SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION
DIVISION OF LABOR AND MANAGEMENT

STEVEN DIETRICH, **HF No. 80, 2010/11**

Claimant,

v. **DECISION ON MOTIONS FOR SUMMARY JUDGMENT**

FED EX GROUND,

Employer,

and

PROTECTIVE INSURANCE,

Insurer.

The Department is in receipt of and has considered Employers and Insurer's Motion for Summary Judgment; Claimant's Motion to Dismiss Employer and Insurer's Motion for Summary Judgment; Claimant's Motion for Summary Judgment; Employer and Insurer's Response to the Claimant's Motions; and all supporting affidavits, evidence, and briefs to the above pleadings. Furthermore, all previous pleadings, affidavits, and evidence submitted in this file have been considered in these Cross-Motions for Summary Judgment.

Undisputed Facts

Claimant was employed by Employer on March 10, 2010, and was at work for Employer when he sustained an injury to his back. Employer was promptly notified of the work-related injury by Claimant. Insurer reported Claimant's injury to the SD Department of Labor and Regulation on October 11, 2010. An administrative fine of $100 was imposed on Employer by the Department for failing to promptly report a workers' compensation injury, pursuant to state law SDCL §62-6-2.

Claimant was seen by Dr. Clayton Van Balen at the Sanford Occupational Medicine and Walk-In Clinic on March 10, 2010. Claimant was given work restrictions and prescriptions for pain relief as well as physical therapy. Claimant was seen again by Dr. Van Balen on April 23 and May 13. Claimant had an MRI of his lumbar spine taken on May 11, 2010, at the USD Medical Center. Dr. Van Balen referred Claimant to a spine specialty clinic. On August 23 and 31, 2010, Claimant received spine injections at the Sanford Spine Center, Dr. Christopher Janssen, MD.

At no time has Employer or Insurer denied Claimant medical treatment for the injuries he has sustained, pursuant to SDCL §62-4-1. Claimant did not miss any work while treating for his injuries. Claimant was given lifting restrictions which he passed along to Employer. Claimant continued to lift packages that weighed more than his restrictions allowed. To his knowledge, Claimant did not suffer an exacerbation of any preexisting condition with the work-related injury.

Claimant did not know that he had the first choice of medical provider under SD law, SDCL §62-4-1, as he was not given any information from Employer regarding workers' compensation rights.

On December 15, 2010, Claimant filed a Petition for Hearing with the Department. Claimant requested a hearing to "determine why [he] was denied [his] rights, information and benefits guaranteed [him] by the South Dakota Workman's Compensation Law." An Answer was filed by Employer and Insurer on January 14, 2011.

Disputes of fact are not material unless they change the outcome of a case under the law. *Hall v. South Dakota Dept. of Transportation*, 2011 SD 70, ¶9 n.3 (citing *Jerauld Cnty. v. Huron Reg'l Med. Ctr., Inc.*, 2004 S.D. 89, ¶ 41 n.4, 685 N.W.2d 140, 149 n.4). There are no disputed facts that would change the outcome of this case. The parties are entitled to judgment as a matter of law.

Statutory Authority

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, 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.

Id. 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. **On the other hand, [t]he party opposing a motion for summary judgment must be diligent in resisting**

> **the motion, and mere general allegations and denials which do not set forth specific facts will not prevent issuance of a judgment. [T]he nonmoving party must substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy.**

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

The guiding principles for a summary judgment determination are well settled and have been set out by the South Dakota Supreme Court as follows:

> (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).

Analysis

Through numerous Interrogatories and Motions to Compel by both Claimant and Employer and Insurer, Claimant has been given the opportunity to present any evidence that he is owed any workers' compensation benefits by Employer and Insurer. Claimant has not presented evidence or made the argument that he is eligible for any temporary or partial disability benefits or permanent disability benefits under SDCL §§62-4-3 through 62-4-7. All of Claimant's medical procedures and prescriptions have been paid for by Employer and Insurer. Claimant has not presented any evidence that he is owed any medical or hospital expenses due to his work-related injury.

Claimant's sole argument in the Petition for Hearing is that he was not given information by Employer and Insurer in a timely manner, regarding his rights under the South Dakota Workers' Compensation laws. The duty of Employer and Insurer to keep injury records is found at SDCL §§62-6-1 through 62-6-3. Claimant's argument is that he would have chosen a

different doctor or health care provider, had he known he had the first choice in medical care. Claimant also argues that because he did not know his rights under the law immediately after his injury occurred, he may be eligible for benefits for which he is unaware. There is an axiom the Courts have relied upon for many years: "Mere ignorance of the law can never be considered a mistake upon which relief from the operation or effect of the law may be predicated." *Sherin v. Eastwood*, 32 S.D. 95, 101, 142 N.W. 176, 179 (1913). Just as Employer cannot use Claimant's ignorance of the law as a shield against paying benefits rightly owed; Claimant cannot now use that same ignorance as a sword against Employer.

Although they initially failed to report the injury to the Department of Labor, Employer and Insurer have always recognized Claimant's injury as work-related and have paid medical benefits. Claimant cannot assert that he may have been entitled to or still is entitled to benefits for which he is unaware. More than speculation is needed for Claimant to prove that benefits are owed. "[The Claimant] need not establish the requirements with absolute certainty, but recovery may not be granted on mere possibility or speculation." *Sauer v. Tiffany Laundry & Dry Cleaners*, 2001 S.D. 24, ¶10, 622 N.W.2d 741, 744 (citation omitted).

Claimant's Petition for Hearing is based upon the speculation that there may be benefits outstanding for which he has not submitted a claim. Relief cannot be granted by the Department on a basis of speculation.

Employer and Insurer's Motion for Summary Judgment is granted. Claimant's Motion for Summary Judgment is denied. Claimant's Petition for Hearing is Dismissed. As this is a Summary Judgment, Findings of Fact and Conclusions of Law are not required. An Order consistent with this Decision is attached.

Dated this 3rd day of April, 2012.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

/s/
Catherine Duenwald
Administrative Law Judge