SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

DONNA DUBRAY, PECIAL ADMINISTRATOR OF THE ESTATE OF BRANDI STANDING BEAR,	**HF No. 174, 2007/08**
Claimant,	
v.	**DECISION**
GOLDEN GOOD FOODS, D/B/A TACO JOHNS,	
Employer,	
and	
CONTINENTAL WESTERN INSURANCE COMPANY,	
Insurer.	

This is a Workers' Compensation proceeding brought before the South Dakota Department of Labor pursuant to SDCL 62-7-12 and ARSD 47:03:01. A hearing was held before the Division of Labor and Management on August 27, 2009, in Rapid City, South Dakota. Lee "Kit" McCahren represented Claimant. Robert B. Anderson represented Employer and Insurer.

Issues:

Whether Brandi Standing Bear's death arose out of and in the course of her employment with Taco Johns?

Facts:

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

1. On September 1, 2004, Brandi Standing Bear (Claimant)[1] worked as a shift manager for Golden Good Foods, d/b/a Taco Johns (Employer) on Haines Avenue in Rapid City, South Dakota. Tammy Hamilton was also a shift manager. However, when Claimant and Hamilton worked together Hamilton was typically in charge,

[1] Both Brandi Standing Bear and the Estate of Brandi Standing Bear will be referred to as "Claimant" in this Decision.

2. On September 1, 2004, Employer was insured by Continental Western Insurance Company for purposes of Workers' Compensation.

3. On August 31, 2004, Claimant, Hamilton and five other employees worked the evening shift until closing. That night was busier than usual. The shift included three hours in which the store had over $600.00 in sales each hour.

4. On August 31, 2009, Employer's store closed to the public at 11: 00 p.m. MDT. It took most of the employees until 11:24 p.m. MDT to clean up and finish their duties for the night. Claimant and all the employees, except Hamilton, clocked out at 11:24 p.m. MDT.

5. Being in charge of the evening crew on August 31, 2004, Hamilton was required to complete the shift's paperwork. Consequently, Hamilton was the last employee to clock out. Hamilton clocked out at 11:32 p.m. MDT. Hamilton was also the last employee to leave the building at 11:33 p.m. MDT. The employees were paid up until they clocked out.

6. Many of the people who worked for Employer were friends. On occasions, the employees would get together after work to "hang out" and drink beer. The employees typically went to one of their homes to hang out after work.

7. At closing time on August 31, 2004, the work crew was excited about the events of the busy evening shift and several decided to "hang out" and "drink a few beers" after work. However, Hamilton had to stop at Wal-Mart on the way home and her car was not working properly so they decided to get together on Employer's parking lot rather than go to one of their homes.

8. The employee get-togethers after work were not sanctioned by Employer. Jennifer Shama, one of the co-owners of the business, testified she was not aware of the gathering by her employees on August 31, 2004, and would not have approved the get-together on the business' property had she known about it.

9. On August 31, 2004, Claimant, Hamilton and two other employees, Tom Jacobson and Jade Burroughs, stayed after work to hang out and drink beer. Three other employees went home after their shift ended. No pressure was exerted for the employees to stay.

10. Claimant and Hamilton went across the street and bought beer. They returned to Employer's property, where the group sat, and "bull-shitted" and drank beer in a partially built shed on Employer's property next to the parking lot.

11. The group's "bull shitting" on August 31, 2004, primarily consisted of conversations about their boyfriend, girlfriends, Claimant's new baby and the kinds of things friends discuss. Some of the group may have talked about the evenings sales in passing.

However, Jade Burroughs testified she did not recall discussing anything work-related after they clocked out that night.

12. After sitting in the garage and drinking beer for more than an hour, the group noticed a man, later identified as John Krogman, looking over the fence at them. Hamilton asked whether the man needed anything. Jacobson stated the man was naked. The man then ran into a camper located off Employer's property.

13. Claimant and Hamilton threw clumps of dirt at the camper in which the man ran. Claimant and Hamilton yelled at the man to get out of the camper and called him perverted. Claimant and Hamilton went over to the camper to look inside the camper. Claimant indicated to Hamilton she saw the man and kicked the door closed. Claimant and Hamilton then returned to Employer's parking lot.

14. After Claimant and Hamilton returned to Employer's parking lot, Hamilton saw the man coming toward her. The man grabbed Hamilton by the neck and stabbed her. Claimant went over to help Hamilton and began fighting with the man. Claimant had a bottle in her hand and tried to hit the man with it.

15. While Claimant was fighting with the man, Hamilton realized she had been stabbed. Hamilton than warned Claimant the man had a knife. About this time the man pinned Claimant to the ground and stabbed her in the chest.

16. Hamilton struck the man in the head with a cinder block and knocked the man off Claimant. Jacobson then ran across the parking lot and kicked the man in the head until he was subdued.

17. The Rapid City police were called to the scene on September 1, 2004, at 1:38 a.m. MDT. Claimant died as a result of her stab wounds at sometime after 1:00 a.m. MDT, September 1, 2004.

18. Additional facts may be discussed in the analysis below.

Analysis:

In this case, Claimant seeks Workers' Compensation benefits for Standing Bear's death. "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.'" 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. "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. Hill Materials Co., 2005 SD 64, ¶9, 698 NW2d 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. "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 [her] 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.

"The term 'in the course of employment' refers to the time, place, and circumstances of the injury." Id. (quoting Bearshield v. City of Gregory, 278 NW2d 166, 168 (SD 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.

The South Dakota Supreme Court has explicitly adopted the approach taken by Dr. Larson, when analyzing cases where an employee is injured after their work shift has ended. The Court stated:

> Under Larson's approach, to determine whether an employee has suffered a compensable injury, the inquiry is two-part: 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. 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} 2 Larson's Workers' Compensation Laws § 21.06[1][a], 21-26 (2006). Fair v. Nash Finch Co. 2007 SD 16, at ¶16.

In this case, Claimant has not satisfied either part of Dr. Larson's analysis. Claimant's stabbing did not occur within a "reasonable period" of time after her work shift ended. Claimant clocked out of work at 11:24 p.m. MDT. Claimant's stabbing occurred shortly before 1:38 a.m. MDT, a time period of about two hours. While claimants have prevailed in cases where their injuries occurred a few minutes after their work shift ended, the

court in Haagenen v. Wyoming Workers; Compensation Division, denied compensation for a worker who was injured two and one-half hours after his work ended.

Claimant was also not engaged in activities "necessary or reasonably incidental" to her work at the time of her stabbing. Claimant and the other employees congregated in the garage on Employer's property primarily to socialize as friends and drink beer. While the energy generated from the busy night may have been the catalyst for the gathering, work played little role in the events of that night. The group did not engage in any work activities. The group talked about work only in passing. They talked about boyfriends, girlfriends, the Claimant's new baby, and the types of things friends talk about. They drank beer. Claimant and Hamilton threw dirt clods at Krogman as he stood in a camper off the Employer's premises. The only reason the group congregated on Employer's property was Hamilton's need to stop at Wal-Mart on the way home, also her car was not working properly.

Footnote number 5 of the Fair decision summarizes the analysis in this case. That footnote states:

> 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] pa] (2006). In contrast, remaining at the workplace to drink beer and become intoxicated may not be considered within the scope of employment. *Id.*

(emphasis added), Fair v. Nash Finch Co. , 2007 SD 16 at ¶16 n.5. Claimant/s death was sad and tragic. However, it was not compensable under the workers compensation laws of this state.

Conclusion:

Counsel for Employer and Insurer shall submit proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision, 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 Proposed Findings of Fact and Conclusions of Law to submit objections or Claimant may submit 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 an Order.

Dated this _9th____day of December, 2009.

SOUTH DAKOTA DEPARTMENT OF LABOR

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