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

AARON TERVEEN, **HF No. 120, 2011/12**
Claimant,

v. **DECISION**

SOUTH DAKOTA DEPARTMENT OF TRANSPORTATION,
Employer,

and

SOUTH DAKOTA WORKERS' COMPENSATION FUND,
Insurer,

This is a workers' compensation proceeding brought before the South Dakota Department of Labor and Regulation pursuant to SDCL 62-7-12 and Chapter 47:03:01 of the Administrative Rules of South Dakota. The parties have agreed to bifurcate the issues of compensability and entitlement to benefits, and submit this matter to the Department on briefs. The Department has received the following submissions:

- Stipulated Facts
- Depositions of Mandi Terveen, Thomas Janklow, and Michael Carlson
- Claimant's Brief Re: Compensability
- Brief of Employer and Insurer
- Claimant's Reply Brief Re: Compensability

Issue
Whether Claimant sustained an injury arising out of and in the course of his employment.

Facts
Aaron Terveen (Claimant or Terveen) was employed by the South Dakota Department of Transportation (DOT) at the Belle Fourche, South Dakota location. Terveen's job as a journey transportation technician often required him to travel to various locations outside Belle Fourche and stay away from home. Terveen was on the road daily during the busy summer season and 70 percent of the time in the winter. His schedule varied depending on what the specific job assignments required. He was reimbursed for his travel time and travel related expenses, including mileage when he drove his personal vehicle, all pursuant to South Dakota statute and Administrative Rules, and DOT policy.

On November 14, 2011, Terveen left Belle Fourche on a work related trip to Yankton, South Dakota. On November 16, 2011, he was returning to Belle Fourche. At 6:28 p.m. he made plans to meet his family for dinner in 15 minutes at the Belle Inn. The Belle Inn is located across the road from the Belle Fourche Department of Transportation shop where Terveen generally checked in when he returned from work-related travel. Sometime between 6:30 p.m. and 7 p.m., Terveen was seriously injured in a single vehicle accident. The accident occurred about one half mile off Highway 85, on a sharp curve on Prairie Hills Road, a gravel road within the Belle Fourche city limits. Prairie Hills Road is accessible only from Wood Road, which itself is only accessible from Highway 85. It is reasonable to conclude that he turned off Highway 85 while driving north and traveled west on Wood Road on to Prairie Hills Road. Due to his injuries, Terveen does not recall the accident or the period of time immediately prior to the accident. He does not recall why he had turned off onto Prairie Hills Road.

Terveen occasionally worked for Tom Janklow on the weekends repossessing vehicles. Terveen was required to get an order for repossessing a vehicle, obtain a truck from Janklow's Rapid City office, and pick up the vehicle specified on the order for repossession. He did not get paid unless he actually repossessed a vehicle. He was not compensated for generating leads or checking the repossession accounts. Janklow spoke to Terveen on the phone on November 16, 2011, after passing each other on the highway. They did not talk about Janklow's business and Janklow did not give Terveen any orders for vehicle repossession on November 16, 2011. At the scene of the accident, police recovered Terveen's personal blackberry device. The web browser was open to one of Janklow's repossession accounts indicating a vehicle to be possessed at 19272 Prairie Hills Road.

Terveen filed a Petition for Benefits seeking workers' compensation benefits related to his motor vehicle accident on November 16, 2011. Employer/Insurer has denied compensability of his claim, stating that the accident did not arise out of and in the course of his employment for DOT.

Other facts will be developed as necessary within the analysis.

Analysis

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. *Horn v. Dakota Pork*, 2006 SD 5, ¶14, 709 NW2d 38, 42 (citations omitted). To recover under workers' compensation law, a claimant must prove by a preponderance of the evidence that [h]e sustained an injury "arising out of and in the course of the employment." SDCL 62-1-1(7); *Norton v. Deuel School District #19-4*, 2004 SD 6, ¶7, 674 NW2d 518, 520. "Both factors of the analysis, arising out of employment and in the course of employment, must be present in all claims for workers' compensation. The interplay of these factors may allow the strength of one factor to make up for the deficiencies in strength of the other." *Fair v. Nash Finch Co.*, 2007 SD 16 ¶9, 728 NW2d 623 (citations omitted).

“For an injury to arise out of the employment, it is necessary and sufficient that there be a causal connection between the injury and the employment, but the employment need not be the direct or proximate cause of injury, it being sufficient if the accident had its origin in the hazard to which the employment exposed the employee while doing his work”. *Krier v. Dick’s Linoleum Shop*, 78 SD 116, 98 NW2d 486 (1959). 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. *Mudlin v. Hills Materials Co.,* 2005 SD 64, ¶11, 698 NW2d 67 (citations omitted).

“[T]he words in the course of employment refer to the time, place and circumstances of the injury.” *Id*. at ¶ 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*. Terveen was an outside employee in that his work required travel away from his home for which he was compensated. “The course of the employment of an outside employee is necessarily broader than that of an ordinary employee. His work creates the necessity of staying at hotels, eating at various places, and of travel in going to and returning from these places”. *Krier,* 78 S.D. 116, 98 N.W.2d 486 (1959)(citations omitted).

Terveen argues that had he not been engaged in work related travel at the time of the accident, he would not have sustained severe injuries on November 16, 2011. Thus the accident had its origin in the hazard to which the employment exposed him and at the time of the accident he was engaged in an authorized activity naturally related to his employment.

Terveen further argues that his deviation from the direct route home to do a brief personal activity does not preclude a finding that his injury is compensable. Terveen relies on *Fair v. Nash Finch Co*., in which an employee finished her regular shift as a grocery store clerk and then stayed to do some personal shopping. As Ms. Fair was leaving the store she was injured. The South Dakota Supreme Court held that her brief deviation to do personal shopping was a minimal amount of time and did not remove her from the scope of her employment. The Court held, “These factors [arising out of and in the course of employment] 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 she was hired to perform.” *Fair*, 2007 SD 16 ¶9, 728 NW2d 623. Claimant concedes that he took a slight detour from his main route, but argues that his detour, like Fair’s was very brief and did not remove him from the scope of his employment.

Terveen lastly argues that his deviation was of the type that his employer expected and condoned. He asserts that Employer had no policy prohibiting employees who traveled from engaging in personal activities that were not work related, such as shopping or visiting family members. At the time of his accident, Terveen had turned down a side road, presumably to drive by the residence where a vehicle being repossessed was

parked. Terveen deviated from his direct route on November 16, 2011, to satisfy his own curiosity about the location of the vehicle that he might seek to repossess at some later time. He was not working for Janklow at the time of the accident nor was he authorized to repossess the vehicle at that time[1]. Terveen argues that Employer could have anticipated that he engaged in personal errands or short detours during his work related travel. Furthermore, Terveen asserts that at the time of the accident he had returned to his work purpose, as evidenced by the fact that he had passed the residence at 19272 Prairie Hills Road and he was returning to the main road back to the DOT shop.

Employer/Insurer argues that Terveen was engaged in a non-DOT related side trip when he was injured, which removed him from any circumstances which could have given rise to an injury arising out of and in the course of his employment. Employer/Insurer argues that this case is similar to *Lloyd v. Byrne Brands*, in which the Court denied Lloyds claim because it "arose from his personal decision to attend a family event independent to any company requirement or motive." *Lloyd v. Byrne Brands*, 2011 SD 28, 799 NW2d 727. Employer/Insurer argue that when Terveen reached the outskirts of Belle Fourche he took a detour on a gravel road based on a personal decision to pursue his part time business interests which were totally unrelated to his DOT employment, and therefore severed any connection with his employment by doing so. Employer/Insurer argues that Terveen had "stepped aside from his employment to do some act of his own not connected with or contemplated by the employment." *Krier*, 78 SD 116, 98 NW 2d 45 (1959). Employer/Insurer claim that it could have in no way anticipated such a deviation.

Employer/Insurer lastly argues that Claimant deviated from his direct route and that the detour onto Prairie Hills Road was not part of any logical route from Yankton to Belle Fourche. By intentionally taking that road for a purpose other than his employment indicates that the side trip was not compensable. Employer/Insurer focus on deviation from direct route as detailed in the administrative rules, specifically ARSD 5:01:03:12, ARSD 5:01:03:13 and ARSD 5:01:03:15. ARSD 5:01:03:12 provides,

> Interrupted travel or indirect route of travel at employees own expenses. If a state employee, for the employees own convenience, travels by an indirect route of interrupts travel by a direct route, the extra expenses shall be borne by the employer.

ARSD 5:01:03:13 states,

> Travel expense reimbursed for direct route only. Reimbursement for travel expenses shall be based on charges which would be incurred by using a direct route.

[1] The vehicle in question was never repossessed. Janklow testified that he did not even know about the repossession order after the accident. By that time the account had been satisfied and there was no longer an order out to repossess the property.

ARSD 5:01:03:15 goes on to state,

> Point of return to duty status. Any employee who engages in interrupted indirect travel is considered to be returned to state business when the employee arrives back at the point from which the employee left duty status or at some point equidistant or near the point of destination.

Employer/Insurer's argument regarding direct route is rejected. The administrative rules relied upon are for determining reimbursement for mileage, not liability for workers' compensation purposes. Employer/Insurer's argument that the side trip could not have been anticipated is inconsistent with the evidence and as such is also rejected. The administrative rules regarding reimbursement for mileage specifically provide for situations where employees take indirect routes and interrupted travel, implying that such activity is anticipated by Employer. Mike Carlson, Claimant's supervisor testified in his deposition that it is expected that most employees will stop to do personal errands, eat, visit family and engage in non-work related activities from time to time and there is no DOT policy prohibiting employees from doing so.

This case is distinguishable from *Lloyd v. Byrne Brands*, where Claimant had chosen to take a non-prearranged and unreimbursed trip from Omaha, where he was working for his employer, to Sioux Falls for the exclusive purpose of attending his wife's birthday party. In *Lloyd*, the Claimant took the trip solely for his own benefit, on his day off. No aspect of the trip benefitted his Employer. *Lloyd*, 2011 SD 28 ¶7, 799 NW2d 727. In the case at hand, the primary purpose of Terveen's trip from to Yankton and back to Belle Fourche was DOT related business. While Terveen made a slight detour for whatever personal purpose, it does not automatically relieve Employer/Insurer of liability for his injuries.

There is only circumstantial evidence as to why Terveen was on Prairie Hills Road at the time of the accident. It was unlikely that he was doing business for another part time employer. No vehicle was repossessed, no order had been assigned to Claimant to repossess a vehicle, and his part time employer testified that he did not instruct Terveen to do so when they spoke on the phone shortly before the accident. Like the employee in *Fair*, Terveen engaged in a brief deviation from the direct route to the DOT shop. The Supreme Court has previously held "the mere fact that an employee deviates from [their] work does not preclude a finding that [their] injuries are compensable". *Fair*, 2007 SD 16 ¶16, 728 NW2d 623.

The Supreme Court in *Fair* adopted Professor Larson's two part test to determine whether an employee has suffered a compensable injury in circumstances such as this, 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 [their] work. Larson defines "incidental" as usual and reasonable both as to the needs to be satisfied and as to the means used to satisfy them." Under Larson's approach when an employee spends a substantial amount of

time engaged in unmistakably personal pursuits, the interlude is not within the scope of employment. *Id*.

In this case, Terveen spent less than ten minutes driving down Prairie Hills Road before returning toward the main road to the DOT shop when the accident occurred. This can fairly be characterized as a reasonable period of time. Terveen was not engaged in a personal pursuit for a "substantial amount of time" before returning to the direct route. Therefore, Terveen's "personal proclivity" had come to an end as he was returning to the highway. The Department must next consider whether his activities were necessarily or reasonably incidental to his work. Terveen was injured while returning to the main highway after a brief deviation from his direct route to the DOT shop. While it was reasonable to expect employees to drive a direct route when returning from a work trip, it is also reasonable in this case to expect Terveen to engage in personal shopping, stopping to see friends, or making a short drive past a property during the course of a long trip that took him across the entire state. Employer conceded that employees routinely stop at Cabelas to purchase hunting equipment when passing through Mitchell or stop to see friends and family along the way, when on work related trips. Michael Carlson, one of Terveen's supervisor testified that there was no DOT policy prohibiting this kind of activity. Thus, under the facts of this case, Terveen's brief trip, less than a few miles off the direct route can fairly be characterized as necessarily or reasonably incidental to his work.

Claimant has met his burden to show he sustained an injury arising out of and in the course of his employment.

Conclusion

Claimant shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within ten (10) days from the date of receipt of this Decision. Employer/Insurer shall have ten (10) days from the date of receipt of Claimant's proposed Findings of Fact and Conclusions of Law to submit objections thereto or to submit proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Claimant shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 19th day of June 2013.

SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION

/s/ *Taya M. Runyan*

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Taya M. Runyan
Administrative Law Judge