SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

MAE FRIER,
Claimant,

HF No. 212, 2009/10

v.

DECISION

HY-VEE, INC.,
Employer,

and

EMC RISK SERVICES, LLC,
Insurer.

This is a workers' compensation proceeding before the South Dakota Department of Labor, pursuant to SDCL 62-7-12 and ARSD 47:03:01. The above-entitled matter came on for hearing before Catherine Duenwald, Administrative Law Judge, Division of Labor and Management on January 25, 2011, in Sioux Falls, South Dakota. Attorney Glenn Boomsma represented Claimant, Mae Frier (Claimant). Attorney Michael McKnight represented Employer and Insurer, Hy-Vee, Inc. and EMC Risk Services, LLC (Employer and Insurer). The witnesses presenting testimony at hearing were: Claimant, Hiroshi Tsuji, and Sherri Javers.

ISSUE

The Parties have agreed that the file be bifurcated. The scheduled hearing was to determine whether Claimant's injury arose out of and in the course of her employment with Employer.

FACTS

At the date of hearing, Claimant was 71 years old, widowed, and living alone in Sioux Falls, South Dakota. Claimant has worked for Employer, as a salad bar clerk since February 2007. She works between 29 and 36 hours per week. Claimant's job duties include, but are not limited to, setting up the salad bar, cutting fruits and vegetables, taking customer orders, and washing dishes. Claimant moves quickly at work, and is well known by Employer and co-workers to walk fast.

Claimant has a friendly working relationship with her co-workers. Claimant and her co-workers belong to a lottery pool, where each pool member puts in a dollar and lottery chances are purchased for the benefit of the group. Claimant would visit with a co-worker Hiroshi Tsuji (Hiro) regarding the lottery pool about four times per month as Hiro collected the money for the pool. Hiro works part-time in the bakery department which is just down the hallway from the salad bar area. In May 2010, Claimant and Hiro had a friendly relationship in that they would joke around with each other on occasion. Hiro did not come by the salad bar trim room (prep room) very often. Claimant, her salad bar co-workers, and Hiro also had a “cold hands” joke or game that they did in the wintertime, where one person, after being outside, would put his or her cold hands on the other person. This “game” was an ongoing inside joke between a few of the employees and occurred only in the wintertime.

The prep room is connected to the bakery by a common hallway. In this hallway are pallets of produce and products. At the end of the hallway, farthest from the prep room and close to the bakery is a supply closet in which dishwashing supplies are kept. Claimant went to the supply closet about twice a week to replenish her dishwashing and cleaning supplies. The door connecting the prep room to the hallway is made of heavy duty plastic. The doors do not have door handles and are meant to push open from either side. On the top part of the door is a transparent plastic window. The lower part of the door is translucent.

On May 20, 2010, Claimant was washing dishes in the sink which is located about 15 feet from the doorway to the hallway. Hiro tapped on the window and waved to Claimant and her co-worker, Sherri Javers. Claimant left the dish sink with the dual purpose of speaking with Hiro and to replenish her supplies from the supply closet. Claimant walked quickly towards the hallway door. As Claimant was pushing through the doors, she tripped on a large section of plastic wrap, the type of wrap used to wrap items stacked on pallets.

Hiro had taken ten to twelve steps from the prep room door when he heard a noise behind him. Hiro turned to see Claimant falling through the doorway, her feet tangled in plastic wrap. Claimant fell on the ground and sustained a hip injury. Hiro went back to Claimant and assisted her back into the prep room. Claimant was assisted by store and emergency personnel after sustaining her injury.

Ms. Javers, with whom Claimant had just had a disagreement, told Employer that Claimant was running to catch Hiro when she tripped and fell. Ms. Javers testified that she saw Claimant running but did not see Claimant fall. Ms. Javers testimony was not wholly credible in that if Claimant was running, Claimant would have tripped within a second of Ms. Javers seeing Claimant running. Ms. Javers had also just had a disagreement with Claimant regarding Ms. Javers work habits. Claimant had told Ms. Javers that she thought Ms. Javers would be fired soon.

Employer and Insurer denied Claimant's request for workers' compensation benefits claiming the affirmative defense that Claimant engaged in willful misconduct or "horseplay" at work which was a proximate cause of her injury. Both Claimant and Hiro were "written up" by Employer for engaging in horseplay at work. Both Claimant and Hiro deny that any "horseplay" occurred on the day in question. Hiro and Claimant presented credible testimony at hearing.

Other pertinent facts may be developed in the analysis below.

ANALYSIS

To recover under workers' compensation law, Claimant must prove by a preponderance of the evidence that she sustained an injury "arising out of and in the course of the employment." SDCL 62-1-1(7). It is well settled that, "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." *Fair v. Nash Finch Co.*, 2007 SD 16, ¶10, 728 NW2d 623, 629 (internal quotations omitted).

"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. As such, 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.* (internal quotations omitted).

Employer's affirmative defense is set out at SDCL § 62-4-37. It reads:

> No compensation may be allowed for any injury or death due to the employee's willful misconduct, including intentional self-inflicted injury, intoxication, illegal use of any schedule I or schedule II drug, or willful failure or refusal to use a safety appliance furnished by the employer, or to perform a duty required by statute. The burden of proof under this section is on the defendant employer.

SDCL § 62-4-37. The South Dakota Supreme Court has written that "willful misconduct," as is alleged by Employer in this case, must be "serious, deliberate, and intentional misconduct." *Holscher v. Valley Queen Cheese Factory*, 2006 S.D. 35, ¶48, 713 N.W.2d 555, 567.

In a case regarding the allegation of willful misconduct under the above statute, the Supreme Court wrote:

> Under the statute, the employer has the burden of proving by a preponderance of the evidence that the employee engaged in willful misconduct and that the employee's injuries were "due to the employee's willful misconduct." *Goebel v. Warner Transportation*, 2000 S.D. 79, ¶¶12-13, 612 N.W.2d 18, 22 (quoting SDCL 62-4-37); see also *Holscher v. Valley Queen Cheese Factory*, 2006 S.D. 35, ¶55, 713 N.W.2d 555, 570. "The words 'due to' in SDCL 62-4-37 refer to proximate cause." *Goebel*, 2000 S.D. 79, ¶13, 612 N.W.2d at 22. Consequently, an employee can be denied compensation under SDCL 62-4-37 if the employer can show by a preponderance of the evidence "that the employee's 'willful misconduct' was a proximate cause of the claimed injury." *Holscher*, 2006 S.D. 35, ¶55, 713 N.W.2d at 570. "An employee's willful misconduct will be the proximate cause of an injury when it 'is a cause that produces [the injury] in a natural and probable sequence and without which the [injury] would not have occurred.'" Id. ¶56 (quoting *Estate of Gaspar v. Vogt, Brown & Merry*, 2003 S.D. 126, ¶6, 670 N.W.2d 918, 921). The employer is not required to show that

> the employee's misconduct was the only cause, nor the last or nearest cause of the injury because an injury may have had several contributing or concurring causes, including willful misconduct. Id. Rather, under SDCL 62-4-37, an injury will be barred only when the employee's willful misconduct was a substantial factor in causing the injury. Id.

VanSteenwyk v. Baumgartner Trees and Landscaping, 2007 S.D. 36, ¶12, 731 N.W.2d 214, 219.

The South Dakota Supreme Court has adopted the four-part test found in Larson's Workmen's Compensation Law to analyze horseplay cases. See *Phillips v. John Morrell & Co.*, 484 NW2d 527, 530 (SD 1992). The Larson treatise states:

> The current tendency is to treat the question, when an instigator is involved, as a primarily course of employment [question]...; thus minor acts of horseplay do not automatically constitute departures from employment, but may here, as in other fields, be found insubstantial. So, whether initiation of horseplay is a deviation from course of employment depends on: (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. quoting 1A Larson's Workmen's Compensation Law § 23.00 (1990).

The facts show that Claimant was moving quickly through a swinging door and did not see a length of transparent plastic wrap lying on the floor. Claimant tripped over or around the plastic wrap and fell to the floor. Claimant was walking her usual fast pace when she fell. Claimant was going through the doors to speak with a co-worker as well as to visit the supply closet. The plastic wrap was taken off items that were stacked on pallets in the hallway.

Claimant did not leave her work station when she walked through the swinging door to the hallway. Claimant has many duties associated with her job. Only one of those duties is washing dishes. For instance, Ms. Javers was cutting up fruit and

vegetables at that time. Claimant leaves the dish sink for a variety of reasons during the day. The dish sink is not Claimant's only work station. The whole of the prep room, the front salad bar area, the attached hallway and other places where Claimant needs to be in order to perform her duties, are considered Claimant's work station.

Claimant did not deviate from the course of her employment when she walked through those swinging doors. Claimant testified that she left the dish sink for two reasons; the first reason was to speak with or joke with her co-worker and the second (but no less important) reason was to get work supplies. Claimant and her co-workers had a joking relationship with Hiro for a couple of years. Some of Employer's employees belong to a common lottery pool and are on a friendly basis with each other. Speaking with co-workers about non work-related topics or joking with co-workers was a common practice. This accident occurred in May, 2010, not during the wintertime. Claimant's testimony is credible that she was not intending on playing the "cold hands" joke on Hiro or that she was chasing after him. Claimant has always walked fast while at work and on this day in May 2010, it was no different.

In applying the Larson analysis, Claimant's minor or insubstantial act of horseplay by attempting to speak with her co-worker about issues not work related, was not a departure from her employment. Speaking with co-workers about other topics, not work related, was an accepted part of her employment and expected to some extent by Employer. Claimant did not completely deviate from her work, as she was also performing her duties at the time she was going to speak with Hiro.

Employer's burden is to show that Claimant engaged in willful misconduct and that this misconduct was a proximate cause of her injury. Employer has not shown that Claimant's action, by leaving the prep room, was willful misconduct. Claimant's walking through the swinging door was a proximate cause of her injury in that there was a three to four feet length of plastic wrap on the floor which she did not see that caused her to trip and fall. However, Employer has not shown that Claimant's reason for walking through the door was willful misconduct.

Claimant's work-related injury arose out of and in the course of her employment with Employer. Claimant did not engage in willful misconduct on May 20, 2010.

Dated this 15th of March, 2011.

SOUTH DAKOTA DEPARTMENT OF LABOR

/s/ Catherine Duenwald
Catherine Duenwald
Administrative Law Judge