February 2, 2021

David S. Barari
Goodsell + Oviatt, LLP
PO Box 9249
Rapid City, SD 57709-8417

Shane E. Eden
Davenport, Evans, Hurwitz & Smith
206 W 14th St.
PO Box 1030
Sioux Falls, SD 57101-1030

RE: HF No. 186, 2015/16 – Fern Y. Johnson (nee Stanton) v United Parcel Service and Liberty Mutual Ins. Group.

Dear Mr. Barari and Mr. Eden,

This letter decision will address Claimant's Motion for Summary Judgment submitted on August 1, 2016, Motion to Reconsider Claimant's Motion for Summary Judgment submitted on December 22, 2016, and Second Motion to Reconsider Claimant's Motion for Summary Judgment submitted October 29, 2020. All responsive briefs have been considered.

The Department of Labor & Regulation (Department) will first address the background of this matter. While working for United Parcel Service (Employer), Fern Y. Johnson (Johnson or Claimant) suffered a sharp pain in her groin in January 1996. Employer was insured for workers' compensation purposes by Liberty Mutual Insurance Group (Insurer).The causation of her pain was litigated from 1997 through February 2009. In 2002, the Department ruled against compensability. Johnson appealed to the Circuit Court. The Seventh Circuit affirmed in part and reversed in part, remanding it to the Department. Upon remand, the Department adopted the Findings and Conclusions of the Circuit Court, which found by a preponderance of the evidence that Johnson's groin pain was caused by a work-related injury. The findings were appealed and then affirmed by the South Dakota Supreme Court on February 23, 2009.

On August 9, 2010, Employer and Insurer sent a letter of denial to Johnson, denying additional benefits, including payment of present and ongoing medical expenses for the groin injury. The denial was based on an independent medical examination (IME) in which the IME physician could not find definitive diagnosis for Johnson's groin pain. Johnson filed a petition with the Department to contest Employer and Insurer's denial of benefits. The Department found that there had been no change in Johnson's condition, and therefore, the issue of whether her work injury was a major contributing cause of her groin pain could not be tried at the time. On appeal, the Seventh Circuit affirmed. Employer and Insurer have continued to pay for medical treatment of Johnson's groin pain since that time.

On April 2013, Johnson alleges that she fainted. Johnson claims this was due to her groin pain. She further claims that as she fell, she struck her face and cheek, and thus injured several teeth. On July 8, 2013, Johnson contacted dentist, Dr. Nelson complaining of a toothache. Dr. Nelson examined Johnson the next day. He noted one broken tooth and two likely tooth fractures. Dr. Nelson referred Johnson to Dr. Van Dam for dental surgery. Dr. Van Dam removed the fractured teeth. Dr. Nelson then referred Johnson to Dr. Scanlon for dental implants. Dr. Nelson also prescribed a bridge.

Johnson submitted her medical treatment for her tooth condition to her dental insurer. The dental insurer paid some of the costs, but the bills exceeded Johnson's annual limit. On January 3, 2014, Johnson's attorney sent a letter to Employer and Insurer's attorney with several medical records and bills regarding Johnson's fainting and dental care. Johnson did not provide specifics about her fall. On January 13, 2014, Employer and Insurer contacted Johnson's attorney regarding the lack of a medical opinion that Johnson's groin pain was a major contributing cause of the fall to the ground and subsequent injury to her teeth. Johnson did not respond. Employer and Insurer contacted Johnson again on February 21, 2014. On March 20, 2014, Johnson's counsel responded, identifying April 2013 as the month in which the alleged fall causing Johnson's tooth condition occurred. Employer and Insurer requested medical records from the medical provider identified as treating Johnson's tooth condition.

On July 15, 2014, Employer and Insurer sent a letter to Dr. Diamond requesting his opinion regarding the causation of Johnson's fall. They provided Dr. Diamond with

the medical record for October 17, 2011. Dr. Diamond responded on July 23, 2014. He said that he did not know whether Johnson's work-related injury was a major contributing cause of the April 2013 fall and damage to her teeth. Employer and Insurer denied medical/dental benefits on October 1, 2014. Johnson filed a Petition for Hearing on June 2, 2016. Johnson has moved the department to reconsider her original motion for summary judgment a second time pursuant to ARSD 47:03:01:08. The Department will consider the original motion, both motions to reconsider, and all responsive briefs.

In her original motion, Johnson asserted that there is no legitimate or reasonable dispute of fact that she is entitled to medical/dental benefits under the workers' compensation statutes. She further asserts that her fainting episodes are a known consequence of her work-related groin pain condition, and despite this, Employer and Insurer have denied prescribed medical care. The Department's authority to grant summary judgment is established in administrative rule 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.

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.*, 2004 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 N.W.2d 362 (S.D.1986)).

Johnson argues that Employer and Insurer must provide medical care and treatment that is necessary, suitable, and proper pursuant to SDCL 62-4-1 which states, in pertinent part:

> The employer shall provide necessary first aid, medical, surgical, and hospital services, or other suitable and proper care including medical and surgical supplies, apparatus, artificial members, and body aids during the disability or treatment of an employee within the provisions of this title.

"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). Johnson further argues that pursuant to SDCL 62-4-1 and the previous Orders of the Department and the Seventh Judicial Court, Employer and Insurer are obligated to pay for all past and present medical care related to her groin pain injury. The issue of her groin pain causing her to pass out was addressed at the hearing on June 7, 2011, and her records show that fainting, or syncopal episodes, are a secondary effect of her groin pain. Dr. Frost is Johnson's primary medical provider for her grown pain. Dr. Frost opines that Johnson's groin pain and related medical expenses continue to be related to or caused by the original work-related groin injury. Johnson asserts that Employer and Insurer did not contact Dr. Frost regarding the cause of Johnson's April 2013 fainting episode. Johnson asserts that because her fainting episodes are known and foreseeable consequence of her groin pain condition, treatment related to them would be necessary, suitable, and proper pursuant to SDCL 62-4-1.

Johnson additionally argues that if Employer and Insurer wish to deny care, they must do so under 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.

"When [claimant] incurs medical expenses in the future, Employer may reimburse her or challenge the expenses as not necessary or suitable and proper under SDCL 62-7-33." *Stuckey v. Sturgis Pizza Ranch*, 2011 S.D. 1, ¶ 27, 793 N.W.2d 378, 389. Johnson argues that Employer and Insurer were required to either reimburse or challenge under SDCL 62-7-33.

> Once notice has been provided and a physician selected or, as in the present case, acquiesced to, the employer has no authority to approve or disapprove the treatment rendered. It is the doctor's province to determine what is necessary, or suitable and proper. When a disagreement arises as to the treatment rendered or recommended by the physician, it is for the employer to show that the treatment was not necessary or suitable and proper.

Hanson v. Penrod Const. Co., 425 N.W.2d 396, 399 (SD 1988).

Johnson asserts that Employer and Insurer have presented no medical opinion to contradict the medical opinions she has presented. She specifically argues that Dr. Diamond's response to Employer and Insurer's attorney is not evidence supporting their burden of proof, because Dr. Diamond merely stated that he does not know whether Johnson's work-related injury was a major contributing cause of the April 2013 fall and damage to her teeth. Johnson asserts that this is not supportive evidence, and therefore, Employer and Insurer have not presented evidence to meet their burden of proof.

Employer and Insurer argue there are genuine issues of material fact to be resolved, and therefore, summary judgment is premature. ''Summary judgment is not the proper method to dispose of factual questions.'' *Stern Oil Co. v. Brown*, 2012 SD 56, ¶ 9, 817 N.W.2d 395, 399 (citations omitted). Employer and Insurer argue that they are not contesting whether Johnson's groin pain is compensable, but whether the groin pain caused her to pass out and thereby caused damage to her teeth. Employer and Insurer assert that a genuine dispute of fact exists whether Johnson's work injury was a major contributing cause of her tooth condition. Johnson visited Dr. Diamond for vertigo in 2011. Employer and Insurer argue there is a question whether the fainting episode in April 2013 was related to the groin pain or the vertigo. On July 18, 2013, Johnson reported to Dr. Diamond "near syncopal" episodes when her groin pain was

exacerbated. She reported vertigo and loss of balance, but a tooth condition is not mentioned in those records. Employer and Insurer also point out that Johnson's groin pain was being treated by Dr Frost. They argue, if she had fainted due to groin pain, she would have seen Dr. Frost instead of Dr. Diamond, who was treating her for vertigo.

The South Dakota Supreme Court (Court) has held that a claimant who has suffered a work-related injury is not necessarily entitled to benefits for her current claimed condition. *Darling v. W. River Masonry, Inc.*, 2010 SD 4, ¶ 11, 777 N.W.2d 363, 367. Employer and Insurer argue that Johnson has not established a connection between her current tooth condition and her work injury. They assert that Dr. Nelson's opinion regarding the cause of the tooth injury is merely speculative. "The evidence must not be speculative, but must be 'precise and well supported.'" *Id.* at ¶ 12, citing *Vollmer,* 2007 SD 25, ¶ 14, 729 N.W.2d 377 at 382.

Employer and Insurer argue that Johnson has not produced records or accounts between April 2013 and July 8, 2013 that present contemporaneous accounts documenting any trouble eating, tooth pain, or injury to her mouth which would link the alleged April 2013 fall with the tooth condition discovered in July 2013. Johnson has testified that following the alleged fall, she did not feel any pain in her mouth or her teeth, none of her teeth were loosened, and it did not hurt to eat. Employer and Insurer assert Johnson's testimony is inconsistent with a fall severe enough to break teeth in her mouth. Additionally, Employer and Insurer argue that the only medical opinion that Johnson offers to show her tooth condition was caused by her work injury was provided by Dr. Frost to Johnson's counsel over three years after the alleged fainting episode. In his response, Dr. Frost opines that Johnson had a fainting episode caused by her groin pain based on descriptions of such symptoms in her medical records. Dr. Frost does not provide a rationale or citation to a medical record. He also does not address the issue of Johnson's vertigo symptoms.

Employer and Insurer further argue they were not required to seek review by the Department under SDCL 62-7-33, as they have no obligation to pay any medical expense for a condition not causally linked to Johnson's work related injury. SDCL 62-4-1.1 provides what actions an employer may take when it receives a request for payment of a medical bill:

> Within thirty days after receiving a properly submitted bill for medical payments, the employer shall:
>
> (1) Pay the charge or any portion of the bill that is not denied;
>
> (2) Deny all or a portion of the bill on the basis that the injury is not compensable, or the service or charge is excessive or not medically necessary; or
>
> (3) Request additional information to determine whether the charge or service is excessive or not medically necessary or whether the injury is compensable.

SDCL 62-4-1.1.

Following Johnson's submission of medical bill for her tooth condition, Employer and Insurer sought more information from Dr. Diamond regarding causation. When Dr. Diamond responded that he did not know if the groin pain was the cause of the fainting spell and subsequent tooth injury, Employer and Insurer denied compensation. Employer and Insurer assert that SDCL 62-7-33 is not invoked because Johnson has not established a causal link between her work injury and tooth condition. They further argue that the Department has not made a specific finding that Johnson's fainting episodes were causally related to her work injury. They assert that they are continuing to pay medical benefits related to Johnson's groin pain but have denied the benefits for the tooth injury due to lack of causal evidence.

In their response to Johnson's Motion for Summary Judgment filed on August 1, 2016, Employer and Insurer stated they required more time for discovery to establish the facts sufficient to defeat the motion for summary judgment. "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.'" *Stern Oil Co. v. Border States Paving, Inc.*, 2014 SD 28, ¶ 26, 848 N.W.2d 273, 281. Johnson responds that the denial process was not conducted properly, but even so Employer and Insurer felt they had sufficient basis to deny the claim. Therefore, they cannot complain that they need more time to justify denial now. Upon review of Johnson's Motion for Summary Judgment and supporting briefs submitted in 2016, the Department found that issues of material fact

still existed. The Department did not find reason to hold otherwise following Johnson's first Motion to Reconsider.

Johnson has again moved the Department to reconsider her Motion for Summary Judgment. Since Johnson's first motions, the Court has entered its decision on *Johnson v. United Parcel Service, Inc., et. al.*, 2020 S.D.39, 946 N.W.2d 1, on June 24, 2020. The parties in this matter are the same as the parties in the *Johnson* decision. In *Johnson*, Employer and Insurer, denied or reduced benefits after a compulsory medical examination under SDCL 62-7-1. The Court found that Employer and Insurer should have proceeded under SDCL 62-7-33 to seek a change of condition determination before denying benefits. Johnson asserts the same is true regarding the denial of her dental benefits. She argues that when Employer and Insurer denied the dental claim, without having contrary medical evidence and without proceeding under SDCL 62-7-33, they breached their affirmative duty under SDCL 62-4-1.

In response, Employer and Insurer assert that *Johnson* does not apply in this matter. In *Johnson*, the denial was related to the work-related groin pain which had previously been litigated. This matter relates to the issues of fainting and dental injury which have not been litigated. Employer and Insurer have sought review of Johnson's records by Dr. Schiffman who has opined that the damage to Johnson's teeth is related to general decay of the teeth and teeth grinding. Johnson argues that did not obtain an expert opinion prior to denial, and Dr. Schiffman's opinion not timely.

Upon review of all motions and submissions, the Department is persuaded that summary judgment remains premature in this matter. The Department has not previously ruled on the causality of Johnson's fainting episodes, and therefore, SDCL 62-7-33 has not been invoked. Additionally, the Department finds that weighing the opposing expert opinions provided in this matter by summary judgment is inappropriate and factual issues remain. ''Summary judgment is not the proper method to dispose of factual questions.'' *Bozied v. City of Brookings*, 2001 S.D. 150, ¶ 8, 638 N.W.2d 264, 268. ''Summary judgment is an extreme remedy, [and] is not intended as a substitute for a trial.'' *Discover Bank v. Stanley*, 2008 S.D. 111, ¶ 19, 757 N.W.2d 756, 762. Johnson has additionally raised issues regarding the management of the claim and the process of the denial related to the tooth claim. The Department also does not find it appropriate

to resolve those issues in this matter by summary judgment. A factual dispute remains related to the issues of causation of the alleged April 2013 fall and subsequent dental care.

Order:

In accordance with the conclusions above, Claimant's Second Motion to Reconsider Claimant's Motion for Summary Judgment is DENIED;

This letter shall constitute the Department's order in this matter.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

_____

Michelle M. Faw