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**LETTER DECISION ON MOTION FOR
PARTIAL SUMMARY JUDGMENT**

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RE: HF No. 32, 2021/22– Austin Gould v Potash Holding Company, Inc. d/b/a Nutrien AG Solutions, Inc. and Ace American Insurance Company

Greetings:

This letter will address Employer and Insurer's Motion for Partial Summary Judgment. All responsive briefs have been considered. The matter arises from a work injury sustained by Claimant on November 2, 2020, while working for Employer. He fell approximately twenty-five (25) feet from a catwalk, resulting in a shattered pelvis, concussion, and other injuries. He has a 24% whole person impairment. Claimant was released to full work duty in June 2021. He is presently employed and has been earning more than his workers' compensation rate since August 2021.

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.

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. “[S]ummary judgment is proper when the party opposing provides only conclusory statements and fails to present specific facts showing that a genuine issue exists for trial.” *Zhi Gang Zhang v. Rasmus*, 2019 S.D. 46, ¶ 31, 932 N.W.2d 153, 163.

Employer and Insurer have moved for an order granting partial summary judgment, because they assert Claimant is not entitled to permanent total disability (PTD) benefits as he is employed full-time and earning more than his workers’ compensation rate. SDCL § 62-4-53 provides, in pertinent part, “[a]n employee is permanently totally disabled if the employee's physical condition, in combination with the employee's age, training, and experience and the type of work available in the employee's community, cause the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income.” A position is considered bona fide and not sporadic if it offers “essential functions that the injured employee can perform, with or without reasonable accommodations, and offers the employee the opportunity to work either full-time or part-time and pays wages equivalent to, or greater

than, the workers' compensation benefit rate applicable to the employee at the time of the employee's injury." SDCL § 62-4-52(2).

Claimant asserts due to his permanent restrictions and ongoing medical issues his current employment cannot be deemed regularly and continuously available. He argues that the Department should retain jurisdiction over the PTD claim in the event of a change of circumstances in which he is no longer employed. "The department shall retain jurisdiction over disputes arising under this provision to ensure that any such position is suitable when compared to the employee's former job and that such employment is regularly and continuously available to the employee." SDCL § 62-4-52(2). In similar circumstances, the South Dakota Supreme Court has directed the Department "to retain jurisdiction over this matter should Claimant no longer work for Employer." *McClafflin v. John Morrell & Co.*, 2001 S.D. 86, ¶ 14, 631 N.W.2d 180, 185.

The Department concludes that pursuant to SDCL §§ 62-4-53 and 62-4-52, Claimant cannot be deemed permanently and totally disabled while working full time and making more than his benefit rate. Following the guidance provided in *McLafflin* and SDCL § 62-4-52(2), the Department will retain jurisdiction over this matter regarding permanent total disability.

It is hereby ORDERED Employer and Insurer's Motion for Partial Summary Judgment is GRANTED.

This letter shall constitute the order in this matter.

Sincerely,



Michelle M. Faw
Administrative Law Judge