May 2, 2008

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LETTER DECISION

William C. Garry
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Sioux Falls, SD 57101-1157

RE: HF No. 98, 2006/07 – Lars E. Wager v. Upper Plains Contracting, Inc. and Zurich Insurance Company

Dear Mr. Hagg and Mr. Garry:

I am in receipt of Claimant's Motion for Partial Summary Judgment, Employer/Insurer's Brief Opposing Motion for Partial Summary Judgment, and Claimant's Response Brief on Issue of Partial Summary Judgment. I have carefully considered these submissions and all exhibits including the Statement of Bobby Morehouse, Deposition of Bobby Morehouse, and the Deposition of Lars Wager in addressing the pending motion.

ARSD 47:03:01:08 governs the Department of Labor's authority to grant summary judgment, which states in part:

> The division shall grant the summary judgment immediately if the pleadings, depositions, answers to interrogatories, and admissions of 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.

Claimant moves the Department to grant Partial Summary Judgment on the issues of compensability and the Employer/Insurer's defense of willful misconduct. Claimant argues that he sustained a hip injury while walking around a pile of concrete on a job site. Employer/Insurer argues that the injury occurred while Claimant was participating in a foot race with a co-worker, Bobby Morehouse. Employer/Insurer contend that the alleged foot race was horseplay that constitutes a substantial deviation from Claimant's employment or in the alternative willful misconduct under SDCL 62-4-37 which would bar recovery under worker's compensation laws.

When considering a Motion for Summary Judgment, all reasonable inferences drawn from the facts must be viewed in favor of the non-moving party, Employer/Insurer in this matter. *Kermmoade v. Quality Inn,* 2000 SD 81, ¶11. *Satterlee v. Johnson*, 1995 SD 7. ¶10. For the purpose of determining this Motion the Department will accept as undisputed that Claimant was involved in a foot race that amounted to horseplay when the injury occurred.

Arising Out Of and In the Course of Employment

"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 employment." SDCL 62-1-1(7); *Mudlin v. Hills Materials Co.*, 2005 SD 64, ¶ 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). "Both factors of the analysis, 'arising out of employment' and 'in the course of employment' must be present in all claims for workers' compensation." *Mudlin* at ¶ 9.

In order for the injury to arise out of the employment, the employee must show that there is a "causal connection between the injury and the employment." *Id*. at ¶ 11. Although the employment need not be the direct or proximate cause of the injury, the accident must have its "origin in the hazard to which the employment exposed the employee while doing his work." *Id*. The injury occurred at the jobsite, Claimant was still on the time clock at the time of the injury, continued to work after the injury occurred, and attended a work related meeting after the injury occurred. It is clear that the injury arose out of Claimant's employment. Claimant would not have been injured but for the fact that he was at work. There is a causal connection between the injury and the employment. The injury need not be proximately caused by the employment, but simply that it would not have occurred but for the employment. *Bearshield v. City of Gregory*, 278 NW2d 166, 168 (SD1979).

To determine if Claimant sustained an injury arising out of and in the course of employment, the Department must examine whether Claimant's horseplay was a substantial deviation from his employment. The phrase "in the course of employment" refers to the time, place and circumstances of the injury. *Id*. The South Dakota Supreme Court adopted four factors to be considered when deciding whether horseplay is within the course of employment. *Phillips v. John Morrell*, 484 NW 2d 527 (SD 1992). The four factors to be examined to determine "whether initiation of horseplay is a deviation from course of employment" are:

> (1) the extent and seriousness of the deviation, (2) the completeness of the deviation (i.e., whether it was commingled with the performance of duty or involved an abandonment of duty), (3) the extent to which the practice of horseplay had become an accepted part of the employment, and (4) the extent to which the nature of the employment may be expected to include some such horseplay.

Id. at 530 (citing 1A Larson's Workmen's Compensation Law 23.00 (1990)). "Minor acts of horseplay do not automatically constitute departures from employment, but may here, as in other fields, be found insubstantial." *Id*.

First, to determine extent and seriousness of deviation, the Department must look to the act and not the consequences. *Id*. The horseplay involved an alleged foot race among two co-workers on a jobsite, toward the end of a shift, when the crew was cleaning up the tools. The whole incident lasted a short time. There was no reason to foresee that a foot race would result in a serious injury. The deviation was not serious or substantial.

Second, the Department must look at the completeness of the deviation. *Id*. Claimant continued to work after the foot race. Both Claimant and Morehouse state that following Claimant's injury he finished picking up the tools. There was no abandonment of his duty.

Third, the Department must look at the extent to which horseplay was accepted by the Employer. *Id*. Morehouse stated in his deposition that it was commonplace for the workers to clown around, verbally joke with each other, and even participate in foot races and throw things at one another on the jobsite. While there is nothing in the record to indicate that Employer accepted or condoned this behavior, neither Claimant nor Morehouse were reprimanded for their participation in the alleged foot race.

Last, the Department must look at the extent to which nature of employment may be expected to include some horseplay. *Id*. Morehouse stated in his deposition that horseplay was commonplace among the workers on the jobsite, especially between the veteran workers and the younger workers. As the court stated in *Philips*,

> Men do not discard their personal qualities when they go to work. Into the job they carry their intelligence, skill, habits of care and rectitude. Just as inevitably, they take along their tendencies to carelessness and camaraderie as well as emotional make up. In bringing men together, work brings these qualities together, causes frictions between them, created occasions for lapses in carelessness, and for fun-making and emotional flare-ups. *Id* at 531.

Upon review of these four factors, as well as the causal connection between the injury and the employment, the horseplay that Claimant was involved in was not a substantial deviation from his employment. Claimant's injury arose out of and in the course of employment as required by SDCL 62-1-1(7) for Claimant to recover under South Dakota Workers Compensation Law.

Willful Misconduct

An Employee's willful misconduct will bar recovery under workers' compensation. The Department must determine whether Claimant's horseplay in this matter amounts to willful misconduct under the statute. SDCL 62-4-37 provides:

> No compensation shall 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 shall be on the defendant employer.

Worker's compensation laws are to be understood as "remedial in character and entitled to a liberal construction." *Oviatt v. Oviatt Dairy*, 80 SD 83, 85, 119 NW 2d 649, 650 (1963). SDCL 62-4-37 gives four examples of intentional acts that are considered willful misconduct. *Philips* at 531. Claimant did not engage in self-inflicted injury, intoxication, failure to use safety equipment, or the failure to perform a duty required by statute.

The act of running a foot race with a co-worker 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." *Id* at 532.

Claimant's Motion for Partial Summary Judgment on the issues of compensability and the Employer/Insurer's defense of willful misconduct is hereby granted. Claimant shall submit an order consistent with this decision.

Sincerely,

Taya M. Dockter
Administrative Law Judge