May 26, 2015

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Letter Decision and Order

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RE: HF No. 141, 2014/15 – Cameron Corey v. Moody County Sheriff's Department and SDML Workers' Compensation Fund

Dear Ms. Werder and Mr. McKnight:

Submissions:

This letter addresses the following submissions to the Department of Labor & Regulation by the parties:

March 26, 2015	[Employer and Insurer's] Motion for Summary Judgment;
	[Employer and Insurer's] Brief in Support of Motion for Summary Judgment;
	Affidavit of Jennifer Selzler;
April 24, 2015	Claimant's Objection to Employer's Motion for Summary Judgment;
	Claimant's Brief in Opposition to Employer's Motion for Summary Judgment;
	Affidavit of Cameron Corey; and
May 7, 2015	[Employer and Insurer's] Reply Brief In Support of Motion for Summary Judgment.

Facts:

The facts of this case are as follows:

1. On May 5, 1999, Cameron Corey (Corey) injured his back while restraining a combative arrestee in the course of his duties as a deputy sheriff for the Moody County Sheriff's Department (Employer).

2. Corey's work injury resulted in a 5% disability rating which was paid by SDML (Insurer) on March 27, 2000.

3. In August of 2001, Corey's back worsened. That worsening led to another 5% disability rating and payment on October 4, 2001.

4. After Corey's back pain worsened again in 2009, Corey went to Dr. Hoversten. Hoversten recommended that Corey get a Cortisone injection.

5. After filing his claim, Corey received a letter from Insurer dated January 26, 2010. This letter stated in pertinent part:

> We received Dr. Hoversten's report of December 30, 2009. He is unable to say with any certainty that your current condition is related to your old work injury of 1999-2001.
>
> For your current condition to be compensable, your work injury must be a major contributing cause of your current condition and need for treatment. Therefore, we must deny your request for additional workers compensation benefits.
>
> If you do not agree with this decision, you have the right to a hearing under SDCL 62-7-12. A written request may be filed with the South Dakota Department of Labor and Management within two (2) years of the date of this letter, SDCL 62-7-35.

6. Corey's back pain increased yet again in 2013. Consequently, Corey requested a doctor's appointment from Insurer. Corey received a letter from Insurer dated April 8, 2013, which stated in pertinent part:

> This is regarding your recent email regarding an appointment with Dr. Hoversten that is scheduled for April 9, 2013.
>
> We sent you a letter on January 26, 2010 in which we denied additional workers compensation benefits for your above captioned workers compensation claim. It stated that you had 2 years to dispute our denial. There has been no activity on your claim since that letter; therefore, additional benefits are barred.

7. Corey filed a Petition for Hearing on March 2, 2015, asking for a review pursuant to SDCL 62-7-33.

Summary Judgment:

Employer and Insurer filed a Motion for Summary Judgment. ARSD 47:03:01:08 governs the Department of Labor and Regulation's authority to grant summary judgment 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, 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)).

Statute of Limitation:

In their motion, Employer and Insurer contend that the statute of limitation imposed by SDCL 62-7-35.1 bars further compensation in this case for the May 5, 1999, injury because more than two years have passed between Insurer's denial letter of January 26, 2010, and Corey's Petition for Hearing filed March 2, 2015. 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.

Corey contends that Insurer's January 26, 2010, letter only denied the cortisone shot advised by Dr. Hoversten and that it failed to give notice of the denial of all future

claims. The department agrees. When the letter is read in its entirety, it appears to address only the present claim. The first two paragraphs quoted in the facts above only address his "current condition". No mention is made of Corey's future claims or condition. The Employer and Insurer rely on the last sentence of the second paragraph quoted above which states: "Therefore, we must deny your request for additional workers compensation benefits." When read in isolation, the sentence at best is ambiguous. However the word "therefore" at the beginning of the sentence is a transitional term which ties the conclusion stated in the rest of the sentence to the premises stated prior to it. And, those premises stated nothing about future claims. In addition, the sentence is both written in the present tense and the "request" denied is stated in the singular which strongly suggests that the denial only pertains to the present claim.

Consequently, the first that Corey received notice that all future claim were denied is when he received the Insurer's letter date April 8, 2013, and Corey's Petition for Hearing falls well within the statute of limitations initiated by that letter.

Order:

In accordance with the discussion above, Employer and Insurer's Motion for Summary Judgment is denied. This letter shall constitute the Department's Order in this matter.

Sincerely,

_/s/ Donald W. Hageman___
Donald W. Hageman
Administrative Law Judge