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Decision on Motion for Summary Judgment

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RE: HF No. 90, 2020/21 – Michael Lee Kemp v Rosebud Concrete, Inc. and Travelers Indemnity Company

Greetings:

This letter addresses Rosebud Concrete, Inc. and Travelers Indemnity Company's (Employer and Insurer) Motion for Summary Judgment submitted on January 25, 2022. All responsive briefs have been considered

The current matter stems from a work-related injury Michael Lee Kemp (Kemp) experienced on or about July 19, 2019, while working for Employer. At the time of his injury, Kemp was earning \$24 dollars an hour with an average weekly wage of \$1,326.86 and a total temporary disability weekly benefit rate of \$829. Employer and Insurer accepted the injuries as compensable and paid Kemp benefits. On December 17, 2020, Kemp was cleared by his treating physician, Dr. Thomas J. Ripperda to work without restrictions. Kemp returned to work with Employer on February 17, 2020.

On February 11, 2021, Kemp filed this Petition for Hearing with the Department of Labor & Regulation (Department) asserting claims for temporary total, temporary

partial, permanent partial, and permanent total disability. Employer and Insurer have paid Kemp's remaining claims for medical, rehabilitation, temporary total, temporary partial, and permanent partial disability benefits. On December 3, 2021, Kemp attended a vocational evaluation with Rick Ostrander to assess his capacity for employment and earnings. Ostrander noted that Kemp had been averaging about 46 hours per week with time and a half for overtime in 2021. Ostrander further noted:

Outside of Kemp's present position no employment can be identified for which Mr. Kemp would have reasonable transferable skills and the functional capacity to perform which would allow him to earn at least his workers' compensation benefit rate. Therefore outside of his present position, Mr. Kemp is obviously disabled and a job search would be futile.

Kemp has been working full-time for Employer since February 17, 2020. He currently earns a higher weekly wage than he was earning at the time of his injury on July 19, 2019, and he is, therefore, earning more than his workers' compensation benefit rate.

The Department's authority to grant summary judgment is established 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 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. *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. “Summary judgment is proper when the [opposing party] provides only conclusory statements and fails to present specific facts showing that a genuine issue exists for trial.” *Zhi Gang Zhang v. Rasmus*, 2019 SD 46, ¶ 31, 932 N.W.2d 153, 163.

Employer and Insurer assert that Kemp has failed to show he qualifies for total permanent disability. SDCL 62-4-53 provides, in pertinent part,

An 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. An employee has the burden of proof to make a prima facie showing of permanent total disability.

Kemp is currently working full-time for Employer at wages greater than his applicable compensation rate. Employer and Insurer further assert that Kemp’s physical condition, age, training, and experience has not caused him to be “unable to secure anything more than sporadic employment resulting in insubstantial income.”

Kemp asserts that he must work under multiple restrictions due to his injury and that he is having difficulty in his position as a dispatcher and batch plant supervisor/operator which requires him to perform duties outside of his restrictions. He further asserts that other than his present position with Employer, no employment can be identified in his community that he would possess reasonably transferable skills or would meet his compensation rate. He is concerned that if his employment with Employer ends, he will be unable to find another position.

SDCL 62-4-52(2) defines “sporadic employment resulting in an insubstantial income” as “employment that does not offer an employee the opportunity to work either full-time or part-time and pay 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) further provides, “[i]f a bona fide position is available that has 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 the employment is not sporadic[.]” As Kemp is currently working full-time in a bona fide position at a wage that exceeds his compensation rate, he has more than sporadic employment. Therefore, he is not permanently and totally disabled pursuant to SDCL 62-4-53. Employer and Insurer have proven that no genuine issues of material fact remain.

It is hereby ORDERED that Employer and Insurer’s Motion for Summary Judgment is GRANTED. Kemp’s Petition for Hearing, hearing file number 90, 2020/21, is DISMISSED without prejudice. The Parties may consider this Letter to be the Order of the Department.

Sincerely,



Michelle M. Faw
Administrative Law Judge