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Letter Decision

Jessica Filler
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RE: HF No. 173, 2009/10 – Gary Timm v. Meade School District 46-1 and Associated School Boards of South Dakota Workers' Compensation Trust Fund

Dear Mr. Leach and Ms. Filler:

Submissions

This letter addresses the following submissions by the parties:

August 2, 2010	[Claimant's] Motion for Partial Summary Judgment;
	Affidavit in of James D. Leach in Support of Motion for Partial Summary Judgment;
September 3, 2010	Employer and Provider's Resistance to Claimant's Motion for Partial Summary Judgment;
September 7, 2010	[Claimant's] Reply Brief in Support of Motion for Partial Summary Judgment.

Facts

The facts of this case as reflected by the above submissions and documentation are as follows:

1. Gary Timm (Claimant) was a maintenance technician for Employer. While on duty on January 7, 2010, Claimant crawled under a building to work on some frozen

water pipes. After Claimant crawled out from under the building, he felt severe pain in his back and leg.

2. Claimant signed a First Report of Injury (FROI) on Monday, January 11, 2010, reporting the injury to his back which had occurred on Thursday, January 7. 2010.

3. Neurosurgeon Stuart Rice, M.D., saw Claimant on February 1, 2010, for left lower back and leg pain. Rice's records state, "His symptoms stem from a work related injury that occurred on January 7, 2010."

4. An MRI ordered by Dr. Rice showed a large disc herniation in the foramen on the left at L4-5.

5. Dr. Rice's report indicates that Claimant's work injury was a major contributing cause of his symptoms and need for surgery and treatment.

6. Meade County School District 46-1 (Employer) and Associated School Boards of South Dakota Workers' Compensation Trust Fund (Provider) sent Claimant to Wayne Anderson, M.D. for an independent medical examination (IME). Anderson reported that Claimant hurt himself at work on January 7, 2010, that he had a disc herniation at L4-5, and that the injury of January 7, 2010, was a major contributing cause of his symptoms and need for treatment, which included surgery.

7. Dr. Rice performed a microdiscectomy on Claimant's spine at L4-5 on April 15, 2010.

8. Additional facts may be discussed in analysis below.

Issues:

Claimant seeks partial summary judgment on the following legal issues:

1. Whether Claimant sustained an injury arising out of and in the course of employment on January 7, 2010?

2. Whether Employer received notice of the injury within three business days?

3. Whether the January 7, 2010 injury was a major contributing cause of Claimant's April 15, 2010 back surgery?

4. Whether Claimant's work injury of January 7, 2010 is compensable?

Motions for Summary Judgment:

Claimant filed a Motion for Partial Summary Judgment. In workers' compensation cases summary judgments are governed by ARSD 47:03:01:08: 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.

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.

In this case, Employer and Provider have not disputed the facts stated above. Therefore, the Department's next inquiry is to determine whether Claimant is entitled to a judgment as a matter of law on the issues that he set forth in his motion.

Rising Out Of and In the Course of Employment:

In this case, Claimant seeks workers' compensation benefits. "A claimant who wishes to recover under South Dakota's Workers' Compensation Laws" must prove by a preponderance of the evidence that he sustained an injury 'arising out of and in the course of the employment.'" *Fair v. Nash Finch Co*., 2007 SD 16, ¶9, 728 NW2d 623; *Bender v. Dakota Resorts Management Group, Inc.*, 2005 SD 81, ¶7, 700 NW2d 739, 742 (quoting SDCL 62-1-1(7)) (additional citations omitted). "Both factors of the analysis, 'arising out of employment' and 'in the course of employment,' must be present in all claims for workers' compensation." *Fair v. Nash Finch Co.,* at ¶9. "The interplay of these factors may allow the strength of one factor to make up for the deficiencies in strength of the other." *Id.* (quoting *Mudlin v. Hill Materials Co.*, 2005 SD 64, ¶9, 698 NW2d 67, 71) (quoting 2 Arthur Larson, Larson's Workers' Compensation Law, § 29, 29-1 (1999)). "These factors are construed liberally so that the application of the Workers' Compensation statutes is "not limited solely to the times when the employee is engaged in the work that he was hired to perform." *Id.* "Each of the factors is analyzed independently although "they are part of the general inquiry of whether the injury or condition complained of is connected to the employment." *Id.*

"In order for the injury to 'arise out of' the employment, the employee must show that there is a 'causal connection between the injury and the employment.'" *Id.* (quoting *Mudlin*, 2005 SD 64, ¶11. "Although the employment need not be the direct or proximate cause of the injury, the accident must have its "origin in the hazard to which the employment exposed the employee while doing [his] work." *Id*. "The injury 'arose out of the' employment if: 1) the employment contributes to causing the injury; 2) the activity is one in which the employee might reasonably engage; or 3) the activity brings about the disability upon which compensation is based." *Id.* (quoting Mudlin at ¶11.

"The term 'in the course of employment' refers to the time, place, and circumstances of the injury." *Id.* (quoting *Bearshield v. City of Gregory*, 278 NW2d 166, 168 (SD 1979)). "An employee is acting 'in the course of employment' when an employee is "doing something that is either naturally or incidentally related to his employment or which he is either expressly or impliedly authorized to do by the contract or nature of the employment." *Id.*

In this case, Clamant was injured during his employment as a maintenance technician. The injury occurred when he crawled under a building to work on some frozen water pipes. Claimant's injury arose out of and in the course of his employment.

Notice:

SDCL 62-7-10 provides the time-line for employees to report work-related injuries to employers.

> An employee who claims compensation for an injury shall immediately, or as soon thereafter as practical, notify the employer of the occurrence of the injury. Written notice of the injury shall be provided to the employer no later than three business days after its occurrence. The notice need not be in any particular form but must advise the employer of when, where, and how the injury occurred. Failure to give notice as required by this section prohibits a claim for compensation under this title unless the employee or the employee's representative can show:
>
> (1) The employer or the employer's representative had actual knowledge of the injury; or
>
> (2) The employer was given written notice after the date of the injury and the employee had good cause for failing to give written notice within the three business-day period, which determination shall be liberally construed in favor of the employee.

SDCL 62-7-10.

In this case, Claimant was injured on Thursday, January 7, 2010. He filed a First Report of Injury on Monday, January 11, 2010 within 3 working days of the injury. Consequently, Employer received notice of Claimant's injury within the statutory period provided by SDCL 62-7-10.

Causation:

Claimant "must establish a causal connection between [his] injury and [his] employment." *Johnson v. Albertson's*, 2000 SD 47, ¶ 22. "The testimony of professionals is crucial in establishing this causal relationship because the field is one in which laymen ordinarily are unqualified to express an opinion." *Day v. John Morrell & Co*., 490 N.W.2d 720, 724 (S.D. 1992). When medical evidence is not conclusive, Claimant has not met the burden of showing causation by a preponderance of the evidence. *Enger v. FMC*, 565 N.W.2d 79, 85 (S.D. 1997).

SDCL 62-1-1(7) defines "injury" or "personal injury" as:

> [O]nly injury arising out of and in the course of the employment, and does not include a disease in any form except as it results from the injury. An injury is compensable only if it is established by medical evidence, subject to the following conditions:
>
> (a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of; or
>
> (b) If the injury combines with a preexisting disease or condition to cause or prolong disability, impairment or need for treatment, the condition complained of is compensable if the employment or employment related injury is and remains a major contributing cause of the disability, impairment or need for treatment.
>
> (c) If the injury combines with a preexisting work related compensable injury, disability, or impairment, the subsequent injury is compensable if the subsequent employment or subsequent employment related activities contributed independently to the disability, impairment, or need for treatment.

SDCL 62-1-1(7).

The South Dakota Supreme Court has noted that there is a distinction between the use of the term "injury" and the term "condition" in this statute. See *Grauel v. South Dakota School of Mines and Technology*, 2000 SD 145, ¶ 9. "Injury is the act or omission which causes the loss whereas condition is the loss produced by an injury, the result." Id. Therefore, "in order to prevail, an employee seeking benefits under our workers' compensation law must show both: (1) that the injury arose out of and in the course of employment and (2) that the employment or employment related activities were a major contributing cause of the condition of which the employee complained, or, in cases of a preexisting disease or condition, that the employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment." Id. (citations omitted).

Here, Claimant has sustained his burden of proof. Both Dr. Rice and Dr. Anderson opined that Claimant's work-related accident was a major contributing cause of Claimant's need for surgery on April 15, 2010.

Compensability:

The law provides that Employer amd Provider must provide necessary medical and surgical treatment. SDCL 62-4-1. The determination of what is necessary is decided by competent medical personnel. "It is in the doctor's province to determine what is necessary or suitable and proper. When a disagreement arises as to the treatment rendered, or recommended by the physician, it is for the employer to show that the treatment was not necessary or suitable and proper." *Engel v. Prostrollo Motors*, 2003
SD 2, ¶ 32, 656 NW2d 299, 304 (citing *Krier v. John Morrell & Co.,* 473 NW2d 496, 498 (SD 1991)).

Here again, Dr. Rice and Dr. Anderson both concurred that the April 15, 2010 surgery was the appropriate treatment for Claimant's work-related injury. Consequently, that surgery is compensable.

Conclusion

In accordance with the discussion above, Claimant's Motion for Partial Summary Judgment is granted in full. Claimant shall submit Proposed Findings of Fact and Conclusions of Law and a Final Order consistent with this Decision, within 20 days after receiving this Decision. Employer and Insurer shall have an additional 20 days from the date of receipt of Claimant's Proposed Findings of Fact and Conclusions of Law to submit Objections and/or Proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for Claimant shall submit such stipulation together with an Order consistent with this Decision.

Sincerely,

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