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

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RE: HF No. 77, 2022/23 – Patti A. Witkop v Enduro Healthcare, LLC. And Liberty Mutual Fire Insurance Company

Greetings:

This letter addresses Employer and Insurer's Motion for Partial Summary Judgment. All responses have been considered.

Employer and Insurer have moved for partial summary judgment pursuant to ARSD 47:03:01:08 on the basis that Claimant cannot seek certain temporary indemnity benefits after she was placed at maximum medical improvement (MMI) by Dr. Dietrich and given an impairment rating on July 13, 2020. Additionally, they move she cannot rely on the federal district court case *Hollow Horn v. Firstcomp Ins. Co.*, 2021 WL 1909707 (D.S.D. May 12, 2021) to argue the compensability of her claim has been established.

First, regarding the temporary benefits, Employer and Insurer assert that under South Dakota law, an employee is only entitled to temporary disability benefits "until the employee attains a complete recovery or until a specific loss becomes ascertainable, whichever comes first." SDCL 62-1-1(8). "[A] loss becomes ascertainable when it becomes apparent that

permanent disability and the extent thereof has resulted from an injury and that injured area will get no better or no worse because of the injury.” SDCL § 62-1-1(2). Employer and Insurer further assert that an ascertainable loss was established on July 13, 2020, when Dr. Dietrich set Claimant at MMI and assigned her a 2% whole person impairment rating. Employer and Insurer urge the Department to conclude that Claimant has conceded the issue by not responding to the Motion in her responsive brief.

While Claimant did not specifically address the issue of entitlement to temporary benefits in her brief, in her recitation of her medical history, she does raise questions of fact regarding Dr. Dietrich’s assignment of MMI. Dr. Dietrich initially set her at MMI on July 13, 2020. However, Claimant continued to treat with him for two more years resulting in the doctor amending her rating to 9% on November 4, 2022. Claimant continued to receive care for her condition and pain.

In matters of summary judgment, whether whole or partial, 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. Inferring the facts in the light most favorable to Claimant, the Department concludes that Claimant has shown that issues of material fact remain regarding when she sustained an “ascertainable” loss under SDCL § 62-1-1(2). Therefore, partial summary judgment on the issue of temporary benefits is not appropriate.

Second, regarding the application of *Hollow Horn*, Employer and Insurer move that Claimant should not be able to rely on that federal decision to argue the compensability of her claim has been established. Claimant directly referred to *Hollow Horn* in a letter to Employer and Insurer’s counsel on December 16, 2022. In her response to this Motion, Claimant asserts that the reliance on *Hollow Horn* was in reference to allegations of bad claims handling on part

of Employer and Insurer which are beyond the jurisdiction of the Department. Employer and Insurer argue that even if she has not specifically named the case, she has relied on the same rationale.

The Department notes, similar questions as those raised by *Hollow Horn* are currently before the South Dakota Supreme Court in the matter of *Jody Pham v Smithfield Foods, Sioux Falls*. As the Court's decision in *Pham* will likely resolve questions of the general applicability of the reasoning in *Hollow Horn*, the Department will wait to receive guidance from the court on those questions and will not address the issue at this time.

For the above stated reasons, Employer and Insurer's Motion for Partial Summary Judgment is DENIED.

The parties shall consider this letter to be the Order of the Department.

Sincerely,

A handwritten signature in blue ink that reads "Michelle Faw". The signature is written in a cursive, flowing style.

Michelle M. Faw
Administrative Law Judge