December 3, 2010

Lee C. "KIT" McCahren
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LETTER DECISION & ORDER

Michael S. McKnight
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Sioux Falls, SD 57117-5015

RE: HF No. 64, 2010/11 – Patrick Kendall, Jr. v. John Morrell & Company

Dear Mr. McCahren and Mr. McKnight:

I have received Employer/Self-Insurer's Motion for Summary Judgment in the above-referenced matter. I have also received Claimant's Response to Employer/Insurer's Motion for Summary Judgment and the Employer/Insurer's Reply.

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, ¶4 (citing *Jewson v. Mayo Clinic*, 691 F2d 405 (8th Cir. 1982)).

Employer/Insurer argues that the claim was properly denied in writing, on January 11, 2008. Claimant's Petition for benefits was filed on November 2, 2010, which Employer/Insurer argues is barred by SDCL§ 62-7-35.

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 contends that Employer/Insurer made medical payments on behalf Claimant on November 6, 2009. Claimant argues that his petition for benefits was filed within two years from the last payment of benefits and as such, Employer/Insurer's Motion for Summary Judgment should be denied.

The South Dakota Supreme Court in *Faircloth v. Raven Industries* addressed the two statutes that deal with limitations in workers' compensation cases.

> Each [statute] addresses a different situation. SDCL §62-7-35 provides the limitations period when an employer gives formal notice that it denies or disputes an employee's claim, in whole or in part. Employers often accept responsibility for one part of a claim and deny responsibility for another. This statute places a two-year limit on claims that are formally denied. Conversely, SDCL §62-7-35.1 furnishes the limitations period when the employer provides the employee with benefits for a period of time, gives no denial notice, and then the matter lies inactive. In the latter circumstance, the employer has at least implicitly validated the employee's claim, and the longer three-year period is warranted because the triggering event under SDCL §62-7-35.1 is simply a cessation of benefits without notice of a dispute.

Faircloth v. Raven Industries, 2000 SD 158, ¶ 8, 620 NW2d 198, 201.

The triggering event in the case at hand was the issuance of a formal notice by Employer/Insurer that it denied further benefits. In this case the two year statute of limitations would have run on January 11, 2010. Claimant did not file his petition for benefits until November 2, 2010, at which time the statute of limitations had lapsed.

The pleadings, admissions on file, together with the affidavits and parties' submissions show that there are no material facts in dispute and Employer/Insurer is entitled to

judgment as a matter of law. Employer/Insurer's Motion for Summary Judgment is granted.

This letter shall serve as the Department's Order.

Sincerely,

Taya M. Runyan
Administrative Law Judge

TMR/jjm