

November 21, 2017

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Letter Decision and Order

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RE: HF No. 193, 2015/16 – Michael Raw v. David Raw Fish, Inc. and United Fire & Casualty Company, et al.

Dear Counsel:

Submissions:

This letter addresses the following submissions by the parties:

August 10, 2017

David Raw Fish and United Fire & Casualty Company's Motion for Summary Judgment and joinder in Miller Fish Company's Motion for Summary Judgment;

Brief in Support of Motion for Summary Judgment and joinder in Miller Fish Company's Motion for Summary Judgment;

Statement of Undisputed Material Facts;

Affidavit of Laura K. Hensley in Support of Motion for Summary Judgment and joinder in Miller Fish Company's Motion for Summary Judgment;

September 12, 2017

Claimant's Brief in Opposition to Employer David Raw Fish, Inc.'s Motion for Summary Judgment;

Claimant's Response to Employer David Raw Fish, Inc.'s
Statement of Undisputed Material Facts;

September 25, 2017

Reply Brief in Support of Motion for Summary Judgment.

Facts:

The facts of this case, as reflected by the submissions are as follows:

Mike Raw (Claimant) worked for David Raw Fish, Inc.,(Raw Fish) a commercial fishing operation owned by his brother, David Raw (David), from approximately 1997 until April 1, 2015. Commercial fishing is a very physically demanding occupation. Beginning in 2004, Claimant began treating with his chiropractor for lower back and hip pain, and this pain slowly progressed for several years. In 2013 or 2014, the pain began to radiate into his arms and feet, and Raw also began experiencing noticeable neck pain. On one occasion, Claimant mentioned to his brother, David, that he was "actually crawling" due to his back pain, but he did not attribute the pain to his work at that time. While Claimant did mention to his brother in October 2010 that he was experiencing back pain and occasionally appeared fatigued, at no time during his employment with Raw Fish did Claimant report a work-related injury. Raw Fish was sold to Terry Miller on April 1, 2015. Claimant went to work for Miller Fish Company. Claimant quit working for Miller Fish Company in September 2015. Claimant completed a First Report of Injury alleging a date of injury of November 10, 2014. Raw Fish first learned of the alleged injury after April 1, 2015. United Fire & Casualty denied Claimant's worker's compensation claim. Raw filed the petition in this matter on June 21, 2016.

Motion for Summary Judgment:

The Department of Labor and Regulation's authority to grant summary judgment is established in administrative rule ARSD 47:03:01:08:

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.

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. Vandenberg, 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)).

Raw Fish and United Fire & Casualty Company (Employer/Insurer) has moved for summary judgment on the grounds that Claimant did not give proper notice as defined by §62-7-10 which states:

Notice to employer of injury--Condition precedent to compensation. 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.

It is not disputed that Claimant did not report a work related injury while employed by Raw Fish. Raw claims he was injured on November 10, 2014. However, David did not learn of the alleged injury until after April 1, 2015.

Claimant argues that David had “actual knowledge” of Claimant’s workplace injury in accordance with §62-7-10 (1). David has stated he was aware of Claimant’s back pain and may have paid for chiropractic treatments for him. Claimant argues that this shows that David was aware of his back pain. However, knowledge of Claimant’s condition does not prove that Raw Fish had actual knowledge that Claimant’s condition was related to a workplace injury. As David is Claimant’s brother, the fact that he knew his brother had back issues does not prove that he knew or should have known that the back issues were work related.

Claimant has also argued that Summary Judgment is an extreme remedy. The Department of Labor (Department) has always held that Summary Judgment should not be granted lightly. However, when considering the facts in this matter “in a light most favorable” to Raw, the Department concludes that Raw has failed to meet the notification requirements of §62-7-10 or to raise other issues showing that a genuine issue of material fact still exists.

Order:

The Department grants Employer/Insurer’s Motion for Summary Judgment for the above stated reasons. This letter shall constitute the order in this matter.

Counsel for Employer/Insurer shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision within twenty (20) days from the date of receipt of this Decision. Claimant shall have an additional twenty (20) days from the date of receipt of Employer/Insurer’s Proposed Findings and Conclusions to submit objections thereto and/or to submit their own proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Employer/Insurer shall submit such Stipulation along with an Order consistent with this Decision.

Sincerely,

Michelle M. Faw
Administrative Law Judge