SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

EILEEN J. FEDERICO,
Claimant,

HF No. 118, 2010/11

v.

DECISION

MEDICAL X-RAY CENTER, PC,
Employer,

and

DAKOTA TRUCK UNDERWRITERS
Insurer.

The Parties having agreed to have this case decided upon the record, and having been given the opportunity to supplement the record, and having stipulated to the facts in the case, and the Department being fully advised does make this Decision.

The credibility of the witnesses is not in dispute. None of the parties appeared in person before the Department. Claimant is represented pro se. Employer and Insurer are represented by attorney Michael J. McKnight. The Department advised Claimant of her right to hearing and her ability to supplement the record before the Department.

ARSD 47:03:01:08 governs the Department of Labor's authority to grant summary judgment:

> A claimant or an employer or its insurer may, anytime after expiration of 30 days from the filing of a petition, move with supporting affidavits for a summary judgment. The division shall grant the summary judgment immediately if the pleadings, depositions, answers to interrogatories, and admissions on 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.

The party seeking summary judgment bears the burden of demonstrating the lack of any genuine issue of material fact, and all reasonable inferences from the facts are viewed in the light most favorable to the non-moving party. *Railsback v. Mid-Century Ins. Co.*, 2005 SD 64, ¶6, 680 N.W.2d 652, 654.

The facts of this case are not at issue. Claimant, Eileen Federico worked for Medical X-Ray Center PC (Employer) on December 21, 2010. At that time, Employer carried workers' compensation insurance through Dakota Truck Underwriters (Insurer).

In the late afternoon of December 21, 2010, at about 5:05 pm, Claimant left her work with Medical X-Ray Center. She went to her car in the employee parking lot and attempted to start the car. The car would not start. The outside temperature was well below freezing and close to 0° degrees Fahrenheit. Claimant did not have the local phone

number for AAA, so she left her car and returned to Employer's office building. As she approached the building, she slipped and fell on the snow or ice that had accumulated on the sidewalk.

Claimant was assisted by her co-worker after she fell. Claimant broke two bones in her right leg and had emergency surgery that evening. Claimant was discharged from the hospital on December 23, 2010. Claimant has been off work from December 22, 2010 through February 28, 2011, as her leg is not weight bearing. Claimant's anticipated return to full duty work was March 14, 2011.

The issue in this case is whether Claimant's accident on December 21, 2010, arose out of and in the course of her employment with Employer.

In South Dakota, the law regarding proof in a worker's compensation claim is clear. The South Dakota Supreme Court, in the case of *Anna Fair v. Nash Finch Company*, clarified this issue. They wrote:

> A claimant who wishes to recover under South Dakota's Workers' Compensation Laws "must prove by a preponderance of the evidence that [s]he sustained an injury `arising out of and in the course of the employment.'" *Bender v. Dakota Resorts Management Group, Inc.*, 2005 SD 81, ¶ 7, 700 N.W.2d 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." Id. ¶ 9. The interplay of these factors may allow the strength of one factor to make up for the deficiencies in strength of the other. Id. (quoting *Mudlin v. Hills Materials Co.*, 2005 SD 64, ¶ 9, 698 N.W.2d 67, 71) (quoting 2 Arthur Larson, Larson's Workers' Compensation Law, § 29, 29-1 (1999)). 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. ¶ 8. 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. ¶ 9.
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> "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. ¶ 10 (quoting *Mudlin*, 2005 SD 64, ¶ 11, 698 N.W.2d at 71).) 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 [her] work." Id. (alteration in original). "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*, 2005 SD 64, ¶ 11, 698 N.W.2d at 71-72).

> The term "in the course of employment" refers to the time, place, and circumstances of the injury. Id. ¶ 11 (quoting *Bearshield v. City of Gregory*, 278 N.W.2d 166, 168 (S.D.1979)). An employee is acting "in the course of employment" when an employee is "doing something that is either naturally or incidentally related to his employment or which he is either expressly or impliedly authorized to do by the contract or nature of the employment." Id. (internal quotations and citations omitted).

Fair v. Nash Finch Co., 2007 SD 16, ¶ 9-11, 728 N.W.2d 623, 628-629 (2007).

In the case of *Fair v. Nash Finch Co*., the injured party, Anna Fair clocked out of her job with Family Thrift (a convenience store owned by Nash Finch); walked through the same store to purchase some items; paid for these items about three (3) minutes after clocking out; and finally walking towards the door of the business tripped over a rug near the entrance of the store. This trip aggravated a preexisting injury that was covered by workers' compensation insurance. The court, in presenting their rationale, wrote:

> We have recognized that "`accidental injuries suffered by an employee while leaving the building wherein his actual work is being done [are] generally deemed to have arisen out of and in the course of the employment within the meaning of the workmen's compensation acts.'" *Steinberg*, 2000 SD 36, ¶ 22, 607 N.W.2d at 603 (quoting *Donovan v. Powers*, 86 S.D. 245, 193 N.W.2d 796, 799 (S.D.1972)). … The rationale in *Steinberg* was based on the fact that the injuries occurred "in an area where [the employee] might reasonably be and at the time when her presence there would normally be expected." *Steinberg*, 2000 SD 36, ¶ 22, 607 N.W.2d at 603 (quoting 1 Larson's Workers' Compensation Law § 13.01[2][b], at 13-8). … Similarly, in *Howell v. Cardinal Industries, Inc.*, we held that an employee who fell in her employer's parking lot after completing her shift was entitled to workers' compensation benefits. 497 N.W.2d at 712. We noted that crossing her employer's parking lot after work was "naturally and incidentally related to her employment." Id. (quoting *Bearshield*, 278 N.W.2d at 168).

Fair at ¶13. The Court looked at the Virginia Supreme Court decision of *Briley v. Farm Fresh, Inc.,* 240 Va. 194, 396 S.E.2d 835 (1990). The SD Court wrote, "Because the [VA] court was required to liberally construe the workers' compensation statutes, it declined to "permit such a hairsplitting analysis where . . . the injury occurs on the employer's premises after a brief deviation and before the employee departs following completion of work."" Id. at ¶15 (quoting *Briley v. Farm Fresh, Inc.,* 240 Va. 194, 396 S.E.2d 835 (1990)).

In the *Fair* case, the South Dakota Supreme Court adopted the Larson approach for determining whether post-shift accidents are compensable. Id. at ¶16, 631. The two-part inquiry is "1) whether the employee was injured during a 'reasonable period' after or before working hours; and 2) whether the employee was engaged in activities necessary or reasonably incidental to her work." Id. (citing 2 Larson's Workers' Compensation Laws § 21.06 [1][a], 21-26 (2006)).

> Larson defines "incidental" as "usual and reasonable both as to the needs to be satisfied and as to the means used to satisfy them." 2 Larson's Workers' Compensation Laws § 21-08 [2], 21-46 (2006). Under Larson's approach when an employee spends a "substantial amount of time" before leaving work engaged in unmistakably personal pursuits, the interlude is not within the scope of employment. [FN5]
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> FN 5. Activities that have been considered within the scope of employment include: arriving at work early to change clothes and have a cup of coffee or **leaving work late because of commuting arrangements**. 2 Larson's Workers' Compensation Law § 21.06[1][a] (2006).

Id. at §16, 631 (emphasis added).

In the current case in front of the Department, Claimant left work, went to her vehicle in the parking lot, and slipped in the parking lot while walking back into Employer's building because she needed to make the necessary arrangements to leave work (find a phone number for AAA). Going to work or leaving from work by passing through the employer's parking lot has been found by the Supreme Court to be an activity "necessary or reasonably incidental to her work." See *Progressive Halcyon Insurance Co. v. Philippi*, 2008 S.D. 69, 2008 S.D., 754 N.W.2d 646 (2008); See also *Steinberg v. S.D. Dept. of Military and Veterans Affairs*, 2000 S.D. 36, ¶22, 607 N.W.2d 596, 603; *Howell v. Cardinal Industries, Inc.*, 497 N.W.2d 709, 709 (SD 1993); *Walz v. Fireman's Fund Ins. Co*., 1996 S.D. 135, ¶¶1-2, 556 N.W.2d 68, 69.

Liberally construing the law, as is required in South Dakota, shows that Claimant's accident arose out of and in the course of her employment with Employer. Summary Judgment is granted in favor of Claimant. An Order by the Department will follow this Decision.

Dated this 28th day of March, 2011.

SOUTH DAKOTA DEPARTMENT OF LABOR

/s/Catherine Duenwald
Catherine Duenwald
Administrative Law Judge