September 12, 2011

Thomas Coathup
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Garretson, SD 57030
Sent via Certified Mail: 7009 2820 0003 7586 1640

LETTER DECISION

Richard L. Travis
May & Johnson PC
PO Box 88738
Sioux Falls, SD 57109

RE: HF No. 178, 2007/08
Thomas Coathup v. Midco Call Center and The Hartford Insurance Company

Dear Mr. Coathup and Mr. Travis:

On May 9, 2011, Employer/Insurer filed a Motion for Summary Judgment. Shortly thereafter, Claimant and Employer/Insurer made attempts to settle their differences. On July 28, 2011, the Department received a letter from Employer/Insurer indicating that settlement would not be forthcoming and that the Motion for Summary Judgment was renewed. Claimant, who had yet to respond to the original Motion, was given until September 1, 2011 to respond to the Motion.

As of the writing of this Decision, Claimant has not responded to the Motion for Summary Judgment. Being advised as such, the Department makes this Decision.

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 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 (emphasis added).

A Scheduling Order was put into place by the Department on February 11, 2011. Claimant was required to disclose and identify any experts and expert reports he will be using in his case, by April 1, 2011. Claimant did not disclose any experts or related reports to Employer/Insurer. In July 210, Claimant had sent in some doctor's notes related to his initial injury in 2006. The notes do not prove causation of the current condition(s) referred to in his Petition for Benefits.

A compensable injury is defined in South Dakota:

> "Injury" or "personal injury," only 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).

> With respect to proving causation of a disability, [the Supreme Court] has stated that:
>
> > [T]he 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. Unless its nature and effect are plainly apparent, an injury is a subjective condition requiring an expert opinion to establish a causal relationship between the incident and the injury or disability.
>
> *Westergren v. Baptist Hospital of Winner*, 1996 SD 69, 31, 549 NW2d 390, 398 (quoting *Day v. John Morrell & Co.*, 490 NW2d 720, 724 (SD 1992)). A medical expert's finding of causation cannot be based upon mere possibility or speculation. *Deuschle v. Bak Const. Co.*, 443 NW2d 5, 6 (SD 1989). *See also Rawls v. Coleman-Frizzell, Inc.*, 2002 SD 130, 21, 653 NW2d 247, 252-53 (quoting *Day*, 490 NW2d at 724) (Medical testimony to the effect that it is possible that a given injury caused a subsequent disability is insufficient, standing alone, to establish the causal relation under [workers] compensation statutes.). Instead, [c]ausation must be established to a reasonable medical probability[.] *Truck Ins. Exchange v. CNA*, 2001 SD 46, ¶19, 624 NW2d 705, 709.

Orth v. Stoebner & Permann Construction, Inc., 2006 SD 99, ¶34.

There are no medical records in the file that support Claimant's claim for benefits on his current condition. Claimant has not sent in ANY supporting evidence in response to the Motion for Summary Judgment.

> The guiding principles in determining whether a grant or denial of summary judgment is appropriate are:
>
> > (1) The evidence must be viewed most favorable to the nonmoving party; (2) The burden of proof is upon the movant to show clearly that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law; (3) Though the purpose of the rule is to secure a just, speedy and inexpensive determination of the action, it was never intended to be used as a substitute for a court trial or for a trial by jury where any genuine issue of material fact exists; (4) A surmise that a party will not

> prevail upon trial is not sufficient basis to grant the motion on issues which are not shown to be sham, frivolous or so unsubstantial that it is obvious it would be futile to try them; (5) Summary judgment is an extreme remedy and should be awarded only when the truth is clear and reasonable doubts touching the existence of a genuine issue as to material fact should be resolved against the movant; and (6) Where, however, no genuine issue of fact exists it is looked upon with favor and is particularly adaptable to expose sham claims and defenses.

Owens v. F.E.M. Electric Association, Inc., 694 N.W.2d 274, 277 (SD 2005).

The evidence in the record does not sustain the Claimant's petition for workers' compensation benefits. Claimant has not provided sufficient information "that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy." *McDowell*, 2007 SD at ¶22. Claimant has failed to sufficiently substantiate his claim. Employer/Insurer's Motion for Summary Judgment is granted.

Furthermore, see *Hoaas v. Griffiths*, 2006 S.D. 27, 714 N.W.2d 61. In that case, the South Dakota Supreme Court affirmed a lower court granting Summary Judgment to the moving party, because the non-moving party did not answer the Motion or respond to the Motion. The Supreme Court said, "The nonmoving party, however, has the responsibility to come forward with specific evidence which places a material fact in dispute." Id. at ¶14. The lower court had no other evidence in front of it to rebut the evidence presented by the moving party and therefore the grant of Summary Judgment was proper.

Motion for Summary Judgment is Granted. The Petition is dismissed. The Parties may consider this Letter Decision to be an ORDER of the Department.

By the Department:

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Catherine Duenwald
Administrative Law Judge