September 30, 2011

Dennis W. Finch
Finch Maks Prof. LLC
1830 West Fulton Street, STE. 201
Rapid City, SD 57702

LETTER DECISION

Charles A. Larson
Boyce, Greenfield, Pashby & Welk LLP
PO Box 5015
Sioux Falls, SD 57117-5015

RE: HF No. 19, 2011/12 – Keith M. Schettler v. Newkirk Ace Hardware and Dakota Truck Underwriters

Dear Mr. Finch and Mr. Larson:

I am in receipt of Employer/Insurer's Motion for Summary Judgment, along with supporting argument and documentation. I have also received Claimant's Brief in Resistance to the Motion, along with the affidavit of Dennis W. Finch and Employer/Insurer's Reply Brief. I have carefully considered each of these submissions.

Facts

Claimant alleges in his Petition for Hearing that he suffered an injury to his left knee on September 24, 2008, while employed at Newkirks Ace Hardware.

Based on the opinion offered in an independent medical evaluation, Employer/Insurer issued a letter on November 5, 2008, denying coverage of the claim. The letter further stated, "[s]hould you disagree with our decision, you have two (2) years to file a Petition for Hearing before the South Dakota Department of Labor pursuant to SDCL 62-7-12."

On February 20, 2009, Counsel for Claimant wrote the Insurer requesting that it reconsider the denial of November 5, 2008. Insurer responded that it would conduct "further investigation regarding the denial of November 5, 2008." From March 10, 2009 until August 4, 2009, Insurer conducted additional investigation. On August 4, 2009, Insurer responded that it was "maintaining its original denial."

The parties then began settlement negotiations on December 18, 2009, until July of 2011. When it became evident that the parties were unable to come to a settlement agreement, Claimant then filed a Petition for Hearing on July 29, 2011.

Analysis

ARSD 47:03:01:08 governs the Department of Labor's authority to grant summary judgment:

> A claimant or an employer or its insurer may, anytime 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 of 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 to show that there are no genuine issues of material fact. To successfully resist the motion, the non-moving party must present specific facts that demonstrate the existence of genuine issues of material fact. All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party. *Kermmoade v. Quality Inn*, 2000 SD 81, ¶11.

"Summary judgment is a drastic remedy, and should not be granted unless the moving party has established the right to a judgment with such clarity as to leave no room for controversy." *Richards v. Lenz*, 95 SDO 597, ¶14, 539 NW2d 80 (SD 1995) (citations omitted). Summary judgment is an appropriate remedy in this matter as there is no dispute as to the issues of material fact, the only issue is when the statute of limitations began to run.

SDCL§ 62-7-35 provides,

> The right to compensation under this title shall be forever barred unless a written petition for hearing pursuant to §62-7-12 is filed by the claimant with the department within two years after the self-insurer or insurer notifies the claimant and the department, in writing, that it intends to deny coverage in whole or in part under this title. If the denial is in part, the bar shall only apply to such part.

Claimant argues that based on the correspondence between Claimant and Insurer, the Insurer reconsidered the November 5, 2008, denial and commenced a new investigation of the claim and that a new denied letter was issued on August 4, 2009. Claimant argues that based on this new date of denial, the petition was timely filed.

Employer/Insurer argues that the denial letter of November 5, 2008, starts the statute of limitations and therefore, the Petition filed July 29, 2011, was untimely.

The language in SDCL §62-7-35 does not dictate that the two year limitation begins to run from the last notification when more than one denial is issued. There is also no language in the statute or in Insurer's letters that suggests that the first denial was superseded or withdrawn by the second denial. After the initial denial, Claimant sought reconsideration. After reconsidering the matter, Insurer restated its denial in the August 4, 2009 letter. There is also no provision that tolls the time limitation in this case. Settlement negotiations and further investigation into the November 5, 2008, denial did not toll the statute of limitations. Claimant failed to file a petition for hearing with two years of Insurer's November 5, 2008, written notification of its intent to deny coverage of Claimant's September 24, 2008, injury

There are no genuine issues of any material fact, and Employer/Insurer is entitled to judgment as a matter of law. Employer/Insurer's Motion for Summary Judgment is granted. Employer/Insurer is directed to submit an Order consistent with this decision.

Sincerely,

/s/ *Taya M. Runyan*

Taya M. Runyan
Administrative Law Judge