January 12, 2011

Garrett J. Horn
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Letter Decision

Charles A. Larson
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PO Box 5015
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RE: HF No. 169, 2009/10 – Britney Ernesti v. Sacred Heart Monastery and Cincinnati Insurance Companies

Dear Mr. Horn and Mr. Larson:

Submissions:

This letter addresses the following submissions by the parties:

October 15, 2010	Employer and Insurer's Motion for Summary Judgment;
November 12, 2010	Claimant's Reply to Employer and Insurer's Motion for Summary Judgment;
	[Claimant's] Motion to Amend Scheduling Order;
November 24, 2010	Employer and Insurer's Reply Brief;
	Affidavit of Charles A. Larson;
November 29, 2010	Employer and Insurer's Response to Motion to Amend Scheduling Order.

Facts:

The facts of this case, as reflected by the submissions, attachments and record, are as follows:

1. Claimant sustained a work-related accident on October 23, 2007.

2. Employer and Insurer initially accepted the claim as compensable and paid benefits until they received the results of an Independent medical examination conducted on April 29, 2008.

3. Claimant filed a Petition for Hearing in March of 2010 seeking additional benefits.

4. Employer and Insurer filed an Answer dated April 13, 2010. In their Answer, the Employer and Insurer denied that Claimant's, "work is and remains a major contributing cause of Claimant's current condition and condition complained of."

5. After receiving input from both parties, the Department issued a Scheduling Order dated June 7, 2010, which set September 30, 2010, as the deadline for claimant to disclose and identify its experts together with the experts' reports.

6. Claimant did not disclose or identify her experts and their reports by the September 30, 2010 deadline.

7. Claimant did not seek an extension of the deadline to disclose and identify her experts and their reports prior to the expiration of the September 30, 2010 deadline.

8. Claimant did not disclose and identify her experts and the expert's reports by the September 30, 2010 deadline because Claimant moved from Yankton, South Dakota to Omaha, Nebraska and failed to remain in contact with her attorney from April through October of 2010 due to various reasons including financial difficulties.

9. Additional facts may be discussed in the analysis below.

Motion for Summary judgment:

Employer and Insurer filed a Motion for Summary Judgment in this case. ARSD 47:03:01:08 governs the Department of Labor's authority to grant summary judgments. That regulation states:

> 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.

ARSD 47:03:01:08. 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.

A review of the record indicates that there is no genuine issue as to any of the facts stated above. Therefore, the Department must next determine whether the Employer and Insurer are entitled to a judgment as a matter of law.

Expert Testimony:

Claimant has the burden of proving all facts essential to sustain an award of compensation. Day v. John Morrell & Co., 490 N.W.2d 720 (S.D. 1992); Phillips v. John Morrell & Co., 484 N.W.2d 527, 530 (S.D. 1992); King v. Johnson Brothers Construction Co., 155 N.W.2d 193, 195 (S.D. 1967. Employer and Insurer's Answer makes clear that they dispute any relationship between Claimant's work-related injury and her current condition. Therefore, the burden falls on Claimant to show that her work injury is a major contributing cause of her current complaints. SDCL 62-1-1 (7). The fact that the injury was initially compensable does not automatically mean that she is entitled to benefits for her current complaint. Darling v. West River Masonary, Inc. , 2010 SD 4,¶ 11, 777 NW2d 363.

In order for Claimant to prevail, she must provide medical testimony. Enger v. EMC, 565 NW2d 79, 84-85, (SD 1997). "Causation must be established to a reasonable degree of medical probability, not just possibility." Id. at ¶ 12, (citation 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." Id. at ¶ 13, (internal quotation omitted)(citation omitted).

Scheduling Order:

After receiving input from the parties, the Department issued a Scheduling Order dated June 7, 2010 which set September 30, 2010, as the deadline for Claimant to disclose and identify her experts, together with the expert's reports. Claimant failed to disclose her experts by that deadline. Claimant also failed to seek an extension to disclose her experts prior to the deadline.

Scheduling Orders in workers' compensation cases are governed by ARSD 47:03:01:12. That regulation states the following:

> The Division of Labor and Management may, after consulting with the attorneys for the parties and unrepresented parties, enter a scheduling order that does the following:
>
> (1) Limits the time to join other parties and to amend the pleadings;
> (2) Limits the time to file and hear motions;
> (3) Limits the time to complete discovery;
> (4) Sets the date for prehearing conferences, a final prehearing conference, and hearing; and
> (5) Addresses any other matters necessary.
>
> The division shall issue the scheduling order as soon as practicable but no more than 120 days after the petition is filed, unless justice is served by issuing the order at a later date. A schedule may not be modified except by order of the Division of Labor and Management upon a showing of good cause.

(emphasis added), ARSD 47:03:01:12.

Claimant states that she missed the September 30, 2010, deadline because she moved from Yankton to Omaha and did not stay in communication with her attorney from April through October of 2010. She states that her failure was due to various reasons, including financial difficulties. However, the cost of a postage stamp is not prohibitive and does not constitute good cause under these circumstances. It seems more likely that negligence was the primary reason for her failure and that too is not good cause.

Claimant's failure to disclose an expert means that she cannot demonstrate by a reasonable degree of medical probability that the causal relationship between her work injury and her current condition. Consequently, Employer and Insurer are entitled to judgment in this case as a matter of law.

Order:

For the reasons stated above, it is hereby, ordered that Employer and Insurer's Motion for Summary Judgment is granted. This decision renders Claimant's Motion to Amend Scheduling Order moot. It is, therefore, denied. This case is dismissed with prejudice. This letter shall constitute the order in this matter.

Sincerely,

__/s/ Donald W. Hageman ___
Donald W. Hageman
Administrative Law Judge