January 22, 2009

David A. Bradsky
Bradsky, Bradsky, & Bradsky, P.C.
927 Min Street, Bradsky Plaza
Rapid City, SD 57701

LETTER DECISION

J. G. Shultz
Justin G. Smith
Woods Fuller Shultz & Smith, P.C.
P.O. Box 5027
Sioux Falls, SD 57117-5027

RE: HF No. 122, 2006/07
Barbara J. Kelley v. Pete Lien & Sons, Inc. and Zurich North America

Dear Counsel:

The Department is in receipt of:

> December 15, 2008 - Employer and Insurer's Motion for Summary Judgment along with Brief in Support of Motion for Summary Judgment and the Deposition of Ms. Barbara J. Kelley.
>
> January 8, 2009 - Claimant's Brief in Opposition to Motion for Summary Judgment.
>
> January 20, 2009 – Employer's Reply Brief in Support of Motion for Summary Judgment.

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, 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 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.

> 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. *Estate of Elliott*, 1999 SD 57, ¶15, 594 NW2d 707, 710 (citing *Wilson*, 83 SD at 212, 157 NW2d at 21). 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. *Breen v. Dakota Gear & Joint Co., Inc.*, 433 NW2d 221, 223 (SD 1988) (citing *Hughes-Johnson Co., Inc. v. Dakota Midland Hosp.*, 86 SD 361, 364, 195 NW2d 519, 521 (1972)). *See also State Auto Ins. Companies v. B.N.C.*, 2005 SD 89, 6, 702 NW2d 379, 382. [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. *Elliott*, 1999 SD 57, ¶16, 594 NW2d at 710 (quoting *Himrich v. Carpenter*, 1997 SD 116, 18, 569 NW2d 568, 573 (quoting *Moody v. St. Charles County*, 23 F3d 1410, 1412 (8thCir 1994))).

McDowell v. Citicorp USA, 2007 SD 53, ¶22, 734 N.W.2d 14, 21.

> The guiding principles in determining whether a grant or denial of summary judgment is appropriate are:
>
> > (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).

The Petition filed by Claimant makes a claim for temporary total disability payments and/ or permanent total disability payments under the odd-lot category subsequent to her surgery on January 10, 2001.

Claimant started her 30-year employment with Employer on or about July 11, 1966, as an office worker and bookkeeper. Claimant attained the position of office manager prior to her retirement. On July 28, 1993, Claimant was injured when moving a box of office supplies. Claimant lifted a box of supplies onto the bed of a pickup truck and climbed onto the truck bed. Claimant experienced a pull in her lower back. On July 31, 1993, a few days later, Claimant began to experience intense pain in her lower back and into her left hip and left leg. Claimant was seen at the emergency room for an evaluation. Claimant was taken off work for five (5) days to rest. After the 5 days, Claimant reported back to work and did not miss any further work with Employer due to the injury.

Insurer accepted compensability for Claimant's injury and has paid medical claims. Claimant participated in physical therapy from the time of injury until August 1995. Claimant then went to see a neurologist, Dr. Steven Goff in late 1995 for injections into her hip. Claimant continued to work for Employer until late 1995. Claimant underwent surgery for her work-related injury on August 10, 2001. It is unclear when or if Claimant has reached maximum medical improvement.

The record is unclear when Claimant decided to retire from Employer, whether it was prior to her injury or after her injury. Employer asked Claimant to work at Birdsall Sand & Gravel (a sister company of Employer). This move occurred at the time of Claimant's injury. Claimant returned to work for Employer about 6 months prior to her retirement. Prior to her retirement, Claimant worked for Employer in a number of locations. Claimant put together the financial statements and company books for Employer and trained her replacement, prior to retiring. Claimant testified, at her deposition taken on May 20, 2008, that she was in pain and that was one of the main reasons she retired from Employer. She has testified that her retirement was not completely voluntary, that the back pain caused from the work-related injury was a factor in her decision to retire. When Claimant informed Employer about her decision to retire is a material fact.

Claimant has testified that she made an agreement with Employer that Claimant could remain on Employer's group health insurance policy until she turned 62 years old. There is no evidence in the record when Employer and Claimant made this agreement. At age 62, Claimant started collecting Social-Security (old-age) and started health coverage with Medicare and a private insurance company. After leaving her employment with Employer, Claimant moved from Rapid City to Interior, South Dakota. She remained there for approximately a year and a half before returning to Rapid City. During her time in Interior, she did not work outside the home. Claimant testified, in her deposition, that there were no jobs

available in Interior, SD. While in Interior, Claimant took care of her fiancé who suffered from heart disease.

After Claimant returned to Rapid City, Claimant was a caretaker for her sister, for about one year, until August 1998. Claimant took care of her brother for a period of time until his death in 2004 or 2005. She did not seek outside work while providing home care for her family. The record is unclear about what type of care Claimant provided for her fiancé and siblings. The record is also unclear whether Claimant sought outside work between the time of her sister's death and when she started caring for her brother. This period of time is both prior to and subsequent to her surgery. There are questions of material fact that remain in regards to Claimant's capacity to work both prior to her surgery, after her surgery, and after caring for her brother.

At the time of her injury, in July 1993, SDCL 62-1-1(7) provided the definition of "Temporary disability, total or partial" as: "the time beginning on the date of injury, subject to the limitations set forth in § 62-4-2, and continuing until the employee attains complete recovery or until a specific loss becomes ascertainable, whichever comes first."

SDCL 62-4-2 is a limiting statute for total disability. In July 1993, it read: "No compensation may be paid for an injury which does not incapacitate the employee for a period of at least seven consecutive days. However, if the incapacity extends beyond seven consecutive days, compensation is computed from the date of the injury."

The limiting statute says "seven consecutive days." The record is unclear on how long Claimant was incapacitated. Claimant was injured on a Friday afternoon. Claimant testified that was incapacitated the following Saturday and Sunday and that she missed the next full work week (Monday through Friday). She returned to work on the 10th day following her injury. Subsequent to her surgery in 2001, Claimant was unable to work for a period of time. The record is unclear as to the length of that period of time.

"Whether the claimant made a prima facie case that he belongs in the odd-lot total disability category is a question of fact." *Petersen v. Hinky Dinky*, 515 N.W.2d 226, 231 (SD 1994) (citing *Shepherd v. Moorman MFG.*, 467 NW2d 916, 191 (SD 1991)). The South Dakota Supreme Court has clarified that there are two separate ways in which a claimant may make the required *prima facie* showing for inclusion in the odd-lot category. *Kassube v. Dakota Logging*, 705 N.W.2d 461, 468 (SD 2005) (citing *Petersen v. Hinky Dinky*, 515 N.W.2d 226, 231 (SD 1994)).

> First, if the claimant is obviously unemployable, then the burden of production shifts to the employer to show that some suitable employment is actually available in claimant's community for

> persons with claimant's limitations. Obvious unemployability may be shown by: (1) showing that his physical condition, coupled with his education, training, and age make it obvious that he is in the odd-lot total disability category, or (2) persuading the trier of fact that he is in fact in the kind of continuous, severe and debilitating pain which he claims. Second, if the claimant's medical impairment is so limited or specialized in nature that he is not obviously unemployable or relegated to the odd-lot category then the burden remains with the claimant to demonstrate the unavailability of suitable employment by showing that he has unsuccessfully made reasonable efforts to find work. Under this test, if the claimant is obviously unemployable, he will not bear the burden of proving that he made reasonable efforts to find employment in the competitive market. Likewise, it is only when the claimant produces substantial evidence that he is not employable in the competitive market that the burden shifts to the employer.

Fair v. Nash Finch Co., 2007 SD 16, ¶19, 728 NW2d 623, 632-633 (quoting *Kassube*, 2005 SD 102, ¶34, 705 NW2d at 468 (internal citations and quotations omitted)). "Under this test, if the claimant is 'obviously unemployable,' he will not bear the burden of proving 'that he made reasonable efforts to find employment in the competitive market.'" *Kassube* at 468 (internal citations omitted).

For Employer and Insurer to prevail in this Motion for Summary Judgment, there can be no issues of material fact and that Employer and Insurer are entitled to judgment as a matter of law. Claimant has shown that material facts do exist, specifically: why and when Claimant left the workforce, whether Claimant was capable of reentering the workforce at any period of time, and whether she is, in fact, obviously unemployable.

The Department, in viewing the evidence and submissions in a light most favorable to the non-moving party, determines that there are genuine issues of material fact. Employer and Insurer have not shown that there is no genuine issue of material fact and that Employer and Insurer are entitled to judgment as a matter of law. Employer and Insurer's Motion for Summary Judgment is denied. An Order denying the Motion is attached to this Letter Decision.

Sincerely,

Catherine Duenwald
Administrative Law Judge