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

MORGAN MULDER,	**HF No. 30, 2021/22**
Claimant,	
v.	**DECISION**
PESKA CONSTRUCTION, INC.,	
Employer,	
and	
EMC INSURANCE COMPANY,	
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 Michelle M. Faw, Administrative Law Judge, on May 13, 2022. Claimant, Morgan Mulder, was present and represented by Jami Bishop of Johnson, Janklow, Abdallah & Reiter, LLP. The Employer, Peska Construction, Inc., and the Insurer, EMC Insurance Company were represented by Kerri Cook Huber of Gunderson, Palmer, Nelson & Ashmore, LLP.

Background:

Jacob Mulder (Jacob), husband of Morgan Mulder (Mulder), began working for Peska Construction (Employer) as a field project engineer in August 2020. He was specifically assigned to a school building project in Marshall, Minnesota. Jacob was required to be on the job site every workday. He was not required to stay in Minnesota, but Employer provided Jacob $300 per month to compensate for overnight stays and

per diem. This payment equaled $15 per night for twenty overnights per month. Jacob used his family's cabin while staying in Minnesota. There were five employees who were assigned to be on-site daily at the project: Jacob, Ryan Huber (Ryan), Stanley Spear (Stan), Victor Zaldana (Victor), and Kayd Hanish (Kayd).

On June 17, 2021, Jacob decided to travel to his home in Brandon, South Dakota to play in a baseball game. He did not inform Employer about his decision to travel. The next day, at approximately 6:00 a.m., Jacob was killed when a vehicle traveling in the opposite direction entered his lane in an attempt to pass a semi-truck. Jacob was hit head-on at around sixty miles per hour. Jacob and the other driver were pronounced dead at the scene. Minutes after the accident, Stan, Victor, and Kayd arrived at the scene as they too had been traveling to the job site in Marshall. At the time of the accident, Employer was insured for workers' compensation purposes by EMC Insurance Company (Insurer). At the time of his death, Mulder was pregnant and gave birth to their daughter, Raegan Jacob Mulder, on October 26, 2021,

On September 7, 2021, Mulder filed a Petition for Hearing on workers' compensation benefits with the Department of Labor & Regulation. In their Answer filed October 15, 2021, Employer and Insurer denied that survival benefits are payable to Mulder.

Additional background may be developed in the issue analysis below.

Issue:

The issue presented at hearing was whether Jacob's death arose out of and in the course of his employment.

Analysis:

To establish entitlement to workers' compensation benefits, Mulder must prove that Jacob's injury arose out of and in the course of his employment. (SDCL 62-1-1(7) and 62-3-2). "A Claimant wanting to recover workers' compensation must prove by a preponderance of the evidence that [he] has sustained an injury arising out of and in the course of employment." *Terveen v. South Dakota Dept. of Transp.*, 861 N.W. 2d 775, 2015 S.D. 10. As is appropriate in workers' compensation matters, the Department will construe "the phrase 'arising out of and in the course of employment' liberally." *Mudlin v. Hills Materials Co.*, 2005 S.D. 64, ¶ 8, 698 N.W.2d 67, 71. The terms are construed "liberally so benefits are "not limited solely to the times when the employee is engaged in the work that he [or she] was hired to perform.'" *Voeller v. HSBC Card Servs.*, *Inc.*, 2013 S.D. 50, ¶ 7, 834 N.W.2d 839, 843.

Furthermore, cases involving an employee on their way to or leaving from work are referred to as "coming and going" cases. "Generally, employees injured while going to and coming from work are not covered under workers' compensation." *S.D. Pub. Entity Pool for Liab. v. Winger*, 1997 S.D. 77, ¶ 19, 566 N.W.2d 125, 131.

The South Dakota Supreme Court (Court) has addressed the issue of "coming and going" in *Mudlin v. Hills Materials Co.*, 2005 S.D. 64, 698 N.W.2d 67. In that case, Mudlin lived in Rapid City, South Dakota, and was injured as a result of a one-vehicle accident in her personal vehicle on the way to her job site near Faith, South Dakota. *Id.* at ¶ 2-3. Mudlin brought a claim for workers' compensation benefits and Department found in her favor. *Id.* The Circuit Court affirmed. *Id.* at ¶ 4. The matter was appealed to

the South Dakota Supreme Court (Court). *Id.* The Court provided a three-part test to establish whether an injury arose out of employment:

> In order for an injury to "arise out of" the employment, the employee must show that there is a "causal connection between the injury and the employment." The employment need not be the direct or the proximate cause of the injury, rather it is sufficient if "the accident had its origin in the hazard to which the employment exposed the employee while doing [her] work." The injury "arose out of" the employment if: 1) the employment contributes to causing the injury; 2) the activity is one in which the employee might reasonably engage; or 3) the activity brings about the disability upon which compensation is based.

Id. at ¶ 11 (Citations omitted).

The Court also addressed whether the injury was in the course of her employment:

> This Court has made it clear that the words 'in the course of employment' refer to the time, place and circumstances of the injury." "An employee is considered within his course of employment if he is doing something that is either naturally or incidentally related to his employment or which he is either expressly or impliedly authorized to do by the contract or nature of the employment.

Id. at ¶ 15 (Citations omitted)

"Arising out of" and "in the course of" are similar but distinct elements and both must be proven for an employee to be entitled to benefits. *Id.* at ¶ 9.

In *Mudlin,* the Court found in favor of claimant holding that she was required to be at the job site to perform her job duties, driving her personal vehicle to the job site was an activity in which she might reasonably engage, and her injuries resulted from the travel. *Id.* at ¶ 14. The Court further concluded that as Mudlin was required to travel to the job site from the location in Rapid City, "it [could] be said that the journey between the base location and the job site was naturally related to the employment." *Id.* at ¶ 16.

Additionally, the Court found it significant that the employer in *Mudlin* had a specific policy requiring employees to furnish personal transportation to the job site when company vehicles were not available and provided partial reimbursement for travel expenses. *Id.* at ¶ 12. The Court concluded that she met both the arising out of and in the course of elements. *Id.* at ¶ 19.

The Court also addressed whether an employee was injured while traveling in *Lloyd v Byrne Brands*, 2011 S.D. 28, 799 N.W.2d 727. In that case, Lloyd was the general manager for a pizza chain in Sioux Falls, South Dakota. *Id.* at ¶ 1. He had agreed to temporarily manage two restaurants in Omaha, Nebraska. *Id.* Lloyd was paid his usual salary and was reimbursed for using his personal vehicle to travel from Sioux Falls to Omaha. *Id.* He was also reimbursed for hotel and meal expenses in Omaha as well as the travel expenses related to two prearranged trips from Omaha to Sioux Falls. *Id*.

Lloyd was injured in a rollover accident as he headed from Omaha to Sioux Falls for his wife's birthday. *Id* at ¶ 2. The trip was not non-prearranged and was unreimbursed. *Id.* The trip was also on his day off. *Id.* at ¶ 7. Applying the same analysis as in *Mudlin*, the Court found for the employer, concluding that while his employment put him in Omaha, it did not require him to return to Sioux Falls at that time. *Id.* Further, the trip did not further the employer's interest and there was no company policy requiring him to make the trip for the employer's benefit. *Id* at ¶ 7.

In this matter, the Department will first analyze whether Jacob was acting in "the course of" his employment at the time of the accident. Both parties agree that Jacob

was required to be at the Marshall, Minnesota job site every day as part of his employment. In order to reach the job site, it was necessary for Jacob to travel from wherever he chose to stay the night. Therefore, driving to work was "naturally and incidentally related to his employment." *Mudlin* at ¶ 15. While Employer provided Jacob with $300 per month per diem to compensate for staying in Minnesota during the week, there is nothing in the record to indicate that Jacob was required to stay there. At his deposition, Jacob's boss, William Goeken, was asked if there was a requirement for employees to stay in Minnesota and he testified that he believed there was not. Jacob had the option to stay in Minnesota, but it was not required. Therefore, traveling to work from where he chose to stay was something he was "either expressly or impliedly authorized to do by the … nature of the employment." *Mudlin* at ¶ 15.

Employer and Insurer have asserted that the Court's decision in *Lloyd* is applicable here. However, while both Jacob and Lloyd elected to travel for personal reasons, there are factors that make this matter distinguishable from *Lloyd*. First, in *Lloyd*, the claimant was traveling home, and Jacob was traveling to the job site at the time of his accident. Second, Lloyd was injured on his day off whereas Jacob was traveling on a workday. Third, there was no benefit to the employer in *Lloyd* regarding the trip Lloyd made to his home for his wife's birthday party. In the present matter, Jacob's employer benefited from Jacob's travel on the morning of his accident because he was on his way to the job site. In fact, Employer required him to be onsite.

Additionally, the Court in *Lloyd* commented on the case *Krier v. Dick's Linoleum Shop*, 78 S.D. 116, 120, 98 N.W.2d 486, 488 (1959.) In *Krier*, Krier had driven to dinner

a short distance from the town in which he was working. *Id.* at 118. The Court in *Krier* concluded that the decision to go to that place for dinner was not a significant deviation from the course of his employment. *Id.* at 120. In *Lloyd*, the Court concluded that in contrast to *Krier*, Lloyd had sufficiently deviated from the course of his employment. Here, the Department concludes that Jacob's situation is more similar to that of the claimant in *Mudlin* than that of the claimant in *Lloyd*, and unlike in *Lloyd*, Jacob was not deviating from the course of his employment at the time he was injured. Jacob was not required to stay in Minnesota, and had chosen to return home to Brandon for the night. However, he was on the road at the time he was killed because he was required to be in Marshall by Employer. Therefore, Jacob's situation is distinguishable from Lloyd's. The Department concludes Jacob was acting in "the course of" his employment at the time of the accident

Next, to establish whether Jacob's injury arose out of his employment, the Department will apply the three-part test provided in *Mudlin*. First, whether the employment contributed to causing Jacob's injury and whether the activity was one in which Jacob might reasonably engage. As stated in the above analysis, Jacob was required to be at the Marshall job site. At his deposition, Ryan was asked if traveling to the job site was a required part of his employment as a salaried employee and he answered that it was. Jacob was also a salaried employee. To compensate employees like Jacob for this required travel, Employer allowed them to fuel their vehicles at a specific gas station in Marshall. In *Mudlin*, the employer had a policy regarding travel and required employees to furnish their own transportation to the job site.

> At the time of the accident, Mudlin was traveling from her employer's base location to a remote job site. Pursuant to company policy, this was a trip Mudlin was required to make for which she was to be partially reimbursed. In summary, the controlling factors here are travel pay, custom and usage, and company policy. Mudlin's travel extended beyond an employee's normal commute to or from work, and falls outside of the "going and coming" rule.

Mudlin at ¶ 18

Employer's requirement that employees like Jacob travel to the job site and the company practice of paying for the fuel for the travel had the same effect as a company policy. Jacob was engaged in the customary practice of traveling to the job site when he was killed. Therefore, employment contributed to causing Jacob's injury, and traveling to the job site was an activity in which he would reasonably engage.

The final element of the test is whether the activity brought on the disability upon which the compensation is based. There has been no medical evidence presented in this matter, however, the police report of the accident indicates that Jacob was killed in the crash. Therefore, it is apparent that the activity of traveling brought on his death.

The Department concludes that the situation of Jacob's death fulfills all the elements of the *Mudlin* test, and therefore, Jacob's death arose out of his employment. For the above reasons, Mulder has proven by a preponderance of the evidence that Jacob's death arose out of and in the course of his employment.

Mulder shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision within twenty (20) days from the date of receipt of this Decision. Employer and Insurer shall have an additional twenty (20) days from the date of receipt of Mulder's Proposed Findings and Conclusions to submit objections thereto and/or to submit their own 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, Mulder shall submit such Stipulation along with an Order consistent with this Decision.

Dated this 17 day of October 2022.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

Michelle M. Faw
Administrative Law Judge