February 1, 2008

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LETTER DECISION

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RE: HF No. 239, 2002/03
Richard S. Tracy v. Perdues Inc. and Berkley Risk Administrators

Dear Counsel:

The Department is in receipt of:

> November 2, 2007 - Employer/Insurer's Motion for Summary Disposition along with Memorandum in Support of Motion and attached depositions of Richard S. Tracy, Wayne J. Anderson, M.D., and David H. Lang, M.D.
>
> January 11, 2008 Claimant's Brief in Resistance to Motion for Summary Disposition

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 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. *Railsback v. Mid-Century Ins. Co.*, 2005 SD 64, ¶6, 680 N.W.2d 652, 654.

> The burden is on the moving party to clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law. *Estate of Elliott*, 1999 SD 57, ¶15, 594 NW2d 707, 710 (citing *Wilson*, 83 SD at 212, 157 NW2d at 21). On the other hand, [t]he party opposing a motion for summary judgment must be diligent in resisting the motion, and mere general allegations and denials which do not set forth specific facts will not prevent issuance of a judgment. *Breen v. Dakota Gear & Joint Co., Inc.*, 433 NW2d 221, 223 (SD 1988) (citing *Hughes-Johnson Co., Inc. v. Dakota Midland Hosp.*, 86 SD 361, 364, 195 NW2d 519, 521 (1972)). *See also State Auto Ins. Companies v. B.N.C.*, 2005 SD 89, 6, 702 NW2d 379, 382. [T]he nonmoving party must substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy. *Elliott*, 1999 SD 57, ¶16, 594 NW2d at 710 (quoting *Himrich v. Carpenter*, 1997 SD 116, 18, 569 NW2d 568, 573 (quoting *Moody v. St. Charles County*, 23 F3d 1410, 1412 (8thCir 1994))).

McDowell v. Citicorp USA, 2007 SD 53, ¶22, 734 N.W.2d 14, 21.

While at work on April 5, 2002, Claimant attempted to climb into a truck cab. As Claimant was attempting to enter the truck, Claimant's foot slipped on some ice that had accumulated on the side of the truck. Claimant fell a few feet, and he landed in a bank of snow against a building. Claimant struck his head and shoulders in the fall. Claimant did not fall onto his hands, and his hands did not strike the building or any objects during the fall.

Claimant's petition alleges that the accident on April 5, 2002, resulted in an upper extremity injury (specifically carpal tunnel syndrome) and that he suffered temporary total disability. Employer admits that Claimant suffered a fall at work on April 5, 2002. Employer contests that the fall on April 5, 2002, caused the condition for which Claimant seeks treatment and benefits.

A compensable injury is defined in South Dakota:

> "Injury" or "personal injury," only 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 interpreted this statute as a two-part test:

> [I]n 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. SDCL 62-1-1(7)(a)-(b); *Steinberg*, 2000 SD 36, 29, 607 NW2d 596, 606.

Grauel v. S.D. Sch. of Mines & Tech., 2000 SD 145, ¶9, 619 N.W.2d 260, 263 (emphasis in original).

Claimant initially saw Dr. Zielike for the accident. Claimant reported to Dr. Zielike that he had neck strain and tingling and numbness in both of his hands. He also reported to Dr. Zielike that he had tingling in his hands prior to the accident and that neck pain was the main problem following the accident. Sometime after the accident and after his initial consultation with Dr. Zielike, while driving a truck at work, Claimant's hands became numb. Dr. Zielike referred Claimant to Dr. David Lang at Black Hills Orthopedic and Spine Center. Dr. Lang is a respected physician who treats patients suffering from carpal tunnel syndrome on a regular basis.

Claimant first saw Dr. Lang on July 19, 2002. Dr. Lang diagnosed Claimant with carpal tunnel syndrome. Dr. Lang treated Claimant with cortisone shots and has recommended surgery. Dr. Lang assumed from reading Dr. Zielike's notes that Claimant had fallen and sustained direct trauma to the palm of his hand. Dr. Zielike did not note that Claimant fell on his hands or that his hands sustained any trauma. The medical record does not document that Claimant fell on his hands. Dr. Lang stated during his deposition that his impression of the accident was that Claimant "fell and sustained direct trauma to his hand and developed post traumatic carpal tunnel." After learning that Claimant did not strike his hands at the time of the fall, Dr. Lang changed his medical opinion about the cause of Claimant's condition. Dr. Lang, at the time of his deposition on July 23, 2006, was not certain about the cause of Claimant's condition. Dr. Lang's opinion was that Claimant's carpal tunnel syndrome could have been caused by a number of different reasons.

Dr. Wayne Anderson, a physician certified in occupational medicine, performed an independent medical exam on Claimant. Dr. Anderson's opinion was that Claimant's carpal tunnel syndrome developed over time and was not the result of a traumatic injury. During the fall from the truck, Claimant did not hit his hands or wrists or suffer from an injury that caused bleeding into his hands or wrists. Dr. Anderson could not find any direct trauma related to the fall in April 2002 that would have caused carpal tunnel syndrome.

The parties both admit and the evidence shows that Claimant suffered a fall at work and that he suffered from a strained neck from the fall. Even though Claimant's carpal tunnel syndrome was not diagnosed until after the fall, that does not mean that the fall caused the condition. The Supreme Court has held the mere occurrence of an injury at work does not mean it is *ipso facto* work-related. The employee must establish by a preponderance of the evidence that his injury arose out of and in the course of his employment and that his employment was *a major contributing cause* of his condition or his disability, impairment, or need for treatment. *Grauel*, 2000 SD 145, ¶19, 619 NW2d at 265.

> With respect to proving causation of a disability, [the Supreme Court] has stated that:
>
> > [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.
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> *Westergren v. Baptist Hospital of Winner*, 1996 SD 69, 31, 549 NW2d 390, 398 (quoting *Day v. John Morrell & Co.*, 490 NW2d 720, 724 (SD 1992)). A medical expert's finding of causation cannot be based upon mere possibility or speculation. *Deuschle v. Bak Const. Co.*, 443 NW2d 5, 6 (SD 1989). *See also Rawls v. Coleman-Frizzell, Inc.*, 2002 SD 130, 21, 653 NW2d 247, 252-53 (quoting *Day*, 490 NW2d at 724) (Medical testimony to the effect that it is possible that a given injury caused a subsequent disability is insufficient, standing alone, to establish the causal relation under [workers] compensation statutes.). Instead, [c]ausation must be established to a reasonable medical probability[.] *Truck Ins. Exchange v. CNA*, 2001 SD 46, ¶19, 624 NW2d 705, 709.

Orth v. Stoebner & Permann Construction, Inc., 2006 SD 99, ¶34.

Neither physician who has seen Claimant for this injury has opined, with a medical certainty (or even a mere probability), that the work-related accident was a contributing cause of his condition. Dr. Lang based his initial opinion on inaccurate information and could not say that the accident was a major contributing cause of Claimant's condition. Likewise, Dr. Anderson opined that the accident was not a cause of Claimant's condition, much less "a major contributing cause" of the condition.

> The guiding principles in determining whether a grant or denial of summary judgment is appropriate are:
>
> > (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., 694 N.W.2d 274, 277 (SD 2005).

The evidence provided by Claimant in support of his resistance to the Motion for Summary Disposition does not sustain the Claimant's assertion that the fall caused his carpal tunnel syndrome. Claimant has not provided sufficient information "that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy." *McDowell*, 2007 SD at ¶22. Claimant's pleadings fail to sufficiently substantiate his claim. Employer/Insurer's Motion for Summary Disposition is granted.

Employer/Insurer shall file an Order consistent with the Motion and this Letter Decision.

Sincerely,

Catherine Duenwald
Administrative Law Judge