February 25, 2011

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Letter Order on Motion for
Partial Summary Judgment

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RE: HF No. 36, 2010/11 – Mamie Ziegler v. Counterpart, Inc. and Acuity Insurance Company

Dear Ms. DeMatteo and Mr. McKnight:

The Department has received and has taken into consideration Employer and Insurer's Motion for Partial Summary Judgment as well as attached Exhibits, Claimant's Opposition to the Motion and attached affidavits, and Employer and Insurer's final Response. After being fully advised, the Department makes the following Letter Order on Motion for Partial Summary Judgment.

ARSD 47:03:01:08 governs the Department of Labor's authority to grant summary judgment. The law on a motion for summary judgment is well settled. Summary Judgment may be granted is there are no issues of material fact and the moving party is entitled to judgment on the issue 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. *McDowell v. Citicorp USA*, 2007 SD 53, ¶22, 734 N.W.2d 14, 21 (SD) (internal citations omitted).

The material facts for this motion, as seen in "the light most favorable to the non-moving party," are settled and are not at issue. Claimant, a 20 year-old college student, initially

treated with Dr. Murenga on April 2, 2008. Dr. Murenga referred Claimant to see an orthopedic specialist, Dr. John Ramsay. Before seeing the specialist, Claimant saw Chiropractor Dr. Hungerford, partly because she did not feel she was being helped by the Dr. Murenga's treatment. Dr. Hungerford suggested Claimant see Dr. Looby, an orthopedic specialist. Claimant felt uncomfortable going to Dr. Ramsay. Claimant asked Dr. Murenga to refer her to a different orthopedic specialist and suggested Dr. Looby, as that was the doctor that Dr. Hungerford suggested. Dr. Murenga then referred Claimant to Dr. Looby.

Before Claimant went to see Dr. Looby, Claimant's father, Mr. Ziegler, telephoned the nurse case manager assigned by Insurer to Claimant's case, Kathy Koplin. Ms. Koplin initially told Mr. Ziegler that Claimant would have to see Dr. Ramsay as he was the referral by Dr. Murenga. However, later that day or early the next day, Ms. Koplin telephoned Mr. Ziegler and preapproved Claimant's treatment with Dr. Looby.

The referral to Dr. Looby and subsequent treatment, led to Dr. Looby referring Claimant to the orthopedic surgeon, Dr. Hermanson, who performed surgery on Claimant. This surgery is contested by Employer and Insurer as being against the spirit and intent of SDCL § 62-4-43.

SDCL § 62-4-43 reads in whole:

> The employee may make the initial selection of the employee's 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 the 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 the selection, the selection requirements of this section do not apply as long as the inability to make a selection persists. If the injured employee unreasonably refuses or neglects to avail himself or herself of medical or surgical treatment, the employer is not liable for an aggravation of the injury due to the refusal and neglect and the Department of Labor may suspend, reduce, or limit the compensation otherwise payable. If the employee desires to change the employee's 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.

The spirit and intent of SDCL § 62-4-43 is to allow the Claimant to choose her initial doctor and not continue to shop for a more favorable medical opinion. If Claimant wishes to have a second opinion, the law requires Claimant to pay for that second

opinion and does not put the burden on the Employer, unless the Employer approves of the second opinion. If Claimant wishes to change her medical practitioner, without a referral from her initial selection, she may do so if Employer approves the choice of doctor. One of the intents of this law is that claimants receive and avail themselves of honest treatment from a qualified medical practitioner.

Claimant was uncomfortable seeing Dr. Ramsay and was never treated by Dr. Ramsay. Dr. Murenga was under no requirement to refer Claimant to Dr. Looby, no matter Claimant's request or preference. If Dr. Looby was not an appropriate or acceptable choice, Dr. Murenga could have refused or insisted on Claimant seeing his first choice of orthopedic specialist. Claimant understood, by visiting with her regular chiropractor, that Dr. Looby was a qualified orthopedic specialist. Claimant had every right to suggest a name of an orthopedic specialist to Dr. Murenga. The law does not prohibit and the intent of the law does not suggest that a claimant not take charge of their own health care decisions. The law specifically empowers claimants to take control of their health care.

Furthermore, the nurse case manager hired by Insurer to provide case management of Claimant's case, approved Claimant to be seen by Dr. Looby. Employer and Insurer preapproved Claimant to see Dr. Looby.

Employer and Insurer's Motion for Partial Summary Judgment is denied. The parties may consider this Letter Order to be an Order of the Department in this matter.

Sincerely,

Catherine Duenwald
Administrative Law Judge
Division of Labor & Management