February 3, 2020

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LETTER DECISION

John Stanton Dorsey
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Rapid City, SD 57709-8008

RE: HF No. 102, 2018/19 – Heinzerling Concrete, LLC and Acuity v. Christopher Baldridge

Dear Mr. Larson and Mr. Dorsey,

This letter addresses the following submissions by the parties:

October 15, 2019	Motion for Summary Judgment; Brief in Support of Motion for Summary Judgment; Affidavit of Jessalyn Ericsson in Support of Motion for Summary Judgment; Affidavit of Brian A. Zielinski in Support of Motion for Summary Judgment;
November 14, 2019	Claimant's Response to Employer/Insurer's Motion for Summary Judgment; and
November 27, 2019	Employer and Insurer's Reply Brief in Support of Motion for Summary Judgment.

Heinzerling Concrete, LLC and Acuity (Employer/Insurer) have moved the Department of Labor & Regulation (Department) for summary judgment in this matter, asserting that Christopher Baldridge (Baldridge) has committed fraud in securing workers' compensation benefits.

BACKGROUND

Baldridge sustained a work injury to his left foot on October 12, 2017. Employer/Insurer accepted the claim as compensable and paid both medical and indemnity benefits. Baldridge complained of pain and issues to his medical providers, as documented in the medical records.

Employer/Insurer filed a Petition for Hearing on March 28, 2019, asserting that Baldridge committed fraud in securing workers' compensation benefits. Employer/Insurer served Baldridge with requests for admissions on April 25, 2019. The requests for admission were based in large part on surveillance. The requests asked Baldridge to admit he was able to bear full weight on his left leg, ambulate without assistance, and stand without assistance on February 20, 22, and 23, 2018. Baldridge was further asked to admit that he presented to medical appointments in a CAM boot. Baldridge was then asked to admit that he required assistance of a wheelchair on July 13, 2018, at his medical visit. Based on surveillance of Baldridge working construction after being wheeled out of his medical appointment, he was then asked to admit that he was able to bear full weight on his left leg, walk without assistance, use stairs, a step ladder, scaffolding, and various constructions tools on July 13, 14, and 15, 2018.

Baldridge was further asked to admit to Dr. Ripperda that he had limited mobility within his home and did not do any walking outside except to get the mail, and that he used a knee scooter to go long distances. Baldridge was on surveillance working out at a gym and was asked to admit that he was able to bear full weight on his left leg, ambulate without assistance, lift weights, jog in place, jump, and perform lunges on November 18, 2018. Baldridge was captured on surveillance working construction on November 29, 2018 and was asked to admit he was able to climb a ladder, walk on a steep roof, move heavy items, bend, and kneel.

Baldridge was then asked to admit that the person depicted in the surveillance was him. He was also asked to admit that he had been working on construction since October 12, 2017. He was asked to admit that his physical capabilities were greater than those reported to his doctors. He was asked to admit he was able to fully perform the activities of daily living, that he was capable of unrestricted work, he was able to earn more than his workers' compensation benefit rate, and that he was able to walk without an assistive device. Finally, Baldridge was asked to admit that he made representations to his physicians regarding his physical capabilities that were not accurate. Baldridge has not responded to the requests for admission.

The Department granted a default judgment in favor of Employer/Insurer on June 18, 2019, ordered that no further benefits were due and owing to Baldridge, and dismissed this matter. When the Department dismissed this Petition, more than 30 days had passed since Baldridge was served with requests for admissions. The Department reinstated this matter on September 23, 2019 after Baldridge filed a motion to set aside default judgment.

Additional facts may be developed in the issue analysis below.

ANALYSIS:

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/Insurer argue that since Baldridge has not responded to the requests for admissions, the requests are deemed admitted, and therefore, there are no issues of material fact remaining. SDCL 15-6-36a regarding requests for admissions states, in pertinent part,

> The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of forty-five days after service of the summons and complaint upon him.

Employer/Insurer sent Baldridge the requests for admissions on April 25, 2019. Baldridge has not responded to the requests for admissions, and he has offered no explanation as to why he has not responded. Following SDCL 15-6-36(a), the admissions requested are presumed to be admitted. Therefore, the facts referenced in the request for admissions are no longer at issue.

Baldridge has argued that summary judgment is not appropriate for the matter of fraud. The South Dakota Supreme Court has stated, "[q]uestions of fact on material issues such as fraud are not appropriate for summary judgment." *Oxton v. Rudland* 2017 S.D. 35 at ¶18. "Indeed, "[t]hough the purpose of [summary judgment] 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." *Id.* citing *Bourk v. Iseman Mobile Homes,* 316 N.W.2d 343, 343-44 (S.D.1982). The Department concludes that in this matter, summary judgment may be appropriate if all issues of material fact are presumed admitted by the failure to respond to the request for admissions. Baldridge also argues that SDCL 62-4-48 limits the Department's authority to modify benefits without a hearing. SDCL 62-4-48 states:

> The department shall order an investigation by the insurer, self-insured employer or administrator of a self-insured plan of the facts contained in a written request made pursuant to § 62-4-47. The investigation shall be completed within ninety days after receipt of the order. After a contested case hearing conducted pursuant to chapter 1-26, the department may order that the claimant's payments be continued, modified, or terminated. If the department has reason to believe that criminal insurance fraud

> has been committed, it shall disclose its information to law enforcement officers and may assist in the criminal investigative process.

However, SDCL 62-4-48 specifically states that the hearing must be held pursuant to SDCL 1-26 which allows for summary disposition of cases in SDCL 1-26-18. SDCL 62-4-48 does not prevent summary judgment in matters of fraud.

Baldridge also asserts that there are issues of material fact that have not been resolved. He argues that SDCL 58-4A-2(6), regarding fraudulent insurance acts, requires that the perpetrator present a statement to "an insurer, or any insurance producer of an insurer" as part of a claim which is false, incomplete or misleading. He states that there are no facts alleging that he made any false, incomplete, or misleading statements to the insurer in this case. However, one of the requests for admissions states, "[a]dmit that you have made representations to your physicians regarding your physical capabilities that are not accurate." SDCL 58-4A-2 also states in pertinent parts (emphasis added,) "a person commits a fraudulent insurance act if the person… [k]nowingly and with intent to defraud or deceive presents, **causes to be presented**, **or prepares with knowledge or belief that it will be presented to or by an insurer** … any false, incomplete, or misleading information concerning any fact or thing material to a claim." Therefore, the inaccurate statements Baldridge made to his physician, which would be presented to and relied on by the insurer in this matter, may have constituted fraud if they were provided knowingly and with the intent to defraud or deceive.

Baldridge argues that the activities he engaged in were at the recommendation of his treating physician Dr. Anderson. He asserts that he was following the advice of his doctor and therefore was not perpetrating a fraud. Employer/Insurer respond that the basis for the accusation of fraud is the misrepresentations made to the doctor on which the doctor would base his medical opinion.

The Department is persuaded by the facts admitted through the requests for admissions and the record as a whole that there are no genuine issues of material fact remaining to be resolved in this matter. Baldridge has admitted to making misrepresentations to his physicians that are not accurate and that he is the individual in the surveillance videos. These admissions combined with the totality of the evidence lead the Department to conclude that Baldridge has knowingly misrepresented facts to the insurance

company, through his misrepresentations to his doctors, and that he did so with the intent to receive workers' compensation benefits to which he is not entitled. Baldridge has committed fraudulent insurance acts as defined by SDCL 58-4A-2(6).

ORDER:

In accordance with the conclusions above, the Department finds that Heinzerling Concrete, LLC and Acuity's Motion for Summary Judgment is Granted.

The Department finds that Baldridge committed fraud in connection with his claim for workers' compensation benefits;

Employer/Insurer are not responsible for any future benefits owed to Baldridge; and

Pursuant to SDCL 62-4-48, Employer/Insurer's payment of further workers' compensation benefits is terminated.

This letter shall constitute the order in this matter.

Counsel for Employer/Insurer shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision within twenty (20) days from the date of receipt of this Decision. Claimant shall have an additional twenty (20) days from the date of receipt of Claimant's Proposed Findings and Conclusions to submit objections thereto and/or to submit their own proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Employer/Insurer shall submit such Stipulation along with an Order consistent with this Decision.

Sincerely,

Michelle M. Faw
Administrative Law Judge

MMF/pas