

June 27<sup>th</sup>, 2017

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**LETTER DECISION AND ORDER**

Christina L. Klinger  
May, Adam, Gerdes, & Thompson, LLC  
PO Box 160  
Pierre, SD 57501

Re: Vaun Hewlett v. Hewlett Plumbing, and Continental Western Insurance Co.  
HF No. 76, 2013/14

Dear Counselors:

This letter addresses the following submissions by the parties:

|                               |   |
|-------------------------------|---|
| March 17 <sup>th</sup> , 2017 | Employer/Insurer's Motion to Dismiss                                      |
| May 10 <sup>th</sup> , 2017   | Claimant's Brief in Opposition to Employer/Insurer's<br>Motion to Dismiss |
|                               | Affidavit of A. Russell Janklow   |

**ISSUE PRESENTED**

**Is Employer/Insurer entitled to dismissal of Claimant's petition as a result of Claimant's death?**

**FACTS**

Claimant Vaun Hawlett, worked for Employer Hewlett Plumbing for many years. Employer was engaged in a remodeling project during October, 2007 and had hired August Good Bird as a temporary laborer to assist with this job. Claimant and Good Bird had a confrontation apparently sparked by the latter's damaging of a bathtub, and

Claimant rebuked Good Bird for his carelessness. Sometime later, Good Bird again damaged a bath tub and as a result of this incident, walked off the job site and did not return.

Several months after this incident, in January, 2008, Good Bird showed up unexpectedly at Claimant's home and assaulted him. Good Bird punched Claimant in the face, breaking Claimant's eye socket and then pushed him to the ground and repeatedly kicked claimant in the head and ribs.

Claimant filed a petition seeking worker's compensation benefits in December, 2013; nearly six years after the original assault. While the case was pending, Claimant died on February 2<sup>nd</sup>, 2017. Claimant's cause of death was listed as "assault by bodily force" and "traumatic brain injury." Employer/Insurer subsequently filed a motion to dismiss Claimant's petition. The Department granted Employer's motion on March 21<sup>st</sup>, 2017. Upon a motion for reconsideration, the Department vacated its original order April 10<sup>th</sup>, 2017. At issue is whether or not Claimant's death necessitates a dismissal of his petition for worker's compensation benefits.

## **ANALYSIS**

"A motion to dismiss tests the legal sufficiency of the pleading; for purposes of the pleading, the court must treat as true all facts properly plead in the complaint." *Richards v. Lenz*, 539 N.W.2d 80, 82 (S.D. 1995)(quoting *Johnson v. Kreiser's, Inc.*, 433 N.W.2d 225, 226 (S.D.1988)). Dismissal of a cause of action is proper when, assuming all the facts as pleaded are true, a claimant is not entitled to the relief sought. In this

case, Employer/Insurer argues that since Claimant is now deceased, Claimant is no longer entitled to receive benefits.

To support its contention, Employer/Insurer rely on *Fredekind v. Trimac Limited*, 566 N.W. 2d 148. In *Fredekind*, Claimant had filed a petition for worker's compensation benefits. Claimant was in the process of negotiating a settlement with the employer when he died suddenly of a heart attack not related to his original injury. The parties had come to a settlement in principle, but it was never written down or approved by the Department. The Supreme Court denied relief to Claimant's heirs, stating:

"[A]uthorizing benefits under an oral settlement not conforming to the written submission and approval requirements of law goes beyond what the Legislature strictly delineated. *Fredekind*, at ¶ 6.

Further, the Court also opined: "[Worker's Compensation] is not intended to be health, accident, and old age insurance and spread general protection over *risks common to all and not arising out of and in the course of employment.*" *Id.*, at ¶ 9.

However, *Fredekind* is distinguishable from this case. There was no dispute in *Fredekind* that Claimant's death was not related to his original work-related injury. Here, Claimant argues that his injury and ultimate death were as a result of being assaulted by a former employee. Workplace injuries resulting in the death of a Claimant are governed by SDCL 62-4-8:

In case death occurs as a result of the injury, then if the employee leaves any spouse, child, parent, grandparent, or lineal heir entitled to compensation under §§ 62-4-12 to 62-4-15, inclusive, the compensation shall be paid at the option of the employer, either to the personal representative or the beneficiaries of the

deceased employee and distributed as provided in § 62-4-17. However, in no case may the amount payable under this section be less than five hundred dollars.

While the Court has been clear that death alone does not entitle a claimant to worker's compensation benefits, SDCL 62-4-8 does allow for an award in the event that such a death is related to a work-related injury. SDCL 62-4-8, therefore, precludes a dismissal of Claimant's petition because the incident which caused Claimant's injury may be have arose from his employment and therefore may be compensable.

**ORDER**

Employer/Insurer's motion for dismissal of the petition is DENIED. This letter shall constitute the Department's Order in this matter.

Sincerely,

/s/ Joe Thronson  
Joe Thronson  
Administrative Law Judge