September 29, 2020

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RE: HF No. 33, 2017/18 – Bruce G. Bludorn v. Terex Utilities, Inc. and Indemnity Insurance Company of North America

Dear Ms. Werder and Ms. Dorsett:

This letter addresses the following submissions by the parties:

July 29, 2020	Employer/Insurer's Motion for Summary Judgment
	Employer/Insurer's Brief in Support of Motion for Summary Judgment
	Employer/Insurer's Statement of Undisputed Material Facts
	Affidavit of Kimberly Dorsett
August 25, 2020	Claimant's Objection to Motion for Summary Judgment
	Claimant's Brief in Opposition to Motion
	Claimant's Statement of Undisputed Material Facts
September 9, 2020	Employer/Insurer's Response to Claimant's Reply
	Second Affidavit of Kimberly Dorsett

ISSUE PRESENTED: IS EMPLOYER/INSURER ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW?

FACTS

Claimant, Bruce G. Bludorn, was employed by Terex Utilities, Inc. (Employer) for approximately 32 years where he performed many tasks. On May 16, 2017, Claimant was working when he suffered an injury to his right arm. Claimant was sanding when he suddenly felt pain in his right arm, followed by the inability to move it. A coworker contacted an ambulance and Claimant was taken to the hospital. While in route, Claimant's right leg become paralyzed. The emergency room doctor's initial diagnosis was that Claimant had suffered a stroke. Based on this diagnosis, Employer/insurer denied compensability for the injury. On June 17, 2017, Claimant saw Dr. Eugenio Matos, who performed a neurodiagnostic study on Claimant's right arm. Dr. Matos subsequently opined that Claimant suffered from median neuropathy at the wrists due to mild carpal tunnel affecting sensory and motor fibers.

Claimant filed a petition for a hearing on September 12, 2017. Employer/Insurer filed its reply on October 9, 2017. On July 2, 2018, the Department entered the first scheduling order. The parties later stipulated to amend the scheduling order which the Department entered October 22, 2018. Under the amended scheduling order, Claimant's deadline to submit its expert and reports was January 28, 2019. The parties further stipulated to extend the deadlines of the amended scheduling order on January 18, 2019. The new deadline for experts was extended to July 29, 2019.

On August 15, 2019, Claimant's attorney contacted Employer/Insurer's attorney by e-mail to inquire whether or not it would require Claimant to obtain an expert report

regarding Claimant's arm injury. Claimant had suffered a previous, compensable injury to his right arm in 1993. Employer/Insurer's attorney responded the following day that Employer/Insurer would require such a report. Claimant's attorney sent four separate letters to Dr. Matos requesting a written opinion regarding Claimant's right arm injury. Dr. Matos never replied to Claimant's request. On November 17, 2019, Claimant died unexpectedly[1]. His estate, hereafter also referred to as Claimant, continues to assert a claim for benefits from the time of injury through Claimant's death. Employer/Insurer filed a motion for 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 in South Dakota. "[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)).

[1] There is no allegation that Claimant's death was related to his workplace injury.

In this case, Employer/Insurer argues that Claimant has failed to designate an expert witness for his various injuries and that he therefore cannot meet his burden of proof. "The burden of proof rested upon claimant to prove by a preponderance of the evidence the facts necessary to establish a right to compensation." *Caldwell v. John Morrell & Co.*, 489 N.W.2d 353, 358 (S.D. 1992)(internal citation omitted). "Causation must be established to a reasonable degree of medical probability, not just possibility." *Darling v. W. River Masonry, Inc.,* 2010 S.D. 4, ¶ 12, 777 N.W.2d 363, 367 (citing *Truck Ins. Exch. v. CNA,* 2001 SD 46, ¶ 19, 624 N.W.2d 705, 709)).

Claimant concedes that he did not provide medical causation evidence regarding injuries to his leg, lungs, or back and does not object to the granting of summary judgment as to those claims. However, Claimant continues to maintain that the injury to his right arm is compensable. Claimant argues that genuine issues of material fact remain as to whether Claimant's right arm injury arose out of and in the course of his employment. The record does not reflect that Claimant formally designated an expert witness pursuant to the scheduling order deadline entered by the Department. However, Claimant underwent a neurodiagnostic study with Dr. Matos on June 13, 2017. This study was made available to Employer/Insurer through discovery.

In determining whether a previously undisclosed expert's testimony should be excluded, the South Dakota Supreme Court has relied on five different factors:

> (1) whether the party's failure to cooperate in discovery was attributable to willfulness, bad faith, or the fault of the client; (2) whether the adversary was prejudiced by the party's failure to cooperate in discovery; (3) whether there is a need for deterrence in a particular sort of noncompliance; (4) whether the party was warned that failure to cooperate could lead to dismissal; and (5) whether less drastic sanctions can be imposed before dismissal.

Dudley v. Huizenga, 2003 S.D. 84, ¶ 15., 667 N.W.2d 644.

A. Fault of Claimant

After Employer/insurer Indicated that it would insist on a full report from Dr. Matos, Claimant reached out to his office several times for a written report. However, Claimant received no response from Dr. Matos. Claimant later learned that Dr. Matos's office was closed temporarily due to the Covid-19 pandemic. The Department finds that Claimant's failure to obtain a formal report from Dr. Matos was not motivated by bad faith, willfulness, or fault. Employer/Insurer was made aware of Dr. Matos's study through discovery, and Claimant made every reasonable effort to obtain a full report from Dr. Matos after Employer/Insurer indicated it insisted one be completed. The inability to reach Dr. Matos was due, at least in part, to the Covid-19 pandemic closing Dr. Matos's office temporarily. Claimant's inability to obtain a report from Dr. Matos is not attributable to any neglect on Claimant's part.

B. Prejudice to Employer/Insurer

In *Dudley*, the Court ruled that the employer/insurer would suffer no prejudice as a result of the claimant's failure to disclose his expert if the Department granted it additional time to complete its discovery disclosures. *Id.* at ¶ 16. To date, no hearing has been set in this case. While Employer/Insurer has disclosed its experts in this case, allowing it extra time to prepare rebuttal of Dr. Matos's report would reduce the threat of substantial prejudice considerably.

C. Other factors

Because the Department finds that Claimant's failure to obtain a report from Dr. Matos was not the result of bad faith, or negligence, and because it determines that the prejudice to Employer/Insurer is minimal, it will not consider the other three factors.

CONCLUSION AND ORDER

Employer/Insurer's motion for summary judgment is granted as to allegations of Claimant's injuries to his leg, lungs, or back. Summary Judgment regarding injury to Claimant's right arm is denied. Claimant shall make every effort to obtain a full report from Dr. Matos as soon as possible. Upon completion of the report, and upon its request, Employer/Insurer may have an additional 60 days to prepare a rebuttal to the report. This letter shall constitute the Department's order in this matter.

Sincerely,

_____
Joe Thronson
Administrative Law Judge