SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

ANNA FAIR, **HF No. 96, 2003/04**

Claimant, **DECISION**

vs.

NASH FINCH COMPANY,

Employer,

and

ROYAL & SUN ALLIANCE,

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. James D. Leach represented Anna Fair (Claimant). J.G. Shultz represented Employer and Insurer (Employer).

The parties submitted a signed Stipulation dated July 1, 2004. The parties agreed that instead of having an in-person hearing, this matter would be submitted based on the depositions of Anna Fair, Russell Shacklett, Michaela Brown and Michelle Sparagon. These depositions were taken on June 30, 2004. In addition, the parties submitted briefs, including Claimant's Brief, Employer and Insurer's Brief and Claimant's Reply Brief.

ISSUES

1. Did the incident which allegedly occurred on or about July 8, 2003, arise out of and in the course of Claimant's employment with Nash Finch?
2. Did Claimant provide adequate notice?

FACTS

Around 7:00 p.m. on July 8, 2003, Claimant completed her shift as a cashier at the Family Thrift Center in Rapid City. After Claimant punched out, she spent approximately ten to fifteen minutes shopping for some groceries in the store. Claimant went through the checkout line and paid for her groceries. As Claimant carried her groceries to leave the store, she tripped over a rug in front of the door that led out of the store. Claimant fell forward and hit the floor, including her head on the cement. Claimant stated, "[i]t was the hardest fall I've ever fell in all my life."

Claimant's night supervisor, Russell Shacklett, worked at the Family Thrift Center on July 8, 2003. Shacklett was at the customer service desk, which is very close to the area where Claimant fell. Shacklett did not see Claimant fall, but he "heard . . . when she fell." Shacklett provided assistance to Claimant and he completed an accident report. In addition, Shacklett, via telephone, completed a First Report of Injury (FRI) on

July 9, 2003. The FRI indicated that Employer was notified of the injury on July 8, 2003. Other facts will be developed as necessary.

ISSUE

DID THE INCIDENT WHICH ALLEGEDLY OCCURRED ON OR ABOUT JULY 8, 2003, ARISE OUT OF AND IN THE COURSE OF CLAIMANT'S EMPLOYMENT WITH NASH FINCH?

Claimant has the burden of proving all facts essential to sustain an award of compensation. King v. Johnson Bros. Constr. Co., 155 N.W.2d 183, 185 (S.D. 1967). 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). To recover under workers' compensation, Claimant must prove by a preponderance of the evidence that she sustained an injury "arising out of and in the course of the employment." SDCL 62-1-1(7). The phrase "arising out of and in the course of employment" is to be construed liberally. Norton v. Deuel Sch. Dist., 2004 SD 6, ¶ 10 (citations omitted). The "application of worker's compensation statutes is not limited solely to the times during which an employee is 'actually engaged in the work that [she] is hired to perform.'" Id. (citations omitted).

Did Claimant's injury arise out of her employment?

The phrase "arising out of" expresses a factor of contribution. Zacher v. Homestake Mining Co., 514 N.W.2d 394, 395 (S.D. 1994). "In order for an injury to 'arise out of' employment, the employee must show that there is a 'causal connection between the injury and the employment.'" Norton, 2004 SD 6, ¶ 8 (citations omitted). "The employment 'need not be the direct or proximate cause of 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.'" Id. (citation omitted). "[T]o show that an injury 'arose out of' employment, it is sufficient if the employment 1) contributes to causing the injury; or 2) the activity is one in which the employee might reasonably be expected to engage or 3) the activity brings about the disability upon which compensation is based." Id. (citations omitted).

Claimant's fall did not result from a hazard to which her employment exposed her. At the time Claimant fell, she was on a personal errand. She was a customer of the Family Thrift Center purchasing personal grocery items. Claimant fell with those items in hand. Claimant was not acting as an employee at the time she fell. There is no causal connection between Claimant's injury and her employment. Claimant's injury did not arise out of her employment.

Did Claimant suffer an injury in the course of her employment?

"The phrase, 'in the course of' employment 'refers to time, place and circumstances under which the accident took place.'" Id. ¶ 9 (citations omitted). "An employee is considered within the course of employment if '[s]he is doing something that is either naturally or incidentally related to employment.'" Id. "[A]n activity that was

expressly or impliedly authorized by the contract or nature of employment falls within the course of employment." Id. (citation omitted).

Claimant asserted that buying groceries "in the store at the end of one's shift, paying for one's groceries, then leaving the store with them is an activity in which any grocery store employee might reasonably be expected to engage." However, Claimant was not required, or even encouraged to shop at her place of employment. It is undisputed that Employer did not offer an employee discount for shopping at the Family Thrift Center. There was no evidence or testimony to suggest that employees of the Family Thrift Center received any type of profit-sharing that would encourage them to shop at the store. Claimant made a personal decision to shop at the Family Thrift Center. She testified, "I usually bought most of my groceries there, you know. Having worked there, earned money there, I liked to, you know, give them some money back, so to speak." There were no employment-related reasons why Claimant chose to shop at the store immediately following the conclusion of her work shift.

Claimant's activities after she punched out when her work shift was completed were outside of the contract or nature of her employment. Instead of leaving the store at the conclusion of her shift, Claimant stepped aside from her employment purpose for personal reasons. There was nothing in Claimant's employment that required her to shop in the store where she worked. Claimant was not ordered or required to be where she was when she was injured. Claimant was a customer of the store performing a personal errand when she was injured. Claimant failed to show that her shopping had anything to do with her employment. Claimant failed to establish that she suffered an injury in the course of her employment.

CONCLUSION

Claimant failed to establish by a preponderance of the evidence that her injury on July 8, 2003, arose out of and in the course of her employment with Employer. Therefore, there is no need to address the notice issue. Claimant's Petition for Hearing must be dismissed with prejudice.

Employer shall submit Findings of Fact and Conclusions of Law, and an Order consistent with this Decision, and if necessary, proposed Findings and Conclusions within ten days from the date of receipt of this Decision. Claimant shall have ten days from the date of receipt of Employer's proposed Findings and Conclusions to submit objections 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, Employer shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 28th day of July, 2004.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Elizabeth J. Fullenkamp
Administrative Law Judge