February 23, 2015

Robert L. Miller
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Sent Certified

LETTER DECISION ON
MOTION FOR SUMMARY JUDGMENT

Thomas J. VonWald
Boyce, Greenfield, Pashby & Welk LLP
PO Box 5015
Sioux Falls, SD 57117-5015

RE: HF No. 101, 2013/14 – Robert L. Miller v. McLaughlin Electric and Travelers Insurance

Dear Mr. Miller and Mr. VonWald:

I have received the parties' arguments and briefs, along with the attached affidavits and evidence, and have taken all into consideration.

ARSD 47:03:01:08 governs the Department of Labor's authority to grant summary judgment:

> 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.

> The burden is on the moving party to clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law. On the

> other hand, [t]he party opposing a motion for summary judgment must be diligent in resisting the motion, and mere general allegations and denials which do not set forth specific facts will not prevent issuance of a judgment. [T]he nonmoving party must substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy.

*McDowell v. Citicorp USA*, 2007 SD 53, ¶22, 734 N.W.2d 14, 21 (emphasis added) (citations omitted).

The guiding principles for a summary judgment determination are well settled and have been set out by the South Dakota Supreme Court as follows:

> (1) The evidence must be viewed most favorable to the nonmoving party; (2) The burden of proof is upon the movant to show clearly that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law; (3) Though the purpose of the rule is to secure a just, speedy and inexpensive determination of the action, it was never intended to be used as a substitute for a court trial or for a trial by jury where any genuine issue of material fact exists; (4) A surmise that a party will not prevail upon trial is not sufficient basis to grant the motion on issues which are not shown to be sham, frivolous or so unsubstantial that it is obvious it would be futile to try them; (5) Summary judgment is an extreme remedy and should be awarded only when the truth is clear and reasonable doubts touching the existence of a genuine issue as to material fact should be resolved against the movant; and (6) Where, however, no genuine issue of fact exists it is looked upon with favor and is particularly adaptable to expose sham claims and defenses.

*Owens v. F.E.M. Electric Association, Inc*., 694 N.W.2d 274, 277 (SD 2005).

MATERIAL FACTS

1. At the age of 52, Claimant suffered a work-related injury on October 29, 1981 while employed for Employer.

2. Employer and Insurer have covered all related medical and indemnity benefits for Claimant since the time of Claimant's injury.

3. Claimant treated with Winkler Chiropractic Clinic for his sciatica pain from April 1997 through May 2013. Dr. Winkler, in 1998, noted this treatment could be listed as "maintenance or supportive care." At that time, it was also noted that Claimant had a regular exercise program at the local YMCA.

4. In June 2006, Claimant started to treat with Orthopedic Surgery Specialists after aggravating his injury. The treatment with this clinic lasted until September 2006.

5. In May 2013, Claimant returned to his doctor at Orthopedic Surgery Specialists regarding his back pain. Treatment was conservative and Claimant was instructed to continue with his stretching and to place ice over the area.

6. In July 2013, Dr. Danny Wolfgram, with Orthopedic Surgery Specialists, noted that Claimant reported his back worsened when he used stairs. This complaint regarding use of stairs was repeated in August 2013.

7. In August 2013, Claimant requested Dr. Wolfgram provide him with a letter stating that he should move to assisted living center, where he does not need to use stairs. As Dr. Wolfgram noted, "He apparently needs this to get into an assisted-living."

8. On August 27, 2013, Dr. Wolfgram wrote a general letter "To Whom It May Concern" regarding Claimant's request. He wrote, "[Claimant] is wondering about getting in to an assisted living situation which would not require him to walk stairs and I think certainly this is in his best interest medically. … In short, it is my medical recommendation that Mr. Miller be in a living situation that does not have stairs."

9. On September 17, 2013, in response to an inquiry from Insurer, Dr. Wolfgram wrote a letter to Insurer stating, "With regards to the "stair-glide", he has stated several times when I have seen him that he has pain walking on stairs so if he is living in a situation where he does not need to walk up and down stairs that should resolve the majority of his back pain. Thus, in my opinion a stair-glide would be an acceptable option."

10. Claimant and his wife moved to Oak Grove, Minnesota, into an assisted living center called Arbor Oaks in August 2013.

11. After moving to Minnesota, on October 1, 2013, Insurer sent Claimant a denial. Within the denial of benefits, Insurer denied paying for Claimant's assisted living care as a stair glide installed in Claimant's home would be an appropriate option.

12. Insurer also denied Claimant's verbal request for physical therapy to treat knee pain. Claimant was having some trouble walking without assistance.

13. From October 9, 2013 to January 16, 2014, Claimant was seen at Andover Physical Therapy for 13 treatments, for which he has requested compensation.

14. The medical records do not indicate that Claimant's treating physician prescribed this physical therapy to Claimant, in regards to his work-related injury. Claimant's doctor, Dr. Danny Wolfgram, last prescribed physical therapy in May 2013.

15. When he moved to Minnesota, Claimant continued to exercise regularly at a local YMCA or similar facility. Claimant has requested Employer and Insurer

reimburse him for the yearly fee of belonging to the local YMCA or similar gymnasium.

16. Employer and Insurer have not formally denied Claimant the cost of a gym membership.

Disputes of fact are not material unless they change the outcome of a case under the law. *Hall v. South Dakota Dept. of Transportation*, 2011 SD 70, ¶9 n.3 (citing *Jerauld Cnty. v. Huron Reg'l Med. Ctr., Inc*., 2004 S.D. 89, ¶ 41 n.4, 685 N.W.2d 140, 149 n.4). There are no disputed facts that would change the outcome of this case. The parties are entitled to judgment as a matter of law.

Dr. Wolfgram's opinion is presented by Claimant as being his proof for requiring assisted living facility. Dr. Wolfgram's opinion speaks for itself. Claimant should not use stairs. An assisted living facility, while nice, is not the only living arrangement that does not have stairs. Claimant chose not to move into a house without stairs or in the alternative to install a stair glide in his current home.

Obviously, Claimant is getting to the age and ability where he and his wife prefer to live in an assisted living facility. However, Claimant's work-related injury is not the cause of his needing the support from assisted living. Claimant's work injury caused him to have sciatica conditions and pains in his back and legs; but not being able to use stairs is not a reason to move to an assisted living facility.

In past years, Claimant has had regular chiropractic treatment and occasional treatment from doctors and physical therapists. Claimant has attempted to keep himself healthy by exercising regularly. These activities, as recommended when he was first injured, have not changed in their necessity. Employer and Insurer have not denied a gym membership to Claimant.

In conclusion, the opinions of Claimant's medical provider regarding Claimant's use of stairs, clearly state that Claimant can live in any situation where he does not have to use stairs. Employer and Insurer denial of Claimant's request for assisted living facility is not overruled. Employer and Insurer's Motion for Summary Judgment is granted for the assisted living.

In regards to the physical therapy bills, the medical records submitted by the parties, as seen in a light more favorable to Claimant, indicate that Claimant's medical providers, Dr. Winckler and Dr. Wolfgram, did not prescribe physical therapy to Claimant. They had not seen Claimant since he moved to Minnesota. There is no indication in the records that Claimant had obtained approval to change treating physicians. The applicable statute states, "The employer is not responsible for medical

services furnished or ordered by any medical practitioner or surgeon or other person selected by the employee in disregard of this section. … If the employee desires to change the employee's choice of medical practitioner or surgeon, the employee shall obtain approval in writing from the employer." SDCL 62-4-43. So, whether Claimant's physical therapy is necessary or related to his work-related injury is not a material fact.

There is another reason why Employer and Insurer are entitled to judgment as a matter of law concerning the physical therapy. Claimant's injury occurred in 1981, so the law in place at the time of injury is the prevailing law. "[T]he law in effect at the time the employee is injured is what controls the rights and duties of the parties in workers' compensation cases." *Sopko v. C&R Transfer, Co., Inc*., 2003 S.D. 69, ¶12, 665 N.W.2d 94, 97. In 1981, SDCL 62-4-43 (patient choice of physician) was not law. At that time, the Employer was in charge of choosing Claimant's medical provider. The law stated, "The employee may elect to secure his own physician, surgeon, or hospital services at his own expense." SDCL 62-4-1 (1981). Claimant had no choice in medical provider, unless he wanted to pay for the services, himself. Therefore, Claimant's choice to secure physical therapy in Minnesota was at his own expense.

For the above reasons, the physical therapy bills incurred by Claimant after moving to Minnesota are not the responsibility of Employer and Insurer. Employer and Insurer are entitled to judgment as a matter of law regarding the physical therapy bills.

The last issue is the YMCA membership. Claimant was instructed by his treating physicians and medical providers to exercise and swim on a regular basis to treat his work-related condition. This bill was not denied by Employer and Insurer. If a bill is presented to Employer and Insurer, they are under an obligation to either pay the bill or deny the bill in writing. Since there was no denial, and Claimant's treating physicians have not instructed Claimant to stop his exercise routine, Employer and Insurer are ordered to pay the bill for Claimant's gym membership for 2014 and 2015.

Summary Judgment is granted to Employer and Insurer. The Petition for Hearing is Dismissed. Employer and Insurer are instructed to pay Claimant's gym membership bill of $50 for 2014 and 2015. As Facts are not at issue, Findings of Fact and Conclusions of Law are not required to be filed. This Letter Order is considered to be an Order of the Department.

Sincerely,

Catherine Duenwald
Administrative Law Judge