

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

TAMMY LAGLER,

HF No. 31, 2008/09

Claimant,

v.

DECISION

MENARD'S, INC.,

Employer,

and

**ZURICH AMERICAN
INSURANCE COMPANY,**

Insurer.

This was a workers' compensation case brought before the South Dakota Department of Labor & Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. Three hearings have been held in this matter. The first was conducted on May 10, 2011. The second was conducted on September 20, 2012. The issues addressed in this Decision were heard in the third hearing held on December 2, 2015, in Sioux Falls, South Dakota. The third hearing was heard by Donald W. Hageman, Administrative Law Judge. Claimant, Tammy Lagler, was represented by Ronald Parsons. The Employer and Insurer, Menards, Incorporated and Zurich American Insurance Co. were represented by J. G. Shultz.

Legal Issues:

The third hearing presented the following legal issues:

1. Whether Claimant is entitled to attorney's fees pursuant to SDCL 58-12-3?
2. Whether Claimant is entitled to a lump sum payment of benefits?
3. Whether Claimant is entitled to costs?

Facts:

The Department finds the following facts by a preponderance of the evidence:

1. Tammy Lagler (Lagler) is 55 years old. She has a high school diploma and went to school for cosmetology. Lagler is not currently married and has no dependents.
2. Lagler injured her right ankle at work in April 2007. At the time of the injury, Lagler was employed by Menard Incorporated (Employer) who was insured by Zurich American Insurance Company (Zurich) for workers' compensation purposes.
3. In February 2008, Dr. Watts performed surgery on Lagler's ankle. Zurich assumed responsibility of the injury and initially paid all medical expenses including this surgery.
4. After her surgery in February 2008, Lagler continued to treat with Dr. Watts and continued to have pain in the ankle that she injured in April 2007.
5. Mary Lemieux (Lemieux), a claims specialist with Zurich, was assigned to Lagler's case. Zurich assigned to her, claims that it deemed "questionable" or expected to involve "protracted care."
6. Lemieux had no formal training as a claim's adjustor and no background in medical diagnosis.
7. On July 30, 2008, Dr. Watts noted that Lagler's original injury was "sustained from a work comp related injury," that she was "failing conservative treatment," and that they may "wish to proceed with surgery."
8. On August 6, 2008, Lagler's pain continued and Dr. Watts noted that the "pain in her heel area was present since her initial injury at work". She told him that "she is not happy with" watching her ankle over the next several months. Dr. Watts mentioned resection of the Haglund Deformity as an "option at this point."
9. On August 6, 2008, Dr. Watts asked Zurich to approve the surgery. That same day, Lemieux communicated with Dr. Watts' office and noted in the claims file that a "surgery request [was] pending."
10. On August 6, 2008, Lemieux's claims notes state: "Called Alvine Ortho. Not in yet. Got answering service and left detailed message for Watts or his nurse to call me ASAP with regard to any request for treatment or surgery. Got a call back from Julie at clinic. Noted I understand there is a surgery request pending? Yes and noted I have not been called and I need the notes. She will check with the scheduler to see if that's been done. Then must have transferred me to scheduler – Jaime. She said she has over three calls on this from various people to fax notes and does not have yet and when she does she will fax and hung up on me!!! I called back for Julie to confirm they have the appropriate fax number since I am not sure who's been calling. Julie was gracious and took the number."

11. On August 25, 2008, Lemieux noted in Zurich's claims file that she set up an orthopedic independent medical evaluation (IME) with Dr. Cederberg for 9/12/08. Lemieux later noted "Melissa called back from integrity. They have Bocklage avail. on 9/16 in Worthington and that's only 60 miles away- ok? Yes. Set for 10:00." Zurich later cancelled the IME and Zurich never rescheduled it. The record is unclear why the IME was cancelled and not rescheduled.
12. The August 25, 2008, claims notes also reflect that 4 additional weeks of temporary benefits were authorized.
13. On August 27, 2008, Claimant's lawyers served and filed Lagler's Petition for Hearing. Claimant alleged "Employer and Insurer have veraciously and unreasonably refused payment...."
14. On August 29, 2008, Lemieux's claims notes state: "Received a call from Jaime at Dr. Watts' office. Called back. Away from her desk, got voice mail. Left very detailed message indicating I would love to approve surgery if I could get the notes and request. Relayed I have been trying to do that since 7/30 and then relayed my call of 8/6 – my last call – and not sure if she and the Jaime that hung up on me are one and the same, but do still need that information and need it RUSH and have needed. Confirmed my fax and phone number and claim number to reference."
15. On September 5, 2008, Lemieux's claims notes state: "Called Jaime. I got the notes now but the medical dictionary does not list a Haglund's deformity so need more information on that and how it relates to the injury to approve the surgery. Does not need to be anything fancy, just a very brief note from the doctor faxed over? My fax number, phone number and file number (since I got his voicemail)."
16. On September 8, 2008, Lemieux's claims note acknowledges the delivery of the Petition for Hearing and goes on to state: "Called Scott Heidepriem, EE's [sic] attorney. Out. Left voicemail. I have his Petition but before sending to an attorney to interpose an answer, want to discuss with him. I believe he's under some mis-assumptions. TTD has and continues to be paid. All medical being paid. All out of pocket as submitted being paid and all outed for payment daily in virtually all instances. Call to discuss ASAP."
17. On September 9, 2008, Lemieux's claims notes state: "Jaime from Dr. Watts' office called. Doctor won't do a letter on Haglund's procedure. She says I can talk to his nurse/PA-C or find on internet. Called her back. Got voice mail. Left message. (1) Nothing from doctor yet other than Haglund's procedure, not what related to, etc. (2) I will talk with the PA-C or nurse but she did not leave that name and number. Please have that person call or call me with her/his contact information."

18. Lemieux's September 9, 2008, claims file notes also state: "Scott H. called and we discussed. EE is telling him we are denying treatment. NO, quite the contrary ... we have been aggressively trying to get information from Dr. Watts' office since the appointment on 07/30 and finally THIS WEEK , just found out what the proposed procedure is but still not WHAT it is and noted I can't find a Haglund's procedure in a medical dictionary, have not heard of it in 25 years and have in fact talked to Jaime at Watts' office once again today and am waiting to either hear from, or get a number for the PA-C /nurse to call directly for clarification on this procedure but certainly it's in our best interest to get this done rush as well since every day delayed is another day of paying TTD . He will withdraw once he confirms we are paying for surgery so call ASAP once I hear back."
19. On September 12, 2008, Lemieux's claims notes state: "Called Jaime to speak to the nurse since per Jaime she will need to locate the nurse and I have searched 12 sites on the internet with no results found for this condition. Held for three minutes and then hung up and called back and left her a message."
20. On September 12, 2008, Lemieux's notes state: "Called Scott H. and explained I would like to approve surgery but need to confirm what condition is and 12 web sites have revealed nothing, meds don't support what it is/how relates and Jaime will not let me speak to doctor and will determine if nurse to call me or not. He said then that we will need to interpose and answer."
21. On September 12, 2008, Attorney Heidepriem wrote a letter to Lemieux saying that Zurich is "still refusing to cover surgery despite repeated requests and documentation submitted from the office of Dr. David Watts."
22. On September 15, 2008, Lemieux's claims notes time stamped 14:34 (2:34 p.m.) state: "Angie Roberts, Dr. Watts' nurse, called me. We discussed the etiology of this. Can be due to heels, i.e., pump bump but really it's more of an idiopathic condition. Not related to ankle injury. Is she then disabled due to the Haglund's? Yes, not due to the original injury."
23. On September 15, 2008, at 2:26 p.m., Core Orthopedic long distance telephone records show a 5.8 minute call to Lemieux's telephone number (952-229-3678).
24. On September 15, 2008, Lemieux's claims notes state: "Called Scott H. Got his voicemail. Left message that denying surgery and why and stopping benefits and why. Will refer to counsel. Call if questions."
25. The name of Dr. Watts' Physician Assistant is Angela Majeres, not Angela Roberts, and there has never been an employee by the name of Angie Roberts at Dr. Watts' office.

26. Angela Majeres testified at hearing that she did not recall any conversation with Lemieux regarding the etiology or cause of Lagler's condition and that no one named Roberts worked at the office. Majeres further stated that it is her practice to make a record in the chart of any such conversations; Lagler's chart contains no such notification and no record of any conversation between Majeres and Lemieux. She stated that she never offers opinions to claims adjusters. Dr. Watts has consistently offered the opinion that Lagler's symptoms were related to her workplace injury.
27. On September 17, 2008, Zurich sent a fax to Dr. Watts' office officially denying payment for the second surgery. On September 22, 2008, Zurich stopped all disability payments to Lagler.
28. On October 27, 2008, Dr. Eric Watson conducted an examination of Lagler's right ankle. While Dr. Watson concluded she "would benefit from excision of Haglund's prominence and bursectomy since she did get relief with the injection," none of his records contain an opinion causally relating the need for this surgery to Lagler's work injury.
29. On November 11, 2008, Dr. Watts recounted how Lagler again claimed that her pain in the Achilles tendon area was present since her 2007 injury and he wrote this note:

"At this point, although the injury may or may not be due to her initial injury, she does have an associate Haglund deformity that has certainly contributed to it. I think the biggest contributor is the way she has changed her gait pattern from her initial injury."
30. Haglund's deformity is a bony enlargement on the back of the heel that sometimes leads to painful bursitis, which is an inflammation of the bursa. Lagler's Haglund deformity pre-dated her work-related injury.
31. On February 19, 2009, Dr. Eric Watson performed surgery on Lagler to address her Haglund's deformity.
32. Lagler had no income between September 2008 and April 2009 when she returned to work in a part time capacity, working between 27 and 30 hours per week. In addition, Lagler did not have health insurance, so when Zurich denied her claim for her second surgery she was burdened with its cost, including the cost of medications. Lagler tried to cope with these financial problems with money given to her by friends and relatives and by paying bills with her credit cards. However, she ultimately lost her home when the bank foreclosed on her mortgage in 2011. In addition, Lager now has a number of judgments against her for several thousand dollars for unpaid debts which came about as a result of her work-related injury. She also owes her family at least \$10,000.

33. After losing her home, Lagler moved from Sioux Falls to Winner where her daughter lives. Her daughter and son-in-law assisted Lagler financially with her living accommodations. Lager lives in a house owned by her daughter and son-in-law and pays \$400 per month which is subsidized by her daughter.
34. On February 10, 2009, Dr. Richard Farnham opined that Lagler's work injury did not require surgery.
35. Lagler now works as lunch lady at the school in Winner making approximately \$8.51 per hour for 24-25 hours per week nine months out of the year.
36. A financial advisor with Edward Jones has put together a sound financial package for Lagler based on her estimated lump sum payment.
37. More facts will be discussed in the analysis below.

Analysis:

Attorney's Fees:

Lagler petitioned the Department asking for an award of attorney's fees pursuant to SDCL 58-12-3. That provision states:

In all actions or proceedings hereafter commenced against any employer who is self-insured, or insurance company, including any reciprocal or interinsurance exchange, on any policy or certificate of any type or kind of insurance, if it appears from the evidence that such company or exchange has refused to pay the full amount of such loss, and that such refusal is vexatious or without reasonable cause, the Department of Labor and Regulation, the trial court and the appellate court, shall, if judgment or an award is rendered for plaintiff, allow the plaintiff a reasonable sum as an attorney's fee to be recovered and collected as a part of the costs, provided, however, that when a tender is made by such insurance company, exchange or self-insurer before the commencement of the action or proceeding in which judgment or an award is rendered and the amount recovered is not in excess of such tender, no such costs shall be allowed. The allowance of attorney fees hereunder shall not be construed to bar any other remedy, whether in tort or contract, that an insured may have against the same insurance company or self-insurer arising out of its refusal to pay such loss.

SDCL 58-12-3.

"The obvious objective of SDCL 58-12-3 is to discourage contesting insurance coverage and to reimburse an insured for any reasonable attorney's fees necessarily incurred in defending or enforcing a valid insurance contract right." All Nation Ins. Co. v. Brown, 344 N.W.2d 493, 494 (S.D. 1984). SDCL 58-12-3 must be "given a liberal construction with a view to effect [its] objects and to promote justice." Id. (citing SDCL 2-14-12).

See also Tripp v. Western Nat'l Mut. Ins. Co., 664 F.3d 1200, 1205 (8th Cir. 2011). Significantly, the statute does not require any malice, ill will, or bad faith on the part of an insurer, but only that the denial was "without reasonable cause" at the time that it was issued.

Dr. Watts asked the Insurer to approve Lagler's second surgery on August 6, 2008. Lemieux had the right to ascertain why the surgery was needed and what the cause of the need was. She asked Watts' office for the doctor's notes that were related to the surgery on that same day. Lemieux finally denied the request for surgery on September 15, 2008. The delay between August 6th and September 15th was due in large part to the failure of Lagler's doctor's office to respond to Lemieux's frequent requests for documentation. She made numerous phone calls to the doctor's office and seems to have pursued the investigation with some diligence.

Lemieux finally decided to deny the request based on a phone conversation that she had with someone from Dr. Watts' office on September 15, 2008. There is no doubt that this conversation took place. Dr. Watts' office's phone records confirm that a call was made from his office to Lemieux's phone at the time indicated by her claims file entry.

We do not know with whom Lemieux spoke during that conversation. It was not Dr. Watt's Physician Assistant, Angela Majeres, who probably knew more about Lagler's case than anyone else in the office other than Dr. Watts. It is more likely than not that it was with a nurse in the office because the claim entry indicates that it was a nurse. Despite the fact that the name of the individual indicated by Lemieux's entry is incorrect, does not lead to the inevitable fact that notation of the rest of the conversation was false or fabricated.

Indeed, the Department believes that the substance of the conversation was much as described in Lemieux's claims entry. She knew nothing about the condition prior to the phone conversation. In addition, some of the details in the claims entry are correct in a general sense, despite the facts that some of the particulars did not apply in Lagler's case. For example, the bursitis is sometimes caused by heels or pumps and the cause is sometimes idiopathic.

While the nurse may have been speaking in general terms rather than the specifics of Lagler's case, the Department finds that this conversation was a legitimate basis for Lemieux's denial. Therefore, the Insurer's denial of Lagler's second surgery was neither vexatious nor with reasonable cause.

Lump Sum Payment:

Claimant next asks the Department for a lump sum payment of her benefits. The Department's authority to order lump sum payment derives from SDCL 62-7-6. That statute states in part:

An employer or employee who desires to have any unpaid compensation paid in a lump sum may petition the Department of Labor and Regulation asking that the compensation be paid in that manner. If, upon proper notice to interested parties and proper showing before the department, it appears in the best interests of the employee that the compensation be paid in lump sum, the secretary of labor and regulation may order the commutation of the compensation to an equivalent lump-sum amount. That amount shall equal the total sum of the probable future payments capitalized at their present value on the basis of interest calculated at a rate per year set by the department with annual rests in accordance with rules promulgated pursuant to chapter 1-26. If there is an admission or adjudication of permanent total disability, the secretary may order payment of all or part of the unpaid compensation in a lump sum under the following circumstances:

- (1) If the employee has exceptional financial need that arose as a result of reduced income due to the injury; or
- (2) If necessary to pay the attorney's fees, costs and expenses approved by the department under § 62-7-36.

SDCL 62-7-3.

The South Dakota Supreme Court has described the application of SDCL 62-7-6 follows:

Our statute authorizing a lump-sum payment clearly sets out the circumstances under which such a payment can be made.” “First, it must be in the ‘best interests of the employee. Our prior decisions confirm that the primary emphasis must be placed on providing an injured worker with a reliable stream of income to replace lost wages and benefits. Second, in the case of a worker who has been permanently and totally disabled ... a lump sum may be ordered if the worker has an ‘exceptional financial need that arose as a result of reduced income due to the injury. Third, a lump sum may be ordered, in the case of a permanent total disability, when necessary to pay the attorney’s fees, costs and expenses.

Steinmetz v. South Dakota, 2008 S.D. 87, ¶ 10, 756 N.W.2d 392. The Court has also set forth the factors to be considered when determining whether the lump sum payment is in the best interest of the claimant. Those factors are:

1. Age, education, mental and physical condition, and actual life expectancy.
2. Family circumstances, living arrangements, and responsibilities to dependents.
3. Financial condition, including all sources of income, debts and living expenses.

4. Reasonableness of plan for investing the lump sum proceeds and ability to manage invested funds or arrangement for management by others.

Id. at ¶ 10.

When these factors are considered, the Department is led to the conclusion that a lump sum payment of her benefits is in the best interest of Lagler. Lagler is a 55 year old single woman with a high school education and has no dependents. She lost her home in Sioux Falls due to foreclosure and now lives in a house in Winner that is owned by her daughter. The rent she pays her daughter for the house is also subsidized by her daughter. Lagler currently has thousands of dollars worth of judgment against her and owes her relatives \$10,000. Lagler will have a stream of income coming in because she earns a small wage at the local school and receives social security disability benefits. She has also presented a reasonable investment plan for her benefits which was prepared by a financial investment advisor with Edward Jones.

The Department also finds that Lagler has “exceptional financial need that arose as a result of reduced income due to the injury.” While she, at the time, had difficulty making “ends meet” before her injury, the loss of hours and wages due to her injury put her in a situation where she lost her home and acquired thousands of dollars in judgments against her. A lump sum payment is also necessary for her to pay her attorney fees in this case.

Costs:

Claimant has also asked for costs in this case. While the Department does have the discretion to award fees in some case, it chooses not to do so here.

Conclusion:

With regards to the attorney’s fees and costs issues, Employer and Insurer shall submit Findings of Fact, Conclusions of Law and an Order consistent with this Decision within 20 days of the receipt of this Decision. An email version shall also be provided to the Department. If desired, Employer and Insurer may also submit Proposed Findings of Fact and Conclusion of Law. Claimant shall have an additional 20 days from the receipt of Employer and Insurer’s Findings of Fact and Conclusions of Law to submit Objections and/or Proposed Findings of Fact and Conclusions of Law.

With regards to the lump sum issue, Claimant shall submit Findings of Fact, Conclusions of Law and an Order consistent with this Decision within 20 days of the receipt of this Decision. An email version shall also be provided to the Department. If desired, Claimant may also submit Proposed Findings of Fact and Conclusion of Law. Employer and Insurer shall have an additional 20 days from the receipt of Claimant’s Findings of Fact and Conclusions of Law to submit Objections and/or Proposed Findings of Fact and Conclusions of Law.

The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, Employer and Insurer shall submit such stipulation together with an Order.

Dated this 29th day of April, 2015.

/s/ Donald W. Hageman
Donald W. Hageman
Administrative Law Judge