SOUTH DAKOTA DEPT. OF LABOR & REGULATION

LABOR & MANAGEMENT DIVISION
Tel: 605.773.3681 | Fax: 605.773.4211 | sdjobs.org

August 19, 2021

David Barari
Goodsell + Oviatt
PO Box 9249
Rapid City, SD 57709-9249

LETTER DECISION ON MOTION FOR SUMMARY JUDGMENT

J. G. Shultz
Woods, Fuller, Shultz & Smith, PC
PO Box 5027
Sioux Falls, SD 57104-5027

RE: HF No. 12, 15.16 – Teresa Norton v. Masco Corporation (f/k/a/ Merillat Industries, Inc.)

Dear Mr. Barari and Mr. Shultz:

The Department of Labor & Regulation (Department) received this Motion for Summary Judgment submitted by Teresa Norton (Norton) on April 14, 2021. All responsive briefs now have been considered. At Norton's request, the Department take judicial notice of its prior rulings and determinations in this matter. Norton moves the Department for Summary Judgment and asks that the Department orders that Masco Corporation (f/k/a/ Merillat Industries, Inc.) (Employer/ Self- Insurer) may not deny medical benefits, fail to pay medical bills, or not authorize treatments.

Norton suffered a work injury on or about December 26, 1989. As a result of the injury, Norton underwent a laminectomy and was diagnosed with chronic pain syndrome and reflect sympathetic dystrophy. She was assigned a whole-body impairment rating of 18 percent. The Department approved an Amended Agreement as to Compensation (Agreement) on December 17, 1993. The Agreement states, in part:

> The Employer/Self-Insurer shall pay all future hospital, medical, surgical, or first aid services, care or treatment to which Claimant may hereafter be entitled to based up on the work-related injury to Claimant's back. All such future medical bills shall be paid by the Employer/Self-Insurer after Employer/Self-Insurer receives written notice of the same, together with any requested information or documentation reasonably necessary to explain or support such entitlement, and in any event before the same are delinquent.

Norton has received medical care and treatment since the date of the Agreement. However, on July 8, 2015, Norton submitted this Petition for Hearing claiming Employer/Self-Insurer has delayed or denied payments request or otherwise hindered Norton's medical treatment. Norton moved the Department for summary judgment on April 14, 2021.

The Department's authority to grant summary judgment is established in ARSD 47:03:01:08:

> A claimant or an employer or its insurer may, any time 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.

"Summary judgment is proper where, 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 judgment as a matter of law." *Stromberger Farms, Inc. v. Johnson*, 2020 S.D. 22, ¶ 31, 942 N.W.2d 249, 258-59 (citations omitted). The non-moving party must present specific facts showing that a genuine issue of material facts exists. *Id.* at ¶ 34.

Following the Agreement, in order to deny benefits Employer/Self-Insurer must bring challenges to care pursuant to SDCL 62-7-33, which states:

> Any payment, including medical payments under § 62-4-1, and disability payments under § 62-4-3 if the earnings have substantially changed since the date of injury, made or to be made under this title may be reviewed by the Department of Labor and Regulation pursuant to § 62-7-12 at the written request of the employer or of the employee and on such review payments may be ended, diminished, increased, or awarded subject to the maximum or minimum amounts provided for in this title, if the department finds that a change in the condition of the employee warrants such action. Any case in which there has been a determination of permanent total disability may be reviewed by the department not less than every five years.

Employer/Self-Insurer also bears the burden of proof when challenging prescribed medical care. *Hanson v. Penrod Const. Co.*, 425 N.W.2d 396, 399 (SD 1988).

Norton argues that Employer/Self-Insurer has failed to respond to repeated inquiries on these issues, which is a violation of SDCL 62-4-1 and the terms of the Agreement. Norton asserts that on February 9, 2016, Employer/Self-Insurer prepared a letter and spreadsheet to address outstanding medical bills and provided it to Norton. Norton responded on March 29, 2016, referencing difficulty obtaining medical records from providers and discovery from Employer/Self-Insurer. Norton provided billing and records to Employer/Self-Insurer on January 25, 2017. On February 10, 2017, Employer/Self-Insurer's counsel sent a letter acknowledging receipt of the January 25, 2017 letter and documents. Norton responded on February 27, 2017 requesting further discovery. Norton submitted a Motion and Renewed Motion to Compel Discovery and Motion for Sanctions Under ARSD 47:03:01:16. Norton's Motion to Compel Discovery was granted with an *in camera* review. Norton asserts that without Employer/Self-Insurer's assistance, she obtained medical records and supplemented her responses. Multiple spreadsheets of outstanding bills and costs were submitted to Employer/Insurer including a submission on February 25, 2019. On September 19, 2019, Employer/Self-

Insurer acknowledged its delay. Additional correspondence was exchanged, and Employer/Self-Insurer's responses were slow and inconsistent. Norton emailed a spreadsheet to Employer/Self-Insurer on June 12, 2020. Employer/Self-Insurer did not respond.

Norton argues that to challenge medical care, Employer/Self-Insurer must first obtain an Order from the Department indicating either a change of condition under SDCL 62-7-33 or that the prescribed care is not compensable. In support of her argument, Norton offers the recent South Dakota Supreme Court case *Johnson v. United Parcel Service, Inc., et. al.*, 2020 S.D. 39, 946 N.W.2d. In *Johnson*, the employer and insurer reduced Johnson's benefits following a compulsory medical examination, which was a violation of an order of the Department. The employer and insurer also failed to show a change of condition as required by SDCL 62-7-33. Norton asserts in her case Employer/Self-Insurer have not even obtained a medical opinion before denying benefits or failing to respond to requests for reimbursement. She also asserts Employer/Self-Insurer have unilaterally delayed and denied benefits.

Employer/Self-Insurer response to Norton's motion was provided by affidavit pursuant to SDCL 15-6-56(f). Employer/Self-Insurer argues that there have been issues with discovery in this matter. First, Employer/Self-Insurer raises concerns with calculations of Norton's outstanding medical bills. Second, Employer/Self-Insurer asserts that Norton did not respond to interrogatories related to Norton's expert witnesses and whether Norton is a Medicare beneficiary. Finally, Employer/Self-Insurer requests the opportunity to conduct additional discovery including the production of the "written Release signed by the Claimant" referenced on page 6 of the Agreement.

Employer/Self-Insurer asserts that without further discovery, it is unable to present all facts that could preclude summary judgment.

The Department finds that summary judgment is appropriate in this matter. Employer/Self-Insurer's affidavit under SDCL 15-6-56(f) does not provide necessary details regarding what probable facts would be uncovered through further discovery or how those facts would address Norton's Motion.

> SDCL 15–6–56(f) ''provides that a party opposing a motion for summary judgment is entitled to conduct discovery when necessary to oppose the motion.'' *Dakota Indus., Inc. v. Cabela's.com, Inc*., 2009 S.D. 39, ¶ 6, 766 N.W.2d 510, 512. ''Under [Rule 56(f)], the facts sought through discovery must be 'essential' to opposing the summary judgment[.]'' *Id*. ''This requires a showing how further discovery will defeat the motion for summary judgment.'' *Id*. (quoting *Keller*, 2007 S.D. 89, ¶ 31, 739 N.W.2d at 43 (Zinter, J., concurring)). To make this showing, the Rule 56(f) affidavit must include identification of ''the probable facts not available and what steps have been taken to obtain'' those facts, ''how additional time will enable [the nonmovant] to rebut the movant's allegations of no genuine issue of material fact[,]'' and ''why facts precluding summary judgment cannot be presented'' at the time of the affidavit.

Stern Oil Co. v. Border States Paving, Inc., 2014 S.D. 28, ¶¶26-27, 848 N.W.2d 273, 281-82 (citations omitted).

The affidavit does not address how issues such as Medicare benefit concerns or discovery delays counter Norton's allegations that Employer/Self-Insurer has repeatedly denied medical benefits, failed to pay medical bills, and failed to authorize medical treatments. Employer/Self-Insurer also has not shown how addressing discovery delays and issues with Medicare benefits are likely to reveal genuine issues of material fact regarding the claim that it has failed to pay medical benefits.

The Agreement provides that the Employer/Self-Insurer would pay all future medical bills Norton may be entitled to that are related to her work injury. Norton has

provided multiple instances where Employer/Self-Insurer has failed to pay medical benefits. "SDCL 62-4-1 places an affirmative duty upon the employer to provide necessary medical care to an injured employee." *Cozine v. Midwest Coast Transport, Inc.*, 454 N.W.2d 548, 555 (S.D. 1990). Employer/Self-Insurer has not provided any evidence to show it has proceeded properly under SDCL 62-7-33 to petition the Department for change of condition or to argue compensability of the prescribed care. The Department finds that Norton has met her burden of proving that no genuine issue of material facts remains.

Therefore, it is hereby ORDERED that Teresa Norton's Motion for Summary Judgment is GRANTED. Norton is entitled to the payment of all benefits owed under SDCL 62-4-1 and the Agreement. Before denying medical benefits, failing to pay medical bills, or failing to authorize treatments, Masco Corporation f/k/a/ Merillat Industries, Inc. must petition the Department for a change of condition under SDCL 62-7-33

It is further ORDERED that Norton and Employer/Self-Insurer will prepare and submit affidavits listing known claims and an accounting of what has been paid or denied. The Department will address total benefits owed upon receipt of the affidavits. The Parties will consider this letter to be the Order of the Department.

Sincerely,

Michelle M. Faw
Administrative Law Judge