SOUTH DAKOTA DEPT. OF LABOR & REGULATION

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December 6, 2021

Bram Weidenaar
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LETTER DECISION ON
MOTION FOR SUMMARY JUDGMENT

Charles A. Larson
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PO Box 5015
Sioux Falls, SD 57117-5015

RE: HF No. 125, 2012/13 – Brenda Vanderbroek v. Conway Freight and Ace Insurance Co.,

Dear Mr. Weidenaar and Mr. Larson:

This letter addresses Conway Freight and Ace Insurance Co.'s (Employer and Insurer) Motion for Summary Judgment submitted June 24, 2021; Brenda Vanderbroek's (Vanderbroek) Brief in Opposition to Employer and Insurer's Motion for Summary Judgment submitted October 25, 2021; and Employer and Insurer's Reply Brief in Support of Motion for Summary Judgment submitted November 9, 2021.

Background

Vanderbroek suffered a work-related injury to her back and left leg on December 17, 2011. Employer and Insurer paid benefits for the injury. She was cleared to return to fully duty work on December 30, 2011. Employer and Insurer requested multiple Independent Medical Examinations which indicated that Vanderbroek had reached Maximum Medical Improvement by December 30, 2011, and that there was no objective

evidence that her injury was a major contributing cause of her current condition. Vanderbroek then filed a Petition for Hearing with the Department of Labor & Regulation (Department) on February 13, 2013. On May 6, 2013, the Department entered an amended scheduling order on July 13, 2013. Pursuant to the Amended Order, Vanderbroek designated her experts on August 29, 2013. On September 6, 2013, Vanderbroek provided additional medical records of Dr. Zarate at the North Okaloosa Medical Center in Crestview, Florida, where she resides. She then supplemented her expert designation on September 19, 2013. On September 26, 2013, Vanderbroek filed her second amended designation of experts. On October 25, 2013, she filed a supplement to her discovery responses. On October 20, 2013, she filed her Third Expert Designation. The parties continued discovery between 2013 and 2016 including a deposition of Dr. Johnson on June 13, 2014. At the deposition, Dr. Johnson stated that the last time she had seen Vanderbroek was in August 2013. Dr. Johnson further testified that she could not explain any objective reason for Vanderbroek's complaints, and that she was unaware of Vanderbroek's history prior to meeting her. Dr. Johnson was asked if Vanderbroek's condition had improved since the date of her report, and she replied that she did not know. She also stated she could not determine whether findings on Vanderbroek's subsequent lumbar MRI were caused by the workplace injury.

On October 17, 2016, the Department entered a new Scheduling Order. In February of 2018, Vanderbroek supplemented her discovery response with additional medical records. On June 8, 2018, Employer and Insurer deposed Vanderbroek. On April 4, 2019, the Department entered a new Scheduling Order. On August 19, 2019,

Employer and Insurer disclosed its experts. On March 3, 2020, Vanderbroek provided Employer and Insurer with a list of her medical care providers in Florida. The Department entered another Scheduling Order on March 15, 2021.

Employer and Insurer have moved for Summary Judgment on the grounds that Vanderbroek has failed to disclose experts and reports sufficient to support a genuine dispute of material fact. They assert that Vanderbroek has not provided any supported expert testimony or medical evidence to establish that her December 2011 injury was a major contributing cause of her current claimed condition as the last expert disclosure or reports were from 2013. Employer and Insurer further assert that the reports and opinions failed to provide a rationale as they were merely letters to two doctors that had been drafted by Vanderbroek's attorney. Each doctor responded to the questions asked by the attorney and then the doctor signed the document. Employer and Insurer argue that the letters do not provide an opinion establishing that the December 2011 injury continues to be a major contributing cause of Vanderbroek's current condition. They further argue that they have provided timely disclosure of their experts, and that Vanderbroek has not disclosed any expert testimony sufficient to rebut their expert's opinions regarding her current condition. However, they do concede that for purposes of this Motion, that Vanderbroek's expert reports raised a genuine dispute of material fact as to the cause of Claimant's condition through the last date of the most recent expert medical report on September 24, 2013, and they request that the Department limit Vanderbroek's claims to that date.

Vanderbroek asserts that by their Motion, Employer and Insurer are asking the Department to draw conclusions regarding the weight and sufficiency of the evidence

which her experts possess, and such findings are more appropriately made in the context of a hearing. She further asserts that she has vigorously pursued her claim for benefits, and the COVID-19 pandemic has made it difficult to obtain updated medical opinions regarding her condition.

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 an extreme remedy, [and] is not intended as a substitute for a trial." *Stern Oil Co., Inc. v. Brown*, 2012 S.D. 56 ¶ 9 (citing *Discover Bank v. Stanley,* 2008 S.D. 111, ¶ 19, 757 N.W.2d 756, 762.)

Employer and Insurer have asserted that Vanderbroek has not provided expert medical opinion. However, the letters she has offered reflect her experts' medical

opinions, and thus Vanderbroek has shown that issues of material fact remain regarding the major contributing cause of her current condition. Further, summary judgment is an extreme remedy that is not appropriate in this matter as the foundation and persuasiveness of Vanderbroek's medical evidence is best considered through the hearing process. Therefore, Employer and Insurer's Motion for Summary Judgment and request to limit Vanderbroek's claims to September 24, 2013 are DENIED.

This letter shall constitute the order in this matter.

Sincerely,

Michelle Faw

Michelle M. Faw
Administrative Law Judge