June 29, 2020

J. G. Shultz
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LETTER DECISION ON MOTIONS FOR SUMMARY JUDGMENT

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RE: HF No. 32, 2019/20 – Rodney Waldner v. School Bus, Inc. and National Interstate Insurance Co.

Dear Mr. Shultz and Ms. Jelen:

This letter addresses the Motion for Summary Judgment submitted by School Bus, Inc. (Employer) and National Interstate Insurance Co. (Insurer) on April 3, 2020 and the Motion for Summary Judgment submitted by Rodney Waldner on May 13, 2020, as well as all responsive briefs.

BACKGROUND

Rodney Waldner (Waldner) alleges that on February 1, 2019, he fell on the school bus and sustained an injury to his toe while working for School Bus, Inc. (Employer) which was at all times pertinent insured for workers' compensation purposes by National Interstate Insurance Co. (Insurer). Waldner felt pain in his knees and later his toes after the fall. Waldner developed an open sore on his toe two weeks after the

fall. On February 15, 2019, Waldner's doctor, Dr. Michael Olson, examined the injured toe and observed a small sore developing on the medial aspect of the second toe. Waldner told Dr. Olson that he had injured his toe at work and was concerned he might lose the toe. On February 15, 2019, Waldner visited Dr. Angelo Santos who noted that Waldner had a small sore on his right second toe that would need to be followed. On February 19, 2019, Dr. Santos prescribed a silver cream for the sore on Waldner's toe. Waldner did not miss any days of work between February 1, 2019 and March 4, 2019. Waldner reported the incident and injury on March 4, 2019. Waldner submitted the First Report of Injury form on March 5, 2019. On March 13, 2019, Employer and Insurer denied Waldner's workers' compensation claim. In May of 2019, Waldner underwent a transmetatarsal amputation on his right foot which resulted in the full amputation of four toes and a partial amputation of a fifth toe. Additional facts may be developed in the analysis below.

The issue before the Department of Labor & Regulation (Department) is whether Waldner has met the notice requirement under SDCL 62-7-10 which states:

> 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.

Both parties have moved for Summary Judgment. The Department'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. Vandeberg*, 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)).

Employer and Insurer assert that Waldner did not provide notice within the three days required by SDCL 62-7-10, and that he does not have good cause for his failure to provide notice. Waldner agrees that he did not provide notice within three days but argues that he did have good cause for not providing the notice.

The South Dakota Supreme Court has concluded, "'the time period for notice of a claim does not begin until the claimant, as a reasonable person, should recognize the nature, seriousness and probably compensable character of [the] injury or disease.'" *McNeil v. Superior Siding, Inc.*, 2009 SD 68, ¶ 8, 771 N.W.2d 345, 348 (citations omitted). Employer and Insurer argue that Waldner is an intelligent and experienced man. He was seventy-two (72) at the time of the injury and is a high school graduate. He has also submitted four or five previous first reports of injuries related to workers' compensation claims. Employer and Insurer further argue that during employee orientation, Waldner was specifically instructed to report any work-related injury to his supervisor as soon as possible, and that Waldner has acknowledged that this was expected of him in cases of work-related injury. Employer and Insurer assert that Waldner, as a reasonable person, knew that his injury was compensable by no later than his doctor visits on February 15, 2019 and February 19, 2019. They also argue that Waldner chose not to report the injury, because he did not want to get another employee in trouble. Waldner asserts that he did not report the injury because he believed the injury would heal on its own. He also

argues that his decision not to report the injury to Employer was supported by the advice of his doctors who advised him to treat the ulcer with cream and monitor it.

Waldner further argues that a first report of injury may not be required under SDCL 62-6-2 if the treatment following an injury amounts merely to minor first aid. SDCL 62-6-2 states, in pertinent part, "An employer covered by the provisions of this title who has knowledge of an injury that requires medical treatment other than minor first aid or that incapacitates the employee for seven or more calendar days shall file a written report…" Waldner asserts that following the injury he did not require more than minor first aid and he required no time off work, and therefore it was reasonable not to report the injury.

However, SDCL 62-6-2, titled "Employer's report of injury," provides guidance to an employer regarding when it is required to file a first report of injury. The statute does not offer guidance to employees regarding when they need to file a first report of injury. SDCL 62-7-10 dictates when an employee is required to inform an employer of an injury so that employer can make an informed decision about the injury including whether it is necessary to file a first report under SDCL 62-6-2.

Under SDCL 62-7-10, notice is required within three days with two exceptions; one, the employer had actual knowledge of the injury or two, the employer was given notice after the injury and the injured employee has good cause for the delay. Waldner is not asserting that the Employer had actual knowledge. He is arguing that he had good cause for the delay in notice.

Analysis as to whether Waldner had good cause, "shall be liberally construed in favor of the employee" as required by SDCL 62-7-10. Waldner did not report the injury within three days, because he thought the injury was minor and would heal on its own. When the injury to his toe developed into an ulcer two weeks later, Waldner had a doctor examine the injury. Four days later, he had another doctor examine the injury. If Waldner had good cause not to give notice within three days because the injury did not require first aid, he was still concerned enough about the ulcer on his toe that he went to the doctor twice within the following month. Waldner asserts that he was not aware of the extent of his injury in the three days following the fall. The Court in *McNeil* stated,

> Based on all of these facts, a reasonable person of McNeil's education and intelligence would not have realized the nature, seriousness and probable

> compensable character of the injury prior to the date he informed Employer. We must remember that the fact that claimant 'suffered from pain and other symptoms is not the determinative factor and will not support a determination that [the claimant] had knowledge of the existence or extent of his injury.

id at ¶ 20 (citing *Bearshield*, 278 N.W.2d at 166.)

Once Waldner thought his injury was something that might need the aid of a medical professional, he should have known it was necessary to inform his employer. Waldner has properly filed multiple workers' compensation claims. He is knowledgeable about what the workers' compensation process requires. As stated above, whether a work-related injury requires first aid or more extensive treatment, it is still the responsibility of the employee to inform the employer unless there is good cause not to. In this matter, Waldner should have known that the injury was potentially compensable and did not have good cause to delay providing notice of his injury within three days of the first doctor's visit on February 15, 2019.

Further, the Court has stated, "[t]he purpose of the notice requirement is to provide the employer an opportunity to investigate the cause and nature of an employee's injury while the facts are readily accessible." *Vaughn v. John Morrell & Co.,* 2000 SD 31, ¶ 16, 606 N.W. 2d 919, 923 (citation omitted). In this matter, if Waldner had provided timely notice, Employer would have been able to review video recordings of the incident before they were recorded over. By choosing not to report the injury, Waldner has deprived Employer of their ability to investigate the circumstances of the injury.

The Department concludes that Waldner did not properly provide notice under SDCL 62-7-10 and did not have good cause for failing to do so.

ORDER:

In accordance with the conclusions above, the Department finds that School Bus, Inc. and National Interstate Insurance Co.'s Motion for Summary Judgment is GRANTED.

Rodney Waldner's Motion for Summary Judgment is DENIED.

The Department finds that Waldner failed to provide notice properly under SDCL 62-7-10.

This letter shall constitute the order in this matter.

Sincerely,

Michelle M. Faw
Administrative Law Judge

MMF/pas