June 26, 2012

LEGAL MAIL

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Sioux Falls, SD 57101-2700

RE: HF No. 6, 2011/12 – Ronald Mestas v. Millennium Recycling, Inc. and Midwest Family Mutual

Letter Decision on Motion for Continuance and Motion for Summary Judgment

Dear Mr. Mestas and Ms. Ferris:

The Department has received Employer and Insurer's Motion for Summary Judgment, and Claimant's Motion for Continuance, as well as the Responses and Replies to Responses. All pleadings and submissions to the Department, by the Parties, have been taken into consideration when deciding this Motion.

I will first deal with the Motion for Continuance filed by Claimant after Employer and Insurer filed their Motion for Summary Judgment. Generally speaking, incarceration is not an excuse for a court to grant a continuance. Claimant filed this Petition pro se, in that he was not represented by counsel. While the courts and this Department are obligated to explain the law and the process to pro se claimants, it is not the Department's duty to put the matter on hold while Claimant is in jail for an unrelated matter. Claimant can utilize the mail system and conduct limited discovery while incarcerated. Incarceration is not cause for a legal stay in the proceedings.

Claimant filed his Petition for Hearing on June 30, 2011, while incarcerated. Claimant was arrested on July 11, 2010 for DUI–4, a Class 5 Felony. On March 24, 2011, Claimant was sentenced to five (5) years in the State Penitentiary, with credit for 228

days. Claimant's expected release date is August 6, 2012, but he may be released sooner. Claimant is expecting to be paroled to the St. Francis House in Sioux Falls, after his release. Claimant was living at the St. Francis House at the time of his arrest in July 2010.

For the reasons stated above, Claimant's request for a continuance until his release is denied. I will make a determination on Employer and Insurer's Motion for Summary Judgment.

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.

Claimant was employed with Employer on April 13, 2010. On April 13, 2010, Claimant reported a lift-related injury to Employer. On April 14, 2010, Employer filled out the First Report of Injury. According to the affidavit of Vince Anderson, a manager for Employer, Claimant went to Avera HealthWorks on April 14, 2010 to receive a medical assessment.

Claimant returned to work for Employer with work restrictions and recommendations for treatment. Employer made accommodations for the lifting and pulling restrictions for Claimant, however Claimant still suffered from pain. Claimant wanted a second opinion so he went to Community Health on May 7, 2010. Dr. Demetre Skliris, a doctor with Community Health, referred Claimant to surgeon, Dr. Michael Bauer with the Surgical Institute of South Dakota. On May 10, 2010, Claimant saw Dr. Bauer who ordered a CT scan of Claimant's abdomen and pelvis. Claimant returned for a follow-up appointment with Dr. James Fink at Avera Healthworks the following day, May 11, 2010, and informed Dr. Fink that he was consulting with Dr. Bauer.

Dr. Fink's final note on Claimant's chart for May 11, 2010 was "We are waiting for information from Dr. Bauer to see what his plan is going to be and we will follow him up with this schedule once we receive his information and inform Mr. Mestas." Dr. Fink did not advise Claimant to not work.

Employer made efforts to accommodate Claimant and allow for the restrictions. Claimant did not feel the accommodations were adequate for the amount of pain he was experiencing. Employer's accommodation was to have Claimant work on lighter items. Claimant is a dwarf and medical records indicate that he is four feet tall. He is shorter than average height. He cannot work at a work station or table of normal height without accommodation. Employer's on-going accommodation for Claimant was to require Claimant to step onto a crate or plastic "tote" to reach the work surface to perform tasks. Claimant was also lifting items onto the table, and was required to step onto and off of a tote container every 7 to 8 minutes with the item in hand. Dr. Fink also had Claimant wearing an athletic cup or scrotal support which increased Claimant's discomfort especially when stepping up and down.

Claimant did not return to work after seeing Dr. Fink on May 11, 2010. He came into the office and told Employer that he needed some time to heal. Employer did not authorize the time off. On Friday, Claimant telephoned Employer to inquire about his paycheck, Employer told Claimant to bring in his uniforms. The employment relationship between the parties terminated at that time.

On June 9, 2010, Dr. Bauer saw Claimant again for his right inguinal pain. The CT scan did not show any signs of a right inguinal hernia but a very small left inguinal hernia. According to his notes, Dr. Bauer did not recommend surgery, but recommended that Claimant continue to watch the injury and take pain medication on occasion. Dr. Bauer's medical impression of the injury was that it was a muscle strain ligamentous insertion point injury. He was under the impression that the pain would resolve with non-operative management. Employer and Insurer have not contested that Claimant did receive a work-related injury and treatment of the injury by the initial medical provider is covered under the workers' compensation laws.

The above stated facts are undisputed.

Claimant's pleadings indicate that he is requesting payment of temporary disability benefit payments from May 11, 2010, until the time he was incarcerated on July 11, 2010; as well as payment of Dr. Bauer's medical bills.

1. Temporary Total Disability Benefits or Temporary Partial Disability Benefits

Claimant separated from Employer on May 11, 2010. Claimant was incarcerated on July 11, 2010. Claimant's separation was not due to the doctor's restrictions. 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). The work offered by Employer to Claimant would have fit the restrictions and would be considered "favored work."

South Dakota courts have provided precedent for when a claimant refuses "favored work" for 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, Beckman made himself unavailable for "favored work" due to his participation in a union strike; therefore John Morrell did not offer Beckman any light-duty or favored work. *Beckman* at 509-510. Beckman did not refuse any favored work as it was never offered by John Morrell. *Id*. The Department of Labor denied temporary total disability benefits to Beckman based upon his 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 Beckman's reasons for his unavailability were justified. *Id.*

In this case at hand, Employer and Insurer have shown that the work offered by Employer was "favored work" in that accommodations would be made. The burden then shifts to Claimant to show medical justification as to why he refused the work or was unavailable for work. The pleadings indicate that he was discharged for failing to appear at work and took an authorized leave of absence. Claimant then was arrested on July 11, 2010 and his failure to be employed through the present time is not due to medical reasons. Claimant's departure from his job was not medically justified or excused by his doctor. Workers' compensation benefits are to relieve a claimant who is out of work due to medical reasons. Claimant lost his job due to other non-medical reasons.

Claimant is not entitled to TTD or TPD from May 11, 2010 through July 11, 2010.

2. Payment of medical bills from Dr. Bauer's office

Claimant was referred to the surgeon, Dr. Bauer, by the physician at Community Health. Claimant went to Community Health to obtain a second opinion. Claimant initially went to Avera HealthWorks and was following the treatment and restrictions ordered by Dr. Fink at Avera HealthWorks.

Under South Dakota law, Claimant is allowed to make the initial selection of a medical practitioner. If Claimant wants a second opinion, he is allowed to do so, but the law does not require the Insurer or Employer to pay for a second opinion. The initial medical provider can refer a patient to another doctor or the employer may approve of a different provider. SDCL §62-4-43.

SDCL § 62-4-43 reads in part:

> 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. The employer is not responsible for medical services furnished or ordered by any medical practitioner or surgeon or other person selected by the employee in disregard of this section. … If the employee desires to change the employee's choice of medical practitioner or surgeon, the employee shall obtain approval in writing from the employer. An employee may seek a second opinion without the employer's approval at the employee's expense.

The spirit and intent of SDCL § 62-4-43 is to allow the Claimant to choose his initial doctor and not continue to shop for a more favorable medical opinion. If Claimant wishes to change his medical practitioner, without a referral from his initial selection, he may do so if Employer approves the choice of doctor.

Claimant did not receive a referral to Dr. Bauer from Dr. Fink. Dr. Skliris, the second opinion doctor, made the referral. Furthermore, Claimant did not consult with Employer and Insurer before seeing Dr. Bauer or going for a second opinion. Because payment of the second opinion is not the responsibility of Employer and Insurer, neither is the payment of Dr. Bauer.

In Conclusion, there are no questions of material fact between the parties and the Employer and Insurer are entitled to judgment as a matter of law. Therefore, Employer and Insurer's Motion for Summary Judgment is granted. Claimant is not entitled to the

payment of the medical bills presented from Dr. Bauer. Claimant is also not entitled to disability benefits for the loss of wages after receiving a work-related injury. As there are no outstanding issues, the Petition for Hearing is Dismissed.

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

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

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Catherine Duenwald
Administrative Law Judge