

June 21, 2022

**VIA EMAIL**

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RE: HF No 84, 2021/22 – Karen M. Franken v Smithfield Foods, Inc.

Greetings:

This letter decision addresses Employer and Self-Insurer's Motion to Dismiss submitted April 4, 2022, Claimant's Brief Opposing Motion to Dismiss submitted May 6, 2022, and Employer and Self-Insurer's Reply Brief in Support of Motion to Dismiss submitted on May 20, 2022.

Karen M. Franken, Individually and as the Personal Representative of the Estate of Craig Allen Franken (Claimant), filed a Petition for Hearing dated February 25, 2022, seeking workers' compensation benefits relating to her husband, Craig Franken's (Franken) death on April 19, 2020. Franken passed away due to complications related to COVID-19. Claimant alleges that Franken suffered a work-related injury pursuant to SDCL 62-1-1(7). She further alleges that the working conditions at Smithfield Foods, Inc. (Smithfield) on or about April 19, 2020, are a major contributing factor to Franken's need for medical treatment and his death.

Smithfield moves to dismiss Claimant's Petition for Hearing, pursuant to SDCL 15-6-12(b)(5), as SDCL 21-68 prohibits and prevents Claimant's claim for benefits related to Franken's COVID-19 diagnosis and death.

Claimant asserts that COVID-19 exposure is an "occupational disease" pursuant to SDCL 62-8-1. However, SDCL 21-68-6(3) provides, "COVID-19 is not an occupational disease under state law." Claimant asserts that SDCL 21-68 does not refer to South Dakota Worker's Compensation statutes found under Title 62, but instead, refers to actions or claims for damages. SDCL 21-68-6(4) states, in pertinent part, that the chapter may not be construed to "[a]brogate, amend, repeal, alter, or affect any statutory or common law immunity or limitation of liability." Claimant has provided numerous cases regarding accidental exposure to disease. However, the cases provided are distinguishable as none of them were directly addressed by legislation that limited exposure liability and potential for benefits.

On July 1, 2021, SDCL 21-68, and its corresponding Session Law, went into effect. SDCL 21-68-2 states,

A person may not bring or maintain any action or claim for damages or relief alleging exposure or potential exposure to COVID-19 unless the exposure results in a COVID-19 diagnosis and the exposure is the result of intentional exposure with the intent to transmit COVID-19. In alleging intentional exposure with the intent to transmit COVID-19, a party shall state with particularity the circumstances constituting intentional exposure with the intent to transmit COVID-19 including all duty, breach, and intent elements and establish all elements by clear and convincing evidence.

Additionally, SDCL 21-68-3 provides

A person who possesses or is in control of a premises, including a tenant, lessee, or occupant of a premises, who directly or indirectly invites or permits an individual onto a premises, shall not be liable for damages for any injuries sustained from the individual's exposure to COVID-19, whether the exposure occurs on the premises or during any activity managed by the

person who possesses or is in control of a premises unless the person who possesses or is in control of the premises intentionally exposes the individual to COVID-19 with the intent to transmit COVID-19. In alleging intentional exposure with the intent to transmit COVID-19, a party must state with particularity the circumstances constituting intentional exposure with the intent to transmit COVID-19 including all duty, breach, and intent elements and establish all elements by clear and convincing evidence.

Claimant's basis for requesting worker's compensation benefits is Franken's COVID-19 diagnosis, complications, and death. She is not alleging that Franken was intentionally exposed to COVID-19, therefore, pursuant to SDCL 21-68-2, his exposure is not compensable.

By Session Law on February 8, 2021, the South Dakota Legislature provided that the Act to Limit Liability for Certain Exposures to COVID-19 applied retroactively. Section 7 of the Session Law states, "This Act applies to any exposure to COVID-19, injury, latent injury, damages, claim, cause of action, or loss that occurs, accrues or begins, whether known, unknown, or latent between January 1, 2020, and December 31, 2022." The Legislature did not specify that workers' compensation claims were exempt from the Act.

As her claim is barred by both SDCL 62-1-7, the Act to Limit Liability for Certain Exposures to COVID-19, and SDCL 21-68-2, the Department concludes that Claimant has not made a claim upon which relief can be granted.

It is hereby ORDERED that Employer and Insurer's Motion to Dismiss is GRANTED. Hearing file 84, 2021/22 is dismissed with prejudice. This is the final decision in this matter unless it is appealed in one of two ways:

- (1) The decision is appealed directly to circuit court within 30 days after the date of this decision, OR

- (2) A request for a Department of Labor and Regulation review is filed by mailing a letter of appeal to the Secretary, S.D. Department of Labor and Regulation, 123 W. Missouri Ave., Pierre, SD 57501 within 10 days after the date of this decision. The Secretary's Decision may be appealed to circuit court within 30 days after the date of the Secretary's decision.

Sincerely,

A handwritten signature in blue ink that reads "Michelle Faw". The signature is written in a cursive, flowing style.

Michelle M. Faw  
Administrative Law Judge

MMF/das