August 27, 2008

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LETTER DECISION

R. Alan Peterson
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PO Box 2700
Sioux Falls, SD 57101-2700

RE: HF No. 65, 2002/03- Joan M. Sauder v. Parkview Care Center and Travelers Insurance Companies

Dear Mr. Nasser and Mr. Peterson:

I am in receipt of Employer/Insurer's Motion for Partial Summary Judgment, Claimant's Resistance to Respondent's Motion for Partial Summary Judgment, Reply Memorandum in support of Employer/Insurer's Motion for Partial Summary Judgment and letter from R. Alan Peterson dated August 6, 2008 which modifies and limits the original Motion for Summary Judgment. I have carefully considered these submissions and accompanying exhibits including a Statement of Material Uncontested Facts and the depositions of Joan M. Sauder and Dr. Thomas L. Luzier in addressing the pending motion.

ARSD 47:03:01:08, which governs the Department of Labor's authority to grant summary judgment, states in part:

> 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.

This matter originally involved two insurance carriers named in the Claimant's Petition for Hearing as having potential liability. A 2007 decision issued by the South Dakota Supreme Court established that Claimant did not develop an occupational disease for which Employer/Insurer owe any workers' compensation benefits. *Sauder v. Parkview Care Center*, 1007 SD 103, 740 NW2d 878. The Supreme Court also ruled that Claimant's claims against Berkley Risk Administrators (Berkley), as the Third-Party

Administrators for Tri-State Insurance, were time barred and the remaining parties to which a claim for benefits may attach are the Employer, Parkview Care Center, and its workers' compensation insurer for the time period of May 25, 1994, to May 25, 1995, Travelers Insurance Companies (Travelers). *Id*.

Employer/Insurer moves the Department to grant Summary Judgment on the issue of Travelers liability for the medical bills incurred or that might be incurred after November 1, 1995.

The parties have submitted a Statement of Material Uncontested Facts, which the parties believe constitute the material facts upon which partial summary judgment as a matter of law can be determined.

The material uncontested facts are as follows:

1. Claimant, Joan Sauder, was employed by Parkview Care Center from 1983 to 2001.
2. Parkview Care Center obtained a policy providing its employees workers' compensation insurance with Traveler's Insurance Companies for the time period of May 25, 1994, until May 25, 1995.
3. Berkley Administrators administered a policy of workers' compensation insurance issued by Tri-state Insurance Company providing coverage to Parkview Care Center employees from May 25, 1995, through all later times relevant to this motion.
4. Travelers Insurance Companies did not provide workers' compensation insurance to Parkview Care Center subsequent to May 25, 1995.
5. Beginning in late 1993, prior to the time period Travelers Insurance Companies provided coverage, and continuing from that time, Sauder developed a series of health issues involving breathing, allergies, and asthma-related complaints, which she alleges arose out of and in the course of her employment with Parkview Care Center when she was exposed to fungus in the work place.
6. Sauder reports that in December, 1995, her respiratory-related health problems became worse than they had been at any prior time and her condition has continued to worsen since December, 1995. In addition, Sauder describes that she developed symptoms, including headaches, dizziness and nausea, beginning in October and November, 1995, that she had not previously experienced and which she related to her mold exposure.
7. Sauder filed a first report of injury concerning her respiratory-related health problems with her employer, Parkview Care Center, on November 10, 1995.
8. Sauder blames her current respiratory-health related problems on an exposure to black mold, which was first observed in her work environment at the Parkview Care Center sometime in October or November of 1995.
9. Sauder consulted Dr. Thomas Luzier, a board certified allergist, who has expressed an opinion that Sauder's respiratory-related health conditions arise

from repeated exposure to fungus that occurred at Sauder's place of employment.

10. Dr. Thomas Luzier also expressed the opinion that Sauder's exposure to fungus during the latter portions of calendar year 1995 was the exposure that advanced her respiratory-related health condition to a point where the condition was no longer reversible.
11. Sauder was told by her physician at the Mayo Clinic that she consulted in December of 1994 that he could not provide an opinion that her respiratory-related condition arose from exposure to fungus at her employment.
12. Sauder was told by her treating doctors at the Central Plains Clinic in Sioux Falls, SD, that they could not provide an opinion that her respiratory-related health condition arose from exposure to fungus at her employment.
13. Sauder was told by her physician she consulted at the National Jewish Hospital in Denver, Colorado, that she cannot relate her respiratory health conditions to exposure to fungus at her employment.

In cases of successive injury, the South Dakota Supreme Court has adopted the Last Injurious Exposure Rule. Under the Last Injurious Exposure Rule, "'[w]hen a disability develops gradually, or when it comes as a result of a succession of accidents, the insurance carrier covering the risk at the time of the most recent injury or exposure bearing a causal relation to the disability is usually liable for the entire compensation.'" *Kassube v. Dakota Logging*, 205 SD 102, ¶43, 705 NW2d 461(quoting *Enger v. FMC*, 1997 SD 70, ¶12, 565 NW2d 79, 83 (citations omitted)).

The Last Injurious Exposure Rule requires inquiry "whether the successive injury is a mere recurrence or an independent aggravation of the first injury." *St. Luke's Midland Reg. Med. Ctr v. Kennedy*, 2002 SD 137, ¶20, 653 NW2d 880, 886. The original employer or insurer will be liable if the second injury is a recurrence of the first. However, if the second injury is an aggravation that independently contributes to the final disability, the subsequent insurer or employer is liable. *Id*. (citation omitted).

The distinction between the meanings of these two concepts is gray. *Enger,* 1997 SD 70 at ¶17, 565 NW2d 79 at 84. "'If the second injury takes the form merely of a recurrence of the first, and if the second incident does not contribute even slightly to the causation of the disabling condition, the insurer on the risk at the time of the original injury remains liable for the second.'" *Id.* (quoting 9 Arthur Larson, Larson's Workmen's Compensation Law § 95.23.)

To find that the second injury was an aggravation of the first, the evidence must show:

1. A second injury; and
2. That this second injury contributed independently to the final disability.

Titus v. Sioux Valley Hospital, 2003 SD 22, ¶14, 658 NW2d 388 (quoting *Paulson v. Black Hills Packing Co*., 1996 SD 118, ¶12, 554 NW2d 194, 196).

To find that the second injury was a recurrence of the first injury, the evidence must show:

1. There have been persistent symptoms of the injury; and
2. No specific incident that can independently explain the second onset of symptoms.

Id. Because an injury is a subjective condition, an expert opinion is required to establish a causal connection between the incident or injury and disability. *Truck Ins. Exchange*, 2001 SD 46, ¶20, 624 NW2d 705, 709; *Day v. John Morrell & Co*., 490 NW2d 720, 724 (SD 1992).

Travelers urges the Department to find that Claimant suffered an aggravation of her original injury, that aggravation being a subsequent exposure to mold and fungus in late October or November of 1995, when Travelers was no longer on the risk. When there are successive insurance carriers involved in a recurrence or aggravation dispute, the "burden of proving the causative effect of the second event is upon the initial carrier seeking to shift responsibility for the consequences of the original injury." *Truck Ins. Exchange*, 2001 SD 46 at ¶28, 624 NW2d at 710-711 (citations omitted).

Claimant asserts that there was no subsequent or second injury, but rather a single exposure from the same incident which began while Travelers on the risk and before Berkley, the subsequent insurer, was on risk. Claimant concedes that her condition greatly worsened after Berkley was on risk, but that there was no subsequent exposure, rather a continuation of the same exposure.

Claimant testified in her deposition that she developed health issues including breathing, allergy, and asthma-related problems from repeated exposure to fungus at the workplace. Claimant stated that her symptoms would get better when she was away from her office. In late 1995 Claimant testified she was exposed to black mold when it was dripping down the walls in the lounge. This exposure caused the onset of additional and more serve symptoms including headaches, dizziness and nausea. While there had been some symptoms that persisted the entire time, those new symptoms that presented following the exposure in late 1995, did not subside thereafter.

The first element of aggravation is that there is a second injury. The increased and new exposure to the fungus and exposure to black mold running down the walls of the lounge in October or November of 1995 constituted a second injury because it resulted in "new problems or symptoms not present" until that time. *Paulson*, 1996 SD 118 at ¶15, 554 NW2d 194 at 196.

The second element of aggravation is whether the second injury contributed independently to the final disability. "In order to determine whether there was an

independent contribution to the injury [Sauder suffered at Parkview], we must review the medical testimony in this case". *Enger,* 1997 SD 70 at ¶18, 565 NW2d 79 at 84.

The second injury, however light, must contribute to the causation of the disability in order for the last injurious exposure rule to apply. *Titus*, 2003 SD 22 at ¶16, 658 NW2d 388 at 391(citations omitted)

Dr. Thomas Luzier is a board certified allergist who was consulted by Claimant. Dr. Luzier, in his deposition, opined that Sauder's respiratory-related health conditions arose from repeated exposure to fungus that occurred at Sauder's place of employment. Dr. Luzier also expressed the opinion that Sauder's repeated exposure to fungus and black mold during the latter portions of calendar year 1995 was the exposure that advanced her respiratory-related health condition to a point where the condition was no longer reversible. According to his testimony, Dr. Luzier stated that there is a "point where avoidance [of the mold] isn't going to help" and in this case that was the 1995 to early 1996 time frame.

Analogous to the present case, the South Dakota Supreme Court has previously found a second compensable injury under SDCL 62-1-1(7) where Claimant had had several previous exposures to allergens. *St. Luke's,* 2002 SD 137 at ¶11, 653 NW2d 880 at 881. In this case, the allergist testified that one specific exposure to the allergen and reaction in question was the "point of no return" and that that exposure was the major contributing cause of Claimant's disability. At that point, any exposure to the allergen was now a major life or death situation from which Claimant would no longer be able to recover. *Id*.

In the case at hand, the second injury contributed independently to the final disability. Employer/Insurer has met its burden of establishing an independent aggravation rather than a continuation, worsening, or a recurrence, thereby relieving Travelers of liability for medical expenses incurred or that may be incurred after November 1, 1995. Claimant's claim against Travelers is limited to any benefits due prior to November 1, 1995. Employer/Insurer is entitled to Summary Judgment as a matter of law. Motion for Summary Judgment is granted. Employer/Insurer shall submit an order consistent with this decision.

Sincerely,

Taya M. Dockter
Administrative Law Judge