SOUTH DAKOTA DEPT. OF LABOR & REGULATION

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RE: HF No 22, 2019/20 - Oscar Arano v. Saputo Cheese USA, Inc., Sedgwick Claims Management Services, Inc., v. Dakota Granite, Co.

Greetings:

This letter addresses Dakota Granite Co.'s (Dakota Granite) Motion for Summary Judgment and Oscar Arano's (Arano) Motion for Partial Summary Judgment. Saputo Cheese USA, Inc. and Sedgwick Claims Management Services did not take a position on these motions.

Background

Arano was raised in Mexico. His first language is Spanish, and he requires an English interpreter. In 2018, Arano worked for Saputo Cheese. While working for Saputo Cheese, he injured his lower back. He was treated by epidural injection and physical therapy. He had been given work restrictions related to his lower back, but they were lifted following his physical therapy. Arano was laid off from Saputo in 2020.

Arano then worked at a farm for four months before he began working for Dakota Granite in July 2020. Raphael Marroquin (Marroquin), a fellow employee at Dakota Granite, acted as Arano's interpreter during his interview with Dakota Granite. During his interview, Arano said he had no limitations regarding what work he could do. He was hired to work in the crating department which required working with stones that weighed 20 pounds up to 1,000 pounds. When Arano and Dakota Granite's management needed to communicate they used Marroquin as an interpreter.

In March 2021, Arano began to notice increasing pain in his back, similar to the pain he had at Saputo. The day Arano had an afternoon doctor's appointment, he told Marroquin to communicate it to his supervisor. The supervisor permitted Arano to leave early for his appointment.

On March 19, 2021, Arano's doctor put him on a 20-pound lifting, pushing, and pulling restriction. Arano gave the doctor's note about restrictions to Marroquin to give to management at Dakota Granite. Marroquin and Arano spoke with supervisor David Kampen (Kampen) and human resources manager, Jason Redmond (Redmond). Arano wanted Marroquin to explain that he was unable to push rocks because of his back issues and would need to transfer to a different department to accommodate his restrictions. Arano was moved to a different job position using a chop saw, but he had difficulty. Redmond offered a First Report of Injury to Arano. Redmond asked Marroquin to interpret whether the back injury happened in the crates department. Arano replied that the back injury happened at Saputo. Redmond did not file a First Report of Injury.

On April 23, 2021, following another doctor's appointment, Arano gave Marroquin a note to give to management. Arano was then moved to a different area. On April 29, 2021, Arano met with Dakota Granite management with Marroquin acting as interpreter. He was asked if his injury was sustained at Dakota Granite, and he again told them it happened at Saputo. Management told Arano that all the jobs available required lifting, pushing, and pulling and that he may not be able to perform them. Arano asked to work in the secretarial office but due to the fact Arano did not speak English, management would not allow it. As the only jobs available to him were physical, Arano left his employment with Dakota Granite.

Analysis

The Department's authority to grant summary judgment is established in 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. *Stromberger Farms, Inc. v. Johnson*, 2020 S.D. 22, ¶ 31, 942 N.W.2d 249, 258-59 (citations omitted). "A fact is material when it is one that would impact the outcome of the case 'under the governing substantive law' applicable to a claim or defense at issue in the case." *A-G-E Corp. v. State*, 2006 SD 66, ¶ 14, 719 N.W.2d 780, 785. [W]orkers' compensation statutes are to

be “liberally construed in favor of injured employees.” *Orth v. Stoebner & Permann Const., Inc.*, 2006 S.D. 99, ¶ 43, 724 N.W.2d 586, 596 (Citations omitted).

Both motions before the Department of Labor & Regulation (Department) regard the notice requirement in workers’ compensation claims. 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.

Arano did not provide written notice within three days. Thus, he must show that either Dakota Granite had actual knowledge of his injury or that he has good cause for failing to provide notice within the three days required by SDCL 62-7-10.

First, the Department will address whether Dakota Granite had actual knowledge of Arano’s injury. Arano argues that Dakota Granite had actual knowledge and should have investigated his condition as a potentially compensable claim. He asserts that certain facts should have indicated further investigation was necessary. One, both Arano and Marroquin were not familiar with the specifics of workers’ compensation and with the need for translation from Spanish to English, there may have been some miscommunications. Two, when he was hired, Arano

had no concerns about handling the heavy-duty job and he had no restrictions. Three, Marroquin observed Arano could do the job without complaints of back pain. Four, Redmond felt Arano was able to do the job he was hired to do. Five, Arano had a positive performance evaluation five months after he started. Finally, Arano did the job well without difficulty for eight months. For these reasons, Arano asserts a reasonably conscientious manager would have investigated the change in his condition, and Dakota Granite had notice of possible injury.

Dakota Granite points to the fact that when Arano was questioned about his back issues, he maintained that his condition was caused by an injury that occurred at Saputo. Therefore, Dakota Granite did not believe a compensable injury had occurred while he was working for it. The South Dakota Supreme Court (Court) provided guidance to satisfy the requirements of actual knowledge in *Orth*.

> The employee must also prove that the employer had sufficient knowledge that the injury was sustained as a result of [his] employment versus a pre-existing injury from a prior employment. In other words, to satisfy the actual knowledge notice requirement, the employer: 1) must have sufficient knowledge of the possibility of a compensable injury, and 2) must have sufficient knowledge that the possible injury was related to employment with the employer.

Orth at ¶ 53 (Internal citations and emphasis removed.)

Therefore, the Department must decide whether Dakota Granite had sufficient knowledge of the possibility of a compensable injury. Arano was able to perform his duties at Dakota Granite well for eight months. Then he began to complain of back issues resulting in a doctor assigning him work restrictions that necessitated a move to a different position at Dakota Granite. The change in Arano's ability to work and his need to see a doctor was enough to spur Dakota

Granite management to ask Arano if he was hurt while working there. The fact management asked that question indicates they had sufficient knowledge of the possibility of a compensable injury.

Next, the Department will address whether Dakota Granite had sufficient knowledge that the possible injury was related to Arano's employment and not with a previous employer. When asked directly about whether his injury occurred at Dakota Granite, Arano stated, through Marroquin, that he was hurt at Saputo. While Dakota Granite was aware that Arano had sustained an injury and his condition required medical care and work restrictions, Arano's own words indicated his injury was related to previous employment. An employer is expected to address potentially compensable claims related to a claimant's employment, but it is reasonable for a diligent employer to trust the worst of the injured employee as to whether the injury occurred with employer or a previous employment.

> [T]he minimum prerequisite is that there must be some indication that the injury is work-related:
>
> It is not enough, however, that the employer, through his representatives, be aware that claimant 'feels sick,' or has a headache, or fell down, or walks with a limp, or.... There must ... be some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim.

Vaughn v. John Morrell & Co., 2000 S.D. 31, ¶ 33, 606 N.W.2d 919, 925 (citing Larson's Workers' Compensation Laws § 78.31(a)(2).)

Therefore, the facts indicate that pursuant to the requirements set forth in *Orth*, Arano has not shown that Dakota Granite had actual knowledge that a compensable work-related injury occurred during his employment.

The Department will now address whether Arano showed good cause for providing notice after the three days required by statute. The Court has emphasized the importance of a claimant understanding the nature of his or her injury as compensable and considered the issue in *Shykes v. Rapid City Hilton Inn*, 2000 S.D. 123, 616 N.W.2d 493. Shykes was raised in Korea and spoke very limited English. *Shykes* at ¶ 2. Her husband, Greg, helped her communicate in English and helped her with doctor's appointments and work-related communications. *Id.* Shykes began working for the Hilton Inn as a maid. *Id* at ¶ 3. During her job at Hilton, she experienced discomfort in her right arm. *Id*. She thought she merely needed to adjust to the demands of the job. *Id*. Greg was afraid that the pain was related to a prior cancer surgery Shykes had undergone. *Id*. He spoke with her doctor about it at her routine visit. *Id*. The doctor recommended anti-inflammatories and soaks for the discomfort to help determine the origin of the pain. *Id*. Shykes quit working at Hilton due to the pain in her arm. *Id* at ¶ 4. After leaving Hilton, her hands and arms improved. *Id* at ¶ 5.

She began working for Custom Packaging (Custom) as a seamstress. *Id*. During the hiring process, Greg filled out any necessary paperwork including a questionnaire at her pre-employment physical. *Id*. Following the physical, Shykes was determined to be suitable for any employment at Custom. *Id*. After a few weeks at Custom, her arm began hurting, but she was told by a co-worker that new employees always experienced some pain that would go away. *Id* at ¶ 6. Greg feared it was related to the surgery, so she had it checked out by a doctor. *Id*. The doctor prescribed medication that did not provide relief. *Id*. He concluded that her condition was chronic and required lifestyle changes including different

employment. *Id*. She continued treatment with various doctors, and she returned to work on light duty. *Id* at ¶ 7-8. Due to Shykes arm being in a cast, Custom management advised her she would need to take a leave of absence. *Id* at ¶ 9. Greg signed the leave of absence form for Shykes. *Id*.

Shykes was later seen by a doctor who attributed her condition to her employment as a maid and not her cancer surgery. *Id* at ¶ 12. Greg notified Hilton of Shykes' work-related injury and completed a First Report of Injury. *Id*. Hilton's insurance company investigated the claim and informed her by letter that it denied her claim due to her employment with Custom aggravating her medical condition. *Id* at ¶ 15. Greg read the letter but did not file a claim with Custom because he did not feel it caused the injury. *Id*. Shykes continued to work for Custom until lack of sewing work required her to be transferred to an area of heavier duty. *Id* at ¶ 17. Shykes experienced pain that resulted in Custom placing her on leave. *Id*. Greg and Shykes spoke with Custom to ask them to let her keep sewing. *Id*. Custom claimed that was the first time they had been told that Shykes had been advised by a doctor to change her employment. *Id*. Shykes and Greg spoke with an attorney regarding her workers' compensation claim against Hilton. *Id* at ¶ 19. The attorney told them that she might have a claim against Custom. *Id*. The attorney sent a letter informing Custom that Shykes suffered a cumulative trauma injury, and he requested payment for workers' compensation. *Id*.

The Department concluded that Shykes had provided timely notice to Custom and awarded benefits. *Id* at ¶ 20. Circuit Court concluded that she had not

provided timely notice. *Id*. The Court affirmed the Circuit Court's determination that Shykes failed to provide timely notice[1]. *Id* at ¶ 45.

The Court stated,

> "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." *Miller v. Lake Area Hospital,* 1996 SD 89, ¶ 14, 551 N.W.2d 817, 820 Whether the claimant's conduct is reasonable is determined "in the light of [her] own education and intelligence, not in the light of the standard of some hypothetical reasonable person of the kind familiar to tort law." *Loewen,* 1997 SD 2, ¶ 15, 557 N.W.2d at 768 (citation omitted).

Id at ¶ 29

The Court considered Shykes limited use and understanding of English, and that Greg assisted her with communication and completing documentation. *Id*. The Court found that Shykes authorized and relied on Greg to act as her agent on her behalf. *Id* at ¶ 31. Greg's knowledge and understanding of letters and other communications were imputed to Shykes by way of the agency she granted him. *Id* at ¶ 32. Ultimately, the Court concluded that someone of Shykes' education and intelligence would have known she had a compensable claim against Custom. *Id* at ¶ 44.

The Court's analysis in *Shykes* is particularly helpful regarding the current matter because Arano, like Shykes, does not communicate in English and requires an interpreter. However, Arano did not have someone acting as his agent in these communications. Marroquin was a fellow employee that was brought in to act as an interpreter. He did not have special knowledge or authority over Arano's matters

[1] The version of SDCL 62-7-10 in effect at the time of *Shykes*, contains the language of the statute before the 1994 amendments. Prior to 1994, claimants had thirty days to provide notice.

the way Greg had on behalf of Shykes. Therefore, it appears that the Court encourages the Department to consider not only someone of the same education and intelligence but also whether someone with the same ability to communicate would recognize the potential compensability of his claim.

Arano has a ninth-grade education, does not speak English, and his communications with Dakota Granite were through Marroquin. He said the injury happened at Saputo but as he is unfamiliar with workers' compensation, he did not know that his employment at Dakota Granite could have contributed to his injury as a recurrence or aggravation. The Department finds that in light of his own education, intelligence, and communication ability, Arano had good cause for providing notice after the three days required by statute. Therefore, he has met the requirement for notice pursuant to SDCL 62-7-10(2).

Order

Dakota Granite's Motion for Summary Judgment is DENIED.

Arano Motion for Partial Summary Judgment is GRANTED.

The parties may consider this letter the Order in this matter.

Sincerely,

Michelle M. Faw
Administrative Law Judge

MMF/das