled substance that is illegal in the State of South Dakota. Claimant does not smoke marijuana before work in the mornings or during work hours.

Claimant did not graduate from high school. He has worked primarily in construction and physical labor, digging ditches, cleaning sewer drains, operating machinery, and installing roofing, among other things. He has extensive experience in the operation of forklifts, cranes, pay loaders, and other machinery. In April of 2003, he began working as a landscaper for Employer. As part of his job, Claimant worked on a daily basis with

Troy Daggett, and the owner of the company, Brian Baumgartner. Baumgartner considered Claimant and Troy to be his best employees, because they were always at work on time, worked hard, understood directions, followed orders, and got the job done. Working with Claimant and Troy day in and day out, Baumgartner never recognized any impairment in Claimant. Baumgartner had no reason to believe that either Claimant was a daily user of marijuana.

On April 29, 2004, Claimant and Troy put in a full day working for Employer. Immediately after work, the two of them went over to Troy's house, where they smoked marijuana to relax, just as they had done together almost every day after work for at least the previous year. Claimant spent between thirty and sixty minutes at Troy's house. At approximately 6:30 p.m., Claimant left Troy's house and returned to his own home in Canistota. He took a shower, had dinner with his family, watched some television, and eventually put his kids to bed. As he did almost every evening, Tom then smoked another marijuana joint before going to sleep between midnight and 12:30 a.m.

On April 30, 2004, Claimant awoke, took a shower, and drove to Troy's house around 8:00 a.m. They first stopped at the company shop, and then proceeded to the site of the landscaping project that they had been working on for approximately a week. The job involved constructing a retaining wall and other landscaping water control measures for a new house. The project was expected to be finished that day, and Claimant and Troy worked quickly to make sure that it would be. At around 9:00 a.m., they were joined by Baumgartner, who worked along side them for most of the morning.

Claimant did not feel impaired in any fashion from his marijuana use the previous night. Baumgartner noticed no impairment in Claimant. Troy noticed no impairment in Claimant. Claimant functioned normally, just as he functioned every other day that he worked for Employer.

As part of his duties, Claimant routinely operated a machine called a skid loader, a compact vehicle engineered for stability with tractor-style tires and a vertical lifting hydraulic arm or boom. The skid loader comes equipped with attachments for the hydraulic arm, including metal tongs or forks for lifting objects, similar to a forklift, and a rectangular metal bucket used for digging, loading, and moving materials.

Around 11:30 a.m., Troy asked Claimant to remove the forks from the skid loader and attach the bucket so that they could do some clean-up work on the site. Although the bucket change could more easily be accomplished with two people instead of one, Claimant was under orders from Baumgartner that, in order to save man-hours, only one person should be performing the bucket change.

This particular skid loader was equipped with several safety mechanisms to ensure its safe operation during such maneuvers as attaching the bucket. First, there are locking pins under the arms of the boom that prevent it from being lowered beyond the height of the pin. However, Employer did not instruct Claimant or Troy on the proper use of the locking pins.

Second, the skid loader also had a pressure switch in the seat that turned the hydraulics off if there was no pressure on the seat. The pressure switch was operational at the time of the accident.

Third, the skid loader in question had a seatbelt safety system. The skid loader came equipped with a starter lockout, meaning that the machine will not start unless the driver is in the seat with the seatbelt securely buckled. The boom and bucket hydraulics locked up the instant the seatbelt was unbuckled. Prior to April 30, 2004, Employer had disengaged the seatbelt safety system and installed a manual toggle switch. Once the pressure switch in the seat had triggered the hydraulics to shut down, the operator had to sit back down, or apply pressure to the seat, and reset the toggle switch to reengage the hydraulics.

The accident happened while Claimant was attempting to attach the bucket. Attaching Employer's bucket was difficult because at some time in the past, the mechanism on the skid loader to which the bucket attaches had cracked and had been rewelded in a slightly warped or off-center position, so that the bucket could not easily slide and lock into place as it was designed to do. On the morning of April 30, 2004, the locking mechanism did not catch because of the crack and reweld. As a result, Claimant had to stand, lean out of the cab of the skid loader, extend his leg forward, and kick at the locking mechanism in order to get it secured. Employer had taught Claimant to do this maneuver when the locking mechanism stuck, which frequently happened. Claimant had performed this maneuver many times before April 30, 2004.

At some point during the attachment of the bucket, the boom came down and crushed Claimant's right leg, pinching it between the lip of the cab and the crosspiece of the boom. The hydraulics were disengaged before the bones were broken, but Claimant suffered a crush trauma to his lower leg requiring hospitalization. Claimant does not remember how the accident occurred. The skid loader was operating normally and did not malfunction. Baumgartner found no malfunctions in the skid loader after the accident. Tom Alcorn, an accident reconstructionist hired by Employer, inspected the skid loader and found no malfunctions.

Although Claimant does not remember how the accident occurred and there were no witnesses, three things had to occur for this accident to happen. First, Claimant had to have had pressure on the seat for the boom to lower onto his leg. Second, Claimant also had to have pressed the left foot pedal to lower the boom. Third, Claimant's right leg had to have been extended outside of the cab at the same time the hydraulics were engaged and he had his foot on the left pedal.

Obviously, Claimant did not injure himself intentionally. Alcorn explained that the accident was due to operator error, not the malfunction of the machine. His testimony established that the accident was due to Claimant leaving his foot extended beyond the edge of the cab while putting pressure on the seat and lowering the boom with the left foot pedal.

After the accident, Claimant was taken to an emergency room and received immediate medical treatment. Urine tests performed at the hospital confirmed that Claimant had recently ingested marijuana.

Based upon the expert opinions offered by Dr. John Vasiliades and Dr. Michael Evans, toxicologists whose testimony was received into evidence, Claimant did have marijuana metabolites in his system at the time of the accident. The experts did not agree whether Claimant was impaired by marijuana at the time of the accident to an extent that such impairment would be a causative factor in the accident.

Other facts will be developed as necessary.

Analysis

The essential purpose of workers' compensation "is to provide for employees who have lost their ability to earn because of an employment-related accident, casualty, or disease." Dudley v. Huizenga, 2003 SD 84, ¶ 11, 667 N.W.2d 644, 648. (citations omitted). Pursuant to statute, however, coverage is barred for workplace injuries under certain limited circumstances. The affirmative defense to workers' compensation coverage commonly known as "willful misconduct" is set forth in SDCL 62-4-37, which 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.

As the South Dakota Supreme Court has explained:

> The term "willful misconduct" has long been defined in this state as "something 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."

Mudlin v. Hills Materials Co., 2005 SD 64, ¶ 28, 698 N.W.2d 67, 76 (citations omitted). The Supreme Court has instructed that "[i]t is only those instances that constitute serious, deliberate, and intentional misconduct, that the bar to benefits provided by SDCL 62-4-37 should be applied." Phillips v. John Morrell & Co., 484 N.W.2d 527, 532 (S.D. 1992).

What Employer must demonstrate to prevail with its misconduct defense is that Claimant's intoxication with marijuana was the proximate cause of the operator error that caused the injury. *See* Wells v. Howe Heating & Plumbing, Inc., 2004 SD 37, ¶ 10, 677 N.W.2d 586, 590. "A proximate cause is a cause that produces a result in a natural

and probable sequence and without which the result would not have occurred." Id. (citations omitted).

Both Dr. Evans and Dr. Vasiliades agreed that Claimant did have marijuana in his system at the time of the accident. Both toxicologists agreed that not all impairments can be seen by simple observation of an individual. The experts disagreed on whether the amount of marijuana in Claimant's system was enough to cause impairment. Neither toxicologist could opine on whether the marijuana in Claimant's system was enough to have caused the operator error that caused the accident.

Dr. Vasiliades testified that he "would not expect any impairment from the effects of the drug 12 hours" after ingestion. Dr. Vasiliades opined that it was unlikely that Claimant's marijuana use impaired him on the day of the accident. Claimant was alert, coordinated, working hard, and performing a routine task that he had performed many times before the accident. None of the testimony of the fact witnesses supports a finding that Claimant showed signs of impairment.

Dr. Evans opined that Claimant was impaired on the day of the accident because of his use of marijuana on the previous night. Dr. Evans based this opinion on a study that showed that pilots operating flight simulators demonstrated some evidence of impairment between 24 and 48 hours after using marijuana. Dr. Evans opined that Claimant was suffering lingering mental and physical impairments, including concentration difficulties and delayed physical and mental reaction times on the day of the accident. Dr. Evans opined that Claimant is impaired every day, every moment of his life because of his admitted daily use of marijuana.

Dr. Evans candidly admitted that he could not say, by a preponderance of the evidence, that Claimant's marijuana use and impairment on April 29 was a proximate cause of his workplace injury on April 30. He testified that he was "absolutely not" able to opine on the causation of the accident. Dr. Evans's opinions do not meet Employer's burden to demonstrate that Claimant's impairment, if any, was a proximate cause of the accident.

In support of its affirmative defense, Employer also presented the opinions of Alcorn, an expert in accident reconstruction. Alcorn could not state with reasonable certainty how the accident happened except to say, "[t]his accident was caused by the operator's failure to follow accepted safety procedures and by not locking the boom in the up position before attempting to lock the bucket to the mounting plate."

Claimant's alleged failure to follow accepted safety procedures was not due to his marijuana use or impairment. Claimant was attaching the bucket the way he had been taught to attach the bucket by Employer and the way he and other employees had attached the bucket many times before the accident. Alcorn offered no opinion on whether Claimant was intoxicated or impaired at the time of the accident.

Alcorn also opined that Claimant "exercised poor judgment in his operation of the machine. He also lacked the coordination in the use of his legs and feet in addition to his slow response time once he realized he had made an error." Yet at hearing, Alcorn

testified that he could not say that the injury would not have happened if Claimant had reacted more quickly.

Alcorn also opined that the way the bucket attachment procedure was performed by "going around the safety procedures on these machines" is "very dangerous." Alcorn opined, "It's not whether you are going to have an accident. It's just when you are going to have it." Alcorn did not opine that Claimant's marijuana use or intoxication was a proximate cause of Claimant's injury. Alcorn's opinions, like those of Dr. Evans, do not meet Employer's burden to demonstrate that Claimant's injury was due to his marijuana use or impairment.

In Mudlin, the South Dakota Supreme Court rejected a claim by the employer and insurer that a claimant's taking of a Valium pill on the evening before her accident constituted willful misconduct that would preclude benefits, stating that "even if we accept Hills' assertion that Mudlin's ingestion of the left-over medication equates to willful misconduct, it has not been shown that the injuries were sustained '*due to the employee's willful misconduct*.'" 2004 SD 64, ¶ 33, 698 N.W.2d at 77. Employer has failed to meet its affirmative burden to show that Claimant's injuries were due to his marijuana use or intoxication.

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 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 21st day of October, 2005.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge