June 1, 2013

Michael M. Hickey
Bangs, McCullen, Butler, Foye & Simmons LLP LETTER DECISION
PO Box 2670
Rapid City, SD 57709-2670

J. G. Shultz
Woods, Fuller, Shultz & Smith PC
P.O. Box 5027
Sioux Falls, SD 57117-5027

RE: HF No. 163, 2008/09 – Douglas D. Whittecar v. Metrix, LLC and Reliamax Insurance

Dear Mr. Hickey and Mr. Shultz:

I am in receipt of Employer/Insurer's Motion for Summary Judgment, along with supporting argument and documentation. Claimant has provided a Brief in Opposition to Employer/Insurer's Motion for Summary Judgment. I have also received Employer/Insurer's Reply Brief in Support of Motion for Summary Judgment. I have carefully considered each of these submissions.

ARSD 47:03:01:08 governs the Department of Labor's authority to grant summary judgment:

> 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 of 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.

Employer/Insurer move the Department to enter summary judgment against Claimant, dismissing his Petition for Hearing on the merits because he cannot meet his burden to show that his employment with Employer was a major contributing cause of his condition as is required under SDCL 62-1-1(7).

The moving party bears the burden to show that there are no genuine issues of material fact. To successfully resist the motion, the non-moving party must present specific facts that demonstrate the existence of genuine issues of material fact. All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party. *Kermmoade v. Quality Inn*, 2000 SD 81, ¶11.There are no genuine issues of material facts for the purposes of this motion, the Department may make a legal conclusion based on the opinions set forth by the medical experts.

Facts

Claimant began working for Employer in the fall of 2006, sandblasting and powder coating equipment surfaces. On March 7, 2007, Claimant was injured while working for Employer when a truck body was dropped on him. Claimant was in a squatting position when the truck body dropped, pinning his arms beneath it. Claimant received a 12 inch cut on his left arm, a large blood clot in his right arm, and he indicated that his legs were bruised as a result of the accident. He was able to continue working the remainder of his shift and then went to the emergency room. Claimant had an x-ray which showed no fracture or dislocation and he was discharged.

Claimant sought treatment with Dr. Rebecca Pengilly, Dr. Thomas Ripperda, and Dr. David Falconer for several months in 2007 for back, neck and shoulder pain following the March 7, 2007, work related incidence. Dr. Pengilly gave Claimant work restrictions of no greater than 20 pounds and no overhead work. Claimant continued to receive chiropractic care and physical therapy. Claimant returned to work for Employer, within his restrictions, until he was terminated in May 2007, for reasons unrelated to his injury.

Claimant was involved in a motorcycle accident after his work related injury in June of 2007. He was thrown off his motorcycle and was rendered unconscious. He was treated at a local emergency room and it was determined he had no acute fractures, only soft tissue injuries.

At the request of Employer/Insurer, Dr. Jeff Luther performed an independent medical examination (IME) and reviewed Claimant's medical history. Claimant did not disclose his recent motorcycle accident to Dr. Luther at this time, nor was Dr. Luther provided with medical records from the incident. Dr. Luther diagnosed severe subjective pain without significant or substantial organic findings and degenerative changes in his neck with right foraminal stenosis. Dr. Luther concluded that the March 7, 2007, injury was not a major contributing cause of his ongoing symptoms.

Dr. Luther reviewed additional records after his initial IME including records related to his June 2007 motorcycle accident and his most recent medical treatment at Puget Sound Veterans Administration. After his review of the additional records, Dr. Luther concluded,

> I do not believe any of Mr. Whittecar's complaints and need for treatment are related to the industrial accident. I am at a loss to explain why the significant and substantial motorcycle history was not conveyed to me at the time of my July 2007 independent

> medical evaluation- which occurred less than a month prior. Therefore based on information provided my opinion is that the claimant's current complaints and need for treatment are not due to the March 2007 industrial accident.

On June 1, 2009, Claimant filed a Petition for Hearing with the Department of Labor and Regulation seeking benefits related to his May 7, 2007 injuries. Employer/Insurer denied his claim for benefits on the basis that medical opinions do not support compensability.

After repeated failed attempts by Claimant to obtain medical opinions as to causation from Claimant's current treating physicians in Washington State, the Department issued an Order compelling Claimant's treating physicians to provide reports and answer compensability questions posed by Claimant's counsel. The doctor responded,

> I cannot comment on his alleged work injury since I was not the physician who initially treated him in 2007. I have only seen him two times. I also do not have access to records with regards to treatment and diagnostic testing he received at the time of his alleged injury.

On March 30, 2012, the Department received Claimant's Notice of Intent to Offer Physician's Written Reports including the reports of Dr. Rebecca Pengilly, Dr. Thomas Ripperda, and David Falconer OTR/L. Claimant was unable to obtain any other expert medical opinion from his current treating physician that supported causation or compensability. On March 8, 2013, the Department granted Employer/Insurer's Motion, precluding Claimant from offering additional expert testimony in this matter. On May 16, 2013, Employer/Insurer brought the present Motion arguing that with no expert medical opinion, Claimant is unable to meet his burden to proof to show that he sustained a work related injury arising out of and in the course of his employment and that injury remains a major contributing cause of his current condition and need for treatment.

Analysis

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. *Horn v. Dakota Pork*, 2006 SD 5, ¶14, 709 NW2d 38, 42 (citations omitted). To recover under workers' compensation law, a claimant must prove by a preponderance of the evidence that [h]e sustained an injury "arising out of and in the course of the employment." SDCL 62-1-1(7); *Norton v. Deuel School District #19-4*, 2004 SD 6, ¶7, 674 NW2d 518, 520.

SDCL §62-1-1(7) also provides that "[n]o injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of[.]" 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). The South Dakota Supreme Court has stated,

> 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. Unless its nature and effect are plainly apparent, an injury is a subjective condition requiring an expert opinion to establish a causal relationship between the incident and the injury or disability.

Orth v. Stoebner & Permann Construction, Inc., 2006 SD 99, 724 NW2d 586 (citations omitted).

> If the injured claimant suffers from a preexisting disease or condition unrelated to the injury, and the injury combines with the preexisting condition to cause or prolong disability, impairment, or need for treatment, the injury is compensable only if the claimant can prove that his employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment.

Id. 2006 S.D. 99,¶ 32-33, 724 N.W.2d 586 (citations omitted);SDCL 62-1-1(7)(b).

> In applying the statute, [The South Dakota Supreme Court] has held a worker's compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that the claimant incurred a disability arising out of and in the course of [his] employment. [The Supreme Court] further said South Dakota law requires [Claimant] to establish by medical evidence that the employment or employment conditions are a major contributing cause of the condition complained of. A possibility is insufficient and a probability is necessary.

Gerlach v. State, 2008 SD 25, ¶7, 747 NW2d 662, 664 (citations omitted). The South Dakota Supreme Court went on to say,

> We have consistently required expert medical testimony in establishing causation for workers' compensation purposes, and we have held that when the medical evidence is not conclusive, the claimant has not met the burden of showing causation by a preponderance of the evidence. Causation must be established to a reasonable medical probability, not just a possibility.

Enger v. FMC, 1997 SD 70, ¶18, 565 NW2d 79 (citations omitted).

Employer/Insurer argues that because Claimant has not provided an expert medical opinion proving a causal relationship between his condition and his work injury, Employer/Insurer is entitled to summary judgment as a matter of law.

Employer/Insurer have provided expert medical testimony which states to a reasonable degree of medical probability that Claimant's alleged injury did not arise out of and in the

course of his employment with Employer. Dr. Luther opined that in 2007, Claimant's alleged injuries did not arise out of and in the course of his employment. Dr. Luther's opinion was based partially on Claimant's well documented history of neck, and shoulder problems prior to the March 2007 injury. The records show that as recently as two days before the accident, Claimant sought treatment for neck, back and shoulder problems. Dr. Luther also based his opinion on the fact that his objective findings could not be connected with Claimant's subjective complaints of pain. Based on Claimant's account of the injury on March 7, 2007, there was no supporting objective pathology for Claimant's complaints. After reviewing additional medical records detailing the motorcycle accident after his alleged work injury, Dr. Luther maintained his opinion that Claimant's employment was not a major contributing cause of his condition and need for treatment.

Claimant argues that he has submitted the reports and medical records of Dr. Pengilly, Dr. Ripperda, Falconer, each of which opined that Claimant's injuries to his neck, arms, shoulders, and upper back were caused by the March 7, 2007 work related incident and that the March 2007 injuries are new and are not an aggravation or reoccurrence of any previous injury.

The South Dakota Supreme Court has held that, "when presented with medical expert testimony, the Department is free to accept all of, part of, or none of, an expert's opinion." *McKibben v. Horton Vehicle Components, Inc*., 2009 SD 47 ¶ 17, 767 NW2d 890 (citations omitted). Dr. Pengilly, Dr. Ripperda and David Falconer each treated Claimant for a short period of time after his March 2007 injury. In 2012, several years after they treated Claimant, each signed an identical written report prepared by Claimant's counsel, which stated in part,

> 2. On March 7, 2007, Mr. Whittecar suffered injuries to his neck, shoulders, arms and upper back arising out of and in the course and scope of his employment with Metrix. His employment activities were a major contributing cause to his medical condition, disability, impairment and need for medical treatment.
>
> 3. In my opinion, based on a reasonable degree of medical probability, a major contributing cause of Mr. Whittecar's injury to his neck, shoulders, arms and upper back was the work- related incident of March 7, 2007.
>
> 4. In my opinion, based upon a reasonable medical probability, Mr. Whittecar's injury of March 7, 2007 is a new injury and is not an aggravation or reoccurrence of any previous injury sustained by Mr. Whittecar.

The medical evidence must be precise and well supported. *Jewett v. Real Tuff, Inc.*, 2011 SD 33 ¶23, 800 NW2d 345, 350. The written reports, relied upon by Claimant are entitled to little or no weight in this matter as they are not precise and well supported by the evidence. The written reports do not address Claimant's preexisting neck, back and shoulder issues. They do not address the motorcycle accident which took place after

the work related injury. And finally, the written reports do not address Claimant's current condition and need for treatment and whether his work related injury in 2007 combined with his preexisting condition to cause or prolong disability, impairment, or need for treatment or whether the work related injury in 2007 remains a major contributing cause of the disability, impairment of need for treatment.

The Department rejects the opinions of Dr. Pengilly, Dr. Ripperda and David Falconer as contained in their written reports. The Department finds the expert opinions of Dr. Luther to be precise, well founded and more persuasive.

Claimant is unable to meet his burden to show by a preponderance of the evidence that he sustained a work related injury arising out of and in the course of his employment with Employer, or that his employment remained a major contributing cause of his current condition and need for treatment. As such, Employer/Insurer is entitled to judgment as a matter of law. Employer/Insurer's Motion for Summary Judgment is hereby granted, Employer/Insurer shall submit an Order consistent with this Decision.

Sincerely,

/s/ *Taya M. Runyan*

Taya M. Runyan
Administrative Law Judge