August 2, 2016

Margo Tschetter Julius
Julius & Simpson LLP
P.O. Box 8025
Rapid City, SD 57709

Letter Decision and Order

Rebecca L. Mann
Gunderson, Palmer, Nelson & Ashmore
P.O. Box 8045
Rapid City, SD 57709-8045

RE: HF No. 37, 2013/14 – Bernard Dean Potts v. Rapid City Window & Glass and Harleysville Insurance

Dear Counsel:

Submissions

This letter addresses the following submissions by the parties:

February 3, 2016	[Claimant's] Motion for Summary Judgment;
	[Claimant's] Brief in Support of Motion for Summary Judgment;
	Affidavit of Margo Tschetter Julius RE: Claimant's Motion for Summary Judgment;
March 7, 2016	Employer/Insurer Response to Auto Owners' Motion for Summary Judgment;
	Affidavit of Rebecca L. Mann;
March 29, 2016	[Claimant's] Reply Brief

Facts

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

1. Bernard Dean Potts (Claimant) began employment with Rapid City Window & Glass (Employer) in 1998 and still works for Employer. Claimant works primarily installing windows as a shop foreman glazer.

2. Claimant suffered a work related injury to his back on January 23, 2008, when he was pulling a metal hand rail base from the truck, while working for Employer.
3. At the time of the January 2008 injury, Employer was insured by Auto Owners Insurance (Auto Owners) for workers' compensation purposes.
4. Claimant was off work for two to three weeks following the January 2009 microdiscectomy spine surgery at the L5-S1 level for which he received temporary total disability benefits from Auto Owners.
5. Auto Owners accepted the claim and paid all medical and indemnity due including an impairment rating.
6. On May 13, 2009, Claimant, still working for Employer, reported a second injury to his back while he was unloading some windows.
7. Claimant had another MRI following the May 2009 incident and it showed another bulging disc at the same level of the first surgery, L5-S1.
8. Harleysville Insurance (Harleysville) insured Employer for workers' compensation purposes at the time of Claimant's May 2009 injury.
9. Claimant submitted a First Report of Injury. Employer submitted the May 2009 injury to Harleysville Insurance, the new workers' compensation insurer.
10. Harleysville denied the claim on June 11, 2009, by sending Claimant a letter stating,
    a. You have a pre-existing low back injury with Auto Owners Insurance. You had surgery in January 2009. This is not a new injury. It is a continuation of your prior work injury.
11. Harleysville did not send a copy of its June 11, 2009 letter or any other denial letter to the Department of Labor and Regulation. Harleysville did not notify the Department of Labor through regular means (fax, e-mail, USPS) that they were denying the claim.
12. Claimant submitted the claim to Auto Owners and with the assistance of Claimant's boss (Curt Cartwright) Auto Owners accepted the claim for the second injury and approved Claimant's second surgery.
13. Claimant had another surgery at the L5-S1 level in July 2009.
14. On August 1, 2009, Claimant stopped collecting indemnity benefits. Claimant's last medical benefits from Auto Owners were paid on May 1, 2010.
15. On November 30, 2012, Claimant returned to the doctor, reporting that his pain was getting worse.
16. On February 22, 2013, Auto Owners sent Claimant to an IME with Dr. Richard Strand. On March 4, 2013, Dr. Strand gave the opinion that Claimant's work was not a major contributing cause of his current back condition.
17. Auto Owners denied the claim on April 3, 2013.
18. Claimant requested Harleysville pay his benefits pursuant to SDCL 62-7-38.
19. Claimant filed a Petition for Hearing on August 20, 2013. The petition named Employer, Auto Owners, and Harleysville.

20. Auto Owners denied responsibility claiming that Harleysville was responsible for Claimant's back injury, need for medical treatment and disability.
21. Harleysville denied asserting that Claimant's claim was barred by the Statute of Limitations.
22. At the time Claimant requested authorization to return to the doctor (November of 2012), Employer had again changed insurance companies and the insurance company on the risk at that time was SFM Mutual Insurance. SFM Mutual had been brought in as an additional defendant on an Amended Petition.
23. On December 30, 2013, Claimant slipped and fell on ice while working for Employer. SFM Mutual accepted the claim and paid benefits to Claimant.
24. Harleysville filed a Motion for Summary Judgment pursuant to either SDCL 62-7-35 or 62-7-35.1. Harleysville argued that it gave written notice to the Department of Labor because its adjuster Steve Doucet electronically submitted a document titled "101 Subsequent Report Claim Detail" to the Department of Labor on June 15, 2009. The Department denied the motion on June 12, 2014.
25. On June 23, 2014, the deposition of treating surgeon Dr. Stuart Rice was taken. Dr. Rice opined that the May 2009 injury contributed independently to Claimant's need for surgery.
26. On October 8, 2014, Harleysville agreed to reimburse the parties who had previously paid benefits, including Auto Owners, Claimant, Blue Cross Blue Shield (Claimant's health insurance) and SFM Mutual for benefits paid after the date of the second injury on May 9, 2013 through the date of the third injury, December 23, 2013.
27. On June 9, 2015, Harleysville filed an Amended Answer admitting that they were responsible and admitted: Without waiving the statute of limitations defense, asserts it is no longer denying liability for the May 13, 2009 injury.
28. On October 13, 2015, the Department approved an order pursuant to a stipulation for dismissal of SFM Mutual Insurance Company.
29. Auto Owners filed a Motion for Summary Judgment pursuant to ARSD 47:03:01:08, arguing that there was no genuine issue of material fact as to causation. The Department granted the motion on November 24, 2015.
30. Harleysville subpoenaed James Marsh, Director of the Division of Labor and Management under the South Dakota Department of Labor and Regulation. Director Marsh was subpoenaed to testify as to the Department's policies and procedures with respect to electronic filing and the Form 101. Director Marsh's Deposition was taken on January 28, 2016.

Additional facts may be discussed in the analysis below.

Employer and Insurer's Motions for Summary Judgment

Claimant filed a Motion for Summary Judgment pursuant to ARSD 47:03:01:08. Claimant argues that Harleysville's affirmative defense of the statute of limitations fails as a matter of law.

ARSD 47:03:01:08 governs Summary Judgments which are considered by the Department of Labor & Regulation in workers' compensation cases. That regulation provides:

> 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.

ARSD 47:03:01:08. 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. "A trial court may grant summary judgment only when there are no genuine issues of material fact." *Estate of Williams v. Vandeberg*, 2000 SD 155, ¶ 7, 620 N.W.2d 187, 189, (citing, SDCL 15-6-56(c); *Bego v. Gordon*, 407 N.W.2d 801 (S.D. 1987)). "In resisting the motion, the non-moving party must present specific facts that show a genuine issue of fact does exist." *Estate of Williams*, 2000 SD 155 at ¶ 7, (citing, *Ruane v. Murray*, 380 NW2d 362 (S.D.1986)).

Claimant argues that electronic notice of a denial in an amended first report of injury is not sufficient written notice to trigger the statute of limitations in SDCL §62-7-35, which provides:

> The right to compensation under this title shall be forever barred unless 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.

It is undisputed that Harleysville sent a denial letter to Claimant on June 11, 2009, but neither that letter, nor any other denial letter was ever sent to the Department. On June 15, 2009, Harleysville electronically submitted an amended first report of injury to the Department. The amended first report of injury indicated the claim was denied and the denial status listed pre-existing injury as the reason. Harleysville argues that by submitting the amended first report of injury through the web application, indicating the claim was denied, they have sufficiently provided the Department written notice to trigger the statute of limitations.

Pursuant to SDCL §62-6-2, employers are required to file a written report of injury with either the Department (self-insured) or the employer's insurer. "The report shall be made on a form approved by the Department of Labor and Regulations." SDCL §62-6-2. The form approved by the Department is the South Dakota Employer's First Report of Injury commonly referred to as the 101 Data Entry Claim Detail. The Department's policies and procedures require Insurers to file first reports of injuries electronically using the management system known as the "web application". The statutes governing first reports of injury permit the Department of Labor to determine the manner and form of filing the first report. Thus, the policies requiring Insurers to file a first report of injury electronically are consistent with the state statute.

The statute governing notice of denial of coverage by insurer or employer do not allow the Department to determine the form and manner of filing, they require a specific manner of writing. The notice of Denial Statute, SDCL §62-6-3 provides in part

> 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 and self-insurer dienes 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. (Emphasis added)

SDCL §62-7-30 provides

> Notice or orders—Methods of service. 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 §62-7-34 provides

> Notice given by department—Statutory notice—Writing required—Manner of service. Any notice given by the department, or any other notice for which provision is made by this title, **shall be in writing**, and service thereof, unless otherwise specifically provided, shall be sufficient if by registered or certified mail addressed to the last known address of the person to be served. (Emphasis added)

The Supreme Court also held in the *Sauder v. Parkview Care Center* case, that the Employer/Insurer substantially complied with SDCL §62-7-30 when they send a copy of the denial letter by regular mail and not by certified or registered mail. *Sauder v. Parkview Care Center*, 2007 SD 103, ¶24, 740 NW2d 878. Nowhere has statute or case law stated that a notice of denial can be filed with the Department in a way other than through written form.

The Supreme Court has held that when language in a statute is clear, certain and unambiguous, there is no reason for construction and the Court's only function is to declare the meaning of the statute as clearly expressed. *Slama v. Landmann Jungman Hospital*, 654 NW2d 826 (2002 SD 151) quoting *Arends v. Dacotah Cement*, 2002 SD 57 at ¶11, 645 NW2d 583, 587 (internal quotes omitted). Claimant argues that SDCL §62-7-34 clearly controls in this case because the case is dealing with a notice provided for in SDCL chapter 62 and the statute requires written notice. The Department agrees. In order to comply with statute Employer and Insurer must provide notice of denial in writing. This allows the Department to scan the written denial into the system to be included in the claim file. This also enables the Department to stay abreast of the claim and be able to record, keep and provide accurate information to all parties as to the status of a claim.

In this case, Insurer filed the first report of injury electronically and submitted an amended first report electronically through data entry into the web application which is permitted by statute. SDCL §62-6-2. The Department of Labor's computer program took the information from documents submitted by Insurer and created a claim detail report. The Department of Labor's information system did not generate the denial when it meshed the important information from these forms to the claim detail report. Without a denial letter in the system the claim detail report listed the status of the claim as not available. In this case all of the medical evidence and the parties agree that Claimant's present back condition was caused by his May 2009 back injury for which Harleysville was the Insurer. Harleysville agreed and amended their answer to accept the back injury as their responsibility. Harleysville does not now get to avoid their admitted responsibility on a compensable claim for failing to follow statute and case law. The statute of limitations was not triggered in this case as a result of that failure.

Order

In accordance with the analysis above, the two year statute of limitations under SDCL §62-7-35 was not triggered as Harleysville failed to provide written notice to the Department of Labor as required by statute in this matter. The Department finds that there are no genuine issues of material fact. Claimant is entitled to judgment as a matter of law. For the reasons stated above, Claimant's Motion for Summary Judgment is GRANTED and Employer/Insurer's, Harleysville's, motion for summary judgment is therefore DENIED.

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

Sincerely,

/s/ Sarah E. Harris
Sarah E. Harris
Administrative Law Judge