

SOUTH DAKOTA DEPARTMENT OF LABOR  
DIVISION OF LABOR AND MANAGEMENT

**ABRAHAM SANDAL,**

**HF No. 176, 2005/06**

**Claimant,**

**DECISION**

v.

**WAL-MART STORES, INC.,**

**Employer,**

and

**CLAIMS MANAGEMENT, INC.,**

**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. Abraham Sandal (Sandal) appeared personally and through his attorney of record, A. Russell Janklow. Comet H. Haraldson and Ryan W. Snell represented Employer and Insurer (Employer).

On January 7, 2005, Sandal was severely injured in Employer's parking lot. Another co-worker ran over Sandal with his car as Sandal was crossing Employer's parking lot on his way to work. The issues presented at hearing were whether Sandal's injury arose out of and in the course of his employment with Employer and whether Sandal's employment was a major contributing cause of his injury.

**FACTS**

Based upon the Department's record and the live testimony at hearing, the following facts have been established by a preponderance of the evidence.

Sandal was born in the Omo Region in southern Ethiopia where he grew up and attended school. In the mid-1970s, while Sandal was in high school, a civil war erupted and Sandal fled the country to the Sudan. In September 1983, Sandal legally emigrated from the Sudan to the United States. Sandal lived in Los Angeles, California for ten years where he obtained his work visa, attended classes, and became proficient in English.

In 1993, Sandal moved to Sioux Falls, South Dakota and obtained employment with John Morrell & Company. While working at John Morrell, Sandal became acquainted with Alemu Berhanu (Berhanu), who was also of Ethiopian heritage. Sandal and Berhanu worked together and became friends. Berhanu subsequently lost his job at John Morrell and moved to Sioux City, Iowa, but Berhanu frequently visited Sioux Falls and sometimes stayed with Sandal.

In April 1995, Employer hired Sandal as an associate to stock shelves and unload delivery trucks at its store located on Louise Avenue. Sandal worked the night shift, from 11:00 p.m. to 7:30 a.m. From the time he started working for Employer in 1995, Sandal was a very good, reliable, obedient, and dedicated employee.

In 1997 or 1998, during one of Employer's hiring periods, Sandal recommended Berhanu for a job. Employer hired Berhanu as an associate in the receiving department at the Louise Avenue store. Berhanu moved in with Sandal and the two lived in the same house for approximately two years. During this time, Sandal convinced his girlfriend, who was living in California, to move to Sioux Falls and they were married on October 7, 2000. For few months, Berhanu continued to live with Sandal and his wife and then Sandal and his wife purchased a home and moved out. Sandal and Berhanu continued to work together and occasionally socialized within the Ethiopian community in Sioux Falls. In 2001, Sandal became a United States citizen.

Sandal and Berhanu worked together for several years without any problems. However, at some point approximately six or seven months before the incident in January 2005, Sandal began having difficulty with Berhanu at work. Berhanu worked in receiving and he would occasionally come into contact with Sandal during their work shifts. For some unknown reason, Berhanu began antagonizing Sandal at work. Sandal explained:

[Berhanu] just - - I really don't know. He just behaving different way. And he started calling me names, and he - - as different people mentioned that working at Wal-Mart. And when I come down there, he's coming in my area and spitting at me and calling me names and leave. And I - - I don't know how I can solve or how I can make him cool down.

Sandal did not know why Berhanu began antagonizing him and surmised that Berhanu was jealous of his standard of living.

One particular time in the fall of 2003, Sandal was stocking in the furniture department and went to the receiving department to pick up a pallet jack to move furniture. Berhanu climbed up on the pallets and laughed at Sandal and called him vulgar names in front of other workers. This incident embarrassed Sandal, but he reported Berhanu's behavior to two different managers, Marco Taborda (Taborda), who was Berhanu's immediate supervisor, and Bob Starr (Starr). Starr talked to the other workers, but did not discuss the incident any further with Sandal. Sandal stated, "[a]nd [Starr] didn't come back, talk to me. It's just - - left the - - I just left it. And then I feel bad, but I can't do anything. I worked my job, my shift, and I went home."

Berhanu's antagonistic behavior toward Sandal continued into 2004. Berhanu called Sandal names, stuck his tongue out and spit at Sandal. Sandal complained to Starr about Berhanu's antagonistic conduct toward him at work on more than three or four occasions. However, this information was not relayed, as it should have been, to Ted Walnofer, Employer's Store Manager. Sandal did not press the issue with Employer about Berhanu's inappropriate behavior because Sandal was fearful of losing his job. Sandal testified, "I try my best because I know anywhere, not only Wal-Mart, anywhere in the U.S.A. at workplace, you have confrontation with your partner, you're going to lose your job right away. So I am hiding myself most of the time. And finally, I told management people. I told Marco and I told Bob."

Berhanu's antagonism toward Sandal continued outside of work. Shortly after the incident in the receiving department, Sandal was at the Shalom Restaurant in Sioux Falls, having coffee with friends. Berhanu was in the restaurant, apparently intoxicated, and threw a glass of wine at Sandal. Sandal left the restaurant, but Berhanu followed him outside and continued to harass him. Sandal called the police, but Berhanu left

before the police arrived. Another time, Berhanu verbally accosted Sandal outside of a neighborhood grocery store.

Another incident involving Berhanu happened after Sandal returned from a visit to Africa. In September 2004, Sandal was at Lalibela Restaurant in Sioux Falls and Berhanu came in and began insulting and physically threatening Sandal. Sandal immediately called the police. Based on Berhanu's conduct, Sandal decided to initiate action to obtain a protection order against Berhanu. Because of difficulty in obtaining service of process against Berhanu and other delays, the protection order was not entered until December 27, 2004.

Sandal immediately informed Employer about the protection order. Employer also received formal notice of the protection order from local law enforcement. Sandal and Berhanu usually worked shifts that overlapped by two hours, with Sandal clocking in around 11:00 p.m. and Berhanu clocking out around 1:00 a.m. As a result of the protection order, Employer immediately attempted to adjust Berhanu's hours so that he would not come into contact with Sandal. However, this adjustment was not successful. Therefore, as an additional measure to avoid contact between the two men at the end of Berhanu's work shift, Taborda began escorting Berhanu to the time clock past Sandal and the other employees and also to the front door of the building.

On the night of January 7, 2005, Sandal drove to Employer's premises to report for his regularly scheduled evening shift. Sandal arrived at work at approximately 10:00 p.m., an hour before his shift was scheduled to begin. It was a common occurrence for Employer's employees to arrive early before work and sit in the break room and have a cup of coffee or a soda and socialize before officially clocking in. Brian McClain, a night stocker for Employer for over twelve years, confirmed:

- Q: You typically come to work at Wal-Mart - - even though your shift starts at 11:00, you typically come to work at 10:15, 10:30; isn't that true?
- A: 10:30, yes, around there.
- Q: So you come at least a half an hour to work early and have coffee and sit in the cafeteria with other employees, don't you, Mr. McClain?
- A: Yes. Yes.
- Q: And in fact, it's pretty routine that other employees did that as well. That they would come at least a half an hour to 45 minutes early to sit around the cafeteria and drink pop in the break room before they go to work; isn't that true?
- A: Yes.
- Q: And there's no policy at Wal-Mart, that Wal-Mart had, that told employees that they shouldn't do that?
- A: No.

Walnofer agreed that employees arrived at work early to socialize in the break room before clocking in and that there was no policy against such behavior. In fact, Employer did not discourage employees from coming to work early in order to "hang around and drink coffee and visit prior to their work shift."

Walnofer admitted he was not aware of any other purpose for Sandal to be on Employer's property on the evening of January 7, 2005, other than to report to work for his regularly scheduled shift. In fact, Sandal would commonly arrive early before his

shift and make coffee, clean the sink, and talk with his manager and fellow co-workers before putting on his blue Wal-Mart vest and officially clocking in. Sandal testified:

- Q: Tell - - tell us: Why did you come to work at 10:00?  
A: Well, I can - - Ted like -- he likes my coffee. I come there and hung out and make coffee. And when I make coffee, Ted likes my coffee. And I make coffee and clean the sink and lay around there and go talking with friends. Then put on my vest or maybe I forgot my badge. I make my badge there. Actually, Wal-Mart is next to my home - - a second home of mine. I just come there and hung out around and do anything. That's for several years.  
Q: Was it routine for you to come to work 45 minutes, an hour - -  
A: Mostly I - - as Brian McClain mentioned, I come two, three days, yes. As he said, yes.  
Q: So a couple times a week - -  
A: A couple times a week.  
Q: - - you would come a half hour - -  
A: Yeah.  
Q: - - to an hour early? And it was routine for other employees to come early as well?  
A: Yes, that's right.  
Q: And you folks would visit, drink coffee, pop?  
A: Yeah, yeah. Talk with each other, yeah.

On the night of January 7, 2005, Sandal went to work because "I had been scheduled to work. I just come to work as normal." Sandal did not arrive early to shop or for any other purpose. The only reason Sandal was on Employer's premises when he was injured was to work his regularly scheduled night shift for Employer. Sandal intended to make coffee for his manager, clean the area, and visit with co-workers prior to the start of his shift. Sandal also thought he might be able to clock in early that evening prior to the start of his eight-hour shift. On a few prior occasions, Sandal had been permitted to clock in early for his 11:00 p.m. shift, sometimes as early as 10:00 p.m.

Employer expected its employees to park in its parking lot. When Sandal arrived on Employer's premises, he parked his car in the same area where he had parked throughout his employment with Employer. Sandal parked in an area that he always believed was designated for employee parking. However, Sandal actually parked in an area designated for customer parking. Employer had an unwritten rule that associates were to park in spaces identified by white lines. Even so, Employer never verbally warned Sandal that he was parking in a customer parking area.

When Sandal arrived at work, he wore a yellow sweat suit, an outfit that he had worn previously to work. Sandal planned to change into jeans that he kept in his car before officially clocking in. In addition, Sandal planned to put on his blue vest that he wore over his street clothes to designate him as an employee.

As Sandal walked toward the store entrance, a car driven by Berhanu, began bearing down upon him and immediately overtook him. Sandal testified, "[a]s I said before, I just come down. I parked on my routine parking lot, employee's parking lot, and I just get out of my car. It wasn't - - took long hours - - I mean minutes. Right away I just get out, and I'm about to - - four or five seconds the car was top of me. That's all I

remember. After that, I don't remember anything." Berhanu's car ran over Sandal from behind. Sandal was trapped underneath between the front wheels and dragged along the pavement until the car slammed into another vehicle parked in front of the store entrance. Sandal remained trapped underneath Berhanu's vehicle until emergency personnel arrived.

Immediately after the crash, Berhanu jumped out of the car and attempted to run from the scene. Customers who witnessed the incident chased Berhanu and quickly apprehended him. Employer's assistant manager, Brian Rehnelt, arrived at work right before the incident took place and was standing in the vestibule. Rehnelt heard the crash and went outside. Rehnelt joined the group of people holding Berhanu and asked Berhanu why he ran over Sandal. Even though most of Rehnelt's testimony was either evasive or self-serving, Rehnelt admitted that Berhanu told him that Berhanu ran over Sandal was because Berhanu had problems with Sandal at work.

Officer Matthew Starr of the Sioux Falls Police Department responded to the scene. Rehnelt informed Officer Starr that Sandal was on his way to work when Berhanu ran over Sandal because of problems with him at work. Officer Starr testified:

Q: I just want to be clear on that. He told you that Alemu Berhanu told him - - this would be Brian Rehnelt - - that Alemu told him that the problems - - the reason that he had run over Mr. Sandal was that he felt like he had problems with him working there at the Wal-Mart?

A: Yes, sir.

At hearing, Rehnelt confirmed that Berhanu had specifically told him after immediately being apprehended that problems with Sandal working for Employer was the motivation behind his assault on Sandal.

Sioux Falls Police Detective Bruce Millikan later interviewed Berhanu at the police station. After waiving his Miranda rights, Berhanu told Detective Millikan that he assaulted Sandal because he felt intimidated by Sandal at work and believed Sandal was trying to get him fired. Detective Millikan testified:

Q: As I understand it, some of the information that was given to you by Mr. Berhanu was that he was frustrated by the court system, frustrated with attorneys, and frustrated with his employer. Mr. Berhanu told you that?

A: I believe that to be correct, yes, sir.

.....

Q: I believe this information is essentially contained in your police reports in summary form. But as I understand it, when you interviewed Mr. Berhanu down at the police station after the incident, he had indicated to you that he felt intimidated by Mr. Sandal at work?

A: Correct.

Q: And that he felt like Mr. Sandal was going to try to get him fired from Wal-Mart?

A: Correct.

Q: And that there was name-calling and belittling going on between the two?

A: Yes, sir.

Q: And that Mr. Berhanu told you he was frustrated with the courts; frustrated with attorneys; and frustrated with his employer, Wal-Mart?

A: Yes, sir.

Q: And as I understand it, your conclusion, after having met with Mr. Berhanu for a couple-of-hour interview, is that he told you he was frustrated essentially from the protection order being in existence, that he had to leave Wal-Mart every night before [Sandal] showed up and was very frustrated by that?

A: Correct.

As a result of the incident, Sandal was severely injured and is still recovering from his injuries. Sandal was a credible witness. This is based on his consistent testimony and on the opportunity to observe his demeanor at hearing. Other facts will be developed as necessary.

## ISSUE

WHETHER SANDAL'S INJURY AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT WITH EMPLOYER AND WHETHER SANDAL'S EMPLOYMENT WAS A MAJOR CONTRIBUTING CAUSE OF HIS INJURY?

Sandal 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). Sandal 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). Under prior case law, there can be no question that Sandal's injury may be compensable even though it occurred before his work shift began. See Fair v. Nash Finch Co., 2007 SD 16; Steinberg v. South Dakota Dept. of Military and Veterans Affairs, 2000 SD 36; Piper v. Neighborhood Youth Corps, 241 N.W.2d 868 (S.D. 1976); Krier v. Dick's Linoleum Shop, 98 N.W.2d 486 (S.D. 1959).

To recover under workers' compensation, Sandal must prove by a preponderance of the evidence that he 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 he is hired to perform.'" Id. (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. However, while each factor must be analyzed independently, they are part of the general inquiry of whether the injury or condition complained of is connected to the employment. Therefore, the factors are prone to some interplay and 'deficiencies in the strength of one factor are sometimes allowed to be made up by strength in the other.'" Mudlin v. Hills Materials Co., 2005 SD 64, ¶ 9 (citations omitted).

*Did Sandal's injury arise out of his 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 his work.’” Id. (citation omitted). The injury “arose out of” employment if: “1) the employment contributes to causing the injury; 2) the activity is one in which the employee might reasonably engage; or 3) the activity brings about the disability upon which compensation is based.” Mudlin, 2005 SD 64, ¶ 11 (citations omitted).

Employer argued Sandal’s injury did not arise out of his employment because it was caused solely by Berhanu’s intentional act and there was no connection between Sandal’s employment and his injury. Despite Employer’s argument, Sandal presented more than sufficient evidence to establish that his employment contributed to causing his injury.

The event that triggered the workplace assault was Employer’s method of enforcement of the protection order against Berhanu at work. Berhanu told Rehnelt immediately after the incident occurred that he ran over Sandal “because of problems with [Sandal] working there at the Wal-Mart.” Berhanu also explained to Detective Millikan that he assaulted Sandal because he felt intimidated by Sandal at work, he believed Sandal was trying to get him fired, and he was frustrated with the court system, attorneys, and with Employer as a result of the protection order.

Employer readily admitted that once it was made aware of the protection order, it took steps to carry out the requirements of the protection order. Taborda immediately tried to change Berhanu’s work schedule so that it would not overlap with Sandal’s work schedule. But, this did not work. As Taborda explained, “[Berhanu] would leave at 11:00 and then [Sandal] would come to work at 11:00, it seemed like - - because the time clock’s here and then there’s a long hallway. They would always meet. So [Berhanu] - - we moved [Berhanu’s] time to 10:30. And he clocked out, and then we walked him out the door.” Employer had Taborda escort Berhanu to the door on several occasions to ensure that Berhanu would not come into contact with Sandal.

Even though Employer’s actions of enforcing the protection order against Berhanu were appropriate, nonetheless, these actions were the direct cause of the workplace assault. The evidence established that Employer’s actions of abiding by and enforcing the protection order were a triggering event for Berhanu and led to the incident on January 7, 2005. Therefore, there is a causal connection between Sandal’s injury and his employment.

Sandal established by a preponderance of the evidence that there was a causal connection between his injury and his employment and Sandal established by a preponderance of the evidence that his injury arose out of his employment.

*Did Sandal suffer an injury in the course of his employment?*

“[T]he words ‘in the course of’ employment ‘refer to the time, place and circumstances of the injury.’” Id. ¶ 15 (citations omitted). “An employee is considered within his course of employment if he is doing something that is either naturally or incidentally related to employment or which he is either expressly or impliedly authorized to do by the contract or nature of the employment.” Id.

Sandal’s injuries occurred on Employer’s premises before his regularly scheduled work shift. Employer expected all employees, including Sandal, to park in Employer’s parking lot. Sandal’s activities of parking in the parking lot on Employer’s premises and

walking toward the store entrance to go to work were activities that were naturally and incidentally related to his employment.

There was no other reason for Sandal to be present in Employer's parking lot at the time of the incident except to go to work. It was a common occurrence for employees to arrive to work early with the intention of sitting in the break room to socialize or have a beverage before clocking in. In fact, Employer did not discourage this practice. Therefore, when Sandal arrived early to work and started crossing Employer's parking lot, he was in an area where he might reasonably be and at a time when his presence there would normally be expected. It was solely Sandal's employment that caused him to be on Employer's premises before his work shift began. Sandal's coming to work early, parking in Employer's parking lot and walking toward the store entrance were activities in which he might reasonably engage. Thus, being in Employer's parking lot before the beginning of Sandal's work shift was impliedly authorized by Employer and as such, was in the course of Sandal's employment. Sandal established by a preponderance of the evidence that he suffered an injury in the course of his employment.

*Was Sandal's employment a major contributing cause of his injury?*

Sandal established by a preponderance of the evidence that his injury arose out of and in the course of his employment with Employer. SDCL 62-1-1(7) provides that "[n]o injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of[.]" There is no question here that Sandal's employment was a major contributing cause of his condition complained of, because his condition was caused by being run over by a co-worker in a workplace assault.

In summary, Sandal's injury on January 7, 2005, arose out of and in the course of his employment with Employer and Sandal's employment was a major contributing cause of his injury. Therefore, Claimant is entitled to workers' compensation benefits and Employer is responsible for those benefits. The Department shall retain jurisdiction over the issue of the extent and degree of Sandal's disability.

Sandal 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. Employer shall have ten days from the date of receipt of Sandal'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, Sandal shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 15<sup>th</sup> day of August, 2008.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Elizabeth J. Fullenkamp  
Administrative Law Judge