January 28, 2013

Margo Tschetter Julius
Julius & Simpson LLP
P.O. Box 8025
Rapid City, SD 57709

LETTER DECISION & ORDER

Michael M. Hickey
Bangs, McCullen, Butler, Foye & Simmons LLP
P.O. Box 2670
Rapid City, SD 57709-2670

RE: HF No. 124, 2010/11 – Kenneth Intorn v. Con-Way Freight and Travelers Indemnity

Dear Ms. Julius and Mr. Hickey:

I have received Employer and Insurer's Motion for Summary Judgment in the above-referenced matter. I have also received Claimant's Response to Employer/Insurer's Motion to Exclude Dr. Sanchez's Opinions and Motion for Summary Judgment along with the Affidavit of Margo Tschetter and Employer/Insurer's Reply. I have carefully considered each of these submissions.

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 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.

Employer/Insurer moves the Department for Summary Judgment on the grounds that Claimant failed to comply with the Department's Scheduling Order, specifically the disclosure of the medical records and reports of expert witness, Dr. Gonzalo H. Sanchez. Employer/Insurer argues that because they were not disclosed, the deposition testimony and medical records should be excluded and summary judgment granted for Employer/Insurer.

The Department issued a Scheduling Order on July 3, 2012, which identified dates the parties were to disclose expert witnesses. Claimant was to disclose expert witnesses along with expert reports by August 15, 2012. Employer/Insurer was to disclose its expert witnesses along with expert reports by September 28, 2012.

On August 14, 2012, Claimant disclosed Rick Ostrander as his expert witness. Claimant also identified all medical practitioners that have provided him treatment and care.

In his answers to interrogatories dated November 30, 2011, Claimant disclosed that he received treatment from Dr. Sanchez in 2010 and provided the medical records from that visit. Claimant returned to Dr. Sanchez on June 20, 2012 and again on November 7, 2012. Claimant did not disclose these additional medical records from Dr. Sanchez prior to the August 15, 2012 deadline set forth in the scheduling order.

Employer/Insurer deposed its expert witness, Dr. David Hoversten, on October 24, 2012. Because records of Dr. Sanchez were not disclosed, Dr. Hoversten did not have the opportunity to review them prior to his deposition.

On November 8, 2012, Claimant served notice of Dr. Sanchez's deposition on December 12, 2012. On December 11, 2012, Claimant produced copies of his medical records pertaining to his June 20, 2012 and November 12, 2012 treatment with Dr. Sanchez. Employer/Insurer argues that Claimant's failure to timely disclose his medical records unfairly prejudices the rights of Employer/Insurer and therefore, the testimony and records of Dr. Sanchez should be excluded. Employer/Insurer further argues that without expert testimony, Claimant is unable to meet his burden of proof and Employer/Insurer is entitled to summary judgment as a matter of law.

"Summary judgment is a drastic remedy, and should not be granted unless the moving party has established a right to a judgment with such clarity as to leave no room for controversy." *Berbos v. Krage*, 2008 SD 68, ¶ 15, 754 NW2d 432 (citing *Richards v. Lenz*, 539 NW2d 80, 83, (SD 1995)). Claimant's counsel has no explanation as to why the records were not disclosed earlier, other than it was error on the part of counsel and they were inadvertently not sent to opposing counsel. While the failure to disclose the additional medical records does create a disadvantage to Employer/Insurer, exclusion of the deposition testimony, medical records and summary judgment would be an extreme remedy when it is clear that there are genuine issues of material fact as to the causation of Claimant's injury and there is conflicting medical testimony available to be weighed by the Department at hearing.

The Department declines to exclude the medical records and testimony of Dr. Sanchez. The Department will allow Employer/Insurer to conduct a supplemental deposition and/or submit a supplemental report from its expert, Dr. Hoversten, after he has had the opportunity to review the additional records and testimony. The Department will entertain a Motion for

attorney fees regarding the expense of obtaining such a deposition or report if Employer/Insurer so choses.

Employer/Insurer's Motion for Summary judgment is denied. This letter shall serve as the Department's Order.

Sincerely,

/s/ *Taya M Runyan*

Taya M. Runyan
Administrative Law Judge