December 6, 2012

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Letter Decision and Order

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RE: HF No. 140, 2011/12 – Jimmy D. Love v. Pro-Build Holdings, Inc. f/k/a United Building Centers and Liberty Mutual and Travelers Indemnity Company

Dear Ms. Julius, Ms. Holm and Mr. Larson:

Submissions:

This letter addresses the following submissions by the parties:

October 25, 2012	[Claimant's] Motion to Amend SDCL§ 62-7-12 Petition for Hearing;
November 15, 2012	Pro-Build Holdings, Inc. f/k/a United Building Centers and Liberty Mutual's Brief in Opposition to Motion to Amend; and
November 30, 2012	Claimant's Brief in Response to Pro-Build Holdings, Inc. f/k/a United Building Centers and Liberty Mutual's Brief in Opposition to Motion to Amend.

Facts:

The facts of this case as reflected by the above submissions and documentation are as follows:

1. Jimmy D. Love (Claimant) suffered a compensable work-related injury to his low back on November 15, 2006, while working for Employer then known as United Building Centers (Employer). At the time of this injury Employer was insured by Travelers Indemnity Company (Travelers).

2. Travelers provided medical treatment to for Claimant's November 2006 injury. His diagnosis included a herniated disk at the L5-S1 level of his spine. Claimant's treatment for this injury continued through December 2008.

3. On January 6, 2009, Claimant either suffered another work-related injury or an aggravation to his 2006 injury while working for Employer. At the time of this injury, Employer was known as Pro-Build Holdings, Inc. and was insured by Liberty Mutual (Liberty).

4. Claimant continued to have problems with his low back following his second injury for which Liberty provided medical treatment

5. Claimant reached maximum medical improvement by August 2010 and was assigned a 5 percent permanent impairment rating for his lumbar spine. Liberty paid partial permanent disability benefits to Claimant based on this impairment rating.

6. Claimant resumed medical treatment in 2011 reporting pain in the L5-S1 disk area. Surgery was recommended to treat Claimant's herniation at the L5-S1 level.

7. Liberty requested an independent medical examination (IME) because Claimant's L5-S1 level herniation had been involved in his 2006 injury. The IME was performed by Dr. Richard Farnham.

8. Following the IME, Dr. Farnham opined that Claimant's condition was caused by his 2006 injury and that he did not require surgery. Based on Farnham's opinion, Liberty denied benefits associated with the Claimant's lower back condition.

9. Following Liberty's 2011 denial, Claimant filed a Petition for Hearing asserting that either Travelers or Liberty were liable for his low back condition as a result of the 2006 and 2009 injuries.

10. After the Petition for Hearing was filed, Liberty resumed the payment of workers compensation benefits pursuant to SDCL 62-7-38.

11. Claimant now moves to amend his Petition for Hearing seeking attorney's fees because he was required to file a Petition for Hearing before Liberty resumed paying worker's compensation benefits.

12. Additional facts may be discussed in the analysis below.

Motion to Amend Pleadings:

Motions to amend pleadings are governed by SDCL 15-6-15(a). That provision states,

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has neither been placed upon the trial calendar, nor an order made setting a date for trial, he may so amend it at any time within twenty days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

SDCL 15-6-15(a).

At this point in time, Claimant requires leave by the Department to amend his Petition for Hearing. Id. That leave "shall be freely given where justice so requires." Id. However, there is no absolute or automatic right to amend. See US. v. ex rel. Lee v. Fairview Health Sys., 413 F.3d 748, 749 (8th Cir. 2005) (citation omitted). Indeed, a court should deny leave to amend when a plaintiff's proposed amendment would be futile. Id. (citation omitted); see also Wiles v. Capitol Indent Corp., 280 F.3d 868, 871 (8th Cir. 2002) (citation omitted)

Timeliness:

Liberty first argues that Claimant cannot amend his Petition for Hearing because the amendment is untimely. They contend that Claimant cannot proceed with a hearing based on a SDCL 58-12-3 claim until an award of benefits is made by the Department, which has not happened in this case. SDCL 58-12-3.1 outlines the process to be followed for such hearings.

> The determination of entitlement to an allowance of attorney fees as costs and the amount thereof under § 58-12-3 shall be made by the court or the Department of Labor and Regulation at a separate hearing of record subsequent to the entry of a judgment or award in favor of the person making claim against the insurance company, and, if an allowance is made, the amount thereof shall be inserted in or added to the judgment or award. Such a hearing shall be

> afforded upon the request of the claimant made within ten days after entry of the judgment or award.

SDCL 58-12-3.1.

Liberty is correct in that the statute prohibits the hearing from proceeding until after and award is made. However, that section of the statute does not prohibit the issue from being pled before that time. More relevant to the timing of the pleading is the last sentence of the statute. That sentence states, "[s]uch a hearing shall be afforded upon the request of the claimant made within ten days after entry of the judgment or award."

On its face, this sentence only affords a hearing to a claimant when the request is made within the ten day window following the entry of an award of benefits. This serves the purpose of cutting off claims when the request is made after that time frame. However, this reading of the provision serves no useful purpose by prohibiting claims requested prior to the award in the prior proceeding. If the request is permitted, and an award is not made, the amended pleading is dismissed along with the rest of the pleading. If an award is made, a hearing on the SDCL 59-12-3 issue can proceed without undue delay without the necessity of filing a new request. Therefore, the Department will not prohibit Claimant from amending his motion based solely on this argument.

Futility:

Liberty argues that amending Claimant's petition is futile because he does not have legally sustainable basis for his complaint. The basis of Claimant's action is that Liberty denied his benefits in violation of SDCL 62-7-38. That statute states:

> In cases where there are multiple employers or insurers, if an employee claims an aggravation of a preexisting injury or if an injury is from cumulative trauma making the exact date of injury undeterminable, the insurer providing coverage to the employer at the time the aggravation or injury is reported shall make immediate payment of the claim until all employers and insurers agree on responsibility or the matter is appropriately adjudicated by the Department of Labor and Regulation pursuant to this chapter.

SDCL 62-7-38.

In July of 2000, Craig Johnson, Secretary of the South Dakota Department of Labor issued a Declaratory Ruling which dealt with the applicability of SDCL 62-7-38. In that Ruling the Secretary found that:

> § 62-7-38 should only be applied when a petition for hearing has been filed by a party to the claim, and the only issue affecting the primary liability of the parties in the litigation is whether the claimed injury and resulting condition arose out of and in the course of employment which the parties insure.

S.D. Dep't of Lab., Declaratory Ruling, 2000 WL 35432553, at *2 (July 20, 2000)

The Secretary's rationale for imposing the requirement that a Petition for Hearing be filed is that, it is the only way to insure that the Department retains subject matter jurisdiction of the case. Otherwise, the last insurer would be required to pay benefits and a dispute of "causation" would become a dispute between insurers concerning indemnity or contribution parties over which the Department has no jurisdiction. Kermmoade v. Quality Inn, 2000 SD 81,26; Medley v. Salvation Army, 267 N.W.2d 201 (S.D. 1978). The Secretary also stated that the statute on its face does not allow for a defense other than 'causation (such as notice, misconduct etc.).

In this case the rationale of the Ruling and its holding are both relevant and applicable. After Dr. Farnham's IME, two issues arose. One issue is whether the 2006 or 2009 injury was the cause of Claimant's current low back condition. The other questions the necessity and reasonableness of the recommended surgery. Under the holding of the Secretary's Declaratory Ruling, Liberty was entitled to deny further benefits for Claimant's low back condition because SDCL 62-7-38 is not applicable. Under these circumstances, Claimant does not have legally sustainable action under SDCL 58-12-3 and filing the amendment to Claimant's Petition for Hearing would be futile.

Order:

In accordance with the analysis above, it is hereby ordered that Claimant's Motion to Amend SDCL§ 62-7-12 Petition for hearing is denied.

Sincerely,

/s/ Donald W. Hageman _____
Donald W. Hageman
Administrative Law Judge