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RE: HF No. 9, 2011/12 – Aaron Caudill v. MCT Transportation LLC and Dakota Truck Underwriters

Letter Decision on Motion for Partial Summary Judgment

Dear Counsel:

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

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.

This Motion for Partial Summary Judgment addresses the questions of whether Claimant is entitled to temporary partial disability benefits from June 11 to July 8, 2011 and whether Employer and Insurer are estopped from denying the benefits to Claimant due to the equitable remedies of waiver and estoppel. Employer and Insurer make the argument that they were legally entitled to suspend the payment of benefits from April 6, 2011 to July 8, 2011 pursuant to SDCL 62-7-3 and 62-4-5 and that Claimant, is not entitled to benefits during that time period.

Undisputed Material Facts

Claimant, Aaron Caudill, was employed by Employer, MCT Transportation LLC, on or about July 12, 2010. At that time Employer carried workers' compensation insurance with Insurer, Dakota Truck Underwriters. On or about July 12, 2010, Claimant suffered an injury to his hand while at work. Employer and Insurer paid for and Claimant received medical treatment for his injury. Employer and Insurer paid Claimant temporary total disability benefits from the date of injury through March 23, 2011. From March 23, 2011 through June 11, 2011, Employer and Insurer paid Claimant temporary partial disability benefits.

On March 23, 2011, Employer and Insurer arranged a part-time temporary job for Claimant that would accommodate his restrictions. Claimant could also attend his physical therapy appointments while working for this temporary employer. Claimant worked this job on March 25 and March 30, 2011. Without notification to the employer, Claimant failed to go to his scheduled work on March 28, April 1 and 4, 2011.

When he started his temporary job, Claimant initially asked his temporary employer to assign tasks to him that fit his medical restrictions. The temporary employer reassigned Claimant to a task that Claimant could perform. The new task eventually caused Claimant pain in his injured arm and hand. Claimant did not ask to be reassigned a second time. At a medical appointment on April 4, 2011, Claimant indicated to Insurer, through the nurse case manager, that he was unable to perform the tasks assigned to him. The treating physician, Dr. Bruggeman, advised that Claimant should not be performing tasks that caused pain in his injured hand and arm. The restrictions were not changed and Dr. Bruggeman advised that Claimant should be working. The nurse case manager indicated to Claimant that she would be in contact with Claimant regarding his temporary employment.

On April 20, 2011, Insurer contacted Claimant in regards to Claimant's nonappearance at the temporary employment. Claimant informed Insurer that he was moving from Omaha, NE to his family's home in Maryland. Insurer scheduled Claimant to see Dr. Keith Segalman on May 23, 2011, in Maryland, to evaluate and potentially treat Claimant's injury. Claimant had a scheduling conflict with May 23 so the appointment was changed to June 6, 2011. Claimant did not attend the appointment on June 6, 2011 with Dr. Segalman.

Employer and Insurer discontinued payments of temporary partial benefits to Claimant on June 11, 2011 due to nonappearance at the June 6, 2011 appointment, pursuant to SDCL §62-7-3. Employer and Insurer also indicated to Claimant that payments of disability benefits were also suspended due to his failure to accept employment within his restrictions, pursuant to SDCL §62-4-5. Both reasons for suspension were put in a letter from Insurer to Claimant's attorney on June 23, 2011.

Claimant moved from Maryland to Council Bluffs, Iowa in June, 2011. Claimant saw his treating physician, Dr. Bruggeman on July 8, 2011, regarding the continued symptoms in his hand and arm. During the appointment on July 8, 2011, Dr. Bruggeman determined that Claimant had reached maximum medical improvement (MMI). On or about August 25, 2011, Dr. Bruggeman assigned Claimant an 8% impairment rating that was later converted to a 10% impairment rating.

Insurer issued Claimant a lump sum permanent partial impairment payment on December 1, 2011, pursuant to SDCL §62-4-6 that related back to July 8, 2011; the date when Claimant reached MMI. These material facts are not in dispute.

ANALYSIS AND DECISION

SDCL §62-4-5 sets out the formula for temporary partial disability benefits. Claimant was released by his treating physician to perform work with certain restrictions. Claimant was not to overwork his injured arm and was given a lifting restriction. Employer and Insurer arranged for Claimant to work for a non-profit agency in a temporary position that would accommodate his injury. This type of light duty work arrangement saves money for Employer and Insurer by reducing the amount of disability benefits paid out, and it allows a claimant to return to the labor force.

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)).

Claimant refused the work due to pain in his injured arm, or a documented medical reason. Shortly after stopping his employment, Claimant explained this to his doctor and the nurse case manager; Employer and Insurer should have been aware of this situation; the nurse case manager makes direct reports to the Insurer. The doctor, during this appointment on April 4, advised both Claimant and the nurse case manager that Claimant should not be performing tasks that cause pain. As an agent of Insurer, the nurse case manager left Claimant with the impression that she would inform contact Claimant and speak with the temporary employer. The Insurer did not contact Claimant in regards to the favored work until such time as he was moving out of state. Employer and Insurer did not suspend benefits at that time but continued to pay TPD to Claimant through June 11, 2011.

Estoppel & Waiver

Claimant makes the argument that Employer and Insurer waived their right to deny benefits paid to Claimant from April 4, 2011 to June 11, 2011. "Waiver is the volitional relinquishment, by act or work, of a known, existing right conferred in law or contract." *Harms v. Northland Ford Dealers*, 1999 SD 143, ¶17, 692 N.W. 2d 58, 62 (citing *Wieczorek v. Farmers' Mut. Hail Ins. Ass'n of Iowa*, 247 N.W. 895, 897 (SD 1933)). "A waiver exists where one in possession of any right, whether conferred by law or by contract, and of full knowledge of the material facts, does or forbears the doing of something inconsistent with the existence of the right or of his intention to rely upon it." *Western Casualty and Sur. Co. v. American Nat'l Fire Ins. Co.*, 318 N.W.2d 126, 128 (SD 1982). Employer and Insurer had full knowledge of the fact that Claimant was not performing "favored work" although given a release to work by his treating physician. Employer and Insurer did not take any immediate action to suspend the payment of TPD benefits, but continued to pay for an additional 10 weeks after Claimant refused "favored work." In the June 23, 2011 letter to Claimant's attorney, Employer and Insurer claim that TPD payments made to Claimant prior to June 11, 2011 were being contested as an overpayment.

Regarding the potential overpayment to Claimant, the South Dakota Supreme Court has made a ruling on this type of circumstance. In the case of *Tiensvold v. Universal Trans., Inc.*, 464 N.W.2d 820 (S.D. 1991), the Supreme Court adopted the reasoning that an employer and insurer should be reimbursed if an overpayment is made in good faith. They wrote:

> We base our holding upon the general premise that an employer is entitled, upon the award of compensation being made against it, to credit or reimbursement for any payments which may have already been made to the worker in advance by way of compensation for the injury in question. 82 Am.Jur.2d, Workmen's Compensation 365. This general treatise authority is buttressed by holdings in *Huston v. Workers' Compensation Appeals Board*, 95 Cal.App.3d 856, 157 Cal.Rptr. 355 (1979); *Belam Florida Corp. v. Dardy*, 397 S.2d 756 (Fla.App. 1981) and *Wilson Food Corp. v. Cherry*, 315 N.W.2d 756 (Iowa 1982). We particularly adopt the rationale of the Iowa Supreme Court in *Wilson Food Corp.* which stated:
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> > It is argued that it is unfair to allow the employer to recoup for his own error at the inconvenience to the claimant. We think not. We think the public interest will be better served by encouraging employers to freely pay injured employees without adversary strictness. It is not so unfair to compel

> the claimant to face at an earlier date the termination he would face later in any event so as not to penalize the employer.
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> *Id*. at 758. (Emphasis added).
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> We also adopt the reasoning in *Western Casualty and Surety Company v. Adkins*, 619 S.W.2d 502 (Ky.App. 1981) wherein it was held: Any statutory interpretation which would penalize an employer who voluntarily makes weekly payments to an injured employee in excess of his ultimate liability would certainly discourage voluntary payment by employers and would therefore constitute a disservice to injured workers generally. *Id*. at 504.

Tiensvold v. Universal Trans., Inc., 464 N.W.2d 820, 825 (S.D. 1991). Employer and Insurer did not waive their rights to collect any potential overpayment from Claimant. Claimant is not entitled to judgment as a matter of law regarding the issue of waiver.

An alternative argument made by Claimant is that Employer and Insurer misled Claimant into believing that the temporary employee would not accommodate Claimant's pain, therefore estopping Employer and Insurer from denying benefits to Claimant. The Courts have written, "estoppel is typically reserved for cases where the employer makes "assurances, misrepresentation, negligent, or even deliberate deceptions." *Vaughn v. John Morrell & Co.*, 2000 SD 31, ¶37, 606 N.W.2d 919, 926. In South Dakota the four elements of equitable estoppel are:

> 1. False representations or concealment of material facts must exist;
> 2. The party to whom it was made must have been without knowledge of the real facts;
> 3. The representations or concealment must have been made with the intention that it should be acted upon; and
> 4. The party to whom it was made must have relied thereon to his prejudice or injury.

Hahne v. Burr, 2005 SD 108, ¶17, 705 N.W.2d 867, 873 (citing *Cleveland v. Tinaglia*, 1998 SD 91, ¶38, 582N.W.d 720, 727.)

The paperwork and letter describing the job with the temporary employer specifically says that accommodations will be made for medical restrictions. Claimant, in fact, immediately asked for accommodations in regards to a lifting restriction and the accommodations were granted. Employer and Insurer did not mislead Claimant in a manner that resulted in his leaving his position. The nurse case manager did say she would get back to Claimant regarding the job, and failed to do so. Those assurances made by Insurer were not made to someone who was unaware of the real facts. The facts do not meet the elements of equitable estoppel.

However, the undisputed facts indicate that Claimant left work for medical reasons. The medical reasons are documented by Dr. Bruggeman. Employer and Insurer failed to follow through with their assurances to get in touch with Claimant in regards to the job. Claimant has met his burden of persuasion to show that he was justified in leaving the work for the temporary employer. The reasons why he left were strictly medical in nature. The evidence does not show that Claimant refused to work due to nonmedical reasons. Claimant has shown he is entitled to judgment as a matter of law and has shown that Claimant did not return to "favored work" due to medical reasons.

SDCL §62-7-3 allows an employer and insurer to temporarily suspend disability benefit payments if a claimant refuses to submit himself to an independent medical exam (IME) or §62-7-1 exam. The claimant is not eligible for benefits that would have been awarded from the time he fails to attend an IME or §62-7-1 exam to such time as he attends the IME or reaches MMI.

Claimant rescheduled the §62-7-1 exam for June 6, 2011 and then failed to attend the appointment. Employer and Insurer were within their statutory rights to stop paying disability benefits to Claimant until such time as he attended an exam arranged by Insurer or until his doctor indicated that Claimant reached MMI, whichever came first. At Claimant's medical appointment with his treating physician on July 8, 2011, Dr. Bruggeman advised that Claimant had reached MMI.

SDCL §62-1-1(8) defines temporary disability, total or partial as: "the time beginning on the date of injury, subject to the limitations set forth in §62-4-2, and continuing until the employee attains complete recovery or until a specific loss becomes ascertainable, whichever comes first." An "ascertainable loss … becomes ascertainable when it becomes apparent that permanent disability and the extent thereof has resulted from an injury and that the injured area will get no better or no worse because of the injury[.]" SDCL §62-1-1(2).

After July 8, 2011, Employer and Insurer were no longer responsible for paying TPD, but were responsible for paying the Permanent Partial Disability (PPD) benefits pursuant to §62-4-6. Employer and Insurer paid a lump sum PPD payment to Claimant that related back to the date he reached MMI or when his permanent partial loss became ascertainable.

The material facts regarding this question are not at issue. Claimant is not legally entitled to TPD from June 11, 2011 through July 8, 2011, pursuant to SDCL §62-7-3. Employer and Insurer did not waive their right to suspend benefits under SDCL §62-7-3. This reason for suspending benefits was given to Claimant at the time of the suspension. Claimant is not entitled to judgment as a matter of law and not entitled to benefits during that time frame.

The Motion for Partial Summary Judgment is granted in part and denied in part.

There is no pending Cross-Motion for Partial Summary Judgment from the Employer and Insurer and the Department would entertain such Motion, if they so choose. The Department retains jurisdiction over this matter as outstanding issues from the Petition for Hearing are pending.

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