CIRCUIT COURT OF SOUTH DAKOTA
SIXTH JUDICIAL CIRCUIT

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RE: 32CIV20-155: Melissa Dittman v. Rapid City School District & Dakota Truck Underwriters

MEMORANDUM DECISION

Claimant Melissa Dittman (Claimant) appeals from the South Dakota Department of Labor's (the Department) decision in favor of Rapid City School District (Employer) and Dakota Truck Underwriters (Insurer) (collectively referred to as Respondents). After remand on appeal, the Department allowed Respondents to file an Amended Answer and subsequently granted summary judgment in favor of Respondents. After reviewing the administrative record and considering the arguments of the parties, the Court now issues this Memorandum Decision.

FACTUAL BACKGROUND

Claimant injured her back on or about February 17, 2017. while working for Employer as a special education teacher. Claimant injured her spine while attempting to restrain a student. Claimant was initially seen at Black Hills Orthopedic and Spine Center for treatment. On April 27, 2017, she was examined by Mitch Grieve, P.A., (Grieve) who was under the supervision of Dr. Robert Woodruff. On June 8, 2017, Grieve referred Claimant to Dr. Peter Vonderau at The Rehab Doctors. Claimant attended appointments with Dr. Vonderau in 2017 and 2018.

At an August 2, 2017 appointment, Claimant and Dr. Vonderau discussed surgery as an option as Claimant did not feel like she was getting relief from the conservative care. Dr. Vonderau referred Claimant to Black Hills Orthopedic and Spine Center for a surgical

evaluation. At an August 10, 2017 appointment at Black Hills Orthopedic and Spine Center, Grieve determined Claimant was not a candidate for surgery.

At an appointment with Dr. Vonderau on August 21, 2017, Claimant indicated she would continue searching for potential surgeons in South Dakota and Colorado. At some point after thereafter, Claimant identified Dr. Donald Corenman, who practiced in Vail, Colorado, as a potential surgeon. Dr. Corenman was somebody who Dr. Vonderau had made successful referrals to in the past. On November 3, 2017, Dr. Vonderau submitted a request for a surgical consultation with Dr. Corenman to Claimant's case management plan provider. This request was denied on November 21, 2017. After this denial, Claimant filed a Petition for Hearing with the Department on November 28, 2017. Respondents submitted their Answer on January 4, 2018.

Claimant still wished to explore surgery with Dr. Corenman as a treatment option. During a February 9, 2018 appointment, Claimant asked Dr. Vonderau to set up a teleconference to discuss a second opinion. Dr. Vonderau ultimately referred Claimant to Dr. Corenman. Claimant had a teleconference with Dr. Corenman to discuss surgery on July 17, 2018. Claimant traveled to Colorado for an evaluation by Dr. Corenman on October 2, 2018. Dr. Corenman performed spinal fusion surgery on Claimant on December 3, 2018.

The issue of whether Dr. Corenman's expenses were a second opinion that would be paid for by Claimant pursuant to SDCL 62-4-43 was submitted to the Department on briefs. Other issues raised in the parties' briefs were compensability and the applicability of the Department's Administrative Regulations. The parties knew these issues were to be decided. The Department ultimately issued an Amended Letter Decision on April 5, 2019. In this decision, the Department did not address the issue of compensability, offering no reasoning or citations to law as to why it refused to hear the issue. Instead, the Department stated the issue was not necessary to decide.

The Department held Dr. Vonderau did make a referral to Dr. Corenman. However, it decided Claimant was to pay for expenses related to Dr. Corenman's treatment because he was not a participating medical provider in Claimant's case management plan. Originally, the case was dismissed without prejudice on June 18, 2019. However, the Department filed an Amended Order and Claimant's case was dismissed with prejudice by on June 26, 2019.

Claimant appealed the Department's decision to this court. On April 2, 2020, this court issued a Memorandum Opinion, holding the Department erred when it refused to adjudicate whether Claimant suffered a compensable injury. It held Respondents' original Answer denied compensability, and thus the Department erred when it determined Respondents did not deny compensability. On the issue of whether Dr. Vonderau made a referral to Dr. Corenman, it was determined the Department did not err. In addition, this court found the Department erred when it determined that Claimant was responsible for the expenses related to Dr. Corenman's treatment and that who pays the expenses was dependent on whether compensability is found. The case was remanded to the Department.

On remand, Respondents moved to file an Amended Answer. The purpose of the Amended Answer was to clarify Respondents' position. The Amended Answer stated Respondents have not denied compensability for Claimant's injury and that they had paid

Claimant all benefits to which she proved she was entitled to. Claimant objected to the filing of the Amended Answer, stating that it was in violation of both ARSD 47:03:01:02:01 and this Court's prior ruling. In a June 5, 2020 decision, the Department rejected this argument, holding that the Amended Answer was sufficient under ARSD 47:03:01:02:01. The Department reasoned that because of justice and clarity, it was appropriate for Respondents to file an Amended Answer. Respondent's Amended Answer was filed on June 11, 2020. Subsequently, Respondents filed a Motion for Summary Judgment on June 15, 2020.

Claimant filed a Motion for Pretrial Summary Judgement re: Claimant's Average Weekly Wage (AWW) on May 28, 2020. Claimant argued that two bonuses, which were signing bonuses paid after Claimant signed her contract, should be included in calculating her AWW.

On August 3, 2020, the Department issued a Letter Decision in which it granted Respondents' Motion for Summary Judgment and denied Claimant's Motion for Pretrial Summary Judgment re: Claimant's Average Weekly Wage. The Department held the issue of compensability was moot, because Respondents did not deny it in the Amended Answer. The Department also stated because compensability is no longer denied and never was denied, Respondents are not responsible for Dr. Corenman's medical expenses under ARSD 47:03:04:05(4). In granting Respondent's motion, the Department concluded there was no longer a genuine dispute of material fact regarding which party was to pay for Dr. Corenman's expenses. In an attempt to move the parties forward, the Department also decided the issue of Claimant's weekly wage. It concluded Claimant's signing bonuses were discretionary, and not included in the calculation of Claimant's AWW.

Claimant filed a Notice of Appeal on September 28, 2020. Oral argument was heard on January 14, 2021. The court now issues this Memorandum Decision.

ISSUES PRESENTED

1. Whether the Department abused its discretion when it allowed Respondents to file an Amended Answer.
2. Whether the Department erred when it granted Respondent's Motion for Summary Judgment.
3. Whether the Department erred when it considered Claimant's signing bonus a "discretionary" bonus, not to be included in calculating her average weekly wage.

STANDARD OF REVIEW

This court's review of a decision from an administrative agency is governed by SDCL 1-26-36:

> The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of

> the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> > (1) In violation of constitutional or statutory provisions;
> >
> > (2) In excess of the statutory authority of the agency;
> >
> > (3) Made upon unlawful procedure;
> >
> > (4) Affected by other error of law;
> >
> > (5) Clearly erroneous in light of the entire evidence in the record; or
> >
> > (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
>
> A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment.

"Motions to amend pleadings are reviewed for clear abuse of discretion." *Robinson-Podoll v. Harmelink, Fox & Ravnsborg Law Office*, 2020 S.D. 5, ¶ 11, 939 N.W.2d 32, 38 (citing *McDowell v. Citicorp Inc.*, 2008 S.D. 50, ¶ 7, 752 N.W.2d 209, 212). "'An abuse of discretion occurs when discretion [is] exercised to an end or purpose not justified by, and clearly against, reason and evidence.'" *McDowell*, 2008 S.D. 50, ¶ 7, 752 N.W.2d at 212 (further citations omitted).

> In reviewing a summary judgment motion, the standard is well settled:
>
> > We must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists. Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. If there exists any basis which supports the ruling of the trial court, affirmance of a summary judgment is proper.

Brandt v. Cty. of Pennington, 2013 S.D. 22, ¶ 7, 827 N.W.2d 871, 874.

ANALYSIS

Amended Answer

Claimant urges Respondents should not have been allowed to file an Amended Answer. Due to the Amended Answer being allowed, Claimant argues she was prejudiced by the dismissal of her case. Respondents have urged that the Amended Answer was simply to clarify the position they have always taken, which is that they have never denied Claimant's claim in the first place. Further, they state the dispute was solely regarding the expenses from Claimant's treatment with Dr. Corenman.

In its June 5, 2020 Letter Decision, the Department granted Respondent's Motion to File Amended Answer. "Motions to amend pleadings are reviewed for clear abuse of discretion." *Harmelink, Fox & Ravnsborg Law Office*, 2020 S.D. 5, ¶ 11, 939 N.W.2d at 38 (citing *McDowell*, 2008 S.D. 50, ¶ 7, 752 N.W.2d at 212). "'An abuse of discretion occurs when discretion [is] exercised to an end or purpose not justified by, and clearly against, reason and evidence.'" *McDowell*, 2008 S.D. 50, ¶ 7, 752 N.W.2d at 212 (further citations omitted). "Generally 'a party may amend his pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires.'" *Harmelink, Fox & Ravnsborg Law Office*, 2020 S.D. 5, ¶ 14, 939 N.W.2d at 38 (citing SDCL 15-6-15(a)).

"[T]he most important consideration in determining whether a party should be allowed to amend a pleading is whether the nonmoving party will be prejudiced by the amendment." *Id.* (further citations omitted). A party may be allowed to file an amended pleading, even after the case has been remanded on appeal. *See Raney v. Riedy*, 71 S.D. 280, 283, 23 N.W.2d 809, 810 (1946) (allowing a party to file an amended answer at the trial court level after an action had been reversed on appeal); *see also City of Columbia, Mo. v. Paul N. Howard Co.*, 707 F.2d 338, 341 (8th Cir. 1983) (stating an amendment to a pleading is proper, even after remand). A trial court may permit the amendment of pleadings after a trial without the consent of the adverse party. *Tesch v. Tesch*, 399 N.W.2d 880, 882 (S.D. 1987).

The standard of review in examining a decision by the Department on a motion to amend a pleading is abuse of discretion. *Harmelink, Fox & Ravnsborg Law Office*, 2020 S.D. 5, ¶ 11, 939 N.W.2d at 38. Claimant admits the amendment of pleadings is liberally allowed, as well as the fact that this court did not forbid Respondents from amending their answer. As a result of the Amended Answer allowed by the Department, Claimant's case was dismissed. The Department allowed the Amended Answer because Respondents wished to clarify their position, which was consistent with the evidence that had been presented throughout this case.

After a thorough review of the record, this court cannot find the Department's reasoning was an abuse of discretion. The Respondent's language in the original Answer said one thing (i.e., it denied compensability) but evidence produced another (i.e., the denial of just Dr. Corenman's expenses because he was an out of network provider). The Department was within its discretion to allow Respondents to file an amended answer on remand. *See Riedy*, 71 S.D. 280, 283, 23 N.W.2d at 810 (stating that it was not unreasonable for a trial court to conclude justice would be served by allowing an amendment to an answer). The Department's decision to

allow Respondents to file an Amended Answer was not made "clearly against reason and evidence", especially in light of the evidence showing the only denial of benefits revolved around the status of Dr. Corenman's status as an out of network provider. *See Harmelink, Fox & Ravnsborg Law Office*, 2020 S.D. 5, ¶ 11, 939 N.W.2d at 38. This ruling is based upon whether the Department abused its discretion, not whether this court would have reached the same decision.

Claimant argues even if the Amended Answer is filed, it is moot, since this Court ruled Respondent's original Answer denied compensability. An amended pleading "supersedes the original and renders it of no legal effect," unless the original document is referred to in the amended pleading. *See W. Run Student Hous. Associates, LLC v. Huntington Nat. Bank*, 712 F.3d 165, 171 (3d Cir. 2013) (stating that an amended complaint will supersede the original and render it null, unless the amended complaint specifically adopts the original) (further citations omitted). However, at the summary judgment stage, a "superseded pleading may be offered as evidence rebutting a subsequent contrary assertion." *Id*. at 173. Put simply, a Court may consider the original Answer in determining whether Summary Judgement is proper.

Respondent's Motion for Summary Judgment

In a summary judgment proceeding, the burden of proof is on the movant to show no genuine issue of material fact exists. *Owens v. F.E.M. Elec. Ass'n, Inc.*, 2005 S.D. 35, ¶ 6, 694 N.W.2d 274, 277 (further citations omitted). "All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party." *Stern Oil Co., Inc. v. Brown*, 2012 S.D. 56, ¶ 8, 817 N.W.2d 395, 398 (further citation omitted). "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." *Owens*, 2005 S.D. 35, ¶ 6, 694 N.W.2d at 277 (further citations omitted). "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." *Breen v. Dakota Gear & Joint Co., Inc.*, 433 N.W.2d 221, 223 (S.D. 1988) (further citations omitted).

With the decision to allow Respondent's Amended Answer upheld, the next question is whether the Department erred when it granted Respondent's Motion for Summary Judgment. Claimant did not dispute that Dr. Corenman is an out of network medical provider. The Amended Answer clarified the position Respondents have taken since the start of this litigation. ARSD 47:03:04:05(4), which Claimant argues applies here, states than an outside medical provider may provide medical services to an employee if compensability is denied. In that situation, the employer would be liable for the employee's expenses. ARSD 47:03:04:05(4). Respondents' Amended Answer states they have not denied compensability. This is consistent to what the evidence has shown – that is the only denial was the referral to Dr. Corenman and his expenses. Therefore, ARSD 47:03:04:05(4) is not applicable.

The original Answer may be considered as evidence that would show there is a disputed fact regarding compensability for purposes of summary judgment. *Huntington Nat. Bank*, 712 F.3d at 172-73. However, in examining all of the evidence in a light most favorable to Claimant, it still shows Respondents have paid all benefits Claimant was entitled to. Claimant has not

denied that all benefits owed to her, other than Dr. Corenman's benefits, have been paid thus far. Further, she has not set forth "specific facts" detailing the benefits Respondents are allegedly not paying (excepting Dr. Corenman's benefits). *Breen*, 433 N.W.2d at 223. In the original Petition for Hearing, the only issue alleged by Claimant was Respondents not paying for her treatment with Dr. Corenman. Claimant has not identified any other claimed but unpaid benefits. In fact, Claimant stated in her response to Respondents' interrogatories that all medical expenses had been paid to her knowledge at that point in time.

There is no "genuine issue of material fact" in this case. Owens, 2005 S.D. 35, ¶ 6, 694 N.W.2d at 277. While Claimant may want the Department to decide if Claimant is potentially owed more benefits, it is not relevant to the issue at hand. The Department did not err in Granting Respondents' Motion for Summary Judgment.

Claimant's Signing Bonus

Claimant argues her two signing bonuses she received as a result of signing her contract with Employer are non-discretionary bonuses. Respondents argue the signing bonuses are discretionary in nature.

"Earnings" is defined by SDCL 62-1-1(6):

> the amount of compensation for the number of hours commonly regarded as a day's work for the employment in which the employee was working at the time of the employee's injury. It includes payment for all hours worked, including overtime hours at straight-time pay, and does not include any sum which the employer has been accustomed to pay the employee to cover any special expense entailed by the employee by the nature of the employment; wherever allowances of any character made to an employee in lieu of wages are specified as a part of the wage contract, the allowances shall be deemed a part of the employee's earnings . . ..

The AWW is calculated using an employee's total earnings as defined in SDCL 62-1-1(6) and SDCL 62-4-24. The Department has ruled non-discretionary bonuses are included in computing the AWW, while discretionary bonuses are not to be included. *In Declaratory Ruling re: SDCL 62-1-1(6)*, 3-4, (2014). Nondiscretionary bonuses include things such as "seniority pay, longevity pay, or bonuses paid out based on the claimant's having met individual performance goals." *Id*. Discretionary bonuses include one-time payments to all employees signing/hiring bonuses, among other things. *Id*. The Department based its decision, in part on Larson's Worker's Compensation Law. Larson stated "In computing actual earnings as the beginning point of wage-based calculations, there should be included not only wages and salary, but anything of value received as consideration for work. . .." *Larson's Worker's Compensation Law* sec. 93.01 [2](a).

Claimant did not receive her signing bonuses for any type of work she completed. Rather, she was given the bonuses for simply signing her contract. Larson wrote that only items of value given as consideration for work should be computed in calculating the AWW. *Larson's Worker's Compensation Law* sec. 93.01 [2](a). The Department has stated signing bonuses, something not given in consideration of an employees' work performance, are considered discretionary

bonuses. *In Declaratory Ruling re: SDCL 62-1-1(6)*, 3-4, (2014). Claimant's signing bonuses in this case were not given in consideration of any work that she had done or performance goals that had been met. Rather, these signing bonuses were given to her as a result of being hired in a hard-to-fill position, which means they are discretionary. *Id*. The Department did not err in considering these bonuses discretionary and precluding them from being used in calculating Claimant's AWW.

CONCLUSION

Based on the foregoing analysis, the Department did not abuse its discretion when it allowed Respondents to file the Amended Answer and did not err when it Granted Respondent's Motion for Summary Judgment. The Department also did not err when it determined that Claimant's signing bonuses were discretionary, and thus not used in calculating Claimant's AWW. The Department's decisions in allowing Respondents to file an Amended Answer and in granting Summary Judgment are AFFIRMED. The Department's decision in determining Claimant's signing bonuses were discretionary and not to be used in calculation of Claimant's AWW is AFFIRMED. A corresponding order shall be entered accordingly.

BY THE COURT

Christina Klinger

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Hon. Christina Klinger
Circuit Court Judge

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT

MELISSA DITTMAN, Claimant/Appellant, vs. RAPID CITY SCHOOL DISTRICT and DAKOTA TRUCK UNDERWRITERS, Employer and Insurer/Appellees.	)	32CIV20-155 **ORDER**

WHEREAS, the Court having entered its Memorandum Decision on February 8, 2021, and having expressly incorporated the same herein, therefore, it shall be and hereby is

ORDERED, ADJUDGED, AND DECREED:

The Department's decision in allowing Respondents to file an Amended Answer is AFFIRMED.

The Department's decision Granting Summary Judgment to Respondents in this matter is AFFIRMED.

The Department's decision in determining Claimant's signing bonuses to be discretionary, and not used in calculating Claimant's Average Weekly Wage, is AFFIRMED.

Pursuant to SDCL 1-26-32.1 and SDCL 15-6-52(a), the Court's Memorandum Decision shall act as the Court's findings of fact and conclusions of law as permitted by SDCL 1-26-36.

Dated this 8th day of February 2021.

BY THE COURT:

Christina Klinger

Attest:
Deuter Cross, TaraJo
Clerk/Deputy

_____
Hon. Christina L. Klinger
Circuit Court Judge