

May 5, 2009

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**Letter Decision and Order**

Michael F. Shaw  
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RE: HF No. 7, 2008/09 – Michael L. Millard, Sr. v. Gary Snow & Associates and Tri-State Insurance Company and Continental Western Insurance Co.

Dear Mr. McCahren and Mr. Shaw:

***Submissions***

This letter addresses the following submissions by the parties:

October 30, 2008	Affidavit of Teresa Boe in Support of [Employer and Insurer's] Motion for Summary Judgment.
November 3, 2008	[Employer and Insurer's] Motion for Summary Judgment.
November 3, 2008	[Employer and Insurer's] Brief in Support of Motion for Summary Judgment.
November 19, 2008	[Claimant's] Motion to Amend Petition for Benefits.
November 19, 2008	Employee and Claimant's Response to Employer and Insurer's Motion for Summary Judgment and Employee and Claimant's Motion for Summary Judgment.
January 9, 2009	Affidavit of Teresa Boe in Support of .Employer and Insurer's Motion for Summary Judgment, in Opposition of Claimant's Motion for Summary

	Judgment and in Opposition of Claimant's Motion to Amend Petition for Benefit.
January 17, 2009	Brief in Support of .Employer and Insurer's Motion for Summary Judgment, in Opposition of Claimant's Motion for Summary Judgment and in Opposition of Claimant's Motion to Amend Petition for Benefits.
February 10, 2009	[Claimant's] Motion to Amend Petition for Benefits and Add Additional Parties.
February 10, 2009	[Claimant's] Amended Petition for Benefits.
March 4, 2009	[Claimant's] Amended Petition for Benefits.
March 27, 2009	Employee/Claimant's Reply Brief.
March 30, 2009	Employer and Insurer's Brief in Opposition to Claimant's Motion to Amend Petition for Benefits and Add Additional Parties.
April 2, 2008	Letter from Michael F. Shaw.
April 9, 2009	Employer and Insurer's Reply Brief.

***Facts***

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

1. Michael L. Millard, Sr. (Claimant) suffered a work related injury to his lower back on or about November 10, 2003, while working for Snow and Associates (Employer).
2. At the time of the November 2003 injury, Employer was insured by Tri-State Insurance Company (Tri-State) for workers' compensation purposes. Berkley Risk Administrators, LLC (Berkley) handled the workers' compensation claims on behalf of Tri-State.
3. Berkley made indemnity payments on behalf of Tri-State to Claimant for his November 2003 injury, through October 7, 2004.
4. Berkley has not made a payment to Claimant related to the November 2003 injury, since October 7, 2004.
5. On or about February 25, 2006, Claimant suffered a work-related shoulder injury while working for Employer.
6. Continental Western Insurance Company (Continental) insured Employer for workers' compensation purposes at the time of Claimant's February 2006 injury.

7. At some point after Claimant's injury in February 2006, Claimant began to experience lower back pain. Some evidence exists that Claimant may have suffered a reoccurrence or aggravation of his lower back injury during a Functional Capacity Evaluation (FCE) on January 23, 2008, during the treatment of his February 2006 injury.
8. Some evidence exists that Claimant's back condition has deteriorated since the November 2003 injury to the point where he is unemployable, and that his income has presumably declined since the November 2003 injury.
9. Claimant filed a Petition for Hearing on July 8, 2008.
10. Additional facts may be discussed in the analysis below.

### ***Motion to Amend Petition for Benefits***

Claimant filed a Motion to Amend Petition for Benefits. Claimant's original petition alleges that Claimant's November 2003 injury is the major contributing cause of his current lower back problem. Claimant's amended petition alleges that Claimant's February 2006 injury and the FCE conducted on January 23, 2008, are also potential major contributing causes.

Motions to amend pleadings are governed by SDCL 15-6-15(a). That provision states, "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." "A trial court may permit the amendment of pleadings before, during, and after trial without the adverse party's consent." Burhenn v. Dennis Supply Company, 2004 SD 91, ¶ 20, 685 NW2d 778, 783. citing Dakota Cheese, Inc. v. Ford, 1999 SD 147, ¶24, 603 NW2d 73, 78. "[T]he most important consideration in determining whether a party should be allowed to amend a pleading is whether the nonmoving party will be prejudiced by the amendment." Id.

In this case, the Employer and Insurers are not prejudiced by Claimant's amended petition. To date, no hearing date has been scheduled and sufficient time is available for Employer and Insurers to prepare their respective defenses. More importantly, there has been no suggestion that the amended claim is more difficult to defend now than it would have been, had the amendment been pled in the original Petition for Hearing. Therefore, Claimant is granted leave to amend his Petition for Benefits.

### ***Motion to Add Additional Parties***

Claimant filed a Motion to Add Additional Parties. This motion is a necessary companion of Claimant's Motion to Amend Petition for Benefits. The amendment to Claimant's petition added the February 2006 injury and its treatment to the November 2003 injury as potential causes to Claimant's present lower back problem. The purpose for

Claimant's Motion to Add Additional Parties is to include both Tri-State and Continental as insurers during those incidents

In light of the fact that Claimant's Motion to Amend Petition for Benefits was granted above, Claimant's Motion to Add Additional Parties is also granted.

### ***Employer and Insurer's Motions for Summary Judgment***

On November 3, 2008, Employer and Insurer filed a Motion for Summary Judgment. They contend that action against Employer and Tri-State as insurer during Claimant's first injury in November of 2003 is barred by the three years statute of limitation provided in SDCL 62-7-35.1.

Summary Judgments are governed in this matter by ARSD 47:03:01:08: That regulation states:

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.

The burden is on the moving party to clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law. *Estate of Elliott*, 1999 SD 57, ¶15, 594 NW2d 707, 710 (citing *Wilson*, 83 SD at 212, 157 NW2d at 21). On the other hand, [t]he party opposing a motion for summary judgment must be diligent in resisting the motion, and mere general allegations and denials which do not set forth specific facts will not prevent issuance of a judgment. *Breen v. Dakota Gear & Joint Co., Inc.*, 433 NW2d 221, 223 (SD 1988) (citing *Hughes-Johnson Co., Inc. v. Dakota Midland Hosp.*, 86 SD 361, 364, 195 NW2d 519, 521 (1972)). See also *State Auto Ins. Companies v. B.N.C.*, 2005 SD 89, 6, 702 NW2d 379, 382. [T]he nonmoving party must substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy. *Elliott*, 1999 SD 57, ¶16, 594 NW2d at 710 (quoting *Himrich v. Carpenter*, 1997 SD 116, 18, 569 NW2d 568, 573 (quoting *Moody v. St. Charles County*, 23 F3d 1410, 1412 (8thCir 1994))).

McDowell v. Citicorp USA, 2007 SD 53, ¶22, 734 N.W.2d 14, 21.

The time limitation proscribed by SDCL 62-7-35.1 is stated as follows:

SDCL 62-7-35.1. In any case in 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 or other benefits under § 62-7-33.

(emphasis added). The exclusion from the limitation provided in SDCL 62-7-33 states:

SDCL 62-7-33. Any payment, including medical payments under § 62-4-1, and disability payments under § 62-4-3 if the earnings have substantially changed since the date of injury, made or to be made under this title may be reviewed by the Department of Labor pursuant to § 62-7-12 at the written request of the employer or of the employee and on such review payments may be ended, diminished, increased or awarded subject to the maximum or minimum amounts provided for in this title, if the department finds that a change in the condition of the employee warrants such action. Any case in which there has been a determination of permanent total disability may be reviewed by the department not less than every five years.

Claimant alleges in his Amended Petition for Hearing that he is now totally disabled as a result of both the 2003 and 2006 injuries. While it, admittedly, takes a broad view of the pleadings and evidence thus far provided, some evidence suggests that Claimant's condition falls within the exclusion provided in SDCL 62-7-33. Therefore, Claimant's action against Tri-State is not barred by SDCL 62-7-35.1. Consequently, a genuine issue as of material fact exists.

Despite this decision, the time limitation imposed by SDCL 62-7-35.2 remains a viable defense for Tri-State when this case proceeds to hearing. Employer and Insurer's Motion for Summary Judgment is denied.

### ***Claimant's Motions for Summary Judgment***

Claimant's Motion for Summary Judgment asserts that he is entitled to benefits as a matter of law under the last injurious exposure rule. Here, there remains a question whether Claimant's present medical condition developed gradually or as the result of a succession of accidents as required to support a last injurious exposure finding. At this point, the evidence also supports a finding that one or the other of Claimant's job related injuries was the predominant cause of his condition. Therefore, a genuine issue of a material fact exists. Claimant's motion for Summary Judgment is denied.

***Order***

For the reasons stated above, it is hereby, Ordered:

- (a) Claimant's Motion to Amend Petition for Benefits is granted. Claimant is granted leave to amend his Petition for Benefits.
- (b) Claimant's Motion to Add Additional Parties is granted. This order supersedes the order to substitute insurers issued on February 5, 2009. Tri-State Insurance Company and Continental Western Insurance Company are parties and respondents in this case.
- (c) Employer and Insurer's Motion for Summary Judgment is denied.
- (d) Claimant's Motion for Summary Judgment is denied.

This letter shall constitute the order in this matter.

Sincerely,

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Donald W. Hageman  
Administrative Law Judge