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

DAVID HAM as Personal Representative of the Estate of Timon Wayne Ham, deceased, and NATALIA ELIZABETH BICKER, as Guardian Ad Litem of ELI MACPHERSON HAM, a minor child,	**HF No. 67, 2016/17**
Claimant,	
v.	**DECISION ON SUMMARY JUDGMENT**
OSMOSE UTILITIES SERVICES, INC.,	
Employer,	
and	
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, a subsidiary or affiliate of AIG Insurance (WC018962552),	
Insurer	

Submissions:

This letter addresses the following submissions by the parties:

February 2, 2018	Employer and Insurer's Motion for Summary Judgment; Brief in Support of Employer and Insurer's Motion for Summary Judgment; Statement of Undisputed Material Facts; Affidavit of Counsel; Affidavit of Dr. Kenneth S. Snell, M.D.; Stipulation and Agreement;
February 26, 2018	Claimants' Motion for Summary Judgment and to Strike Defense of Willful Misconduct; Claimants' Brief in Resistance to Respondents' Motion for Summary Judgment and In Support of

	Claimant's Motion for Summary Judgment and to Strike Respondents' Affirmative Defense of Willful Misconduct; Claimant's Statement of Undisputed Material Facts;
March 14, 2018	Reply Brief in Support of Employer and Insurer's Motion for Summary Judgment and In Opposition to Claimants' Motion for Summary Judgment and to Strike Defense of Willful Misconduct; Employer and Insurer's Response to Claimant's Statement of Undisputed Material Facts;
March 26, 2018	Claimants' Comment on Respondents' Objections to Claimants' Statement of Undisputed Material Facts and Claimants' Reply Brief in Support of Claimants' Motion for Summary Judgment and to Strike Respondents' Affirmative Defense of Willful Misconduct;

Background:

On and before November 5, 2014, Timon Ham (Ham) was employed by Osmose Utilities Services, Inc. which was at all times pertinent covered for workers' compensation purposes by National Union Fire Insurance Company of Pittsburgh, PA (jointly Employer/Insurer). Ham and his supervisor and friend, Robert Holman (Holman) had completed a job in Fargo, North Dakota. They planned to leave Fargo and travel to Mitchell, South Dakota the next day to perform another job. Ham and Holman both consumed 15-20 beers each and some whiskey on the evening of November 5, 2014. The following morning of November 6, 2014, Ham and Holman got up and each drank 4 - 6 beers as they packed and loaded the truck. They ate lunch at a Mexican restaurant where they consumed multiple margaritas. After lunch, Ham and Holman proceeded to travel toward Mitchell in the Employer's company vehicle. They continued to consume beer while they traveled. Ham and Holman took turns driving the vehicle with each driving half of the time.

At approximately 5:30 p.m. on November 6, 2014, Holman was driving the vehicle and Ham was riding as a passenger. Holman lost control of the vehicle which then went into the ditch on the opposite side of the road, rolled over, and landed on its top. Ham was partially ejected from the vehicle and received fatal injuries. Holman's blood alcohol content was 0.21% and Ham's postmortem blood alcohol level was .224%

Motion for Summary Judgment:

Both parties have moved for summary judgment in this matter. The Department of Labor and Regulation's (Department) authority to grant summary judgment is established in administrative rule ARSD 47:03:01:08:

> A claimant or an employer or its insurer may, any time after expiration of 30 days from the filing of a petition, move with supporting affidavits for a summary judgment. The division shall grant the summary judgment immediately if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The party seeking summary judgment bears the burden of demonstrating the lack of any genuine issue of material fact, and all reasonable inferences from the facts are viewed in the light most favorable to the non-moving party. *Railsback v. Mid-Century Ins. Co.*, 2005 SD 64, ¶ 6, 680 N.W.2d 652, 654. "A trial court may grant summary judgment only when there are no genuine issues of material fact." *Estate of Williams v. Vandeberg,* 2000 SD 155, ¶ 7, 620 N.W.2d 187, 189, (citing, SDCL 15-6-56(c); *Bego v. Gordon*, 407 N.W.2d 801 (S.D. 1987)). "In resisting the motion, the non-moving party must present specific facts that show a genuine issue of fact does exist." *Estate of Williams,* 2000 SD 155 at ¶ 7, (citing, *Ruane v. Murray*, 380 NW2d 362 (S.D.1986)).

Employer/Insurer have asserted the affirmative defense of willful misconduct. Willful Misconduct is defined by SDCL § 62-4-37 in pertinent part as follows:

> 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.

In order to meet the requirements of SDCL § 62-4-37, Employer/Insurer must show that the injury sustained by Ham was due to willful misconduct. The court has established a two-prong test for establishing if an employee has engaged in willful misconduct under SDCL § 62-4-37.

First, Employer/Insurer must show that the employees alleged willful misconduct was the proximate cause of the injury. The proximate cause test was defined by the Court in *Wells v. Howe Heating & Plumbing, Inc.*, 2004 SD 37, ¶19, 677 N.W.2d 586, 590. "SDCL § 62-4-37 places the burden on the employer to prove that an employee committed "willful misconduct" and that the injury was incurred 'due to' the employee's

willful misconduct." *Wells*, 2004 SD 37, ¶10, 677 N.W.2d 586, 590 (citing *Goebel v. Warner Transp*. 2000 SD 79, ¶13, 612 N.W.2d 18, 22.)

It is undisputed that Ham was not driving at the time of the accident which resulted in his death. Therefore, Ham's own action was not a direct cause of his death. However, the Court has stated that Employer/Insurer need only show that the employee's conduct was a substantial factor in the injury. "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. Rather, under § SDCL 62-4-37, an injury will be barred only when an employee's willful misconduct was a substantial factor in causing the injury." *VanSteenwyk v. Baumgartner Trees and Landscaping*, 2007 SD 36, ¶12, 731 N.W.2d 214, 219 (citations omitted).

To be a substantial factor, Ham's injury must be due to his alleged willful misconduct of intoxication. Employer/Insurer has asserted that Ham's willful misconduct in electing to ride with Holman, who was intoxicated, and Ham's own intoxication was a substantial factor in his death. This argument presumes that it was Ham's decision to become intoxicated that resulted in him being a passenger in a vehicle that ultimately rolled off the road resulting in his death. The Department is not persuaded by this argument, because it requires too much supposition. In order to accept that it was intoxication that resulted in Ham riding with Holman, it must be supposed that he would not otherwise have ridden with him. Holman was the supervisor and they were far from their next job. Ham could have concluded that not riding with Holman would have resulted in discipline or perhaps being stranded far from where he needed to be. From the record and facts available, the Department cannot conclude that Ham riding with Holman was the result of Ham's intoxication. The act of becoming intoxicated or riding in a vehicle while intoxicated is not a substantial factor to Ham's injury.

The second prong in the willful misconduct analysis is the following Four-Part Test as established by the Court in *Holscher v. Valley Queen Cheese Factory,* 2006 S.D. 35, ¶49, 713 N. W. 2d 555, 568-69 (citing *2 Larson's Workers' Compensation Law § 35.010*:

1. The employee must have actual knowledge of the rule or appliance, and its purpose;
2. The employee must have an actual understanding of the danger involved in the violation of the rule or failure to use the appliance;
3. The rule or use of the appliance must be kept alive by bona fide enforcement by employer

4. The employee has no valid excuse for violating the rule or failing to use the appliance.

Employer has a company policy that provides:

> **Use of Alcoholic Beverages** - … It is a violation of Company policy for an employee to be found under the influence of alcohol, have possession of or used alcoholic beverages or on Company property as defined below. Further, employees shall neither act in any capacity of the Company nor operate a company-owned, leased or rented vehicle on or off the job while under the influence of alcohol.

The policy further states:

> While at company sponsored or business-related functions, the employee is requested to use common sense when consuming alcoholic beverages. If there is any question as to whether or not it is safe for an employee to drive, the employee should use alternate travel such as a taxi or arrange for overnight lodging. The company will reimburse the employee for reasonable costs associated with such alternate arrangements. Under no circumstances shall an employee operate a company-owned, leased, or rented, vehicle, or a personal vehicle (being used for company business) while under the influence of alcohol.

The parties have stipulated that it is the usual practice of Employer to require Employees, when furnished with a copy of this policy, to sign an "Acknowledgment and Consent to Substance Testing" form. The parties further stipulate that Employer has no record of a document signed by Ham acknowledging that he received and read this policy. Ham's understanding of the nature of the policy and the dangers of its violation can only be supposed as he is unable to provide his own testimony. The language of the policy itself seems to present an ambiguous rule regarding drinking at work. The language indicates that an employee operating a company vehicle while under the influence of alcohol is prohibited. However, it is not clear whether drinking itself while traveling between jobs is a violation of policy. Holman was driving the vehicle while drinking in violation of the policy. Ham's drinking as a passenger while riding in the company vehicle is not a clear violation of the policy.

Due to driving while intoxicated in violation of the policy, Holman was not upholding or enforcing a policy which required employees to not use alcohol on the job. Bona fide enforcement is necessary to meet the *Holscher* test. The Court established the importance of enforcement in *Phillips v. John Morrell & Co.*, 484 N.W.2d 527. In

Phillips, the Court concluded that the employee engaged in horseplay which was against company policy and the horseplay resulted in the employee receiving a laceration on his leg. However, the Court found the employer was still liable for workers' compensation benefits, because it had not enforced the policy. The horseplay was committed in sight of supervisors who did not shut down production or reprimand the employee.

In the current matter, Holman, as the supervisor, was responsible for enforcing company policy. Instead, he was, himself, violating the policy he was responsible for enforcing. Employer/Insurer have not shown that Ham understood the policy or that the policy was consistently enforced. The requirements established by *Holscher*'s four-part test have not been met. Therefore, the Department concludes that as neither prong of the two-prong test for establishing willful misconduct has been met, willful misconduct has not been proven.

Order:

The Department denies Employer and Insurer's Motion for Summary Judgment and grants Claimant's Motion for Summary Judgment and to Strike Defense of Willful Misconduct.

Dated this 26 day of September 2018.

Michelle Faw

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Michelle M. Faw
Administrative Law Judge