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Margo Tschetter Julius
Julius & Simpson LLP
P.O. Box 8025
Rapid City, SD 57709

Letter Decision and Order

Michael S. McKnight
Laura K. Hensley
Boyce, Greenfield, Pashby & Welk LLP
P.O. Box 5015
Sioux Falls, SD 57117-5015

Daniel E. Ashmore
Rebecca L. Mann
Gunderson, Palmer, Nelson & Ashmore
P.O. Box 8045
Rapid City, SD 57709-8045

RE: HF No. 37, 2013/14 – Bernard Dean Potts v. Rapid City Window & Glass and Auto Owners Insurance and Harleysville Insurance Company

Dear Counsel:

Submissions

This letter addresses the following submissions by the parties:

August 27, 2015	[Employer and Insurer's] Motion for Summary Judgment;
	[Employer and Insurer] Auto Owners Insurance's Brief in Support of Motion for Summary Judgment;
	Affidavit of Laura K. Hensley in Support of Motion for Summary Judgment;
October 7, 2015	Claimant's Response to Auto Owners' Motion for Summary Judgment;
	Affidavit of Margo Tschetter Julius;
	Affidavit of Bernard Dean Potts;

October 22, 2015	[Employer and Insurer] Auto Owners Insurance's Reply Brief in Support of Motion for Summary Judgment

Facts

The facts of this case as reflected by the above submissions and documentation are as follows:

1. Bernard Dean Potts (Claimant) suffered a work related injury to his back on January 23, 2008, while working for Rapid City Window & Glass (Employer).
2. At the time of the January 2008 injury, Employer was insured by Auto Owners Insurance (Auto Owners) for workers' compensation purposes.
3. Auto Owners accepted the claim and paid benefits to Claimant.
4. On May 13, 2009, Claimant reported a second injury to his back while working for Employer.
5. Harleysville Insurance (Harleysville) insured Employer for workers' compensation purposes at the time of Claimant's May 2009 injury.
6. Harleysville denied the claim. Harleysville claimed that the second injury was not a new condition, but the result of a preexisting back injury sustained in 2008 while Auto Owners was the insurer.
7. Auto Owners accepted the claim for the second injury and paid benefits to Claimant.
8. On November 30, 2012, Claimant returned to the doctor, reporting that his pain was getting worse.
9. At the time of November 2012, Employer was insured by SFM Mutual Insurance Company (SFM) for workers' compensation purposes.
10. On February 22, 2013, Auto Owners sent Claimant to an IME with Dr. Richard Strand. On March 4, 2013, Dr. Strand gave the opinion that Claimant's work was not a major contributing cause of his current back condition.
11. Auto Owners denied the claim on April 3, 2013.
12. Claimant filed a Petition for Hearing on August 20, 2013. The petition named Employer, Auto Owners, and Harleysville.
13. On October 24, 2013, Claimant filed an Amended Petition also naming SFM as an insurer for Employer.
14. On December 23, 2013, Claimant sustained another injury while working for Employer. At the time of the December 2013 injury, Employer was insured by SFM for workers' compensation purposes. SFM accepted the claim and paid benefits to Claimant.
15. Harleysville filed a Motion for Summary Judgment pursuant to either SDCL 62-7-35 or 62-7-35.1. The Department denied the motion on June 12, 2014.

16. On June 23, 2014, the deposition of treating surgeon Dr. Stuart Rice was taken. Dr. Rice opined that the May 2009 injury contributed independently to Claimant's need for surgery.
17. On October 8, 2014, Harleysville agreed to reimburse Auto Owners and SFM for benefits paid after the date of the second injury on May 9, 2013 through the date of the third injury, December 23, 2013.
18. On June 9, 2015, Harleysville filed an Amended Answer admitting the allegations contained in paragraph 21, but without waiving its statute of limitations defense, asserts it is no longer denying liability for the May 13, 2009 injury.
19. On October 13, 2015, the Department approved an order pursuant to a stipulation for dismissal of SFM Mutual Insurance Company.
20. Additional facts may be discussed in the analysis below.

Employer and Insurer's Motions for Summary Judgment

Employer/Insurer, Rapid City Window & Glass/Auto Owners Insurance, filed a Motion for Summary Judgment. Auto Owners argues that there is no genuine issue of material fact as to causation.

ARSD 47:03:01:08 governs Summary Judgments which are considered by the Department of Labor & Regulation in workers' compensation cases. That regulation provides:

> 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.

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. Vandeberg*, 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)). Claimant has the burden of proving all facts essential to sustain an award of compensation. *Darling v. West River Masonry, Inc.*, 777 N.W.2d 363, 367 (SO 2010); *Day v. John Morrell & Co.,* 490 N.W2d (SD 1967). The Claimant must establish that the work-related injury is a major contributing cause of the current claimed condition and need for treatment. *Vollmer v. Wal-Mart Stores*, Inc., 2007 SD 25, ¶12, 729 N.W.2d 377, 382.

Employer and Insurer, Auto Owners, argue that they are entitled to Summary Judgment because there exists no evidence causally connecting Claimant's current condition and

need for treatment to the injuries sustained in January 2008 while Auto Owner's was the workers' compensation carrier for Employer. Whether a claimant's "employment was a major contributing cause of his [or her] condition is necessarily a question of fact." *Gerlach v. State*, 2008 S.D. 25, ¶ 7, 747 N.W.2d 662. There is no dispute that Claimant suffered a compensable work-related injury to his back on January 23, 2008, during the time that Auto Owners was the insurer. There is also no dispute that Claimant suffered a compensable work-related injury to his back on May 13, 2009, during the time that Harleysville was the insurer. The question is whether the January 2008 injury is a major contributing cause to any condition and need for treatment Claimant has suffered after May 13, 2009.

Claimant retained the expert opinion of Dr. Christopher Dietrich, M.D., Auto Owners retained the expert opinion of Dr. Richard Strand, M.D., Harleysville retained the expert opinion of Dr. Wade Jensen, M.D., and SFM retained the expert opinion of Dr. Thomas Ripperda, M.D. In this matter, there is clearly no diversity of opinions among the experts that the second injury on May 13, 2009, is a major contributing cause of Claimant's condition and need for surgery in July 2009 and treatment thereafter. The experts all agree that Claimant's condition and need for treatment is not from an injury sustained on January 23, 2008 while Auto Owners was the insurer.

In this case, there are no genuine issues of material fact in dispute. The Department must then determine whether Employer and Insurer are entitled to judgment as a matter of law.

Promissory Estoppel

The Claimant contends that Auto Owners is estopped from denying responsibility for a claim they accepted in 2009. The South Dakota Supreme Court has held that "promissory estoppel may be invoked where a promisee alters his position to his detriment in the reasonable belief that a promise would be performed." *Garrett v. Bank West, Inc.*, 459 N.W.2d 833, 848 (SD 1990) (citing *Minor v. Sully Buttes School District, #58-2*, 345 N.W.2d 48, 41 (SD 1984). For promissory estoppel to apply, the court must find in addition to a promise: (1) the detriment suffered in reliance must be substantial in an economic sense; (2) the loss to the promisee must have been foreseeable by the promisor; and (3) the promisee must have acted reasonably in justifiable reliance on the promise made." Id.

Harleysville was the insurer on the risk at the time of the May 13, 2009 injury. Harleysville denied coverage, claiming the injury was a result of a preexisting back injury that was covered by Auto Owners. Auto Owners accepted the claim following Claimant's May 2009 injury and paid medical expenses for a second back surgery and other benefits. In late 2012, Claimant contacted Auto Owners requesting authorization to return to his doctor for more treatment for pain. Auto Owners sent Claimant for an IME with Dr. Strand, who opined that the May 2009 injury contributed independently to Claimant's medical condition and the proposed treatment. After which Auto Owners refused to pay further benefits or otherwise accept responsibility for Claimant's injuries. Claimant argues that by Auto Owners accepting the 2009 claim, they induced Claimant to not pursue litigation against Harleysville until the statute of limitations had arguably run. The Department disagrees.

The South Dakota Supreme Court in *Martz* cited a Massachusetts case which stood for the proposition that a claim of estoppel must reflect "an intention to act or refrain from acting in a specified way, so as to justify a promise in understanding that a commitment has been

made. *Martz v. Hills Materials*, 2014 S.D. 83, ¶ 19, 847 N.W.2d 413 (citing *Rhode Island Hosp. Trust nat. Bank v. Varadian*, 419 Mass. 841, 647 N.E.2d 1174 (1995) (citations omitted)). The court in *Martz* went on to say that, furthermore, the promise must be established by clear and convincing evidence. *Id*., (citing *Hahne v. Burr*, 2005 S.D. 108, ¶ 18, 705 N.W.2d 867, 873). In this case, there is a question as to whether a promise existed and, if so, what was the nature of that promise. The only evidence that a promise was made by Auto Owners is that it paid medical expenses at the time of the 2009 injury when Harleysville denied the claim. The Department is unable to conclude from Auto Owners actions that it promised to pay all bills related to Claimant's back injury into perpetuity. It simply would not make good business sense for it to do so.

Over time, medical conditions change. It is unlikely that Auto Owners made a promise that would put it in a position where it could not respond to circumstances and facts which may come to light in the future. The mere fact that Auto Owners originally accepted responsibility for the claim is not clear and convincing evidence that it promised to be continuously responsible for benefits in the future. Consequently, the Department finds that Auto Owners did not promise to continue paying all medical expense associated with Claimant's 2009 back condition in the event that circumstances change or new facts are uncovered in the future. Likewise, Auto Owners could not reasonably be expected to believe that Claimant would not take precautions to protect his interests should circumstances change in the future.

Justice would not be served by requiring Auto Owners to continue paying for a claim for which it is not liable.

Order

In accordance with the analysis above, the Department holds that Employer and Insurer have shown there are no genuine issues of material fact. The Department also finds that it would be inappropriate to grant relief under the doctrine of promissory estoppel here because the elements of promissory estoppel have not been met. Employer and Insurer, Auto Owners, are entitled to judgment as a matter of law. For the reasons stated above, Employer and Insurer, Auto Owners, Motion for Summary Judgment is granted in favor of Auto Owners.

The Parties may consider this Letter Decision to be the Order of the Department.

Sincerely,

/s/ Sarah E. Harris
Sarah E. Harris
Administrative Law Judge