April 14, 2011

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LETTER DECISION

Jessica L. Filler
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PO Box 550
Pierre, SD 57501

RE: HF No. 36, 2008/09 – Joyce McKay v. Sisseton School District and Associated School Boards of South Dakota Worker's Compensation Trust Fund

Dear Mr. Schulz and Ms. Filler:

I am in receipt of Employer/Insurer's Motion for Summary Judgment in the above-referenced matter. Claimant's Counsel resisted the Motion with a Motion to Continue. Claimant's Counsel indicated that he was unable to contact the Claimant, Ms. McKay by mail or phone as she does not answer the phone. Claimant's Counsel requested a continuance for six months in hopes that he will be able to reach Ms. McKay. The Department concluded that the parties have had ample time to conduct discovery in this matter and ruled that Ms. McKay had 30 days to contact her attorney and resist Employer/Insurer's Motion for Summary Judgment. The Department has previously indicated that if no response was received by the designated date, the Department would consider the Motion without the benefit of a response. To date, the Department has not received any resistance from Claimant.

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.

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits of the parties reveal no genuine issues of material fact. SDCL§ 15-6-56(c). When considering a motion for summary judgment, the evidence must be viewed in a light most favorable to the nonmoving party. The moving party bears the burden of proving that no such issues exist. The nonmoving party, however, cannot merely rely on general allegations or denials. Rather, the nonmoving party must set forth specific facts which show the existence of genuine issues of material fact. *Hoaas v. Griffiths*, 2006 S.D. 27¶ 11, 714 N.W.2d 61.

Claimant filled out a first report of injury on January 17, 2008, indicating that she injured her lower back and leg bending down to pick up a milk crate while performing her job duties. Claimant was pregnant at the time of her injury. Claimant did not return to work after her alleged injury and on February 1, 2008, Claimant informed Employer that she would not be returning until after her baby was born. Claimant's baby was born in February 2008.

Claimant never returned back to work, and eventually resigned in August 2008. A petition for hearing was filed with the Department on September 2, 2008. The parties agreed to a Stipulation for Bifurcation on the threshold issue of causation and the Department entered an order to that effect on June 17, 2009.

Employer/Insurer in its Answer, contends that Claimant did not sustain a work related injury. For the purposed of summary judgment, the facts must be viewed in the light most favorable for to the non-moving party. Therefore, for the purposes of the motion, it is assumed Claimant did sustain a work related injury. Employer/Insurer move for summary judgment in this matter arguing that Claimant is unable to meet her burden to establish that her employment is a major contributing cause of her current condition and need to treatment.

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. *Horn v. Dakota Pork*, 2006 SD 5, ¶14, 709 NW2d 38, 42 (citations omitted). To recover under workers' compensation law, a claimant must prove by a preponderance of the evidence that she sustained an injury "arising out of and in the course of the employment." SDCL 62-1-1(7); *Norton v. Deuel School District #19-4*, 2004 SD 6, ¶7, 674 NW2d 518, 520.

SDCL§ 62-1-1(7) provides that "[n]o injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of[.]"

> In applying the statute, we have held a worker's compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that the claimant incurred a disability arising out of and in the course of [her]

> employment. We have further said South Dakota law requires [Claimant] to establish by medical evidence that the employment or employment conditions are a major contributing cause of the condition complained of. A possibility is insufficient and a probability is necessary.

Gerlach v. State, 2008 SD 25, ¶7, 747 NW2d 662, 664 (citations omitted).

With respect to proving causation of a disability, the Supreme Court has stated,

> The 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.

Orth v. Stoebner & Permann Construction, Inc., 2006 S.D. 99, ¶ 34 724 N.W.2d 586(citations omitted).

On April 8, 2008, Claimant saw Dr. Jerry Blow for an independent medical exam at the request of Employer/Insurer. Dr. Blow diagnosed failed back syndrome, left SI joint pain and noted a long history of SI radiculopathy. Dr. Blow opined that the work injury on January 17, 2008 was not a major contribution cause of any of these diagnoses. He stated that her diagnoses were consistent with her long history of chronic back pain and leg pain for which she eventually underwent surgery.

Claimant designated Dr. Mark Fox, Dr. James Johnson, Dr. Linda Peterson, Dr. Jonathon Stone, Dr. Marc Eichler, Dr. Jerome Sampson, Terry Breidenback, N.P., Michelle Peterson, P.A., and Dr. Michael Gonzales as expert witnesses.

Dr. Fox treated Claimant from May 15, 2008 through November 17, 2008. Based on her subjective complaints and her description of the work incident on January 17, 2008, Dr. Fox indicated that it was “reasonable to conclude that her work related injury of January 17, 2008, was a major contributing factor to her current problems and her need for both medical and surgical intervention.” Dr. Fox later had an opportunity to review Claimant’s medical records dating back to 1998. Upon review of these records, he issued a letter amending his earlier opinion. Dr. Fox stated,

> I had an opinion as to causation in my second preoperative visit on 7-28-08. I wrote that I believed her work injury on 1-17-08 caused new symptoms and therefore was a work injury. However, after a review of all medical records prior to my visits, including her previous surgery in 2006, a left L5 laminectomy and discectomy, I would agree with Dr. Blow that her symptoms were similar to those she had previously. As a result, it is my opinion to a reasonable degree of medical certainty, that the work injury of 1-17-08 caused and aggravation of previous symptoms, but was not a major contributing factor in her subsequent need for surgery performed by me on 8-19-08. Her back pain had been present

since a motor vehicle accident at age 12 or 13, while her symptoms had been aggravated by pregnancy.

Employer/Insurer submitted Dr. Fox's affidavit in support of its Motion for Summary Judgment which reiterates his earlier opinion that he does not believe that the January 2008 injury was a major contributing cause of her condition and need for treatment.

Dr. Linda Peterson treated Claimant after January 17, 2008. In her records, it indicated Claimant requested that Dr. Peterson provide an opined that her work related injury was a major contributing cause of her current condition and need for treatment. Dr. Peterson declined to do so. Michelle Peterson, P.A. was also asked to provide a similar opinion as to Claimant's disability. Ms. Peterson also declined to opine that Claimant was disabled. No other treating physician identified as Claimant's expert witnesses have provided an opinion to a reasonable degree of medical probability that Claimant's related injury was a major contributing cause of her current condition and need for treatment.

Claimant filed no affidavits or other evidence to refute Employer/Insurer's summary judgment motion. Employer/Insurer, on the other hand, presented affidavits, documents, and medical records in support of its motion. Since Claimant failed to respond to the summary judgment motion, the record presented no genuine issues of material fact. With no expert medical opinion to the contrary, Claimant has failed to meet her burden to show that her employment is a major contributing cause of her current condition and need for treatment. Based upon the record and the facts presented, Employer/Insurer's Motion for Summary Judgment is hereby granted. Employer/Insurer shall submit an Order consistent with this decision.

Sincerely,

/s/ *Taya M Runyan*

Taya M. Runyan
Administrative Law Judge