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RE: HF No. 102, 2011/12 – Curtis Jutting v. Terex South Dakota, Inc. and Travelers Insurance and ESIS/Indemnity Insurance Company

Dear Counsel:

I have received and reviewed the Motion for Summary Judgment made by Employer Terex South Dakota, Inc. and Insurer Indemnity Ins. Co. against Travelers Indemnity Company, as well as all Replies to the Motion and Responses. All affidavits and exhibits have been taken into consideration when deciding this motion.

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).

In this case, the issue is whether the Claimant's current condition and need for treatment stems from an injury that occurred when Travelers Indemnity Company carried the workers' compensation insurance for Employer or when ESIS/Indemnity Insurance Company carried the Employer's policy. The Motion for Summary Judgment is between the two Insurers. The applicable statute is SDCL 62-1-1(7)(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."

A material question of fact is whether the incident on January 4, 2011 "contributed independently to the disability, impairment, or need for treatment." This is a question of fact that only can be determined with the testimony and the opinions of medical experts. The medical opinions of the experts are conflicting with each other and at least with one expert, his opinion gives more than one possible cause depending upon the outcomes of further testing.

The evidence, when viewed in a light more favorable to Travelers, shows that material facts regarding the source of Claimant's current condition and need for treatment remain and are in dispute.

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).

In this case, material questions of fact remain. The moving party has not shown, by a preponderance of the evidence, that they are entitled to judgment as a matter of law. The Motion for Summary judgment is denied.

The parties shall consider this letter to be the Order of the Department. Parties shall resume discovery and contact the Department if they desire a Scheduling Order to be put into place.

Sincerely,

Catherine Duenwald
Administrative Law Judge