October 18, 2007

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RE: HF No. 117, 2005/06 – Curtis Nessan v. Brosz Engineering Incorporated and American Family Insurance

Dear Mr. Hoy and Ms. Raymond:

I am in receipt of Employer and Insurer's Motion for Partial Summary Judgment, along with supporting argument and documentation. Claimant has provided a brief in resistance to Employer's Motion, and Employer has submitted a Reply Brief. I have carefully considered these submissions.

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 of 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 Motion for Partial Summary Judgment relates to the medical expenses from the treatment of Claimant by Dr. Mitchell Johnson. The facts, for which there is little disagreement by either side, indicate that Claimant initially treated with the doctors at the Medical Associates Clinic at the time of the accident, May 29, 2003. Claimant was referred to Dr. Puumala, and continued under his care until November 2004. Employer/Insurer approved and paid for the medical treatment by Dr. Puumala. Dr.

Puumala recommended a surgical option to Claimant. The surgery was not approved by Employer / Insurer. On February 15, 2005, an independent medical examiner, Dr. K. Stephen Kazi, determined that Claimant's injuries were not caused by the accident on May 29, 2003. On February 15, Insurer sent Claimant a letter denying coverage, based upon Dr. Kazi's report. As soon as Claimant was denied coverage, medical treatment was no longer available to Claimant to treat his injuries.

In August 2005, Claimant saw Dr. Mitchell Johnson from the Orthopedic Institute on his own initiative. Dr. Johnson recommended and performed a surgery on Claimant. Dr. Johnson's opinion is that Claimant's recurrent back problems were directly related to the work-related injury of May 29, 2003. Claimant did not seek Employer's approval prior to treating with Dr. Johnson.

Employer's argues that 62-4-43[1] precludes the payment of medical fees to Dr. Johnson because Claimant received medical treatment from Dr. Johnson without seeking approval from Employer. Employer cites as authority *Lori Scott v. Photos to Go and Heritage Companies*, HF No. 128, 1997/1998. The facts of *Scott* are very similar to the facts of this case, in that Lori Scott, the claimant, sought medical treatment from a secondary physician without a referral from her treating physician and without permission from her employer. Ms. Scott also had been denied coverage from the insurer/employer prior to her seeking another treating physician, and medical treatment was not available.

The Department ruled in favor of the employer / insurer in the Scott case. This decision was appealed by the claimant and a decision was made by the circuit court on May 26, 2004. Judge Max Gors, Sixth Judicial Circuit, reversed the Department's decision in *Scott*. Employer, in this case, failed to recognize or cite the decision reversing the Department's decision in their brief before the Department. Judge Gors, in his memorandum decision, held that "SDCL 62-4-43 does not fit a case where the insurer withdrew benefits." *Scott v Photos to Go,* Hughes Co., 03-119, ¶ 27 (2004). The Court went on to state, "[a]n insurer assumes the consequences of discontinuing medical treatment. Heritage lacked justification to deny coverage and "its actions are undoubtedly of a nature to vex any reasonable person." *Biegler v. American Family*

[1] **SDCL 62-4-43.** The employee may make the initial selection of his 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 his 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 is unable to make such selection, the selection requirements of this section shall not apply as long as the inability to make a selection persists. If the injured employee unreasonably refuses or neglects to avail himself of medical or surgical treatment, the employer is not liable for an aggravation of such injury due to such refusal and neglect and the Department of Labor may suspend, reduce or limit the compensation otherwise payable. If the employee desires to change his 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.

Mutual Ins. Co., 2001 SD 13 ¶58, 6321 NW2d 592, 607. Withdrawing medical coverage that is a statutory obligation is unreasonable." *Scott* at ¶32. (internal citations omitted).

Employer / Insurer's rely on case law which is precedent for the very opposite of their argument. Employer has not shown, by their argument to the Department, that they are entitled to judgment as a matter of law.

The Supreme Court has set out the principles for determining whether a grant or denial of summary judgment is appropriate.

> (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.

Jerauld County v. Huron Regional Medical Center, Inc., 2004 SD 89, 9, 685 NW2d 140, 142 (quoting **Dept. of Revenue v. Thiewes, 448 NW2d 1, 2 (SD 1989)** (citing **Wilson v. Great Northern Ry. Co., 83 SD 207, 212, 157 NW2d 19, 21 (1968)**)).

Owens v. F.E.M. Electric Assn., Inc., 2005 SD 35, 694 NW2d 274 (2005).

To grant summary judgment, it must be shown by the moving party, that 1) there is no genuine issue of material fact and 2) that he is entitled to judgment as a matter of law. ARSD 47:03:01:08. The moving party, employer, has not proven both elements. The claimant has not filed a counter motion for summary judgment.

There may be genuine issues of any material fact as to Claimant's condition and ability to work based upon Dr. Kazi's IME report. Furthermore, Employer / Insurer is not entitled to judgment as a matter of law. Employer / Insurer's Motion for Partial Summary Judgment is denied. Claimant is directed to submit an Order consistent with this decision.

Sincerely,

Heather E. Covey
Administrative Law Judge