December 10, 2014

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Letter Decision and Order

Thomas J. von Wald
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RE: HF No. 128, 2012/13 – Michael J. Giblin v. A.O. Express and Acuity

Dear Ms. Christensen and Mr. Von Wald:

Submissions

This letter addresses the following submissions by the parties:

February 13, 2014	Employer and Insurer's Motion for Summary Judgment;
	Employer and Insurer's Brief in Support of Motion for Summary Judgment;
	Affidavit of Thomas J. Von Wald in Support of Employer and Insurer's Motion for Summary Judgment;
October 1, 2014	Claimant's Brief in Opposition to Motion for Summary Judgment;
	Affidavit of Renee H. Christensen.

Facts:

When construed in the light most favorable to the non-moving party, the facts of this case are as follows:

1. Michael J. Giblin (Giblin) sustained an injury to his knee while working for A.O. Express (Employer) on either January 21 or January 22, 2013. Giblin was hauling grain and had stopped to eat in De Smet, South Dakota. Giblin was parked in a parking lot and was headed back to his truck when he slipped on ice and hit his knee on the metal corrugated running board of his truck. Giblin felt sore but got himself up and into the truck.

2. Giblin felt like he had a bruise. The night of Giblin's injury his knee was sore but he did not think that it was anything major. He looked at his knee in the truck and noticed that there was a scrape. Giblin was able to work the rest of the week.

3. On Saturday, January 26, 2013, Giblin woke up in the morning and his knee was much sorer. His knee was leaking fluid and he bought some peroxide and cleaned the scrape and used a bandage. He also wore sweat pants so that he would have less tightness on his leg.

4. On Saturday, January 26, 2013, Giblin contacted James Grosz, his dispatcher, and told him that he was at the Acute Care Clinic and that he had slipped earlier in the week and hit his knee on the running board.

5. Grosz informed Giblin that he (Giblin) was to contact another person at Employer to report the injury.

6. Giblin completed the First Report of lnjury on January 30, 2013.

7. Katie Hiemstra works as the office manager for Employer. She testified during a deposition that the drivers would report injuries to James Grosz, the dispatcher, or to her. She recalled that Giblin was interviewed and hired by James Grosz. She talked to Giblin the week after his surgery. He told her that he had slipped on the ice and hit his knee on the step and he did not think it was that big of a deal. Katie admitted that there was no dispute about how Giblin fell and that he told James Grosz about the knee injury on Saturday, January 26, 2013.

8. James Grosz testified that Giblin worked there for only three to four weeks at the time that he fell. James recalled that he interviewed, hired, and supervised Giblin and the other drivers.

9. James Grosz testified that Giblin called him at home on Saturday, January 26, 2013, and that Giblin told him that he fell on Monday evening while walking after getting food at Subway. He said that his knee did not start bothering him until Friday or Saturday, January 25 or 26, 2013.

10. Giblin had a managerial/supervisory role in several of his manual labor jobs before being employed by Employer. Giblin was told and understood how to report a work injury at all of his previous jobs. Giblin acknowledged

> that as a supervisor at his previous jobs that work injuries should and would be reported to him.

Summary Judgment:

Employer and Insurer filed a Motion for Summary Judgment. ARSD 47:03:01:08 governs the Department of Labor and Regulation's authority to grant summary judgment in workers' compensation cases. That regulation states:

> A claimant or an employer or its insurer may, any time 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 on 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.

ARSD 47:03:01:08.

The party seeking summary judgment bears the burden of demonstrating the lack of any genuine issue of material fact, and all reasonable inferences from the facts are viewed in the light most favorable to the non-moving party. Railsback v. Mid-Century Ins. Co., 2005 SD 64, ¶ 6, 680 N.W.2d 652, 654. "A trial court may grant summary judgment only when there are no genuine issues of material fact." Estate of Williams v. Vandeberg, 2000 SD 155, ¶ 7, 620 N.W.2d 187, 189, (citing, SDCL 15-6-56(c); Bego v. Gordon, 407 N.W.2d 801 (S.D. 1987)). "In resisting the motion, the non-moving party must present specific facts that show a genuine issue of fact does exist." Estate of Williams, 2000 SD 155 at ¶ 7, (citing, Ruane v. Murray, 380 NW2d 362 (S.D.1986)). "Summary judgment is not the proper method to dispose of factual questions." Stern Oil Co., Inc. v. Brown, 2012 SD 56, ¶ 9, 817 N.W.2d 395, 399 (quoting Boziad v. City of Brookings, 2001 S.D. 150, ¶ 8, 638 N.W.2d 264, 268).

In this case, the Department must first determine whether there are any issues of material facts.

Notice:

The basis for Employer and Insurer's Motion for Summary Judgment is its contention that Giblin failed to give appropriate notice to Employer following his injury. The notice requirement in workers'' compensation cases is set forth in SDCL 62-7-10. That statue states:

> 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.

SDCL 62-7-10.

Here, Claimant did not provide written notice of his injury to Employer within three business days of its occurrence. The Employer also did not have actual knowledge of the injury. Hence, the legal question now becomes, whether there was "good cause" for Giblin's failure to give written notice to Employer within three business days.

The South Dakota Supreme Court discussed the proper way to analyze notice cases in Clausen v. Northern Plains Recycling, 2003 S.D. 63, ¶13, 663 N.W.2d 685. There, it stated:

> This Court also adopted a reasonable person test in Miller for determining when a person should know that their injury requires attention and that the notice time limit has commenced running. The proper test is:
>
> > "The time period for notice or claim does not begin to run until the claimant, as a reasonable person, should recognize the nature, seriousness and probable compensable character of [the] injury or disease." 2B Arthur Larson, Larson's Workmen's Compensation Law, § 78.41(a) at 15-185-86 (1995). This reasonable person test does not place an affirmative duty on Claimant to continue seeking medical advice where further treatment is not warranted and there is no suggestion that the condition may have a work-related component.
>
> Miller, 1996 SD 89 at ¶14, 551 N.W.2d at 820.

Application of the reasonable person test is generally a function of the jury, i.e. a factual determination. Here, Giblin contends that his conduct when providing notice was reasonable and Employer and Insurer contend that they were not.

Consequently, there is an issue of material fact which remains and the Motion for Summary Judgment must be denied.

In addition, “at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial". Amlerstm v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 LE2d 202, 212 (1986). Here, a determination under the reasonable person test requires the weighing of evidence. As such, summary judgment at this stage is inappropriate.

Order

It is hereby, ordered that Employer and Insurer’s Motion for Summary Judgment is denied. This letter shall constitute the order in this matter.

Sincerely,

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