SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

LANCE KOLB, **HF No. 203, 2003/04**

Claimant, **DECISION**

vs.

EASTWAY BOWL, INC.,
a South Dakota corporation,

Employer,

and

FIRST DAKOTA INDEMNITY CO.,

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. A hearing was held before the Division of Labor and Management on December 3, 2004, in Sioux Falls, South Dakota. Lance Kolb (Claimant) appeared personally and through his attorney of record, Rory King. Michael S. McKnight represented Employer/Insurer.

ISSUES

1. Whether Claimant's injury arose out of and in the course of his employment with Employer?
2. Willful misconduct.

FACTS

1. Tom and Cindy Thomas have owned Eastway Bowl since January 1985. Tom is the general manager and Cindy handles the bookkeeping, insurance matters, paperwork and building maintenance.
2. Eastway Bowl consists of thirty-two bowling lanes, a fairly wide concourse area and a bar. The bar is separated from the bowling alley by a wall. There is a door into the bar from the bowling alley. Patrons of the bar have to use the bathrooms located in the bowling alley.
3. Tom and Cindy have a policy that all workers of legal drinking age are entitled to one free drink in the bar at the end of their shift when their work is completed. This policy was started by the previous owner of Eastway Bowl. Tom and Cindy continued the policy as a way to thank employees for a job well done and, in part, to increase business.
4. Claimant started working for Employer on January 8, 2001, as a mechanic. Claimant was twenty-two years old at the time. Claimant was later promoted to assistant manager.

5. As assistant manager, Claimant's duties were to do "anything that needed to get done," including working in the pro shop, taking care of locker rentals, inventory and doing anything the manager would do.
6. Claimant was paid a salary and worked regular hours, but did not punch a time clock.
7. Claimant primarily worked the night shift, which meant that he would close the facility for the night. This entailed several tasks. Claimant, or another employee, asked customers in the bowling alley to leave at closing time and locked the doors. It would take about twenty minutes or so to ensure that everyone was out of the bowling center. Second, Claimant counted the money in the till, ran tapes and reconciled the money in the till with the tapes. Claimant spent approximately twenty minutes completing this task. Once the money was counted, Claimant put the money in the safe in the office. Next, Claimant had to make sure other employees did their jobs and cleaned the bowling alley. Finally, Claimant helped the other employees clean the bowling area as needed.
8. It was Claimant's responsibility to ensure the bowling alley was picked up. Tom and Cindy used a professional cleaning crew to vacuum and clean the facility, but it was expected the bowling alley would be picked up before the cleaning crew arrived.
9. The events surrounding this workers' compensation claim occurred on May 28 and May 29, 2002.
10. On May 28th, a Tuesday, Claimant was working in his capacity as assistant manager. Josh Thomas, Tom and Cindy's son, also worked that night.
11. It was "quarter mania" night. This was a special promotion designed to attract more customers on weeknights and during the summer by offering reduced prices on bowling, beer and pop. Therefore, the bowling alley was busier than normal on May 28th.
12. Sometime between 11:00 p.m. and midnight, Claimant and Josh started to close the bowling center for the night.
13. Josh estimated most patrons left by 11:20 p.m. Josh worked on cleaning the bowling alley area while Claimant counted the till. Once Claimant put the money in the safe, he came out and helped Josh finish cleaning up.
14. Claimant testified that before he was done for the night, he stopped into the bar area, talked to a few people and ordered his free drink. Claimant stated his work was not done because he "had to do [his] final walk-through and make sure everything was picked up and close down the actual place and shut lights off and everything."
15. However, employees were not to get their free drink until after their work was completed. Claimant knew the free drink was available after he finished his shift.
16. Josh's timecard showed that he punched out at 12:30 a.m. When Josh left, everything was cleaned up.
17. Josh and Claimant walked into the bar together and then Josh left for the night.
18. Greg Witte, a former employee, and Terry Gunderson, an off-duty bar employee, were in the bar drinking when Claimant went into the bar.
19. Claimant sat and had his free drink with Witte and Gunderson. At some point, the three began discussing who was faster: Witte or Claimant. The three

discussed betting a round of drinks on who was faster and the loser of the race had to buy the next round of drinks.

20. Claimant was reluctant to run the race because he was wearing a pair of heavy Doc Marten dress shoes.
21. Claimant testified he got up and walked back into the bowling alley to finish his walk-through. Claimant stated he had to dump some ashtrays and put a bowling ball away. However, the evidence showed that Claimant had finished with his duties when he went into the bar and ordered his free drink.
22. Witte and Gunderson followed Claimant into the bowling alley. The three decided that Claimant and Witte would run a footrace on the bowling alley concourse.
23. Claimant and Witte lined up on the east side of the bowling alley and ran toward the pro shop located along the west wall.
24. Witte won the first race. After some discussion, Claimant, Witte and Gunderson decided that Claimant and Witte would run another race with the stakes being double or nothing. Both Claimant and Witte agreed.
25. During the second race, Claimant's shoe fell off and he tripped and fell forward into the cement wall. As he fell, Claimant put his left arm up to brace himself from falling forward onto his face. Unfortunately, this caused Claimant to break his left arm and dislocate his elbow.
26. At first, Claimant did not think anything was physically wrong with his arm. However, as soon as he stood up, Claimant immediately knew there was something wrong with his left arm.
27. For about twenty minutes, Claimant and other patrons discussed who would take Claimant to the hospital. Most people could not give Claimant a ride because they had been drinking. In addition, they also discussed making up a story so that the incident appeared to be work-related.
28. Witte left several minutes after the race because he was scared as "we were goofing around and I knew we shouldn't have been."
29. The short order cook finally offered to give Claimant a ride to the hospital.
30. It took approximately ten minutes to drive from Eastway Bowl to McKennan Hospital's emergency room.
31. The hospital records showed that Claimant arrived at the emergency room at 1:48 a.m. Claimant informed the emergency room physician that he hurt his left elbow when he fell backwards while taking out some garbage.
32. After the incident, Claimant informed Tom and Cindy that he injured his elbow falling backwards while taking out the trash.
33. Cindy completed a First Report of Injury on May 29, 2002. Based on Claimant's information, Cindy described Claimant's injury as he "stepped up onto step [and] fell backwards onto [left] elbow."
34. A few days later, Claimant told Tom and Cindy the truth about how his injury occurred. Claimant testified, "everybody knew what happened and Tom and Cindy I'm sure heard plenty of different versions of it and so I thought they just better know exactly what happened."
35. Claimant told Tom during the conversation that he "was goofing around" and "screwing around" when he hit the wall and broke his elbow.
36. On June 3, 2002, Cindy and Claimant wrote the following letter to Insurer:

> Please be advised that a claim was made for the above employee because of an accident which happened at our place of employment. After investigating the situation it was found that the employee had closed the bowling center and then entered the lounge and proceeded to have several beers. He was then challenged by a customer to a footrace in the bowling center which he acted upon. As he ran from one end of the concourse to the other, he stopped himself by using his arm and the wall. Thus the fracture of the left arm occurred. Since the employee was not acting in the scope of employment, and since he had totally closed the bowling center including locking the doors and putting away the money in the safe, and since alcohol was involved, no claim should have been made.

37. Insurer denied the claim on June 11, 2002.
38. Tom did not fire Claimant for participating in two footraces on the bowling alley concourse. Tom felt sorry for Claimant as he admitted he made a mistake and was very remorseful for his actions.
39. Tom and Cindy recognized they typically have young employees who work for them and Cindy would "parent them."
40. Prior to this incident, there was another footrace that took place on the bowling alley concourse. Witte raced Derek Lewin, an employee at the time. Claimant witnessed the race and saw Lewin fall down during the race.
41. Tom and Cindy were not aware that footraces had taken place on the bowling alley concourse until after Claimant's injury.
42. Running a race after work was not part of Claimant's job duties. Claimant admitted that running a race was "definitely" not part of his job duties and that Tom and Cindy would not have approved.
43. Claimant was not injured while performing a final walk-through, but during a footrace with a bar patron. Claimant admitted that Tom and Cindy had nothing to gain from the race.
44. Tom and Cindy both credibly testified that had they known about the footraces, they would not have tolerated the races. Tom testified he would not tolerate races on the concourse because "it's stupid. Somebody will get hurt." Cindy testified she never expected footraces would take place on the concourse. She does not tolerate that type of behavior from customers or their children and would not allow her employees to do so either.
45. Tom and Cindy did everything they could to hold Claimant's job open while he treated for his injury, including having other employee's cover his shift.
46. Eventually Claimant quit working for Employer and moved back to Aberdeen.
47. Claimant currently works several jobs and attends Northern State University studying graphic design.
48. There is no dispute that Claimant suffered a serious injury on May 29, 2002. Claimant suffered a dislocated elbow and broke his forearm in three places. Due to medical complications, Claimant has undergone fourteen surgeries. Claimant cannot extend his left arm completely straight or bend it all the way or roll his

wrist over all the way. Claimant has incurred significant medical expenses due to his injury.

49. Other facts will be developed as necessary.

ISSUE I

WHETHER CLAIMANT'S INJURY AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT?

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 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). "[B]oth elements of the statute, 'arising out of employment' and 'course of employment,' must be present in all claims for worker's compensation. However, while both elements of the statute 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.'" Id. ¶ 11 (citation omitted) (emphasis added).

Did Claimant'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). "[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 employment did not contribute to causing his injury. Claimant was injured while running a footrace with a bar patron after Claimant's work was completed. Claimant's duties did not include running a footrace and Claimant admitted he knew participating in a footrace was not part of his duties as an assistant manager.

Running in a footrace on the bowling alley concourse is not an activity in which Claimant might reasonably be expected to engage. It is true that the bowling alley is a recreational facility. However, Tom and Cindy did not tolerate racing on the concourse

from their employees. In addition, Cindy testified, "we don't tolerate it from customers or their children." Claimant knew that running in a footrace on the bowling alley concourse would not have been tolerated by Tom and Cindy. Tom and Cindy did not know that a prior footrace had taken place until after Claimant's injury and therefore, did not acquiesce to the activity.

More importantly, Claimant's employment activity did not bring about his disability. When an employee steps aside from employment for personal reasons by doing such activities "*for his own pleasure and gratification*," that employee is not allowed compensation for the injuries received. Id. ¶ 21. At the time Claimant injured himself, he was participating in a footrace for his own pleasure and gratification, either to earn a free drink or to avoid paying for a round of drinks. Employer derived no benefit from Claimant's decision to run in the footraces. Claimant stepped aside from his employment at the time he participated in the footrace. There was no causal connection between Claimant's injury and his employment. It was not reasonably foreseeable that Claimant would participate in footraces on the bowling alley concourse. Claimant's injury did not arise out of his employment.

Did Claimant suffer an injury in the course of his 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 '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).

At the time Claimant decided to participate in a footrace, he was not doing something that was naturally or incidentally related to his employment. There was nothing in Claimant's employment that required him to run in a footrace after hours. Claimant knew that running a footrace was "definitely" not part of his job duties and that Tom and Cindy would not have approved. At no time was Claimant participating in an activity in which any of Tom and Cindy's employees might reasonably be expected to engage. Tom and Cindy would not tolerate footraces on the bowling alley concourse. Claimant made a personal decision to participate in the footrace. Employer gained no benefit from Claimant's decision. Claimant's activities were outside of the contract or nature of his employment. Claimant stepped aside from his employment purpose for his own pleasure and gratification.

Claimant engaged in horseplay when he participated in the footraces on the bowling alley concourse. 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 N.W.2d 527 (S.D. 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)).

Because footraces do not constitute a part of Claimant's duties for Employer, "the question of whether [Claimant] was operating in the course of his employment becomes a question as to the seriousness of the deviation from his duties." Id. When considering the extent and seriousness of the deviation, it is necessary to look at the act and not the consequences. Id.

First, the extent and seriousness of Claimant's deviation was substantial. Claimant's job duties included locking up the bowling center, counting the till, supervising employees and helping to clean up the bowling alley. Claimant's duties did not require him to race a bar patron on the concourse of the bowling alley. There was no need for Claimant or any of the bar patrons to be out in the bowling area after the clean up had taken place. The race did not provide any benefit to Employer. The horseplay amounted to a total and serious deviation of his job duties because there is no way for Claimant to work while racing.

By participating in the footrace, Claimant completely abandoned his job duties. Even if Claimant walked from the bar into the bowling alley to finish his walk-through, he completely abandoned his job duties once he decided to compete in a footrace for personal gain. Participating in the footrace was not commingled with the performance of any of Claimant's job duties. It was for pure personal gain. Claimant completely deviated from his work to participate in the footraces. Claimant even admitted the footraces had nothing to do with his job duties.

There was no evidence to show that horseplay was an accepted part of employment at Eastway Bowl. Tom and Cindy recognized that the typically employed younger employees. However, they do not tolerate horseplay in their business, including running on the concourse. They did not accept such behavior from employees or customers. There was testimony that one other footrace took place prior to Claimant's injury. But, Tom and Cindy were unaware of the footrace until after Claimant's accident. Again, they did not condone such actions.

It is true that Tom and Cindy did not discipline any employee, including Claimant, for participating in the footrace. Tom and Cindy felt sorry for Claimant and what happened to him. Claimant was very apologetic for his actions. Cindy always gives people a second chance and Claimant showed remorse. Tom and Cindy's actions of not disciplining Claimant do not suggest that they condone horseplay in their business.

Eastway Bowl is a recreational facility. One would assume the nature of this type of employment may include some horseplay. However, the fourth factor states the employment "may be expected to include some such horseplay." Here, the horseplay is participating in footraces. There was no reason for Tom and Cindy to expect their employees' horseplay would include footraces. They did not tolerate such behavior from employees or customers.

After reviewing the four factors, the evidence demonstrated that the horseplay Claimant engaged in, participating in footraces, was a substantial deviation from his employment. Therefore Claimant did not suffer an injury in the course of his employment.

This was an unfortunate incident. Claimant suffered a serious injury and lives with a constant reminder of the accident. But, the evidence showed that Claimant's injury did not arise out of and in the course of his employment. Further, the evidence demonstrated that the horseplay Claimant engaged in was a substantial deviation from his employment. Based upon this determination, there is no need to address the issue of willful misconduct. Claimant failed to demonstrate that he suffered an injury arising out of and in the course of his employment. Claimant's request for workers' compensation benefits must be denied and his petition 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 14th day of June, 2005.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Elizabeth J. Fullenkamp
Administrative Law Judge