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Letter Decision and Order

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Re: HF No. 128, 2014/15 – Donna Eixenberger, as surviving spouse of Max Eixenberger v. Rapid City Winair Company and Travelers Insurance Company

Counsel:

This letter addresses Claimant's Motion for Summary Judgment, filed on May 13, 2016. Employer/Insurer responded to that Motion June 15, 2016, and Claimant replied June 29, 2016.

Max Eixenberger worked for Employer, a HVAC supply company, as a delivery driver and as warehouse personnel. He pulled products and loaded trucks, and drove the delivery truck. Loading the truck consisted of lifting, stacking, pushing, and moving large, heavy, cumbersome parcels. He had the use of a forklift, two-wheelers and a rear lift gate to make the loading of truck easier; the warehouse in which Eixenberger worked had large overhead doors that were open, and his delivery truck was a soft side tarp truck that could be loaded from the side.

On July 8, 2013, he completed his deliveries in the morning then loaded the truck for the next day's deliveries. It was a slow day with no large orders, no rush deliveries and a light delivery load. It was hot; the recorded high temperature was 87, and inside the truck it was hotter. It took over an hour that day for Eixenberger to load the truck.

That afternoon, Eixenberger told Todd Marzenell, a co-worker, that he felt sick to his stomach. Marzenell suggested Eixenberger should take a break, and Eixenberger decided to sit down. Soon after, about 4:00 p.m., Michelle Merrill, another co-worker, found Eixenberger lying next to the truck, unresponsive. Merrill alerted Employer's

management staff, and emergency response personnel were called. Eixenberger was rushed to the hospital.

At the hospital emergency room, Eixenberger was treated by Dr. Adam Newman. Dr. Newman testified that David Voss, Dr. Newman's father-in-law and Eixenberger's co-worker, told him Eixenberger had "collapsed after unloading a large quantity of heavy boxes from the back of a hot semi-trailer; and that he had complained that he didn't feel well earlier, was nauseated, was noted to be short of breath and diaphoretic (sweating heavily) by Mr. Voss in the hours leading up to his collapse." Dr. Newman immediately began taking life-saving measures, but Eixenberger died without regaining consciousness. The cause of death was determined to be a heart attack.

Additional facts will follow.

Claimant's motion is for summary judgment per ARSD 47:03:01:08:

A claimant or an employer or its insurer may, anytime 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.

The guiding principles for summary judgments are well-established:

(1) The evidence must be viewed most favorable to the nonmoving party; (2) The burden of proof is upon the movant to show clearly that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law; (3) Though the purpose of the rule is to secure a just, speedy and inexpensive determination of the action, it was never intended to be used as a substitute for a court trial or for a trial by jury where any genuine issue of material fact exists; (4) A surmise that a party will not prevail upon trial is not sufficient basis to grant the motion on issues which are not shown to be sham, frivolous or so unsubstantial that it is obvious it would be futile to try them; (5) Summary judgment is an extreme remedy and should be awarded only when the truth is clear and reasonable doubts touching the existence of a genuine issue as to material fact should be resolved against the movant; and (6) Where, however, no genuine issue of fact exists it is looked upon with favor and is particularly adaptable to expose sham claims and defenses.

*Owens v F.E.M. Electric Association, Inc.*, 2005 SD 35, ¶6; 694 N.W.2d 274.

Here, to prevail on the motion, Claimant has to prove there is no genuine factual issue that Eixenberger's employment with the Employer and his heart attack were

causally connected. Without the need for a hearing, on the basis of the record so far, read with any reasonable inferences drawn in Employer/Insurer's favor, Eixenberger's employment or employment-related activities must be shown to have been a major contributing cause for his heart attack and resulting death. Claimant is not required to prove the employment was the proximate, direct, or sole cause of the injury. *Smith v Stan Houston Equipment Co.*, 2013 SD 65, ¶16, 836 N.W.2d 647, 652 (additional citations omitted.)

Expert testimony is necessary to establish causation. *Id.* Causation must be established to a reasonable degree of medical probability, not just possibility. *Darling v. W. River Masonry*, 2010 SD 4, ¶12, 777 N.W.2d 363, 367. The opinion of an examining physician should be given substantial weight when compared to the opinion of a doctor who only conducts a review of medical records. *Darling*, 2010 SD 4, ¶19, 777 N.W.2d at 369. Expert testimony is entitled to no more weight than the facts upon which it stands upon. *Peterson v Evangelical Lutheran Good Samaritan Society*, 2012 SD 52, ¶24, 816 N.W.2d 843, 850.

Here, Dr. Newman, the emergency room doctor, opined Eixenberger's work activities on July 8, 2013 were a major contributing factor in his heart attack. He believed Eixenberger's physical exertion that day caused the heart attack, going further to say Eixenberger would be alive today if he had not been at work on July 8, 2013.

There are genuine disputes, however, about the facts upon which Dr. Newman relied in reaching those conclusions. He relied on Dave Voss, who told him Eixenberger had "collapsed after unloading a large quantity of heavy boxes from the back of a hot semi-trailer; and that he had complained that he didn't feel well earlier, was nauseated, was noted to be short of breath and diaphoretic by Mr. Voss in the hours leading up to his collapse." In his sworn statement, Voss said he didn't remember talking to Eixenberger much that day or having much contact with him. He remembered calling Dr. Newman and telling him he thought Eixenberger had a heart attack, but did not recall giving any details on how it occurred.

Todd Marzenell testified he had about the same duties as Eixenberger and worked with Eixenberger the most. He said Eixenberger felt a little sick to his stomach earlier in the day, but had no other complaints and was able to keep working. Marzenell said Eixenberger had loaded his truck with small random boxes (versus Dr. Newman's understanding he was unloading a large quantity of heavy boxes) and did not notice Eixenberger was short of breath.

Michelle Merrill's statement was that she did not remember any work activities that day that were out of the ordinary, it was not exceedingly hot that day, that Eixenberger did not race around to complete his duties, that Eixenberger was chipper about thirty minutes before collapsing, and that his complexion was normal and he was not out of breath at that time. Dr. Newman conceded his causation opinion would change if Eixenberger's physical exertion was less than Voss described; he assumed Eixenberger's diet was high in sugar, fat, salt and cholesterol, and had a body mass

index that put him at risk for heart disease. Dr. Newman's understanding of the facts may be proven to be the correct one, but it is genuinely disputed, and summary judgment is not the vehicle by which such issues should be decided.

Employer/Insurer offers the testimony of Dr. Del Core, a board certified cardiologist and professor at Creighton Medical School. He researches, writes about and teaches concerning heart disease issues and their causes. His evaluation of the matter consisted of a paper review. He testified Eixenberger's heart attack was due to atherosclerotic blockage in his heart which ruptured and caused a clot, and concluded the heart attack was "not necessarily related to his work activities." He noted Eixenberger's smoking habit, a "very important risk factor" in heart attacks. He assumed, however, that Eixenberger was not performing extreme physical activity on July 8, 2013, which is disputed, and conceded a cholesterol test and autopsy would have been helpful to determine the cause of the heart attack.

Claimant would have Dr. Del Core's opinion rejected based on the following testimonial exchange with Claimant's counsel:

Q. (Claimant's counsel): So my question then is, if what you're saying is is that you cannot say with any degree of medical certainty that the work duties participated in by Mr. Eixenberger were a major contributing cause, can you say definitively that they were not?

A. (Dr. Del Core): Boy, this is semantics here. I guess, no I can't say that they were not.

Dr. Del Core went on to explain there was not enough information to know what caused the heart attack, but that Eixenberger's activities that day were not the single factor; a plaque rupture leading to a heart attack is a complex process, and no one contributing factor leads to it. He would look for something the patient was doing at the time of the attack that was not necessarily part of daily activities and resulted in extreme stressors to the body. Again, whether such unusual activity occurred that day is disputed, and a hearing will be needed to resolve the matter.

Genuine issues of material fact therefore remain about whether Eixenberger's heart attack was sufficiently connected to his employment. Claimant's Motion for Summary Judgment is DENIED; the parties will bear their own costs.

This letter shall constitute the Department's order in this matter.

Sincerely,

/s/

Sarah E. Harris  
Administrative Law Judge