SOUTH DAKOTA DEPARTMENT OF LABOR
Division of Labor and Management

MICHAEL A. POMMERVILLE,
Claimant,
v.
TRANSWAY, INC. and B & L PERSONNEL, INC.,
Employer, and
LIBERTY MUTUAL INSURANCE COMPANY,
Insurer.

and

B & L PERSONNEL, INC.,
Employer, and
ZURICH – AMERICAN INSURANCE COMPANY,
Insurer.

HF 96, 2000/01

DECISION

This is a workers' compensation proceeding before the South Dakota Department of Labor, pursuant to SDCL 62-7-12 and ARSD 47:03:01. Steven L. Pier, of Kennedy, Rokahr, Pier & Knoff L.L.P., represents Claimant, Pommerville. Steven J. Morgans, of Lynn, Jackson, Shultz & Lebrun, P.C., represents Employer and Insurer Liberty Mutual Insurance Company (Liberty Mutual). J.G. Shultz, of Woods, Fuller, Shultz & Smith P.C., represents Employer and Insurer Zurich-American Insurance Company (Zurich-American.)

Procedural History

This file is on remand from the circuit court in and for the Sixth Judicial Circuit of the State of South Dakota.

Pommerville suffered an injury to his chest in April 1999. This injury was accepted as compensable. Subsequently, on June 15, 1999, Pommerville exceeded his doctor's restrictions and suffered further injury to his chest. Department awarded summary judgment to both Insurers, concluding that Pommerville's actions in exceeding his restrictions constituted misconduct under SDCL 62-4-37 and a bar to his claim for workers' compensation benefits. Pommerville appealed.

The circuit court, in her order of remand, wrote "[the ALJ] seems to ignore the facts asserted by Pommerville that on June 15, 1999, his only choice was to violate his doctor's orders[.]" The circuit court directed the Department to "address the legal issue of 'excusable not willful' misconduct raised by [Pommerville.]"

Issue

The sole issue for consideration on remand is whether Pommerville's actions on June 15, 1999, constitute "willful misconduct" under SDCL 62-4-37 so as to bar his claim for workers' compensation benefits, or whether his misconduct should be excused.

Findings of Fact

1. Pommerville has worked off and on in the trucking industry for nearly 20 years. He worked for Employer as a long haul driver in 1998 and 1999.
2. Pommerville suffered a work related injury to his chest on April 6, 1999, while tarping a load. This injury was accepted as compensable.
3. After his April 1999 injury, Pommerville treated with Dr. Mark Mabee.
4. Because Pommerville was having financial problems and was anxious to return to work, he talked Dr. Mabee into releasing him to work in May 1999. Dr. Mabee returned him to work with specific restrictions: no tarping, no overhead work and no lifting over 10 pounds. Pommerville admitted, in addition to these specific restrictions, that Dr. Mabee told him to "take it easy."
5. It is undisputed that Pommerville knew and understood his restrictions.
6. Dr. Mabee placed the tarping restriction on Pommerville because Pommerville suffered his April 1999 injury while tarping a load. Pommerville not only understood this restriction, he knew he was at risk for injury if he violated this restriction.
7. Employer generally knew of Pommerville's restrictions, and worked with him to accommodate such restrictions.
8. Employer had previously accommodated drivers with both tarping and lifting restrictions, and had at no time instructed or required any driver to violate known restrictions.
9. Pommerville hauled a load to California in mid-June 1999. While there, he was dispatched by Jason Marquardt, one of Employer's shareholders, to pick up a load of asphalt shingles in Bakersfield, California.
10. Initially Pommerville and Jason disagreed whether the load of shingles would need to be tarped. Ultimately, in the event the load required tarping, Jason authorized Pommerville to spend up to $100 to pay someone else to tarp the load for him. Jason did not instruct Pommerville to tarp the load himself.
11. Pommerville arrived at the roofing company in Bakersfield at 4:45 p.m., local time. A sign at the entrance gate said loading would cease at 5 p.m. Pommerville knew he had little time if he was to pick up the load of shingles that day.
12. Pommerville was never told by anyone at Employer that he needed to pick up the load that day. It is not unusual for a driver to wait over night, or longer, before picking up a load.
13. Pommerville never checked with Employer to see if he could wait to pick up the load the next day, when he was more likely to find help with tarping.
14. There was no hurry to deliver this particular load. June 15, 1999, was a Tuesday. Pommerville did not have to deliver the load to Kansas City until the next Monday.
15. Pommerville knew he needed to find someone else to tarp the load. He admitted it was unlikely he would find someone to help him at that late hour.

16. Despite the potential problems presented by the late hour, Pommerville decided to enter the yard and begin loading. He proceeded to the loading area. He did not check to see if there was anyone available to help him tarp the load before he had the shingles loaded.
17. After the load was on the trailer, Pommerville went to the scale. The trailer was heavy on the rear axles. He returned to the loading area to have the load shifted. When he returned to he scale, the trailer was heavy on front axles. A representative of the roofing company then told Pommerville he would not shift the load again.
18. Pommerville knew it was two hours later in South Dakota and Employer's place of business would be closed. After several attempts to call Employer for instructions over a period of approximately 11 minutes, Pommerville decided to redistribute the weight and tarp the load himself.
19. First he pulled the two tarps off the truck and lifted them up to the trailer. After moving the tarps, his chest hurt and he felt like he had suffered the same injury he suffered in April.
20. Pommerville exceeded his lifting restriction when he removed the tarps from the truck. He knew immediately he should not have lifted the tarps. Although he was in pain and knew he had re-injured his chest by lifting and moving the tarps, he continued with several other tasks that also exceeded his medical restrictions.
21. He lifted the tarps up to the top level of the trailer. He moved bundles of shingles around the trailer to balance the load. He then tarped the load. In redistributing the load, Pommerville estimated he carried 1,000 to 2,000 pounds, 50 to 100 pounds at a time, as much as 48 feet along the length of the trailer. Pommerville knew that each of these activities exceeded his doctor's restrictions and each was likely to cause injury.
22. After shifting and tarping the load, Pommerville then called Doug Marquardt, one of Employer's shareholders, at home. This is the first Doug knew of the problem. Doug said, had he known of the disagreement between Pommerville and the roofing company, he could have called the roofing company and they would have shifted the load until it was legal. However, by this time, not only was the roofing company closed, Pommerville had already suffered further injury.
23. Pommerville admitted no one at Employer told him he had to shift or tarp the load himself.
24. Pommerville hauled the load of shingles to Kansas City. He took his time, because he was in a great deal of pain.
25. Having failed to make arrangements to get someone else to untarp the load in Kansas City, Pommerville, again knowing he was violating his restrictions and knowing injury was likely, untarped the load himself.
26. Pommerville was now in so much pain he refused any additional hauls and returned home.
27. There is no evidence Employer would have disciplined or terminated Pommerville for refusing the Bakersfield load based on circumstances surrounding his health.
28. Pommerville argued he was under "forced dispatch" and could not refuse a load without being disciplined or fired. However, Pommerville admitted no one from Employer actually told him he would be disciplined or terminated if he refused the load in Bakersfield.
29. Employer had accommodated another employee, Bill Davis, when Davis experienced health problems on the road. In this case, Employer sent a replacement tractor and driver to replace Davis. Davis was not disciplined or terminated.
30. Pommerville was not disciplined or terminated for refusing the additional haul he was offered in Kansas City. In fact, on his return he was offered further employment with Employer. He refused for reasons not related his work injury.

31. Pommerville was not a credible witness. His testimony concerning material facts surrounding his misconduct was inconsistent. He was deposed twice, filed an affidavit, and finally testified at the hearing. Pommerville's hearing testimony, and its inconsistencies with his prior testimony, appear to be an attempt to bolster his argument that Employer left him with no choice but to violate his restrictions. Two points are particularly significant: It was not until his hearing testimony that he claimed he specifically asked to not haul the load from Bakersfield, and, it was not until his hearing testimony that he claimed the dispatcher told him he needed to pick up the load at Bakersfield on June 15. In addition to being inconsistent with his prior testimony, Pommerville's new testimony on these two significant points was not corroborated.

Analysis

SDCL 62-4-37 provides: "[n]o compensation shall be allowed for any injury or death due to the employee's willful misconduct[.] . . . The burden of proof under this section shall be on the defendant employer."

Willful misconduct under this statute has been construed to include a claimant's failure to follow a physician's advice:

> [An i]njury aggravated or extended in time by the employee's neglect or disobedience of his physician's instructions is not compensable as to the additional period . . . The proposition that one may continue, or even increase, his disability by his willful and unreasonable conduct, and then claim compensation from his employer for his disability so caused, is untenable.

Fenner v. Trimac Transp., Inc., 1996 SD 121, ¶ 10, 554 NW2d 485, (quoting Detling v. Tessier, 60 SD 405, 410, 244 NW 538, 541 (1932)).

> In applying SDCL 62-4-37, the South Dakota Supreme Court has defined willful misconduct as "something more than ordinary negligence but less than deliberate or intentional conduct. Conduct is gross, willful, wanton, or reckless when a person acts or fails to act, with a conscious realization that injury is a probable, as distinguished from a possible (ordinary negligence), result of such conduct."

Cantalope v. Veterans of Foreign Wars Club, 2004 SD 4, ¶ 6, 674 NW2d 329, 333 (citing Fenner at ¶ 9, 554 NW2d at 487).

Pommerville argues that Cantalope supports his argument. However, any reliance on Cantalope is misplaced. Pommerville was restricted from lifting and tarping. In comparison to the present facts, the Cantalope court wrote:

> Her physician stated that she had her asthma controlled and had been working at the bar for over a year without incident. Additionally, she was not under physician orders to refrain from working in any particular environment. Given these facts, even considered in the light most favorable to VFW, Jennifer's conduct does "not compare to the deliberate

> actions required under the statute. ... It is only in those instances that constitute serious, deliberate, and intentional misconduct, that the bar to benefits provided by SDCL 62-4-37 should be applied."

Cantalope, ¶ 9, (quoting Phillips v. John Morrell & Co., 484 NW2d 527, 532 (SD 1992)).

Pommerville had a "conscious realization" that injury was "probable" if he violated his doctor's restrictions. Id. Pommerville knew and understood his restrictions. Pommerville knew that Dr. Mabee had placed him under the lifting and tarping restrictions because he had injured himself in April 1999 by lifting and tarping. Pommerville ignored these restrictions and suffered further injury.

To borrow from the Fenner court:

> If [Pommerville's] actions in this case are not held to constitute such misconduct, how many times should [Pommerville] be permitted to draw from the public pocketbook, workers' compensation benefits for injuries suffered from repeated attempts to return to his job despite his medical restrictions? The public should not be required to bear the economic loss due to [Pommerville's] own willful actions in clear violation of his doctor's orders.

Fenner ¶ 17.

Pommerville argues his misconduct should be excused because he was left by Employer with no choice but to violate his doctor's restrictions. Pommerville's argument that he was "forced" to violate his restrictions is not supported by the evidence.

The evidence shows that Pommerville could have refused the load when he was initially dispatched to Bakersfield. Employer would not have disciplined Pommerville for refusing this load.

Once Pommerville reached Bakersfield, it was his actions, not those of Employer, that progressively complicated the events leading to his violation of his restrictions. Pommerville reached the roofing company and chose to load the shingles at 4:45 p.m., a mere 15 minutes before quitting time, even though he knew he would have difficulty finding help at that late hour. He could have waited to the next day to pick up the load, making it easier to find someone to assist him.

Even after the shingles were loaded and he was not allowed to leave the yard without tarping the load, he could have unhooked the trailer and left the load sit in the yard over-night or, as the evidence shows, he could have refused the load altogether and made the roofing company unload it.

Pommerville had several alternatives to lifting and tarping in violation of his doctor's orders. Instead, Pommerville made the choice to violate his lifting and tarping restrictions.

Conclusion

Employer/Insurer met its burden to establish that Pommerville willfully exceeded his doctor's restrictions. Pommerville's current condition and need for treatment is causally related to his misconduct. Pursuant to SDCL 62-4-37, no compensation shall be allowed for those injuries suffered due to Pommerville's willful misconduct.

Counsel for each Employer/Insurer shall submit proposed Findings of Fact and Conclusions of Law, and an Order, consistent with this Decision, within 10 days of the receipt of this Decision. Counsel for Pommerville shall have an additional 10 days from the date of receipt of Employer/Insurer's proposed Findings of Fact and Conclusions of Law to submit objections. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, they shall submit such stipulation together with an Order consistent with this Decision.

Dated: November 19, 2004.

SOUTH DAKOTA DEPARTMENT OF LABOR

Randy S. Bingner
Administrative Law Judge