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LETTER DECISION AND ORDER

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RE: HF No. 26, 2003/04 – Shewaye E. Abiyu vs. Hutchinson Technology, Inc., and Constitution State Services Company

Dear Counsel:

I am in receipt of "Employer and Third Party Administrator's Motion for Summary Judgment, or in the Alternative, Motion in Limine", along with "Employer and Third Party Administrator's Brief in Support of Motion for Summary Judgment, or in the Alternative, Motion in Limine" and the Affidavit of Eric C. Schulte. I am in receipt of "Claimant's Response to Motion for Summary Judgment" and Employer and Insurer's letter response.

ARSD 47:03:01:08 governs the Department of Labor's authority to grant summary judgment:

> A claimant or an employer or its insurer may, anytime 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 of 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.

In support of its Motion, Employer/Insurer submitted Claimant's deposition, along with the deposition of Dr. E. Paul Amundson, with exhibits, and the Affidavit of Eric C. Schulte. Employer/Insurer included a copy of the article Frederick Wolfe, The Fibromyalgia Syndrome: A Consensus Report on Fibromyalgia and Disability, 23:3 The Journal of Rheumatology 535, 534 (1996) (cited by Black v. Food Lion, Inc., 171 F.Ed 308, 312-13 (5th Cir. 1999); Vargas v. Lee, 317 F.3d 498, 501 (5th Cir. 2003)); a copy of the article Geoffrey Littlejohn, Medicolegal Aspects of Fibrositis Syndrome, 16 Journal of Rheumatology 169, 171-72 (Supp. 19 1989) and a copy of the article Kevin P White, et al., Perspectives on Posttraumatic Fibromyalgia: A Random Survey of Canadian General Practitioners, Orthopedists, Physiatrists, and Rheumatologists, 27:3 J. of Rheumatology 790, 794 (2000).

Employer argues, "[b]ecause the Department of Labor has determined that fibromyalgia is not a compensable worker's compensation injury as a matter of law," Employer is entitled to summary judgment. The Department of Labor must apply the law to the facts of each case. Causation is a question of fact to be determined on a case-by-case basis. Lawler v. Windmill Restaurant, 435 N.W.2d 708, 709 (SD 1989) (citing Newbanks v. Foursome Package & Bar, Inc., 272 N.W.2d 372, 376 (Neb 1978)). Summary judgment will not be granted solely on the Department's ruling in another case.

In further support of its Motion for Summary Judgment, Employer argues that Claimant cannot meet her burden with the expert testimony of her treating physician, Dr. Paul Amundson. Employer asks the Department to reject Dr. Amundson's opinions because they do not rely on studies supporting his opinions and he admits that the medical community does not know the cause of fibromyalgia. Employer argues, "Because these glaring omissions demonstrate the absence of a genuine issue of material fact, Employer and Third Party Administrator are entitled to summary judgment." Employer's argument goes to the ultimate issue of fact in this case, whether Claimant's work-related injury and employment activities are and remain a major contributing cause to her current condition. Employer's Motion is denied.

Employer has also made a Motion in Limine seeking the Department's ruling that Dr. Amundson's opinions regarding the cause of fibromyalgia are inadmissible under the "Daubert" standard for expert testimony. The United State Supreme Court summarized:

> . . . the Rules of Evidence - especially Rule 702 - do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, (1993). Dr. Amundson is a board certified family practice physician. He was Claimant's treating physician. Employer has already accepted Dr. Amundson's treatments as compensable. Claimant has been paid permanent partial disability benefits arising out of her work-related injury and employment with Employer. Dr. Amundson is familiar with Claimant, her medical

condition, and her relevant employment duties. Dr. Amundson's opinions as a treating physician are relevant. Under SDCL 19-15-2, Claimant's treating physician can testify as an expert. The opinions of Dr. Amundson are admissible and will be given the weight they deserve under the causation standards for workers' compensation claims as set forth in SDCL Title 62 and relevant case law. Employer's Motion in Limine is denied.

This letter shall constitute the Department's Order.

Sincerely,

Heather E. Covey
Administrative Law Judge