

July 28, 2014

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**Letter Decision and Order**

J. G. Shultz  
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Re: HF No. 31, 2008/09 – Tammy Lagler v. Menards, Inc. and Zurich American Insurance Co.

Dear Counsel:

***Submissions:***

This decision addresses the following submissions by the parties:

May 16, 2013	[Employer and Insurer's] Motion for Summary Judgment;  Affidavit of Counsel;
February 21, 2014	Claimant's Brief in Opposition to Employer and Insurer's Motion for Summary Judgment;  Affidavit of Counsel in Opposition to Employer and Insurer's Motion for Summary Judgment;
May 9, 2014	Claimant's Supplemental Brief in Opposition to Employer and Insurer's Motion for Summary Judgment;  Supplemental Affidavit of Counsel in Opposition to Employer and Insurer's Motion for Summary Judgment;

June 30, 2014

Employer and Insurer's Reply Memorandum in  
Support of Motion for Summary Judgment; and

Second Affidavit of Counsel.

***Procedural Background:***

The Department has conducted two hearings addressing the merits of this case. The first was held on May 10, 2011. The issues involved in that hearing dealt with the causation of Lagler's need for surgery on her right ankle which was performed on February 19, 2009, and whether the surgeries performed on Lagler's ankle were reasonable and necessary. The second hearing was conducted on September 20, 2012, and dealt with the compensability of certain chiropractic treatments and whether Lagler was entitled to permanent total disability. This letter deals with a Motion for Summary Judgment filed by Employer and Insurer with regard to Claimant's contention that Insurer's denial of benefits to Claimant was "veraciously or without reasonable cause".

***Facts:***

The facts of this case, as reflected by the submissions, are as follows:

1. Tammy Lagler (Lagler) injured her right ankle at work in April 2007. At the time of the injury, Lagler's employer (Employer) was insured by Zurich American Insurance Company (Zurich) for workers' compensation purposes.
2. In February 2008, Dr. Watts performed surgery on Lagler's ankle. Zurich paid the assumed responsibility of the injury and initially paid all medical expenses including this surgery.
3. After her surgery in February 2008, Lagler continued to treat with Dr. Watts and continued to have pain in the ankle that she injured in April 2007.
4. Mary Lemieux (Lemieux), a claims specialist with Zurich, was assigned to Lagler's case. Zurich assigned to her, claims that it deemed "questionable" or expected to involve "protracted care."
5. Lemieux had no formal training as a claim's adjustor and no background in medical diagnosis.
6. On July 30, 2008, Dr. Watts noted that Lagler's original injury was "sustained from a work comp related injury," that she was "failing conservative treatment," and that they may "wish to proceed with surgery."

7. On August 5, 2008, Lemieux spoke with Lagler and was informed that Lagler had retained an attorney. Lemieux noted that "I find it odd that welll [sic] over year she gets and [sic] atty. When we are on the verge of a rtw (return to work) that has been extended far past the anticipated rtw date. Ee [sic] also has a lot of recurrent swelling and pain w/no noted precipitator [sic]-time for some survallance [sic]?" Zurich never placed Lagler under surveillance prior to denying her claim.
8. On August 6, 2008, Lagler's pain continued and Dr. Watts noted that the "pain in her heel area was present since her initial injury at work". She told him that "she is not happy with" watching her ankle over the next several months. Dr. Watts mentioned resection of the Haglund Deformity as an "option at this point."
9. On August 6, 2008, Lemieux's claims notes state: "Called Alvine Ortho. Not in yet. Got answering service and left detailed message for Watts or his nurse to call me ASAP with regard to any request for treatment or surgery. Got a call back from Julie at clinic. Noted I understand there is a surgery request pending? Yes and noted I have not been called and I need the notes. She will check with the scheduler to see if that's been done. Then must have transferred me to scheduler – Jaime. She said she has over three calls on this from various people to fax notes and does not have yet and when she does she will fax and hung up on me!!! I called back for Julie to confirm they have the appropriate fax number since I am not sure who's been calling. Julie was gracious and took the number."
10. Dr. Watts asked Zurich to approve the surgery. That same day, Lemieux communicated with Dr. Watts' office and noted in the claims file that a "surgery request [was] pending."
11. On August 25, 2008, Lemieux noted in Zurich's claims file that she set up an Orthopedic independent medical evaluation (IME) with Dr. Cederberg for 9/12/08. Lemieux later noted "Melissa called back from integrity. They have Bocklage avail. on 9/16 in Worthington and that's only 60 miles away- ok? Yes. Set for 10:00." Zurich later cancelled the IME and Zurich never rescheduled it.
12. The August 25, 2008, claims notes also reflect that 4 additional weeks of temporary benefits were authorized.
13. On August 27, 2008, Claimant's lawyers served and filed Lagler's Petition for Hearing. Claimant alleged "Employer and Insurer have veraciously and unreasonably refused payment..."
14. On August 29, 2008, Lemieux's claims notes state: "Received a call from Jaime at Dr. Watts' office. Called back. Away from her desk, got voice mail. Left very detailed message indicating I would love to approve surgery if I could get the notes and request. Relayed I have been trying to do that since 7/30 and then relayed my call of 8/6 – my last call – and not sure if she and the Jaime that hung

up on me are one and the same, but do still need that information and need it RUSH and have needed. Confirmed my fax and phone number and claim number to reference.”

15. On September 5, 2008, Lemieux’s claims notes state: “Called Jaime. I got the notes now but the medical dictionary does not list a Haglund's deformity so need more information on that and how it relates to the injury to approve the surgery. Does not need to be anything fancy, just a very brief note from the doctor faxed over? My fax number, phone number and file number (since I got his voicemail).”
16. On September 8, 2008, Lemieux’s claims note acknowledges the delivery of the Petition for Hearing and goes on to state: “Called Scott Heidepriem, EE's [sic] attorney. Out. Left voicemail. I have his Petition but before sending to an attorney to interpose an answer, want to discuss with him. I believe he's under some mis-assumptions. TTD has and continues to be paid. All medical being paid. All out of pocket as submitted being paid and all outed for payment daily in virtually all instances. Call to discuss ASAP.”
17. On September 9, 2008, Lemieux's claims notes state: “Jaime from Dr. Watts' office called. Doctor won't do a letter on Haglund's procedure. She says I can talk to his nurse/PA -C or find on internet. Called her back. Got voice mail. Left message. (1) Nothing from doctor yet other than Haglund's procedure, not what related to, etc. (2) I will talk with the PA -C or nurse but she did not leave that name and number. Please have that person call or call me with her/his contact information.
18. Lemieux’s September 9, 2008, claims file notes also state: Scott H. called and we discussed. EE is telling him we are denying treatment. NO, quite the contrary ... we have been aggressively trying to get information from Dr. Watts' office since the appointment on 07/30 and finally THIS WEEK , just found out what the proposed procedure is but still not WHAT it is and noted I can't find a Haglund's procedure in a medical dictionary, have not heard of it in 25 years and have in fact talked to Jaime at Watts' office once again today and am waiting to either hear from, or get a number for the PA -C /nurse to call directly for clarification on this procedure but certainly it's in our best interest to get this done rush as well since every day delayed is another day of paying TTD . He will withdraw once he confirms we are paying for surgery so call ASAP once I hear back.”
19. On September 12, 2008, Lemieux’s claims notes state: “Called Jaime to speak to the nurse since per Jaime she will need to locate the nurse and I have searched 12 sites on the internet with no results found for this condition. Held for three minutes and then hung up and called back and left her a message.
20. On September 12, 2008, Lenieux’s notes state: Called Scott H. and explained I would like to approve surgery but need to confirm what condition is and 12 web

sites have revealed nothing, meds don't support what it is/how relates and Jaime will not let me speak to doctor and will determine if nurse to call me or not. He said then that we will need to interpose and answer.”

21. On September 12, 2008, Attorney Heidepriem wrote a letter to Lemieux saying that Zurich is “still” refusing to cover surgery despite repeated requests and documentation submitted from the office of Dr. David Watts.”
22. On September 15, 2008, Lemieux’s claims notes time stamped 14:34 (2:34 p.m.) state: “Angie Roberts, Dr. Watts’ nurse, called me. We discussed the etiology of this. Can be due to heels, i.e., pump bump but really it’s more of an idiopathic condition. Not related to ankle injury. Is she then disabled due to the Haglund's? Yes, not due to the original injury.”
23. On September 15, 2008, at 2:26 p.m., Core Orthopedic long distance telephone records show a 5.8 minute call to Lemieux’s telephone number (952 229-3678) shown on her fax to Dr. Watts.
24. On September 15, 2008, Lemieux’s claims notes state: “Called Scott H. Got his voicemail. Left message that denying surgery and why and stopping benefits and why. Will refer to counsel. Call if questions.”
25. The name of Dr. Watts’ nurse is Angela Majeres, not Angela Roberts, and there has never been an employee by the name of Angie Roberts at Dr. Watts’ office.
26. During her deposition, Angela Majeres, did not recall any conversation with Lemieux regarding the etiology or cause of Lagler’s condition. Majeres further stated that it is her practice to make a record in the chart of any such conversations; Lagler’s chart contains no such notification and no record of any conversation between Majeres and Lemieux. Moreover, she has stated, in a sworn affidavit that: “I would never offer an opinion to a claims adjuster contrary to the opinion of the physician I am working for. Dr. Watts has consistently offered the opinion that Lagler’s symptoms were related to her workplace injury. To my knowledge that opinion has never changed.”
27. On September 17, 2008, Zurich sent a fax to Dr. Watts’ office officially denying payment for the second surgery. On September 22, 2008, Zurich stopped all disability payments to Lagler.
28. On October 27, 2008, Dr. Eric Watson conducted an examination of Lagler’s right ankle. While Dr. Watson concluded she "would benefit from excision of Haglund's prominence and bursectomy since she did get relief with the injection," none of his records contain an opinion causally relating the need for this surgery to Lagler's work injury.

29. On November 11, 2008, Dr. Watts recounted how Lagler again claimed that her pain in the Achilles tendon area was present since her 2007 injury and he wrote this note:

“At this point, although the injury may or may not be due to her initial injury, she does have an associate Haglund deformity that has certainly contributed to it. I think the biggest contributor is the way she has changed her gait pattern from her initial injury.”

30. Lagler had no income between September 2008 and April 2009 when she returned to work in a part time capacity, working between 27 and 30 hours per week. In addition, Lagler did not have health insurance, so when Zurich denied her claim for her second surgery she was burdened with its cost, including the cost of medications. Lagler tried to cope with these financial problems with money given to her by friends and relatives and by paying bills with her credit cards. However, she ultimately lost her home when the bank foreclosed on her mortgage in 2011.

31. Ultimately, Lagler moved from Sioux Falls to Winner where her daughter lived. Her daughter and son-in-law assisted Lagler financially with her living accommodations, for a time.

32. On February 19, 2009, Dr. Eric Watson performed surgery on Lagler to address her Haglund's deformity.

33. On February 10, 2009, Dr. Richard Farnham opined that Lagler's work injury did not require surgery.

34. More facts will be discussed in the analysis below.

***Summary Judgment:***

Employer and Insurer have filled a Motion for Summary Judgment. ARSD 47:03:01:08 governs the Department of Labor and Regulation's authority to grant summary judgment in workers' compensation cases. That regulation states:

A claimant or an employer or its insurer may, any time 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.

ARSD 47:03:01:08.

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. “A trial court may grant summary judgment only when there are no genuine issues of material fact.” Estate of Williams v. Vandenberg, 2000 SD 155, ¶ 7, 620 N.W.2d 187, 189, (citing, SDCL 15-6-56(c); Bego v. Gordon, 407 N.W.2d 801 (S.D. 1987)). “In resisting the motion, the non-moving party must present specific facts that show a genuine issue of fact does exist.” Estate of Williams, 2000 SD 155 at ¶ 7, (citing, Ruane v. Murray, 380 NW2d 362 (S.D.1986)). “Summary judgment is not the proper method to dispose of factual questions.” Stern Oil Co., Inc. v. Brown, 2012 SD 56, ¶ 9, 817 N.W.2d 395, 399 (quoting Boziad v. City of Brookings, 2001 S.D. 150, ¶ 8, 638 N.W.2d 264, 268).

In this case, the Department must first determine whether there are any issues of material facts.

***Without reasonable cause:***

In this action Lagler is seeking attorney’s fees pursuant to SDCL 58-12-3 alleging that Zurich denied benefits to Lagler without good cause. In its Motion for Summary Judgment, Zurich contends that Lager had the burden of showing that her work injury was a major contributing cause of her need for surgery and that she failed to do so, prior to the denial. Lagler counters that Zurich had a duty to make a good faith investigation of Lagler’s claim and that they failed to do so before denying her benefits. The premise of both of these positions may be true depending on the facts of the particular case. Howie v. Pennington Co., SD, 1997 S.D. 45, ¶ 9, 563 N.W.2d 116 (stating that the determination as to whether the insurer engaged in vexatious or unreasonable conduct depends on the facts of each particular case).

Under SDCL 58-12-3, an insured is entitled to an award of reasonable attorneys’ fees when “it appears from the evidence that such company or exchange has refused to pay the full amount of such loss and that such refusal is vexatious or without reasonable cause.” SDCL 58-12-3. The South Dakota Supreme Court stated, “[t]he obvious objective of SDCL 58–12–3 is to discourage contesting insurance coverage and to reimburse an insured for any reasonable attorney’s fees necessarily incurred in defending or enforcing a valid insurance contract right.” All Nation Ins. Co. v. Brown, 344 N.W.2d 493, 494 (S.D. 1984). SDCL 58-12-3 must be “given a liberal construction with a view to effect [its] objects and to promote justice.” Id. (citing SDCL 2–14–12).

Our State’s Supreme Court has also stated:

The general rule is “a failure to pay because of a good faith belief that no payment is due will not warrant a penalty [for unreasonable nonpayment of compensation.]” Larson’s Workmen’s Compensation Law § 83.41(b)(2) (1996). Although states’ prerequisites vary for an imposition of such a penalty, the main inquiry is whether the insurer acted in good faith. For example, in All Nat’l Ins.

Co., we stated: “Where there [are] open question[s] of fact or law determinative of the insured’s liability, the insurer, acting in good faith, may insist on judicial determination of such questions without subjecting itself to penalties for vexatious refusal to pay.” 363 N.W.2d at 218 (quoting Taylor v. Commercial Union Ins. Co., 614 F.2d 160, 165 (8th Cir. 1980) (other citations omitted)). Furthermore, “if there is a bona fide and reasonable factual ground for contesting the insured’s claim, there is no failure to pay “without just cause or excuse.”” Id. (quoting St. Francis Hosp. v. Baldwin, 626 P.2d 1229, 1232 (Kan 1981)).

Howie, SD 1997 S.D. 45 at ¶ 11.

***February 19, 2009 Surgery:***

Lagler injured her right ankle at work in April of 2007. In February of 2008, Dr. Watts performed surgery on the ankle. Lagler’s medical treatment of the ankle then continued until August of 2008. Zurich paid all medical expense for the treatment of Lagler’s ankle including the surgery.

On August 6, 2008, Dr. Watts suggested that surgery may be an option for treating Lagler’s Haglund Deformity. When Lemieux, Zurich’s adjuster, became aware of a possible a second surgery, she sought information from Dr. Watts’ office regarding Lagler’s need for surgery. When the possibility of a second surgery arose, it was reasonable for Lemieux to question the need for surgery before authorizing the surgery.

Lemieux’s investigation of Lagler’s condition continued until September 15, 2008. The length of the investigation was prolonged, at least in part, due to the doctor’s office delay in making that information available to Zurich. On September 15, 2008, Zurich’s claims file indicates that Lemieux had a phone conversation with someone from Dr. Watts’s office who indicated that the Haglund Deformity was not caused by Lagler’s work injury. It seems apparent that Zurich then denied coverage for the second surgery based on this alleged conversation.

On the other hand, Lagler has presented evidence that the September 15<sup>th</sup> conversation did not take place or that it took place with someone other than Dr. Watts’s nurse. Whether this conversation took place or could be relied upon to deny Lagler’s surgery are facts upon which this action could be decided. Consequently, there is an issue of material fact and summary judgment is not appropriate.

In addition, there are some references in Dr. Watts’s notes that suggest the Haglund Deformity resulted from Lagler’s work injuries but at least one entry as late as November, 2008, suggests that Dr. Watts was unsure whether the Haglund Deformity resulted from Lagler’s work injury. While these entries may be pertinent to Zurich’s decision to deny benefits, it is unclear from the facts at this point to know if Zurich was aware of the content of these entries during the time it was deciding whether or not to cover the surgery.



***Chiropractic treatment and Permanent Total Disability:***

Zurich argues in the alternative, that it is entitled to partial summary judgment for the issues litigated during the second hearing which took place on September 20, 2012. Those issues dealt with Lagler's entitlement of permanent total disability and the compensability of certain chiropractic treatments.

While the facts surrounding the denial of these benefits were not well developed in the submissions offered in support or opposition to this motion, the reasons for the denials are identifiable from the pleadings and record of that hearing and there is no dispute of the facts surrounding those denials. Following Lagler's injury and the foreclosure of her house, she moved from Sioux Falls to Winner, where her daughter lived. Employer and Zurich's position during the proceedings was that Lagler's move was done to withdraw from the Sioux Falls job market and to collect workers' compensation benefits and was not made in good faith. Employer and Zurich also maintained that Lagler was a viable candidate for retraining. Lagler needed to prevail on both of these issues to show entitlement to the permanent total disability benefits that she sought. These were both legitimate legal positions supported by certain facts. While the Department ultimately ruled against them on these questions, Employer and Insurer were entitled to a "judicial determination" of the issues. Therefore, the Department finds that Zurich had good cause to deny Lagler's permanent total disability benefits.

Employer and Zurich also contested certain chiropractic treatments. Here too, their position was supported by certain facts. Indeed, they ultimately prevailed on a portion of the fees. Consequently, the Department finds good cause for Zurich's denial of benefits for the chiropractic treatments.

***Order:***

In accordance with the analysis above, the Zurich's Motion for Summary Judgment is denied with regard to the attorney's fee associated with the hearing conducted on May 10, 2011. Zurich's Alternative Motion for Partial Summary Judgment is granted. The portion of this action seeking attorney's fees associated with the hearing conducted on September 20, 2012 is dismissed. This letter shall constitute the order in this matter.

Dated this \_\_\_\_\_ day of July, 2014.

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