SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

MARGARET GUNDERSON,

Claimant, **HF No. 25, 2007/08**

vs. **MOTION RULINGS AND ORDER**

THRIVENT FINANCIAL FOR LUTHERANS (f/k/a LUTHERAN BROTHERHOOD),

Employer,

and

CNA TRANSCONTINENTAL INSURANCE,

Insurer.

This matter comes before the Department on a petition for workers' compensation benefits. Claimant, Margaret Gunderson, is represented by Lisa Hanson-Marso and Charles A. Larson, Boyce, Greenfield, Pashby & Welk, Sioux Falls; Employer, Thrivent Financial, and Insurer, CNA, are represented by Patricia Meyers, Costello, Porter, Heisterkamp, Bushnell & Carpenter, Rapid City. Claimant has filed a Motion for Default or Alternatively Summary Judgment dated October 4, 2007 (the Motion for Default was withdrawn), and a Motion to Strike/Exclude Affidavit Testimony of Bonita Edmon dated November 7, 2007; Employer/Insurer has filed responses to those motions, and a Motion to Strike Marso Affidavits and Claimant's Reply Brief dated November 21, 2007.

The Motion for Summary Judgment is being considered under the authority of 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.

Claimant asserts that summary judgment should be granted for the reimbursement of services provided by Claimant's husband, Ron Gunderson. A claim was also made for attorney's fees per SDCL 58-12-3. Employer/Insurer responds that there are factual disputes over the medical nature, extent, and value of those services, and whether its conduct was unreasonable or vexatious, rendering the matters inappropriate for disposition by summary judgment.

The relevant facts the parties have admitted are:

1. On March 26, 2006, the Department determined that Claimant was entitled to reasonable future medical care made necessary by her work injury on December 4, 2000. Employer/Insurer is liable for this care.

2. Claimant had right rotator cuff surgery on November 7, 2006. Claimant's treating physician, Dr. James MacDougall, prescribed home health care for her, as she was wheelchair-bound and unable to use her right extremity.

3. The parties agreed that Ron Gunderson, Claimant's husband, would provide this home health care; Insurer paid Mr. Gunderson $23.66 an hour, which was the rate he would have been earning at his job with the U.S. Post Office.

4. Claimant had left rotator cuff surgery on July 23, 2007. On August 1, 2007, Dr. MacDougall, the treating physician, prescribed home health care that would amount to twelve hours of daily care over a twenty-four hour period for eight weeks. Insurer sought to provide those services through a home health aid.

Employer/Insurer has offered the affidavit of Bonita Edmon, the file handler for Insurer at the times pertinent to the pending motions. Edmon's affidavit states in part that she did not receive the home health care prescription until August 13, 2007; that she learned Avera St. Luke's Home Health (Avera) employs its aides at $9.00 an hour; that she also learned Avera charges $20.00 to $25.00 an hour for such services, but that most of that charge is administrative cost; and that she offered Mr. Gunderson $9.00 an hour for such services (she did not state when this offer was made.)

Claimant objects to the affidavit, asserting that Edmon is incompetent to testify to these facts, and that the statements are hearsay. Those objections are overruled. would be competent to state her understanding of the Avera rate structure based on what she was told. She is clearly competent to state the hourly rate she offered Mr. Gunderson for his services. Nor would her statements about what she understood be hearsay. As to Edmon's having offered Mr. Gunderson $9.00 an hour for services, Claimant acknowledges that was said in her Answer.

Carla Vandyke, Nursing Manager for Avera, stated that aide assistance would cost $20.00 an hour for care provided Monday through Friday from 7:00 a.m. to 7:00 p.m., and that this cost increases to $25.00 an hour for care provided from 7:00 p.m. to 7:00 a.m. Monday to Friday, as well as weekends and holidays. She made no statements about how much of this, if any, was administrative cost. Theresa Frank (Frank), a nurse case manager employed by Broadspire, which contracts with Insurer to provide medical case management, told Edmon's predecessor, Renee Sakry, that such care would cost $20.00 an hour; she did not say it would cost $9.00, and never told Mr. Gunderson he would be paid anything other than the $23.66 an hour he had received previously.

Mr. Gunderson stated in his October 3, 2007 affidavit that from Claimant's discharge until September 23, 2007, he "was available to assist (Claimant) 24 hours a day as her need for the care arose at different times during the 24 hour day period." Since September 23, 2007, he has "provided additional assistance to (Claimant) of around six to eight hours each day." Claimant stated in her affidavit that Mr. Gunderson "has been providing the assistance to me, available 24 hours a day." Both she and Mr. Gunderson assert that they were not told the $9.00 rate Insurer intended to pay for such services until August 22, 2007.

Dr. MacDougall's statements were offered by affidavit. He attested to Claimant's need following her July, 2007 surgery to have an aide available "throughout the 24 hour period of day," with the actual time spent in giving care estimated at 12 hours. This continued until September 23, 2007. For the period from September 24, 2007 to November 12, 2007, the time for actual care would be six hours a day. Such care could be provided by Avera or by Mr. Gunderson.

Claimant asserts that Mr. Gunderson should be compensated at the rate of $23.66 an hour for his services, a minimum of 12 hours a day, and that summary judgment should be granted in her favor, based primarily on the argument that Employer/Insurer is estopped from compensating Mr. Gunderson at a different rate, using theories of both equitable and promissory estoppel.

Employer/Insurer initially argues that such arguments cannot be allowed, and Claimant's Brief raising such arguments should be stricken, as Claimant's Motion for Summary Judgment does not specifically address estoppel. The Department is satisfied that Employer/Insurer has had its opportunity to address the relevant arguments via the "Insurer's Brief in Resistance to Motion to Strike Affidavit and in Support of Motion to Strike Marso Affidavits and Claimant's Reply Brief," and will

therefore overrule the objections to Claimant's Reply Brief. See Canyon Lake Park, L.L.C., v. Loftus Dental, P.C., 2005 SD 82, ¶¶ 32-33, 700 NW2d 729.

The Department concludes that Claimant should be reimbursed at the rate of $23.66 per hour for Mr. Gunderson's services, based on twelve hours of care a day for eight weeks from July 24, 2007 to September 23, 2007, and six hours a day for September 24, 2007 to November 12, 2007. Dr. MacDougall is Claimant's treating doctor, and 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. Streeter v. Canton School District, 2004 SD 30, ¶25, 677 N.W.2d 22. Employer/Insurer has presented nothing to contradict Dr. MacDougall's opinions about the actual care required, or that Mr. Gunderson is capable of providing them.

Employer/Insurer argues that some of this care is for conveniences, not medical necessities. It is true that an employer is not responsible for conveniences. Howie v. Pennington County, 521 N.W.2d 645, 648 (S.D. 1994). The Department has previously adopted the standard expressed in Quinn v. Archbishop Bergan Mercy Hospital, 439 N.W.2d 507 concerning home health care:

> To determine whether the claimant is entitled to workers' compensation benefits for home health care, three basic requirements must be met: (1) The employer must have knowledge of the employee's disability and need of assistance as a result of a work-related accident; (2) the care given by the spouse or other health care provider must be extraordinary and beyond normal household duties; and (3) there must be a means of determining the reasonable value of the services rendered by the spouse or other health care provider.

Quoted in Suhn v. Hyland Argus Ranch, HF No. 278, 1990/91, 1992 WL 518728 (South Dakota Department of Labor). In Suhn, housekeeping tasks considered noncompensable included "cleaning, preparation of meals, and washing and mending of

clothes. Compensable tasks include serving meals in bed, bathing and dressing, administering medication and assisting with sanitary functions."

Again, however, Claimant has provided evidence via Dr. MacDougall's affidavit, without refutation, about the hours of actual care he required. Employer/Insurer paid for twelve hours of care following Claimant's first surgery. As for determining the reasonable value of such services, the facts are that such services would cost between twenty and twenty-five dollars an hour, that Mr. Gunderson previously charged and was paid $23.66 an hour for identical services, and that Frank, who performs medical case management for Insurer, had no issue with the rate Mr. Gunderson charged. Indeed, Edmon's statement that $9.00 an hour was charged for such services is the only contrary information in the record; Edmon is an insurance adjuster. To the degree that her statement represented some type of opinion on the reasonableness of rates for such services, the opinion would lack foundation and therefore not be probative. Summary judgment for the care ordered by Dr. MacDougall and provided by Mr. Gunderson is appropriate.

Claimant has also requested an award of attorney's fees per SDCL 58-12-3, quoted in part:

> In all actions or proceedings hereafter commenced against any … insurance company, … if it appears from the evidence that such company … has refused to pay the full amount of such loss, and that such refusal is vexatious or without reasonable cause, the Department of Labor … shall, if judgment or an award is rendered for plaintiff, allow the plaintiff a reasonable sum as an attorney's fee to be recovered and collected as a part of the costs.

The Department finds that, for purposes of summary judgment, this request is premature. Issues such as the reasonableness of Employer/Insurer's conduct are primarily factual, and typically await the outcome of primary litigation to be decided.

Claimant's Motion for Summary Judgment will therefore be granted in part. Claimant is entitled to reimbursement for Mr. Gunderson's services based on twelve hours a day, $23.66 an hour, for July 24, 2007 to September 23, 2007, and based on six hours a day at that same rate for September 24, 2007 to November 12, 2007. Summary judgment will be denied as to Claimant's attorney's fees and related costs. Costs of the motions considered in this matter will be borne by the parties.

Dated this 27th day of December, 2007.

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James E. Marsh
Director