

October 16, 2013

Carlene Myers  
P.O. Box 306  
Lake Preston, SD 57249

Letter Decision on Motion  
for Summary Judgment

Joseph M. Dylla  
Cutler & Donahoe LLP  
P.O. Box 1400  
Sioux Falls, SD 57101-1400

RE: HF No. 7, 2013/14 – Carlene Myers v. I-90 Fuel Services, Inc. and Zurich Insurance Co.

Dear Ms. Myers and Mr. Dylla:

The Department is in receipt of Employer and Insurer's Motion for Summary Judgment on the issue of Statute of Limitations, filed with the Department on September 9, 2013. Claimant responded on October 3, 2013. Employer and Insurer submitted a final Reply to the Response on October 10, 2013. The Department, having considered all submissions, including briefs, affidavits, and case citations, and being fully advised in the premises, issues this Letter Order on the Motion for Summary Judgment.

Claimant has not met the three-year statute of limitations as set out in SDCL §62-7-35.1. Claimant's Petition for Hearing is Dismissed with Prejudice.

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 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.

ARSD 47:03:01:08.

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. *Railsback v. Mid-Century Ins. Co.*, 2005 SD 64, ¶6, 680 N.W.2d 652, 654.

## FACTS

1. While working for Employer, Claimant suffered a work-related injury on July 2, 2008.
2. Claimant slipped on a wet floor, while at work, and injured her right lower extremity.
3. Employer and Insurer accepted the claim as compensable. Claimant received workers' compensation benefits, including costs of medical treatment.
4. On February 6, 2009, Myers was discharged from physical therapy as she had reached maximum medical improvement. She was given instructions to continue exercises at home for her leg.
5. In July 2009, Claimant completed a functional capacities exam and was given a 22% lower right extremity impairment or a 9% whole person impairment.
6. Employer and Insurer sent Claimant a lump sum payment for permanent partial disability on September 8, 2009.
7. On October 9, 2009, Insurer made an additional payment for medical care for Claimant.
8. No further payments have been made by Insurer on Claimant's injury since October 9, 2009.
9. On March 29, 2011, Claimant returned to her treating physician for further treatment.
10. On April 21, 2011, Insurer informed Claimant and the physician that payment for that treatment would be denied as it was not related to the original injury. This denial on April 21, 2011 was not submitted to the Department of Labor & Regulation.
11. On May 3, 2011, Claimant's attorney wrote to Insurer regarding the non-payment of Claimant's medical bills. He told Insurer that a petition for hearing would be filed on Claimant's behalf if Insurer continued not to pay medical bills.
12. Claimant's attorney did not file a petition for hearing at that time.
13. On August 2, 2011, Claimant again sought medical treatment and submitted the medical bills to Employer and Insurer.
14. On September 30, 2011, Insurer once again informed Claimant that payment would not be made as it was not related to the original injury. This letter was not copied to the Department of Labor and Regulation.
15. On October 9, 2012, three years passed since Insurer had paid any benefits to Claimant or for medical treatment for Claimant.
16. On October 25, 2012, Claimant went to her treating physician for treatment of her original injury.
17. On March 21, 2013, Insurer formally denied payment for further medical treatment to Claimant. This denial was copied to the Department of Labor and Regulation. This denial was the first to contain a notice that Claimant had two years in which to file a Petition for Hearing regarding the denial of benefits.
18. On July 15, 2013, Claimant filed a Petition for Hearing, pro se.
19. An Answer was made by Employer and Insurer on August 9, 2013.
20. Employer and Insurer filed this Motion for Summary Judgment on September 9, 2013.

## ANALYSIS & DECISION

SDCL § 62-7-35.1 reads:

In any case in which any benefits have been tendered pursuant to this title on account of an injury, any claim for additional compensation shall be barred, unless the claimant files a written petition for hearing pursuant to §62-7-12 with the department within three years from the date of the last

payment of benefits. The provisions of this section do not apply to review and revision of payments or other benefits under §62-7-33.

SDCL § 62-7-35.1.

The South Dakota Supreme Court has held that “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.” *Faircloth v. Raven Indus., Inc.*, 2000 SD 158, ¶8, 620 NW2d 198, 201. The first two denials issued by Employer and Insurer were never sent the Department of Labor and Regulation, therefore, Employer and Insurer were not under any duty to inform Claimant that there was a statute of limitations for her to file a petition for hearing with the Department.

The three-year period, since the final payment by Employer and Insurer, was on October 9, 2012. Claimant did not file her Petition for Hearing with the Department until July 15, 2013. Failure to do so within the three-year statute of limitations is a bar to Claimant’s cause of action and claim for benefits.

Claimant filed a Petition for Hearing with the Department of Labor past the statute of limitations provided for in SDCL §62-7-35.1. The Petition for Hearing is hereby Dismissed with prejudice.

The Parties may consider this Letter Decision to be the Order of the Department.

Sincerely,

Catherine Duenwald  
Administrative Law Judge  
Division of Labor & Management  
Department of Labor & Regulation