

**SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION
DIVISION OF LABOR AND MANAGEMENT**

CHARLES DOCKTER,

HF. NO. 38, 2013/14

Claimant,

v.

DECISION

RON'S EQUIPMENT PAINTING, INC.,

Employer,

and

FARMER'S INSURANCE GROUP,

Insurer.

This is a Workers' Compensation case brought before the South Dakota Department of Labor & Regulation pursuant to SDCL 62-7-12 and ARSD 47:03:01. The case was heard by Donald W. Hageman, Administrative Law Judge, on May 28, 2014, in Watertown, South Dakota. Lonald L. Gellhaus represented Claimant. J. G. Shultz represented Employer and Insurer.

Issues:

Whether an injury sustained by Charles Dockter arose out of and in the course of his employment with Ron's Equipment Painting, Inc.?

Facts:

Based upon the testimony and evidence presented at hearing, the following facts are found by a preponderance of the evidence:

1. Ron Bjerke is the president and owner of Ron's Equipment Painting, Inc. (Employer).
2. Bjerke currently employs nine individuals at his business. His employees typically work four ten-hour days, Monday through Thursday, with Friday through Sunday off. Occasionally, employees work half-days on Fridays.
3. Charles Dockter (Dockter) was employed by Employer during the week of July 16, 2013. His job duties primarily were power washing trucks, waxing and cleanup. He typically worked alone in the wash bay.

4. Bjerke has hired, fired, and re-hired Dockter numerous times over the years. Dockter was fired twice for dishonesty. On one occasion, Dockter called in sick, and then was spotted at a casino in Watertown. On another occasion he called in sick and went fishing. As such, Dockter has a reputation at work of being dishonest.
5. During the week of July 15, 2013, Dockter worked from Monday, July 15, to Wednesday, July 17. Dockter clocked out at 5:00 p.m. on July 17, 2013.
6. Several employees of the Employer testified that Dockter left work in a good mood on July 17, 2013, wishing them a good weekend. He had told none of them that he had injured himself. Dockter told one employee that he was going to see his attorney the next day. The testimony of these employees was credible. Their stories were all consistent and they had no reason to be untruthful.
7. Chad Wientjes, Employer's Assistant Manager, testified that Dockter did not complain of an injury on July 17, 2013. Wientjes is supposed to be informed of any work-related injuries. Dockter clocked out at 5:00 p.m. on July 17.
8. Dockter did not come into work on Thursday, July 18, 2013. Dockter had previously requested the day off to go see his lawyer in Aberdeen. Dockter wrote "see lawyer" on the space for July 18 on the time-off request calendar.
9. On Saturday, July 20, 2013, Dockter went to the Emergency Room in Ortonville, Minnesota. Dockter's medical records from that visit states, "It started hurting yesterday morning [July 19]. He was really not doing anything. It started hurting around 11 AM, more of an ache."
10. Dockter called Bjerke on Saturday, July 20, 2013, at approximately 4:30 p.m., after Dockter's visit to the Emergency Room. Dockter told Bjerke he had gone to the Emergency Room and had hurt his neck on Wednesday [July 17, 2013]. Bjerke then called Wientjes to ask him what he knew about the incident. Wientjes did not know anything about an injury to Dockter.
11. Dockter testified that he called Wientjes on the morning of July 18 to inform Wientjes he was not coming in that day because his shoulder was sore. Dockter's testimony was contradicted by Wientjes, who denied receiving such a call. Wientjes' testimony was more credible than that of Dockter. Wientjes has a good reputation at work and in the community and he had no reason to be untruthful.
12. At hearing, Dockter testified that he was injured on July 17, 2013, while washing a truck at work. However, he gave inconsistent testimony regarding the pain that occurred at the time of the injury. In one version, he stated that while washing a

truck his shoulder started feeling funny in there and described the pain as an ache. In the other version, his description of the pain was quite different. He stated that the initial pain was like a knife was stuck in there.

13. In an unrelated event, Ryan Oliver, an employee of Employer, shattered his finger when he closed the door of his house on it. Oliver discussed his injury with his co-workers, including Dockter. Dockter told Oliver that he should go tell Ron Bjerke that it happened at work so that he could collect workers' compensation. Oliver's testimony was credible. He had no reason to be untruthful.

14. Additional fact may be disused in the analysis below.

Analysis:

"A claimant who wishes to recover under South Dakota's Workers' Compensation Laws" must prove by a preponderance of the evidence that he sustained an injury 'arising out of and in the course of the employment.'" Fair v. Nash Finch Co., 2007 SD 16, ¶9, 728 NW2d623; Bender v. Dakota Resorts Management Group, Inc., 2005 SD 81, ¶7, 700 NW2d 739, 742 (quoting SDCL 62-1-1(7)) (additional 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." Fair v. Nash Finch Co., at ¶9. "These factors are construed liberally so that the application of the Workers' Compensation statutes is "not limited solely to the times when the employee is engaged in the work that he was hired to perform." Id. "Each of the factors is analyzed independently although "they are part of the general inquiry of whether the injury or condition complained of is connected to the employment." Id.

"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. (quoting Mudlin, 2005 SD 64, ¶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 'arose out of the' 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." Id. (quoting Mudlin, ¶11.

Dockter has the burden of proving that his injury "arose out of his employment". He has failed to do so here. His only evidence that he was injured at work was his testimony and his testimony was not credible. Dockter's description of his initial pain was internally inconsistent. His testimony that he called the Employer on July 18, 2013, was contradicted by a more credible witness. His characterization of the injury is contradicted by the medical records of the Ortonville Emergency Room. Dockter did not complain of or report an injury on July 17, 2013.

In addition, Dockter has a reputation for dishonesty at employer. He even suggested to a co-worker that the co-worker should file a false workers' compensation claim. When

the evidence in this case is considered in its entirety, Dockter falls far short of carrying his burden of proof.

Conclusion:

Counsel for Employer and Insurer shall submit proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision and if desired Proposed Findings of Fact and Conclusions of Law, within 20 days of the receipt of this Decision. Counsel for Claimant shall have an additional 20 days from the date of receipt of Employer and Insurer's Findings of Fact and Conclusions of Law to submit objections and/or Proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, Counsel for Employer and Insurer shall submit such stipulation together with a Final Order.

Dated this 5th day of March, 2015.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

/s/ Donald W. Hageman
Donald W. Hageman
Administrative Law Judge