March 8, 2012

Jennifer Louise Clark
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LETTER DECISION & ORDER

Rick W. Orr
Davenport, Evans, Hurwitz & Smith LLP
PO Box 1030
Sioux Falls, SD 57101-1030

RE: HF No. 7, 2011/12 – Jennifer Louise Clark v. Daktronics, Inc. and CNA – American Casualty Company of Reading PA

Dear Ms. Clark and Mr. Orr:

I am in receipt of Employer/Insurer's Motion for Summary Judgment, along with supporting argument and documentation. Claimant has provided a letter dated February 15, 2012, in resistance to Employer/Insurer's Motion. I have also received Employer/Insurer's Reply Brief in Support of Motion for Summary Judgment. I have carefully considered each of these submissions in addressing this Motion.

Employer/Insurer request that the Department grant summary judgment in its favor on Claimant's claim of mental injury because Claimant cannot show any underlying physical injury. Employer/Insurer further urges the Department to grant summary judgment in its favor because Claimant failed to notify Employer/Insurer that she suffered an injury within three days.

ARSD 47:03:01:08 governs the Department of Labor's authority to grant summary judgment:

> A claimant or an employer or its insurer may, anytime after expiration of 30 days from the filing of a petition, move with supporting affidavits for a summary judgment. The division shall grant the summary judgment immediately if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any

material fact and that the moving party is entitled to a judgment as a matter of law.

The moving party bears the burden to show that there are no genuine issues of material fact. To successfully resist the motion, the non-moving party must present specific facts that demonstrate the existence of genuine issues of material fact. All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party. *Kermmoade v. Quality Inn*, 2000 SD 81, ¶11.

Claimant was working at Employer, Daktronics, Inc. in February 2011 when she developed numbness in her right hand. On May 13, 2011, Claimant informed her supervisor, Emily Voelker that her right hand had been going numb from the shoulder to the tip of her fingers for three months and that she had tried to put off disclosing the issues as long as she could. On July 6, 2011, Claimant filed a petition for benefits alleging an injury to her right arm/forearm/hand on or about February 1, 2011. Also on July 6, 2011, Claimant filed a second petition for benefits alleging that on or about June 24, 2011, she suffered a panic attack arising out of and in the course of her employment at Daktronics.

Mental Injury Claim

Claimant argues that her panic attack occurred following a personnel meeting with her supervisor, Emily Voelker and a human resource representative, Melissa Harms. Claimant acknowledges that there was no physical injury that took place at this meeting, but rather it was the comments and accusations made by Voelker and Harms that caused the panic attack.

SDCL§ 62-1-1(7) provides that the term "injury" under the workers' compensation statutes, "does not include a mental injury arising from emotional, mental, or nonphysical stress or stimuli. A mental injury is compensable only if a compensable physical injury is and remains a major contributing cause of the mental injury, as shown by clear and convincing evidence. A mental injury is any psychological, psychiatric, or emotional condition for which compensation is sought."

The South Dakota Supreme Court has held that mental injuries produced solely by mental stimulus or stress are not compensable under the workers' compensation statutes. *Lather v. Huron College*, 413 NW2d 369 (SD 1987). *See also Everingim v. Good Samaritan Center*, 1996 SD 104, 552 NW2d 837.

Claimant has admitted that the panic attack she suffered on June 24, 2011 did not result from a physical injury at that time nor was it caused by her injury to her right arm/forearm/hand. Claimant admits that her panic attack was caused solely by the interpersonal meeting with her supervisor and human resource manager regarding personnel issues.

Claimant's panic attack fails to meet the definition of a compensable injury under SDCL §62-1-(7). Employer/Insurer is entitled to summary judgment as a matter of law on

Claimant's mental injury claim. Employer/Insurer's Motion for Summary Judgment is hereby granted on the issue of Claimant's metal injury claim.

Notice

The purpose of the notice requirement is "to give the employer the opportunity to investigate the injury while the facts are accessible. The notice requirement protects the employer by assuring he is alerted to the possibility of a claim so that a prompt investigation can be performed." *Loewn v. Hyman Freightways, Inc*., 1997 SD 2 ¶ 10, 557 NW2d 762, 767 (citation omitted).

SDCL §62-7-10 provides:

> An employee who claims compensation for an injury shall immediately, or as soon thereafter as practical, notify the employer of the occurrence of the injury. Written notice of the injury shall be provided to the employer no later than three business days after its occurrence. The notice need not be in any particular form but must advise the employer of when, where, and how the injury occurred. Failure to give notice as required by this section prohibits a claim for compensation under this title unless the employee or the employee's representative can show:
>
> (1) The employer or the employer's representative had actual knowledge of the injury; or
> (2) The employer was given written notice after the date of the injury and the employee had good cause for failing to give written notice within the three business-day period, which determination shall be liberally construed in favor of the employee.

Claimant bears the burden of proof to show that her employer had notice of the work related nature of her injury. *Mudlin v. Hills Materials Company*, 2005 SD 64, 698 NW2d 67. Claimant admits that she did not report her injury in writing within 3 days as required by law. Claimant must show that Employer had either actual knowledge of the injury or that Claimant had good cause for failing to given notice within the three day period.

Claimant alleges in her petition for hearing that the numbness in her right hand is due to her work. Claimant noticed numbness in her hand as early as February 2011. While Claimant argues that she believed it was caused by her pregnancy, she admits that her work activities and taking a large number of calls aggravated the numbness and caused her pain to increase. Even if she was not sure that work was the cause of her issues, she had sufficient knowledge of a possible compensable injury in February 2011. Claimant admitted she put off providing notice as long as possible. She claimed that she was concerned she would be punished or retaliated against in some fashion; however Claimant admitted that she was never punished or retaliated against and in fact she had filed previous workers' compensation claims without incident in the past. Based upon the evidence presented, Claimant failed to show that she had good cause for failing to give notice within the three day period.

Claimant also argues that Employer/Insurer had actual knowledge of her injury. She claims her supervisor was aware of the numbness in her hands when she was pregnant with her son and that taking continuous calls during the day that further exacerbated her pain. Claimant contends that her supervisor had been made aware that she had been taking more calls that recommended by management and that doing so made Claimant's problems worse.

"Summary judgment is a drastic remedy, and should not be granted unless the moving party has established the right to a judgment with such clarity as to leave no room for controversy." *Richards v. Lenz*, 95 SDO 597, ¶14, 539 NW2d 80 (SD 1995) (citations omitted). A genuine issue of material fact exists as to whether Employer had actual knowledge of Claimant's possibility of a compensable injury.

There are genuine issues of material fact whether Employer/Insurer had actual notice of the potential work relatedness of Claimant's injury. Employer/Insurer is not entitled to judgment as a matter of law on the issue of notice. Employer/Insurer's Motion for Summary Judgment on Notice is hereby denied. This letter shall serve as the Department's Order.

Sincerely,

/s/ *Taya M. Runyan*

Taya M. Runyan
Administrative Law Judge