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February 10, 2009

Mr. Daniel Ashmore, Chairman
Committee for Worker's Comp.
P.O. Box 8045
Rapid City, SD 57709

Mr. James Marsh
SD Department of Labor
Worker's Compensation Advisory Council
700 Governor's Drive
Pierre, SD 57501

Re: Cantwell vs. Clear Channel Radio, et al
HF No.: 243, 2004/05
Hughes County Civ. 08-269

Dear Mr. Ashmore and Mr. Marsh:

I bring the above matter to your attention out of a professional concern for the integrity of the worker's compensation system in South Dakota (SDCL 62). I do not engage myself in many worker's compensation cases in my professional practice simply because they are very time consuming, costly and not very financially productive in the vast majority of those cases (I believe this is the sentiment of many legal practitioners in South Dakota). I have had, however, several cases that have reached the Supreme Court level (see Cantalope vs. Veterans of Foreign Wars Club of Eureka, 674 NW2d 829, 2004 SD 4; Enger vs. FMC, 609 NW2d 132, 200 SD 48). The result that came out of the Cantwell[1] case addressing the issues below bothered my legal conscience to the point

[1] Rebecca Cantwell, the claimant in this case, has authorized the use of her name and the background of her case for review purposes for anyone that cares to consider and listen to it.

that I need to address them with you folks to see if you share in any of these concerns.

If you do, then please take the initiative to investigate the outcome of this case further and determine what needs to be done within the law, procedurally or administratively, to ensure that claimants like Cantwell are not left holding the proverbial "empty bag." To the extent that I can, I offer my time to be involved in that effort.

PROSECUTION COSTS

As is true with most worker's compensation cases, the clients/claimants are wage earners that live on a weekly or monthly paycheck, many existing scarcely above poverty level. They seldom have any reserve with which to pay the cost of the prosecution of a worker's compensation case. Most of that burden falls on the back of the attorney that is unfortunate to get caught up in the expensive prosecution of a worker's compensation case and not prevail. The attorneys that are fortunate enough to defend these cases are normally paid by the employer and/or insurer by the hour, thus they do not have these same concerns.

I believe the attorneys for claimants, from my discussions with some of them, are becoming less and less involved because of the time and cost it takes to handle these cases. Let's use the Cantwell case for example. It took over four years to prosecute. It consisted of deposing Dr. Berry, the surgeon (OB-GYN) that treated Cantwell's female organ injuries; deposing Dr. Skjefte, the chiropractor that treated her back injuries; deposing Dr. Ivey, the chiropractor that provided an impairment rating for the back injuries; deposing Dr. Luther who did an impairment rating for the injuries to the female organs. The employer hired an OB-GYN expert/MD in Minneapolis, Dr. Marcus, thus requiring a trip to the Cities for that deposition. There was an all day hearing with the ALJ. After the hearing, transcripts of the testimony were ordered and extensive briefs were submitted to the ALJ of the DOL. She finally rendered her opinion mostly in favor of Cantwell, to the extent that it would have paid approximately $45,000 of back medical expenses and compensation under SDCL 62-4-6. The employer and insurer appealed to the circuit court in Hughes County. Again, extensive briefs were submitted to the circuit judge. Oral argument was provided, which required a trip from Aberdeen to Pierre to

engage in that argument. Finally, several months later we received the enclosed decision from Judge Lori Wilbur.

The whole process up to this date took over four years. The prosecution costs incurred, paid up front, exceeded $7,000. If this was a fee paying case, there would be over $20,000 worth of attorney's time at $150 per hour.

Had there been a judgment entered and payment received as a result of the ALJ's decision, these costs would not have been fully satisfied. Now the result from the circuit court decision makes losing this case hurt even more financially[2].

Cantwell would not authorize the appeal to the Supreme Court. She is literally exhausted from handling the case. Her own time and expense that she put into the case is not even a part of the above numbers. She knew she had a significant obligation to the office of the undersigned for the prosecution costs in excess of $7,000. With the possibility of getting that paid through a settlement offer, she agreed to accept it to at least get her prosecution bill paid and be done with the case.

The cost of the prosecution of worker's compensation cases is a real concern for many practitioners. It is an issue that should be studied so it is a level playing field: claimant ∧ employer.

WORK RELATED INJURY

The ALJ accepted the testimony of Dr. Berry (OB-GYN) and the claimant in finding the lifting incident as a major contributing cause to the claimant's cystocele, rectocele and uterine prolapse. The circuit judge ignored the sworn testimony of the claimant who described how the lifting incident occurred and what she felt immediately because of it and then reported it to her doctors the very first thing the next morning. The circuit judge relied on the transcript of both OB-GYN's and concluded that since they were not there to see how the lifting incident occurred and what the result was, all they could declare was "... lifting the pool

[2] The employer and insurer in this case, to settle with the claimant without Supreme Court review, agreed to pay the prosecution costs to the claimant. The claimant agreed to accept that compromise as explained above.

may have been a precipitating event, but no doctor is able to testify that there is any medical evidence that it actually was the precipitating event," (page 9 of enclosed decision). Incidentally, Dr. Berry did state, in answer to several different questions, that the lifting incident was a "major contributing cause," but that was based on the history of the case given to him from the claimant.

If the law does require that there must be "medical evidence" to show that an injury was work related, you will need another expert come in to reconstruct the injury event (at a huge cost to the claimant) in order for the doctor to use that accident reconstruction testimony in his medical opinion.

The dilemma with this issue in this case is how does a claimant carry the burden of proof that an incident at work caused her injury? A majority of these types of cases occur without other witnesses being involved. It often comes down to the claimant explaining how the accident happened and how she was injured because of that accident. That information is then relayed to the treating physician who certainly is not an expert in accident reconstruction to determine whether or not an accident as described by the claimant can bring about a certain type of medical injury and/or impairment. The potential solution here is to lessen the burden of the claimant in proving her injury was work related. How one does that is the issue for debate, but, in this case, there would be no way for the claimant to prevail under Judge Wilbur's rationale.

IMPAIRMENT RATING

Employer and insurer in this case contended that SDCL 62-4-6 requires a showing that there is a "loss of use" from the injury that affects the employee's "income earning capability." On behalf of the Claimant Cantwell, I took the position that all the claimant needs to show is a work related injury that resulted in an impairment rating regardless if it affects one's "earning capability." It certainly is not spelled out very well in the statutes that address this issue. Many reported worker's compensation cases do require something more than just an impairment rating. The later cases do not appear to require anything more than an impairment study and a rating. All of this is discussed in Judge Wilbur's Memorandum Decision, page 9-13. Judge Wilbur was correct in her analysis, in my opinion, but it took a great deal of my time and effort to

convince her that my position was correct. This brings up this question: why does it have to be a matter of interpretation and application of case law to come to that conclusion? Why can't it be specifically spelled out and explained in these statutes: SDCL 62-4-1.2, 62-4-6, etc.? This is an issue that could be addressed legislatively with the next session in 2010 so it gets cleared up and does not require more effort by the worker's compensation practitioners and the judges that handle these cases to address this type of issue in the future.

PERMANENT DISFIGUREMENT
OR PERMANENT DISABILITY

I contended that the results from Cantwell's surgical treatment that she needed in connection with her work related injury (vaginal hysterectomy and the repair of her cystocele and rectocele) were covered under SDCL 62-4-6(24). Dr. Luther set that impairment at 15%. It was based upon the expert testimony of Dr. Luther who studied the medical issue and the AMA Guide and determined that, in his opinion, she had a compensable injury for being hysterectomized at 15%.

The employer and insurer did not raise this issue at the ALJ level, thus it was not an issue that was covered in the testimony during the medical depositions or at the hearing with the ALJ. When the employer and insurer raised this issue with the circuit court, I objected to considering the issue because it had not previously been presented at the lower level. The circuit judge declared that since the ALJ did address it in her Memorandum Decision and in some of her Findings of Fact then that was sufficient to allow the circuit judge to consider the same issue on appeal.

What is really bothersome with the circuit judge's decision, which arguably could be correct, is that there is no "specific bodily injury" that is listed under SDCL 62-4-6 that covers the type of injury Cantwell suffered as a result of the lifting incident at work: cystocele, rectocele and uterine prolapse which resulted in a complete hysterectomy (removal of cervix, uterus and ovaries). If a claimant like Cantwell needs to show that she ended up disabled, in the context of not being able to work, she could not do that since she did recover and went on to work. If she needs to prove disfigurement, some of the cases that address that issue, as referenced by Judge Wilbur, require a change to one's visible bodily

appearance in order to be classified as "disfigured." In Cantwell's case, as is true with any woman that has gone through a hysterectomy, all of the damage is done internally. Clearly, there is internal disfigurement; clearly, there is internal disability (cannot bear children) and many more adverse consequences because of being hysterectomized. Nevertheless, any claimant that has been injured at work that has internal injuries that are not covered by other subparagraphs of SDCL 62-4-6, are not able to recover at all. I believe that result is clearly contrary to what the legislature intends in these kinds of cases, especially with the amendment to SDCL 62-4-6 in 1994.

I believe the solution to this dilemma is legislative. Women that lose their female organs, and suffer numerous adverse consequences because of it, not to mention no longer being able to bear children, certainly should be compensated just like a person that might lose a toe, foot, leg; finger, hand, arm; etc. Under Judge Wilbur's rationale, these claimants cannot recover for this type of injury under SDCL 62-4-6(24). The law in this area needs to be changed.

CONCLUSION

I bring this "case study" to your attention not to be critical of any of the participants involved in it (defense counsel, ALJ or circuit court judge), but with the hope that the right people in the right positions are aware of it and can agree with me that something needs to be done with these issues:

1. Making the prosecution of the claimant's case more affordable and profitable for claimant's attorneys to level the playing field;

2. Easing the claimant's burden of proof in connecting the injury to work;

3. Amending the law to make "impairment ratings" the only proof necessary to qualify for additional compensation under SDCL 62-4-6; and

4. Adding additional sections to SDCL 62-4-6 that cover claimants that have suffered internal injuries, resulting in impairments, even though they do not result in "disfigurement" or "disability."

If you believe I should share this letter and the Memorandum Decision with others, I will certainly do that. On the other hand, you have my permission to share the same with the appropriate people in the right positions that have the ability to bring about a forum in which these issues can be further studied and considered, hoping there will be the appropriate changes made in the law to resolve them.

Thank you for your time and consideration.

Sincerely yours,

JOHNSON LAW OFFICE

Drew C. Johnson

DCJ/mjj
cc: Ms. Rebecca Cantwell
Mr. Dean Nasser