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ORDER ON MOTION
FOR SUMMARY JUDGMENT

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RE: HF No. 139, 2013/14 – Dean Kusel v. Dakota Trailer Mfg., Inc. and United Fire Group

Dear Mr. Pollard and Mr. McKnight:

The Department is in receipt of and has considered Employer and Insurer's Motion for Summary Judgment, Claimant's Opposition to the Motion, and Employer and Insurer's Reply in Support of the Motion, along with all supporting briefs, exhibits, and affidavits. After being fully advised, the Department makes the following Order on Motion for Summary Judgment.

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.

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.

Undisputed Facts:

1. Claimant alleges he was injured in a work-place incident on March 1, 2011, while employed with Employer.

2. On June 3, 2011, Employer and Insurer mailed to Claimant a "provisional denial." This denial was also sent to the Department of Labor. This denial did not inform Claimant about his statute of limitations for filing a Petition for Hearing.

3. On November 18, 2011, Employer and Insurer mailed to Claimant a denial of benefits. This denial was not sent to the Department of Labor.

4. Contained within the November 18, 2011, denial letter are Claimant's statutory rights to appeal the denial within two years of the denial.

5. Claimant filed a Petition for Hearing on March 26, 2014.

ANALYSIS & DECISION

Employer and Insurer's Motion for Summary Judgment is based upon SDCL § 62-7-35, the statute of limitations for filing a petition for hearing. The statute states:

> 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.

SDCL §62-7-35. Employer and Insurer argue that the Claimant Petition for Hearing was filed beyond the two-year statute of limitations and that the Petition should be dismissed.

Employer and Insurer clearly stated in the November 2011 denial letter that Claimant had two years in which to appeal the decision of the Employer. This letter, however, was not sent to the Department of Labor. The Department of Labor did receive a denial by the Insurer in June 2011. The Insurer never updated the Department of Labor, but the status of the Insurer and Claimant had not changed.

Claimant makes the argument that because the November 2011 denial letter was never sent to the Department of Labor, Claimant's statute of limitation has not tolled. 62-7-35.1. Employer and Insurer argue that since the Department had received at least one denial, there was substantial compliance of the statute. *Sauder v. Parkview Care Center,* 2007 S.D. 103, 740 N.W.2d 878. The *Sauder* case sets out the definition of "substantial compliance."

In this situation, the two denials read together, form a substantial compliance of the statute. SDCL 62-6-3 requires that the Insurer notify the Claimant and the Department of any denial of benefits. The Insurer shall also "state the reasons therefor and notify the claimant of the right to a hearing under §62-7-12." S.D.C.L. §62-6-3. The provisional denial sent in June

2011, worked to notify the Department that the claim was denied. The denial sent to Claimant in November 2011, effectuated the notice of rights of appeal.

Claimant's statute of limitations tolled in November 2013. Claimant was given those two years to file a Petition for Hearing based upon the November 2011 denial; however, he failed to do so.

There are no material facts in dispute. Employer and Insurer are entitled to judgment as a matter of law. Employer and Insurer's Motion for Summary Judgment is granted. The Claimant's Petition for Hearing, is dismissed. This letter serves as the Department's Order.

Dated this 25th day of July, 2014.

BY THE DEPARTMENT,

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Catherine Duenwald
Administrative Law Judge