May 13, 2009

Kimberly K. Rupp
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Sturgis, SD 57788
Sent certified: 7007 0710 0000 8014 3286

LETTER DECISION and ORDER
ON MOTION FOR SUMMARY JUDGMENT

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

RE: HF No. 62, 2007/08 – Kimberly K. Rupp v. Spearfish Regional Hospital and FinCor Solutions

Dear Ms. Rupp and Mr. Smith:

The Department is in receipt of and has considered the following submissions:

> March 27, 2009 - Employers and Insurer's Motion for Summary Judgment along with Brief in Support of Motion for Summary Judgment, along with attached exhibits, and the Affidavit of Colleen DeRosier in Support of Employer and Insurer's Motion for Summary Judgment and the Deposition of Dr. Paul Cederberg.
>
> April 23, 2009 - Claimant's Response to Employers and Insurer's Motion for Summary Judgment along with attached exhibits.
>
> May 1, 2009 – Employer and Insurer's Reply Brief in Support of Motion for Summary Judgment.

The Department also heard oral arguments from the parties during a telephonic conference held on May 11, 2009. This conference was not recorded by the Department.

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 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.

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.

> The burden is on the moving party to clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law.

McDowell v. Citicorp USA, 2007 SD 53, ¶22, 734 N.W.2d 14, 21 (SD) (internal citations omitted).

> The guiding principles in determining whether a grant or denial of summary judgment is appropriate are:
>
> > (1) The evidence must be viewed most favorable to the nonmoving party; (2) The burden of proof is upon the movant to show clearly that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law; (3) Though the purpose of the rule is to secure a just, speedy and inexpensive determination of the action, it was never intended to be used as a substitute for a court trial or for a trial by jury where any genuine issue of material fact exists; (4) A surmise that a party will not prevail upon trial is not sufficient basis to grant the motion on issues which are not shown to be sham, frivolous or so unsubstantial that it is obvious it would be futile to try them; (5) Summary judgment is an extreme remedy and should be awarded only when the truth is clear and reasonable doubts touching the existence of a genuine issue as to material fact should be resolved against the movant; and (6) Where, however, no genuine issue of fact exists it is looked upon with favor and is particularly adaptable to expose sham claims and defenses.

Owens v. F.E.M. Electric Association, Inc., 694 N.W.2d 274, 277 (SD 2005).

Claimant's Petition for Hearing, filed pro se on November 8, 2007, states that Claimant suffered a low back injury on January 26, 2007 and that she continues to suffer from the effects of that work-related injury. Claimant generally requests in her petition that all benefits due and owing under the South Dakota Workers' Compensation Act be awarded to her. More specifically, Claimant requests Employer and Insurer pay for ongoing and future medical treatment of her work-related injury. Insurer issued a letter denial of ongoing medical benefits to Claimant on September 24, 2007.

Answer to the Petition was made by Employer and Insurer, by and through attorney, Comet Haraldson, on December 6, 2007. The Motion for Summary Judgment was made by Employer and Insurer on March 30, 2009.

Undisputed Facts

Claimant is a registered nurse, age 51, living in Sturgis, South Dakota. Claimant worked for Employer, Spearfish Regional Hospital, on January 26, 2007. On that day, Claimant was at work and helped transfer a sedated patient. The walking patient started to fall and Claimant and the other worker caught the patient. Claimant immediately experienced pain in her low back that radiated down her left leg. Employer received immediate notification of the injury. Claimant went on vacation for a few days but did not exert herself. Claimant received four 1 ½ hour massage treatments while on vacation. Claimant saw Dr. Bailey on February 5, 2007. Claimant was prescribed Flexeril, Celebrex, and a TENS unit. Claimant also participated in physical therapy.

On March 9, 2007, an MRI scan was performed on Claimant. The MRI showed mild desiccation at L4-5 and L5-S1, minimal bulging at L3-4 and L4-5. The MRI shows a postoperative laminectomy defect at L5-S1 with left lateral disc bulging.

Claimant has prior back injuries. Claimant underwent an anterior cervical fusion in 2000 at spine level C3-4 and C5-6. One of the levels was redone in 2004. In February 2002, Claimant injured her low back while working for Sioux Valley Hospital. As a result, she underwent a bilateral hemilaminectomy at L5-S1 and decompression of the S1 nerve root. Claimant was put on light duty at that time. On May 20, 2003, Claimant had another work incident where she had to catch a patient. She received physical therapy at that time. In September 2003, Dr. Jeff Luther, during an IME, gave Claimant an impairment rating of 5% whole person. A prior MRI was done on April 2, 2004 that showed a mild residual central protrusion at L4-5, and a mild left foraminal stenosis without left L4 nerve root impingement. Claimant had a series of epidural steroid injections which relieved some pain.

Claimant moved to Spearfish, SD and began working as a part-time surgical nurse at the Spearfish Regional Hospital. Claimant treated with Dr. Brett Lawlor for her back pain associated with the injury in 2002. On August 29, 2006, Dr. Lawlor was of the opinion that Claimant reached maximum medical improvement (MMI) for the 2002 injury. Claimant was released with restrictions of working a maximum of 20 hours per week and a lifting restriction of 35 pounds.

Claimant returned to Dr. Lawlor's treatment on March 15, 2007, after the January 2007 incident. Dr. Lawlor recommended physical therapy, modified work, and prescribed Lidoderm patches. Dr. Lawlor reviewed the MRI scans and is of the opinion that "no obvious interval changes" occurred between April 2004 and March 2007. Dr. Lawlor also opined that the January 2007 work event contributed independently to Claimant's current symptoms.

Employer made "favored work" available to Claimant, within her new restrictions, following her January 2007 injury. Claimant accepted the work for a period of time. The work consisted of unskilled office work, not nursing work. Claimant resigned on May 24, 2007 due to the nature of the light work, not due to medical reasons.

On April 5, 2007, at the request of Employer and Insurer, Claimant was examined by Dr. Paul Cederberg. Dr. Cederberg reviewed Claimant's medical history and files and performed a physical examination of Claimant. Dr. Cederberg, in his IME report dated April 13, 2007, opined that the January 2007 work injury "contributed independently by causing an aggravation of pre-existing degeneration of the lumbar spine and need for treatment and modified work activities." Dr. Cederberg agreed that the treatment since January 2007 was reasonable and necessary. He was of the opinion that "no further treatment [was] recommended" and that Claimant could return to work with the same restrictions that were put into place in August 2006.

In May 2007, Claimant underwent a series of epidural steroid injections. The injection alleviated some of Claimant's pain. Dr. Lawlor discharged her on July 3, 2007 and noted the following: "We discussed treatment options. At this point, I think she is doing well. I would like to add Lyrica to try to help with some of the leg and foot symptoms that she is having. If she has a flare up in her pain, I would be happy to see her back, but at this point I am going to discharge her."

On August 9, 2007, at the request of Insurer, Dr. Lawlor filled out a form regarding Claimant's treatment. Dr. Lawlor indicated that Claimant had reached MMI and that she had no additional impairment rating, other than the 5% whole person that Dr. Luther had given Claimant in September 2003.

On September 24, 2007, Insurer issued a letter of denial to Claimant for additional medical treatment and benefits based upon her January 2007 injury.

On December 18, 2007, in response to a letter from Claimant, Dr. Lawlor wrote to Claimant regarding the permanency of her injury. In pertinent part he wrote, "I am not sure what discussion you had with Work Comp, however, if they told you that I indicated that you were 'completely recovered with no residual injury', this would be a mischaracterization of my correspondence with them. … I did not say that you had completely recovered, in fact, I know that this is not the case. In my last dictation dated 7/3/07, you were rating your pain at a 2/10, indicating that you were still getting some tingling in your feet, which was rare. You indicated that you had had 'much improvement since the injections', and it was my recommendation on that that if you had a flare up in your pain, I would be happy to see you back."

He went on to write, "It is important for you to understand that the designation of maximum medical improvement does not in any way imply that I think you [sic] that you are back to normal. Maximum medical improvement simply means that at the point in your last visit, there was nothing further that I felt we could do to help your situation, nor did I feel at that point any specific further treatment was necessary. This does not in any way mean to imply that I think you are 'fully recovered'."

ISSUES

1. Whether Claimant is eligible to receive disability benefits in the form of temporary partial disability or temporary total disability benefits?

The Supreme Court has adopted the "favored work" doctrine in determining whether claimants are entitled to workers' compensation benefits. "In general, a claimant who refuses favored (light duty) work, due to non-medical reasons, temporarily forfeits his right to compensation benefits." *Beckman v. John Morrell & Co.*, 462 N.W.2d 505, 509-10 (S.D. 1990). The Supreme Court explained the doctrine:

> The "favored work" doctrine, a judicial creation and term of art, imposes limits on claimants so as to "allow an employer to reduce or completely eliminate compensation payments by providing work within the injured employee's physical capacity." See *Pulver v. Dundee Cement Co*., 515 NW2d 728, 736 (Mich. 1994). … [T]he "favored work" doctrine is implicated when an employee is given the opportunity to continue employment through "favored work" with his or her employer. If the employee refuses such "favored work," then, under the doctrine, the employer cannot be legally obligated to remit workers' compensation benefits to that employee, due to his or her refusal of such work.

McClaflin v. John Morrell & Co., 2001 SD 86, ¶14 n.5, 631 NW2d 180, 185 n.5 (2001). Claimant was given work by Employer that fit within her medical restrictions. Claimant considered the work to be mundane and boring, however, it was work. The office work would have fit the restrictions and would be considered "favored work." Claimant refused the work for non-medical reasons.

South Dakota courts have provided precedent for when a claimant refuses "favored work" for medical reasons, but there is no case law in South Dakota for when a claimant refuses "favored work" for non-medical reasons. In his dissent in the case of *Beckman v. John Morrell & Company*, Chief Justice Miller wrote, "[u]nder the favored-work doctrine, the employer carries its burden of persuasion to show that the tendered job is within the claimant's residual capacity. Upon such showing, the burden of persuasion then shifts to the claimant to show that he is justified in refusing the offer of modified work." *Beckman v. John Morrell & Co.*, 462 NW2d 505, 510 (SD 1990) (Miller, C.J. dissent) (citing *Talley v. Goodwin Brothers Lumber Co.*, 224 Va. 48, 294 SE2d 818 (1982)).

In the *Beckman* case, the claimant made himself unavailable for "favored work" due to his participation in a union strike; therefore the employer did not offer the claimant any light-duty or favored work. *Beckman* at 509-510. The claimant did not refuse any favored work as he it was never offered by the employer. Id. The Department of Labor denied temporary total disability benefits to the claimant based upon claimant's unavailability for favored work. The Supreme Court affirmed the Circuit Court and the Department's denial of temporary total disability benefits. See *Beckman* generally. The Court did not consider whether Claimant's reasons for his unavailability were justified or whether Claimant's reasons were "good cause."

A few months prior to the issuance of the *Beckman* decision, the South Dakota Supreme Court issued the opinion of *Whitney v. AGSCO Dakota*. *Whitney v. AGSCO Dakota,* 543 NW2D 847 (SD 1990). In that case, the claimant requested his award of disability be reopened due to a "change of condition", pursuant to SDCL 62-7-33. The change of condition was economic as opposed to physical. The Supreme Court adopted the interpretation of "change in condition" as used by the federal courts. In the opinion, the Court agreed with and quoted a Colorado court's opinion regarding some of the guiding principles behind workers' compensation. The opinion is as follows,

> The rationale behind these [federal] cases is a recognition of the fundamental principle that the workers' compensation laws were designed to compensate for diminishment of a worker's earning capacity due to specified physical or mental injuries. (citations omitted) The laws are not intended to protect against diminishment of a worker's earning capacity due to mass layoffs and other external fluctuations in economic conditions. *Workers' compensation should not become, by way of strained construction, unemployment insurance.*

Whitney, 543 NW2d at 851 (quoting *Lucero v. Climax Molybdenum Co.*, 732 P2d 642, 647 (Colo. 1987)) (emphasis added).

The Supreme Court went on to write: "Our legislature certainly did not intend that the benefits to be derived from the worker's compensation law be an absolute financial substitute for salaried employment." Id. at 851. Claimant, in this current case, refused "favored work" for non-medical reasons. Those reasons may have been "good cause" under the unemployment insurance laws, but the reasons were still non-medical. Workers' compensation benefits are to relieve a claimant who is out of work due to medical reasons.

Claimant is not entitled to TTD or TPD after refusing light-duty or "favored work" for non-medical reasons. Summary Judgment is granted to Employer and Insurer on this issue.

2. Whether Claimant is entitled to future medical benefits or treatments?

Claimant has reached MMI, but her treating physician, prior to discharge from care, recommended that Claimant return for further treatments if still in pain. Claimant has not returned to her physician because Employer and Insurer denied benefits. At the time of her discharge, Dr. Lawlor was of the opinion that Claimant will continue to suffer from injuries sustained as an independent aggravation of her work-related injuries. Claimant would like to return to Dr. Lawlor for additional epidural injections but has not, as Employer and Insurer has denied coverage.

South Dakota law requires an employer to provide all necessary medical and surgical treatment to employees covered by workers' compensation insurance. SDCL 62-4-1. The South Dakota Supreme Court has clarified the burden of showing reasonable and necessary medical expenses. "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." *Engel v. Prostrollo Motors*, 2003 SD 2, ¶ 32, 656 NW2d 299, 304 (SD 2003)(quoting *Krier v. John Morrell & Co.*, 473 NW2d 496, 498 (SD 1991) (emphasis in original).

Furthermore, state law provides under SDCL 62-1-18 that, "If an employee who has previously sustained an injury, or suffers from a preexisting condition, receives a subsequent compensable injury, the current employer shall pay all medical and hospital expenses and compensation provided by this title."

Employer and Insurer's expert, Dr. Cederberg, in his deposition of July 14, 2007, said that as of his examination of Claimant in April, he "cannot imagine any other treatment that would be of benefit to her." Dr. Cederberg's opinion was made prior to Dr. Lawlor prescribing and giving Claimant a series of epidural injections. These injections were covered by workers' compensation insurance. Employer and Insurer accepted that the treatments and prescriptions were necessary. It is not argued that Claimant received no benefit from the injections. Therefore, the Department rejects Employer and Insurer's argument that all treatments after MMI are unnecessary. Dr. Cederberg may not be able to imagine what treatment could benefit Claimant; but her treating physician, Dr. Lawlor, may be able to do so.

Dr. Lawlor gave the opinion that Claimant did not need treatment in December 2007, but will likely need future treatment for her back injury. Dr. Lawlor, however, did not specify what treatment may be necessary. Employer and Insurer have not shown they are entitled to a judgment, as a matter of law, that all future medical treatments for Claimant are unnecessary. No future medical treatments have been ordered by the treating physician and the necessity of such is a question of fact that may be debated after they have been ordered. Whether a specific treatment is not medically necessary is a material question of fact yet to be determined.

Material fact remains whether Claimant requires further medical treatment and whether the treatment relates back to her injury in January 2007. Claimant presented evidence that, when viewed in the most favorable light, shows that she will require future medical treatment. Questions of material fact remain. Employer and Insurer are not entitled to judgment as a matter of law, in regards to the issue of reimbursement of future medical treatment.

Partial Summary Judgment is granted to Employer and Insurer in regards to the issue of temporary disability benefits.

This Letter Decision constitutes the Order of the Department.

Sincerely,

_____
Catherine Duenwald
Administrative Law Judge