SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT
WORKER'S COMPENSATION

JOHN TRACY, Claimant, vs. COLONY CONSTRUCTION, Employer, and UNITED FIRE & CASUALTY, Insurer.	HF No. 99, 2006/07 **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. A hearing was held on the matter on October 9, 2007, in Rapid City, SD. Margo Julius of Julius & Simpson, LLP, represents Claimant, John Tracy (Claimant). Jeremy Nauman and Eric Blomfelt of Blomfelt & Associates, P.C., represent Employer, Colony Construction and Insurer, United Fire & Casualty (Employer/Insurer).

ISSUE:

The case has been bifurcated by stipulation of the parties.

The issue to be determined is whether Claimant, by his continued use of chewing tobacco, willfully violated his physician's order and therefore his injury is no longer compensable under SDCL 62-4-37?

FACTS:

1. Claimant was employed by Employer on February 11, 2003.
2. On February 11, 2003, Claimant sustained a back injury in the course of his employment. Claimant was injured while cleaning out the inside of the pot-belly semi-trailer that he drove.
3. Claimant initially treated with his chiropractor, Dr. Tony Hintgen. Claimant eventually became a patient of Dr. Rand Schleusener and Dr. Stephen Eckrich, board certified orthopedic surgeons, with the Black Hills Orthopedic and Spine Center.
4. Dr. Eckrich went on sabbatical in 2005.
5. Claimant started to treat with Dr. Marius Maxwell, an orthopedic surgeon who works at the Spine Center of Rapid City, on July 14, 2005.

6. Claimant and his wife were present when Dr. Maxwell first saw Claimant and gave Claimant his options. Dr. Maxwell recommended Claimant undergo fusion surgery.
7. Claimant disclosed to his doctors that he used chewing tobacco on a regular basis. This was listed in Claimant's medical history.
8. Dr. Maxwell performed a fusion surgery at Claimant's spine level L5-S1, on August 10, 2005. The initial fusion surgery performed by Dr. Maxwell was unsuccessful. The surgery resulted in a pseudoarthrosis.
9. Dr. Maxwell did not give Claimant any instructions about the use of chewing tobacco prior to surgery.
10. The nurse case manager did not speak with Claimant about quitting tobacco use prior to the August 10, 2005 surgery. There are no pre-surgical notes taken by the case manager that specify that Claimant must stop using tobacco prior to surgery.
11. Dr. Raymond Pierce conducted the pre-operative exam, as well as the post-operative consultation. On August 10, 2005, after the surgery, Dr. Pierce offered Claimant nicotine patches to help Claimant stop using tobacco. Dr. Pierce did not order Claimant to stop using tobacco. Claimant does not recall this conversation as he was still groggy from surgery.
12. The instructions given to Claimant when he was discharged from the hospital do not specify that Claimant needed to cease using tobacco.
13. After the surgery, the nurse case manager made a handwritten note in her personal notes about Claimant needing to "quit chewing". She did not advise Claimant that he needed to quit chewing tobacco.
14. Claimant's medical chart does not note that Claimant was told to quit chewing tobacco until September 8, 2005.
15. On September 8, 2005, P.A.-C., Darrel Sieg instructed Claimant to stop chewing tobacco at the post-operative check-up.
16. Claimant understood that Mr. Sieg was advising against chewing tobacco for Claimant's general health and not because of his surgery.
17. Claimant's wife does not approve of Claimant's use of chewing tobacco. She would have remembered if any of the doctors had recommended to Claimant that he stop chewing.
18. On June 20, 2006, Claimant saw Dr. Maxwell for a final visit. Dr. Maxwell dictated in his notes that Claimant continued to chew tobacco against his advice.
19. Employer/Insurer issued a denial of benefits letter to Claimant on September 21, 2006.
20. Claimant was not informed that chewing tobacco would cause a pseudoarthrosis until he received the denial letter from Employer/Insurer. Claimant did not know that tobacco may cause his fusion to fail.
21. On October 4, 2006, Claimant saw Dr. Eckrich. Dr. Eckrich diagnosed a pseudoarthrosis and recommended that his fusion surgery be redone.
22. Dr. Eckrich wanted Claimant to be tobacco free for a number of months prior to surgery.
23. Claimant stopped using tobacco in November 2006, at the advice of Dr. Eckrich.

24. Dr. Eckrich performed another fusion surgery on Claimant on February 8, 2007. This fusion was successful and Claimant has returned to work.
25. Other facts will be developed as necessary.

ANALYSIS & DECISION:

The South Dakota Code regarding misconduct by a claimant is found at SDCL 62-4-37.

> 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.

SDCL § 62-4-37.

Employer/Insurer has the burden of showing 1) that Claimant committed "willful misconduct" and 2) that such willful misconduct was a proximate cause of the injury. *Wells v. Howe Heating & Plumbing, Inc.*, 2004 SD 37, ¶10, 677 N.W.2d 586, 590 (SD 2004).

The SD Supreme Court has recently clarified the law regarding willful misconduct. They have written that the statute "contemplates conduct that constitutes serious, deliberate, and intentional misconduct … the intentional doing of something with the knowledge that it is likely to result in serious injuries, or with reckless disregard of its probable consequences." *Holscher v. Valley Queen Cheese Factory,* 2006 SD 35, ¶48, 713 N.W.2d 555, 567-68 (internal citations omitted).

In *Fenner v. Trimac Transportation, Inc.*, the Supreme Court wrote:

> The term willful misconduct has long been defined in this state 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.

Fenner v. Trimac Transportation, Inc., 1996 SD 121, ¶ 9, 554 NW2d 485, 487 (citing *VerBouwens v. Hamm Wood Products*, 334 NW2d 874, 876 (SD 1983)) (emphasis in the original).

The Supreme Court has applied SDCL 62-4-37 to situations where a claimant willfully disregarded his physician's orders. See *Detling v. Tessier*, 244 NW 538 (S.D. 1932), aff'd on reh'g, 249 NW 686, and *Fenner v. Trimac Transportation*, 1996 SD 121, 554 NW2d 485. In *Detling* the court stated:

> "[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."

Id. at 541 (citing Honnold, *Workmen's Compensation*, vol.1, § 137, pp 521, 523).

In *Fenner*, the claimant was found to have "intentionally and deliberately disregarded his physical limitations and his physician's order with respect to his back injury." *Fenner* at ¶15. Furthermore, the Court said, "that a reasonable person … would realize that injury was not merely possible, but probable." *Id.*

The Court in *Fenner* also relies on Professor Larson regarding independent intervening causes of injury. They note:

> It is only when we come to cases involving the conduct of the claimant himself that the possibility of a break in the chain of compensable consequences is encountered. … [C]onduct of the employee related to the treatment of a compensable injury … should not break the chain of causation *unless it amounted to an intentional violation of an express or implied prohibition.*

Fenner at ¶12 (quoting Larson, at §13.21(d) (1996) (emphasis added)).

Employer/Insurer alleges that Claimant's act of continuing to chew tobacco is misconduct. For Claimant's actions to be misconduct under SDCL 62-4-37, Employer/Insurer must prove that 1) Dr. Maxwell instructed Claimant to stop chewing tobacco because of the increased risk of a failed fusion and 2) the chewing tobacco was a proximate cause of Claimant's failed fusion.

Dr. Maxwell, in his deposition testimony, admits that any instructions he gave to Claimant would be documented. There is no documented evidence that Dr. Maxwell instructed Claimant to quit chewing tobacco prior to the surgery. Furthermore, the discharge documents given to Claimant after the surgery did not restrict tobacco products. The first time Dr. Maxwell documented his recommendation to stop chewing tobacco was June 20, 2006. This was the last meeting between Claimant and Dr. Maxwell. Claimant's fusion had already failed to heal properly by the time Claimant was given a warning by Dr. Maxwell.

On two occasions, after the surgery in 2005, other medical professionals documented that they encouraged Claimant to stop using tobacco. Dr. Pierce, visited with Claimant while he was recovering from surgery. He recommended that Claimant use nicotine patches to help stop using tobacco. The second occasion occurred about one month after the surgery on September 8, 2005. Dr. Maxwell's physician assistant, Darrel Sieg, P.A.-C., became upset when he noticed a can of tobacco in Claimant's back pocket. Mr.

Sieg instructed Claimant to stop using tobacco. Mr. Sieg did not tell Claimant why he needed to stop using tobacco. Dr. Maxwell did not see Claimant on September 8, 2005.

The nurse case manager assigned to Claimant did not document that Claimant was made aware of the risk associated with tobacco use and fusion surgery until September 8, 2005. Karen Bielmaier, the most recent nurse case manager assigned to Claimant, was unaware when or if Dr. Maxwell cautioned Claimant against using tobacco. Ms. Bielmaier also did not know that tobacco use caused a higher rate of failures in fusion surgeries. Employer/Insurer asked Ms. Bielmaier to look through Claimant's medical history and all the doctor's notes to find when Claimant was told not to use tobacco.

Ms. Bielmaier responded in an e-mail to Employer/Insurer:

> One thing I have been thinking about is the fact that no where [sic] in Dr. Maxwell's notes does it mention that he counseled the client to quit chewing, except after the fact of having had the surgery back in 2005. That does coincide with what John has stated to me; that Dr. Maxwell never advised him to quit chewing prior to the surgery. The internal medicine Dr. Pierce did, the one who performed the pre-operative history and physical, but John does not recall that.

Claimant credibly testified that if he knew tobacco would cause problems with the fusion he would have quit chewing tobacco sooner. Claimant's wife also presented credible testimony. She was with Claimant at most of his doctor visits including the visit with Dr. Maxwell prior to surgery. Mrs. Tracy does not like chewing tobacco and was always looking for reasons for her husband to quit. If Dr. Maxwell had told Claimant to stop chewing, she would have remembered. Claimant was told by Employer/ Insurer at the time of his denial of benefits, that tobacco could be a cause of his fusion failing.

Claimant did not act with the realization that because he chewed tobacco a failed fusion was "probable". *Fenner* at 487. Claimant was unaware that chewing tobacco could affect the outcome of his surgery until he was denied benefits. The nurse case manager, a registered nurse, was also unaware that chewing tobacco would have an affect upon Claimant's fusion surgery. The fact that tobacco or nicotine affects bone growth is not common knowledge, even among medical professionals. After Claimant's surgery, Maxwell and the surgery center gave Claimant a list of prohibited activities. That list did not include an order to cease the use of chewing tobacco.

Employer/Insurer has failed to show that Claimant's action, by continuing to chew tobacco, was "willful misconduct". Employer/Insurer has failed to identify the orders that Claimant allegedly disobeyed. For the forgoing reasons, Employer/Insurer has failed to show that Claimant's action of continuing to chew tobacco was "willful misconduct" as contemplated by SDCL 62-4-37. Willful misconduct has not been proven by Employer/Insurer; therefore, it is not necessary to determine whether tobacco use was a proximate cause of Claimant's failed fusion.

Counsel for Claimant shall submit proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision, within 20 days of the receipt of this Decision. Counsel for Employer/Insurer shall have an additional 20 days from the date of receipt of Claimant'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, counsel for Claimant shall submit such stipulation together with an Order consistent with this Decision.

Dated this 27th day of May, 2008.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Catherine Duenwald
Administrative Law Judge