December 27, 2016

Brad J. Lee
Beardsley Jensen & Lee LLC
PO Box 9579
Rapid City SD 57709

Letter Decision and Order

Jennifer L. VanAnne
Woods Fuller Shultz & Smith PC
PO Box 5027
Sioux Falls SD 57104-5027

Re: HF No. 19, 2015/16 – Mary Lou Trimble v Rapid City Regional Hospital and Hartford Insurance Company of the Midwest

Counsel:

This letter addresses Claimant's Motion for Order That Employer and Insurer May Not Terminate Benefits Except Pursuant to SDCL 62-7-33, filed on April 21, 2016. Employer/Insurer responded to the Motion on June 9, 2016, and Claimant replied June 21, 2016.

The Department approved an agreement submitted by the parties pursuant to SDCL 62-7-5 on July 10, 2013. Among other things, the agreement recites:

1. On November 22, 2010, Claimant slipped and fell on the ice and snow while getting out of her personal vehicle;

2. Claimant was an employee of Employer at the time;

3. Claimant had preexisting low back problems which she asserted were aggravated in the claimed injury;

4. Claimant claimed a new low back injury and knee injury as a result of her claimed injury;

5. Employer disputed Claimant's claim of new injuries to her back or knee stemming from her claimed injury;

6. Claimant asserted she was entitled to reimbursement for medial meniscus and total knee replacement surgery due to her claimed injury;

7. Claimant asserted she was entitled to temporary disability and permanent total disability benefits due to her claimed injury;

8. The agreement said it was a "compromise of doubtful and disputed claims and that the payment of the above-mentioned sum of money is not to be construed as an admission of liability on the part of the persons, firms and corporations hereby released, by whom liability is expressly denied";

9. Claimant received $180,000 "in exchange for full, final and complete release of all claims under South Dakota law relative to her November 22, 2010 slip and fall," and in exchange waived her rights to any form of indemnity claim, while leaving open her medical claims;

10. Employer/Insurer reserved "all rights they have to investigate, question, and if appropriate, deny future medical claims concerning Claimant's low back and right knee, including but not limited to their rights under SDCL §§ 62-4-1, 62-7-1, 62-7-3, 62-1-1(7)(a), 62-1-1(7)(b), and 62-1-1(7)(c)."

11. Employer/Insurer also agreed to submit a Medicare Set-Aside (MSA) amount to the Center for Medicare and Medicaid Studies (CMS), and would fund the MSA unless Medicare arrived at a required Set-Aside amount that was "unacceptable." Claimant agreed that if Employer/Insurer funded an MSA, she would release Employer/Insurer from any claims for future medical treatment. If Employer/Insurer considered Medicare's required Set-Aside amount unacceptable, it would pay Claimant's medical expenses connected with her knee and back injuries "related to the November 22, 2010 date of injury."

Employer/Insurer began refusing authorizations for Claimant's low back treatments, such as medications, physical therapy, and a sacroiliac joint belt, shortly after the agreement was approved. A pattern developed where Employer/Insurer would not respond to treatment authorization requests, would deny authorization, then would approve payment of some bills. The MSA was never funded.

Claimant's doctors, Drs. Ingraham and Dietrich, recommended back surgery, and opined her 2010 work injury made the surgery necessary. Dr. Anderson, who conducted an IME for Employer/Insurer in 2011, had also reached those conclusions. Claimant had low back surgery on December 16, 2014.

Employer/Insurer scheduled an IME with Dr. Nolan Segal in connection with the need for surgery. The IME was conducted on February 19, 2015. Dr. Segal concluded Claimant's slip and fall incident at work was not a major contributing cause for her to need for low back surgery. Employer/Insurer denied further medical claims in

connection with low back treatment. Claimant has incurred $73,000 in expenses unpaid by Employer/Insurer.

Claimant asserts Employer/Insurer's denial of medical benefits for her low back surgery violates South Dakota law because a petition for reopening per SDCL § 62-7-33 was required. In the absence of such a petition, res judicata and judicial estoppel bar Employer/Insurer from denying benefits.

Claimant's motion is in the nature of a motion for summary judgment per ARSD 47:03:01:08:

> 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 guiding principles for summary judgments are well-established:
>
> (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., 2005 SD 35, ¶6; 694 N.W.2d 274.

Here, Claimant must prove her need for medical treatment to her low back since November 22, 2010 is a product of her claimed work injury. Her low back condition is compensable if her work injury combined with her preexisting back condition to cause or prolong disability, impairment, or need for treatment. Her back condition is compensable if the employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment. SDCL 62-1-1(7)(b); *Hayes v. Rosenbaum Signs*, 2014 S.D. 64, ¶29, 853 N.W.2d 878, 885-86.

Claimant asserts this proof should not be necessary, as the representations in the agreement serve to resolve such disputes; in Hayes, for example, the employer admitted that claimant's work activities were a major contributing cause to claimant's current need for medical treatment and low back pain. *Hayes*, 2014 SD 64, ¶3, 853 N.W.2d at 880. The employer later disputed this conclusion, relying on its independent medical examiner's causation opinions. Those opinions, however, were founded on facts that entirely predated the making of the agreement, and the employer was not allowed to step back from its admission of causation after the parties' agreement was signed and approved by the department.

The agreement in this case, however, admits nothing at all of import to the remaining issues. On the contrary, the agreement said it was a "compromise of doubtful and disputed claims and that the payment of the above-mentioned sum of money is not to be construed as an admission of liability on the part of the persons, firms and corporations hereby released, by whom liability is expressly denied." Employer/Insurer reserved "all rights they have to investigate, question, and if appropriate, deny future medical claims concerning Claimant's low back and right knee, including but not limited to their rights under SDCL §§ 62-4-1, 62-7-1, 62-7-3, 62-1-1(7)(a), 62-1-1(7)(b), and 62-1-1(7)(c)." Nowhere in the agreement does it say, and nowhere in the history of this claim has it occurred, that Employer/Insurer admitted Claimant's low back symptoms and need for any particular treatment are connected to her slip and fall on November 22, 2010.

Genuine issues of material fact therefore remain about whether Claimant's medical treatment for her low back is sufficiently connected to her slip and fall. As that matter was not settled by the 2013 agreement, Claimant's assertion that the agreement bars its consideration under the principles of res judicata or equitable estoppel must be rejected. Employer/Insurer need not use the process under SDCL 62-7-33 to reopen the claim, as it was never closed. It is not necessary to address Employer/Insurer's remaining arguments. Claimant's Motion for Order That Employer and Insurer May Not Terminate Benefits Except Pursuant to SDCL 62-7-33 is denied; the parties will bear their own costs.

This letter shall constitute the Department's order in this matter.

Sincerely,

/s/
Sarah E. Harris
Administrative Law Judge