

October 15, 2018

Shiloh MacNally  
MacNally Law Office  
625 ½ Main Street, Ste 2  
Rapid City, SD 57701

**LETTER DECISION AND ORDER**

Robert B. Anderson  
May, Adam, Gerdes, & Thompson, LLP  
PO Box 160  
Pierre, SD 57501-0160

RE: HF No. 141, 2016/17 – Lisa Kroger v. Black Hills Clean Freaks and Acuity Insurance

Dear Ms. MacNally and Mr. Anderson:

This letter addresses the following submissions by the parties:

June 26, 2018	Insurer's Motion for Summary Judgment
	Insurer's Memorandum in Support of Motion
	Insurer's Statement of Undisputed Material Facts
	Affidavit of Robert B. Anderson
July 18, 2018	Claimant's Response to Insurer's Motion for Summary Judgment
	Claimant's Response to Insurer's Statement of Undisputed Material Facts
	Affidavit of Lisa Kroger
	Affidavit of Shiloh MacNally

August 1, 2018 Insurer's Reply Memorandum in Support of Motion for Summary Judgment

Affidavit of Don Odens

Affidavit of Whitney Christopherson

September 26, 2018 Insurer's Supplemental Brief

Affidavit of Jennifer Meiselwitz

**ISSUE PRESENTED: IS EMPLOYER/INSURER ENTITLED TO SUMMARY JUDGMENT ON THE ISSUE OF CLAIMANT'S ELECTION TO WAIVE WORKERS COMPENSATION COVERAGE UNDER SDCL 62-3-5.1?**

**FACTS**

Claimant, Lisa Kroger, was employed by Employer, Black Hills Clean Freaks, beginning in 2014. Employer was incorporated on June 23, 2014 by Doug Vandierendonck, Claimant's boyfriend. Vandierendonck was the sole incorporator and shareholder. Vandierendonck went to Bank West to obtain insurance for Black Hills Clean Freaks, where they met agent Brad Blumenthal. Claimant alleges that Blumenthal advised them that Claimant could not be covered under workers compensation because she was an officer of the corporation. Claimant does not deny that the waiver included language which informed the signor that officers were automatically covered unless they chose to waive coverage. Claimant insisted that Blumenthal had her sign the waiver notwithstanding.

While working with Employer, Claimant performed a number of tasks including making daily deposits, supervising employees, handled bookwork, and processing employee payroll. However, Claimant contends she had no authority to open accounts, sign checks, or bind the company in any way.

On April 15, 2016, Claimant was traveling between job sights when she was involved in a serious auto accident. Black Hills Clean Freaks contacted Blumenthal who advised it that Claimant had been excluded from workers compensation coverage. Later that fall, Insurer's auditor, Don Odens, performed an audit of Employer's coverage. Claimant alleges that Odens informed her that she was not an officer of Employer and therefore should not have been excluded from workers compensation coverage. Claimant also alleges Odens told her that, as such, if Employer paid past premiums for Claimant's coverage, Insurer would retroactively add Claimant to the policy. Odens denies telling Claimant this. Odens recollection was that Claimant told him she was not in fact an officer of the company and should have been covered from the beginning. Subsequently, Claimant filed a claim for workers compensation benefits which Insurer denied based on the earlier exclusion. Claimant filed a petition seeking benefits with the Department. Insurer then filed this motion for summary judgment.

### **ANALYSIS**

Employer/Insurer's motion is based on Claimant's election under SDCL 62-3-5.1 to not take workers compensation coverage. SDCL 62-3-5.1 reads:

Section 62-3-3 does not apply to an executive officer of a corporation who, at the time of the officer's election or appointment, or more than thirty days prior to the officer's injury or death or, in the case of chapter 62-8, thirty days prior to contracting or incurring any occupational disease, serves upon the corporation, personally or by certified mail, written notice of election to reject the provisions of this title. The rejection may be withdrawn by the officer by serving a written notice in the same manner upon the corporation more than thirty days prior to the officer's injury or death or, in the case of chapter 62-8, thirty days prior to contracting or incurring any occupational disease.

Claimant contends that she paid Insurer a premium to be retroactively covered by Black Hills Clean Freak's workers compensation policy and it is therefore estopped

from denying her coverage. The Supreme Court has previously set out the elements of equitable estoppel:

In order to constitute an equitable estoppel, [also known today as] estoppel in pais, false representations or concealment of material facts must exist; the party to whom it was made must have been without knowledge of the real facts; th[e] representations or concealment must have been made with the intention that it should be acted upon; and the party to whom it was made must have relied thereon to his prejudice or injury. There can be no estoppel if any of these essential elements are lacking, or if any of them have not been proved by clear and convincing evidence.

*L.R. Foy Const. Co. v. S. Dakota State Cement Plant Comm'n*, 399 N.W.2d 340, 344 (S.D. 1987) (quoting *Taylor v. Tripp*, 330 N.W.2d 542, 545(S.D.1983)).

Claimant alleges that Insurer falsely represented that it would retroactively add Claimant to the workers compensation policy if Employer paid the difference in premium. What Don Odens told Claimant about being retroactively covered is in dispute. It is undisputed that Claimant was added to Employer's workers compensation policy effective June 27, 2016. However, Odens stated that he did not tell Claimant that she could be added retroactively to Black Hills Clean Freak's workers compensation policy. Nothing in the record supports Claimant's contention that Odens told her she would be retroactively covered by simply paying back premiums. Neither the billing notice provided by Claimant, nor the policy provided by Insurer, demonstrates that Claimant's addition to Black Hills Clean Freak's policy was meant to be retroactive to the time of the accident.<sup>1</sup> The billing notice clearly indicates that the effective date of the policy was June 27, 2016. Likewise, the insurance policy indicates the same as its

---

<sup>1</sup> As part of her brief, Claimant included a document labeled Exhibit C entitled "Account Summary" which includes an item indicating that coverage was backdated to 6-27-15 and resulted in additional premium. Insurer has denied that it generated this document and it is not apparent where it came from. Since its origin is not clear, the Department will not consider it in its decision.

inception date. While the change of Claimant's coverage status was retroactive, it was only to June 27 and not to the date of Claimant's accident. Since the Department finds that no false representation was made by Insurer regarding retroactive coverage, Claimant cannot meet her burden of establishing equitable estoppel.

Claimant also argues that she was not actually an officer of Employer and therefore should not have been excluded. Indeed, it is unclear whether Claimant was an officer under SDCL 47-1A-840, but neither is this determination relevant to the Department's decision. It is not the Department's practice to investigate or enforce any criteria for proper waiver. Indeed, even if the Department was so inclined, nothing in the code grants it any specific power to do so. When an officer self-identifies as such and elects to forgo coverage, the Department simply takes her at her word. Any claim that an officer is improperly excluded is a matter between that individual and her employer.

Finally, Claimant asserts that Insurer is liable by the statement Brad Blumenthal made to Claimant that she could not be covered under workers compensation. The Supreme Court has also previously noted "as a 'general rule[,] if the insured authorizes an agent not only to insure but to keep the property insured, with power to select the insurer, and the agent then places the insurance in a company not represented by him, he is the agent of the insured....'" *N. Star Mut. Ins. Co. v. Rasmussen*, 2007 S.D. 55, ¶ 45, 734 N.W.2d 352, 362 (quoting *Flanagan v. Sunshine Mut. Ins. Co.*, 73 S.D. 256, 258, 41 N.W.2d 761, 762 (1950)).

It was not immediately apparent whether Blumenthal was a captive agent of Insurer or an independent agent. The Department requested supplemental briefing and information. According to affidavits provided by Insurer, Blumenthal was not an agent of

Insurer. Rather, he was an independent agent employed by Bank West Insurance. While he ultimately chose a policy with Insurer on behalf of Employer, Blumenthal was not obligated to do so. The prospect of Blumenthal erroneously informing Employer that Claimant could not be covered under a workers compensation policy is troubling to say the least. However, it did not bind Insurer to retroactively cover Claimant.

### **ORDER**

Employer/Insurer's motion for summary judgment is GRANTED.

Representative for Employer/Insurer shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision. Claimant may submit proposed Findings of Fact and Conclusions of Law within 10 days after receipt of Employer/Insurer's submission. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for Employer/Insurer shall submit such stipulation together with an Order consistent with this Decision.

SOUTH DAKOTA DEPARTMENT OF LABOR  
& REGULATION

/s/ Joe Thronson  
Joe Thronson  
Administrative Law Judge