SOUTH DAKOTA DEPT. OF LABOR & REGULATION

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April 26, 2022

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LETTER DECISION ON MOTION FOR SUMMARY JUDGMENT

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RE: HF No. 102, 2020/21 – Maribelia Castillo v Link Snacks, Inc. and Trumball Insurance Company

Greetings:

This letter addresses Employer and Insurer's Motion for Summary Judgment submitted on February 8, 2022; Claimant's Brief in Opposition to Employer and Insurer's Motion for Summary Judgment submitted on March 11, 2022; and Employer and Insurer's Reply Brief in Support of Employer and Insurer's Motion for Summary Judgment submitted on March 23, 2022.

The facts of this matter arise from an alleged work-related injury sustained by Maribelia Castillo (Castillo) on May 27, 2017, while she was employed by Links Snacks, Inc (Employer) which was at all times pertinent insured for workers' compensation purposes by Trumball Insurance Company (Insurer). At the time of her alleged injury, Castillo earned gross wages of $32,821.88 per year with an average weekly wage of $631.19 and a total temporary disability weekly benefit rate of $420.82. She was making

$11.00 per hour. Employer and Insurer accepted the injury as compensable and paid Castillo benefits.

On May 31, 2017, Castillo's treating physician, Amy Albrecht, CNP, cleared her to return to work on June 1, 2017, with a 20 lb. weight restriction and light duty assignment. On June 7, 2017, CNP Albrecht cleared Castillo to work 8 to 12-hour shifts for Employer. By October 2, 2017, Castillo was cleared to return to full duty without restrictions.

Dr. Bruce Elkins performed an Independent Medical Examination (IME) on Castillo on February 22, 2018. He noted that Castillo has chronic headaches but was working full time without restrictions. On December 4, 2018, Castillo attended a follow-up IME with Dr. Elkins who noted that she was working with no restrictions and that she reported her condition was the same.

On or about January 20, 2019, Castillo was rear-ended at work by another vehicle. On January 23, 2019, her treating physician cleared her to return to work without restrictions. On or about April 17, 2019, Castillo took thirteen days off work and then was cleared to return to work without restrictions. Castillo continued to work without restrictions through June 3, 2019, when she was excused from work for a day.

Dr. Elkins performed another follow-up IME on Castillo on June 19, 2019. He noted she remained symptomatic and required follow up for medication management. Another follow-up IME was conducted on August 14, 2019. Dr. Elkins noted that Castillo would be at Maximum Medical Improvement (MMI) if she elected not to pursue further medications such as gabapentin and nortriptyline.

Castillo filed a Petition for Hearing with the Department of Labor & Regulation on Mach 29, 2021. Castillo continues to work for Employer and has done so since the date of her alleged injury. She is currently making an hourly base wage of $17.00 per hour. Her gross wages for 2021 totaled $39,434. 78. Castillo's gross wages for May 2016 through May 2017, the 52 weeks prior to her alleged injury, totaled $33,877.94 roughly $5,000.00 less than her 2021 wages. She has also continued to work 8 to 12-hour shifts 3-4 days per week. Employer and Insurer have paid Castillo's remaining claims for medical, rehabilitation, temporary total, temporary partial, and permanent partial disability benefits. In her Petition, Castillo asserts she is entitled to permanent total disability benefits.

Employer and Insurer have moved for summary judgment on the grounds that Castillo has failed to show she qualifies for permanent total disability. The Department's authority to grant summary judgment is established in ARSD 47:03:01:08 which provides:

> 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 does not require a statement of facts. Castillo further argues that her claim is valid and that her current treating physician has opined that she suffered a work-related injury.

In matters of summary judgment, the moving party 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. *Stromberger Farms, Inc. v. Johnson*, 2020 S.D. 22, ¶ 31, 942 N.W.2d 249, 258-59 (citations omitted). The non-moving party must present specific facts showing that a genuine issue of material facts exists. *Id.* at ¶ 34. "A fact is material when it is one that would impact the outcome of the case 'under the governing substantive law' applicable to a claim or defense at issue in the case." *A-G-E Corp. v. State*, 2006 SD 66, ¶ 14, 719 N.W.2d 780, 785.

SDCL 62-4-53 provides, in pertinent part,

> An employee is permanently totally disabled if the employee's physical condition, in combination with the employee's age, training, and experience and the type of work available in the employee's community, cause the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income. An employee has the burden of proof to make a prima facie showing of permanent total disability.

Castillo is currently working for Employer and earning a wage greater than she had been before her injury. Her employment is not sporadic and thus she is not permanently and totally disabled pursuant to SDCL 62-4-53. Therefore, Employer and Insurer have proven that no genuine issues of material fact remain.

Castillo has requested that even if it is determined that she is not presently permanently and totally disabled that the Department should retain jurisdiction over her claim for benefits so that if her employment circumstances change, she would not be subject to the two-year statute of limitations. In *McLaflin v. John Morrell & Co.*, the Court addressed a similar situation where McLaflin was currently employed, but there were concerns regarding change of circumstances and the statute of limitations. The Court held, "[t]hus, this Court should allow [McLaflin] to show that if his position is terminated by Employer, his change in condition requires

further examination without regard to time limitations" 2001 SD 86 ¶15, 631 N.W.2d 180, 185. SDCL 62-4-52(2) provides, in pertinent part, "The department shall retain jurisdiction over disputes arising under this provision to ensure that any such position is suitable when compared to the employee's former job and that such employment is regularly and continuously available to the employee." Following the guidance provided in *McLaflin* and SDCL 62-4-52(2), the Department will retain jurisdiction over this matter regarding continuous employment and permanent total disability.

It is hereby ORDERED that Employer and Insurer's Motion for Summary Judgment is GRANTED. This letter shall constitute the order in this matter.

Sincerely,

Michelle M. Faw
Administrative Law Judge