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RE: HF No. 147, 2012/13 – David M. Green v. United Defense, LP and Indemnity Insurance Company of North America

Letter Decision on Motion for Summary Judgment

Dear Counsel:

The Department has received Employer and Insurer's Motion for Summary Judgment, and Claimant's Response to the Motion, as well as the Employer and Insurer's Final Reply to the Response. All pleadings and submissions to the Department, by the Parties, have been taken into consideration when deciding this Motion.

This Motion for Summary Judgment addresses the question of whether Claimant met the statute of limitations when filing his Petition for Hearing. Employer and Insurer are arguing that Claimant failed to meet the two-year statute of limitations set out in SDCL §62-7-35. Claimant alleges that the statute of limitations set out in §62-7-35 does not apply as he never received the denial.

Undisputed Material Facts

1. On March 15, 2006, Claimant suffered a work-related injury to his arm while employed by Employer.

2. Employer had admitted that Claimant suffered a work-related injury.

3. Employer and Insurer have paid for medical treatment for Claimant's arm injury. Claimant has required continuous treatment to his arm since the time of the injury.

4. On July 27, 2007, an IME physician assigned an impairment rating of 28% whole person. This information was not shared with Claimant.

5. In September 2007, Insurer began sending checks for $410.15 on a weekly basis to Claimant. Claimant did not know what these checks were for until he called the Department of Labor and Regulation. The worker's compensation compliance specialist for the DLR advised Claimant that he was permanently and totally disabled and these checks were to compensate him for that disability.

6. On September 25, 2007, in response to a request by Claimant, DLR approved a lump sum payment of PPD benefits to Claimant.

7. Claimant never received a completed Form 111 from Insurer, a Memorandum of Payment of Permanent Partial Disability.

8. On October 1, 2007, Insurer wrote a letter that denied any further indemnity benefits to Claimant. This letter advised Claimant that if he disagreed with the denial, he had two years in which to file a written request for hearing with the DLR.

9. Insurer did not send this letter to Claimant via certified or registered mail.

10. Claimant denies that he received this October 1, 2007 denial letter.

11. The first time Claimant was aware that he received the denial letter was when he received a subsequent denial letter on September 1, 2011.

12. Claimant filed a Petition for Hearing with the Department on March 21, 2013.

ANALYSIS AND DECISION

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.

Employer and Insurer's argument for Summary Judgment, is that Claimant did not file his Petition for Hearing within the two years following the denial letter sent by Insurer, in violation of the statute of limitations found in SDCL §62-7-35.

> 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. If the denial is in part, the bar shall only apply to such part.

SDCL §62-7-35.

Claimant's Petition for Hearing alleges a permanent and total disability stemming from the workplace injury and requests permanent total disability indemnity benefits. Employer and Insurer have not denied any medical benefits stemming from the injury, only the continued indemnity benefits. Claimant was paid a lump sum of the permanent partial benefits after a doctor hired by Employer and Insurer, informed Employer and Insurer that Claimant had reached maximum medical improvement. Claimant never received a copy of that doctor's opinion and did not know why he was receiving a weekly check from Employer and Insurer. Claimant continued to receive medical treatment and now alleges his injury worsened over time and he is now totally disabled.

After reaching MMI, Employer and Insurer prepared a letter denying further indemnity benefits and filed it with the Department of Labor and Regulation. A denial of benefits, either medical or indemnity, are filed with the Department and sent to the claimant pursuant to SDCL §62-6-3.

> The insurer or, if the employer is self-insured, the employer, shall make an investigation of the claim and shall notify the injured employee and the department, in writing, within twenty days from its receipt of the report, if it denies coverage in whole or in part. This period may be extended not to exceed a total of thirty additional days by the department upon a proper showing that there is insufficient time to investigate the conditions surrounding the happening of the accident or the circumstances of coverage. If the insurer or self-insurer denies coverage in whole or in part, it shall state the reasons therefor and notify the claimant of the right to a hearing under § 62-7-12. The director of the Division of Insurance, or the secretary of labor and regulation if the employer is self-insured, may suspend, revoke, or refuse to renew the certificate of authority, or may suspend or revoke all certificates of authority granted under Title 58 to any company or employer which fails, refuses, or neglects to comply with the provisions of this section. A company or employer which fails, refuses, or neglects to comply with the provisions of this section is also subject to an administrative fine of one hundred dollars payable to the Department of Labor and Regulation for each act of noncompliance, unless the company or employer had good cause for noncompliance.

SDCL §62-6-3.

Claimant has presented an affidavit to the fact that he did not receive the denial letter from Insurer. There is no proof that this denial letter was sent to Claimant, besides the affidavit of an employee of

Insurer. The Insurer admits that the denial letter would not have been sent by certified or registered mail. Notices and orders issued pursuant to SDCL Ch. 62-7 are required to be sent by certified or registered mail.

> All notices or orders provided for in this chapter may be served personally or by registered or certified mail. If served by registered or certified mail, proof by affidavit thereof shall be accompanied by post office return receipt. If, however, any party is represented by an attorney, the service shall be made on the attorney, and may be made either in the manner provided in this section, or in the manner provided by § 15-6-5.

SDCL §62-7-30.

The burden of proof in this case is on Employer and Insurer to show that notification was made to both Claimant and the Department. Claimant asserts that because notification was not made personally or by certified or registered mail, that notification cannot be proven by Employer and Insurer. A similar situation came before the S.D. Supreme Court in the case of *Sauder v. Parkview Care Center*, 1007 SD 103, 740 NW2d 878. In that case, the claimant Joan Sauder admitted receiving a copy of the denial but argued that it was ineffectual. The Supreme Court rejected the claimant's argument, as she admitted receiving a copy. However, the Court presented a warning for employers and insurers in future cases by writing, "The employer that proceeds without using registered or certified mail does so at its own risk in that it may not be able to show service of the denial." Id. at ¶21.

In this situation, the inferences from the evidence are to be seen in a light more favorable to the non-moving party, the Claimant. The Claimant's affidavit and statements are judged to be equally credible to Insurer's affidavit and statements. Employer and Insurer have not been able to meet their burden and prove by a preponderance of the evidence that Claimant was served with a denial of indemnity benefits. Employer and Insurer are not entitled to judgment as a matter of law in regards to the statute of limitations and material issues of fact are still present. Therefore, Employer and Insurer's Motion for Summary Judgment is Denied.

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

The Parties are instructed to continue with Discovery and contact the Department if a Scheduling Order is desired.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

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Catherine Duenwald
Administrative Law Judge