SOUTH DAKOTA DEPT. OF LABOR & REGULATION

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April 21, 2022

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LETTER DECISION ON MOTION FOR SUMMARY JUDGMENT

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RE: HF No. 33, 2020/21 – Lynda Hendricks v. Sanford Health and Dakota Truck Underwriters

Greetings:

This letter addresses Employer and Insurer's Motion for Summary Judgment submitted on February 2, 2022; Claimant's Responses to Employer/Insurer's Motion for Summary Judgment submitted on March 8, 2022; and Reply Brief in Support of Employer and Insurer's Motion for Summary Judgment submitted on March 23, 2022.

Lynda Hendricks (Hendricks) worked for Sanford Health (Employer) which was at all times pertinent insured for workers' compensation purposes by Dakota Truck Underwriters (Insurer). On December 3, 2018, Hendricks slipped on ice in the parking lot and fell. She was taken to the emergency room for evaluation and was later admitted to the hospital for observation and treatment. A CT scan came back negative for intracranial bleeding, and she was ultimately diagnosed with a closed head injury,

concussion, and posttraumatic vertigo. Employer and Insurer paid the related medical costs and workers' compensation benefits while Hendricks was off work.

Hendricks continued treating and on December 10, 2018, she reporter to Dr. Kathryn Higgins that she had experienced a 10-percent improvement in her symptoms. Dr. Higgins took Hendricks off work and prescribed physical and occupational therapy. On January 3, 2019, Hendricks noted a 90 percent improvement in symptoms. She continued to complain of daily headaches which she described as less severe than migraines she had experienced in the past. Dr. Higgins released Hendricks back to work part-time on January 7, 2019. On January 16, 2019, CNP Moen requested a neurological consult due to Hendricks continued headaches. Hendricks underwent an MRI which was negative for intracranial abnormality. Dr. Higgins referred Hendricks to Dr. Peter Johnson.

Dr. Johnson diagnosed Hendricks with post-concussion syndrome with headaches and recommended a sub-symptomatic exercise program. Dr. Johnson re-evaluated Henricks after she underwent the program. He referred her for neurological evaluation. Hendricks was seen by Dr. Ryah McKinley on June 19, 2019. Dr. McKinley recommended Hendricks try Botox for the headaches, continue with the OT, and adjust her medications.

On October 21, 2019, Hendricks returned to Dr. Johnson who recommended speech therapy for cognitive testing as well as neuropsychological testing to determine any potential deficits. Dr. Johnson noted that Hendricks had a normal neurological exam and that most of her post-concussion symptoms had resolved.

On December 19, 2019, Hendricks was evaluated by neuropsychologist Dr. Robert Arias in Omaha, Nebraska. Following testing, Dr. Arias concluded that Hendricks had reached maximum medical improvement. He also opined that she had no neuropsychological based work restrictions related to her fall.

On January 20, 2020, Hendricks was seen by Dr. Johnson who opined that her cognitive skills were appropriate for her age. He also concluded that she was back to normal following her concussion, and her symptoms were likely unrelated to concussion symptoms. The nurse case manager assigned to Hendrick's claim issued a letter to Dr. Johnson regarding his January 20, 2020, examination. In a response dated May 26, 2020, Dr. Johnson confirmed his opinion that the fall on December 3, 2018, was no longer a major contributing cause of Hendricks' headaches or need for additional treatment. He also opined that her post-concussion condition had resolved, she required no additional prescription medicine, and she no longer needed work restrictions related to her injury. Dr. Johnson declined to provide an impairment rating.

In 2021, Hendricks moved to Prior Lake, Minnesota. She began treating with Dr. Nguyen-Tran who opined that her concussion symptoms continued to worsen into 2021, and she suffers from situational depression related to the traumatic brain injury as a result of her fall. On June 2, 2020, Hendricks' counsel was provided a copy of Dr. Johnson's letter. Employer and Insurer indicated that although ongoing temporary total disability benefits were not due as Hendricks had reached MMI, they would temporarily pay weekly benefits as an advance toward any permanent partial disability benefits that might be due prior to an assigned impairment rating.

On June 14, 2020, an impairment rating record review was performed by Dr. Bruce Elkins who concluded that Hendricks had not sustained any permanent partial impairment as a result of her fall on December 3, 2018. On June 26, 2020, a copy of Dr. Elkins' report was provided to Hendricks who was also informed she was not entitled to any further indemnity benefits. Hendricks submitted her Petition for Hearing to the Department of Labor & Regulation (Department) on October 19, 2020. Employer and Insurer answered, asserting that all compensable benefits to which Hendricks has demonstrated entitlement had been voluntarily paid and based upon the opinion of her treating physician the December 3, 2018, injury does not remain a major contributing cause of her current condition or need for treatment.

The Department issued its Scheduling Order on September 28, 2021, which set the deadline for Hendricks to disclose her experts along with their reports to January 7, 2022. Hendricks did not disclose an expert by the deadline.

Employer and Insurer have moved for summary judgment on the grounds that Hendricks lacks the medical evidence to sustain her burden of proof and establish a causal connection between her work injury on December 3, 2018, and her current condition and need for treatment.

In response, Hendricks first argues that Employer and Insurer's Motion is procedurally deficient because they did not provide a "separate, short, and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried" pursuant to SDCL 15-6-56(c). However, 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.

ARSD 47:03:01:08 does not require a statement of facts. Hendricks further argues that her claim is valid and that her current treating physician has opined that she suffered a work-related injury.

In matters of summary judgment, the moving party 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.

Hendricks failed to provide a medical expert within the time set by the Scheduling Order. ARSD 47:03:01:12 provides, in pertinent part, "[a] schedule may not be modified except by order of the Division of Labor and Management upon a showing of good cause." Hendricks did not request to modify the Scheduling Order, nor has she provided good cause for why it should be modified. Without a timely medical expert, Hendricks cannot prove that her injury is a major contributing cause of her current condition or need for treatment. "No recovery may be had where the claimant has failed to offer

credible medical evidence that [their] work-related injury is a major contributing cause of [their] current claimed condition." *Darling v. West River Masonry, Inc.*, 2010 S.D.4, ¶ 13, 777 N.W.2d at 367. The testimony must establish causation to "a reasonable degree of medical probability, not just possibility." *Jewett v Real Tuff, Inc.*, 2011 S.D. 33, ¶ 23, 800 N.W. 2d 345, 350. As Hendricks is unable to prove that her December 3, 2018, work injury is the major contributing cause of her current condition or need for treatment, no genuine issue of material fact remains.

It is hereby ORDERED that Employer and Insurer's Motion for Summary Judgment is GRANTED. Hearing file 33, 2020.21 is dismissed with prejudice. This letter shall constitute the order in this matter.

This is the final decision in this matter unless it is appealed in one of two ways:

1. The decision is appealed directly to circuit court within 30 days after the date of this decision.

Or

2. A request for a Department of Labor and Regulation review is filed by mailing a letter of appeal to the Secretary, S.D. Department of Labor and Regulation, 123 W. Missouri Ave., Pierre, SD 57501 within 10 days after the date of this decision. The Secretary's Decision may be appealed to circuit court within 30 days after the date of the Secretary's decision.

Sincerely,

Michelle Faw

Michelle M. Faw
Administrative Law Judge