October 3, 2012

Dennis W. Finch
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Letter Decision and Order

Justin G. Smith
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PO Box 5027
Sioux Falls, SD 57117-5027

Re: HF No. 17, 2010/11- Terry R. Bennett v. Cleary Building Corp. and Zurich American Insurance Company

Dear Mr. Finch and Mr. Smith:

Submissions:

This letter addresses the following submissions by the parties:

August 8, 2012	Claimant's Motion for Partial Summary Judgment;
	Claimant's Brief in Support of Partial Summary Judgment;
	Affidavit of Counsel;
	Affidavit of Claimant;
September 7, 2012	Employer and Insurer's Resistance to Claimant's Motion for Partial Summary Judgment;
	Affidavit of Justin G. Smith;
September 19, 2012	Letter Brief from Dennis W. Finch

Facts:

The facts of this case are as follows:

1. Terry R. Bennett, (Bennett) was hired by Cleary Building Corporation (Cleary) to eventually fill the position of foreman at a wage of $16.00 per hour.
   Every project on which Bennett worked for Cleary involved the construction of a pole barn.

2. Cleary entered into a contract with Lee Goddard to build a pole barn on the Goddard farm just outside Onida, SD. Cleary in turn subcontracted the labor of the project to Billy Brown Construction. Cleary provided the majority of the materials, machinery, equipment and tools to perform the contract.

3. Sometime prior to January 19, 2010, and while actively employed by Cleary, Bennett was directed by Cleary to work on the Goddard project.

4. Cleary would transport Bennett to the Lee Goddard site but on occasion would take him to other Cleary sites only to be returned to the Goddard site.

5. Bennett was paid by Billy Brown Construction for the time he worked on the Goddard pole barn.

6. On January 19, 2010, Bennett was on the roof of the pole barn at the Goddard farm when he stepped on a frozen 2x4 and fell some 20 to 22 feet to the ground.

7. As the result of his fall, Bennett sustained multiple injuries, including but not limited to, facial, nasal, left eye and/or orbital fractures as well as left wrist, left ankle, low back and potentially closed head injuries.

8. After the fall, Bennett was taken by ambulance to St. Mary's Hospital in Pierre, SD, and subsequently transferred to Avera McKennan Hospital in Sioux Falls, for treatments and multiple reconstructive surgical procedures.

9. To date, Bennett has incurred close to $ 67,000.00 in unpaid medical expenses. This amount remains due and owing.

10. Bennett initially submitted his worker's compensation claims to Billy Brown Construction; Bennett was advised verbally by Billy Brown Construction that it maintained no worker's compensation coverage at the time of Bennett's accident. Consequently, Bennett provided notice to Cleary and its Insurer, Zurich American Insurance Company (Zurich) that claims were being submitted to it pursuant to SDCL 62-3-10.

11. The Department takes judicial notice of the fact that Billy Brown Construction does not have workers' compensation coverage in South Dakota.

12. Bennett's claims have not been accepted by Zurich and these proceedings were initiated by Bennett.

13. Additional facts may be discussed in analysis below.

Summary Judgment:

Bennett has filed a Motion for Partial Summary Judgment. The motion is limited to the issues of Cleary's "coverage" and the "causation" of Bennett's injuries. ARSD 47:03:01:08 governs summary judgments considered by the Department of Labor & Regulation in worker's compensation cases. That regulation 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. The party seeking summary judgment 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. Railsback v. Mid-Century Ins. Co., 2005 SD 64, ¶ 6, 680 N.W.2d 652, 654. "A trial court may grant summary judgment only when there are no genuine issues of material fact." Estate of Williams v. Vandeberg, 2000 SD 155, ¶ 7, 620 N.W.2d 187, 189, (citing, SDCL 15-6-56(c); Bego v. Gordon, 407 N.W.2d 801 (S.D. 1987)). "In resisting the motion, the non-moving party must present specific facts that show a genuine issue of fact does exist." Estate of Williams, 2000 SD 155 at ¶ 7, (citing, Ruane v. Murray, 380 NW2d 362 (S.D.1986)).

Coverage:

A more detailed statement of the first issue is, whether Cleary and Zurich are responsible for the coverage of the treatment of those injuries suffered by Bennett in his fall at the Goddard farm. Cleary and Zurich argue that the issue should not be decided here because the question of Bennett's employment by Cleary at the time of his fall is in doubt. The Department acknowledges that Bennett's employment status may be in some doubt, that fact is not material to the question of Cleary's coverage in this case. SDCL 62.-3-10 states:

> A principal, intermediate, or subcontractor is liable for compensation to any employee injured while in the employ of any subcontractor and engaged upon the subject matter of the contract, to the same extent as the immediate employer. Any principal, intermediate, or subcontractor who pays compensation under the

> provisions of this section may recover the amount paid from any person, who, independently of this section, would have been liable to pay compensation to the injured employee. Each claim for compensation under this section shall in the first instance be presented to and instituted against the immediate employer, but such proceeding does not constitute a waiver of the employee's rights to recover compensation under this title from the principal or intermediate contractor. However, the collection of full compensation from one employer bars recovery by the employee against any others. The employee may not collect from all a total compensation in excess of the amount for which any contractor is liable. This section applies only in cases where the injury occurred on, in, or about the premises on which the principal contractor has undertaken to execute work or which are otherwise under the contractor's control or management.

SDCL 62-3-10.

In this case, Cleary was the principal contractor. Cleary provided materials, machinery, equipment and tools for the project. Cleary also made Bennett available to work on the Goddard pole barn. Consequently, Cleary undertook to execute work on the contract. In addition, Bennett presented his claim for workers' compensation to Billy Brown Construction who did not have workers' compensation coverage. Under these circumstances, Cleary and Zurich are responsible for the coverage of Bennett's work-related injuries regardless of whether Bennett was employed by either Billy Brown Construction or Cleary.

While the establishment, of Bennett's employment status in not critical to the question of Cleary's coverage, it may be to issues not dealt with in this decision. Therefore, a couple of points are worth noting. First, employment is a contractual relationship between and employer and an employee, not between two potential employers. Justice Wuest stated in his dissent in Johnston v. Dlorah, Inc., 95 SDO 173, 529 N.W.2d 201 (S.D. 1995):

> The relation of employer and employee arises out of contract, and the existence of an employment contract, express or implied, is essential to an employer-employee relationship." 30 CJS Employer-Employee §7 (1992); Baker v. Jackson, 372 N.W.2d 142, 147 (S.D. 1985).

Johnston v. Dlorah, Inc., 95 SDO 173, ¶ 24, 529 NW2d 201 (S.D. 1995) (Justice WUEST, Retired (dissenting)).

The second point is that contractors may agree to exchange labor, but they cannot exchange employees without the employees' consent since the adoption of the Thirteenth Amendment to the US Constitution. The Thirteenth Amendment banned the existence of "slavery and "involuntary servitude"" within the United States. In other words, to establish that Bennett was employed by Billy Brown Construction at the time of his accident, it must be shown that both Billy Brown Construction and Bennett

voluntarily agreed to Bennett's employment by Billy Brown Construction and that it was not just an agreement between Cleary and Billy Brown Construction.

Causation:

The second question presented by Claimant's Motion for Partial Summary Judgment is whether Bennett's fall at the Goddard farm was a major contributing cause of the injuries for which he received treatment following his fall.

Claimant has the burden of proving all facts essential to sustain an award of compensation. Darling v. West River Masonry, Inc., 777 N.W.2d 363, 367 (SD 2010); Day v. John Morrell & Co., 490 N.W.2d (SD 1967). When medical evidence is not conclusive, Claimant has not met the burden of showing causation by a preponderance of the evidence. Enger v. FMC, 565 N.W.2d 79, 85 (S.D. 1997).

SDCL 62-1-1 (7) defines "injury" or "personal injury" as:

> [O]nly injury arising out of and in the course of the employment, and does not include a disease in any form except as it results from the injury. An injury is compensable only if it is established by medical evidence, subject to the following conditions:
>
> > (a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of; or
> >
> > (b) If the injury combines with a preexisting disease or condition to cause or prolong disability, impairment, or need for treatment, the condition complained of is compensable if the employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment;
> >
> > (c) If the injury combines with a preexisting work related compensable injury, disability, or impairment, the subsequent injury is compensable if the subsequent employment or subsequent employment related activities contributed independently to the disability, impairment, or need for treatment.

SDCL 62-1-1(7).

The South Dakota Supreme Court has noted that there is a distinction between the use of the term "injury" and the term "condition" in this statute. See Grauel v. South Dakota Sch. of Mines and Technology, 2000 SD 145, ¶ 9. "Injury is the act or omission which causes the loss whereas condition is the loss produced by an injury, the result." Id. Therefore, "in order to prevail, an employee seeking benefits under our workers' compensation law must show both: (1) that the injury arose out of and in the course of

employment and (2) that the employment or employment related activities were a major contributing cause of the condition of which the employee complained, or, in cases of a preexisting disease or condition, that the employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment." Id. (citations omitted).

"[T]he 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." Westergren v. Baptist Hospital of Winner, 1996 SD 69,131, 549 NW2d 390, 398.

In this case, it is undisputed that Bennett fell from the roof of a pole barn some 20 to 22 feet to the ground and that he was taken by ambulance to the Pierre Hospital where it was determined that he had suffered facial, nasal and orbital fractures, and left wrist, left leg, lower back and potential closed head injuries. It is "plainly apparent" that the facial injuries and the initial treatment of the left wrist, left leg and potential closed head injuries were caused by his work-related fall. Because of the obvious nature of his injuries no expert medical testimony is required to prove a causal connection between these injuries and his employment.

However, it must be noted that this determination does not extend to the issue of "compensability" for those injuries. Cleary and Zurich argue that two issues exist which could bar compensation in this case, Bennett's misconduct and his failure provide timely notice. These questions are not answered here and are preserved for hearing.

***Order*:**

In accordance with the discussion above, Claimant's Motion for Partial Summary Judgment is granted with regard to the issues of "coverage" and "causation". This decision shall constitute the order in this matter.

Sincerely,

/S/ Doanald W. Hageman
Donald W. Hageman
Administrative Law Judge