September 26, 2013

Jeffrey P. Maks
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Letter Decision and Order

Timothy J. Becker
Banks, Johnson, Kappelman & Becker
P.O. Box 9007
Rapid City, SD 57709-9007

Re: HF No. 67, 2011/12 – Deanna Johnson v. City of Rapid City

Dear Mr. Maks and Mr. Becker:

Submissions:

This letter addresses the following submissions by the parties:

May 9, 3013	City's Motion for Summary Judgment;
	City's Statement of Undisputed Material Facts:
	City's Brief in Support of Its Motion for Summary Judgment;
	Affidavit of Timothy J. Becker;
August 14, 2013	Claimant's Brief in Resistance to Employer/Self-Insurer's Motion for Summary Judgment;
	Claimant's Statement in Opposition to City's Statement of Undisputed Material Facts;
	Affidavit of Robert H. Arnio, PhD.:
	Affidavit of Counsel; and

August 30, 2013	City's Reply Brief in Support of Its Motion for Summary judgment

Facts:

The relevant facts of this case are as follows:

1. Deanna Johnson (Johnson) was employed by the Rapid City Police Department (City) for almost 19 years.

2. During the time Johnson worked for the City, she held a variety of clerical and administrative positions. All of those positions required her to sit at a desk typing and using a computer mouse for 6 to 7 hours per day. The rest of her work day was spent answering the phone. The last position she held was Police Support Technician's Supervisor.

3. In November 1995, Johnson submitted a first report of injury indicating that she was experiencing pain in her left hand, wrist and fingers. She also stated that she had experienced the same pain in July, August and September of 1994, but had not reported it because she thought it was associated with her pregnancy at that time.

4. Johnson, again, filed a first report of injury in October 2006, with complaints of shooting pain up the arm and constant pain in her left wrist, thumb and hand, and tingling in her fingers.

5. Claimant began experiencing right hand and wrist pain around February 2008.

6. In April 2008, Johnson had a slip and fall on ice while taking her children to school. In the fall, both of her hands and wrists were forced back as she hit the ground.

7. In May 2008, Johnson filed a first report of injury stating that she had pain in her right hand, wrist and lower arm. Since this first report of injury, her pain has progressed over time to include her left hand, wrist and lower arm, left shoulder, upper back along with severe headaches.

8. Johnson has received treatment for the pain indicated in her May 2008 first report of injury and the pain that has evolved since from numerous physicians from May of 2008 through at least April of 2012. This includes an evaluation at the Mayo Clinic in Rochester, Minnesota and a Psychologist, Dr. Robert H. Arnio, PhD. Johnson was referred to the Mayo Clinic by Dr. Wessel, a Rapid City, South Dakota physician.

9. On October 8, 2009, Dr. Wayne Anderson performed an independent medical evaluation (IME) of Johnson at the City's request. As a result of Anderson's examination, he opined that her employment was not a major contributing cause of her condition. Following Anderson's IME, City denied further coverage for Johnson's medical treatment.

10. Dr. Gelfman and Dr. Arnio, PhD. opined that Johnson's pain is work related.

11. Dr. Lawlor opined that work was "a" contributing factor to her symptoms and that there were other contributing factors as well.

12. Dr. Dale Anderson, Dr. Wayne Anderson, and Dr. Steven Frost all opine that the Claimant's pain and problems are of unknown etiology.

13. Dr. Wessel has indicated that Johnson's pain is of unknown etiology and on numerous occasions has indicated in his medical notes that her pain was work related.

14. Additional facts may be discussed in the analysis below.

Summary Judgment:

City has filed a Motion for Summary Judgment. 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, 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. 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)).

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. In this matter, it is also a material fact. There is clearly a diversity of opinions among the experts as to whether Johnson's work at the City was a major contributing cause of her pain. Dr. Gelfman and Dr. Arnio, PhD. opine that it is. Dr. Wayne Anderson opines that it is not. Dr. Lawlor's opinion must be construed to mean that the work was a major contributing cause of her condition.[1] Some experts apparently do not know. Consequently, an issue of material fact exists in this case.

City makes two arguments that deserve additional comment. First, it argues that the opinion of Dr. Gelfman, who works at the Mayo Clinic, should not be considered because he is not licensed to practice medicine in South Dakota. The requirement to be licensed in South Dakota, in part, stems from the definition of "medical practitioner set forth in SDCL 62-1-1.1.[2] The term "medical practitioner" appears in two statutes of relevance. The first is SDCL 62-7-1, which deals with compulsory IME's and is not applicable here. The other is SDCL 62-4-43, which requires a claimant to choose a medical provider licensed in South Dakota. However, this statute does not require a referral from that practitioner to be licensed here.[3] More importantly for purposes of this analysis, there is nothing which suggests that an expert must be licensed here before offering an opinion in a workers' compensation case.

A public policy interest is served by requiring an injured employee to choose a qualified medical provider to first treat her injury. The same is true of a medical provider chosen by the insurer to perform an IME. However, once the injured employee is under the care of a qualified medical provider, that provider is in the best position to know what further treatment is required and by whom. No public policy would be served by limiting those referral choices to South Dakota physicians, when the best care can be provided by someone from another state.

Here, Dr. Wessel properly referred Johnson to the Mayo Clinic because he thought they were in the best position to help her. Gelfman treated Johnson subject to that referral and there is nothing to prevent him from offering an opinion in this case.

City's second argument is that summary judgment should be granted because the experts opinions relied on by Johnson were made some time ago. Therefore, they cannot speak to whether Johnson's work activities are a major contributing cause of her current condition. First, Johnson has received medical treatment on a fairly continuous basis since 2008. While the record does not precisely pinpoint the date City denied

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[1] Dr. Lawlor opined that work was "a" contributing factor to her symptoms and that there were other contributing factors as well." When considering whether a movant is entitled to summary judgment. 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,

[2] Medical practitioner defined. For purposes of this title only, a health care provider licensed and practicing within the scope of his profession under Title 36 is a medical practitioner. SDCL 62-1-1.1.

[3] The employee may make the initial selection of the employee's medical practitioner or surgeon from among all licensed medical practitioners or surgeons in the state. The employee shall, prior to treatment, notify the employer of the choice of medical practitioner or surgeon or as soon as reasonably possible after treatment has been provided. The medical practitioner or surgeon selected may arrange for any consultation, referral, or extraordinary or other specialized medical services as the nature of the injury shall require. (emphasis added) SDCL 62-4-43 in part.

further medical expenses for Johnson, it was sometime after Dr. Wayne Anderson's IME, which was conducted on October 8, 2009. Consequently, there must be medical expenses at issue which are contemporaneous with those opinions. Further, Johnson has pointed out that depositions of the experts have not yet been taken. In the natural course of such proceedings those opinions would be brought up to date prior to hearing for purposes of later benefits. If that is not the case here, the City can pursue this issue again at hearing.

Order:

As noted above, issues of material fact exist. Therefore, City's Motion for Summary judgment is denied.

Sincerely,

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