January 4, 2013

Laura T. Brahms
Kading, Kunstle & Goodhope
7400 S. Bitterroot Pl. #100
Sioux Falls, SD 57108

LETTER DECISION

Charles A. Larson
Boyce, Greenfield, Pashby & Welk LLP
PO Box 5015
Sioux Falls, SD 57117-5015

RE: HF No. 136, 2009/10 – Derek J. Mack v. Nathan Hunke d/b/a Hunkes Transfer d/b/a Coteau Environmental and Dakota Truck Underwriters

Dear Ms. Brahms and Mr. Larson:

I am in receipt of Employer/Insurer's Motion for Partial Summary Judgment, along with supporting argument and documentation. Claimant has provided a brief in resistance to Employer/Insurer's Motion, along with the affidavit of Laura T. Brahms. I have also received Employer/Insurer's Reply Brief in Support of Motion for Partial Summary Judgment. I have carefully considered each of these submissions.

Facts

Claimant sustained an injury on December 19, 2007. while at work. He sought medical, chiropractic and physical therapy treatment for his injury. On March 4, 2008, he began treating with Dr. Timothy LeeBurton. On November 5, 2008, Claimant underwent left shoulder diagnostic arthroscopy surgery. On November 18, 2008, Claimant complained of zero pain out of ten.

On December 8, 2008, Claimant reported to his physical therapist that he fell down the stairs and his arm came out of his brace which escalated his symptoms. Claimant did not report this fall to his treating physician, Dr. LeeBurton. On December 11, 2008, his pain complains had increased to four out of ten and by January 27, 2009, the pain was an eight out of ten. On April 14, 2009, Claimant returned to Dr. LeeBurton for his five

month post-operative appointment. He was released from care and instructed to follow up as needed.

Dr. LeeBurton was deposed on December 9, 2011. He initially testified that Claimant's work injury was a major contributing cause of his current condition. He clarified that his opinion pertained only to Claimant's condition as of his last visit on April 14, 2009, as he had not seen Claimant since that time and admitted that he had no idea what Claimant's current physical condition was.

Dr. LeeBurton testified as to the possible cause of Claimant's increased complaints of pain following his surgery. Dr. LeeBurton explained that pain could increase with increased use and movement of the arm. On cross examination, Dr. LeeBurton was made aware of the December 8, 2008 physical therapy note, indicating that Claimant had fallen down the stairs. Dr. LeeBurton testified,

> Q: After the December 8, 2008 physical therapy note from Sanford Clinic, which would have been, you know, two three weeks after the surgery, Mr. Mack had reported that he fell down the stairs while holding a newborn infant, at which time his arm came out of his brace, and his problems had escalated ever since then. Where you aware of that at all?
>
> A: No.
>
> Q: And after December 8, 2008, Mr. Mack complains of increasing problems with his left shoulder. And as you sit there, can you opine whether the increased pain was the result of simply moving his shoulder more or it was the result of the December 8, 2008 incident where he fell down the stairs?
>
> A: I can't
>
> Q: Without having more information on the fall down the stairs, can you – can you opine within a reasonable degree of medical probability whether the work injury, not the fall down the stairs- - well strike that. You don't know whether Mr. Mack reinjured his shoulder when he fell down the stairs. Is that true?
>
> A: Correct
>
> Q: That certainly could have been an intervening event causing a new or prolonged injury. Is that correct?
>
> A: If he fell down the stairs, correct.

Dr. LeeBurton was unable to testify to a reasonable degree of medical certainty or probability whether the fall down the stairs or the December 19, 2007, work injury was the cause of Claimants condition.

Analysis

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 argues that claimant did not make his treating physician aware of a major fall that occurred December 8, 2008. Therefore, Dr. LeeBurton is unable to opine as to causation after that date. Because Claimant is unable to meet his burden to show by medical testimony that his injury is a major contributing cause of his condition, Employer/Insurer is entitled to judgment as a matter of law.

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. *Horn v. Dakota Pork*, 2006 SD 5, ¶14, 709 NW2d 38, 42 (citations omitted). The claimant must prove that "the employment or employment-related activities are a major contributing cause of the condition complained of." SDCL 62-1-1(7)(a).

> In applying the statute, we have held a worker's compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that the claimant incurred a disability arising out of and in the course of [his] employment. We have further said South Dakota law requires [Claimant] to establish by medical evidence that the employment or employment conditions are a major contributing cause of the condition complained of. A possibility is insufficient and a probability is necessary.

Gerlach v. State, 2008 SD 25, ¶7, 747 NW2d 662, 664 (citations omitted).

> The testimony of medical professionals is crucial in establishing the causal relationship between the work-related injury and the current claimed condition because the field is one in which laypersons ordinarily are unqualified to express an opinion. No recovery may be had where the claimant has failed to offer credible medical evidence that his work-related injury is a major contributing cause of his current claimed condition.

Darling v. West River Masonry, Inc., 2010 SD 4, ¶13, 777 NW2d 363.

Pursuant to a scheduling order, Claimant disclosed his exert witness list on September 10, 2012. Claimant identified Dr. LeeBurton as the only expert. Dr. LeeBurton was

unable to offer an opinion to a reasonable degree of medical probability that the December 19, 2007 work injury was a major contributing case of his condition. Dr. LeeBurton's initial opinion that the work incident was a major contributing case is not convincing. He admitted that was unable to form an opinion because he had not been made aware of Claimant's fall on December 8, 2008. "Expert testimony is entitled to no more weight than the facts upon which it is predicated". *Id*. Based on Dr. LeeBurton's testimony, Claimant is unable to meet his burden to show that his employment or employment-related activities are a major contributing cause of the condition complained of after December 8, 2008.

Conclusion

There are no genuine issues of any material fact. Employer/Insurer is entitled to judgment as a matter of law. Employer/Insurer's Motion for Partial Summary Judgment is hereby granted. Employer/Insurer is directed to submit an Order consistent with this decision.

Sincerely,

/s/ *Taya M Runyan*

Taya M. Runyan
Administrative Law Judge