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RE: HF No. 52, 2017/18 – Mohammed El Karmassi v. Bridgestone Americas and Old Republic

FACTS

Claimant, Mohammed El Karmassi, was employed by Bridgestone Americas on November 11, 2015, when he was injured by a falling tractor tire. Claimant alleges that three of his coworkers witnessed the injury. Claimant sought out an employee named Dennis, who Claimant identified as being in charge that day due to the absence of the store manager. Dennis allegedly advised Claimant that he would have to wait until the manager returned to fill out an accident report. The following day, Claimant called in to work stating that due to his back injury he was unable to work. Employer/Insurer dispute that Claimant gave timely notice alleging that it was not until November 19, 2015 that Claimant provided written notice of his injury. Nonetheless, Employer/Insurer treated Claimant's injury as compensable and paid approximately $14,000 towards his care. Employer terminated Claimant on February 9, 2016.

Claimant received various treatments for his back between November 2015 and June 2017. On June 14, 2017, Claimant's treating physician, Dr. James Brunz, placed Claimant at maximum medical improvement (MMI). Despite this determination, Dr.

Brunz suggested that Claimant may in fact benefit from more physical therapy. Dr. Brunz noted that he wished for Claimant to be seen by a spine therapist to instruct him on how to complete more physical therapy. However, it is unclear whether Claimant attended the follow up appointment. In June 2017, Insurer closed Claimant's case and ceased paying any more of his medical bills.

Claimant then filed a petition for workers compensation benefits. The Department received Claimant's petition on November 1, 2017. Employer/Insurer subsequently filed a motion for summary judgment.

Is Employer/Insurer entitled to Summary Judgment on the Issue of Claimant's eligibility for workers compensation benefits?

ANALYSIS

The Department is granted the authority to grant summary judgment by ARSD 47:03:01:08, which reads:

> 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.

A. Notice

Employer/Insurer contend that Claimant failed to give written notice of his injury within three days as required by SDCL 62-7-10. Claimant counters that three of his coworkers witnessed the accident. Claimant also contends that he informed an employee named Dennis, who was in charge at the time due to the store manager's

absence. Dennis allegedly informed him that he would have to speak to the manager when he returned. "When determining whether a genuine issue of material fact exists, the evidence must be viewed most favorably to the non-moving party and reasonable doubts are to be resolved against the moving party." *Baatz v. Arrow Bar*, 452 N.W.2d 138, 140 (S.D. 1990)(Internal citations omitted). When viewed in a light most favorable to Claimant, a dispute exists as to whether he followed the proper chain of command in reporting his injury, and whether Employer had actual notice of the accident. Therefore, summary judgment is not proper as to notice.

B. Temporary Benefits

Claimant must prove that at some time after the injury, he missed at least seven *consecutive* days to be eligible for temporary benefits. SDCL 62-4-2 provides:

> No temporary disability benefits may be paid for an injury which does not incapacitate the employee for a period of seven consecutive days. If the seven day waiting period is met, benefits shall be computed from the date of the injury.

It is uncontroverted that Claimant missed 4 ½ days following his injury. Claimant provides no evidence that he missed seven consecutive days at any time between the accident and when he left his job with Employer. Without proof that he in fact missed seven consecutive days of work, Claimant is not eligible for temporary disability benefits.

C. Permanent Benefits

Employer/Insurer next argues that Claimant is ineligible for permanent partial disability under SDCL 62-4-6, which provides in relevant part:

> If, after an injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing the employee's usual and customary line of

> employment, or if the employee has been released by the employee's physician from temporary total disability and has not been given a rating to which § 62-4-6 would apply, the employee shall receive compensation, subject to the limitations as to maximum amounts fixed in § 62-4-3…

Here, Claimant's treating physician Dr. James Brunz, placed Claimant at maximum medical improvement on June 14, 2017 without assigning an impairment rating. Claimant has not shown that he is unable to engage in his usual or customary line of employment. Indeed, all indications are that after Claimant left his job with Employer, he secured another. Thus, Claimant is not eligible for permanent benefits.

D. Medical Benefits

For some time after Claimant was injured, he continued to receive medical care for his back. Eligibility for medical benefits is governed by SDCL 62-4-1, which provides in relevant part:

> The employer shall provide necessary first aid, medical, surgical, and hospital services, or other suitable and proper care including medical and surgical supplies, apparatus, artificial members, and body aids during the disability or treatment of an employee within the provisions of this title… The employee shall have the initial selection to secure the employee's own physician, surgeon, or hospital services at the employer's expense. If the employee selects a health care provider located in a community not the home or workplace of the employee, and a health care provider is available to provide the services needed by the employee in the local community or in a closer community, no travel expenses need be paid by the employer or the employer's insurer.

Regarding medical care, our Supreme Court has noted:

> Once notice has been provided and a physician selected or, as in the present case, acquiesced to, the employer has no authority to approve or disapprove the treatment rendered. 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.

Hanson v. Penrod Const. Co., 425 N.W.2d 396, 399 (S.D. 1988).

"*Penrod* unequivocally establishes that the Employer has the burden to demonstrate that the treatment rendered by the treating physician was not necessary or suitable and proper." *Krier v. John Morrell & Co.*, 473 N.W.2d 496, 498 (S.D. 1991). While Dr. Brunz acknowledged that Claimant was at MMI, he recommended Claimant see a spinal therapist for further instruction on physical therapy. Having originally acquiesced to Dr. Brunz's treatment of Claimant, Employer/Insurer has the burden to show that any future treatment prescribed by Dr. Brunz is no longer necessary. Employer's sole basis for discontinuing medical treatment appears to be the Claimant had reached MMI. This fact alone does not meet Employer/Insurer's burden of establishing that further treatment is not necessary.

CONCLUSION AND ORDER

The issue of whether Claimant provided sufficient notice to Employer of his injury remains in dispute. Nonetheless, Claimant has failed to demonstrate that he is entitled to either temporary or permanent benefits. However, until Employer/Insurer presents evidence to the Department that it is no longer necessary, suitable, or proper, Claimant is entitled to continue receiving treatment as prescribed by his treating physician. Employer/Insurer's motion for summary judgment is GRANTED IN PART and DENIED IN PART. This decision shall constitute the Department's decision on this matter.

Sincerely,

/s/ Joe Thronson
Joe Thronson
Administrative Law Judge