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

TONY BURSING,
Claimant,

HF No. 83, 2018/19

v.

DECISION

BOWES CONSTRUCTION, INC.,
Employer,

and

ACUITY MUTUAL 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 Joseph Thronson, Administrative Law Judge, on March 25, 2019, in Sioux Falls, South Dakota. Claimant, Tony Bursing, was present and represented by Jami Bishop of Johnson, Janklow, Abdallah, & Reiter, LLP. The Employer, Bowes Construction, Inc. and Insurer, Acuity, were represented by Charles Larson of Boyce Law Firm, LLP.

ISSUES PRESENTED

1. DID CLAIMANT'S INJURY ARISE OUT OF HIS EMPLOYMENT?

FACTS

Claimant, Tony Bursing, was employed by Bowes Construction (Employer) at the time of his injury as an excavator operator. Bowes is a construction company based in Brookings that is primarily engaged in road construction in the Brookings and Sioux

Falls areas. Travel to its various job sites is often necessary, and employees may either meet at Bowe's home office in Brookings and ride in a company vehicle to a site or they may drive themselves. Employees who go to the office first clock in and are paid for travel to the job site. Those employees who opt to take their own vehicles are not paid for travel time or reimbursed for mileage to a site. Bowes has no written policy regarding transportation and had no preference regarding whether employees ride in a company vehicle or use their own to get to a job site.

On May 22, 2018, Claimant was part of a crew of men working on a road project near Dell Rapids resurfacing a portion of South Dakota Highway 115. Bowes constructed a diversion lane to move traffic around the area under construction. The diversion lane was separated from the construction by orange construction cones.

At the beginning of each work day, workers met at a common staging area where they would be briefed about the day's work and then travel to different parts of the site to operate machinery. The staging area was closed off to the public, but to reach the staging area, workers were required to travel through a section of the road which was marked off by orange construction cones.

At the time of the accident, Claimant lived in Ramona, South Dakota, located south and west of Brookings. On May 22, 2018, Claimant decided to ride his motorcycle to the job site. Claimant first traveled from Ramona to Madison to retrieve his motorcycle from a storage. Claimant rode west and south towards Dell Rapids. Claimant testified that he was traveling East on Highway 115 and had just entered the coned area when he noticed a vehicle approaching him in the opposite direction. There

was heavy fog on this particular morning and the vehicle was driving partially over the dividing line. Claimant attempted to move over to avoid colliding with the vehicle but was unable to do so. The two vehicles collided inside the coned area and the driver of the vehicle drove approximately a quarter mile before he realized he had hit Claimant.

A local homeowner witnessed the accident and called 911. Claimant was taken to a hospital in Sioux Falls with a number of serious injuries. Ultimately, Claimant's left leg was amputated below the knee. Claimant also suffered injuries to his left arm which required two surgeries and the insertion of several plates and screws.

Claimant filed a claim for workers compensation benefits. Employer/Insurer denied benefits since Claimant was injured while driving his own vehicle to the job site and had not yet begun work. Claimant then filed a petition seeking a hearing on benefits. The parties agreed to bifurcate the hearing. At issue at this hearing was whether Claimant was injured in the course and scope of his employment with Employer.

ANALYSIS

Claimant argues that his accident arose out of his employment because, but for his job, he would not have been at the construction site. The South Dakota Supreme Court "long ago disavowed a strict interpretation of the phrase 'out of and in the course of employment'… [Rather] this court looks to whether the activity which resulted in the injury is one in which an employee might reasonably be expected to engage or has been impliedly authorized to perform." *Howell v. Cardinal Indus., Inc.,* 497 N.W.2d 709, 711 (S.D. 1993)(Internal citations omitted).

Employer/Insurer counters that Claimant had not yet reached work at the time of his accident. Rather, it claims Claimant's injuries occurred during his commute to work. "The rule is well established that an injury sustained by an employee while going to or from his work is not compensable." *Driessen v. Schiefelbein*, 67 S.D. 645, 297 N.W. 685, 687 (1941). Under this rule, commonly referred to as the "coming-and-going rule", Claimant is barred from recovery unless he meets one of the recognized exceptions to the rule.

The parties dispute whether Claimant had entered the construction zone at the time of his accident. Claimant had passed signs warning drivers of reduced speed. Claimant had also passed several orange construction cones though he had not yet reached the staging area. Once Claimant passed the reduced speed sign, for all intents and purposes, he had entered the construction zone. However, this fact alone is not dispositive. More important is that Claimant was at a location Employer could reasonably expect him to be at when he suffered an accident. Even if Claimant had not yet reached the actual area where work was being done, he did read an area directly adjacent to the work zone.

No South Dakota case has dealt with a work zone exception. However, many other jurisdictions have adopted this as an exception to the coming-and-going rule. As far back as the 1920's, courts have examined whether a claimant could recover benefits from an injury suffered in close proximity to an employer's premises. In 1923, the United States Supreme Court considered this rule in *Cudahy Packing Co. of Nebraska v. Parramore*, 263 U.S. 418, 44 S. Ct. 153, 68 L. Ed. 366 (1923). In *Parramore*, a worker in Utah was killed when the vehicle he was riding in was struck by a train.

Several train tracks crossed the public road that led to Employer's premises. After the Utah Supreme Court affirmed the award of benefits to the decedent's widow, the employer appealed the case to the US Supreme Court. Employer argued that interpreting Utah's workers compensation statutes to grant benefits in that case was so arbitrary and capricious as to violate employer's due process rights. The Court rejected this argument and upheld Utah's original grant of benefits. The Court noted "[t]he fact that the accident happens upon a public road or at a railroad crossing and that the danger is one to which the general public is likewise exposed is not conclusive against the existence of such causal relationship, if the danger be one to which the employee, by reason of and in connection with his employment, is subjected peculiarly or to an abnormal degree.

Id. at 424, 44 S. Ct. 153, 154, 68 L. Ed. 366 (1923).

The Court found that the decedent was entitled to benefits even though he had crossed a public road to which any member of the public may have also been exposed.

> Here the location of the plant was at a place so situated as to make the customary and only practicable way of immediate ingress and egress one of hazard. Parramore could not, at the point of the accident, select his way. He had no other choice than to go over the railway tracks in order to get to his work; and he was in effect invited by his employer to do so. And this he was obliged to do regularly and continuously as a necessary concomitant of his employment, resulting in a degree of exposure to the common risk beyond that to which the general public was subjected.

Id. at 426, 44 S. Ct. 153, 155, 68 L. Ed. 366 (1923)

The California Supreme Court came to a similar conclusion in *Pac. Indem. Co. v. Indus. Acc. Comm'n*, 28 Cal. 2d 329, 170 P.2d 18 (1946). As in *Parramore*, *Pacific Indemnity* involved an employee who was killed on a public road during his commute to work. The vehicle in which the decedent was riding was hit from behind as it was

turning into employer's parking lot. In upholding the award of benefits to decedent's estate, the California court noted, "[f]urthermore, the fact that an accident happens upon a public road and the danger is one to which the general public is likewise exposed, does not preclude the existence of a causal relationship between the accident and the employment if the danger is one to which the employee, by reason of and in connection with his employment, is subjected peculiarly or to an abnormal degree."

Id. at, 338, 170 P.2d 18.

Recovery under the work zone exception is consistent with South Dakota law. In *Steinberg*, our Supreme Court upheld the granting of benefits for a claimant who slipped on a public street while walking between her office and an off-site parking lot.

> [W]e look to whether Steinberg's activity of crossing the street to reach the parking lot where her car was located was one in which she might reasonably expect to engage. We find the answer obvious. DMVA provided the parking lot in which her car was parked, and to get there Steinberg had no choice but to cross the camp street. Steinberg was not required to stay on camp premises during her lunch break. Steinberg was walking to her car during her lunch hour, shortly after 12:00 p.m., a reasonable time for an employee to take a lunch break. Thus, Steinberg was "in an area where she might reasonably be and at the time when her presence there would normally be expected."

Steinberg v. S. Dakota Dep't of Military & Veterans Affairs, 2000 S.D. 36, ¶ 22, 607 N.W.2d 596, 603

Further, employer/insurer in *Steinberg* argued that the claimant's injury did not arise out of her employment because it was a risk common to any pedestrians who may have been walking in that area. The court again rejected this argument, explaining:

> [W]hen one in the course of his employment is reasonably required to be at a particular place at a particular time and there meets with an accident, although

> one which any other person then and there present would have met with irrespective of his employment, that accident is one 'arising out of' the employment of the person so injured.

Id. at ¶ 25, (quoting *Nippert v. Shinn Farm Const. Co.*, 388 N.W.2d 820, 822 (1986)(quoting 1 Larson's Workers' Compensation Law § 8.12 at 3–23 (1985)).

Here, Claimant was entering the construction zone to report to work at the time of his accident. Claimant was required to travel through a portion of highway separated by orange cones to reach the staging area, a fact which was reasonable given his duties.

To support its argument that the coming-and-going rule bars Claimant's recovery, Employer/Insurer cites *Lloyd v. Brands*, 2011 S.D. 28, 799 N.W.2d 727. The claimant in *Lloyd* was temporarily managing two of employer's Cici's Pizza restaurants in Omaha and returning periodically to Sioux Falls where he lived. On one return trip for his wife's birthday, Claimant was injured in a car accident. The Department granted summary judgment to employer/insurer finding that Claimant's injuries did not arise out of his employment. The circuit court affirmed summary judgment and the case was appealed to the Supreme Court. It also affirmed summary judgment, explaining:

> It is undisputed that Lloyd was driving on I–29 because he wanted to be home for his wife's birthday. This trip was not prearranged or assigned as part of his duties. The trip was for Lloyd's benefit on his days off. And unlike in *Mudlin,* there was no company policy that required Lloyd to make the trip for the company's benefit. No aspect of the trip was in furtherance of Dakota Land's or Byrne Brands' interests. While Lloyd's employment put him in Omaha on the day of his accident, his employment did not require or compel him to return to Sioux Falls at that time. Therefore, under these facts, Lloyd has failed to demonstrate the causal connection between his employment and his injury.

Lloyd v. Brands, 2011 S.D. 28, ¶ 7, 799 N.W.2d 727, 730.

The Department finds that *Lloyd* is distinguishable from the case at bar. First, unlike Lloyd, who chose his path to home, Claimant had little choice but to travel

through construction to get to the staging area. Second, Claimant's reason for traveling this portion was to get to work while Lloyd was traveling home for personal reasons unrelated to his job. Employer/Insurer contends that the South Dakota Supreme Court has rejected the "but for" rule for coming-and-going cases. However, the Department does not read Lloyd this broadly. Lloyd was hundreds of miles away from his work place in Omaha at the time of his accident and not within a zone of employment. To interpret Lloyd in this way would run counter to the court's proclamation that a claimant may recover when she is injured "in an area where she might reasonably be and at the time when her presence there would normally be expected." *Steinberg*, at ¶ 22.

CONCLUSION

While the Department finds Claimant was in the construction zone at the time of his accident, more importantly, he was at a location at a time which he could reasonably be expected to be. Even if Claimant had not entered an area over which Employer exerted control, he was nonetheless in a work zone near the job site. Claimant had no choice but to take the route he did as the construction limited the entry and exit points to the common staging area. Therefore, the injury Claimant suffered on May 22, 2018, arose out of his employment. The parties shall proceed to determine to what benefits Claimant is entitled.

Dated this 1st day of July, 2019.

/s/ Joe Thronson
Joe Thronson
Administrative Law Judge