June 24, 2015

Michael S. McKnight
Thomas J. Von Wald
Boyce Law Firm, L.L.P.
300 South Main Avenue
P.O. Box 5015
Sioux Falls, SD 57117-5015

Letter Decision on Motion for Summary Judgment

A. Russell Janklow
Jami J. Bishop
1700 W. Russell St.
Sioux Falls, SD 57104

RE: HF No. 197, 2013/14 – Atkelet Abraha v. John Morrell & Company

Dear Mr. Janklow and Mr. Von Wald:

Submissions:

This letter addresses the following submissions by the parties:

April 9, 2015	[Employer/Self-Insurer's] Renewed Motion for Summary Judgment.
April 9, 2015	[Employer/Self-Insurer's] Brief in Support of Motion for Summary Judgment.
April 9, 2015	Affidavit of Thomas J. Von Wald in Support of [Employer/Self-Insurer's] Renewed Motion for Summary Judgment.
May 5, 2015	Affidavit of Atkelet Abraha in Opposition to John Morrell's Renewed Motion for Summary Judgement & in Support of [Claimant's] Motion to Amend the Petition for Hearing.
May 6, 2015	Claimant's Opposition to John Morrell's [Employer/Self-Insurer's] Renewed Motion for Summary Judgment.

May 6, 2015	Claimant's Brief in Opposition of John Morrell's [Employer/Self-Insurer's] Renewed Motion for Summary Judgment.
May 6, 2015	[Claimant's] Motion to Amend Petition for Hearing.
May 6, 2015	[Claimant's] Brief in Support of Claimant's Motion to Amend Petition.
May 7, 2015	[Claimant's] Proposed Second Amended Petition for Benefits.
May 26, 2015	Employer/Self-Insurer's Reply to Claimant's Opposition to Summary Judgment.
May 26, 2015	Affidavit of Thomas J. Von Wald.
May 27, 2015	Employer's/Self-Insurer's Objection and Response to Claimant's Motion to Amend.
June 9, 2015	Reply Brief in Support of Claimant's Motion to Amend Petition.

Facts:

When construed in the light most favorable to the non-moving party, the facts of this case are as follows:

1. On December 28, 2007, Atkelet Abraha (Claimant) suffered a work related injury to her left shoulder, neck and lower back when she slipped on a wet surface, while working for John Morrelll & Company (Employer).

2. On December 28, 2007, Employer was self-insured for purposes of workers' compensation.

3. Employer was notified of the injury or had actual knowledge of the injury within three (3) days of its occurrence.

4. In 2009, Claimant underwent an MRI, which revealed an annular tear at L4-5.

5. Employer/Self-Insurer accepted the December 2007 injury claim as compensable and covered all related medical and indemnity payments.

6. In December 2009, Dr. Jeffrey Luther, with WorkForce, performed an independent medical exam, placing Claimant at maximum medical improvement.

In December 2009, Claimant was assigned permanent work restrictions due to Claimant's work related injury and subsequent medical treatment.

7. Claimant returned to work for Employer in 2010 and worked full-time performing various different job duties.

8. The last payment of workers' compensation benefits (including indemnity and medical payments) were made on April 20, 2010.

9. On April 19, 2013, Dr. Gregg Harvison of Avera McGreevy Clinic evaluated Claimant. Claimant reported pain in the left side of upper back for the last two weeks, hard to turn head and lift arm, with no report of injury or trauma. In September 2013, Claimant started to treat with Dr. Scott Hiltunen of Avera McGreevy Clinic. In September 2013 Claimant was evaluated by Dr. Hiltunen and reported generalized pain. Claimant was given additional work restrictions.

10. Employer/Self-Insurer denied this treatment as compensable.

11. Employer was not able to accommodate Claimant's most recent restrictions and Claimant has not regularly worked at Employer since September 2013.

12. In October 2013, Dr. Hiltunen opined that Claimant's ongoing pain was caused by her work-related injury. Dr. Hiltunen opined that Claimant's work-related injury was a major contributing factor of Claimant's current pain.

13. Some evidence exists that Claimant's back condition has deteriorated since the December 2007 injury. Dr. Hiltunen opined that Claimant's disabling pain, which increased in 2013 due to a recent exacerbation, constituted a significant worsening of her physical condition where she is unemployable, and that her income has presumably declined since the December 2007 injury.

14. Claimant filed a Petition for Hearing on June 9, 2014.

15. Employer/Self-Insurer filed a Motion for Summary Judgment on June 24, 2014.

16. On August 4, 2014, Claimant and Employer/Self-Insurer agreed to an indefinite extension to respond to the Motion for Summary Judgment, in order to obtain medical records and amend the petition.

17. Claimant and Employer/Self-Insurer stipulated to allowing Claimant to file an Amended Petition and Administrative Law Judge ordered that Claimant is allowed to file said Amended Petition for Hearing in this matter on October 27, 2014.

18. Claimant filed an Amended Petition for Hearing on October 30, 2014.

19. Employer/Self-insurer filed this Renewed Motion for Summary Judgement on April 9, 2015.

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

Motion to Amend Petition for Benefits:

Claimant filed a Motion to Amend Petition for Benefits on May 6, 2015. Claimant's October 30, 2014 amended petition alleges that Claimant's additional medical treatment, conditions and restrictions are an aggravation of her prior work related injury or in the alternative a reoccurrence of her prior work related injury. Claimant's second amended petition alleges that Claimant's additional medical treatment, conditions and restrictions are an aggravation or reoccurrence of her prior work related injury; or in the alternative, Claimant's work activities since she returned to work in 2010 are a major contributing causes of her medical treatment and condition.

Motions to amend pleadings are governed by SDCL 15-6-15(a). That provision states, "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." "A trial court may permit the amendment of pleadings before, during, and after trial without the adverse party's consent." Burhenn v. Dennis Supply Company, 2004 SD 91, ¶ 20, 685 NW2d 778, 783. citing Dakota Cheese, Inc. v. Ford, 1999 SD 147, ¶24, 603 NW2d 73, 78. "[T]he most important consideration in determining whether a party should be allowed to amend a pleading is whether the nonmoving party will be prejudiced by the amendment." Id.

In this case, the Employer and Insurers are not prejudiced by Claimant's amended petition. To date, no hearing date has been scheduled and sufficient time is available for Employer and Insurers to prepare their respective defenses. More importantly, there has been no suggestion that the amended claim is more difficult to defend now than it would have been, had the amendment been pled in the original Petition for Hearing. Therefore, Claimant is granted leave to amend his Petition for Benefits.

Employer/Self-Insurer's Renewed Motion for Summary Judgement:

On April 9, 2015, Employer/Self-Insurer filed a Renewed Motion for Summary Judgment. ARSD 47:03:01:08 governs the Department of Labor and Regulation's authority to grant summary judgment 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.

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)).

Statute of Limitation:

In their motion, Employer/Self-Insurer contend that the statute of limitation imposed by SDCL 62-7-35.1 bars further compensation in this case for the December 2007 injury because more than three years passed between the last payment of benefits to Claimant which occurred on April 20, 2010, and Claimant's Petition for Hearing filed June 9, 2014. SDCL 62-7-35.1 states:

> In any case in which any benefits have been tendered pursuant to this title on account of an injury, any claim for additional compensation shall be barred, unless the claimant files a written petition for hearing pursuant to § 62-7-12 with the department within three years from the date of the last payment of benefits. The provisions of this section do not apply to review and revision of payments or other benefits under § 62-7-33.

SDCL 62-7-35.1 (emphasis added). Claimant responded to the Motion for Summary Judgment argues that the statute of limitations imposed by SDCL 62-7-35.1 is not applicable here, because she is entitled to a review of her benefits pursuant to SDCL 62-7-33. SDCL 62-7-33 states:

> SDCL 62-7-33. 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 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 contend that in order for Claimant to reopen or review a workers' compensation claim under SDCL 62-7-33, a claimant must meet three requirements. McDowell v. Citibank, 2007 SD 52, ¶ 12, 734 N.W.2d 1, 5. The claimant must first be able to prove "a change in condition." Id. Second, the claimant must prove that the asserted change in condition "derives from an injury unknown at the time of settlement or from a known injury with its disabling character unknown." Id. Finally, "a claimant must prove that the unknown injury is causally connected to employment, or that the unknown disabling character is causally connected to the original, compensable injury." Id.

When the facts of this case are viewed in the light most favorable to the Claimant, they indicate that Claimant's pain has significantly increased, since she last received benefits, to the point where she can no longer work and is unemployable.

"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 this case, Dr. Hiltunen has opined that Claimant has had a change of condition. Whether Claimant underwent a change of condition is an essential factor in determining whether Claimant is entitled to a SDCL 62-7-33 review. While it, admittedly, takes a broad view of the pleadings and evidence thus far provided, some evidence suggests that Claimant's condition falls within the exclusion provided in SDCL 62-7-33. Therefore, Claimant's action against John Morrell & Company is not barred by SDCL 62-7-35.1. Consequently, there is an issue of material fact remaining and Employer/Self-Insurer's Motion for Summary judgment must be denied.

Order:

For the reasons stated above, it is hereby, ordered:

(a) Claimant's Motion to Amend Petition for Benefits is granted. Claimant is granted leave to amend her Petition for Benefits.
(b) Employer/Self-Insurer's Motion for Summary Judgment is denied. The Department has jurisdiction of this case.

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

Sincerely,

/s/ Sarah E. Harris
Sarah E. Harris
Administrative Law Judge
Division of Labor & Management
Department of Labor & Regulation