May 17, 2012

Jennifer Louise Clark
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Sent certified: 70111150000239030997

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 Renewed Motion for Summary Judgment, along with supporting argument and documentation. The Department also received a letter from Claimant on May 9, 2012, in resistance to Employer/Insurer's Motion. I have also received Employer/Insurer's Reply Brief. I have carefully considered each of these submissions in addressing this Motion.

Employer/Insurer has renewed its request that the Department grant summary judgment in its favor on the basis and grounds that no genuine issues of material fact exist and Employer/Insurer is entitled to judgment as a matter of law.

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, 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 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.

In a Letter Decision and Order dated March 8, 2012, the Department previously determined Claimant failed to timely report her injury in accordance with SDCL §62-7-10(2) and failed to prove that Claimant had good cause for failing to give notice. However, based on the evidence presented, the Department determined genuine issues of material fact existed regarding whether Employer/Insurer had actual knowledge of the potential work-relatedness of Claimant's injury. Employer/Insurer has since deposed the Claimant and has filed this Renewed Motion for Summary Judgment based on Claimant's testimony.

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. “In determining actual knowledge, the employee must prove that the employer had sufficient knowledge to indicate the possibility of a compensable injury. The employee must also prove that the employer had sufficient knowledge that the injury was sustained as a result of her employment versus a pre-existing injury[.]” *Shykes v. Rapid City Hilton Inn*, 2000 SD 123,¶36, 616 NW2d 493 (citations omitted).

Employer/Insurer argues that during her deposition, Claimant testified that she reported the numbness in her hand to Ms. Voelker in March 2010. She further testified that during the March 2010 meeting, she specifically told Ms. Voelker that the numbness was due to her pregnancy, not her work activities. Claimant had her baby in June 2010 and testified that the pain went away until February 2011, the date of the injury she alleged in her Petition for Hearing. Claimant testified that she never talked to Ms. Voelker about the numbness in her hand after the March 2010 conversation until she reported it on May 13, 2011.

During her deposition, Claimant admitted that Employer could not have known about her alleged injury or its work relatedness until May 13, 2011. Claimant testified,

> Q: Isn’t it true that Emily Voelker was never aware that you were claiming that work caused numbness in your hand until you e-mailed her on May 13, 2011?
>
> A: That would be correct.
>
> Q: So, for all she knew, your symptoms were related to your pregnancy and were over after your pregnancy.
>
> A: Correct.
>
> Q: There was never a time before May 13, 2011, that you’re claiming Dakotronics had actual knowledge of the symptoms being caused by work?
>
> A: No.

Claimant argues that Emily Voelker had knowledge of her right arm/hand going numb. She argues that Ms. Voelker had knowledge because Claimant submitted an IT request for an ergonomically correct keyboard sometime after August 2010, when she returned to work from having her baby. Claimant asserts that this request shows Claimant was having problems with numbness before May 13, 2011 when the injury was reported.

Claimant cannot claim a version of the facts more favorable to her position than she gave in her own deposition. *Mack v. Kranz Farms, Inc.,* 1996 SD 63 ¶11, 548 NW2d 812, 814 (citations omitted). Even if Employer did know of numbness, that does not show that Employer had actual knowledge of the work related nature of the injury. Claimant herself admitted in her deposition that she never reported the work

relatedness of her injury prior to May 13, 2011. In this case Claimant had informed Employer numbness in her hands related to her pregnancy. She never reported to her supervisor that the condition had resolved and then returned due to work, there was no reason for a reasonably conscientious manager to inquire as to the potential work relatedness of Claimant's injury in February of 2011, even if she requested an ergonomically correct keyboard following her maternity leave in 2010.

Claimant has failed to present specific facts that demonstrate the existence of genuine issues of material fac. Employer/Insurer has demonstrated that it is entitled to judgment as a matter of law, the Renewed Motion for Summary Judgment is hereby granted. Claimant's Petition for Benefits is denied. 4This letter shall serve as the Department's Order.

Sincerely,

/s/ *Taya M. Runyan*

Taya M. Runyan
Administrative Law Judge