

October 19, 2020

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AMENDED DECISION

Jennifer L. Wosje
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RE: HF No. 124, 2018/19 – Randy Peters v. Reede Construction, Inc. and Twin City Fire Insurance Company

Dear Mr. Lee and Ms. Wosje:

This letter decision will address Claimant's Motion for Summary Judgment submitted July 22, 2020; Employer and Insurer's Motion for Bifurcation submitted August 5, 2020; Employer and Insurer's Opposition to Claimant's Motion for Summary Judgment submitted August 26, 2020; Claimant's Memorandum in Opposition to Employer/Insurer's Motion for Bifurcation submitted August 31, 2020; Employer and Insurer's Reply in Support of Motion for Bifurcation and Claimant's Reply in Support of Motion for Summary Judgment submitted September 11, 2020. All submissions and supporting documents have been considered.

On November 12, 2018, Randy Peters (Claimant or Peters) was employed by Reede Construction (Employer) which was, at all times pertinent, insured for workers' compensation purposes by Twin City Fire Insurance Company (Insurer). He was working road construction near Belvidere, South Dakota. Around 6:00 P.M., Peters loaded his dump truck and headed towards the Belvidere Dam. After dumping the final load, Peters departed and headed back towards Kadoka, South Dakota.

Peters chose to take Highway 248 towards Kadoka. It was dark outside, and the dump truck Peters was driving only had one headlight. Peters was aware that there was a paver ahead on Highway 248 so he exited from the highway onto the haul road that ran parallel to Highway 248. Peters was also aware that there was a road groomer on

the side of the road about a mile ahead of him. However, someone had swung a conveyor belt out blocking the entire haul road. Traveling at 55 mph, Peters noticed the conveyor belt and immediately began braking and turning the steering wheel in an attempt to avoid hitting the conveyor belt. Peters was unable to avoid the conveyor belt, and almost the entire driver's side of the cab of the dump truck was obliterated on contact. Peters was trapped in the cab of the crushed dump truck for over two hours, until the cab was pried open and he was removed from the vehicle. He was then Life Flighted to Rapid City, South Dakota. Peters sustained a left interochanteric femur fracture, left distal femur fracture, left tibial plateau fracture, multiple fractured ribs, and multiple abrasions. On the same day, he underwent surgery at Rapid City Regional hospital to repair his left femur. Insurer denied Peters workers' compensation benefits on December 21, 2018. The basis for the denial was a drug screening that was performed two days after the accident which had indicated that Peters tested positive for amphetamine and methamphetamine. Peters filed a Petition for Hearing on May 15, 2019.

Claimant's Motion for Summary Judgment

Peters has moved for summary judgment on the grounds that no evidence has been offered on the record to prove that his drug use was the proximate cause of the injuries sustained in the course of his employment. The Department's authority to grant summary judgment is established in administrative rule 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 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.*, 2004 SD 64, ¶ 6, 680 N.W.2d 652, 654. "A trial court may grant summary judgment only when there are no genuine issues of material fact." *Estate of Williams v. Vandenberg*, 2000 SD 155, ¶ 7, 620 N.W.2d 187, 189, (citing, SDCL 15-6-56(c); *Bego v.*

Gordon, 407 N.W.2d 801 (S.D. 1987)). “In resisting the motion, the non-moving party must present specific facts that show a genuine issue of fact does exist.” *Estate of Williams*, 2000 SD 155 at ¶ 7, (citing, *Ruane v. Murray*, 380 NW2d 362 (S.D.1986)).

On October 25, 2019, Dr. John Vasillades, a forensic toxicologist at the Toxicology Labs, Inc. issued a report regarding Peters’ drug screening results. Dr. Vasillades stated the results from the drug screening were “unreliable, forensically unacceptable, can be false positive, and are not to be used for legal purposes.” Employer and Insurer have not provided an expert to contradict Dr. Vasillades opinion.

Based on the drug screening results, Employer and Insurer had alleged that Peters engaged in willful misconduct by being intoxicated while driving. Willful misconduct is defined under SDCL 62-4-37 which states:

No compensation may be allowed for any injury or death due to the employee's willful misconduct, including intentional self-inflicted injury, intoxication, illegal use of any schedule I or schedule II drug, or willful failure or refusal to use a safety appliance furnished by the employer, or to perform a duty required by statute. The burden of proof under this section is on the defendant employer.

As an affirmative defense the burden of proof is on Employer and Insurer. “The employer has the burden of proving by a preponderance of the evidence that the employee engaged in willful misconduct and the employee’s injuries were ‘due to employee’s willful misconduct.’ ” *Goebel v. Warner Transp.*, 2000 SD 79, ¶¶ 12-13, 612 N.W. 2d 18, 22. Peters argues that summary judgment is appropriate in this matter under SDCL 62-4-37, because no evidence has been provided by Employer and Insurer to contradict Dr. Vasillades opinion or that Peters’ drug use was the proximate cause of the injuries sustained in the course of is employment. Peters asserts that Employer and Insurer have failed to meet their burden of proof.

In response to Peters’ motion and assertions, Employer and Insurer argue that Peters has focused on the intoxication/drug use issue under SDCL 62-4-37, but he does not address the issue raised in discovery of whether Peters’ conduct in taking the haul road the evening of the accident constitutes willful misconduct. Employer and Insurer assert that all employees, including Peters, were instructed not to drive on the haul road and to only stay on the highway particularly at night. The Supreme Court has held that SDCL 62-4-37, “contemplates conduct that constitutes serious, deliberate, and

intentional misconduct ... the intentional doing of something with the knowledge that it is likely to result in serious injuries, or with reckless disregard of its probable consequences.” *Holscher v. Valley Queen Cheese Factory*, 2006 SD 35, ¶ 48, 713 N.W.2d 555, 567-68. Employer and Insurer assert that issues of material fact remain regarding Peters’ decision to take the highway, and therefore, summary judgment is not appropriate.

Peters argues that Employer and Insurer’s sole basis for the denial of his workers’ compensation benefits was the positive drug screening. He further argues that Dr. Vasillades report provides expert opinion as to why the drug screening is unreliable, and Employer and Insurer have not refuted the doctor’s opinions. Therefore, Peters asserts that he is entitled to summary judgment as a matter of law on the issue of willful misconduct based on drug use. Peters further argues that Employer and Insurer stated in their First Set of Interrogatories that illicit drug use was the basis of their defense under SDCL 62-4-37, and did not allege willful misconduct based on use of the haul road until they provided Peters with supplemental answers on July 20, 2020. Employer and Insurer assert they supplemented the answer to interrogatories following information revealed during discovery. In their Answer to the Petition for Hearing (Answer) filed July 18, 2019, Employer and Insurer answered, “Employer and Insurer assert that Claimant’s claim for worker’s compensation benefits is barred under § SDCL 62-4-37.” Employer and Insurer did not specifically state in their Answer that the defense of willful misconduct was based on Peters’ drug screening or drug use. They specifically mentioned the drug use in the answers to interrogatories, and later, amended the answers to interrogatories once the discovery process revealed pertinent information to indicate Peters use of the haul road as potential willful misconduct.

The Department agrees that Employer and Insurer have not provided any evidence or argument regarding the allegation of willful misconduct pertaining to Peters’ drug use. The Department is persuaded from the record and the parties’ arguments regarding the amended answers to interrogatories that Employer and Insurer have properly brought the issue of whether Peters engaged in willful misconduct when he took the haul road. Therefore, Partial Summary Judgment is granted regarding the matter of willful misconduct based on drug use and the drug screening.

Employer and Insurer's Motion for Bifurcation

Employer and Insurer have moved the Department to determine the issue of willful misconduct, by separate hearing, before the other issues in this case are heard. Discretion to try issues separately is provided under SDCL 15-6-42(b) which states:

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the state or federal Constitution or as given by a statute.

The Department, therefore, must decide whether bifurcation in this matter is conducive to expedition and economy, furthers convenience, or avoids prejudice.

Employer and Insurer argue that bifurcation of the issues is reasonable in this matter because it will eliminate confusion, limit time and expense, and is necessary to allow them to present their defense on the issue of nature and extent of disability. They have also argued that bifurcation is necessary, because both party's designated vocational expert has indicated that Peters may require more surgery in the future. Employer and Insurer argue they cannot address the issue of permanent disability until Peters has finished his medical treatment and final medical and vocational opinions can be obtained. Employer and Insurer's expert, Jim Carroll, has opined that due to the potential need for additional medical treatment, it would be premature to complete a vocational assessment on Peters.

Peters argues that bifurcation prejudices him and is not conducive to the judicial economy of his claims. Peters asserts that separate trials would not be conducive to judicial economy of his claim, because it prolongs the matter and increases expenses. He also asserts that bifurcation will unnecessarily prolong the suffering he endures due to his injury and inability to afford medication or treatment. Additionally, he argues that bifurcation will double his attorney fees and time, requiring double the writing, researching, and litigating.

The Department is persuaded that bifurcation in this matter may offer expeditiousness and judicial economy, because depending on the outcome of a hearing

on the willful misconduct issue there may not be a need for a further hearing or further evidence gathering. Also, as Peters has not finished treating, the necessary vocational evidence required to establish the nature and extent of disability related to his permanent total claim is not yet available. Peters has alleged that the time and expense of two hearings will prejudice him and cause him unnecessary pain. However, the Department finds the potential prejudice towards Employer and Insurer by being unable to effectively respond to Peters expert opinions regarding permanent total disability is greater than the potential prejudice Peters faces regarding expense or extension of time. For these reasons, Employer and Insurer's Motion to Bifurcate is granted.

Order:

In accordance with the conclusions above, Partial Summary Judgment on the issue of drug use and the drug screening is hereby GRANTED;

Summary Judgment related to use of the haul road is DENIED; and

Employer and Insurers Motion for Bifurcation is GRANTED

This letter shall constitute the Department's order in this matter.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

_____/S/_____
Michelle M. Faw
Administrative Law Judge