

August 14, 2018

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**LETTER DECISION AND ORDER**

Issa Augustino  
312 S. Duluth Ave., Apt. 304  
Sioux Falls, SD 57104

RE: HF No. 92, 2016/17 – Issa Augustino v. Rosenbauer South Dakota, LLC and The Phoenix Insurance Company, a Subsidiary of Travelers Insurance

Dear Mr. Von Wald, Mr. Zielinski, and Mr. Augustino:

This letter is in response to Employer/Insurer's motion for summary judgment which was filed July 25, 2018. Claimant was given ten days to file a response but failed to do so.

**FACTS**

Claimant, Issa Augustino, filed a petition seeking workers compensation benefits on January 16, 2017. At the time, Claimant was represented by A. Russell Janklow and Jami Bishop of Johnson, Janklow, Abdallah, Reitter, and Parsons, LLP. On October 30, 2017, Claimant signed a consent form allowing his attorneys to withdraw from his case. The Department granted Janklow and Bishop's motion to withdraw by order entered November 5, 2017. No other attorney has contacted the Department to indicate he/she is representing Claimant in this matter. As such, Claimant proceeds pro se. In January, 2018, Employer/Insurer requested a scheduling order be entered by the Department.

The Department sent the parties a proposed scheduling order. As the Department received no proposed order from the Claimant, it adopted Employer/Insurer's proposed scheduling order. The order set a deadline for Claimant to designate his expert witness by March 2, 2018. Claimant failed to designate an expert. On July 3, 2018, Employer/Insurer filed a motion for summary judgment alleging that no facts were in dispute regarding Claimant's injury. The Department gave Claimant 20 days to reply to Employer/Insurer's motion, but Claimant has failed to enter a reply.

**ISSUE PRESENTED: IS EMPLOYER/INSURER ENTITLED TO SUMMARY JUDGMENT?**

**ANALYSIS**

The Department's authority to grant summary judgment is found in ARSD 47:03:01:08:

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 standard for granting summary judgment is well established. "[The] Court reviews a grant of summary judgment to determine whether the moving party has demonstrated the absence of any genuine issue of material fact and entitlement to judgment on the merits as a matter of law." *Stern Oil Co. v. Brown*, 2012 S.D. 56, ¶ 8, 817 N.W.2d 395, 398. (Quoting *Tolle v. Lev*, 2011 S.D. 65, ¶ 11, 804 N.W.2d 440, 444).

Employer/Insurer bases its motion for summary judgment on the fact that Claimant has not provided any medical evidence to support his claims of injury. In a workers compensation case, a claimant bears the burden of proving all essential elements of his case. *Orth v. Stoebner & Permann Const., Inc.*, 2006 S.D. 99, ¶ 35, 724 N.W.2d 586, 593. Claimant must support his claim that he is entitled to workers compensation benefits with medical evidence. SDCL 62-1-1(7)(2018). In addition, “The 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.” *Day v. John Morrell & Co.*, 490 N.W.2d 720, 724 (S.D. 1992). Finally, “[c]ausation must be established to a reasonable medical probability.” *Orth*, at ¶ 34 (citation omitted).

Claimant has failed to provide any medical evidence or expert which would support his claim that he is entitled to workers compensation benefits. Normally, summary judgment is an extreme remedy. However, Claimant has not acknowledged any pleading in this case since his attorneys withdrew. Claimant failed to submit a proposed scheduled order or to a response to this motion. Claimant’s failure to respond to the motion for summary judgment warrant’s a finding for Employer/Insurer.

### **ORDER**

Employer/Insurer’s motion for summary judgment is GRANTED. Representative for Employer/Insurer shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision. Claimant may submit proposed Findings of Fact and Conclusions of Law within 10 days after receipt of Employer/Insurer’s submission. The parties may stipulate to a waiver of formal Findings

of Fact and Conclusions of Law. If they do so, counsel for Employer/Insurer shall submit such stipulation together with an Order consistent with this Decision.

SOUTH DAKOTA DEPARTMENT OF LABOR  
& REGULATION

/s/ Joe Thronson  
Joe Thronson  
Administrative Law Judge