December 19, 2008

J. G. Shultz
Woods, Fuller, Shultz & Smith PC
PO Box 5027
Sioux Falls, SD 57117-5027

LETTER DECISION

Brian W. Underdahl
South Dakota Subsequent Injury Fund
445 East Capitol Ave.
Pierre, SD 57501-3185

RE: HF No. 137, 2007/08 – Continental Western Insurance Company v. South Dakota Subsequent Injury Fund (Teresa A. Stellingwerf, SIF 1193)

Dear Mr. Shultz and Mr. Underdahl:

The Department of Labor (Department) has received and considered Petitioner's Motion for Summary Judgment, Respondent's Resistance to Petitioner's Motion for Summary Judgment, and Petitioner's Response to Respondent's Resistance in the above-referenced matter. The Department has also considered briefs, affidavits and attachments filed with the above documents.

The underlying Petition for Hearing arrives at the Department pursuant to SDCL 1-26 and 62-4-34.2 (As repealed by SL 1999, ch. 262, § 4). The Division of Insurance denied Petitioner's claim against the Subsequent Injury Fund (SIF). Division of Insurance denied the claim as they are of the opinion that Petitioner failed to file the claim within 90 days after the settlement between the parties was approved by the Department of Labor. SDCL 62-4-34.1.

Petitioner filed a Petition for Hearing with the Department pursuant to SDCL 62-4-34.2 on March 19, 2008. Respondent responded to the Petition on April 10, 2008. Petitioner makes this Motion for Summary Judgment.

The Department's authority to rule on a Motion for Summary Judgment is found at SDCL §1-26-18(1).

> [E]ach agency, upon the motion of any party, may dispose of any defense or claim [i]f 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 a party is entitled to a judgment as a matter of law.

SDCL §1-26-18(1). In this case the issue is whether Petitioner met the statute of limitations pursuant to SDCL 62-4-34.1, when filing the claim with the Respondent. Both sides are in agreement on the dates upon which certain events took place. The questions that remain are questions of law, particularly:

1) Whether the 90-day time period as set by §62-4-34.1 was triggered a second time by the Second Amended Compromise Settlement and Order signed by the Department; and

2) Whether the original Notice of Claim mailed to Respondent on October 18, 2007 was filed at the time of mailing; does the mailbox rule of §15-6-6(e) apply to SDCL chapter 62-4.

Facts

Claimant sustained a work-related injury on February 20, 1997. "[I]n workers' compensation cases, 'the law in effect when the injury occurred governs the rights of the parties.'" *SD Subsequent Injury Fund v. Heritage Mut. Ins. Co.*, 2002 SD 34, ¶15. Petitioner seeks reimbursement from the Subsequent Injury Fund (SIF), as provided for in SDCL 62-4-34 to 62-4-36.3.[1] SIF is a fund created under South Dakota workers' compensation laws to encourage employers to hire or retain disabled or handicapped workers. *Id*. at ¶2. (citing *Sioux Falls Sch. Dist. v. South Dakota Subsequent Injury Fund*, 504 NW2d 107, 107 (SD 1993) and *2 Larson, Workers' Compensation Law,* § 59.30 (1992)). SIF is not an insurance statute, but is administered by the Division of Insurance.

The Department entered an Order on July 24, 2007, approving a Compromise Settlement and Release between Teresa Stellingwerf and Petitioner. On Thursday, October 18, 2007, Petitioner mailed a Notice of SIF Claim, by US Mail, to Respondent. Respondent received and date-stamped the Notice on October 23, 2007, 91 days after the Order was signed. Respondent denied the Claim on November 2, 2007 for failure to file the claim within 90 days of the Department's Order, pursuant to SDCL 62-4-34.1.

On November 30, 2007, the Department entered a Second Amended Compromise Settlement and Release. Based upon this Second Amended Compromise, Petitioner submitted another Notice of Claim to Respondents on December 10, 2007. The two settlements made by the parties contained similar provisions. The latter settlement made provision and provided funding for a Future Medical Expense Trust and Medicare set-aside fund. Respondents denied this claim on

[1] The Subsequent Injury Fund is a fund created by statute, specifically SDCL 62-4-34 through 62-4-36.3. This Fund was repealed by Session Law 1999, ch. 262, §§ 2-11.

January 2, 2008, as the second settlement was substantially the same as the previous settlement.

Analysis and Decision

1. Whether the 90-day time period as set by §62-4-34.1 was triggered a second time by the Second Amended Compromise Settlement and Order signed by the Department?

SDCL §62-4-34.1 (as repealed in 1999) reads:

> Any claim against the subsequent injury fund shall be filed with the division of insurance within ninety days from the date of the final decision by the department that a compensable injury exists resulting in additional permanent partial or permanent total disability, or approval by the department of settlement between the parties. No claim may be filed prior to a decision or approval of settlement from the department. The division shall conduct an investigation and make a decision on the claim within thirty days of the filing of a complete claim as set forth in § 62-4-34.4 or within a time agreed upon between the claimant and the department.

Id. SDCL 62-4-34.1 is a statute of limitations. *S.D. Subsequent Injury Fund v. Heritage Mut. Ins. Co.*, 2002 SD 34 at ¶3, 641 NW2d at 657. On July 24, 2007, the Department approved and signed a Compromise Settlement and Release regarding the workers' compensation claim made by Ms. Stellingwerf against Petitioner. This Release was a "final decision" by the Department.

On November 30, 2007, the Department approved and signed a Second Amended Compromise Settlement and Release. This Release was also a "final decision" by the Department. This amended settlement included a funded Medicare Set-Aside fund (MSA) for future medical expenses as required by the Centers for Medicare and Medicaid Services (CMS). The July 24 settlement did not contain a funded MSA and included a provision that stated the settlement was only effective upon the approval of the Department and CMS.

CMS did not approve the first settlement and on October 18, 2007, informed Petitioner that CMS required a balance of $5,817 in the MSA. The MSA was to be self-administered by Ms. Stellingwerf in accordance with the terms required by the U.S. Department of Health and Human Services. The changes made to the Compromise Settlement were extensive and substantive. Both parties had to agree to new provisions, specifically regarding the MSA account. Respondent's possible reimbursement of this claim may also have changed with the amendment. This change made by the amended settlement was substantive to all parties involved.

In South Dakota, the case law regarding amended decisions is not extensive, but it is settled. "Where a judgment is amended, an appeal will lie therefrom within one year after the amendment, though more than one year after the entry of the original judgment." *Engelcke v. Farmers' State Bank of Canistota*, 246 N.W. 288, 289 (SD 1932).

Engelcke is based upon the decision of *Brown v. Brown*, in which the Supreme Court wrote:

> Respondent appeared pursuant to the show cause order on this question of change and modification of judgment, and argued the matter on the merits, and … raised no question of jurisdiction of the court to make a change or modification. The instrument itself, that is, the [amended] judgment …, was drawn by respondent…. The judgment not being in fact a judgment '*nunc pro tunc'* and not purporting to be a judgment '*nunc pro tunc*' beyond the fact that respondent saw it so to call it, does not relate back to the judgment which it modifies, but is the judgment of the court in the cause as of the filing date, and appellant … having taken all steps necessary to perfect the same, there is now pending in this court an effective appeal."

21 A.L.R.2d 285 (1952 as amended) (quoting *Brown v. Brown* 49 SD 167, 206 NW 688 (1925). The second settlement was not amended "*nunc pro tunc*" by the Department and therefore did not "relate back" to the original settlement and order. This action results in the settlement being a new judgment or order with new rights attached. Petitioner had 90 days from November 30, 2007, in which to file a claim with Respondent.

Petitioner filed his claim with Respondent, based upon the Second Amended Compromise Settlement and Order, on December 10, 2007. This claim was made timely, as a matter of law and fact, under SDCL § 62-4-34.1. Petitioner's Motion for Summary Judgment is granted.

2) Whether the original notice mailed to Respondent on October 18, 2007 was filed at the time of mailing; does the mailbox rule of §15-6-6(e) apply to SDCL chapter 62-4.

The mailbox rule, as made statutory in SDCL §15-6-6(e), reads:

> Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him, or whenever such service is required to be made a prescribed period before a specified event, and the notice or paper is served by mail, three days shall be added to the prescribed period.

> Service by facsimile transmission shall not be deemed service by mail for purposes of this section.

SDCL §15-6-6(e). This statute specifically applies to workers' compensation laws, chapter 62-7, pursuant to SDCL §62-7-30. Generally, workers' compensation laws and hearings are held pursuant to the Administrative Procedures Act found in SDCL chapter 1-26. SDCL § 62-4-34.2 specifically refers to chapter 1-26 as the hearing procedure in the cases regarding chapter 62-4. There is no statutory provision that would place a 62-4 hearing under the rules of civil procedure and likewise, §15-6-6(e). The Department does not grant Petitioner's motion for summary judgment due to the application of the "mailbox rule".

Counsel for Petitioner shall submit proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision, within 30 days of the receipt of this Decision. Respondent shall have an additional 20 days from the date of receipt of Petitioner's proposed Findings of Fact and Conclusions of Law to submit objections. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for Petitioner shall submit such stipulation together with an Order consistent with this Decision.

Sincerely,

Catherine Duenwald
Administrative Law Judge