Paid to Horseplay: An Analysis of South Dakota's Allowance of Horseplay in the Workplace to Be Compensable

Tyler Haigh

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In recent years, the South Dakota Supreme Court has held a liberal view in favor of compensating employees who were injured while at work. This liberal view has been beneficial in many respects but fails to make exceptions in certain situations. The court has twice ruled in favor of a claimant who was injured while engaging in horseplay that was not in any furtherance of the employment. While the court should continue to take a liberal approach in favor of workers’ compensation claimants, these cases have presented conclusions that go against public policy and create concerns for employers across South Dakota. Recognizing that there is limited room for horseplay in the area of workers’ compensation will eliminate frivolous claims and incentivize employers to promote workplace safety and avoid injuries that create more workers’ compensation claims.

I. INTRODUCTION

In 2015, the South Dakota Supreme Court expanded its liberal view in favor of claimants petitioning for workers’ compensation benefits. In Petrik v. JJ Concrete Inc., the court held that an employee who was injured during an act of horseplay was entitled to collect workers’ compensation. The employee’s injury, which occurred as a result of playing a prank on a co-worker and then running around a dangerous construction site, was found to have “arisen out of” and “in the course” of the employee’s employment. Despite the undisputed facts showing that the claimant was the cause of his own injuries while not in furtherance of the employer’s interest, the court ruled in favor of the claimant. The court’s “lull in work” theory presented employees, who were injured while waiting for additional work at their employment, with a remedy for their injury by broadening the workers’ compensation analysis for claimants.
This article examines the considerations that the court left out in its analysis of Petrik, as well as previous workers’ compensation cases in South Dakota. After a discussion of the facts and procedural history of Petrik, this article describes the background of workers’ compensation in South Dakota. The background provides a framework for factors the court looks at in determining whether a workers’ compensation claimant’s injury arose out of and in the course of his or her employment. The background is followed by an analysis of the direction in which South Dakota is headed with regard to horseplay in workers’ compensation, including a description of how the court has made misjudgments in its previous decisions. This article provides several suggestions, and ultimately concludes that the law must be modified to make workers’ compensation laws more fair and reasonable for employers. The recommendations include steps that can be taken by the South Dakota Supreme Court and the South Dakota Legislature can take to make sure changes are made to improve public policy on this issue.

II. PETRIK V. JJ CONCRETE: AN ILLUSTRATION OF THE DIRECTION SOUTH DAKOTA IS HEADED IN ADDRESSING HORSEPLAY IN WORKERS’ COMPENSATION

A. FACTUAL BACKGROUND

JJ Concrete is a construction company located in Tea, South Dakota, mainly engaged in the business of pouring concrete for residential or commercial structures. Jamie Poppe, along with his wife, has owned JJ Concrete since March 2004. Poppe is a supervisor and manager who oversees daily management of the business. Jason Petrik was hired by JJ Concrete in February 2011 as a laborer, responsible for pinning out footings, placing string lines, staking, setting up forms, and pouring concrete at each of the job sites.

6. See infra Part II (detailing the facts and procedural history of Petrik). See also infra Part III (discussing the legal history of South Dakota workers’ compensation claims).
7. See infra Part III (examining historical case law and statutory law regarding whether an employee’s injury arose out of and in the course of his or her employment for workers’ compensation purposes).
8. See infra Part IV.A (using Petrik as an example of the South Dakota Supreme Court’s trend in evaluating horseplay claims in workers’ compensation claims).
9. See infra Part IV.C (providing suggestions to modify South Dakota law regarding workers’ compensation claims).
10. See id. (suggesting how the South Dakota Supreme Court or South Dakota Legislature must address workers’ compensation claims stemming from certain instances of employee horseplay).
11. Brief for Appellant at 2, Petrik v. JJ Concrete, Inc., 2015 SD 39, 865 N.W.2d 133 (No. 27173) [hereinafter Appellant’s Brief].
12. Brief for Appellee at 3, Petrik v. JJ Concrete, Inc., 2015 SD 39, 865 N.W.2d 133 (No. 27173) [hereinafter Appellee’s Brief].
13. Appellant’s Brief, supra note 11, at 3.
Petrik had many friends he worked and socialized with outside of work.\textsuperscript{15} As a result, they would often play jokes on each other or give each other grief while they were at work.\textsuperscript{16} The jokes were nothing more than a few pranks, which Petrik and his co-workers found to be made in good fun.\textsuperscript{17} While the workers would poke fun at each other on numerous occasions, it was not a common occurrence, and had never resulted in someone being placed at risk of injuring himself or herself.\textsuperscript{18}

These pranks continued from time to time, despite the safety manual that JJ Concrete handed out to each of its employees on their first day of work.\textsuperscript{19} The safety manual included several brief sections that totaled about twelve pages, along with a page that each employee was required to sign.\textsuperscript{20} In the “General Safety Rules” section of the safety manual, a rule specifically stated that “[h]orseplay will not be tolerated.”\textsuperscript{21} While Petrik recognized that he had a responsibility to read the safety manual, most of the rules were general provisions that would be expected to be seen in a construction safety manual.\textsuperscript{22} JJ Concrete also required each of its employees to attend safety meetings that were held once per month covering a range of issues.\textsuperscript{23}

On a typical day, JJ Concrete required its employees to pour footings or foundations in several dug trenches.\textsuperscript{24} After finishing that preparation work, the

\begin{itemize}
\item \textsuperscript{15} \textit{Id.}
\item \textsuperscript{16} Appellant’s Brief, supra note 11, at 3. Petrik testified during his hearing that he and his co-workers occasionally played jokes on each other to give each other a hard time. Petrik Deposition Hearing at 16-17, Petrik v. JJ Concrete, Inc., 2015 SD 39, 865 N.W.2d 133 [hereinafter Hearing Transcript]. For example, the co-workers would put dirt in each other’s pin and wedge buckets, put chalk in each other’s gloves, stuff their lunchbox’s with dirt, or throw dirt balls at each other to pass time. \textit{Id.} at 17-18. Additionally they would verbally joke around with each other once in a while, sometimes to the point where a manager would tell them to stop messing around. \textit{Id.} at 18-19.
\item \textsuperscript{17} Appellee’s Brief, supra note 12, at 5.
\item \textsuperscript{18} \textit{Id.} Petrik stated that he believed the types of jokes they played were meant to be funny but would not result in anyone being injured. Hearing Transcript, \textit{supra} note 16, at 39. In fact, Petrik admitted that he would not run through a job site because he felt that it was more dangerous than some of the other pranks that his co-workers usually engaged in. \textit{Id.} at 37-39.
\item \textsuperscript{19} Appellee’s Brief, supra note 12, at 4. Petrik recognized that JJ Concrete took safety provisions seriously. Hearing Transcript, \textit{supra} note 16, at 31. In fact, he acknowledged that he received a copy of the safety manual when he started work for JJ Concrete, but he never actually read it. \textit{Id.} at 31-32. Reading the manual was a responsibility that Petrik realized he had as an employee, but admitted that he merely glanced through it, as it was fairly common sense. \textit{Id.} at 31-32.
\item \textsuperscript{20} Appellee’s Brief, supra note 12, at 75. A copy of the safety manual was signed by Jason Petrik on February 19, 2011. \textit{Id.}
\item \textsuperscript{21} \textit{Id.} at 74. A letter from Jamie Poppe at the beginning of the safety manual additionally stated in part: “JJ Concrete, Inc., believes that employee safety is as important to our business as production and quality. Regard for safety of the general public and our own employees is a supreme responsibility of all levels of our company.” \textit{Id.} at 63.
\item \textsuperscript{22} Appellee’s Brief, supra note 12, at 64-72; Hearing Transcript, \textit{supra} note 16, at 31-32. See Appellee’s Brief, at 63-75 (demonstrating the manual provides safety measures for job inspections, accident reporting, investigations, vehicles, equipment, fire prevention, and shop rules, which are clearly written out).
\item \textsuperscript{23} Appellee’s Brief, \textit{supra} note 12, at 5. The South Dakota Department of Labor ("the Department") found that the safety manual and requirements of the employees to attend these safety meetings was strict, as there had to be an acknowledgment signed by the employees before they would be allowed to work. Appellee’s Brief, \textit{supra} note 12, at 9.
\item \textsuperscript{24} Appellant’s Brief, \textit{supra} note 11, at 3.
\end{itemize}
employees would wait for a concrete truck to come in to complete the work. While waiting for the truck to arrive, the employees, including Petrik, were responsible for cleaning up the site, putting equipment and tools away, and engaging in other productive tasks. When the site was ready for the pour, employees could be expected to have some downtime to have a lunch break and wait for the concrete truck to arrive. Sometimes Petrik and his co-workers would drive their personal vehicles to a nearby gas station to get some snacks before returning to work when the trucks arrived.

On August 23, 2012, during a normal work day, the JJ Concrete employees had completed all their work and were having a lunch break while waiting for the concrete truck to arrive on the site. As they were waiting, Petrik drove his personal vehicle to a gas station to put some air in the tires before returning to the work site. Upon returning to the site, there were no supervisors around to direct the employees as they waited for the truck. It was a hot day and some of the employees were sitting in an air-conditioned pickup truck while they were waiting. One such employee was Kevin Cole. As Cole sat in the pickup to cool off, Petrik decided to pull a prank to lure Cole out of the truck so that Petrik could take his seat and have some time to cool off before they started work again. Petrik told Cole that there was a co-worker who needed to speak with him on the other side of the site, and when Cole got out to talk with the co-worker, Petrik took his spot in the truck.

When Petrik returned to the site after sitting in the pickup for a few minutes, he saw Cole, which created a short-lived chase through the job site. During the chase, two other co-workers yelled at Petrik and Cole to stop chasing each other.

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25. Id. All employees were required to be at the site when concrete trucks arrived so they could help to get the work completed. Id.


27. Appellee’s Brief, supra note 12, at 5.


29. Petrik, 2015 SD 39, ¶ 3, 865 N.W.2d at 135.

30. Hearing Transcript, supra note 16, at 47.

31. Appellant’s Brief, supra note 11, at 3-4. Supervisors were at the site earlier that day, but they had left to work on other projects that were work obligations, thus there were no supervisors around at the time of Petrik’s injury. Id.

32. Id. at 4.

33. Id. Kevin Cole was considered the “old guy” on the job site, as he was forty-seven years old and an active National Guard member. Appellee’s Brief, supra note 12, at 6.

34. Appellant’s Brief, supra note 11, at 4.

35. Id. Petrik sat in the truck for five or ten minutes after Cole had left and had time to smoke a cigarette before returning to the job site. Appellee’s Brief, supra note 12, at 6.

36. Id. Petrik told Cole that there was a co-worker who needed to speak with him on the other side of the site, and when Cole got out to talk with the co-worker, Petrik took his spot in the truck. Id. at 4. The chase was a friendly one that lasted “[m]aybe thirty seconds.” Hearing Transcript, supra note 16, at 111. The only factual dispute in this case was whether Petrik started running from Cole to get him engaged in the chase, or whether Cole was the one who started running after Petrik. Appellee’s Brief, supra note 12, at 6 (citing Hearing Transcript, supra note 16, at 142). The Department made a finding of fact that Petrik began running first, and Petrik even admitted that he was responsible for what led up to the chase to begin with. Appellee’s Brief, supra note 12, at 8; Appellee’s Brief, supra note 12, at 6. In either event, it appears that the chase was made in a friendly attempt to give each other more grief. Appellant’s Brief, supra note 11, at 4.
around the job site. As the workers continued to chase each other, Petrik tried to jump over one of the trenches and ended up breaking his ankle in an awkward fall. After the fall, Petrik recognized the significance of the injury and had Cole drive him to the hospital to receive medical treatment. Petrik called Poppe to notify him of the injury before leaving for the hospital. Poppe later followed up with Petrik, hearing him admit that he was messing around and stating that he would take care of the medical bills with his own insurance because of his conduct.

B. PROCEDURAL HISTORY

Soon after Petrik’s injury, he requested workers’ compensation benefits and was denied by JJ Concrete and its insurer, EMC Insurance Company. Petrik then filed a petition for benefits and had a hearing held on May 22, 2013. The Department denied the benefits, stating that although the injury arose out of employment, Petrik substantially deviated from his regular work activities and therefore it did not commence in the scope of employment.

The Sixth Circuit affirmed the Department’s determination in a letter from the Honorable Mark Barnett of the Sixth Judicial Circuit Court in South Dakota. Judge Barnett agreed that the injury arose out of the employment, and, like the Department, came to the same conclusion on the issue of whether the injury occurred in the course of employment. Using Larson’s treatise on workers’ compensation law, Judge Barnett shelved Petrik’s contention that a “lull in work” theory warranted reparation for his injury on the job. He found that the deviation...
of running through a workplace, which Petrik recognized to be a dangerous construction site, was a substantial digression and that any lull in the work activity should not permit employees to commit dangerous acts. As a result, the Sixth Circuit affirmed the Department’s determination, leading to the appeal at the Supreme Court of South Dakota.

The court reviewed the Department’s decision in the same manner as the Sixth Circuit, without presuming the circuit court’s conclusion to be correct. In doing so, the court found that the Department was correct in finding that Petrik’s injury arose out of the employment, as “[h]e was injured during a period of time in which he was required to standby and remain idle until the concrete truck arrived.” The question of whether the injury took place in the course of employment, however, was analyzed under a four-factor test. The four factors, from Phillips v. John Morrell & Co., included:

(1) the extent and seriousness of the deviation [from the course of employment], (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.

In reviewing the first factor, the court found that, although running through a job site was “dangerous” and “foolish,” the deviation was insubstantial because there was a “lull in work” as Petrik had no other work duties to perform. On the second factor, the court held that Petrik’s deviation was commingled with his job duties because it occurred while he was waiting for the concrete truck to arrive on the site. In addressing the third and fourth factors, the court found that although there was no evidence to suggest that running through the work site was an accepted part of the job, under the third factor, it was to be expected when there

48. Id. at 25. Because Petrik could not prove that the Department erred in concluding that the injury occurred within the course of employment, Judge Barnett did not need to analyze the question of whether the injury arose out of Petrik’s employment with JJ Concrete. Id.
49. Petrik v. JJ Concrete, Inc., 2015 SD 39, ¶ 8, 865 N.W.2d 133, 136.
50. Id. ¶ 10, 865 N.W.2d at 136-37. Justice Janine Kern wrote the opinion for the South Dakota Supreme Court, reviewing the conclusions of law de novo, while giving deference only to the Department’s findings of fact. Id.
51. Id. ¶ 14, 865 N.W.2d at 138. The court did, however, point out that running on the dangerous job site “had no direct connection with or relation to the work Petrik was to perform.” Id.
52. Id. ¶ 17, 865 N.W.2d at 138.
54. Id. at 530 (citations omitted).
55. Petrik, 2015 SD 39, ¶ 22, 865 N.W.2d at 140. Justice Kern pointed out that Petrik’s deviation was somehow insubstantial because, “[h]owever misguided,” the decision to run through the work site was made out of impulse, rather than taking time to think about it. Id.
56. Id. ¶ 23, 865 N.W.2d at 140. The court disregarded any deviation from JJ Concrete’s safety rules, as those rules were only relevant in the third factor. Id. Ultimately, it was determined that although he was “engaged in prohibited horseplay,” he did not abandon his duty to wait for the concrete truck to arrive. Id.
were waiting times on the site.\(^{57}\) After reviewing the factors, the court reversed the Sixth Circuit’s ruling that the injury did not occur in the course of employment.\(^{58}\) As a result, the case was remanded to the Department to award workers’ compensation benefits in favor of Petrik.\(^{59}\)

### III. A BRIEF BACKGROUND TO WORKERS’ COMPENSATION IN SOUTH DAKOTA

South Dakota first enacted laws for workers’ compensation in 1917.\(^{60}\) Title 62 of the South Dakota Codified Laws governs workers’ compensation for employees who were injured on the job. More specifically within the South Dakota Code, the injury is compensable only if it “aris[es] out of and in the course of employment.”\(^{61}\) The purpose of workers’ compensation is to allow recovery for employees who have lost their capabilities of working because of injuries that have resulted from the employment.\(^{62}\) South Dakota has long been accustomed to understanding that the statutes regarding workers’ compensation shall be construed liberally in favor of the impaired worker.\(^{63}\) This public policy comes from the belief that the law needs to protect the economic status of the worker to

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57. Id. ¶ 24-28, 865 N.W.2d at 140-41. The court’s rationale on this fourth factor was that “difficult and repetitive” work that required workers to wait presented an expectation that workers would engage in horseplay. Id. ¶ 26-28, 865 N.W.2d at 141. Because no expert testimony could be presented on the issue, the court was also not impressed with JJ Concrete’s contention that workers had a duty to save their energy while waiting on the job site to perform their next tasks. Id. ¶ 28, 865 N.W.2d at 141.

58. Id. ¶ 30, 865 N.W.2d at 142.

59. Id.

60. 1917 S.D. Sess. Laws ch. 376, 832. This statute was consistent with workers’ compensation laws passed in many other states. Michael Marlow, Exclusive Remedy Provisions in the Workers’ Compensation System: Unwarranted Immunity for Employers’ Willful and Wanton Misconduct, 31 S.D. L. REV. 157, 159 (1985). The workers’ compensation law has had some changes over the years, including in 1971, when the legislature disallowed workers from having the option to be covered under their employers’ insurance for workers’ compensation. Id. Several states still allow this, but this is a law that has been controversial in South Dakota. See id. at 159-64, 169 (recommending that this “exclusive remedy” grants immunity to employers for scenarios in which their workers are put in dangerous situations removing the opportunities to collect under personal injury, loss of consortium, wrongful death, or any other remedy).

61. S.D.C.L. § 62-1-1(7) (2015). Additionally, the injury is not compensable if it is not established by medical evidence that the employment or work-related activities were the major contributing cause. S.D.C.L. § 62-1-1(7)(a).

62. See Caldwell v. John Morrell & Co., 489 N.W.2d 353, 362 (S.D. 1992) (holding that the law “is designed to compensate an employee or his family for the loss of his income-earning ability which loss is occasioned by an injury, disablement, or death because of an employment-related accident”). See also Dudley v. Huizenga, 2003 SD 84, ¶ 11, 667 N.W.2d 644, 648 (finding that “[t]he purpose of workers’ compensation is to provide for employees who have lost their ability to earn because of an employment-related accident, casualty, or disease”).

63. Mills v. Spink Elec. Coop., 442 N.W.2d 243, 246 (S.D. 1989). See also Donovan v. Powers, 193 N.W.2d 796, 798 (S.D. 1972) (stating that workers’ compensation laws are “remedial and should be liberally construed to effectuate [their] purpose). The court has also made it clear that liberal construction applies only to the law, but not the findings of fact that would support the claim, unless there is clearly erroneous evidence to the contrary. Id.
prevent "uncertainties, delay, expense and hardship attendant upon the enforcement of common-law remedies." 64

While there are protections for the employees’ ability to earn wages, there must also be protections for employers. 65 In addition to many other affirmative defenses used by employers in workers’ compensation cases, horseplay has been recognized as a justification for denying such a claim. 66 The horseplay must be a deviation from the course of employment in order to deny the employee those benefits available under workers’ compensation. 67 Under the analysis of whether horseplay was a deviation in a given situation, the court must determine whether the injury "arose out of" and "in the course of" the employment. 68

"Arising out of" requires "a causal connection between the injury and the employment and that the injury had its origin in the hazard to which the employment exposed [the employee] while doing his work." 69 As a result, an injury arises out of the employment only when such injury would not have occurred but for the employment. 70 There is no requirement that the employment was the direct or proximate cause of the injury. 71 According to the South Dakota Supreme Court the claimant must only prove that either (1) the employment "contribute[d] to causing the injury"; (2) "the activity [was] one in which the employee might [have] reasonably be[en] expected to engage;" or that (3) "the

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65. See Holscher v. Valley Queen Cheese Factory, 2006 SD 35, 713 N.W.2d 555, 568 (quoting Willful Misconduct, BLACK'S LAW DICTIONARY 1600 (6th ed. 1990) (denying workers’ compensation on the basis of willful misconduct which "contemplates the intentional doing of something with the knowledge that it is likely to result in serious injuries, or with reckless disregard of its probable consequences"); Ham v. Cont'l Lumber Co., 506 N.W.2d 91, 95 (S.D. 1993) (stating that "[w]orker’s compensation is the exclusive remedy for all on-the-job injuries to workers except those injuries intentionally inflicted by the employer"); Therkildsen v. Fisher Beverage, 1996 SD 39, ¶ 11, 24, 545 N.W.2d 834, 836-37, 839 (holding that intoxication as the cause of an employee’s death relieves the employer of a workers’ compensation claim); Kasuske v. Farwell, Ozmun, Kirk & Co., 2006 SD 14, ¶ 13, 710 N.W.2d 451, 455 (citations omitted) (noting that in order "to recover disability benefits under the work[ers’] compensation statutes, the claimant has the burden of establishing a causal connection between the employment and the disability"); Sauder v. Parkview Care Center, 2007 SD 103, ¶ 23, 740 N.W.2d 878, 884 (stating that there is a statute of limitations for workers’ compensation claims which requires the employee to give the employer notice of the injury within the specified time period). See also Phillips v. John Morrell & Co., 484 N.W.2d 527, 531 (S.D. 1992) (stating that horseplay resulting in a substantial deviation from employment could allow an employer to be relieved from a workers’ compensation claim).

66. See Phillips, 848 N.W.2d at 531 (holding horseplay was a valid affirmative defense in a workers’ compensation claim).

67. Id. at 530. See Petrik v. JJ Concrete, Inc., 2015 SD 39, ¶ 17, 865 N.W.2d 133, 138 (quoting Phillips, 848 N.W.2d at 530) (adapting the four factors used in Phillips for determining whether the horseplay was a deviation from the course of employment).

68. Phillips, 484 N.W.2d at 530 (citations omitted).


70. Krier, 98 N.W.2d at 487. Generally, simply being at work would put the employee in such a situation for him or her to get injured, so the "arising out of" prong can easily be satisfied by the claimant when he or she is injured at a job site. See Phillips, 484 N.W.2d at 530 (stating that employee’s injury clearly arose out of the employment because the employee “would not have become injured but for the fact that he was at work”).

71. Id.
activity [brought] about the disability upon which compensation is based.”

Courts have found that this generally requires nothing more than showing that the employee was at work when he or she was injured.

To show that an injury occurred “in the course of” employment is a factor that must be evaluated independently of whether the injury arose out of the employment. While this factor can be analyzed separately, “the factors are prone to some interplay and ‘deficiencies in the strength of one factor are sometimes allowed to be made up by strength in the other.’” Consequently, there can be situations in which workers’ compensation applies when the employee is not at work. This prong only looks at “the time, place and circumstances of the injury.” For this reason, the issue of whether an employee’s injury resulting from horseplay is compensable usually focuses on the “in the course of” employment prong. If it can be shown that the injury arose out of and in the course of employment, then horseplay, resulting in willful misconduct, cannot be utilized as a defense by the employer.

The issue of horseplay, as it relates to recovery of workers’ compensation benefits, has not been a matter of much discussion in South Dakota. In Phillips v. John Morrell & Co., the South Dakota Supreme Court analyzed whether an employee’s injury arose out of and in the course of employment after the employer denied workers’ compensation benefits based on a claim of horseplay. This was a case of first impression before the court. In Phillips, the claimant was stabbed by a co-worker when he was throwing sperm cords taken from hog trimmings at the hog kill operation where they were working. The employer argued that there were two ways in which the employee was engaged in horseplay, which would relieve the employer of any liability under workers’ compensation.


73. See Phillips, 484 N.W.2d at 530 (finding “the fact that he was at work” to be enough of an explanation that the injury “arose out of” the employee’s employment). See also Petrik v. JJ Concrete, Inc., 2015 SD 39, ¶¶ 13-14, 865 N.W.2d 133, 137-38 (stating that the employee “was injured during a period of time in which he was required” to be at work).


75. Id. (citing Norton, 2004 SD 6, ¶ 11, 674 N.W.2d at 521).

76. See id. ¶ 8, 698 N.W.2d at 71 (citing Norton, 2004 SD 6, ¶ 10, 674 N.W.2d at 521) (stating 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”).


78. See id. (acknowledging previous horseplay questions dealt with whether the injurious activity was “in the course of employment”). See also Petrik, 2015 SD 39, ¶¶ 15-16, 865 N.W.2d at 138 (recognizing that previous cases dealing with horseplay centered around the issue of whether the activity that caused the injury was “in the course of employment”).


80. Id. at 529.

81. Id. In the Petrik opinion, to the sections regarding horseplay, the Phillips case is the only South Dakota case cited. See Petrik, 2015 SD 39, ¶¶ 16-29, 865 N.W.2d at 138-42 (demonstrating reliance on the Phillips case as South Dakota precedent).

82. Phillips, 484 N.W.2d at 528.

83. Id. at 529. The facts of the case indicate that there were two employees who were throwing sperm cords removed from hogs at the John Morrell hog kill department. Id. at 528-29. One employee
was that the horseplay was a substantial deviation from his duties of employment.\textsuperscript{84} In determining this initial issue, the court first determined that the employee "would not have become injured but for the fact that he was at work," and therefore there was "a causal connection between the injury and the employment . . . ."	extsuperscript{85} The court then analyzed whether the injury arose out of and in the course of employment with reference to the circumstances surrounding the injury.\textsuperscript{86} In using the factors provided in Larson’s Workmen’s Compensation Law, the court concluded that the employee’s horseplay was not a substantial deviation from employment.\textsuperscript{87} The court based its findings upon the evidence that the horseplay did not affect the work product, the employee did not abandon his work duties, the employer tolerated some horseplay, and horseplay would be expected on the assembly line job.\textsuperscript{88}

The next claim made by the employer was that the horseplay constituted willful misconduct because the employee knew that his actions were a violation of the work rules.\textsuperscript{89} The employer argued that under South Dakota Codified Laws section 61-6-14.1, misconduct included "failure to obey orders," and as a result, the employee was not entitled to workers’ compensation benefits.\textsuperscript{90} The court refused to recognize this definition from Chapter 61 of the South Dakota Codified Laws; and instead followed the Chapter 62 definition of "willful misconduct."\textsuperscript{91} Under section 62-4-37, the employer could not show that the employee "engage[d] in self-inflicted injury, intoxication, the failure to use safety equipment, or the warned the other, the claimant, to stop throwing the sperm cords and threatened him with a knife. \textit{id.} at 529. When the claimant refused to stop, the other employee, either by accident or intentionally, stabbed the claimant in his left leg. \textit{id.}

\textsuperscript{84} \textit{id.} at 530.

\textsuperscript{85} \textit{id.} (citing \textit{Bearshield v. City of Gregory}, 278 N.W.2d 166, 168 (S.D. 1979)). The court held that simply being at work was sufficient for determining that the injury arose "out of" course of his employment. \textit{id.}

\textsuperscript{86} \textit{id.} (citing \textit{Bearshield}, 278 N.W.2d at 168). This was the first time the South Dakota Supreme Court had interpreted factors for "in the course of" as it pertained to horseplay. \textit{id.} The court adopted the factors listed above from the Larson’s Workmen’s Compensation Law treatise. \textit{id.} (citations omitted).

\textsuperscript{87} \textit{id.} at 531 (citation omitted). As to the factor of whether the practice of throwing sperm cords at one another had become an accepted part of the employment, the court found that the employer had tolerated such behavior in the past, which was enough to fulfill that factor. \textit{id.} The court even recognized that there was undisputed evidence that the employer had a rule against horseplay, and that the employee engaged in such horseplay, but nevertheless, found in favor of the employee. \textit{id.}

\textsuperscript{88} \textit{id.} at 531-32.

\textsuperscript{89} \textit{id.} at 533. Under statutory law regarding unemployment benefits in South Dakota, misconduct is defined as “(1) [f]ailure to obey orders, rules, or instructions,” “(2) [s]ubstantial disregard of the employer’s interests,” “(3) [c]onduct evincing such willful or wanton disregard of an employer’s interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee,” or “(4) [c]arelessness or negligence of such degree or recurrence as to manifest equal culpability or wrongful intent.” S.D.C.L. § 61-6-14.1 (2015). This is different from the definition of “willful misconduct” used in Chapter 62 of the South Dakota Codified Laws, which pertains to workers’ compensation. \textit{Compare} S.D.C.L. § 62-4-37 (2015) (stating that compensation may not be allowed for certain employee conduct), \textit{with} S.D.C.L. § 61-6-14.1 (2015) (defining what is considered misconduct for purposes of unemployment compensation).

\textsuperscript{90} \textit{Phillips}, 484 N.W.2d at 531.

\textsuperscript{91} S.D.C.L. § 61-6-14.1; S.D.C.L. § 62-4-37 (2015). \textit{See also} \textit{Phillips}, 484 N.W.2d at 531 (demonstrating Chapter 61 dealt solely with unemployment benefits, while Chapter 62 did not define willful misconduct “as a violation of work rules” anywhere in South Dakota Codified Laws section 62-4-37).
failure to perform a duty required by statute, but rather in the throwing of sperm cords during moderate horseplay." \(^92\) Accordingly, the South Dakota Supreme Court affirmed the Department of Labor’s determination that the employee was entitled to workers’ compensation benefits. \(^93\)

Before 2013, \textit{Phillips} was the only South Dakota workers’ compensation case that referenced “horseplay” as a limitation for an employee seeking benefits. \(^94\) In 2013, however, the South Dakota Supreme Court came back to the issue of “arising out of” employment in making its decision in \textit{Voeller v. HSBC Card Services, Inc.} \(^95\) In that case, the employee had logged out of her work so she could take her morning break in her car. \(^96\) As she walked out to her vehicle, she was subsequently shot in the parking lot by her estranged husband who had been waiting in the parking lot for her. \(^97\) Despite the fact that the employee was only on a break from work, the court held that her death was not compensable because it did not have its “origin in the hazard to which the employment exposed [the employee] while doing her work.” \(^98\) Specifically, the court could not find that the employer had any role in her death, other than being the place where the employee was killed. \(^99\) Accordingly, the shooting was deemed to be “so clearly personal” to the employee “that even though it occurred while she was at her place of work, the assault cannot possibly be attributed to her employment.” \(^100\)

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\(^92\) S.D.C.L. § 62-4-37; \textit{Phillips}, 484 N.W.2d at 531-32. The South Dakota Supreme Court also agreed with the Department of Labor that “[t]hese circumstances do not compare to the deliberate actions required under the statute . . . . It is only in those instances that constitute serious, deliberate, and intentional misconduct, that the bar to benefits provided by SDCL § 62-4-37 should be applied.” \textit{Phillips}, 484 N.W.2d at 532.

\(^93\) \textit{Id.} Justice Henderson was clearly not in agreement with the majority, stating that this holding would encourage dangerous actions taken by workers who did not care about work ethics and safety in the workplace. \textit{Id.} (Henderson, J., dissenting).

\(^94\) There were a few opinions that made reference to \textit{Phillips} in discussing horseplay, but none of those opinions discussed horseplay as an actual issue to the case. \textit{See generally} Therkildsen v. Fisher Beverage, 1996 SD 39, 545 N.W.2d 834 (finding the fact that employee was intoxicated was a substantial factor in causing his death, but that employer was stopped from using intoxication as a defense); Fair v. Nash Finch Co., 2007 SD 16, 728 N.W.2d 623 (holding that an employee who shopped at her employer’s store after she had clocked out of work did “arise out of” and “in the course of” employment); \textit{Voeller v. HSBC Card Services, Inc.}, 2013 SD 50, 834 N.W.2d 839 (finding an employee who was shot by her husband in her employer’s parking lot did not “arise out of” her employment).

\(^95\) 2013 SD 50, 834 N.W.2d 839.

\(^96\) \textit{Id.} ¶ 2, 834 N.W.2d at 842.

\(^97\) \textit{Id.} The employee’s husband had been served with a summons and complaint for divorce the day before. \textit{Id.} After killing the employee, the husband then killed himself. \textit{Id.}

\(^98\) \textit{Id.} ¶ 28, 834 N.W.2d at 850 (quoting \textit{Fair}, 2007 SD 16, ¶ 10, 728 N.W.2d at 629).

\(^99\) \textit{Id.} The court also stated that the “[e]mployer’s only role in the assault was that it was the place where [the husband] found [the employee], a connection that is not sufficient by itself to make the assault compensable.” \textit{Id.} This finding was different from many of the other cases in which the court simply looked to the fact that the employee was at work in order to find that there was a compensable workers’ compensation claim. \textit{See} Phillips v. John Morrell & Co., 484 N.W.2d 527, 530 (S.D. 1992) (stating that the employee would not have been injured “but for the fact he was at work[,]” and that “[t]he injury need not be proximately caused by the employment, but simply that it would not have occurred but for the employment”). \textit{See also} Bearshield v. City of Gregory, 278 N.W.2d 166, 168 (S.D. 1979) (stating that “arising out of” refers to “the time, place and circumstances of the injury”).

\(^100\) \textit{Voeller}, 2013 SD 50, ¶ 28, 834 N.W.2d at 850. As a result, the court upheld summary judgment in favor of the employer because the employee’s death did not “arise out of” her employment. \textit{Id.}
In Voeller, the South Dakota Supreme Court also made a reference to the “positional risk” doctrine.\footnote{Id. ¶¶ 10-12, 834 N.W.2d at 844-45.} For states that follow the positional risk doctrine, “[a]n injury arises out of the employment if it would not have occurred but for the fact that the conditions and obligations of the employment placed claimant in the position where he or she was injured.”\footnote{Id. ¶ 10, 834 N.W.2d at 844 (quoting LARSON, supra note 47, at § 3.05).} This doctrine requires that the risk must be one in which “any other person then and there present would have met with irrespective of his employment . . . .”\footnote{Steinberg v. S.D. Dept. of Military & Veterans Affairs, 2000 SD 36, ¶ 25, 607 N.W.2d 596, 605.} The doctrine seems to suggest that the employee would need to show that the injury occurred as a result of a condition or a requirement of the work duties or employment.\footnote{See LARSON, supra note 47, at § 3.05 (stating that courts will award compensation when there is a “neutral” force that caused the injury, meaning it was “neither personal to the claimant nor distinctly associated with the employment”).} Furthermore, a court may apply the positional risk doctrine by at least showing that the employee was acting in furtherance of the employment.\footnote{Id. The example used by Larson comes from Pennsylvania, in which the court ruled that an employee who lost sight in his left eye after suppressing a sneeze during a business meeting could recover under workers’ compensation. Id. (citing Carroll v. Workers’ Comp. App. Bd., 750 A.2d 938, 929 (Pa. Commw. Ct. 2000)). The court found that the employee was trying to suppress the sneeze so that he would not spread germs to others in the room, which was a showing that the action that caused the injury was done with the intention of acting “in the furtherance of [e]mployer’s affairs.” Carroll, 750 A.2d at 942. See LARSON, supra note 47, at § 27.01[4] (noting that “[i]f the act which the employee undertakes outside his regular duties is positively prohibited, it will probably be held to be outside the course of employment”). There are some exceptions that may apply to this rule, such as if the activity was done to further the practice by the employer, the employer acquiesced to the activity, or the “employer actually requests the unusual activity.” Id.} The doctrine should not apply, however, when an employee is not taking actions that further his or her employment. This is especially true when the employee is engaged in activities that are prohibited by the employer.\footnote{See infra Part IV.} As addressed in the following section, South Dakota should not allow an exception to this concept for employees who engage in dangerous activities at work for no apparent reason, which could be spent doing other productive work activities in furtherance of the employment.\footnote{Petrik v. JJ Concrete, Inc., 2015 SD 39, ¶¶ 18-29, 865 N.W.2d 133, 139-42.}

IV. ANALYSIS

A. DOWNFALLS OF THE COURT’S FINDING IN PETRIK

In Petrik, the court pointed out four factors it considered in finding that the injury arose out of and in the course of the claimant’s employment, and thus, in favor of the claimant seeking recovery of workers’ compensation benefits.\footnote{Petrik v. JJ Concrete, Inc., 2015 SD 39, ¶¶ 18-29, 865 N.W.2d 133, 139-42.} While each factor included a detailed analysis in the opinion, the court overlooked public policy concerns and made several inconsistencies in coming to its ultimate
It is necessary to further explore the court's findings with regard to each factor in order to reach a more fair and reasonable outcome in horseplay-related workers' compensation cases.

1. Deviations Can Occur During a "Lull in Work"

In coming to its conclusion, the court first addressed that the "deviation during a lull in work was insubstantial." In making its finding, the court tried to interpret the claimant's decision to run through the work site as an insignificant and impulsive deviation from the work he was to be performing. As a result, the court believed that the injury arose out of and in the course of the employment. This finding is inconsistent with the language used by the court in previous decisions and the "lull in work" theory presents problems for the future of workers' compensation in South Dakota.

In its focus on whether the injury was "in the course of" the employment, the court conceded that "[a]n employee [will be] considered in the course of the employment if he 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." Further, the court even recognized that running on a dangerous job site has "no direct connection with or relation to the work Petrik was to perform." Yet, the court made the decision to reward the "dangerous and foolish" deviation because of a "lull in work" and because it was made out of impulse rather than taking the time to think about the decision to run around the dangerous workplace. Had the claimant been injured while simply resting or waiting for the truck to arrive, the lull in work would not have been an issue discussed, and the claimant would have collected workers' compensation without much opposition because resting or waiting would be done "in the course of" employment. Running on the worksite, in an act of horseplay, during a "lull in work," however, does not present an activity that is authorized by

109. Id.
110. Id. ¶ 22, 865 N.W.2d at 140.
111. Id. Specifically, the court stated that "[n]o doubt running through the job site was dangerous . . . . However misguided, the extent of Petrik's momentary and impulsive deviation during a lull in work was insubstantial." Id.
112. Id. ¶ 30, 865 N.W.2d at 142.
113. Id. ¶ 15, 865 N.W.2d at 138 (quoting Mudlin v. Hills Materials Co., 2005 SD 64, ¶ 15, 698 N.W.2d 67, 73).
114. Id. ¶ 14, 865 N.W.2d at 138. This quote from the court seems to contradict the exact purpose for recognizing why the injury must occur during the course of employment, as it allows for recovery when an employee causes his or her own injury without doing the work that he or she was assigned to.
115. See id. ¶ 22, 865 N.W.2d at 140 (demonstrating the court's failure to point reasons why an impulsive, yet still foolish, deviation would allow for recovery more often than a deviation that was not made in the moment); Id. ¶ 3-4, 865 N.W.2d at 135 (demonstrating there was no discussion in the opinion about why the court believed this to be an impulsive decision, when the facts seem to indicate that the claimant planned out the prank he played on his co-worker and made the decision to run around while they sat around waiting); Id. ¶¶ 14, 22, 865 N.W.2d at 138, 140 (stating a "lull in work," as the court referred to, actually suggests that the claimant had more time to think about this prank rather than making the decision to engage in horseplay in a "momentary and impulsive deviation").
the employer, and thus should not be considered to be "in the course of employment." 116

The court was also required to show that the claimant's horseplay "arose out of" the employment. 117 While this requirement can usually be easily satisfied because "[t]he employment need not be the direct or proximate cause of the injury[]", it is at least arguable that there was not "a causal connection between the injury and the employment" that exposed the employee "while doing [his] work." 118 Instead, the court misapplied the factors for determining this "arising out of" element, as stated in Norton. 119 On the first point, the court stated that the employment contributed to causing the injury because he was required to be there to standby and remain idle. 120 It is clear from the facts, however, that the claimant was not forced by his employment to remain idle. 121 Instead, the claimant was on a lunch break and had even left the site to put some air in the tires of his own personal vehicle. 122 Had the claimant been injured in a car accident on his way to fill the tires of his vehicle, the court would most likely not have found the injury to have arisen out of the employment, despite the fact that he would have been in an accident while leaving work. 123

On the second point, the court found that it was to be expected that the claimant might reasonably play a prank on his co-worker during the idle period. 124 The court made this finding, despite the undisputed evidence that there was a safety manual that all employees were required to read and to recognize that horseplay would not be tolerated at the worksite. 125 Such a blatant violation of workplace duties should not be considered an action that the employer could have reasonably expected its employees would engage in, and thus, the court could not find the second point to be satisfied under the "arising out of" requirement. The

116. See Bearshield v. City of Gregory, 278 N.W.2d 166, 168 (S.D. 1979) (stating that the claimant's actions must be "naturally or incidentally related to his employment" in order for there to be recovery).
117. Petrik, 2015 SD 39, ¶ 12, 865 N.W.2d at 137.
118. Mudlin v. Hills Materials Co., 2005 SD 64, ¶ 11, 698 N.W.2d 67, 71 (emphasis added). Keep in mind that the emphasized portion states "while doing his work" rather than simply stating "while at work." This is a big distinction and it is evident from the facts of Petrik that he was not doing the work that he was assigned to complete by his employer. Petrik, 2015 SD 39, ¶ 14, 865 N.W.2d at 138.
119. Id. ¶ 12, 865 N.W.2d at 137; Norton v. Deuel School Dist. No. 19-4, 2004 SD 6, ¶ 8, 674 N.W.2d 518, 521.
120. Petrik, 2015 SD 39, ¶ 14, 865 N.W.2d at 138. The court does preface their ruling, however, by conceding that the claimant's act of running at the work site in fact "had no direct connection with or relation to the work Petrik was to perform." Id.
121. See Hearing Transcript, supra note 16, at 48 (stating the employees often took breaks at the job site waiting for concrete).
122. Id.
123. See Mudlin, 2005 SD 64, ¶ 7, 698 N.W.2d at 71 (stating the general rule that employees are not covered under workers' compensation when "going and coming" to work). See also Lloyd v. Brands, 2011 SD 28, ¶ 7, 799 N.W.2d 727, 730 (holding that an employee who was injured when he traveled for his own benefit, without a company policy requiring the employee to make the trip, was not enough to find that the injury "arose out of" the employment).
124. Petrik, 2015 SD 39, ¶ 14, 865 N.W.2d at 138. See id. (illustrating the court stated nothing more about why it believed this to be an activity in which an employee might engage in during work).
125. Appellee's Brief, supra note 12, at 63-75. See Hearing Transcript, supra note 16, at 31-32 (claimant admitted that there was a safety manual that prohibited horseplay and that he was aware of the manual).
court did not address the third point, that "the activity [brought] about the disability upon which compensation was based[,]" as it was uncontested that the claimant was injured during an act of horseplay. By investigating the Norton factors more acutely and precisely, it is arguable that even the "arising out of" requirement was not satisfied by the claimant.

Further, the court could have looked to the analysis in Voeller for exploring whether the injury arose out of the employment. The court held that an injury that was "so clearly personal" to the employee would not be covered under workers' compensation, as it did not have its "origin in the hazard to which the employment exposed" the employee. Similarly, the personal relationship between Petrik and Cole is what caused the claimant's injury. Even if the decision to run around on the worksite was made out of impulse, as Justice Kern suggested, the deviation was made on a personal level, which brought it outside of the employment. It is not sufficient to say that the injury arose out of the employment simply because Petrik and Cole were co-workers. If that were the case, the court could find that an injury that occurred outside the workplace between co-workers who were not working would "arise out of" the employment, which would simply not make any sense for the purposes of workers' compensation.

Recognizing the "lull in work" theory creates inconsistencies in the workers' compensation system and creates bad law that will go against public policy. The law needs to reflect the logical notion that "thrill seeking which bears no conceivable relation to accomplishing the job for which the employee was hired moves the employee from the scope of his employment." By recognizing this basic and understandable principle, the court would appropriately relieve the employer of having to reward claimants seeking workers' compensation for injuries that occur as a result of horseplay that did not affect the work product. The fact that an injury occurred as a result of an activity that does absolutely

126. Petrik, 2015 SD 39, ¶ 12, 865 N.W.2d at 137. See id. (showing it was obvious to the court that the work that the claimant performed for which he was paid for was not the activity that caused his injury); id. ¶ 2, 865 N.W.2d at 135 (stating in other words, the claimant was not injured while "pinning footings, placing stake lines, [or] setting foundation forms," or any other work that was part of his regular work duties).

127. See Voeller v. HSBC Card Servs., Inc., 2013 SD 50, ¶¶ 27-28, 834 N.W.2d 839, 849-50 (holding that the claimant failed to prove that the death had its "origin in the hazard to which the employment exposed [claimant] while doing her work").

128. Id. ¶ 28, 834 N.W.2d at 850.

129. See Hearing Transcript, supra note 16, at 15-19 (indicating that the claimant was "pretty good friends" with his co-workers, and that they consistently played pranks on each other).

130. See Petrik, 2015 SD 39, ¶ 22, 865 N.W.2d at 140 (taking into account that the court considered that Petrik and Cole were co-workers).

131. Once co-workers develop a friendship that extends outside the employment, deviations that the employees engage in while at work are often "personal" and outside of the "arising out of" requirement for workers' compensation, instead of putting the burden on employers to separate co-workers who tend to mess around at work.

132. See Hoyle v. Isenhour Brick & Tile Co., 293 S.E.2d 196, 202 (N.C. 1982). The Supreme Court of North Carolina made this ruling after summarizing the legal principles that applied in several of their workers' compensation cases dealing with injuries that resulted from horseplay. Id.
nothing in furtherance of the work product should be considered when determining the seriousness of the deviation from work duties.\textsuperscript{133}

The \textit{Phillips} case presents another illustration where the court ruled in favor of the claimant when the horseplay that caused the injury had no effect on the work product.\textsuperscript{134} Even in that case, however, the employer seemed to acquiesce to the behavior as there were several supervisors and inspectors that oversaw the operations and did not actively try to prevent the horseplay.\textsuperscript{135} Additionally, the court recognized that the claimant in \textit{Phillips} could not have expected to be stabbed by a co-worker while engaging in horseplay.\textsuperscript{136} In \textit{Petrik}, the deviation was even more evident because the claimant recognized that running through a dangerous worksite could result in injury.\textsuperscript{137} The court should have found that the deviation was even more apparent because the claimant realized that the horseplay was dangerous. As Judge Barnett stated, the “deviation taken by claimant was substantially larger than that in \textit{Phillips} where there was only a split second deviation which was commingled with the work duties. Claimant took off running across a construction site, which is definitely more of a deviation than \textit{Phillips}’s ‘flick of a wrist.’”\textsuperscript{138} It is evident there was a substantial deviation despite the “lull in work” theory utilized by the court in \textit{Petrik}.\textsuperscript{139}

While an employee’s attempts to improve the work product should be considered, the “lull in work” theory should not be recognized. The South Dakota Supreme Court recognized the two purposes for the lull in work theory, one being that “idleness breeds mischief.”\textsuperscript{140} While this is theoretically accurate, it would allow a worker to engage in any number of actions that would be a deviation from

\textsuperscript{133} In \textit{Phillips}, the court seemed to recognize that the horseplay’s effect on the work product was something that should be considered, but only when finding in favor of the claimant. \textit{Phillips} v. John Morrell & Co., 484 N.W.2d 527, 530-31 (S.D. 1992). See id. (determining that “the horseplay was not significant enough to affect the work product,” it found this to be a point in favor of the claimant). Instead of looking to whether the horseplay negatively affects the outcome of the work, the court should be denying workers’ compensation benefits if the claimant is injured as a result of horseplay that is not positively affecting the work product in any way. See \textit{generally} Carroll v. Workers’ Comp. App. Bd., 750 A.2d 938 (Pa. Commw. Ct. 2000) (finding in the Pennsylvania case, in which the worker injured his eye while trying to suppress a sneeze, he was doing so to avoid spreading germs). Although the employee did not significantly attempt to have a positive impact on the workplace, he nonetheless took steps in furtherance of his work, for which he was rewarded. \textit{Id}. The South Dakota Supreme Court should take the same approach in making its determinations regarding workers’ compensation and how the deviation affected the workplace.

\textsuperscript{134} \textit{Phillips}, 484 N.W.2d at 531.

\textsuperscript{135} \textit{Id}. at 529.

\textsuperscript{136} See \textit{id}. at 530-31 (stating that there was “no reason to foresee that the throwing of sperm cords or stick wounds would result in a serious injury such as a stabbing wound”).

\textsuperscript{137} See \textit{Hearing Transcript}, supra note 16, at 30-31. The claimant admitted that the type of horseplay he engaged in was prohibited by the employer, when he agreed that “running through a job site would be dangerous” and “running through a job site could result in someone tripping and getting hurt[.]” \textit{Id}.

\textsuperscript{138} \textit{Petrik} v. JJ Concrete, Inc., Hughes County Civ. No. 13-321, at 8 (S.D. 6th Cir. 2014).

\textsuperscript{139} \textit{Petrik}, 2015 SD 39, ¶ 30, 865 N.W.2d at 142.

\textsuperscript{140} \textit{Id}. ¶ 21, 865 N.W.2d at 139-40 (citing \textit{Larson}, supra note 47, at § 23.07[5]) (explaining the effect of a lull in work).
work activities. Recognition of "lull in work" is detrimental to businesses carrying workers' compensation insurance for its employees for two reasons, as it promotes the employer to find additional work for its employees. First, it would cost employers more money to find additional work for employees to work on in order to avoid having a "lull in work." Second, there is more risk of injury to employees, as it would be more likely for the employee to be injured during times of labor, especially performing a job that requires demanding manual work, such as the work for JJ Concrete. Either way, the employer would be liable for workers' compensation payments, so it would make more sense for the employer to have productive work being done rather than having employees sit idle. Because the claimant realized the horseplay was dangerous, the horseplay did not affect the work product, and the injury resulted from a personal action that the claimant took with his co-worker, the court should ultimately have determined that the horseplay in Petrik was a substantial deviation from employment.

2. "No Work Duties to Abandon" Does Not Allow for Horseplay

In its second enquiry, the court found that there was no work to abandon, and therefore the claimant could not have possibly deviated from his work. The court used this technicality, which was first stated in Larson's treatise on workers' compensation law, despite the actions that appeared strikingly similar to willful misconduct. As the court stated in Holscher, willful misconduct is defined as "the intentional doing of something with the knowledge that it is likely to result in serious injuries, or with reckless disregard of its probable consequences." As it was clear in the facts of Petrik, even if there were no work duties to abandon,
the claimant was engaged in an act of horseplay that constituted willful misconduct.146

During the time the claimant and his co-workers had their idle periods, they
"were required to wait for a concrete truck to arrive."147 While they waited, they
were also expected to "clean the site, put away tools, and engage in other
miscellaneous duties."148 If the work was completed, the workers could be
expected to have some downtime for a lunch break or to converse with each
other.149 While the claimant was aware that there were several activities to work
outside of horsing around with his co-workers, he also knew that running
around the job site was a precarious activity.150 In fact, the claimant stated that
he felt it was more dangerous to run on the work site than any of the other pranks
that his co-workers usually engaged in.151 The claimant, however, undertook the
risk of getting injured by engaging in horseplay despite recognition of the danger
presented.152

South Dakota Codified Laws section 62-4-37 states that willful misconduct
includes "intentional self-inflicted injury, intoxication, illegal use of... drug[s],
or willful failure or refusal to use a safety appliance furnished by the employer, or
to perform a duty required by statute."153 The actions taken by the claimant in

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146. See Petrik, 2015 SD 39, ¶ 2-5, 865 N.W.2d at 135-36 (reciting the facts of the horseplay giving
rise to the workers' compensation claim).
147. Id. ¶ 2, 865 N.W.2d at 135.
148. Id. This description of the claimant's work duties demonstrates that this situation should not
have even been considered an "idle period," as it was evident there was more work that could have been
done before the arrival of the concrete truck. Id.
149. See id. ¶ 3, 865 N.W.2d at 135 (demonstrating that employees were still on the job site when
they would take their lunch break). The claimant admitted that sometimes the workers would drive their
personal vehicles to a gas station near the work site to get some snacks before the trucks arrived. Hearing
Transcript, supra note 16, at 16. There were certainly activities that were permitted by the employer that
the workers could engage in, besides running around the dangerous worksite.
150. See Hearing Transcript, supra note 16, at 37-39 (agreeing at the deposition that there are dangers
with running through the job site).
151. See id. at 37-40 (comparing other pranks such as putting chalk in someone's gloves which would
not lead to an injury). The claimant also stated that he would not have run through the job site again
knowing how dangerous it is, and that he would not have let his daughter run through a job site like that
because of the danger. Id. During his hearing, the claimant fully admitted his knowledge of the hazards
on the job site:

Q: You said you had never run on a job site before, correct?
A: Correct.
Q: And the reason you've never run on a job site before is because it's dangerous to
do so?
A: That's right.

Q: And so running through a job site would be dangerous?
A: Correct.
Q: And running through a job site could result in someone tripping and getting hurt?
A: Yes.

153. S.D.C.L. § 62-4-37 (2015). The court had previously stated that this statutory language does
not define a violation of the work rules alone as willful misconduct. Phillips v. John Morrell & Co., 484
Petrik clearly fit within this definition. Taking actions, such as running around a dangerous worksite, should be considered “self-inflicted” by the court, and should therefore be a bar to workers’ compensation.\textsuperscript{154} As it was noted in Phillips, the employer argued that the horseplay that was undertaken by the claimant “was a knowing violation of [the employer’s] work rules and should be considered willful misconduct.”\textsuperscript{155} Further, using Chapter 61 of the South Dakota Codified Laws, the employer asserted that misconduct includes the “failure to obey orders.”\textsuperscript{156} The court, however, in sticking to its liberal application of workers’ compensation laws, refused to recognize the Chapter 61 definition of misconduct and held that the claimant did not engage in a self-inflicted injury during his “moderate horseplay.”\textsuperscript{157}

This is an additional illustration of the direction the South Dakota Supreme Court is headed in with regard to workers’ compensation cases dealing with horseplay. As Judge Barnett stated in the Petrik case, workers should not be “compensated for any and all acts of horseplay while they are waiting for duties to resume.”\textsuperscript{158} While the South Dakota Supreme Court held that the claimant was engaged in horseplay only because of a “lull in work,” it failed to explain how the injury was work-related.\textsuperscript{159} In other words, the court did not unambiguously explain how it found the horseplay compensable as a work-related injury when it held that there was no work to do.\textsuperscript{160} Additionally, as the claimant was taking a break from his difficult manual labor, he was not involved in any repetitious work, unlike the case in Phillips.\textsuperscript{161} The only injury the claimant could have been compensated for would have had to occur if the injury took place during the time in which the claimant should have been resting. Instead, the court rejected the contention that “heavy lifting and manual labor would motivate employees to save

\textsuperscript{154} See id. (demonstrating that a self-inflicted injury was not present). See also S.D.C.L. § 62-4-37 (stating that willful misconduct will be found in the event of a self-inflicted injury). See generally Petrik, 2015 SD 39, 865 N.W.2d 133 (demonstrating that the court failed to address willful misconduct in the Petrik case, and therefore did not look into the definition as defined by statute).

\textsuperscript{155} Phillips, 484 N.W.2d at 531.

\textsuperscript{156} Id. Chapter 61 of the South Dakota Codified Laws actually deals with unemployment benefits, which the court recognized in refuting the employer’s contention. Id. Nevertheless, the statutory language in Chapter 61 should have been considered by the court in the workers’ compensation case, or the court should have chosen to adopt the language for interpreting willful misconduct in the workers’ compensation context.

\textsuperscript{157} Id. at 531-32.

\textsuperscript{158} Appellant’s Brief, supra note 11, at 24.

\textsuperscript{159} See Petrik v. JJ Concrete, Inc., 2015 SD 39, ¶¶ 22-23, 865 N.W.2d 133, 140 (finding that the “impulsive deviation” was due to a “lull in work,” yet failing to explain how the resulting injury was work related).

\textsuperscript{160} See id. (demonstrating a lack of discussion on how the deviation was specifically related to work activities). This is where the court should have addressed how there could be an injury related to the employment if it was simultaneously holding that there was no work to perform.

\textsuperscript{161} See Appellant’s Brief, supra note 12, at 20 (demonstrating that Judge Barnett gave less leniency to Claimant and found there was more of a deviation in the Claimant’s case where he was engaged in nonmonotonous manual labor than in Phillips which was a momentary deviation in the middle of repetitious work which necessitates “outside stimuli”).
As a matter of law, the court should have found the obvious notion that manual labor requires some idle time to allow workers to preserve their energy, and engaging in horseplay activities would be a substantial deviation from using that time to rest. Ultimately, the court’s holding that there was not a deviation from work activities because there was “no work to abandon” created contradiction and unpredictability, as it failed to address how the lack of work would still allow the employee to be “in the course of” the employment when the horseplay occurred.\(^{163}\)

### 3. Horseplay is Not an Accepted Part of the Job

In analyzing the third and fourth factors to determine whether the horseplay was a substantial deviation, the court composed another inconsistency. Under the third factor, the court first found that the horseplay had not become an accepted part of the employment.\(^{164}\) It was noted that there was “no dispute that running through the job site had not become an accepted part of Petrik’s employment.”\(^{165}\) In fact, the court recognized that the claimant even knew that it was against the employer’s work rules to run around on the worksite.\(^{166}\) More importantly, “there [was] no evidence that running on the job site was a regular occurrence.”\(^{167}\)

While the court recognized that the employer took exceptional measures to prevent disruptive horseplay at work, it found in the fourth factor that horseplay was to be expected.\(^{168}\) Despite the “no horseplay” policy that was clearly stated in the employee safety manual and the recognition by the claimant that the employer did not tolerate messing around at work, the court expressed that horseplay should be expected.\(^{169}\) The inconsistency is rather apparent: how can activities that are expressly prohibited by the employer be expected for purposes of workers’ compensation?

Similar to the theory of negligence per se, in which a defendant is liable for injuries that occur to the plaintiff when the defendant violated a statute that was aimed at protecting the plaintiff regardless of whether it was reasonable, an

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162. *Petrik*, 2015 SD 39, ¶ 28, 865 N.W.2d at 141. Justice Kern stated that expert testimony would have been needed to show that manual laborers should relax during idle times to save up their energy rather than engage in horseplay. *Id.*

163. *Id.* ¶¶ 18, 30, 865 N.W.2d at 139, 142.

164. *Id.* ¶ 24, 865 N.W.2d at 140.

165. *Id.*

166. *Id.* The court also pointed out that an employee manual was issued to each employee, which contained the safety policy. *Id.* In the safety policy, the “[e]mployer emphasized that it did not tolerate horseplay.” *Id.*

167. See *id.* ¶¶ 25-28, 865 N.W.2d at 140-41 (demonstrating that this point is important in analyzing the fourth factor addressed by the court, which was that the employer should have expected there to be horseplay).


169. *Id.* As noted earlier, the claimant in *Petrik* admitted that he was messing around and stated that he would take care of the medical bills with his own insurance because of his conduct. Appellee’s Brief, *supra* note 12, at 8. Although this fact is disputed, it was pretty evident from the facts, as several co-workers backed up this admission made by the claimant. *Id.* at 8-9.
employee who violates rules that are explicitly stated by the employer should be barred from collecting workers' compensation benefits.\textsuperscript{170} Any other finding punishes an employer who takes protective steps and careful measures to prevent injuries at the work place, especially when the injury occurs as a result of horseplay.\textsuperscript{171}

This is a point that the South Dakota Supreme Court failed to identify in both the \textit{Phillips} and \textit{Petrik} cases.\textsuperscript{172} In \textit{Phillips}, the employer made the argument that the employee was well aware of the workplace rules, which prohibited horseplay.\textsuperscript{173} The court refuted this argument by essentially arguing that employees will break the workplace rules just by their general nature.\textsuperscript{174} The court stated that "[t]hese monotonous jobs provide such a constant pattern of repetition that some new stimulus becomes necessary to relieve the tedium."\textsuperscript{175} Additionally, it was noted that employees generally "do not discard their personal qualities when they go to work . . . . In bringing men together, work brings [their] qualities together, causes frictions between them, creates occasions for lapses into carelessness, and for fun-making and emotional flare-up."\textsuperscript{176} As a result, the court found that even activities that are prohibited expressly can still be expected to occur at work, and the employer is still liable.\textsuperscript{177} Likewise, in \textit{Petrik}, the court recognized there was a "no horseplay" policy.\textsuperscript{178} In fact, the owner at JJ Concrete stated "[w]e explain that difference of screwing around, having fun . . . . Horseplay, something like this that happened with [the claimant] is not part of their daily activities and they should not be doing this."\textsuperscript{179} Nevertheless, the court held that the idle periods that occurred at the claimant's workplace encouraged horseplay to occur, and they should therefore be expected by the employer.\textsuperscript{180}

The court pointed out that "[m]ultiple courts have found that '[c]mployers, whose work requires that men wait upon the job for work conditions ought not to be heard to say that an accident, occurring out of the very conditions presented by

\textsuperscript{170} See Weeks v. Prostrollo Sons, Inc., 169 N.W.2d 725, 728-29 (S.D. 1969) (stating that "where a particular statutory or regulatory standard is enacted to protect persons in the plaintiff's position or to prevent the type of accident that occurred, and the plaintiff can establish his relationship to the statute, unexplained violation of that standard renders the defendant negligent as a matter of law").

\textsuperscript{171} Comparing those employers who do take preventative measures with employers who do not make safety of their employees an important issue really makes this an important point. In the court's eyes, however, it appears that both of these types of employers are treated equally for workers' compensation purposes, which is a further inconsistency presented by the court.

\textsuperscript{172} See generally \textit{Petrik}, 2015 SD 39, 865 N.W.2d (failing to discuss barring claimant’s recovery due to violating employer’s policies); \textit{Phillips} v. John Morrell & Co., 484 N.W.2d 527 (S.D. 1992) (declining to evaluate employer policy in discussing workers' compensation claim).

\textsuperscript{173} \textit{Phillips}, 484 N.W.2d at 531.

\textsuperscript{174} See id. (finding that horseplay could be expected during assembly line jobs).

\textsuperscript{175} Id.

\textsuperscript{176} Id. (quoting Hartford Accident & Indemnity Co. v. Cardillo, 112 F.2d 11, 15 (C.A.D.C. 1940)). Furthermore, the court stated that "[w]ork could not go on if men became automatons repressed in every natural expression." \textit{Id}.

\textsuperscript{177} \textit{Id}.

\textsuperscript{178} Petrik v. JJ Concrete, Inc., 2015 SD 39, ¶ 5, 865 N.W.2d 133, 135-36; Appellee's Brief, \textit{supra} note 12, at 4.

\textsuperscript{179} Hearing Transcript, \textit{supra} note 16, at 63.

\textsuperscript{180} \textit{Petrik}, 2015 SD 39, ¶ 26, 865 N.W.2d at 141.
the required waiting, is not compensatory." While this finding bears some truth, the exception to the general rule should be horseplay. In other words, a man who waits at work and is injured by something outside his control is innocent and should be compensated appropriately. Additionally, someone who undertakes actions in furtherance of his employer’s mission during an idle period and is injured should also be compensated for the injuries sustained. An employee injured in an act of horseplay, however, should not receive such compensation. The employer appropriately argued that “[e]very job is repetitive, but that does not mean every job is monotonous and people screwing around should be awarded workers’ compensation benefits when their horseplay causes their injury.”

Although the court has attempted to be liberal in their interpretation of workers’ compensation benefits, it should consider whether horseplay is explicitly prohibited by the employer and if the action that is prohibited is what led to the injury.

B. EFFECTS OF THE PHILLIPS AND PETRIK DECISIONS

The liberal approach that the court took in Phillips and Petrik has had negative effects on public policy and on employers’ businesses. Awarding workers’ compensation claimants for injuries that occur as a result of senseless horseplay only promotes workplace shenanigans, allows for frivolous claims to be filed against employers, and causes bigger risks and expenses for employers. Ultimately, the trend in favor of awarding workers’ compensation to those who are injured while they are messing around not in furtherance of the employment needs to be reversed to limit these negative effects.

As Justice Henderson stated in Phillips, which is applicable to the Petrik case, the claimant “was injured as the natural consequences of his own tomfoolery (voluntary acts), unrelated to [the employer’s] interests, and a course of conduct purely personal in character.” Justice Henderson explained that taking a course of action that was not part of the employee’s job and was “stupid,” given the circumstances, should not hold the employer to be financially liable for injuries incurred. These types of actions are substantial deviations and should be

181. Id. ¶ 27, 865 N.W.2d at 141 (quoting Gilmore v. Ring Constr. Co., 61 S.W.2d 764, 766 (Mo. App. 1933)). It is important to note that the case that the court quoted here was one in which the employee was injured as a result of a co-worker who engaged in horseplay and injured the claimant, which is far different from case in Petrik. Gilmore, 61 S.W.2d at 764-65. The court also noted that “employees whose job requires them to expend ‘physical energy cannot be expected, during slack period, to sit in idleness and gossip. The employer must expect that they will engage in some form of activity.’” Id. (quoting Meigel v. Gen. Foods Corp., 2 A.D.2d 945, 945 (N.Y. App. Div. 1956)).

182. Appellee’s Brief, supra note 12, at 23. In further illustrating this point, the employer added that this notion “is not specific to concrete workers. Lawyers also give each other grief as writing a brief can get boring . . . and speaking/joking with a co-worker is a nice break. Chasing an employee down the hall, however, would not be permitted in any setting.” Id. at 24.


184. Id. Justice Henderson described that “throw[ing] sperm cords at fellow employees was not only not a part of his job, it was also stupid—particularly when he and his fellow employees had exceedingly sharp, long thin knives (9 inches long). Morrell’s, as his employer, should not be financially responsible for this type of conduct.” Id. This analysis can be directly compared with Petrik, in that it was not part of
considered willful misconduct under South Dakota Codified Laws section 62-4-37.185 Most importantly, Justice Henderson recognized the broader issue in his dissent, addressing the reason that those who engage in horseplay should not be compensated through workers’ compensation laws. Justice Henderson declared that “[a]s a matter of work ethics and safety, this state should take a firm position to discourage, not encourage, horseplay in the work place[,] . . . especially, when it is highly dangerous!”186 Ultimately, Justice Henderson took the position that he could “not vote to affix liability on the employer and thereby reward foolishness.”187

The court has set troublesome and unwanted public policy with regard to benefiting employees who engage in horseplay. The decisions that were made in Phillips and Petrik will lead to more frivolous claims for workers’ compensation benefits until the court has stretched the law beyond the main purpose of these benefits.188 Not only will there be negative effects on public policy, but also on businesses’ ability to manage their employees with regard to workers’ compensation.

When a worker is injured and given workers’ compensation benefits, the awarded claim affects the premiums that are paid by the employer to its insurance company.189 Workers’ compensation premiums are determined using several factors, including an “experience modification rate.”190 The experience modification rate is a method used by insurers to modify an employer’s premium “based on the number of claims and the cost of each claim.”191 Therefore, the experience modification rate is higher for more claims that are made.192 While the injuries that occur during acts of horseplay might not amount to large losses, “the formula is weighted more towards frequency than severity.”193 If employees continue to collect on claims of injuries that occur as a result of horseplay, premium rates for employers will only continue to rise, presenting higher risks and

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186. Phillips, 484 N.W.2d at 532.
187. Id. at 533.
188. See Dudley v. Huizenga, 2003 SD 84, ¶ 11, 667 N.W.2d 644, 648 (citing Rawls v.Coleman-Frizzell, Inc., 2002 SD 130, ¶ 19, 653 N.W.2d 247, 252) (holding that “[t]he purpose of workers’ compensation is to provide for employees who have lost their ability to earn because of an employment-related accident, casualty, or disease”) (emphasis added).
189. See Martin F. McGavin, What’s in your workers’ compensation policy?, 20 No. 6 Quinlan, WORKERS’ COMP BOTTOM LINE art. 3. (2011) (discussing how workers’ compensation premiums are calculated).
190. Id. The formula for determining workers’ compensation premiums is taking the manual rate and multiplying it by the payroll of the employer and the experience modification, and then adding that to the taxes and assessments of the employer. Id.
192. Id.
193. McGavin, supra note 189.
expenses for businesses. Employers should not be penalized with higher risks and expenses when they have taken safety measures, much like the employer did in Petrik, as opposed to those employers who do not enforce strict safety approaches. Companies like JJ Concrete, who made it a point to eliminate horseplay on the worksite, are those who value the safety of their employees and, as such, ought to be able to limit the risks and expenses that occur through these types of claims.

C. PROPOSED SOLUTIONS FOR HANDLING HORSEPLAY IN WORKERS’ COMPENSATION

The problems presented in Phillips and Petrik need to be addressed in South Dakota either legislatively or judicially. Currently, the laws do not adequately protect employers from frivolous claims brought about by injuries sustained as a result of horseplay activities. Moreover, South Dakota Codified Laws section 62-4-37 is not specific enough to limit the number of claims that can be collected by those types of claimants.\(^{194}\) The legislature should adopt the definition of misconduct provided in Chapter 61, which affects unemployment compensation, as it more clearly and fairly expresses the true meaning of willful misconduct.\(^{195}\) While modifications to the definition of willful misconduct should be strongly considered by the legislature, the legislature should also lay out a new test for the court to follow in its analysis of horseplay’s consequence in each case.

In his dissent in Phillips, Justice Henderson stated an alternative method for analyzing workers’ compensation cases involving horseplay.\(^{196}\) His opinion was that “[i]n reviewing a case such as this, we must determine the substantiality of the deviation from employment by viewing (a) the nature of the work performed and (b) any risk the employee exposes himself to by engaging in horseplay.”\(^{197}\) This proposed test is not unlike the positional risk doctrine, which was referenced in Voeller.\(^{198}\) The positional risk doctrine may be applied when it is shown that the employee was acting in furtherance of the employment.\(^{199}\) As stated by

\(^{194}\) See S.D.C.L. § 62-4-37 (2015) (demonstrating a lack of specificity with regards to barring recovery for employees who are injured while engaging in willful misconduct such as horseplay during employment).

\(^{195}\) S.D.C.L. § 61-6-14.1 (2015). The legislature should particularly look at the third subsection of the statute, which states that misconduct is “[c]onduct evincing such willful or wanton disregard of an employer’s interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee . . . .” Id. This language would have expressly affected the way the court ruled in Petrik, as the claimant was clearly engaged in behavior that was contrary to the employer’s interests.


\(^{197}\) Id.

\(^{198}\) See Voeller v. HSBC Credit Card Servs., Inc., 2013 SD 50, ¶ 10, 834 N.W.2d 839, 844 (citation omitted). See Larson, supra note 47, at § 3.05 (stating that “[a]n injury arises out of the employment if it would not have occurred but for the fact that the conditions and obligations of the employment placed claimant in the position where he or she was injured” when following the positional risk doctrine).

\(^{199}\) Although the positional risk doctrine, as referred to in Voeller, states that there is a “but for” test for determining whether someone would have been injured, irrespective of employment, it would not make sense for someone who was injured while not doing something in furtherance of the employment to be compensated for the injury. For example, if an employee robbed their own employment and left the
Professor Larson, “[i]f the act which the employee undertakes outside his regular duties is positively prohibited, it will probably be held to be outside the course of employment even if designed to advance the employer’s work.” The only exceptions to this general rule are (1) when the activity was done to further the practice of the employer; (2) the employer acquiesced to the activity; or (3) the employer requested the unusual activity. Clearly, none of these exceptions applied in Petrik, and as such, the court should not have allowed for workers’ compensation benefits to be awarded to the claimant. This proposal set out by Justice Henderson is one that the court should use in the future of determining the outcome of workers’ compensation cases featuring acts of horseplay, and is a consideration that should be deliberated in the South Dakota Legislature to create a more consistent judicial approach.

The one thing that is clear is that South Dakota needs to protect employers from paying frivolous claims for workers’ compensation benefits. The Supreme Court of South Dakota should carefully consider clearer guidance on how an injury “arises out of” and “in the course of” employment to create a more just and consistent approach. Additionally, the court needs to flip the decisions made in Phillips and Petrik to advance employers’ interests and progress public policy in South Dakota. Although the court has consistently held a liberal view in favor of workers’ compensation claimants, the court has the ability to correct errors it has made in prior rulings. The court may still be liberal in its approach handling workers’ compensation cases, but should recognize that those cases involving horseplay that are detached from the employers’ interests should be found in favor of the employer as a matter of public policy and the interests of promoting employers’ businesses.

workplace and subsequently slipped and fell outside, it would not make sense for that employee to be compensated for falling because of the conditions and obligations of the employment that were placed on the employee.

200. LARSON, supra note 47, at § 27.01.

201. Id.

202. See Petrik v. JJ Concrete, Inc., 2015 SD 39, ¶¶ 2-5, 865 N.W.2d 133, 135-36 (reviewing the factors and exceptions to the general rule). Judge Barnett found that “the deviation was completely and wholly separate from his job duties.” Petrik v. JJ Concrete, Inc., Hughes County Civ. No. 13-321, at 10 (S.D. 6th Cir. 2014). Although running on the worksite had been seen before, it was only when an employee was working in furtherance of the employment, such as running to grab tools; not in an act of horseplay. Id. at 10, n.4.

203. See Voeller, 2013 SD 50, ¶ 28, 834 N.W.2d at 850 (finding that the death “was so clearly personal” to the claimant, that it could not be said that the injury did not “arise out of” the employment); Mudlin v. Hills Materials Co., 2005 SD 64, ¶ 9, 698 N.W.2d 67, 71 (stating that these two factors “are prone to some interplay and ‘deficiencies in the strength of one factor are sometimes allowed to be made up by strength in the other’”); Bearshield v. City of Gregory, 278 N.W.2d 166, 168 (S.D. 1979) (holding that “in the course of employment” is a requirement that is “quite broad and that [if] the employee’s actions were incidental to his employment, his injuries were compensable”).

204. See supra notes 183-193 and accompanying text (reviewing the effects of these two South Dakota cases on employers’ interests).

205. See State v. Hoensheid, 374 N.W.2d 128, 129 (S.D. 1985) (stating that Hoensheid presented the South Dakota Supreme Court with an opportunity to correct an error it had made in a previous case).
V. CONCLUSION

South Dakota’s current laws concerning workers’ compensation with regards to horseplay and willful misconduct need to be changed. The unfairness in awarding victims of their own horseplay is apparent and should be considered by the South Dakota Supreme Court as well as the South Dakota Legislature. Justice Henderson was correct in his assertion that we should not reward foolishness, and workers injured by their own deviations from work should not be used as tools to punish employers who have policies that do not tolerate horseplay at work.

The South Dakota Supreme Court has presented the framework for determining how an employee can collect workers’ compensation, by a showing that he or she had an injury “arising out of” and “in the course of” employment. Although horseplay is generally not an activity that arises out of and in the course of employment, the court has continually held that an employee injured as a result of horseplay may collect benefits. Even if the court could only find that these injuries arose out of and in the course of employment, there should at least be an exception made for those injuries that occur as a result of horseplay not in furtherance of the work that the employee is being compensated to perform.

While the court is capable of making a modification to its prior holdings, it still requires the proper statutory guidance. The South Dakota Legislature should make changes to Chapter 62 of the South Dakota Codified Laws to justly limit the types of workers’ compensation claimants who can receive benefits. The Legislature ought to look at the workers’ compensation statutes in other states to help construct language limiting the types of claims that are brought. Although there have only been two cases involving horseplay in workers’ compensation over the last three decades, the judiciary and legislature certainly need to focus on steering their opinions of such cases in a different direction to ensure fairness in our workers’ compensation system. The proposals in this article aim to help guide the court and legislators in making more reasonable and consistent laws regarding substantial deviations as a result of horseplay in workers’ compensation cases.