February 11, 2011

H. I. King
Tonner, Tobin & King LLP
PO Box 1456
Aberdeen, SD 57402

LETTER DECISION & ORDER

J. G. Shultz
Woods, Fuller, Shultz, & Smith PC
PO Box 5027
Sioux Falls, SD 57117

RE: HF No. 26, 2008/09 – Janet Moser-Taylor v. Leonard Louis Healthcare Properties, LLP, d/b/a Aberdeen Health and Rehab and United Heartland

Dear Mr. King and Mr. Shultz:

I have received Employer/Insurer's Motion for Summary Judgment, Supporting Brief and Affidavit of J.G. Shultz in the above referenced matter. I have also received Claimant's Resistance to Employer/ Insurer's Motion for Summary Judgment and Employer/Insurer's letter dated February 9, 2011, indicating it did not intent to file a reply.

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 of 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.

Employer/Insurer move the Department to enter summary judgment against Claimant Janet Moser-Taylor, dismissing her petition for Hearing because she cannot meet her burden to show that her employment with Employer was a major contributing cause of her condition as required under SDCL §62-1-1(7).

Claimant alleges that on October 31, 2007 or November 1, 2007, she suffered injuries to her stomach/abdomen arising out of and in the course of her employment over the period of time she was employed with Employer. During her last shift working for Employer, Claimant was working in the course of her duties as a certified nursing assistant (CNA) tending to a resident, when she was kicked in the stomach. Following this incident, Claimant developed flu like symptoms and was taken to the Emergency Room at Avera St. Lukes Hospital in Aberdeen and eventually transferred to Avera McKennan Hospital in Sioux Falls. Claimant was diagnosed with Necrotizing fasciitis consisting of Group B Streptococcus. Employer/Insurer denied Claimant's claim for benefits on the basis that the alleged injury is not work related.

During discovery, Claimant requested culture results for the residents in rooms 137 and 177 of Employer's facility. Without disclosing any identifying information about the residents in question, Employer/Insurer disclosed that during the relevant time period, the residents in rooms 137 and 177 had pseudomonas and staphylococcus haemolyticus. None of the residents' cultures revealed Group B Strep.

Claimant has no expert witnesses that will testify that her Employment is and remains a major contributing cause of her condition or need for treatment. Claimant argue that there is circumstantial evidence that the injuries she incurred is common in the healthcare type facility such as the Employer's facility and that the onset of such bacterial infection would point to the Claimant being exposed to the harmful bacterial at her place of employment.

There are no genuine issues of material fact in this matter. The issue is only whether Employer/Insurer is entitled to judgment as a matter of law.

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. *Horn v. Dakota Pork*, 2006 SD 5, ¶14, 709 NW2d 38, 42 (citations omitted). To recover under workers' compensation law, a claimant must prove by a preponderance of the evidence that she sustained an injury "arising out of and in the course of the employment." SDCL 62-1-1(7).

> In applying the statute, we have held a worker's compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that the claimant incurred a disability arising out of and in the course of [her] employment. We have further said South Dakota law requires [claimant] to establish by medical evidence that the employment or employment conditions are a major contributing cause of the condition complained of. A possibility is insufficient and a probability is necessary.

Gerlach v. State, 2008 SD 25, ¶7, 747 NW2d 662, 664 (citations omitted).

> [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 S.D. 69, ¶31, 549 N.W.2d 390, 398 (quoting *Day v. John Morrell & Co.,* 490 N.W.2d 720, 724 (SD 1992)).

In this matter, the nature and effect is not plainly apparent and an expert opinion is necessary to establish a causal relationship between the incident and the injury. Claimant has offered no such expert medical opinion. In this case, Claimant is unable to meet her burden of proof and Employer/Insurer is entitled to judgment as a matter of law. Employer/Insurer's Motion for Summary Judgment is hereby granted.

This letter shall serve as the Department's Order.

Sincerely,

/s/ *Taya M Runyan*

Taya M. Runyan
Administrative Law Judge