February 25, 2013

Dennis W. Finch
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1830 West Fulton Street, Ste. 201
Rapid City, SD 57702

Letter Decision and Order

Michael S. McKnight
Boyce, Greenfield, Pashby & Welk LLP
PO Box 5015
Sioux Falls, SD 57117-5015

Re: HF No. 121, 2011/12 – Donald L. Kryger v. City of Deadwood and SDML Workers' Compensation Fund

Dear Mr. Finch and Mr. McKnight:

Submissions:

This letter addresses the following submissions by the parties:

November 16, 2012	Employer and Provider's Motion for Summary Judgment;
	Employer and Provider's Brief in Support of Their Motion for Summary Judgment;
	Affidavit of Jennifer Andrisen Selzer;
February 17, 2013	Affidavit of Christopher T. Dietrich, MD
	Notice of Intent to Offer Medical Records by Affidavit;
	Affidavit of Claimant;
January 18, 2013	Claimant's Brief in Resistance to Employer and Provider's Motion for Summary Judgment; and

February 4, 2013 Employer and Provider's Reply Brief in Support of Their Motion for Summary Judgment;

Facts:

The facts of this case are as follows:

1. During all times relevant in this case, Donald L. Kryger (Claimant) was employed by the City of Deadwood (Employer) and Employer was covered by SDML Workers' Compensation Fund for purposes of workers' compensation.

2. On October 16, 2002, Claimant suffered a work-related injury to his lower back when he bent over to pick up a "small tractor sander."

3. Claimant sought treatment for the injury on October 17, 2002, at which time he complained of pain in his lower back and a "hot, pulling sensation down his right leg, with some pain down into the calf and to the ankle and he thinks the foot."

4. Claimant received chiropractic treatments for the injury, which was covered by workers' compensation and he was released from treatment on November 25, 2002.

5. In a letter sent from Provider's claims administrator to Claimant on December 16, 2002, the claims administrator stated:

> As you are aware, we are the claims administrator for SDML Workers' Compensation Fund who provides coverage for the City of Deadwood.
>
> According to Dr. Weber's office, you were released from care on November 25, 2002, in regards to this work injury. No further treatment is indicated.
>
> In view of this information, we are closing your file.
>
> If you disagree with this decision, you do have a right to a hearing, pursuant to SDCL 62-7-12, provided a written request is filed with the South Dakota Department of Labor within two (2) years from the date of this decision (SDCL 62-7-35).

6. A final payment was made by Provider for the October 16, 2002, injury on December 31, 2002.

7. Claimant sustained a toe injury in May of 2003; this injury was also covered by workers' compensation.

8. The toe injury file was closed in December of 2003.

9. Claimant then aggravated his back in 2007, workers' compensation, again, covered the costs of the injury.

10. The 2007 file was closed on May 9, 2008.

11. Claimant again injured his lower back on January 25, 2010.

12. Claimant initially received workers' compensation benefits for the January 25, 2010 injury. It covered his treatment and paid Temporary Total Disability benefits (TTD). He also received a 5% Permanent Partial Disability (PPD) payout.

13. Claimant was then released to work without limitations by Dr. Dietrich in May of 2010.

14. On June 23, 2010, Provider's claims administrator sent a letter to Claimant that stated in part:

> Dr. Dietrich also opines that you have reached pre-injury status regarding your 1-25-10 injury. Therefore, we must deny further benefits as of 5-27-10 regarding your above captioned claim.
>
> If you do not agree with this decision, you have a right to a hearing, pursuant to SDCL 62-7-12. A written request may be filed with the South Dakota Department of Labor and Management within two (2) years from the date of this letter. SDCL 62-7-35.

15. In November of 2010, Claimant contacted Provider and complained about pain in his back, right leg and right foot.

16. Then, in March of 2011, he saw a doctor regarding pain in his right big toe, which the doctor related to his back injury.

17. Claimant went back to Dr. Dietrich in May of 2011 with complaints of back problems and right leg numbness down to his right big toe. Claimant's condition at this time could not be attributed to a specific event.

18. In a medical record dated 05/09/11, Dr. Dietrich states, "I believe that [Claimant's] current symptoms are a re-flare of his preexisting L4-L5 disc and related to his previous work injury."

19. Provider set up an independent medical evaluation (IME) for Claimant with Dr. Nolan M. Segal on June 6, 2011.

20. Based on the June 6, 2011, IME, Dr. Segal opined that "the January 25, 2010 work injury is not a major contributing cause of [Claimant's] current diagnosis and

need for treatment." He went on, "[t]he first mention of right leg symptoms is following the October 16, 2002 work injury. He had symptoms suggestive of his right L4-L5 disc herniation at that time. In this regard, the October 16, 2002, incident would be considered a major cause of the current diagnosis and need for treatment. I do not find evidence to support any new structural injuries occurring as a result of the January 25, 2010 incident." Dr. Segal also concluded that Claimant's 2007 back injury was simply an aggravation of the 2002 back injury and not a substantial contributing factor to Claimant's current symptoms and that Claimant's 2003 toe injury was also not a substantial contributing factor to Claimant's current issues.

21. As a result of the IME performed by Dr. Segal, Employer and Provider denied further coverage to Claimant.

22. Claimant filed a Petition for Hearing on March 6, 2012, seeking workers' compensation benefits. In that petition, Claimant alleges that his current condition is the result of his January 25, 2010 injury.

23. Additional facts may be discussed in the analysis below.

Summary Judgment:

Employer and Provider filed a Motion for Summary Judgment. 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, 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 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, when 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 NW2d 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 NW2d 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)).

Statutes of Limitation:

In their motion, Employer and Provider argue that Claimant's action is barred by the statutes of limitation set out in SDCL 62-7-35 and SDCL 62-7-35.1. SDCL 62-7-35 states:

> 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. SDCL 62-7-35.1 states:

> 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.

SDCL 62-7-35.1.

The South Dakota Supreme Court discussed these two statutes in Owens v. F.E.M. Electric Association, Inc., 2005 SD 35, 694 NW2d 274. The Court identified under what circumstances each statute applies. The Court stated:

> 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.

Id. at 278 (citing Faircloth v. Raven Industries, Inc., 200 SD 158, 620 NW2d 198,

Employer and Provider's argument is premised on the fact that Claimant's current condition was caused by his October, 2002 injury. With regards to that injury, the Provider did not send a denial letter within the meaning of SDCL 62-7-35. The letter that Provider's claims administrator's sent to Claimant on December 16, 2002, does not indicate that it "intends to deny future coverage." The letter simply states that according

to Dr. Weber's office, Claimant was released from the doctor's care, that no further treatment was indicated and that the Claimant's file was being closed. At that point, there was nothing to disagree with. The Claimant was released from the doctor's care and no further treatment was indicated. The letter also does not state what the implications of closing the file means. As far as the Claimant knew, the file could simply be re-opened if further treatment was required in the future.

Because no denial letter was sent, the three year limitation imposed by SDCL 62-7-35.1 is applicable to the October 2002 injury. The Provider made the final payment related to that injury on December 31, 2002. The three year limitation ran on December 31, 2005 without Claimant filing a petition for hearing. Therefore, any claim filed after December 31, 2005 related to the October 16, 2002 injury is forever barred.

Unlike the October 2002 injury, a letter of denial was sent related to the January 25, 2010 incident. That letter was sent on by the Provider's claims administrator on June 23, 2010 and clearly states that future claims will be denied. Therefore, the time limitation imposed by SDCL 62-7-35 is applicable. The provider made the final payment related to that injury on June 23, 2010 and the two year statute of limitations would have been on June 23, 2012. However, Claimant filed his Petition for Hearing on March 6, 2012, well within the time permitted by SDCL 62-7-35. As such, the Department has authority to proceed on issues related to the January 2010 injury.

With regards to an action based on SDCL 62-7-33, the Petition for Hearing does not seek address base on that provision and does not allege a change of condition. Consequently, any comment by the Department on that issue would be a matter of speculation at this time and will not be addressed here.

Dispute of Facts:

When considering a motion for summary judgment, "[a]ll reasonable inferences drawn from the facts must be viewed in favor of the non-moving party." State Farm Automobile Ins. Co. v. Gertsema, 2010 S.D. 8, ¶ 8, 778 NW2d 609; Estate of Trobaugh v. Farmers Ins. Exch., 2001 SD 37, ¶ 16, 623 NW2d 497, 501. In this matter, it is reasonable to infer from Dr. Dietrich's May 9, 2011 medical note that he is relating Claimant's current condition to the January 25, 2010 injury. Dr. Dietrich stated in that note, "I believe that his current symptoms are a re-flare of his preexisting L4-L5 disc and related to his previous work injury." The term "related to his previous injury" can be construed to mean his most recent injury.

The question of whether the Claimant's current condition is related to his October 2002 or January 2010 injury is a mixed question of fact and law. As such, a dispute of fact exists and it would be inappropriate for the Department rule on that question in this motion.

Order:

A genuine issue of material fact exists in this case related to Claimant's January 25, 2010 injury and issues related to that injury can proceed to hearing. Issues related to Claimant's October 2002 injury are barred. Accordingly, Employer and Provider's Motion for Summary Judgment is granted in part and denied in part. This letter shall constitute the Department's Order in this matter.

Sincerely,

__/s Donald W. Hageman__
Donald W. Hageman
Administrative Law Judge