

February 10, 2009

Michael J. Simpson
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LETTER DECISION & ORDER

Michael S. McKnight
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PO Box 5015
Sioux Falls, SD 57117-5015

RE: HF No. 169, 2007/08 – Edward D. Thurman v. Zandstra Construction and General Casualty

Dear Mr. Simpson and Mr. McKnight:

I have received Employer/Insurer's Motion for Summary Judgment in the above-referenced matter. I have also received and considered the following documents:

1. Employer/Insurer's Brief in Support of Motion for Summary Judgment,
2. Employer/Insurer's Statement of Undisputed Material Facts,
3. Affidavit of Charles A. Larson
4. Claimant's Response to Employer/Insurer's Motion for Summary Judgment and Cross Motion for Summary Judgment
5. Claimant's Statement of Undisputed Material Facts
6. Affidavit of Michael J. Simpson
7. Claimant's Brief in Support of Resistance to Employer/Insurer's Motion for Summary Judgment and in Support of Claimant's Motion for Summary Judgment
8. Employer/Insurer's Reply Brief and Brief Resisting Claimant's Motion for Summary Judgment
9. Employer/Insurer's Response to Claimant's Statement of Undisputed Material Facts.

The following facts are undisputed:

1. Claimant, Edward D. Thurman suffered an injury on September 24, 1999, that arose out of and in the course of his employment.
2. Employer/Insurer accepted the claim as compensable and paid benefits pursuant to the workers' compensation statutes in South Dakota.

3. Claimant received a 5% impairment rating and was paid \$6,708 in permanent partial disability (PPD) benefits. The last PPD payment occurred on January 28, 2002.
4. Claimant's last medical treatment related to his September 24, 1999 injury occurred on June 1, 2004.
5. The last medical payment Employer/Insurer made on Claimant's behalf occurred on June 29, 2004.
6. Dr. Wayne Anderson, of Occupational Health Network, Inc., opined on February 22, 2008, that Claimant did not have a physical change of condition since he was rated in 2002.
7. Insurer denied Claimant's workers' compensation claim in a denial letter dated May 2, 2008, and provided a copy of said letter to the South Dakota Department of Labor.
8. Claimant filed a Petition for Hearing in this case on June 4, 2008, alleging he was entitled to additional workers' compensation benefits, including medical benefits under SDCL §62-4-1.
9. Employer/Insurer answers the Petition for Hearing on June 20, 2008, and asserted a statute of limitations defense under SDCL §62-7-35.1.

ARSD 47:03:01:08 states the Department "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."

Claimant suffered a work related injury and received workers' compensation benefits, including PPD and medical treatments, for several years. Employer/Insurer did not pay for any workers' compensation benefits after June 29, 2004. Claimant filed a petition for Hearing on June 20, 2008. Employer/Insurer argues that the Claimant's claim is time-barred by SDCL §62-7-35.1, which provides,

In any case which any benefits have been tendered pursuant to this Title on account of an injury, any claim for additional compensation shall be barred, unless the Claimant files a written petition for hearing pursuant to §62-7-12 with the Department within three years from the date of the last payment of benefits. The provisions of this section do not apply to review and revision of payments for other benefits under §62-7-33.

Claimant argues that there is another statute of limitations for workers' compensation claims in which there has been a formal denial of workers' compensation benefits. SDCL §62-7-35 provides,

The right to compensation under this Title shall be forever barred unless a written request 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.

Claimant argues that because General Casualty issued a denial of additional workers' compensation benefits on May 2, 2008, SDCL §62-7-35 applies and the Petition for Hearing filed on June 20, 2008 is timely.

The South Dakota Supreme Court in *Faircloth v. Raven Industries* addressed the two statutes that deal with limitations in workers' compensation cases.

Each [statute] addresses a different situation. SDCL §62-7-35 provides the limitations period when an employer gives formal notice that it denies or disputes an employee's claim, in whole or in part. Employers often accept responsibility for one part of a claim and deny responsibility for another. This statute places a two-year limit on claims that are formally denied. Conversely, SDCL §62-7-35.1 furnishes the limitations period when the employer provides the employee with benefits for a period of time, gives no denial notice, and then the matter lies inactive. In the latter circumstance, the employer has at least implicitly validated the employee's claim, and the longer three-year period is warranted because the triggering event under SDCL §62-7-35.1 is simply a cessation of benefits without notice of a dispute.

Faircloth v. Raven Industries, 2000 SD 158, ¶ 8, 620 NW2d 198, 201.

The triggering event in the case at hand was the cessation of workers' compensation benefits without notice of a dispute. The Claimant's injury was treated as compensable by Employer/Insurer and he received workers' compensation benefits. The final payment of benefits was paid on June 29, 2004. At that time, the claim had not been denied and therefore the three year statute of limitations set forth in SDCL §62-7-35.1 applied. Claimant did not seek medical attention or additional workers' compensation benefits relating to his September 24, 1999, injury for over 3 years.

The three year statute of limitations set forth in SDCL §62-7-35.1 lapsed on June 29, 2007, prior to General Casualty's denial letter of May 2, 2008 and prior to Claimant's filing for Petition for Hearing on June 20, 2008. Therefore, Claimant's claim for additional benefits is barred.

The pleadings, admissions on file, together with the affidavits and parties' submissions show that there are no material facts in dispute and Employer/Insurer is entitled to judgment as a matter of law. Employer/Insurer's Motion for Summary Judgment is granted. This letter shall serve as the Department's Order.

Sincerely,

Taya M. Dockter
Administrative Law Judge