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**Letter Decision on Motion for Partial
Summary Judgment**

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RE: HF No. 19, 2022/23 – Landon Gab v. Kramp Enterprises, Inc. and Addison-United Fire and Casualty Company

Greetings:

This letter addresses Kramp Enterprises, Inc. and Addison-United Fire and Casualty Company's (Employer and Insurer) Motion for Partial Summary Judgment. All responsive briefs have been considered.

Employer and Insurer have moved for summary judgment on the grounds that Gab has failed to make a prima facie showing that he is entitled to permanent total disability benefits. 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.

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. *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. “Summary judgment is proper when the [opposing party] provides only conclusory statements and fails to present specific facts showing that a genuine issue exists for trial.” *Zhi Gang Zhang v. Rasmus*, 2019 SD 46, ¶ 31, 932 N.W.2d 153, 163.

This matter arises from an alleged work-related injury sustained by Landon Gab (Gab) on or about February 20, 2020, while working for Employer. In his Petition for Hearing dated August 15, 2022, Gab alleged he was unable to perform his normal work duties and was unable to lift anything over 5 pounds for over a year after the Incident. He further alleged he suffered permanent total disability.

SDLC 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.

Additionally, SDCL 62-4-52(2) provides,

"Sporadic employment resulting in an insubstantial income," [is defined as] employment that does not offer an employee the opportunity to work either full-time or part-time and pay wages equivalent to, or greater than, the workers' compensation benefit rate applicable to the employee at the time of the employee's injury. Commission or piece-work pay may or may not be considered sporadic employment depending upon the facts of the individual situation. If a bona fide position is available that has essential functions that the injured employee can perform, with or without reasonable accommodations, and offers the employee the opportunity to work either full-time or part-time and pays wages equivalent to, or greater than, the workers' compensation benefit rate applicable to the employee at the time of the employee's injury the employment is not sporadic. 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.

Employer and Insurer argue that Gab is working full-time within his restrictions, and thus does not qualify as permanently and totally disabled as a matter of law. At his deposition on March 23, 2023, Gab testified that he is currently working as an Electricians' Apprentice for Hughes Electric. He has been working at Hughes Electric since approximately January 2022. He further testified that Hughes Electric accommodates his restrictions which are that he can lift 25 pounds most of the time, up to 50 pounds sometimes, and work 40 hours a week, not including drive time. Gab is being paid \$20.50 an hour and works 40 hours per week at Hughes Electric. He testified that he has not missed time or had to leave his employment with Hughes Electric early due to pain. Employer and Insurer contend that Gab's employment is not sporadic under SDCL 62-4-52, because he is working within his restrictions earning wages greater than his workers' compensation rate.

Gab argues that the fact Gab's current employer is accommodating his limitations is not proof of his ability to find regular continuous work with any other employer in the community. Additionally, he asserts that even if the Department should conclude that Gab's work for Hughes is sufficient to prove his employment is regular and continuously available, the Department should retain jurisdiction over the permanent and total disability claim in the event he suffers a change of circumstances and no longer has light duty position with his current employer pursuant to SDCL 62-4-52(2).

In *McClafin v. John Morrell & Co.*, the South Dakota Supreme Court addressed a similar situation where McClafin 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 [McClafin] 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.

As Gab is currently employed full-time and earning more than his workers' compensation rate, the Department concludes that he is employable and not permanently and totally disabled under SDCL 62-4-53. Therefore, Gab has failed to show a genuine issue of fact exists for trial on the issue of permanent total disability. However, while Gab's employment is not currently sporadic that may change in the future, therefore, following the guidance provided in *McClafin* 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 Partial Summary Judgment is GRANTED. The Department retains jurisdiction over the issue of continuous employment and permanent total disability. This letter shall constitute the order in this matter.

Sincerely,

A handwritten signature in blue ink that reads "Michelle Faw". The signature is written in a cursive, flowing style.

Michelle M. Faw
Administrative Law Judge

MMF/das