August 22, 2012

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Letter Decision and Order

Rick W. Orr
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Sioux Falls, SD 57101-1030

Re: HF No. 55, 2010/11- David Thyen v. Hubbard Feeds, Inc. and Sentry Insurance

Dear Mr. Schulz and Mr. Orr:

Submissions:

This letter addresses the following submissions by the parties:

June 14, 2012	Claimant's Motion for Summary Judgment;
	Affidavit in Support of Motion for Summary Judgment;
	Employer and Insurer's Answers to Claimant's Interrogatories and Request for Production of Documents to Employer and Insurer (First Set).
July 18, 2012	Employer and Insurer's Brief in Opposition to Claimant's Motion for Summary Judgment;
	Affidavit of Paul Hanson;
	Affidavit of Michael McKnight;
	Affidavit of Drew Worlie;

August 4, 2012	Claimant's Reply to Employer and Insurer's Resistance to Claimant's Motion for Summary Judgment;
August 8, 2012	Affidavit of Kenny Strickland; and
	Affidavit of Gary Johnson.

Facts:

The facts of this case are as follows:

1. David Thyen ("Thyen") worked for Hubbard Feeds, Inc. ("Hubbard") at its Watertown, South Dakota facility during all times relevant in this case.

2. While working on July 2, 2008, Hubbard assigned Thyen to monitoring the flow of wheat middlings being removed from a tank accidentally contaminated with a load of limestone the previous day. He was also sorting parts from 5 gallon buckets that were stored in the vicinity.

3. Thyen performed these duties in an area near the "meat and bone tank" where old feed had spilled and become moldy and "raunchy smelling."

4. While performing his work duties, Thyen felt his face turn red and "burn red hot". His stomach, arms, hands, legs, and neck became hot and tingling, with a pins-and-needles burning sensation. Thyen also began shaking.

5. Claimant was taken to a local medical facility for initial treatment.

6. After being seen by several doctors, some of the physicians theorized that Thyen had suffered an allergic reaction or had been exposed to a toxin.

7. On July 16, 2008, Thyen suffered the same symptoms that he had experience of July 2, 2008, when he returned to Hubbard's office to obtain an ingredient list for his medical providers to review.

8. In August and September 2008, Claimant asked to take samples in the area where he suffered symptoms. Hubbard did not allow Thyen to take any samples of the rotting material.

9. Thyen's treating doctor gave him a prescription slip dated August 29, 2008, and another one on September 26, 2008, with collection and mailing materials stating the procedure to be followed to obtain samples of the moldy material that Thyen was working in and around on July 2, 2008.

10. Thyen delivered those prescriptions to Hubbard and told Hubbard that he wanted to take samples when weather conditions were similar to what they were on July 2, 2008

11. Thyen received a letter dated October 6, 2008, from Hubbard which acknowledged his request for samples but told him that he could not take any samples.

12. Thyen returned to work at Hubbard's during the first week in November 2008. Before Hubbard allowed Thyen to start work, it required Thyen to sign a memo dated November 5, 2008, which stated in part that he was not to remove from the plant any property, products or other items belonging to the Company. It stated that removal of those items was a violation of the Rules of Conduct and would, according to established policy, result in Thyen's termination of employment.

13. This litigation was initiated when Claimant filed a Petition for Hearing dated October 15, 2008. Hubbard's Insurer, Sentry Insurance Company (Sentry) retained Attorney, Michael S. McKnight to represent Hubbard and itself. Thyen's attorney, Ronald L. Schulz by letter dated December 29, 2008, to Mr. McKnight stated, "I hope that when we are at the point where we need to obtain sampling, if this matter isn't settled before then, that your client will cooperate in that sampling without involving the Department of Labor."

14. On April 7, 2009, Thyen's attorney sent a letter to Department of Labor and Regulation ALJ Donald W. Hageman indicating his desire to do testing at a time when the temperature reached the same degree in 2009, as it did at the time of the occurrence in July of 2008 and stated, "Claimant would like the opportunity to obtain samples for analysis, assuming the employer does not clean up the work area" and he indicated that Mr. McKnight had indicated to him that sampling would be allowed and at no time did Mr. McKnight ever indicate that sampling would be denied. McKnight has acknowledged that he agreed that sampling would be permitted.

15. On June 24, 2009, a couple of Hubbard employees started cleaning the area where Thyen wanted to collect samples. When Thyen heard that the area was being cleaned up, he went to the plant superintendent, Brian Monahan, and told Monahan that he was legally trying to get sampling of that area and that he wished that they would not clean it up until the samples were taken. Mr. Monahan responded that he was not aware of the cleanup and that they would stop cleaning the area. Monahan also told Thyen that if they cleaned up the area they would let Thyen know and if they needed, would set aside a sample for him.

16. Hubbard stopped its cleanup on June 24, 2009. Two days later the employees were again cleaning up the area. Thyen went to Brian Monahan again. This time Monahan responded that Hubbard had the right to clean the plant.

17. Hubbard did not collect samples nor did it allow Thyen to collect any samples for testing.

18. Hubbard has in place a Housekeeping/Sanitation protocol stating, "Regular cleaning of all areas is required as outlined by the plant cleaning schedule or SOP." Hubbard also routinely used cleaning checklists.

19. Hubbard also performs a “deep clean” on an annual basis which is usually conducted in May, June or July.

20. Hubbard contends that the 2008 deep cleaning project was in process at the time Thyen’s symptoms first occurred and that the cleanup was completed within a few days following the incident. It also maintains that the area was routinely cleaned between the time of Thyen’s first symptoms and June 2009.

21. Hubbard contends that Thyen was engaged in the deep cleaning project when he first suffered his symptoms.

22. Thyen alleges that the area in which his symptom occurred was not cleaned until June of 2009.

23. Thyen alleges that he was not involved in the deep cleaning when he first experienced symptoms. He claims that he was sorting parts stored in 5 gallon pails in the area.

24. Additional facts may be discussed in the analysis below.

Spoliation Doctrine:

The South Dakota Supreme Court remanded this case to the Department of Labor and Regulation to consider whether the spoliation of evidence occurred when Hubbard cleaned up the area where Thyen wanted to collect samples. Thyen v. Hubbard Feeds, Inc., 2011 SD 61, ¶ 17. In its decision, the Court determined as a matter of first impression that the common law doctrine of “spoliation” was applicable in workers’ compensation cases in this case.

"Spoliation is the intentional destruction of evidence." Id. at ¶ 11, (citing State v. Engesser, 2003 SD 47, ¶ 44, 661 NW2d 739, 753; State v. Kietzke, 85 SD 502, 514-15, 186 NW2d 551, 558 (1971)). Spoliation can be found when "substantial evidence exists to support a conclusion that the evidence was in existence, that it was in the possession or under the control of the party against whom the inference may be drawn, that the evidence would have been admissible at trial, and that the party responsible for destroying the evidence did so intentionally and in bad faith." Id. (quoting Engesser, 2003 SD 47, ¶ 46, 661 NW2d at 755. When [spoliation] is established a fact finder may infer that the evidence destroyed was unfavorable to the party responsible for the destruction.” Id. at ¶ 16.

In this case, the material that Thyen wanted to sample and test for allergens and toxins was under the control of Hubbard and the test results from that material would have been admissible at trial. The question that remains is whether Hubbard intentionally destroyed that evidence in bad faith when it cleaned up the material.

Summary Judgment:

Thyen filed a Motion for Summary Judgment. ARSD 47:03:01:08 governs Summary Judgments which are considered by the Department of Labor and Regulation in worker's 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. 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)).

In this case, Hubbard contends that it was in the process of "deep cleaning" the plant when Thyen first experienced his symptoms and that the "deep cleaning" was completed within a few days of the incident. It also contends that routine cleaning or housekeeping occurred on a regular basis between the time Thyen experienced symptoms and June of 2009. On the other hand, Thyen contends that the area was not thoroughly cleaned between the time of his symptoms and June of 2009. This dispute constitutes a genuine issue of a material fact. It may be one of the most important facts in the case when determining Hubbard's intent.

In addition, Hubbard contends that Thyen was involved in the "deep cleaning" project when he suffered his symptoms on July 2, 2008. Thyen contends that he was not involved in a cleanup at that time. These disputes of fact must ultimately be resolved at hearing. Therefore, Claimant's motion must be denied.

Further, there are many questions which need to be answered before the Department can get a “clear picture” of Hubbard’s intent. Why did Hubbard refuse to allow Thyen to collect samples or collect them itself? What is the difference between a “deep cleaning” and ongoing housekeeping cleanings? Why was cleanup stopped on June 24, 2008, when Thyen brought that fact to the plant superintendent’s attention, then resumed two days later without a credible explanation? The answers to these and other questions should be addressed at hearing.

Order:

Genuine issues of material facts exist in this case. Accordingly Claimant’s Motion for Summary Judgment is denied. This letter shall constitute the Department’s Order in this matter.

Sincerely,

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