Mr. Timothy Waugh
41992 3056th Street
Tabor, SD 57063

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LETTER DECISION

Mr. Rick W. Orr
Davenport, Evans, Hurwitz & Smith LLP
P.O. Box 1030
Sioux Falls, SD 57101-1030

RE: HF No. 147, 2009/10 Timothy Waugh v. Kolberg-Pioneer, Inc., and Liberty Mutual Fire Insurance Company

Dear Mr. Waugh and Mr. Orr:

The Department has received Employer and Insurer's Motion for Summary Judgment, Mr. Waugh's Response to that Motion, and Employer and Insurer's Reply. 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.

> 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, the 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. The 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 (internal citations omitted) (emphasis added).

At the time of the reported incident, Claimant was 48 years old. Claimant was on work restrictions for a previous injury. Claimant had surgery for a ruptured right bicep in August 2008 and was restricted from lifting anything over 10 pounds.

On February 12, 2009, Claimant reported to work at his regular time of 6:30 am. At about 7:30 am, he squatted down to pick up a couple of metal parts. It is Claimant's story that when he stood up, he felt a muscle pull go down his lower back and into his right lower extremity. Claimant was on pain medication at that time for his arm and did not feel any acute pain from his back. Claimant took a break about 8:30 am; he did not report the injury to anyone at that time. Later that morning, Employer told Claimant that he was going to be laid off from his job, along with a number of other employees.

When Claimant returned home that day, it is his testimony that his back then started to hurt. That afternoon, Claimant telephoned Employer and reported his injury to the nurse. Claimant met with Employer that same day regarding the injury. Claimant saw Dr. Schurrer, Employer's doctor with Healthworks, the following day, February 13, 2009. Dr. Schurrer's opinion was that Claimant suffered from a muscle strain. Claimant again saw Dr. Schurrer on February 17, 2009, as his back was still bothering him. Dr. Schurrer took an x-ray of Claimant's back and again advised Claimant that it was a muscle strain. The experts' evidence is set out in more complete detail below.

Dr. Schurrer reported to Employer and Insurer that Claimant's examination was generally inconsistent. Claimant was able to bend at the waist without pain, flex his hip to more than 90 degrees without any problems and have a full range of motion throughout his back and spine. However, Claimant reported some tenderness around the L4-L5 level of the spine. But Dr. Schurrer did not observe any bony tenderness Dr. Schurrer prescribed Tylenol and Tramadol as well as stretching exercises.

When Claimant returned on February 17, Dr. Schurrer observed that Claimant's body was even when Claimant bent over to remove his shoes. Claimant did not have observable issues with pain or guarding when bending to remove or put on his shoes. Dr. Schurrer again noted that there was some tenderness at the L4-L5 region on the right, but that this did not seem to cause any issues with Claimant's movement. Dr. Schurrer's opinion was that Claimant suffered a lumbar back strain and that it was a muscular issue and not having to do with Claimant's bone process.

Dr. Schurrer obtained Claimant's records from the Yankton Medical Clinic where Claimant had been treating for the previous four years. Dr. Schurrer looked at the reasons for Claimant's 76 visits to the clinic over the past four years. Most visits most had to do

with fatigue and pain, none of which concluded with any definitive diagnosis. As well, most of these visits to the clinic also resulted in a doctor's note excusing Claimant from work for Employer. These visits did not include the four visits for the ruptured bicep that Claimant had treated at Yankton Bone and Joint Clinic. Those visits had a definitive diagnosis and treatment that resulted in work restrictions.

It is Dr. Schurrer's medical opinion that Claimant is malingering. Based upon Claimant's medical history and current symptoms or lack thereof, Dr. Schurrer came to this conclusion. There were no findings from the x-rays regarding Claimant's symptoms and Claimant was unwilling to attempt any stretching or rehabilitative exercises in order to eliminate the correct the stated symptoms.

For 16 months, Claimant did not seek treatment with any other doctors regarding this injury. On May 4, 2010, Claimant saw Dr. Melvin Wallinga from the Bon Homme Family Practice clinic in Tyndall, SD, for a second opinion. He recommended that Claimant have an MRI and x-rays of his lumboscral spine as he was unable to say for certain what was wrong with Claimant. Claimant did inform Dr. Wallinga that he was not able to perform any exercise routine due to pain. This is the same as what Claimant reported 16 months prior to Dr. Schurrer. Dr. Wallinga diagnosed that Claimant had low back pain with right sciatic nerve irritation. Dr. Wallinga's notes, do not state with any degree of medical certainty, that Claimant's work activities were a major contributing cause of Claimant's condition.

A compensable injury is defined in South Dakota:

> "Injury" or "personal injury," only injury arising out of and in the course of the employment, and does not include a disease in any form except as it results from the injury. An injury is compensable only if it is established by medical evidence, subject to the following conditions:
>
> > (a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of; or
> >
> > (b) If the injury combines with a preexisting disease or condition to cause or prolong disability, impairment, or need for treatment, the condition complained of is compensable if the employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment.
> >
> > (c) If the injury combines with a preexisting work related compensable injury, disability, or impairment, the subsequent injury is compensable if the subsequent employment or subsequent employment related activities contributed independently to the disability, impairment, or need for treatment.

SDCL 62-1-1(7).

The South Dakota Supreme Court has interpreted this statute as a two-part test:

> [I]n order to prevail, an employee seeking benefits under our workers compensation law must show *both*: (1) that the *injury* arose *out of* and *in the*

> *course* of employment and (2) that the employment or employment related activities were a *major contributing cause* of the *condition* of which the employee complained, or, in cases of a preexisting disease or condition, that the employment or employment related injury is and remains a *major contributing cause* of the disability, impairment, or need for treatment. SDCL 62-1-1(7)(a)-(b); *Steinberg*, 2000 SD 36, 29, 607 NW2d 596, 606.

Grauel v. S.D. Sch. of Mines & Tech., 2000 SD 145, ¶9, 619 N.W.2d 260, 263 (emphasis in original).

To establish that Claimant's low back pain is compensable as a work-related injury, Claimant must present admissible testimony linking his injury to the incident at work. The employee must establish by a preponderance of the evidence that his injury arose out of and in the course of his employment and that his employment was *a major contributing cause* of his condition or his disability, impairment, or need for treatment. *Grauel*, 2000 SD 145, ¶19, 619 NW2d at 265. The Department looks to how the SD Supreme Court has decided cases such as these.

> With respect to proving causation of a disability, [the Supreme Court] has stated that:
>
> > [T]he testimony of professionals is crucial in establishing this causal relationship because the field is one in which laymen ordinarily are unqualified to express an opinion. Unless its nature and effect are plainly apparent, an injury is a subjective condition requiring an expert opinion to establish a causal relationship between the incident and the injury or disability.
>
> *Westergren v. Baptist Hospital of Winner*, 1996 SD 69, 31, 549 NW2d 390, 398 (quoting *Day v. John Morrell & Co.*, 490 NW2d 720, 724 (SD 1992)). A medical expert's finding of causation cannot be based upon mere possibility or speculation. *Deuschle v. Bak Const. Co.*, 443 NW2d 5, 6 (SD 1989). *See also Rawls v. Coleman-Frizzell, Inc.*, 2002 SD 130, 21, 653 NW2d 247, 252-53 (quoting *Day*, 490 NW2d at 724) (Medical testimony to the effect that it is possible that a given injury caused a subsequent disability is insufficient, standing alone, to establish the causal relation under [workers] compensation statutes.). Instead, [c]ausation must be established to a reasonable medical probability[.] *Truck Ins. Exchange v. CNA*, 2001 SD 46, ¶19, 624 NW2d 705, 709.

Orth v. Stoebner & Permann Construction, Inc., 2006 SD 99, ¶34.

Claimant saw a doctor for a second opinion in May of this year. However, Dr. Wallinga was unable to say, by a medical certainty, that Claimant suffered from a work-related injury. Furthermore, there is no finding in Dr. Wallinga's report that Claimant's alleged injury is a major contributing cause of his conditions. Dr. Wallinga's report does not create a disputed question of fact in this case.

> The guiding principles in determining whether a grant or denial of summary judgment is appropriate are:
>
> > (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).

Employer and Insurer have shown there are no genuine issues of material fact. The evidence provided by Claimant in support of his resistance to the Motion for Summary Judgment does not sustain the Claimant's assertion that he suffers from a work-related injury. Claimant has not provided sufficient information "that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy." *McDowell*, 2007 SD at ¶22. Claimant's pleadings fail to sufficiently substantiate his claim. Employer and Insurer are entitled to judgment as a matter of law. Employer and Insurer's Motion for Summary Judgment is granted.

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

Dated this ___26th____ day of August, 2010.

BY THE DEPARTMENT,

___/s/ Catherine Duenwald ____
Catherine Duenwald
Administrative Law Judge