

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

**STEPHANIE BONEBRIGHT
Individually and as Personal
Representative of the Estate of
James Bonebright**

HF No. 52, 2016/17

Claimant,

v.

AMENDED DECISION

CITY OF MILLER,

Employer,

and

**SOUTH DAKOTA MUNICIPAL
LEAGUE WORKERS'
COMPENSATION FUND,**

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor & Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. The case was heard by Michelle M. Faw, Administrative Law Judge, on September 19, 2017, in Miller, South Dakota. Claimant, Stephanie Bonebright, was present and represented by Lee Schoenbeck of Schoenbeck Law, PC. The Employer, City of Miller and Insurer, South Dakota Municipal League Workers' Compensation Fund, were represented by Laura K. Hensley of Boyce Law Firm, LLP.

Legal Issue:

The legal issues presented at hearing is whether James Bonebright's (Bonebright) actions constitute willful misconduct under SDCL § 62-4-37, thereby precluding Stephanie Bonebright (Claimant) from receiving workers' compensation benefits for Bonebright's death.

Facts:

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

1. On July 7, 1987, Bonebright began his employment with the City of Miller. He was employed as an employee of the water/wastewater department (Water Department). The City of Miller was at all times pertinent insured by South Dakota Municipal League Workers' Compensation Fund (jointly, City) for workers' compensation purposes.
2. September 2003, Bonebright became Superintendent of the Water Department, taking over the Superintendent position from Bill Lewellen (Lewellen).
3. September 15, 1997, the City approved and adopted a Safety Handbook. Bonebright was present at the City Council meeting where the approval took place.
4. As Superintendent of the Water Department, Bonebright was responsible for planning, scheduling, and implementing construction projects involving the Water Department for the City.
5. The City had monthly safety meetings to emphasize the importance of safety when completing projects.
6. On June 18, 2002, Bonebright successfully completed training and demonstrated the knowledge and skills to classify him as a Competent Person for Trench and Excavation Safety as the same is defined by OSHA.
7. On August 21, 2007, Bonebright obtained a Certificate of Training on a Confined Space Entry Course.
8. On March 3, 2010, Bonebright completed seven hours of Loss Control Training at an MSHA Annual Refresher Training.
9. On September 24, 2012, Bonebright attended a Safety Meeting on Cave In/Trenching-Shoring Safety.
10. OSHA defines a "competent person" as "one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them."
11. On July 8, 2016, the trench Bonebright was working in began to collapse on him. Terry Manning (Manning) jumped into the trench to aid Bonebright. The trench collapsed on both of them.
12. On July 10, 2016, Bonebright passed away due to complications from the injuries sustained during the trench collapse.
13. On September 26, 2016, Claimant filed a Petition for Hearing with the Department of Labor and Regulation (Department) seeking an award of workers' compensation benefits from the City.
14. On December 15, 2016, after a Motion to Strike the Pleadings was granted, the City filed an Answer asserting Bonebright's claim was barred by SDCL § 62-4-37 due to Bonebright's willful misconduct and failure to use a safety device supplied by the City or implement any other safety measures.

Additional facts may be developed in the issue analysis below.

Analysis:

Issue: Whether Bonebright's actions constitute willful misconduct under SDCL § 62-4-37.

The affirmative defense of willful misconduct is stated in SDCL § 62-4-37 as follows:

Injury or death due to willful misconduct of employee not compensable. 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.

In *Fenner v. Trimac Transp., Inc.*, the SD Supreme Court stated, "...[willful misconduct] means more than mere negligence, and contemplates the intentional doing of something with the knowledge that it is likely to result in serious injuries, or with reckless disregard of its probably consequences." *Fenner*, 1996 S.D. 121, ¶9, 554 N.W. 2d (citations omitted). The court has established a two-prong test for establishing if someone has engaged in willful misconduct under SDCL § 62-4-37.

The first prong is the following Four-Part Test as established by the Court in *Holscher v. Valley Queen Cheese Factory*, 2006 S.D. 35, ¶49, 713 N. W. 2d 555, 568-69 (citing *2 Larson's Workers' Compensation Law § 35.010*):

1. The employee must have actual knowledge of the rule or appliance, and its purpose;
2. The employee must have an actual understanding of the danger involved in the violation of the rule or failure to use the appliance;
3. The rule or use of the appliance must be kept alive by bona fide enforcement by employer
4. The employee has no valid excuse for violating the rule or failing to use the appliance.

First, to establish whether Bonebright engaged in willful misconduct, Employer must show that Bonebright had actual knowledge of the rule or appliance, and its purpose. Bonebright was present at the City Council meeting in September, 1997 when the City adopted the Safety Handbook which provides the safety rules governing the work performed by the City. On April 27, 2015, Bonebright met with Doug Kirkus, the

President of Safety Benefits, Inc., while Kirkus was conducting a Loss Control Survey with members of the South Dakota Municipal League Workers' Compensation Fund of which the City is a member. During the meeting with Kirkus, Bonebright identified the existence of the Safety Handbook and that each employee received a copy.

The Safety Handbook section, *Excavations*, states in part, "When working in an excavated area, always ensure that the proper shoring system is in place before anyone enters the excavation." In addition to the directives of the Safety Handbook, Bonebright also received trainings on trenching safety. Bonebright's job description included, "Oversee[ing] the safety of assigned maintenance workers and equipment operators by instructing individuals in proper safety procedures and monitoring work in progress." Bonebright had actual knowledge of the City's Safety Rules in the Safety Handbook and that these rules required action be taken to prevent the cave in of an excavation.

Second, Employer must show that Bonebright had an actual understanding of the danger involved in the violation of the rule or failure to use the appliance. As Superintendent of the Water Department, Bonebright was responsible for identifying and addressing any unsafe working conditions. Bonebright successfully completed training to be qualified as a "Competent Person" for Trench and Excavation Safety as defined by OSHA. Qualifying as a "Competent Person" means Bonebright had shown he had the skills to be able to "identify existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them." Bonebright received a Certificate of Training on Confined Space Entry on August 21, 2007, and he completed seven hours of Loss Control Training at an MSHA Annual Refresher Training on March 3, 2010. These trainings emphasized the importance of proper trench safety. Bonebright also displayed his understanding of the danger related to trenching when he requested that the City purchase a trench box in the 1990's. In addition to the training he received, Bonebright's behavior on the day of the trench collapse indicates he understood the potential danger of the unsloped trench. He avoided having a worker in the trench maneuvering the pipe until it was necessary to remove the dirt that had fallen onto it. The combination of his training and his behavior regarding the trench prove that Bonebright had actual understanding of the danger

involved in failing to use a trench box or adjust the trench as the Safety Handbook directed.

The third requirement for willful misconduct that Employer must prove is that the rule or use of the appliance must be kept alive by bona fide enforcement by employer. As Superintendent of the Water Department, it was Bonebright's responsibility for training, supervising, and disciplining employees under his command. Bonebright was specifically tasked with advising the City Council and other City officials in matters relating to the activities of the Water Department. According to the Employee Policy Manual, in his position as Superintendent, he was required to "oversee the safety of assigned maintenance workers and equipment operators by instructing individuals in proper safety procedures and monitoring work in progress" and "enforce rules, regulations, policies and procedures relating to the operation of the water and wastewater utility system." *Employee Policy Manual* pg 6.

Before Bonebright was Superintendent, he worked in the Water Department under Bill Lewellen. In the late 1990's, while Lewellen was Superintendent, there was a trench collapse. Following this collapse, the City bought its first trench box. After the purchase of the trench box, the employees, including Bonebright, used it once and then did not use it again. Instead, Bonebright said that they would slope the trench sides. Manning has testified that usually the trench sides would be sloped, but not all the time. When they did not slope the trench, they did not use a trench box. Once Bonebright took over as superintendent, he continued the practice of sloping the trenches instead of using a trench box, and sometimes neither sloping the trench nor using a trench box. Claimant asserts that the inconsistent use of sloping proves that the procedures put forth in the Safety Handbook were not enforced by the City. Claimant further asserts that the City continued to not enforce the Safety Procedures after Bonebright's death. Claimant alleges another instance of an unsloped trench project after Bonebright's death. However, that was contracted out and was not a City project.

Claimant has argued that the City's conduct regarding the trench project at issue confirmed Bonebright's actions. During the course of the project, Mayor Mike Beanor, City Council President Tony Rangel, Street Superintendent Ron Hoftiezer, Electrical Superintendent Bill Lewellan, and Councilman Gale Auch visited the site. These various City officials did not stop the project even though neither trench box nor sloping were

being used. Claimant argues that by failing to stop the project that was unsafe and out of line with City Safety Guidelines, these officials were confirming that Bonebright had the discretion to perform the project as he saw necessary.

However, as the individual responsible for ensuring projects conducted by the Water Department were performed in accordance with safety policies and procedures, Bonebright was responsible for enforcing the rules on behalf of the City. He knew of the Safety Handbook and the City's safety policies. Claimant argues that the safety manual was not disseminated, that the President of the City Council and member of the City Utility Committee did not know about the safety handbook, and neither the City Council or the Utility Committee had ever reviewed it. However, Bonebright told Kirkus that the Safety Handbook existed. Bonebright knew there was a Safety Handbook and the rules within. He also knew that it was his responsibility to enforce the policies and to discipline those who failed to properly apply them. Bonebright's discretion regarding City projects did not include the discretion to disregard safety procedures, to the contrary, it was Bonebright's duty to advise the City on what was necessary to ensure a project was completed in line with the Safety Handbook and Bonebright's various trainings.

The final part in the Four-Part Test is that there be no valid excuse for violating the rule or failing to use the appliance. Claimant has argued that Bonebright had multiple reasons for violating the rule or failing to use a safety appliance. Claimant alleges that the City was rushing employees to get the job done quickly, and that City employees usually did not do this type of work. Manning testified that City Council President, Tony Rangel, was on the site telling them to hurry and get the job done. Claimant argues that the trench box would not have worked for the project as it was too small, was rusted shut, and had not been used by the City since before Bonebright became Superintendent. However, the trench box was not the only means available to ensure the project proceeded in accordance with the Safety Handbook. How to proceed with a project was within Bonebright's discretion. Bonebright had the options of using the trench box, feathering, or shoring the trench. Bonebright had concluded that due to its location, feathering or shoring would not have worked on this project. Bonebright chose to proceed with the project even though he had concluded that the required safety precautions could not be used. If Bonebright believed, as the record indicates, that the safety procedures required by the Safety Manual were not

possible for the project, Bonebright was the individual with the responsibility to advise the City on the situation and make necessary changes to ensure safety.

The Department is persuaded by the above analysis of the record and application of the Four-Part Test, that Bonebright did commit willful misconduct by his willful failure to use a safety appliance or procedure as directed by his employer.

The second prong of the test for willful misconduct is the “proximate cause” test established by the Court in *Wells v. Howe Heating & Plumbing, Inc.*, 2004 SD 37, ¶19, 677 N.W.2d 586, 590. “SDCL § 62-4-37 places the burden on the employer to prove that an employee committed “willful misconduct” and that the injury was incurred ‘due to’ the employee’s willful misconduct.” *Wells*, 2004 SD 37, ¶10, 677 N.W.2d 586, 590 (citing *Goebel v. Warner Transp.* 2000 SD 79, ¶13, 612 N.W.2d 18, 22.)

In that case, Wells was working as a plumber when he received an electrical burn. Howe argued that Wells’ injury was not entitled to workers’ compensation coverage because he had failed to use a safety device called a GFCI. Howe argued, “(a) its employees were required to use GFCIs when using any electrical equipment, (b) Wells could have obtained a GFCI upon request, and (c) if he had used the device, the accident would not have occurred.” *Wells* at ¶4. Howe offered the testimony of its Service Manager as evidence. The Service Manager testified that, using a GFCI, he was able to finish the work that Wells had started without being injured. Wells offered no other possible cause for the accident, but disputed the Service Manager’s ability to offer an opinion that failure to use the GFCI was a proximate cause of the accident.

The matter came before the Department which concluded that Wells had intentionally disregarded a safety rule and that Howe had established by a preponderance of the evidence that Wells willful failure to use a safety device was the proximate cause of the injury. *Wells* at ¶7. The Circuit Court reversed concluding that Howe has failed to demonstrate that failure to use a safety appliance proximately caused the injuries. *Wells* at ¶8.

On appeal to the Supreme Court of South Dakota, Howe argued “that the ‘mechanics of the accident support the conclusion that [the claimant’s] injury was the proximate result of his failing to use a [GFCI]. “In maintaining this proposition, they reason that [i]t is beyond dispute that the very purpose for using a [GFCI] is to protect from electrocution... [T]he electric shock occurred after [the claimant] grabbed the

Sawzall... Thus, the evidence presented to the Department showed that the *only logical explanation* is that the living room outlet was the source of the electric shock. (Emphasis added by the Court.)” *Wells* at ¶11.

The Court concluded that it was necessary for Howe to prove whether use of the GFCI would have prevented the underlying electrical irregularity from harming Wells. “Thus, in order to prove that the claimant’s failure to use a GFCI was a proximate cause of his injury, it was necessary for the employer and insurer to prove, by a preponderance of the evidence, that under the circumstances a GFCI would have prevented the electrical shock. This they failed to do.” *Wells* at ¶12. The Court reasoned that the Service Manager’s testimony was not sufficient to prove the matter, and that no evidence provided by Howe explained the cause of the electrocution. The Court affirmed the Circuit Court and concluded that the Department was clearly erroneous in concluding that the evidence established failure to use the GFCI as the proximate cause of injury. *Wells* at ¶20.

In order to meet the proximate cause standard set in *Wells*, an employer must provide evidence that the injured employee was injured due to failure to use a safety device and that the safety device would have changed the outcome of the incident. “[A]n injury... will be barred under SDCL § 62-4-37 only when the employee’s willful misconduct was a substantial factor in causing the injury.” *Cavender v. Bodily, Inc.*, 1996 S.D. 74, ¶ 19, 550 N.W.2d 85, 89 (citing *Driscoll v. Great Plains Mktg. Co.*, 322 N.W. 2d 478, 479-80 (S.D. 1982.)

While there has been ample discussion regarding the use of a trench box or other safety measures, no evidence has been offered to show the effect such safety measures would have had on the outcome of the trench collapse. The City has not provided probative evidence showing that failure to use a safety device or procedure was the proximate cause of Bonebright’s injury and death. Nor has the City proven how use of a safety device or procedure would have prevented injury in this circumstance. “A party must lose when it bears the burden of proof but fails to offer probative evidence.” *Wells* (citing *Cavender v. Bodily, Inc.*, 1996 SD 74, ¶ 19, 550 N.W.2d 85, 89.) Without such evidence, the Department is unable to conclude that failure to use the trench box or other safety measure was the proximate cause of Bonebright’s injury. Therefore, the City has not proven the affirmative defense of willful misconduct.

Conclusion:

The City has not proven the affirmative defense of willful misconduct. Therefore, Claimant is not barred from recovery of workers' compensation benefits.

Counsel for Claimant shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision within twenty (20) days from the date of receipt of this Decision. The City shall have an additional twenty (20) days from the date of receipt of Claimant's Proposed Findings and Conclusions to submit objections thereto and/or to submit their own 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 consistent with this Decision.

Dated this 17 day of April, 2018.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

Michelle M. Faw
Administrative Law Judge