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

JENS J. FULLER, **HF No. 2, 2012/13**

Claimant,

v. **DECISION**

CONCRETE PROFESSIONALS, LLC,

Employer,

and

ACUITY,

Insurer,

This is a workers' compensation case brought before the South Dakota Department of Labor & Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. The case was heard by Donald W. Hageman, Administrative Law Judge, on November 15, 2012, in Rapid City, South Dakota. Claimant, Jens J. Fuller, was represented by Jody Speck. The Employer, and Insurer, Acuity, were represented by Michael McKnight.

Legal Issue:

The legal issue presented at hearing is stated as follows:

> Whether the injuries that Jens Fuller suffered on May 14, 2012 are not compensable because they were caused by his willful misconduct?

Facts:

The Department finds the following facts by a preponderance of the evidence:

1. Jens J. Fuller (Claimant) was hired by Concrete Professionals, LLC (Employer) as a laborer on April 20, 2012.

2. Employer's business is located in Rapid City, South Dakota and was insured by Acuity (Insurer) for purposes of workers' compensation during all time relevant in this case.

3. On May 14, 2012, Claimant and a co-worker, Adrian Fornal (Fornal), were setting forms and tying rebar, while preparing a driveway for a concrete pour. Before they were finished, Claimant walked about a block up the street where their foreman, Kyle Gustafson, was stripping forms.

4. When Claimant returned to the driveway where Fornal was working, words were exchanged between Fornal and Claimant. The exchange was likely related to the fact that Claimant had walked off before all the work had been completed.

5. After the exchange, Claimant took off his sunglasses and threw them down, then threw his tape measure and hit Fornal with it and put up his fists. It is more likely than not that Claimant than threw the first punch of a physical altercation which left Claimant requiring medical treatment.

6. Claimant was taken to Urgent Care on Jackson Boulevard in Rapid City where his initial injuries were treated. He was then taken to another location where a plastic surgeon sutured a laceration inside Claimant's mouth.

7. Both Claimant and Fornal were suspended from work for a time as a result of the altercation. Claimant later quit his job with Employer.

8. No charges were filed related to the incident. However, Fornal was on probation at the time, was later incarcerated, presumably as a result of a probation violation which stemmed from the altercation with Claimant.

9. Additional facts may be discussed in the analysis below.

Analysis:

The Insurer denied coverage in this case alleging willful misconduct on the part of Claimant. Issues involving misconduct in workers' compensation cases are governed by SDCL 62-4-37. That statute provides:

> No compensation may 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 is on the defendant employer.

SDCL 62-4-37. Under this statute, the employer has the burden of proving by a preponderance of the evidence that the employee engaged in willful misconduct and that the employee's injuries were "due to the employee's willful misconduct." VanSteenwyk v. Baumgartner Trees and Landscaping, 2007 SD 36, ¶ 12, 731 NW2d 214, citing, Goebel v. Warner Transportation, 2000 SD 79, ¶¶ 12-13, 612 NW2d 18, 22. The employer is not required to show that the employee's misconduct was the only cause, nor the last or nearest cause of the injury because an injury may have had

several contributing or concurring causes, including willful misconduct. Id. Rather, under SDCL 62-4-37, an injury will be barred only when the employee's willful misconduct was a substantial factor in causing the injury. Id. "Willful misconduct under the workers' compensation statutory scheme 'contemplates the intentional doing of something with the knowledge that it is likely to result in serious injuries, or with reckless disregard of its probable consequences.' " Holscher v. Valley Queen Cheese Factory, 2006 SD 35, ¶ 48, 713 NW2d 555, quoting Fenner, 1996 SD 121, ¶9, 554 NW2d 485, 48.

In this case, Claimant's testimony at hearing and his version of events on May 14, 2012 were not credible. First, his testimony was dis-jointed and totally self-serving. Second, his testimony was inconsistent. He first testified that Fornal had a long list of assaults on his "rap sheet", that he was on probation at the time of the incident and that he was jailed as a result of the altercation. Later, Claimant testified that he did not know Fornal's whereabouts and that he knew nothing about him. Claimant also testified during direct examination that he was eventually fired for the incident. Then during cross examination, he admitted that he had walked off the job. Finally, it is unlikely that Fornal would initiate an attack on a co-worker, while at work, "out of the blue" and without provocation or a disagreement. This is particularly true after Claimant and Fornal worked together for a month without conflict and, as Claimant testified, he had shared his lunch with Fornal and bought him soda on a couple of occasions.. In addition, in light of Fornal's probationary status, it seems unlikely that Fornal would have initiated an unprovoked attack on Claimant knowing that the act would likely send him to jail.

It is more likely that the story Claimant told to Doug Ficken, one of Employer's owners, following the incident was closer to the truth. At that time, Claimant admitted to Ficken that Claimant took off his sunglasses and threw them down, that he threw his tape measure and hit Fornal with it, that Claimant then put up his fists and may have punched Fornal first. This version is consistent with the story that Fornal told Ficken and is supported by the fact that Claimant admitted to having a history of fighting, and that he showed Doug Ficken "that he can handle himself pretty well."

In this more likely version of events, Claimant's actions were clearly provocative. This combined with the facts that he made no attempt to defuse the situation or retreat prior to engaging in the altercation and then willingly engage in the fight is misconduct within the meaning of SDCL 62-4-37 even if he did not throw the first punch of the altercation. His actions were a substantial factor in causing the injury and he had knowledge that his actions was likely to result in serious injuries.

Conclusion:

The Department concludes that the injuries Jens Fuller suffered on May 14, 2012 are not compensable because they were proximately caused by his willful misconduct. Employer and Insurer shall submit Findings of Fact, 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. Claimant shall have an additional 20 days from the 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, Employer and Insurer shall submit such stipulation together with an Order.

Dated this _22nd_ day of March, 2013.

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