

December 6, 2021

Kirk D. Rallis
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**LETTER DECISION ON
MOTION FOR SUMMARY JUDGMENT**

Laura K. Hensley
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PO Box 5015
Sioux Falls, SD 57117-5015

RE: HF No. 130, 2020/21 – Janice Acheson v. Western Provisions, Inc., and Dakota Truck Underwriters

Dear Mr. Rallis and Ms. Hensley:

This letter addresses Western Provisions, Inc., and Dakota Truck Underwriters (Employer and Insurer) Motion for Summary Judgment submitted October 12, 2021; Janice Acheson’s (Acheson) Brief in Resistance to Defendant’s Motion for Summary Judgment submitted October 22, 2021; Acheson’s Supplemental Brief in Resistance to Defendant’s Motion for Summary Judgment; and Employer and Insurer’s Reply Brief in Support of Motion for Summary Judgment submitted November 12, 2021.

Background

On or about June 26, 2014, Acheson suffered a work-related injury while working for Employer. She had injuries related to her left ankle, lower back, and lower left leg.

Employer and Insurer initially accepted the injury claim and provided certain medical benefits. On May 4, 2016, Dr. Watson recommended a hindfoot or patellar fusion. On August 23, 2017, Acheson was seen by Dr. Neely who recommended proceeding surgically.

On September 27, 2017, Acheson emailed the case manager that she would not be having surgery as she felt there were other options at that time. On October 3, 2017, Dr. Neely opined in response to Employer and Insurer's letter that Acheson had not reached maximum medical improvement because she had refused surgery. On November 28, 2017, Acheson received a letter informing her that her file was being closed and that future treatments required pre-authorization. The last payment was made to Acheson on December 12, 2017. Acheson underwent surgery on February 7, 2018. Acheson filed a Petition with the Department of Labor & Regulation (Department) on June 15, 2021.

Employer and Insurer have moved for summary judgment pursuant to SDCL 62-7-35.1 which 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.

They assert that more than three years have passed since the last payment of benefits to Acheson, and therefore, her claims should be barred. Acheson argues that there has been a change in her condition under SDCL 62-7-33 due to the surgery performed by Dr. Watts, and therefore, Employer and Insurer's Motion should be denied.

The Department's authority to grant summary judgment is established in ARSD

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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.

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. *Stromberger Farms, Inc. v. Johnson*, 2020 S.D. 22, ¶ 31, 942 N.W.2d 249, 258-59 (citations omitted). The non-moving party must present specific facts showing that a genuine issue of material facts exists. *Id.* at ¶ 34.

The question before the Department is whether Acheson's Petition was timely under SDCL 62-7-35.1. The record shows that the last date Employer and Insurer paid benefits to Acheson was December 12, 2017, and the Petition was submitted three and a half years later on June 15, 2021. Therefore, Acheson's Petition was not submitted within the required three years and is not timely. SDCL 62-7-35.1 also provides that the three-year limitation does not apply to benefits under SDCL 62-7-33 which requires a change of condition. Acheson has asserted that she has had a change of condition due to her surgery. However, the surgery had originally been recommended by Dr. Neely in 2017 prior to the date of the last payment of benefits, and merely undergoing surgery is not enough to show a change of condition. Acheson has not provided specific facts to

prove that her surgery relates to a change of condition, and therefore, Employer and Insurer's Motion for Summary Judgment is Granted.

This letter shall constitute the order in this matter.

Sincerely,

A handwritten signature in blue ink that reads "Michelle Faw". The signature is written in a cursive, flowing style.

Michelle M. Faw
Administrative Law Judge