May 18, 2016

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Letter Decision and Order

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RE: HF No. 142, 2014/15 – Jeffrey E. Koval v. City of Aberdeen and SDML Workers' Compensation Fund

Dear Mr. Bornitz and Mr. McKnight

Submissions

This letter addresses the following submissions by the parties:

January 25, 2016	Employer and Insurer's Motion for Partial Summary Judgment;
	Employer and Provider's Brief in support of Motion for Partial Summary Judgment;
	Affidavit of Michael S. McKnight in support of Motion for Partial Summary Judgment;
March 28, 2016	Claimant's brief resisting Employer and Insurer's Motion for Partial Summary Judgment;
April 11, 2016	Employer and Provider's reply brief in support of Motion for Partial Summary Judgment.

Facts:

The facts of this case as reflected by the submissions are as follows:

1. On and prior to May 11, 2012, Jeffrey E. Koval (Claimant) was employed by the City of Aberdeen (Employer) as a law enforcement officer. At all times pertinent,

Employer's workers compensation insurance was provided by SDML Workers' Compensation Fund (Insurer).

2. On May 11, 2012, Claimant while in the course of his employment responded to a call that included a building fire. Claimant entered into a burning building without protective equipment to assist firefighters and as a result, suffered injuries to his respiratory system.

3. Claimant filed a claim for workman's compensation benefits to Employer, and Insurer accepted the claim and paid benefits accordingly.

4. Claimant enrolled at Northern State University in Aberdeen, South Dakota in the accounting program.

5. Claimant notified Employer that he was going to school, but did not get preapproval from Employer or Insurer about receiving retraining benefits while attending Northern State University.

6. On November 25, 2013, a medical record review was completed by Dr. Paul Johnson, who found there was no evidence to suggest a respiratory disease and felt that Claimant had no impairment.

7. On December 6, 2013, after the record review by Dr. Paul Johnson, Insurer denied the claim.

8. In January 2013, Claimant resigned his position as a law enforcement officer and moved to Fargo, North Dakota to start school at Minnesota State-Moorhead.

9. Claimant did not get preapproval from Employer or Provider about receiving retraining benefits while attending Minnesota State-Moorhead.

10. On February 19, 2015, Claimant filed a claim for retraining benefits.

11. In May, 2015, Claimant graduated with a degree in accounting.

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

Analysis:

Summary Judgment:

Employer and Insurer filed a Motion for Partial Summary Judgment. ARSD 47:03:01:08 governs the Department of Labor & Regulation's authority to grant summary judgment in workers' compensation cases. That regulation states:

> 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.

Rehabilitation Benefits:

Employer/Insurer asserts in its Motion for Partial Summary Judgment that Claimant admitted in his deposition testimony that he did not get approval from Employer/Insurer before starting a retraining program. Employer/Insurer asserts Claimant therefore, is not entitled to retraining benefits.

Rehabilitation benefits are governed by SDCL 62-4-5.1 which states as follows:

> Compensation during period of rehabilitation--Procedure. If an employee suffers disablement as defined by subdivision 62-8-1(3) or an injury and is unable to return to the employee's usual and customary line of employment, the employee shall receive compensation at the rate provided by § 62-4-3 up to sixty days from the finding of an ascertainable loss if the employee is actively preparing to engage in a program of rehabilitation as shown by a certificate of enrollment. Moreover, once such employee is engaged in a program of rehabilitation which is reasonably necessary to restore the employee to suitable, substantial, and gainful employment, the employee shall receive compensation at the rate provided by § 62-4-3 during the entire period that the employee is engaged in such program. Evidence of suitable, substantial, and gainful employment, as defined by § 62-4-55, shall only be considered to determine the necessity for a claimant to engage in a program of rehabilitation.
>
> The employee shall file a claim with the employee's employer requesting such compensation and the employer shall follow the procedure specified in chapter 62-6 for the reporting of injuries when handling such claim. If the claim is denied, the employee may petition for a hearing before the department.

The Supreme Court interprets SDCL 62-4-5.1 as a five part test that must be satisfied for a claimant to receive a reward of rehabilitation benefits.

The five part test for awarding rehabilitation benefits is:

1. The employee must be unable to return to his usual customary line of employment;
2. Rehabilitation must be necessary to restore the employee to suitable, substantial and gainful employment;

3. The program of rehabilitation must be a reasonable means of restoring the employee to employment;
4. The employee must file a claim with his employer requesting the benefits; and
5. The employee must actually pursue the reasonable program of rehabilitation.

McKibben v. Horton Vehicle Components, 2009 S.D. 47, ¶ 12, 767 N.W. 2d 890, 895 (quoting *Sutherland v. Queen of Peace Hosp.,* 1998 SD 26, ¶ 13, 576 N.W.2d 21, 25).

Employer/Insurer's motion for Summary Judgment rests on the fourth step of the test. Employer/Insurer asserts that Claimant did not properly file a claim requesting benefits, because he failed to request benefits before beginning the retraining program.

However, there is nothing in SDCL 62-4-5.1 or the five part test established by the Supreme Court which dictates when such a claim must be made. It is merely required that a claim be made. That such a claim could later be denied is merely a risk the Claimant makes by not getting preapproval. "A claimant may enroll in a rehabilitation program without the consent of employer, but he does so at his own risk; that is, rehabilitation benefits will not be guaranteed for a particular program simply because the program is one the claimant wishes to pursue." *Kurtenbach v. Frito-Lay*, 1997 S.D. 66, ¶ 23, 563 N.W. 2d 869, 875. "It is [claimant's] right to seek a college education, but [employer] cannot be compelled to pay for such a program if it is not necessary." *Chiolis v. Large Dev. Co*., 512 N.W.2d 158, 161 (S.D. 1994) (emphasis added) (quoting *Cozine v. Midwest Coast Transport Inc*., 454 N.W.2d 548, 554 (S.D. 1990)).

Pursuing a rehabilitation program without first filing a claim and receiving approval does not guarantee the receipt of benefits. However, not seeking preapproval does not preclude the application of the rest of the test to establish if claimant is entitled to the rehabilitation benefits. Therefore, since Claimant's claim satisfactorily fulfills step four of the test, and Claimant and Employer disagree on his fulfillment of the rest of the five part test requirements, issues of material fact remain regarding Claimant's petition for retraining benefits.

Order:

Accordingly, it is hereby, ordered that Employer and Insurer's Motion for Partial Summary Judgment is denied. This letter shall constitute the Departments order in this matter.

Sincerely,

__/s/ Sarah E. Harris______
Sarah E. Harris
Administrative Law Judge