

September 19, 2011

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**Letter Decision and Order**

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RE: HF No. 89, 2010/11 – Ronald Voeller, Court Appointed Personal Representative of the Estate of Julie Diane Tassler, and Court Appointed Guardian of Mitchel Kane Tassler and Kristal Macie Tassler, Minors and Dependents of Deceased Employee, Julie Diane Tassler v. HSBC Card Services, Inc. and AIG

Dear Counsel:

***Submissions:***

This letter addresses the following submissions by the parties to the Department of Labor and Regulation:

May 20, 2011	Claimant/Petitioner's Motion for Summary Judgment;
	Claimant/Petitioner's Statement of Undisputed Facts;
	Affidavit of Ronald Voeller in Support of Claimant/Petitioner's Motion for Summary Judgment;
	Memorandum of Law in Support of Claimant/Petitioner's Motion for Summary Judgment;
June 21, 2011	Employer and Insurer's Cross Motion for Summary Judgment;
	Employer and Insurer's Statement of Undisputed Material Facts;

	Employer and Insurer's Response to Claimant/Petitioner's Statement of Undisputed Facts;
	Brief in Support of Employer and Insurer's Cross Motion for Summary Judgment and in Response to Claimant/Petitioner's Motion for Summary Judgment;
July 12, 2011	Claimant/Petitioner's Response to Employer and Insurer's Statement of Undisputed Material Facts;
	Supplemental Affidavit of Ronald Voeller in Resistance to Employer and Insurer's Cross Motion for Summary Judgment;
	Memorandum of Law in Reply to Respondent's Response to Claimant/Petitioner's Motion for Summary Judgment and in Resistance to Respondent's Cross Motion for Summary Judgment;
August 11, 2011	Reply Brief in Support of Employer and Insurer's Cross Motion for Summary Judgment;
	Employer and Insurer's Response to Claimant's Supplemental Affidavit of Ronald Voeller;
August 5, 2011	Claimant's Response to Employer and Insurer's Reply Brief in Support of Employer and Insurer's Cross Motion for Summary Judgment;
	Claimant's Second Supplemental Affidavit Responding to Employer and Insurer's Response to Claimant's Supplemental Affidavit of Ronald Voeller;
	Affidavit of Cleo Voeller;
August 15, 2011	Email from Eric NeNure to the ALJ;
August 15, 2011	Email from Dean Nasser to the ALJ;
August 16, 2011	Affidavit of Andy Minihan.

***Facts:***

The material facts of the case are undisputed and are as follows:

1. Ronald Voeller (Claimant) is the Personal Representative of the Estate of Julie Diane Tassler (Decedent).
2. Claimant is the Guardian of Mitchel Kane Tassler and Kristal Macie Tassler, the surviving children of Decedent.

3. Decedent was employed by HSBC Card Services, Inc. (Employer) at all times relevant hereto.
4. Employer was insured by AIG (Insurer) for purposes of workers' compensation at all times relevant hereto.
5. On December 23, 2008, Decedent commenced a divorce proceeding and served her estranged husband with the divorce papers.
6. The morning of December 24, 2008, the Decedent, reported for work at the Employer's work place and engaged herself in her normal work activities.
7. During the course of the morning of December 24, 2008, Decedent took a 15-20 minute break from her work duties in accordance with Employer's policies. It was Decedent's intention to resume her work activities following her break.
8. It was Decedent's routine to take her breaks in her car in Employer's parking lot and she proceeded to do so on the morning of December 24, 2008.
9. Decedent's estranged husband learned of Decedent's work schedule and break routine from Decedent or his own past observations.
10. Prior to Decedent's break on December 24, 2008, Decedent's husband entered Employer's parking lot and lay in wait for her there. When Decedent appeared, Decedent's husband shot her with a handgun and killed her. Decedent's husband then took his own life.
11. As a result of the homicide, the Decedent left her two minor children without support.
12. Employer and Insurer concede that Decedent's death occurred "within the course" of her employment.
13. Additional facts may be discussed in the analysis below.

***Legal Issue:***

The sole legal question in this matter can be stated as follows:

Whether Decedent's death "arose out of" her employment?

***Summary Judgment:***

Claimant has filed a Motion for Summary Judgment. Employer and Insurer have filed a Cross 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 provides:

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. 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)).

In this case, there are no genuine issues of material fact and the question of liability can be determined as a matter of law.

#### ***Arise Out of the Employment:***

In this case, Claimant seeks workers’ compensation benefits for Decedent’s death. “A claimant who wishes to recover under South Dakota’s Workers’ Compensation Laws” must prove by a preponderance of the evidence that [s]he sustained an injury ‘arising out of and in the course of the employment.’” Fair v. Nash Finch Co., 2007 SD 16, ¶9, 728 NW2d623; Bender v. Dakota Resorts Management Group, Inc., 2005 SD 81, ¶7, 700 NW2d 739, 742 (quoting SDCL 62-1-1(7)) (additional citations omitted). “Both factors of the analysis, ‘arising out of employment’ and ‘in the course of employment,’ must be present in all claims for workers’ compensation.” Fair v. Nash Finch Co., at ¶9. “The interplay of these factors may allow the strength of one factor to make up for the deficiencies in strength of the other.” Id. (quoting Mudlin v. Hill Materials Co., 2005 SD 64, ¶9, 698 NW2d 67, 71) (quoting 2 Arthur Larson, Larson’s Workers’ Compensation Law, § 29, 29-1 (1999)). “These factors are construed liberally so that the application of the Workers’ Compensation statutes is “not limited solely to the times when the employee is engaged in the work that he was hired to perform.” Id. “Each of the factors is analyzed independently although “they are part of the general inquiry of whether the injury or condition complained of is connected to the employment.” Id.

“In order for the injury to ‘arise out of’ the employment, the employee must show that there is a ‘causal connection between the injury and the employment.’” Id. (quoting Mudlin, 2005 SD 64, ¶11. “Although the employment need not be the direct or proximate cause of the injury, the accident must have its “origin in the hazard to which the employment exposed the employee while doing [her] work.” Id. “The injury ‘arose out of the’ employment if: 1) the employment contributes to causing the injury; 2) the activity is one in which the employee might reasonably engage; or 3) the activity brings about the disability upon which compensation is based.” Id. (quoting Mudlin, ¶11.

“The term ‘in the course of employment’ refers to the time, place, and circumstances of the injury.” Id. (quoting Bearshield v. City of Gregory, 278 NW2d 166, 168 (SD 1979)). “An employee is acting ‘in the course of employment’ when an employee is “doing something that is either naturally or incidentally related to his employment or which he is either expressly or impliedly authorized to do by the contract or nature of the employment.” Id.

The South Dakota Supreme Court has not dealt directly with the issue of whether injuries sustained as the result of a domestic assault arise out of the employment. However, “[g]enerally, courts have found that injuries do not arise from employment where private quarrels are ‘imported’ from outside of the employment.” Temple v. Denali Princess Lodge, 21 P.3d 813, 816 (Alaska 2001). “Courts are especially likely to deny compensation when the sole role of employment in the assault is ‘providing a place where the assailant can find the victim.’” Id.

Larson’s Worker’s Compensation Law discusses domestic assaults in the work place. “When the animosity or dispute that culminates in an assault is imported into the employment from claimant’s domestic or private life, and is not exacerbated by the employment, the assault does not arise out of the employment under any test.” Larson’s Worker’s Compensation Law § 8.02 [1][a]. “When it is clear that the origin of the assault was purely private and personal, and that the employment contributed nothing to the episode, whether by engendering or exacerbating the quarrel or facilitating the assault, the assault should be held no compensable. Id. at 8.02[1][c].

In this case, Employer did not exacerbate or contribute to the assault on Decedent. The origin of the assault was a marital conflict which became explosive when divorce papers were served on Decedent’s husband on the day prior to the attack. Decedent’s husband was not an employee of the Employer and was not told by Employer where to find his wife. There is also no evidence that Decedent’s employment or her relationship with a co-worker was a source of irritation in their marriage. Consequently, Decedent’s death did not “arise out of” her employment and is not compensable under the laws of this state.

***Order:***

In accordance with the discussion above, Claimant’s Motion for Summary Judgment is denied. Employer and Insurer’s Cross Motion for Summary Judgment is granted. This letter shall constitute the Department’s Order in this matter.

Sincerely,

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