

October 4<sup>th</sup>, 2017

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**LETTER DECISION AND ORDER**

Cassidy M. Stalley  
Lynn, Jackson, Shultz, & Lebrun, PC  
PO Box 160  
Rapid City, SD 57709-8250

Re: Michael Klamm v. Black Hills Corporation & Black Hills Power, Inc. and Liberty Mutual Insurance HF No. 30 2015/16

Dear Counselors:

This letter addresses the following submissions by the parties:

June 28 <sup>th</sup> , 2017	Employer/Insurer's Motion for Summary Judgment
	Employer/Insurer's Brief in Support of Motion for Summary Judgment
	Employer/Insurer's Statement of Undisputed Material Facts
	Affidavit of Cassidy M. Stalley
September 1 <sup>st</sup> , 2017	Claimant's Brief in Response to Employer/Insurer's Motion for Summary Judgment
	Claimant's Response to Employer/Insurer's Statement of Undisputed Material Facts
	Affidavit of Michael Hickey
September 20 <sup>th</sup> , 2017	Employer/Insurer's Reply Brief in Support of Motion for Summary Judgment

**Issue Presented: Is Employer Insurer entitled to Summary Judgment as to Claimant's claim for workers compensation benefits?**

**Facts**

On January 31<sup>st</sup>, 2006, Claimant suffered an injury to his knees while working for Employer. Employer/Insurer treated Claimant's injuries as compensable and paid for two surgeries on Claimant's knee and provided indemnity benefits. Employer/Insurer last paid benefits for Claimant's knee injury in 2008. In 2013, Claimant was seen at Black Hills Orthopedic and Spine Center for bilateral knee pain. Employer/Insurer denied further benefits based on the timeliness of Claimant's claim.

Claimant suffered a second work-related injury to his upper extremities in April, 2010. Employer/Insurer also treated this injury as compensable. Claimant underwent carpal tunnel surgery on January 28<sup>th</sup>, 2010. Claimant was subsequently given a twenty percent impairment rating for each of his wrists. Employer/Insurer and Claimant entered into an agreement in which Employer/Insurer paid Claimant \$46,544.29 in permanent partial disability benefits and Claimant signed a release for any future claims of permanent partial disability from the upper extremity injury.

Claimant underwent another carpal tunnel surgery in February, 2014, in Billings, Montana. Employer/Insurer paid for this surgery but refused to pay Claimant's mileage to Billings. Claimant, who was living in Deadwood at the time, claimed he did not get along with his treating physician, Dr. Steven Lang. In June, 2014, Dr. Settergren, the Montana doctor who performed the surgery, found that Claimant was at MMI and released him to return to work. Claimant alleges that he is entitled to further temporary benefits.

On March 10<sup>th</sup>, 2015, Claimant sought treatment for pain he was experiencing in his left elbow. Claimant saw Dr. Shawn O’Driscoll at the Mayo Clinic in Rochester, Minnesota. Dr. O’Driscoll diagnosed Claimant as suffering from hypertrophic osteoarthritis with nonunited fracture osteophytes, loose bodies, and ulnar neuritis. Employer/Insurer sought an Independent Medical Examination by Dr. Thomas Jetzer who opined that Claimant’s osteoarthritis was not caused by his employment. Dr. Lang concurred that Claimant’s osteoarthritis was not work-related.

In contrast to these opinions, Claimant provided a letter from Dr. O’Driscoll which indicates that Claimant’s osteoarthritis is caused by “overuse of the elbow.” Further, Dr. O’Driscoll attributed the osteoarthritis “principally to [Claimant’s] work history.”

Employer/Insurer filed a motion for summary judgement arguing Claimant was not entitled to further benefits.

## **Analysis**

### **A. Claim for Knee Injury**

Claimant concedes that his claim is barred by SDCL 62-7-35.1.

Employer/Insurer is entitled to summary judgment on this issue.

### **B. Claim for Mileage Expenses**

SDCL 62-4-1 provides:

If the employee selects a health care provider located in a community not the home or workplace of the employee, and a health care provider is available to provide the services needed by the employee in the local community or in a closer community, no travel expenses need be paid by the employer or the employer's insurer.

In order to claim mileage, Claimant must demonstrate that there was no one available in Spearfish to perform this surgery. Claimant's reasoning for seeking treatment from Dr. Settergren was that "he did not get along" with Dr. Lang. There is no evidence that Dr. Lang could not operate on Claimant, and the inability to get along with one's treating physician does not render treatment "unavailable" under SDCL 62-4-1. Therefore, Claimant fails to show that travel to Billings to seek out another doctor was necessary.

Claimant argues that the fact that Dr. Lang referred him to Dr. Settergren justifies his travel. An examination of Dr. Lang's referral letter, however, indicates Dr. Lang referred Claimant to Billings at Claimant's request and not because Dr. Lang was unable to perform the surgery himself. Therefore, Employer/Insurer's motion for summary judgement on the issue of mileage is granted.

### **C. Claim for Left Elbow Injury**

Employer/Insurer argues that Claimant's elbow injury was not caused by his employment and therefore is not compensable. To support its argument, Employer/Insurer offers letters from Dr. Lang and Dr. Jetzer. Both letters indicated that Claimant's elbow injury was not work related. Claimant offers a letter of Dr. O'Driscoll to counter that his left elbow injury is compensable. "It is the function of the fact finder to resolve the conflicting testimony and evaluate credibility of witnesses to determine the comparative weight to be given to such testimony. *Eric Gosch*, HF No. 169, 1993/94, 1996 WL 46570, at \*4 (S.D. Dept. Lab. Jan. 15, 1996)(citing *Hanson v. Penrod Const. Co.*, 425 N.W.2d 396 (S.D. 1988)).

Here, the Department finds the opinions of Dr. Lang and Dr. Jetzer more persuasive. Dr. O'Driscoll's opinion does not conclusively state that Claimant's elbow injury was work-related. While Dr. O'Driscoll assumes that the injury was caused by "a history or overuse of the elbow..." which he attributed to Claimant's employment, he also concedes that the onset of osteoarthritis can be caused by previous injuries, sports, or genetic predisposition. Dr. O'Driscoll admits, "I do not have details of how long [Claimant] worked with that company nor for how long he did the type of work described in his written letter. I also don't have any details regarding other factors that might lead to the type of problem he had with his elbow..." "Our law requires a claimant to establish that his injury arose out of his employment by showing a causal connection between his employment and the injury sustained." *Horn v. Dakota Pork*, 2006 S.D. 5, ¶ 14, 709 N.W.2d 38, 41 (citation omitted). Because Dr. O'Driscoll was not provided with enough evidence to conclusively draw a causal link between Claimant's injury and his employment, his opinion is highly speculative. Such speculation is inadequate to meet a claimant's burden in a workers compensation case. (see *Brady Mem'l Home v. Hantke*, 597 N.W.2d 677).

Dr. Lang and Dr. Jetzer, on the other hand, are clear in their opinions that Claimant's osteoarthritis was not related to his employment. Therefore, Employer/Insurer's motion for summary judgment is granted. As Claimant's elbow surgery is not compensable, Claimant is not entitled to reimbursement for mileage related to his elbow surgery.

**ORDER**

For the forgoing reasons, Employer/Insurer's Motion for Summary Judgment is GRANTED. This letter shall constitute the Department's Order in this matter.

Sincerely,

    /s/ Joe Thronson  
Joe Thronson  
Administrative Law Judge