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LETTER DECISION & ORDER

Shiloh M. MacNally
Gunderson, Palmer, Nelson & Ashmore LLP
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RE: HF No. 45, 2011/12 – Devern D. Smith v. Lind-Exco Inc. and Acuity

Dear Mr. Leach and Ms. MacNally:

I am in receipt of Claimant's Motion for Summary Judgment, along with supporting argument and documentation and the affidavit of James D. Leach. Employer/Insurer has provided a brief in resistance to Claimant's Motion, along with supporting argument and documentation and the affidavits of Shiloh M. MacNally. I have also received Claimant's Response to Employer/Insurer's Statement of Disputed Material Facts and Reply Brief in Support of Motion for Summary Judgment. I have carefully considered each of these submissions in addressing the above referenced Motion.

Claimant moves the Department for summary judgment on the issue of whether Employer/Insurer must pay for prosthesis from Touch Bionics, Inc. to replace the little finger that Claimant lost in his work injury.

Claimant had his index, long, and ring finger on the right hand amputated in a farm accident in the 1960's. He had been using his thumb and little finger on the right hand with decent function for over 40 years. On January 28, 2008, while working for Lind-Exco, Claimant sustained an injury arising out of and in the course of his employment in which he injured his little finger and eventually his injury required amputation of the finger. Employer/Insurer paid Claimant for the loss of his right little finger.

Claimant's treating physician at Mayo Clinic, Dr. David Dennison prescribed a four finger prosthesis from Touch Bionics, Inc. to restore function to Claimant's right hand.

Dr. William Call preformed an independent medical exam at the request of Employer/Insurer. Dr. Call opined that only a single finger prosthesis is necessary to return the patient to pre-injury status. He further opined that "with respect to the prosthetic fingers,

the Touch Bionics finger appears appropriate' however, these are highly specialized items and for a specific comparison between the two I would recommend a consultation with a sub-specialist in prosthetics or orthotics. Certainly, replacement of four fingers is not necessary as a result of the accident of January 28, 2008, to return Mr. Smith to his pre-injury status as he has not had either an index, long or ring finer for 40 years. If a single finger prosthesis is elected, then careful attention should be directed at placement of the prosthesis."

Employer/Insurer argue that if Smith is entitled to a prosthesis, he is entitled to only a single finger prosthesis based on the opinion of Dr. Call to restore Smith to his pre-injury status. Employer/Insurer further argues that there may be other reasonable alternatives to the Touch Bionic prosthesis that would be more reasonable.

Claimant argues that SDCL §62-4-1 entitles him to medical care that is necessary, suitable and proper including artificial members, and body aids. Claimant argues in his brief that he is entitled to judgment as a matter of law and that he is entitled to the Touch Bionics little finger prosthesis prescribed by Dr. Dennison, that Dr. Call agrees is "appropriate."

Claimant's argument is flawed because Dr. Dennison in his report does not prescribe a little finger prosthesis, rather he specifically prescribed four finger Touch Bionic prosthesis to restore function to Smith's right hand and did not address whether a single finger prosthesis would be reasonable and necessary.

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.

"Summary judgment is a drastic remedy, and should not be granted unless the moving party has established the right to a judgment with such clarity as to leave no room for controversy." *Richards v. Lenz*, 95 SDO 597, ¶14, 539 NW2d 80 (SD 1995) (citations omitted). Summary Judgment is not appropriate at this time. There are genuine issues of material fact as to the type and quality of prosthesis that is reasonable and necessary. Claimant is not entitled to judgment as a matter of law. Claimant's Motion for Summary Judgment is hereby denied. This letter shall serve as the Department's Order.

Sincerely,

/s/ *Taya M. Runyan*

Taya M. Runyan
Administrative Law Judge