May 8, 2020

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Letter Decision On Motion to Strike

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RE: HF No. 62, 2019/20 – Kari Benson-Gross v. New Angus LLC dba Demkota Ranch Beef and Sedgwick Claims Management Services, Inc.

Dear Mr. Wurgler and Ms. Holm:

This letter addresses Employer and Insurer's Motion to Strike and Brief in Support of Motion to Strike submitted on March 13, 2020; Claimant's Response in Opposition to Motion to Strike Submitted on March 19, 2020; and Employer and Insurer's Reply Brief in Support of Motion to Strike submitted on April 14, 2020.

Employer and Insurer have moved the Department of Labor & Regulation (Department) to strike Exhibit A and the following paragraphs from Claimant's Petition for Hearing on the grounds that they are immaterial and impertinent to her claim. For the sake of clarity through the rest of the document, the sections of the Petition at issue will be referred to as the "Paragraphs."

> 7. Despite notice of Kari's injury, and though required to by South Dakota law, Employer chose not to submit a First Report of Injury at that time.

> 16. On October 2, 2019, Kari presented her treating physician's work restrictions to Kelley Lopez who, upon information and belief, works in Human Resources (aka the "People Department") at Employer.

17. Employer/Insurer told Kari it refused to accept the work restrictions from her treating physician.

18. Employer/Insurer claimed that Kari was required by the employee handbook to seek treatment only from a doctor that Employer selected.

19. Employer/Insurer claimed that Kari had violated the employee handbook when Kari selected her own treating physician.

20. Employer/Insurer knew or should have known that the workers' compensation laws of South Dakota give Kari the right to select her initial treating physician.

21. Despite that knowledge, Employer/Insurer rejected Kari's choice of treating physician, his treatment, and the work restrictions.

24. Employer/Insurer knew or should have known that the workers' compensation laws of South Dakota requires them to pay for necessary, suitable, and proper medical care for work-related injuries.

28. Between October 2 and October 15, Employer/Insurer did not permit Kari to work, nor did it pay her any indemnity benefits.

35. Employer/Insurer did not follow South Dakota's workers' compensation laws with regard to reporting of Kari's injury.

36. By October 3, 2019, Employer/Insurer still had not filed a First Report of Injury with the South Dakota Department of Labor.

39. On October 4, the Department wrote to Employer, directing it to complete the Employer's portion of the First Report of Injury.

41. Kari received the letter on October 23.

42. In that letter, Insurer advised Kari in that it was responsible for making certain Kari received all benefits to which she was entitled under the workers' compensation laws.

43. In that letter, Insurer advised Kari that her claim was under review.

44. In that letter, Insurer asked Kari to let it know if she lost time at work so that Insurer could deliver benefits as appropriate in a timely manner.

45. In that letter, Insurer provided Kari with a medical authorization so it could request her medical information, and asked Kari to return it as soon as possible.

46. In that letter, Insurer asked Kari to call if she was losing time from work.

47. As requested, Kari tried calling Insurer on October 24 to report that she had lost time from work and to give a status update on her treatment.

48. As requested by Insurer, Kari filled out the medical authorization and submitted it to Insurer on October 29, both by mail and through Insurer's website.

49. From October 24 through November 4, Kari tried calling Insurer numerous times and left messages each time.

50. During that time, Kari could not reach Insurer's claims examiner.

51. On November 4, Kari found another phone number believed to be for Insurer's corporate headquarters.

52. Kari called it and eventually was able to get transferred to the appropriate Sedgwick claims examiner.

53. In that call, Kari provided Insurer with a recorded statement and explained her injury.

54. On November 5, Kari logged into her account on Insurer's website and received a short notice her claim had been denied, and there was no explanation.

55. Insurer also wrote to Kari on November 5 and told her it was denying her claim, a copy of which is attached as Exhibit A.

56. In its denial letter, Insurer did not state the reason for its total denial of Kari's claim.

57. On November 7, Kari called Insurer to ask why Insurer had denied her claim when her medical records said that it was a work-related injury.

58. Insurer explained it had never received any medical records and that it was denying the claim based on the November 4 phone call with Kari.

59. As of its November 5 denial of Kari's claim, Insurer had not requested any medical records from Kari's medical providers.

60. By November 8, Insurer still had not filed the First Report of Injury with the Department of Labor, so the Department wrote to Insurer demanding the filing and a written explanation for the late filing.

61. On November 8, Insurer wrote to the Department and said it did not believe a First Report of Injury needed to be filed until a medical report was received to show treatment was sought.

62. Employer and Insurer have provided no medically legitimate reason why they denied that Kari's injury was work-related.

63. Employer and Insurer have not paid to Kari the statutory penalty of for late payment of benefits.

64. Employer and Insurer have provided no legitimate reason why they have not paid the benefits Kari is entitled to under South Dakota law.

65. Because of Employer and Insurer's unreasonable conduct in delaying the provision of benefits owed to Kari and in placing her on unpaid leave, Kari was unable to pay her rent, and is currently being evicted from her home.

66. Because of Employer and Insurer's unreasonable conduct in delaying the provision of benefits owed to Kari, Kari was forced to hire counsel to protect her rights under South Dakota law, and has incurred costs, such as attorney's fees and expenses, related thereto.

67. Employer and Insurer have failed to perform a reasonable investigation of Kari's claim.

68. Employer and Insurer have denied her claim.

69. By reason of her work injury, Kari hereby claims any and all benefits to which she may be entitled under Title 62 of the South Dakota Codified Laws, and

any and all other statutes and applicable case law, including, but not limited to, past medical expenses for reasonable and necessary medical treatment, ongoing medical expenses for reasonable and necessary medical treatment and other suitable and proper care, and temporary total, temporary partial, permanent partial, or permanent total disability benefits.

Departmental Jurisdiction and Authority

The parties have raised two questions regarding the jurisdiction and authority of the Department. First, Employer and Insurer argue that the Paragraphs are raising an issue that is beyond the scope of the Department's jurisdiction. Second, Claimant argues that the Department lacks the authority to strike allegations from the Petition for Hearing (Petition).

Employer and Insurer argue that an insurer's investigation into a claim and whether an insurer's denial of a claim was done in bad faith are beyond the scope of Department's limited and statutorily established authority. The "proceeding's under Work[er's] Compensation Law . . . are purely statutory, and the rights of the parties and the manner of procedure under the law must be determined by its provisions." *Martin v Am. Colloid Co.,* 2011 S.D. 57, ¶ 12, 804 N.W.2d 65, 68. Citing *Caldwell v. John Morrell & Co.,* 489 N.W.2d 353, 364 (S.D.1992). Employer and Insurer assert that the Paragraphs characterize their actions as culpable, reckless, and are included to make a bad faith argument and find them at fault. They further argue that the Paragraphs are beyond the limited nature of these proceedings.

Claimant argues that the Paragraphs include numerous claims and potential defenses that affect her entitlement to benefits. Claimant further argues that the paragraphs also relate to her claim for attorney's fees for vexatious refusal to pay.

The Department's jurisdiction over workers' compensation claims is provided purely by statute and is limited in scope. "[I]n its simplest form, most inquiries in workers' compensation cases are limited to the following: 1) whether claimant suffered an injury which arose out of and in the course of employment. In this case, the answer to this inquiry is yes; 2) whether claimant's work-related injury is a major contributing cause of her current complaint; and 3) whether the treatment sought or provided was reasonable and necessary." *Cf. Chute v. Nifty Fifties, Inc. & Firstcomp, 2011* WL 2475185, at *2

(S.D. Dept. Lab. June 10, 2011). SDCL 58-12-3 provides the Department authority to permit the Claimant to recover attorney's fees if there is found to have been a vexatious or unreasonable refusal to pay benefits to which the Claimant was entitled. SDCL 58-12-3 only applies after benefits have been awarded to the Claimant. Other issues and allegations related to accusations of bad faith, vexation, or fault are not within the jurisdiction of the Department.

Claimant argues that the Department has no procedural rule that permits Employer and Insurer to move to strike allegations from the Petition. Claimant further argues that the Department has the right to "promulgate rules pursuant to chapter 1-26 governing procedures in worker's compensation hearings, petitions, interested parties, summary judgments, dismissals, applications in self-insurance, and related procedural matters" under SDCL 62-2-5.

Pursuant to the Rules of Civil Procedure found in Title 15 of the South Dakota Codified Law, the Department is permitted to strike any "redundant, immaterial, impertinent, or scandalous matter" from a pleading. See SDCL 15-6-12(f). However, "[t]he Department of Labor frequently observes the rules of civil procedure, particularly when, as in this case, the parties are represented by excellent legal counsel. The rules of civil procedure provide litigants with the benefit of centuries of evolving jurisprudence. These rules are time tested and have weighed the conflicting policies confronted while litigating cases." *Homan v. Wal-mart & Am. Home Assurance Co, 2009 WL 3199118, at *3 (S.D. Dept. Lab. Sept 30, 2009).* The Department intends to observe the Rules of Civil Procedure in this matter, as both parties are represented, and the Rules offer useful guidance when considering this motion.

Further, the Department does not have jurisdiction over allegations of bad faith, and such allegations are not relevant to establishing whether a claimant is entitled to benefits under South Dakota workers' compensation law. However, in its discretion, the Department is applying the Rules, and, therefore, has the authority to grant motions to strike under SDCL 15-6-12(f). The Department will exercise that authority in this matter.

Application of ARSD 47:03:01:02

Employer and Insurer argue that Claimant has failed to provide a Petition for Hearing that is clear and concise as required by ARSD 47:03:01:02 which states:

> The petition shall be in writing and need follow no specified form. It shall state clearly and concisely the cause of action for which hearing is sought, including the name of the claimant, the name of the employer, the name of the insurer, the time and place of accident, the manner in which the accident occurred, the fact that the employer had actual knowledge of the injury within 3 business days or that written notice of injury was served upon the employer, and the nature and extent of the disability of the employee. A general equitable request for an award shall constitute a sufficient prayer for awarding compensation, interest on overdue compensation, and costs to the claimant. A letter which embodies the information required in this section is sufficient to constitute a petition for hearing.

Claimant urges that the Department turn to Federal Rules for analytical assistance to interpret South Dakota's civil procedure rules. Under Federal Rules, Employer and Insurer would need to show that the allegations have no possible relation or logical connection to the subject matter of the controversy and may cause sort of significant prejudice to one or more of the parties to the action. *Plan Pros, Inc. v Joshua, Inc.,* No. CIV 13-406, 2013 WL 4402357, at * 1 (D.S.D. Aug. 14, 2013). Claimant argues that the Employer and Insurer have not shown that the allegations have no possible relation to the subject matter of the claim nor that they would suffer prejudice by their inclusion in the petition.

Claimant asserts that ARSD 47:03:01:02 is a broad rule that is meant to be interpreted liberally in favor of the claimant. "[W]orkers' compensation statutes should be construed liberally in favor of injured employees." *Sopko v C & R Transfer Co.,* 1998 S.D. 8, ¶8, 575 N.W.2d 225, 229. She further argues that the Rule lists subjects that should be included in the petition, but that the Rule does not say the petition must be limited to those subjects. Claimant asserts that including the Paragraphs in the Petition helps eliminate surprise at trial and narrow the issues.

Employer and Insurer respond that the liberal-construction rule only applies when there is a need to interpret a rule after reading the plain language leads to ambiguity.

"[I]f the statute has an ambiguity, it should then be liberally construed in favor of injured employees." *Caldwell v. John Morell & Co*., 489 N.W. 2d 353, 364 (S.D. 1992). They further argue that the language requiring that the Petition "shall state clearly and concisely" the claim for workers' compensation benefits is not ambiguous and hence, requires no interpretation. Therefore, Employer and Insurer assert that the Rule's plain language does not permit Claimant to include these Paragraphs. Employer and Insurer further assert that the included Paragraphs do not narrow the issues.

The Department concludes that applying Federal standards to this matter is unnecessary, as there is sufficient guidance in South Dakota's own rules and laws to resolve this matter. The Department finds the plain language of ARSD 47:03:01:02 to be clear and unambiguous. "[I]f the language of a statute is clear, we must assume that the legislature meant what the statute says and we must, therefore, give its words and phrases a plain meaning and effect" *Id.* ARSD 47:03:01:02 requires that a petition "state clearly and concisely the cause of action for which hearing is sought." SDCL 15-6-12(f) permits the Department to strike any "redundant, immaterial, impertinent, or scandalous matter" from a pleading. Applying both ARSD 47:03:01:02 and SDCL 15-6-12(f), the Department will analyze the Paragraphs and decide whether their inclusion fits with the requirements to be clear, concise, material, and pertinent.

Paragraph Analysis

As stated above, the Department is unable to decide on matters related to bad faith or wrongdoing on behalf of Employer and Insurer. Therefore, Paragraphs that are included simply to make argument related to those allegations are not relevant and will be struck.

Paragraphs 7, 35, 36, 39, 60, and 61 are related to the filing of the First Report of Injury (FROI). Claimant argues that the purpose of including Paragraph 7, which regards whether Claimant gave appropriate notice, is related to the claim for benefits, because it is Claimant's burden to show that she gave notice. Employer and Insurer respond that the filing of a First Report of Injury is an administrative matter, and the time of filing of the FROI does not have a relevance to the claim for benefits.

Notice is required in workers' compensation claims, so it is proper to mention it in a Petition. However, Paragraphs 7, 35, 36, 39, 60, and 61 are redundant as paragraph 5 and 6 of the Petition, which have not been objected to, already reference proper notice. Also, paragraphs 5 and 6 do not make accusations of fault that are beyond Department jurisdiction. The Department agrees with Employer and Insurer that the filing of a FROI is administrative and does not have direct bearing on entitlement to benefits. Paragraphs 7, 36, 39, 60, and 61 will be struck from the Petition.

Employer and Insurer argue that Paragraphs 57-59 and paragraphs 62-67 all relate to Claimant's characterization of Employer and Insurer's allegedly culpable conduct in investigating or denying her claim. Claimant argues that these paragraphs are included to show that she complied with her responsibilities in filing her claim, and that including them simplifies the issues. Claimant further asserts that these allegations are logically connected to her claim and will allow her to anticipate Employer and Insurer's defenses.

The Department agrees that these Paragraphs are related to the claim. Paragraphs 62, 63, and 64 are related to the penalty claim Claimant is making for late payments of benefits. Paragraph 66 is related to Claimant's potential claim for attorney's fees under SDCL 58-12-3. However, Paragraphs 57, 58, 59, 65, and 67 are not relevant to whether Claimant is entitled to benefits and will be struck from the Petition.

Employer and Insurer argue that Paragraphs 16-21 and Paragraphs 24 and 28 are related to Employer and Insurer's allegedly reckless refusal to follow Claimant's work restrictions. Claimant responds that Paragraphs 16-21 are related to the "nature and extent" of Claimant's disability and Employer and Insurer's rejection of that disability. Claimant asserts that the Department needs to know that the matter is not only a dispute about Claimant's injuries. Claimant argues that Paragraph 24 narrows the issues and presents a question of law to the Department. Claimant asserts Paragraph 28 relates to her ability to work and the economy injury she has suffered and why she suffered it.

The Department concludes that Paragraphs 16-21 and Paragraphs 24 and 28 are not material to this matter. The issue before the Department concerns whether Claimant is entitled to benefits. These Paragraphs regard allegations against Employer and Insurer that will not aid in resolving the matter of entitlement to Benefits. Paragraphs 16-21 and Paragraphs 24 and 28 will be struck from the petition.

Paragraphs 41-56 and Exhibit A relate to a letter Claimant sent to Insurer and Insurer's denial of the claim. Employer and Insurer's denial of the claim is

pertinent, but these communications between Claimant and Insurer prior to the denial are not pertinent. The Department concludes that Paragraphs 41- 54 and Paragraph 56 are not material to this matter and will be struck from the Petition. Paragraph 55 and Exhibit A will not be struck because while they are not required to be included in the Petition, they are material and pertinent.

Order:

For the reasons stated above, it is hereby, ordered that Employer and Insurer's Motion to Strike is Partially Granted. Paragraphs 7, 16, 17, 18, 19, 20, 21, 24, 28, 36, 39, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, 60, 57, 58, 59, 61, 65, and 67 will be struck from the Petition. This letter shall constitute the order in this matter.

Sincerely,

Michelle Faw

Michelle M. Faw
Administrative Law Judge