August 31, 2012

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LETTER DECISION

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RE: HF No. 31, 2009/10 – Pamela McKinney v. Rapid City Regional Hospital and Fincor Solutions

Dear Counsel:

I have received the following submissions in the above referenced matter:

Employer/Insurer's Motion for Summary Judgment, Employer/Insurer's Brief in Support of Motion for Summary Judgment, and Affidavit of Charles A. Larson in Support of Motion for Summary Judgment

Claimant's Motion for Summary Judgment, Affidavit of James D. Leach, and Claimant's Brief Re: Employer and Insurer's Motion for Summary Judgment as to Causation and Claimant's Alternative Motion for Summary Judgment

Brief of Employer and Insurer Rapid City Regional Hospital

Employer/Insurer's Reply Brief in Support of Motion for Summary Judgment

I have carefully considered each of these submissions in addressing the Motions before the Department.

It is undisputed that Pamela McKinney (McKinney or Claimant) was first injured on August 28, 1998. Employer, Rapid City Regional Hospital, was self-insured at that time and admits that the injury occurred. McKinney reported a second injury on August 30, 2007. Employer was insured by Fincor Solutions at that time.

In 1998, Claimant sought treatment from Dr. Brett Lawlor at The Rehab Doctors. Dr. Lawlor, who is board certified in Physical Medicine & Rehabilitation and Pain Medicine, treated her for right upper extremity problems which Claimant attributed to her work activities as a receptionist/secretary. Claimant reported to Dr. Lawlor that there was no specific episode that brought on her symptoms, but rather it had gradually come on and increased with her activity at work. Over the years, Claimant continued to treat with various doctors at The Rehab Doctors for a continuation of her upper extremity, neck, and shoulder issues. Claimant testified at her deposition that her pain continued to be the same in 2007 as it was in 1998 and had never completely healed.

Dr. Lawlor was deposed on March 13, 2012. He testified that Claimant's medical records show that she continued to have flares in her condition and that her condition never fully resolved. He offered his opinion to a reasonable degree of medical probability that Claimant's 1998 injury was a major contributing cause of her current problems and need for treatment and he also opined that the 2007 injury was a major contributing cause. Dr. Lawlor further testified that he could not say that the 2007 work related activities contributed independently to her current problems or need for treatment.

On September 2, 2011, Dr. Wayne Anderson, who was disclosed as an expert witness for Fincor performed an independent medical examination (IME) at the request of Fincor. Dr. Anderson's report concluded that Claimant's current condition was not related to Claimant work activities.

Rapid City Regional Hospital and Insurer, Fincor Solutions (Fincor) move the Department for summary judgment regarding the August 30, 2007 injury pursuant to ARSD 47:03:01:08, which provides,

> A claimant or an employer or its insurer may, anytime 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 of 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.

Fincor argues that there are no medical opinions which support a claim against Fincor and therefore summary judgment would be appropriate. While there is an issue whether Claimant's condition is even related to her work activities, Fincor argues that this fact is not material for purposes of this summary judgment motion. Fincor argues that none of

the medical experts have offered opinions that the work activities in 2007 contributed independently to Claimant's continued problems and need for treatment. Fincor points out that if the Department were to accept its expert's opinion, Claimant's claim would not be compensable at all. If the Department were to accept the opinion of Claimant's and Self-Insurer's expert, the 1998 injury would remain a major contributing cause and Self-Insurer, not Fincor would be responsible. Fincor argues that under no scenario can Fincor be responsible for Claimant's upper right extremity and therefore Fincor is entitled to Judgment as a matter of law.

Claimant argues that Dr. Lawlor testified that the 2007 injury was a major contributing cause of her continuation of her symptoms. Claimant further argues that the last injurious exposure rule is applicable in this case and Fincor may be liable as the insurer in 2007. Rapid City Regional Hospital as a Self-Insurer (Self-Insurer) also argues that this is clearly a last injurious exposure case and since Fincor was the insurer for the 2007 injury, they should be responsible. Self-Insurer join in the arguments set forth by Claimant.

The moving party bears the burden to show that there are no genuine issues of material fact. To successfully resist the motion, the non-moving party must present specific facts that demonstrate the existence of genuine issues of material fact. All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party. *Kermmoade v. Quality Inn*, 2000 SD 81, ¶11.There are no genuine issues of material facts for the purposes of this motion, the Department may make a legal conclusion based on the opinions set forth by the medical experts.

The South Dakota Supreme Court has adopted the last injurious exposure rule. Under the last injurious exposure rule, "[w]hen a disability develops gradually, or when it comes as a result of a succession of accidents, the insurance carrier covering the risk at the time of the most recent injury or exposure bearing a causal relation to the disability is usually liable for the entire compensation." *Kassube v. Dakota Logging*, 205 SD 102, ¶43, 705 NW2d 461(quoting *Enger v. FMC*, 1997 SD 70, ¶12, 565 NW2d 79, 83 (citations omitted)). The Legislature in 1999 codified the last injurious exposure rule at SDCL §62-1-18, which provides,

> If an employee who has previously sustained an injury, or suffers from a preexisting condition, receives a subsequent compensable injury, the current employer shall pay all medical and hospital expenses and compensation provided by this title.

The South Dakota Supreme Court has interpreted the last injurious exposure rule to exclude a mere recurrence of a previous injury but to include an aggravation of a previous injury. *Id*. The original employer or insurer will be liable if the second injury is a recurrence of the first. However, if the second injury is an aggravation that independently contributes to the final disability, the subsequent insurer or employer is liable. *St. Luke's Midland Reg. Med. Ctr v. Kennedy*, 2002 SD 137, ¶20, 653 NW2d 880, 886. (citation omitted).

To find that the second injury was an aggravation of the first, the evidence must show:

1. A second injury; and
2. That this second injury contributed independently to the final disability.

Titus v. Sioux Valley Hospital, 2003 SD 22, ¶14, 658 NW2d 388 (quoting *Paulson v. Black Hills Packing Co*., 1996 SD 118, ¶12, 554 NW2d 194, 196).

To find that the second injury was a recurrence of the first injury, the evidence must show:

1. There have been persistent symptoms of the injury; and
2. No specific incident that can independently explain the second onset of symptoms.

Both Claimant and Self Insurer disclosed Dr. Lawlor, Claimant's treating physician, as their only expert witness. Dr. Lawlor offered his deposition testimony regarding the two reported dates of injury,

> As you know, I did not see her in 2007 when she made a second report. However, in reading Dr. Wisniewski's notes, it didn't appear that there was a new injury, but continuation of those symptoms. So quoting from Dr. Wisniewski: The patient was never 100 percent pain free from this - - referring to my treatment of her - - but she was doing fairly well when she last met with Dr. Lawlor.
>
> She continued to have symptoms off and on that have been similar in location as there were back then, namely the right wrist, hand, and elbow. At times the pain would radiate into the shoulder and neck. The last two months, the symptoms have been much worse. Been doing a lot of clerical work and lots of charts and binders, and more recently been busier at work, which has increased her symptoms. So I would consider that, based on that note, that this was a continuation of her symptoms.

Dr. Lawlor further testified,

> Q: Correct me if I'm wrong, but my understanding was that since 1998, Ms. McKinney has continued to have right upper extremity problems and would have flares every now and again.
>
> A: Yes.
>
> Q: Okay, Did her problems ever fully resolve, to your knowledge?
>
> A: Never fully. I think there's a statement in the record that she's 100 percent pain free on a day to day basis, but then would still have these periodic shooting pains.

Q: Okay. And so it's your opinion that the 1998 reported injury, that remains a major contributing cause of her current problem and need for treatment?

A: Yes.

Q: It was your opinion you could not state within a reasonable degree of medical certainly or probability that the work activities from 2007 on contributed independently to her current problems and need for treatment.

A: Correct.

The evidence presented shows that there have been persistent symptoms of the original injury and there is no specific and identifiable incident that can independently explain the second onset of symptoms. Therefore the 2007 injury reported by Claimant was a recurrence of the first injury and Self-Insurer not Fincor remains liable.

Upon consideration of the parties' briefs along with accompanying depositions and affidavits, it appears there are no genuine issues of material fact and Fincor is entitled to judgment as a matter of law. Fincor's Motion for Summary Judgment is hereby granted. Counsel for Fincor shall submit an Order consistent with this decision for the Department's signature.

Claimant has moved the Department to grant summary judgment for Claimant that the August 28, 1998 injury is and remains a major contributing cause of Claimant's current condition and need for treatment. Based upon the medical evidence present and for the reasons discussed above, Claimant's Motion for Summary Judgment is granted. Claimant shall submit an Order consistent with this decision for the Department's signature.

Sincerely,

/s/ *Taya M. Runyan*

Taya M. Runyan
Administrative Law Judge