

March 29, 2011

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Letter Decision and Order

Jessica L. Filler  
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PO Box 550  
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RE: HF No. 173, 2009/10 – Gary Timm v. Meade School District 46-1 and Associated School Boards of South Dakota Worker's Compensation Trust Fund

Dear Mr. Leach and Ms. Filler:

**Submissions:**

This letter addresses the following submissions by the parties to the Department of Labor:

January 21, 2011	Employer/Provider's Motion for Costs and Attorney Fees;
February 8, 2011	[Claimant's] Motion for Attorney's Fees; [Claimant's] Motion to Dissolve Stay; [Claimant's] Response to Employer/Provider's Motion for Attorney's Fees;
February 23, 2011	Employer/Provider's Reply to Claimant's Response to Employer/Provider's Motion for Attorney's Fees;
March 11, 2011	Employer/Provider's Response to Claimant's Motion for Attorney's Fees; Employer/Provider's Response to Claimant's Motion to Dissolve Stay;
March 17, 2011	Claimant's Reply Brief Re: Motion for Attorney's Fees;

March 23, 2011

Employer/Provider's Sur-reply to Claimant's Reply Brief Re:  
Motion for Attorney's Fees.

**Facts:**

The facts of this case as reflected by the above submissions and documentation and record are as follows:

1. Gary Timm (Claimant) sustained a work injury on January 7, 2010, while employed by Meade School District 46-1 (Employer). Timm gave timely notice of the injury to Employer.
2. Associated School Boards of South Dakota Worker's Compensation Trust Fund (Provider) provided employer with workers' compensation coverage at the time of Claimant's injury.
3. Provider is a pool arrangement authorized by SDCL Ch. 1-34 and is a separate legal entity from employer.
4. Claimant suffered severe back, left hip, thigh and leg pain as a result of his work injury.
5. On February 1, 2010, Claimant saw Dr. Stuart Rice, M.D. a neurosurgeon. Dr. Rice diagnosed Claimant with a herniated disc and recommended surgery.
6. Dr. Rice told Claimant that waiting longer for the surgery could cause additional permanent damage to his back. At this point in time, Provider had not agreed that Claimant's work injury was compensable.
7. Claimant's attorney sent a letter to Provider's claims administrator on March 8, 2010, asking Provider to authorize the surgery and provide coverage for the injury.
8. On March 11, 2010, Provider's claims administrator advised Claimant's attorney that his claim was "tentatively denied".
9. On March 17, 2010, Provider wrote to Claimant's attorney instructing Claimant to appear on April 13, 2010, for an independent medical examination (IME).
10. On March 25, 2010, Claimant filed a Petition for Hearing with the Department of Labor. An Amended Petition for hearing was later filed. Employer and Provider's Answer denied compensability.
11. On April 13, 2010, Claimant reported for an IME by Dr. Wayne Anderson.
12. On April 15, 2010, Claimant underwent the recommended surgery on his back.

13. Dr. Anderson issued a report indicating that Claimant's work injury was a major contributing cause of his need for surgery.
14. Claimant filed a Motion for Partial Summary Judgment on August 2, 2010. Employer/Provider resisted that motion. In a letter decision dated October 20, 2010, the department granted Claimant's Motion in full finding that Claimant's injury arose out of and in the course of his employment, that Claimant had provided Employer with timely notice, that the work injury was a major contributing cause of his need for surgery and that the injury was compensable.
15. On October 25, 2010, Claimant filed a Motion for Attorney's Fees and Stay of all Proceedings on this Motion. The department granted Claimant's Motion in a letter dated November 9, 2010, which acknowledged Claimant's request for attorney's fees and stayed all proceedings involving that Motion.
16. Additional facts may be discussed in the analysis below.

**Employer/Provider's Motion for Costs and Attorney Fees:**

Employer and Provider filed a Motion for Costs and Attorney Fees. They allege that Claimant's Petition for Hearing was filed frivolously or for malicious purposes. They contend that they are entitled to costs and attorney's fees pursuant to SDCL 15-17-51. That provision states the following:

If a civil action or special proceeding is dismissed and if the court determines that it was frivolous or brought for malicious purposes, the court shall order the party whose cause of action or defense was dismissed to pay part or all expenses incurred by the person defending the matter, including reasonable attorney's fees.

SDCL 15-17-51.

The South Dakota Supreme Court has discussed the application of SDCL 15-17-51. The Court described a frivolous action as follows:

[A] Frivolous action is one which the proponent can present no rational argument based on the evidence or law in support of the claim. In order to fall to the level of frivolousness there must be such a deficiency in fact or law that no reasonable person could expect a favorable judicial ruling.

First Lady, LLC v. JMF Properties, LLC, 2004 SD 69, ¶ 16, 681 NW2d 94, (internal citations omitted).

In this case, Claimant suffered a work injury. He was told by his doctor that he needed surgery as a result of that injury and that delaying the surgery could cause additional permanent damage to his back. More than two months pass without the Provider accepting responsibility for the medical expenses. The Claimant is then informed by Provider that his claim is "tentatively denied". Several days later he is instructed to undergo an IME. Under these circumstances, filing Claimant's Petition for Hearing was neither frivolous nor malicious.

Claimant's coverage was denied. Whether the denial was tentative or not, the statute of limitation for filing the suit had begun to run. At this point in time, filing a petition for hearing is justified. Within days of the denial, Claimant was instructed by Provider to submit to an IME. This action could reasonably be construed by Claimant as an attempt by the Provider to solidify its position.

It is also noteworthy that Provider refused to admit compensability after the action was filed. Even after its IME indicated that Claimant's injury was compensable, Provider continued to resist Claimant's Motion for Partial Summary Judgment. An admission of liability at this time would have ended any pretenses of a dispute.

Provider argues that Claimant had no need to file his Petition for hearing because Claimant had health insurance which would cover his surgery. Contrary to this argument, Claimant's health insurance coverage is irrelevant. Provider is obligated to meet its obligations regardless of the status of the claimant's health insurance.

Finally, the fact that Claimant's Motion for Partial Judgment was granted, demonstrates that Claimant's actions were founded. Claimant's Petition for Hearing was not filed prematurely or frivolously. Employer and Provider are not entitled to costs and attorney's fees.

#### **Claimant's Motion for Attorney's Fees and Motion to Dissolve Stay:**

Claimant has filed a Motion asking the department to dissolve the stay it imposed on November 9, 2010. This action would allow Claimant to proceed with a case against Employer and Provider for attorney fees as authorized by SDCL 58-12-3.

SDCL 58-12-3 provides:

In all actions or proceedings hereafter commenced against any employer who is self-insured, or insurance company, including any reciprocal or interinsurance exchange, on any policy or certificate of any type or kind of insurance, if it appears from the evidence that such company or exchange has refused to pay the full amount of such loss, and that such refusal is vexatious or without reasonable cause, the Department of Labor, the trial court and the appellate court, shall, if judgment or an award is rendered for plaintiff, allow the plaintiff a reasonable sum as an attorney's fee to be recovered and collected as a part of the costs provided, however, that when a tender is made by such insurance company, exchange or self-insurer before the commencement of the action or proceeding in which judgment or an award is rendered and the amount recovered is not in excess of such tender, no such costs shall be allowed. The allowance of attorney fees hereunder shall not be construed to bar any other remedy, whether in tort or contract, that an insured may have against the same insurance company or self-insurer arising out of its refusal to pay such loss.

SDCL 58-12-3.

Employer and Provider points out that SDCL 58-12-3 only authorizes actions against insurance companies and self-insured employers. They then contend that Provider is not an insurance company and that Employer is not self-insured.

Provider was established pursuant to SDCL Ch. 1-24. SDCL 1-24-17 states:

No pool arrangement and no agreement or financing in connection therewith may be considered insurance nor may any such pool arrangement, agreement, or financing be considered to be an insurance company under the laws of South Dakota nor may any such pool arrangement, agreement, or financing be under the jurisdiction of the commissioner of insurance.

SDCL 1-24-17. This statute makes clear that Provider is not an insurance company against which SDCL 58-12-3 authorizes action.

In addition, it appears that Employer is not self-insured. The Provider as a trust fund is a separate legal entity from Employer. As such, the workers' compensation coverage is not provided by the Employer. Consequently, SDCL 58-12-3 does not authorize Claimant to proceed against Employer or Provider.

Order:

In accordance with the discussion above, Employer/Providers motion for costs and Attorney's Fees is denied. Claimant's Motion for Attorney's Fees and Motion to Dissolve Stay are denied. This letter shall constitute the Department's Order in this matter

Sincerely,

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