SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

CHADWICK G. SCHANDER,
Claimant,

HF No. 31, 2002/03

v.

DECISION

SIOUX FALLS TOWER SPECIALISTS, INC.,
Employer,

and

AMERICAN INTERNATIONAL 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 March 1, 2005 and April 13, 2005, in Sioux Falls, South Dakota. Claimant, Chadwick G. Schander (Claimant) appeared personally and through his counsel, Grant Alvine. J. G. Shultz represented Employer Sioux Falls Tower Specialists, Inc., and Insurer American International Group (Employer). By Order of the Department and agreement of the parties, the issues in the above-captioned matter were bifurcated and the sole issue to be addressed in this decision is whether Claimant suffered an injury arising out of and in the course of his employment. All other issues are reserved for hearing and decision at a later date.

Facts:

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

This workers' compensation case involves an incident occurring on July 6, 2000. At the time of the incident, Claimant was a full-time employee of Employer. Employer is a South Dakota company primarily in the business of repairing, painting and maintaining cellular towers all over the nation. Claimant was hired by Employer in 1996.

Claimant worked on towers across the country for Employer. Claimant's employment required him to travel overnight, sometimes for two weeks at a time. Claimant was paid his regular hourly wage for time spent traveling.

Generally, Claimant worked with a crew of four or five men, called tower riggers/technicians (tower tech). A crew chief was also assigned to each crew. Crew

chiefs were paid a salary instead of an hourly wage. A crew chief was in charge of the crew at the job site. The handbook referred to crew chiefs as supervisors.

Each tower tech was assigned to a crew by the project coordinator Bart Roberts. Roberts always picked the crew for each crew chief. A crew chief could request certain tower techs be placed on his crew, but Roberts made the decisions as to the members of a crew. The supervisory duties of a crew chief at a job site included managing the performance of the crew at the job site, implementing company policies and procedures, authorizing payment for hotels, meals and other orders, and filling out the daily logs for the employees.

Travel consumed a large portion of a tower tech's time. As an inducement of employment, Employer paid their tower techs for the time spent traveling to and from a job site. Employees have driven their own vehicles to and from job sites. However, it is customary for employees to use company vehicles to travel to job sites. It is uncommon for an employee to use his own personal vehicle. The situations where personally owned vehicles were used were for jobs very close to Sioux Falls and when employees had personal business during the week that required travel back to Sioux Falls. Roberts had never reprimanded employees when they drove their vehicles to and from job sites. Roberts generally required employees to get his permission to use their own vehicles on a trip to a job site out of town. Roberts could not recall any employees being denied payment for hourly wages for travel because the employee used his own vehicle without permission. Anita Eichmann, a bookkeeper payroll accountant for Employer since 1998, was not aware of any employee who was denied payment for travel to and from a job site. Eichmann had to get approval to pay employees for travel time using their own vehicle and always asked whether personal vehicle use was authorized. The handbook given to each of Employer's employees does not state that employees will not be paid for travel time if a personal vehicle is used, with or without permission.

Prior to the incident in July of 2000, Claimant had used his personal vehicle for travel to and from job sites while working for Employer. Claimant was never reprimanded in any way for such usage. Claimant had always been paid his hourly wage for time spent traveling.

All crewmembers were required to attend weekly crew meetings to discuss specific aspects of the job to which the crew was assigned, safety, vehicles and equipment issues, and any crewmember issues. Generally weekly meetings were held on Mondays. A crewmember found out at the weekly meeting if he had been assigned to a different crew or if his crew had been assigned to a different job. Roberts assigned the crews to the job sites. Claimant had missed weekly meetings before July 5, 2000, and not been reprimanded for his absence. It was not customary for an employee to leave from his home to travel to a job site. If an employee could not leave when the rest of his crew left, it was customary for the employee to leave from the shop in a company vehicle if one was available.

Claimant was part of a crew led by crew chief Paul Betzing painting a tower in Holdrege, Nebraska the week before the July 4 holiday in 2000. The usual procedure called for the crew to meet at the shop on the day following the holiday for the weekly meeting to discuss the ongoing project with Roberts and then travel back to Holdrege and finish the painting. July 5, 2000, was a Wednesday. It was intended that Claimant and the rest of the crew would return to Holdrege after the holiday to finish painting the tower.

Claimant and Betzing spoke sometime on July 4 and discussed leaving for Holdrege on July 6 instead of July 5. Neither Claimant nor Betzing went to the meeting at the shop on the morning of July 5, 2000. Betzing did not speak to Roberts about missing the July 5, 2000, meeting. Claimant, however, called Roberts at the shop on the morning of July 5 and told Roberts that he was not feeling well and would not be able to leave for Holdrege with the crew. Roberts replaced Betzing and Claimant on the Holdrege crew with other employees on the morning of July 5, 2000. Roberts did not tell Claimant that he and Betzing had been replaced on the Holdrege crew with another crewmember. If Claimant had not been replaced on the crew, Roberts would have sent Claimant to Holdrege in a company vehicle, not in Claimant's own vehicle. If Claimant had come to the shop on the morning of July 6, Roberts would not have sent him to Holdrege because both Claimant and Betzing had been replaced on the Holdrege crew with other crewmembers. Claimant was unaware that he and Betzing had been replaced on the Holdrege crew. Roberts was unaware that Claimant was planning to go to Holdrege with Betzing on July 6, 2000. Claimant ended up traveling with Betzing to Holdrege, Nebraska, on the morning of July 6, 2000, to finish painting the tower.

Claimant and Betzing met at Claimant's house around 7:00 a.m. on July 6, 2000. Betzing arrived on his motorcycle. Although Claimant had already packed his car for the trip, he repacked his gear onto his own motorcycle. He and Betzing left from Claimant's house for Holdrege on their motorcycles. Neither Claimant nor Betzing checked in with Employer before leaving Sioux Falls on the morning of July 6, 2000.

Unfortunately, Claimant did not make it all the way to Holdrege. Near Winner, South Dakota, Claimant was injured when his motorcycle hit some sand or gravel on the highway and skidded out of control. Claimant was taken to the Winner Hospital with severe injuries. Betzing informed Employer by telephone that Claimant had been injured in an accident.

After a period of recovery, Claimant returned to work for Employer. Claimant was not paid for the time he traveled on July 6, 2000. Claimant did not ask to be paid for that time. Claimant did not ask that the accident be treated as a workers' compensation injury. Employer paid Claimant some money during his recovery to help with expenses, but did not treat the accident as a workers' compensation injury.

On April 4, 2002, Claimant filed a claim for workers' compensation benefits for the accident. Employer denied the claim. Claimant filed his Petition for Hearing on August 5, 2002.

Other facts will be developed as necessary.

Issue

Did Claimant suffer an injury arising out of and in the course of his employment with Employer?

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. Day v. John Morrell & Co., 490 N.W.2d 720 (S.D. 1992); Phillips v. John Morrell & Co., 484 N.W.2d 527, 530 (S.D. 1992); King v. Johnson Bros. Constr. Co., 155 N.W.2d 183, 185 (S.D. 1967). The claimant must prove the essential facts by a preponderance of the evidence. Caldwell v. John Morrell & Co., 489 N.W.2d 353, 358 (S.D. 1992). Claimant "must establish a causal connection between [his] injury and [his] employment." Johnson v. Albertson's, 2000 SD 47, ¶ 22. The South Dakota Supreme Court recently addressed similar facts:

> Generally, employees injured while going to and coming from work are not covered under workers' compensation. To recover under workers' compensation, a claimant must prove by a preponderance of the evidence that [he] sustained an injury "arising out of and in the course of the employment." The claimant must prove that "the employment or employment-related activities are a major contributing cause of the condition complained of."
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> We construe the phrase "arising out of and in the course of employment" liberally. Therefore, application of the workers' compensation statutes is not limited solely to the times when the employee is engaged in the work that he was hired to perform.
>
> Both factors of the analysis, "arising out of" employment and "in the course of employment," must be present in all claims for workers' compensation. However, while each factor must be analyzed independently, they are part of the general inquiry of whether the injury or condition complained of is connected to the employment. Therefore, the factors are prone to some interplay and "deficiencies in the strength of one factor are sometimes allowed to be made up by strength in the other."

Mudlin v. Hills Materials Co., 2005 SD 64, ¶ 8 (citations omitted).

Employer argued that because Claimant's injuries resulted from a traffic accident that occurred while Claimant traveled to Holdrege allegedly in violation of company policies, his injuries did not "arise out of and in the course of" his employment.

"Arising out of" Employment

"Arising out of" employment is defined as follows:

> 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 his 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).

Claimant was traveling to Holdrege for the sole purpose of his employment with Employer. He had no personal business in Holdrege. He made no personal stops along the way. Claimant traveled routinely to job sites throughout the county in performing his work for Employer. Claimant was routinely paid for this travel. His travel to a job site is an activity which he "might reasonably engage" in performing his work for Employer.

Claimant, however, traveled on a personally owned motorcycle. It was not common for employees to use a personal vehicle to travel to and from job sites, but it did happen occasionally. Roberts had never reprimanded an employee for using personal vehicles to travel to job sites. Eichmann had never denied payment to an employee for travel time because a personal vehicle was used. Claimant would have been paid for his travel time if he had made it to Holdrege.

Employer argued that employees were never authorized to travel to a job site on motorcycles. Employer had not banned the use of motorcycles for work travel. Betzing arrived at Claimant's house on his motorcycle and intended to drive the motorcycle to Holdrege. Claimant was unaware of any prohibition against the use of a motorcycle.

It was Employer's custom and practice to have each crew meet at the shop before leaving Sioux Falls to travel to a job site. Claimant called Roberts on the morning of July 5 and told Roberts that he would not be able to make it to Holdrege with the rest of the crew. Claimant was not reprimanded for not showing up at the July 5 meeting. Claimant had missed other meetings without being reprimanded. Roberts did not tell Claimant that Betzing had been replaced on the crew for the Holdrege assignment. Claimant considered Betzing the crew chief on the Holdrege job. Crew chiefs acted as supervisors of the crews at the job sites.

Claimant's employment contributed to causing the injury and his travel brought about his injuries. Although Claimant did not call in on July 6, he called and spoke with Roberts on July 5. Claimant's action of traveling on a motorcycle to Holdrege with Betzing, who was also on a motorcycle, was an activity which he "might reasonably engage" in performing his work for Employer.

The necessary causal link between Claimant's employment activities and his injury has been shown. Claimant's injuries arose out of his employment.

"In the Course of Employment"

The phrase 'in the course of employment' refers 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).

In Mudlin, the Court looked to travel pay, custom and usage, and company policy as controlling factors in the "in the course of employment" test. There is no dispute that travel to the job site is naturally and incidentally related to Claimant's employment. Claimant traveled across the country building, repairing, and maintaining communication towers for Employer. He was expressly authorized to travel to and from job sites.

Employer regularly paid its tower techs their hourly wage for hours spent traveling to job sites. Crew chiefs were paid a set salary, regardless of travel time. Employer had not refused travel pay to Claimant for using a personally owned vehicle before July of 2000. As Roberts testified, Claimant would have been paid for his travel time if he had made it to Holdrege and painted the tower. Claimant's travel to Holdrege extended beyond his normal commute to or from work, and falls outside of the "going and coming" rule.

Employer's attacks on Claimant's credibility are not persuasive. Claimant candidly explained his misuse of the company credit card, his history of substance abuse and problems with physical altercations. Neither Roberts nor Claimant could remember exactly what he said to the other during their telephone conversation on the morning of July 5, 2000. Claimant testified credibly that on July 6, 2000, he thought he and Betzing were still assigned to the crew painting the tower at Holdrege. Claimant testified credibly that he did not violate an order from Roberts when he left for Holdrege. Roberts did not tell Claimant that he had been replaced on the crew painting the tower at Holdrege. Roberts did not tell Claimant that Betzing had been replaced on the Holdrege crew. Roberts had no communication with Betzing.

The only reason Claimant traveled to Holdrege with Betzing was to perform work for Employer. Claimant testified credibly that he had no reason other than work to travel to Holdrege. Claimant made no personal deviations while traveling to Holdrege. The work at Holdrege was not desirable work. Craig Snyder, Employer's president, testified that tower painting is the kind of work "the tower crews would least want to do." He also stated that the crews are not happy about being assigned to paint towers because it is "menial," "stinky" work, but the crews "do it because it's their turn so to speak."

Employer required its employees to attend weekly meetings. Claimant called Roberts on the morning of July 5, 2000, and told Roberts that he would not be able to leave for Holdrege with the rest of the crew. Claimant did not know from his conversation with Roberts that he and Betzing had been replaced on the Holdrege crew by other employees. As far as Claimant knew on the morning of July 6, 2000, when he left for Holdrege, Claimant was still on the Holdrege crew and Betzing was still the crew chief. Claimant had missed weekly meetings before and not been reprimanded.

In summary of the circumstances surrounding his trip to Holdrege, Claimant's employment required him to travel extensively. Employer paid Claimant and tower techs like Claimant their hourly wage for time spent traveling. Claimant had driven his personal vehicle to job sites before July 2000. Employer had no written policy regarding the use of a motorcycle for travel to and from job sites. Claimant traveled with Betzing, the crew chief from the Holdrege job, who was also on a personally owned motorcycle. Neither Claimant nor Betzing was reprimanded for traveling to Holdrege or for traveling on their motorcycles. Claimant was traveling to Holdrege for no other purpose than work. Claimant contacted Roberts on July 5, 2000, and told him that he would not be able to leave for Holdrege with the rest of the crew. Roberts never told Claimant that he and Betzing had been replaced on the Holdrege crew. Roberts never spoke with Betzing. Employer would have paid Claimant for his travel time if he had arrived in Holdrege. Given the circumstances surrounding Claimant's trip to Holdrege, Claimant's injuries were in the course of his employment.

Claimant has demonstrated by a preponderance of the evidence that his injuries arose out of and in the course of employment.

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 30th day of September, 2005.

SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR MANAGEMENT

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Heather E. Covey
Administrative Law Judge