December 31, 2014

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Letter Decision and Order

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RE: HF No. 54, 2012/13 – Kathleen Harvard v. Spearfish Healthcare LLC and MHA Insurance Company.

Dear Mr. Simpson and Mr. Larson:

Submissions

This letter addresses the following submissions by the parties:

August 15, 2014	Employer and Insurer's Motion for Summary Judgment;
	Employer and Insurer's Brief in Support of Motion for Summary Judgment;
	Affidavit of Charles Larson;
October 3, 2014	Claimant's Response to Employer/Insurer's Motion for Summary Judgment;
	Affidavit of Michael J. Simpson;
October 17, 2014	Employer and Insurer's Reply Brief in Support of Motion for Summary Judgment

Facts:

The undisputed material facts of this case are as follows:

1. Kathleen Harvard (Harvard) was employed by Spearfish Healthcare LLC (Employer) on July 30, 2011, when she slipped and fell, injuring her left foot.

2. Employer and Insurer accepted Harvard's July 30, 2011, work injury as compensable and paid benefits accordingly.

3. Harvard was originally treated for conservative pain management. However, after additional examinations, Harvard underwent surgery on her left foot on December 5, 2011, to fuse her foot. The procedure was performed by Dr. DenHartog.

4. Harvard was released by Dr. DenHartog to work without restrictions on March 21, 2012.

5. On April 13, 2012, Harvard complained of left hip pain. Harvard resigned from her position with Employer on July 2, 2012.

6. Harvard received a denial letter on October 5, 2012. The denial was based on an independent medical evaluation done by Dr. Richard Farnham dated August 17, 2012,

7. Harvard filed a Petition on or about October 24, 2012, alleging that she is unable to return to her former and customary occupation in her present medical condition.

8. Harvard underwent a second surgery on her left foot on March 15, 2013.

9. Employer and Insurer have paid for all costs associated with the second surgery and a resulting impairment rating.

10. Harvard stated that her pain was greatly reduced after her second surgery.

11. Harvard is presently in need of bilateral hip replacement surgery. Harvard has not suggested that the need for her hip replacements is due to her work.

12. Harvard was seen by Dr. Nolan Segal on October 24, 2013, for purposes of an independent medical examination. Dr. Segal opined that Harvard was at maximum medical improvement and Harvard had no work restrictions. Segal reported that Harvard has arthritis in her foot and hips but that is unrelated to the injury.

13. The Department issued a Scheduling Order on June 9, 2014, identifying Harvard's deadline to disclose her experts and the experts' reports by July 1, 2014. In response to the Scheduling Order, Harvard disclosed Rick Ostrander, a Licensed Professional Counselor, providing that he would testify consistent to his report. Harvard also disclosed Kathleen Boyle, a physical and occupational therapist. Neither Ostrander nor Boyle have offered a Medical opinion that there is a causal connection between Harvard's July 30, 2011, work injury and her current inability to work.

14. Harvard visited her treating doctor, Dr. DenHartog, on March 4, 2014. Dr. DenHartog opined that Claimant's work related injury was not a major contributing cause to her current hip problems. Dr. DenHartog did not provide any permanent work restrictions to Harvard's left foot. Dr. DenHartog opined that he did not believe Harvard's work injury was a major contributing cause to any current restrictions Harvard may have had.

15. Additional facts will be discussed in the analysis below.

Summary Judgment:

Employer and Insurer filed a Motion for Summary Judgment. ARSD 47:03:01:08 governs the Department of Labor & Regulation's authority to grant summary judgment in workers' compensation cases. That regulation states:

> 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.

ARSD 47:03:01:08.

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)). "Summary judgment is not the proper method to dispose of factual questions." Stern Oil Co., Inc. v.

Brown, 2012 SD 56, ¶ 9, 817 N.W.2d 395, 399 (quoting Boziad v. City of Brookings, 2001 S.D. 150, ¶ 8, 638 N.W.2d 264, 268).

Just because someone has a work injury does not automatically entitle them to other benefits. Hayes v. Ford, 2004 SD 99, ¶ 17, 686 N.W.2d 657, 661.

In this case, the Department finds no genuine issues of material fact. Consequently, the Department must next determine whether Employer and Insurer are entitled to judgment as a matter of law.

Causation:

Claimant has the burden of proving all facts essential to sustain an award of compensation. Darling v. West River Masonry, Inc., 777 N.W.2d 363, 367 (SD 2010); Day v. John Morrell & Co., 490 N.W2d (SD 1967). When medical evidence is not conclusive, Claimant has not met the burden of showing causation by a preponderance of the evidence. Enger v. FMC, 565 N.W.2d 79, 85 (S.D. 1997).

"No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of;". SDCL.62-1-1 (7). "The testimony of professionals is crucial in establishing this causal relationship because the field is one in which laymen ordinarily are unqualified to express an opinion." Day v. John Morrell & Co., 490 N.W.2d 720, 724 (S.D. 1992). "A medical expert's finding of causation cannot be based upon mere possibility or speculation. Instead, "[c]ausation must be established to a reasonable medical probability." Orth v. Stoebner & Permann Const., Inc., 2006 SD 99, ¶ 34, 724 NW2d 586, 593 (citation omitted).

In this case, the Department issued a Scheduling Order that set a deadline of July 1, 2014, for Harvard to disclose her expert witnesses and their reports. That Scheduling Order states in part: "The Scheduling Order may not be modified except by order of the Department." Harvard did not ask the Department to modify that Scheduling Order and the deadlines set forth in the Scheduling Order have not been modified.

The disclosure of experts filed by Harvard with the Department lists Rick Ostrander, a Licensed Professional Counselor, and Kathleen Boyle, a physical and occupational therapist as her experts. A review of their reports indicates that neither of these experts has offered a medical opinion that Harvard's work injury is a major contributing cause of her current condition. Indeed, most of the evidence indicates otherwise. Therefore, Harvard has failed to meet her burden of proof in this case and Employer and Insurer are entitled to judgment as a matter of law.

Order:

It is hereby, ordered that Employer and Insurer's Motion for Summary Judgment is granted. This matter is dismissed with prejudice. This letter shall constitute the order in this matter.

Sincerely,

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