October 1, 2013

Jamie Dean Hammer
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Harrisburg, SD 57032
Sent Certified: 70130600000197461629

Letter Decision and Order

Charles A. Larson
Boyce, Greenfield, Pashby & Welk LLP
P.O. Box 5015
Sioux Falls, SD 57117-5015

Re: HF No. 135, 2010/11 – Jamie Dean Hammer v. Preform Solutions, Inc. and United Fire & Casualty

Dear Mr. Hammer and Mr. Larson:

Submissions:

This letter addresses the following submissions by the parties:

August 6, 2013	[Employer and Insurer's] Motion for Summary Judgment;
	[Employer and Insurer's] Brief in Support of Motion for Summary Judgment;
	Affidavit of Charles A. Larson;
August 7, 2013	Letter from Jamie Hammer:
September 2, 2013	Letter from Jamie Hammer:
September 9, 2013	[Employer and Insurer's] Reply Brief in Support of Motion for Summary Judgment

Facts:

The relevant facts of this case are as follows:

1. Jamie Dean Hammer (Hammer) filed a Petition for Hearing on March 3, 2011, alleging that he suffered a work-place injury on September 18, 2008.

2. Preform Solutions, Inc. (Employer) and United Fire & Casualty (Insurer) filed an answer to the Petition for Hearing on March 18, 2011, in which they denied any work-related injury to Hammer's left knee or left leg.

3. The Department issued a scheduling order on May 29, 2013, which required Hammer to disclose his experts by August 2, 2013.

4. Hammer failed to disclose his experts by August 2, 2013, and has not disclosed any experts since that time.

5. In his letter to the Department dated August 7, 2013, Hammer admits that Hammer received the Department's scheduling order in mid-May, 2013. Further, Hammer admits that he did not have an expert as of the date of his letter.

6. Mid-May to August 2, 2013 is more than enough time to procure an expert opinion.

Summary Judgment:

Employer and Insurer have filed a Motion for Summary Judgment. ARSD 47:03:01:08 governs Summary Judgments which are considered by the Department of Labor & Regulation in workers' compensation cases. That regulation provides:

> 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.

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 trial court may grant summary judgment only when there are no genuine issues of material fact." Estate of Williams v. Vandeberg, 2000 SD 155, ¶ 7, 620 N.W.2d 187, 189, (citing, SDCL 15-6-56(c); Bego v. Gordon, 407 N.W.2d 801 (S.D. 1987)). "In resisting the motion, the non-moving party must present specific facts that show a genuine issue of fact does exist." Estate of Williams, 2000 SD 155 at ¶ 7, (citing, Ruane v. Murray, 380 NW2d 362 (S.D.1986)).

Causation:

Employer and Insurer argue that Hammer has failed to disclose his expert and that without an expert opinion he cannot prove the essential element of causation. The South Dakota Supreme Court discussed causation in workers' compensation cases in Peterson v. Evangelical Lutheran Good Samaritan Society, 2012 S.D. 52, 816 N.W.2d 843. There it stated:

> In a workers' compensation dispute, a claimant must prove the causation elements of SDCL 62-1-1(7) by a preponderance of the evidence. Grauel v. S.D. Sch. of Mines & Tech., 2000 S.D. 145, ¶11, 619 N.W.2d 260, 263. The first element requires proof that the employee sustained an "injury" arising out of and in the course of the employment. SDCL 62-1-1(7); Bender v. Dakota Resorts Mgmt. Group, Inc., 2005 S.D. 81, ¶7, 700 N.W.2d 739, 742.

Id. at ¶ 20. The Court went on to say that the claimant must also "prove that the employment or employment related activities were a "major contributing cause" of the "condition" of which the employee complains. (citing, SDCL 62-1-1(7)(a)). Id. at ¶ 20.

"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." Day v. John Morrell & Co., 490 N.W.2d 720, 724 (S.D. 1992). "A medical expert's finding of causation cannot be based upon mere possibility or speculation. Instead, "[c]ausation must be established to a reasonable medical probability." Orth v. Stoebner & Permann Const., Inc., 2006 SD 99, ¶ 34, 724 N.W. 2d 586, 593 (citation omitted).

In this case there is not issue of facts related to whether Hammer has the necessary professional testimony and opinion. Hammer was required to disclose his experts by August 2, 2013, and he failed to do so. As such, Hammer cannot sustain his burden of proving a causal connection between his employment activities and the current condition of his left leg or knee as a matter of law.

Order:

Under these circumstances, Employer and Insurer are entitled to summary judgment. Employer and Insurer's Motion for Summary Judgment is granted. This case is dismissed with prejudice.

Sincerely,

_/s/ Donald W. Hageman_____
Donald W. Hageman
Administrative Law Judge