April 28, 2011

Kelly E. McCabe
1610 Copperfield Dr.
Rapid City, SD 57703
Sent Certified: 7009 2820 0003 7586 1121

Letter Decision

Timothy J. Becker
Nicholas A. Carda
Banks, Johnson, Kappelman & Becker
PO Box 9007
Rapid City, SD 57709-9007

RE: HF No. 106, 2008/09 – Kelly E. McCabe v. City of Rapid City and Berkley Risk Administrators

Dear Ms. McCabe, Mr. Becker and Mr. Carda:

Submissions:

This letter addresses Employer and Third Party Administrator's Motion for Summary Judgment filed November 9, 2010; Employer and Third Party Administrator's Statement of Undisputed Material Facts; Affidavit of Nicholas A. Carda; submissions of medical records by Claimant which were received by the Department on February 16, 2011 and March 30, 2011, and a letter from Timothy J. Becker dated March 30, 2011.

Facts:

The facts of this case, as reflected by the submissions, attachments and record, are as follows:

1. Kelly McCabe (Claimant) filed a Petition for Hearing on February 20, 2009 seeking workers' compensation benefits for an alleged work injury.

2. City of Rapid City and Berkley Risk Administrators (Employer and Third Party Administrator) filed an Answer to Claimant's Petition for Hearing on March 19, 2009.

3. The Department issued a Scheduling Order dated June 23, 2010, which set August 15, 2010, as the deadline for Claimant to disclose and identify her experts together with the experts' reports.

4. Claimant did not disclose or identify her experts and their reports by the August 15, 2010 deadline.

5. Claimant did not seek an extension of the deadline to disclose and identify her experts and their reports prior to the expiration of the August 15, 2010 deadline.

6. Claimant has provided no explanation why she failed to disclose or identify her experts and their reports.

7. Claimant's March 30, 2011, submission of records contained two letters. One from Dr. Edward Seljeskog dated January 8, 2009, and the other from Dr. Gordon C. Abernathie. The Abernathie letter indicates that the doctor remembers that Claimant suffered from neck and lower back pain following a work injury. However, the letter does not reveal what the source of that information was and neither letter contains a medical opinion by the doctors that a work injury was a major contributing cause of Claimant's complained of condition.

8. Claimant has not affirmatively indicated either Dr. Seljeskog or Dr. Abernathie as an expert and has not indicated whether they will be called as witnesses at her hearing or submit their testimony by deposition.

9. The doctor's letters have not been authenticated and the statements made therein were not made under oath.

10. Additional facts may be discussed in the analysis below.

Motion for Summary judgment:

Employer and Third Party Administrator filed a Motion for Summary Judgment in this case. ARSD 47:03:01:08 governs the Department of Labor's authority to grant summary judgments. That regulation states:

> 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.

ARSD 47:03:01:08. 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.

A review of the record indicates that there is no genuine issue as to any of the facts stated above. Therefore, the Department must next determine whether the Employer and Third Party Administrator are entitled to a judgment as a matter of law.

Expert Testimony:

Claimant has the burden of proving all facts essential to sustain an award of compensation. Day v. John Morrell & Co., 490 N.W.2d 720 (S.D. 1992); Phillips v. John Morrell & Co., 484 N.W.2d 527, 530 (S.D. 1992); King v. Johnson Brothers Construction Co., 155 N.W.2d 193, 195 (S.D. 1967. The burden falls on Claimant to show that her work injury is a major contributing cause of her current complaints. SDCL 62-1-1 (7).

In order for Claimant to prevail, she must provide medical testimony. Enger v. EMC, 565 NW2d 79, 84-85, (SD 1997). "Causation must be established to a reasonable degree of medical probability, not just possibility." Id. at ¶ 12, (citation omitted). "The testimony of medical professionals is crucial in establishing the causal relationship between the work-related injury and the current claimed condition because the field is one in which laypersons ordinarily are unqualified to express an opinion." Id. at ¶ 13, (internal quotation omitted)(citation omitted).

Scheduling Order:

The Department issued a Scheduling Order dated June 23, 2010, which set August 15, 2010, as the deadline for Claimant to disclose and identify her experts, together with the expert's reports. Claimant failed to disclose her experts by that deadline. Claimant also failed to seek an extension to disclose her experts prior to the deadline.

Scheduling Orders in workers' compensation cases are governed by ARSD 47:03:01:12. That regulation states the following:

> The Division of Labor and Management may, after consulting with the attorneys for the parties and unrepresented parties, enter a scheduling order that does the following:
>
> (1) Limits the time to join other parties and to amend the pleadings;
> (2) Limits the time to file and hear motions;
> (3) Limits the time to complete discovery;
> (4) Sets the date for prehearing conferences, a final prehearing conference, and hearing; and
> (5) Addresses any other matters necessary.

> The division shall issue the scheduling order as soon as practicable but no more than 120 days after the petition is filed, unless justice is served by issuing the order at a later date. A schedule may not be modified except by order of the Division of Labor and Management upon a showing of good cause.

(emphasis added), ARSD 47:03:01:12.

Claimant states that she missed the August 15, 2010, deadline because she moved from Yankton to Omaha and did not stay in communication with her attorney from April through October of 2010. She states that her failure was due to various reasons, including financial difficulties. However, the cost of a postage stamp is not prohibitive and does not constitute good cause under these circumstances. It seems more likely that negligence was the primary reason for her failure and that too is not good cause.

Claimant's failure to disclose an expert means that she is judicially prohibited from presenting expert testimony. Therefore, Claimant cannot demonstrate by a reasonable degree of medical probability that the causal relationship between her work injury and her current condition. Consequently, Employer and Third Party Administrator are entitled to judgment in this case as a matter of law.

Order:

For the reasons stated above, it is hereby, ordered that Employer and Third Party Administrator's Motion for Summary Judgment is granted. This case is dismissed with prejudice. This letter shall constitute the order in this matter.

Sincerely,

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