September 14, 2012

Heather Lammers Bogard
Costello, Porter, Hill, Heisterkamp,
Bushnell & Carpenter LLP
PO Box 290
Rapid City, SD 57709

LETTER DECISION

Comet H. Haraldson
Justin G. Smith
Woods, Fuller, Shultz & Smith PC
PO Box 5027
Sioux Falls, SD 57117-5027

RE: HF No. 161, 2010/11 – Robin Weber v. Rapid City Regional Hospital and FinCor Solutions

Dear Ms. Bogard and Mr. Haraldson:

I have received Employer and Insurer's Motion for Partial Summary Judgment in the above-referenced matter along with the affidavit of Jan K. Stine, statement of Undisputed Material Facts in Support of Employer and Insurer's Motion for Partial Summary Judgment and Brief in Support of Employer and Insurer's Motion for Partial Summary Judgment. I have also received Claimant's Resistance to Employer and Insurer's Motion for Partial Summary Judgment and Claimant's Response to Employer and Insurer's Statement of Material Facts and Employer and Insurer's Reply to Claimant's Resistance to Employer and Insurer's Motion for Partial Summary Judgment. I have carefully considered each of these submissions in addressing the Motion.

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, any time 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 of 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 moving party bears the burden to show that there are no genuine issues of material fact. To successfully resist the motion, the non-moving party must present specific facts that demonstrate the existence of genuine issues of material fact. All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party. *Kermmoade v. Quality Inn*, 2000 SD 81, ¶11.

Employer/Insurer move the Department for partial summary judgment against Claimant based on SDCL 62-7-35, which Employer/Insurer argue bars Claimant from entitlement to any indemnity benefits. SDCL 62-7-35 provides,

> 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 notified 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.

The material facts are not in dispute. On May 2, 2006, Robin Weber (Claimant or Weber) alleges she was injured at work while attempting to assist a patient. Employer/Insurer initially treated Claimant's claim as compensable and paid benefits and medical expenses arising from the incident for several years. After the injury, Claimant was able to return to work. She was terminated on August 25, 2008.

On August 29, 2008, FinCor Solutions sent a partial denial letter that stated in part,

> "South Dakota workers' compensation law SDCL 62-4-3 and 62-4-5 indicates that wage loss benefits shall be paid "unless the claimant refuses suitable employment." Termination of employment "for cause" indicates a refusal of suitable employment. Therefore, all further wage loss benefits are being denied on this claim. We will continue to cover medical benefits related to your claim, as appropriate.
>
> If you disagree with this denial, you have the right to file a Petition for Hearing with the South Dakota Department of Labor within two years of the date of this letter, and absent such a petition, your claim may be forever barred from coverage.

On February 24, 2009, Dr. Dietrich determined that Claimant has reached maximum medical improvement and assigned a 0% impairment rating. Based on this information FinCor issued a second denial letter on April 16, 2009, which stated, "You are entitled to no further benefits under workers' compensation for your claim that occurred on 5/02/06." Like the first denial letter, this letter further stated "If you disagree with this denial, you have the right to file a Petition for Hearing with the South Dakota Department of Labor within two years of the date of this letter, and absent such a petition, your claim may be forever barred from coverage."

Claimant filed a Petition for Hearing with the South Dakota Department of Labor on April 15, 2011.

Employer/Insurer argues that Claimant is not entitled to payment of any further indemnity benefits by Employer/Insurer as that component of her workers' compensation claim is barred by the two year statute of limitations set forth in SDCL 62-7-35. Employer/Insurer argues that the partial denial issued by FinCor on August 29, 2008 started the two year statute of limitations and Claimant failed to file a petition for hearing with the Department of Labor until April 14, 2011, well past when the statute of limitations had run.

In her resistance to Employer/Insurer's Motion, Claimant argues that the August 29, 2008, denial stated only that "all further wage loss benefits are being denied on this claim" whereas the April 16, 2009, denial letter was considerably more broad stating that "you are entitled to no further benefits under workers' compensation for your claim that occurred on 5/02/06" and in no way referenced the prior correspondence. Claimant further argues that the August 29, 2008, letter stated only that all further wage loss benefits were being denied, but failed to specify what benefits fell into this category. Claimant asserts that the term "wage loss benefits" is not a term used or defined in South Dakota and therefore the denial was not effective under SDCL 62-7-35.

Claimant argues that a denial letter must not be ambiguous and must leave no doubt as to what benefits are to be denied. Because the letter used a term essentially unknown under South Dakota law to describe the benefits it purported to deny it cannot put Claimant on notice that she needed to file a petition to preserve her claim for any workers' compensation benefits.

The statute of limitations set forth in SDCL 62-7-35 clearly contemplates a partial denial of benefits and allows the limitation period to apply only to a single part of the overall claim. Claimant does not deny that the Petition was filed over two years after August 29, 2008, the date the insurer notified the Claimant and the Department, in writing, that it intended to deny coverage in part. Claimant instead argues that the denial letter was not effective because it was ambiguous.

The required form of a denial is set forth in SDCL 62-6-3, which provides in relevant part,

> The insurer or, if the employer is self-insurer, 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.
> …
> If the insurer or self-insurer denies coverage in whole or in part, it shall state the reasons therefore and notify the claimant of the right to a hearing under 62-7-12.

The August 29, 2008, denial letter meets the requirements set forth in SDCL 62-6-3. As to Claimant's assertion that the letter did not adequately describe the benefits the

insurer purported to deny, the letter clearly identified SDCL 62-4-3 and 62-4-5 as the wage loss benefits it would no longer provide. SDCL 62-4-3 provides for temporary total disability compensation and SDCL 62-4-5 provides compensation for partial disability. These workers' compensation benefits were specifically referenced in the denial letter. The denial also specifically stated that medical benefits would be continued. The August 29, 2008 also clearly set forth the right to a hearing within two years. The time in which to file a petition was clear. Any argument claimant had as to what benefits were encompassed by the denial is not material for purposes of this Motion. Such arguments may only be asserted by a claimant who files a timely claim. Because Claimant did not file a timely claim for compensation, she was procedurally barred from raising any merits arguments. *Kendall v. John Morrell & Co*., 809 NW2d 851, 2012 SD 13, ¶13.

Claimant failed to file a petition for hearing with the Department of Labor within two years after the insurer notified the claimant and the department, in writing, that it intended to deny coverage in part. Therefore the claim is barred as to that part. Employer/Insurer is entitled to judgment as a matter of law, the Motion for Partial Summary Judgment is granted. Employer/Insurer shall prepare an Order in accordance with this decision for my signature.

Sincerely,

/s/ *Taya M. Runyan*

Taya M. Runyan
Administrative Law Judge