

June 22, 2022

**VIA EMAIL**

Kirk D. Rallis  
King Law Firm, PC  
101 N Phillips Ave., Ste 602  
Sioux Falls, SD 57107

Laura K. Hensley  
BOYCE LAW FIRM, L.L.P.  
P.O. Box 5015  
Sioux Falls, SD 57117-5015

RE: HF No. 10, 2021/22- Bradley Bauer v. Billion Motors, Inc. and Dakota Truck Underwriters

Greetings:

This letter decision addresses Employer and Insurer's Motion for Summary Judgment submitted on April 26, 2022; Claimant's Brief in Resistance to Defendant's Motion for Summary Judgment submitted on May 10, 2022; and Employer and Insurer's Reply Brief in Support of Motion for Summary Judgment submitted on May 27, 2022.

On March 11, 2020, Bradley Bauer (Claimant) reported he suffered a work-related injury while he was working for Billion Motors, Inc. (Employer) which was at all times pertinent insured for workers' compensation purposes by Dakota Truck Underwriters (Insurer). Claimant was seen by Sarah Fodness, PA-C, at Workforce on March 12, 2020, and he told her he had been loading tires on March 6, 2020, when he felt pain in his left knee. PA-C Fodness diagnosed him with left knee sprain. Claimant again saw PA-C Fodness on March 17, 2020, reporting an exacerbation of his left knee

and leg pain. PA-C Fodness referred Claimant for orthopedic care. Claimant was seen by Dr. Erik Peterson at Orthopedic Institute on March 24, 2020, complaining of radicular pain down his left leg. Dr. Peterson gave Claimant an injection in his left knee and recommended an MRI for low back pain.

On March 26, 2020, Claimant had an MRI of his lumbar spine which showed spinal stenosis at L4-5 secondary to mild bulging disc osteophyte complex facet arthropathy and thickening of the ligamenta flava exaggerated by shortened pedicles. The MRI also showed minimal bulging at L3-4 and L5-S1. On March 31, 2020, Claimant was seen by Dr. Peterson who noted he had a chronic anatomical abnormality of the lumbar spine that may predispose him to injury. He gave Claimant a left-sided L4-5 epidural. On April 6, 2020, a note from Orthopedic Institute provides that Claimant called Dr. Peterson's office and reported he could not stand for more than 20 minutes without severe back pain, and he was having new pain in his buttocks. At that time, Claimant had not work since the reported work injury and he had not filled his Gabapentin prescription.

On April 15, 2020, Claimant was seen by Dr. Matthew Blake at Avera Orthopedics for a second opinion. Dr. Blake ordered another MRI which showed the same findings as the previous MRI. Claimant underwent physical therapy as recommended by Dr. Blake. The therapy was paid for by Employer and Insurer. On April 24, 2020, the physical therapist noted that Claimant reported increased pain following the epidural, and that Claimant was able to carry a duffle bag and backpack into the clinic. On April 28, 2020, Claimant was seen by Dr. Matthew Wingate, a spine

specialist at Orthopedic Institute. Dr. Wingate's records note the findings of the MRI and that his spinal issues are likely not related to a workers' compensation claim.

On May 19, 2020, Claimant was seen by pain specialist Dr. James Brunz at Orthopedic Institute. Dr. Brunz ordered an EMG which was normal. On June 22, 2020, Dr. Brunz allowed Claimant to go back to work as of June 25, 2020. Employer was able to accommodate Claimant's restrictions. On July 14, 2020, Claimant was terminated from his position with Employer for repeatedly violating attendance policies.

On August 24, 2020, Claimant called Orthopedics Institute stating he did not want to see Dr. Wingate and that Dr. Brunz was not giving him correct care. On October 27, 2020, Claimant called Orthopedic Institute and canceled his appointment with Dr. Brunz. He stated that he wanted a note to be ordered off work, otherwise, he was going to the board of directors at Orthopedic Institute to discuss Dr. Brunz.

On November 3, 2020, Claimant was seen by Dr. Brunz who noted Claimant had been seen by Dr. Wingate who found pre-existing degenerative disease at L4-5 that may require surgery and was unrelated to the work injury. On November 18, 2020, Dr. Brunz referred Claimant back to Dr. Wingate, and opined in a letter at the work injury of March 11, 2020, is not a major contributing cause of the need for work restrictions assigned on November 4, 2020. On November 19, 2020, Dr. Wingate saw Claimant and recommended surgery. He opined that he could not correlate the work injury with the MRI findings.

Claimant filed a Petition for Hearing with the Department of Labor & Regulation (Department) on July 26, 2021, alleging that he suffered a work-related injury to his left knee and low back on March 11, 2020. The Department entered a scheduling order on

December 8, 2021, which set Claimant's deadline to produce an expert and expert's report by March 22, 2022. Claimant disclosed Aleesha Clyde, OT as an expert on January 11, 2022, medical expert with impairment rating, and Dr. Thomas Ripperda on February 21, 2022. Claimant disclosed vocational expert, Tom Audet on March 28, 2022.

On April 22, 2022, Employer and Insurer filed an Expert disclosure with the Department and served Claimant's counsel. Employer and Insurer identified two of Claimant's treating physicians as experts, Dr. Wingate and Dr. Brunz. Claimant emailed Employer and Insurer's counsel in the afternoon on April 22, 2022, to designate Dr. Erik Peterson as an expert.

Employer and Provider have moved the Department for summary judgment on the grounds that (1) Claimant has failed to timely disclose his expert along with reports and (2) Claimant is unable to meet his burden to establish that his reported injury of March 11, 2020, is a major contributing cause of his current condition and need for treatment and, therefore, there is no genuine issue as to any material fact.

The Department's authority to grant summary judgment is established in 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. *Stromberger Farms, Inc. v. Johnson*, 2020 S.D. 22, ¶ 31, 942 N.W.2d 249, 258-59 (citations omitted). The non-moving party must present specific facts showing that a genuine issue of material facts exists. *Id.* at ¶ 34. “A fact is material when it is one that would impact the outcome of the case ‘under the governing substantive law’ applicable to a claim or defense at issue in the case.” *A-G-E Corp. v. State*, 2006 SD 66, ¶ 14, 719 N.W.2d 780, 785. “Summary judgment is proper when the [opposing party] provides only conclusory statements and fails to present specific facts showing that a genuine issue exists for trial.” *Zhi Gang Zhang v. Rasmus*, 2019 SD 46, ¶31, 932 N.W.2d 153, 163. “The testimony of professionals is crucial in establishing this causal relationship because the field is one in which laymen ordinarily are unqualified to express an opinion.” *Day v. John Morrell & Co.*, 490 N.W.2d 720, 724 (S.D. 1992).

To prevail in this matter, Claimant must be able to prove that his work-related injury is and remains a major contributing cause of his current condition. Employer and Insurer’s assert that Claimant has failed to timely disclose an expert. However, Claimant’s disclosures of Dr. Ripperda and Aleesha Clyde were timely. Claimant failed to disclose Dr. Peterson and Tom Audet by the deadline set by the Scheduling Order. Therefore, the untimely disclosures of Dr. Peterson and Tom Audet shall be struck from the record.

Employer and Insurer have also asserted that Claimant has insufficient medical support to survive summary judgment and prove that his alleged work injury is a major contributing cause of his condition. Claimant argues that the records and medical opinions establish that Claimant’s injuries arose out of and in the scope of his

employment and that the work injury of March 11, 2020, is a major contributing cause of his right knee, left knee, right hip, and low back condition. He further argues that issues of material fact exist and thus summary judgment is inappropriate.

Upon review of the record and submissions made by the parties, the Department has concluded that issues of material fact remain. For the above reasons, it is hereby ORDERED that Employer and Insurer's Motion for Summary Judgment is DENIED. It is further ORDERED that the untimely disclosures of Dr. Peterson and Tom Audet are hereby struck from the record.

This letter shall constitute the Department's order in this matter.

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