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LETTER DECISION & ORDER

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RE: HF No. 143, 2007/08 – Herman Schroeder, Jr. v. City of Winner and S.D.M.L. Workers' Compensation Fund

Dear Mr. Simpson and Mr. Shaw:

I am in receipt of Employer/Insurer's Motion for Summary Judgment, along with a Statement of Undisputed Material Facts and Brief in Support of Summary Judgment. Claimant has submitted a Response to Employer/Insurer's Statement of Undisputed Material Facts, Response to Employer/Insurer's Motion for Summary Judgment and the depositions of Jack Day, Herman Schroeder, and Dennis Schroeder (one dated July 17, 2008 and one dated February 25, 2009). Employer/Insurer also submitted a Reply Brief in Support of Summary Judgment I have carefully considered each of these submissions in addressing this motion.

ARSD 47:03:01:08 governs the Department of Labor's authority to grant summary judgment:

> 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 of 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 moving party bears the burden to show that there are no genuine issues of material fact. To successfully resist the motion, the non-moving party must present specific facts that demonstrate the existence of genuine issues of material fact. All reasonable

inferences drawn from the facts must be viewed in favor of the non-moving party. *Kermmoade v. Quality Inn*, 2000 SD 81, ¶11.

"Summary judgment is a drastic remedy, and should not be granted unless the moving party has established the right to a judgment with such clarity as to leave no room for controversy." *Richards v. Lenz*, 95 SDO 597, ¶14, 539 NW2d 80 (SD 1995) (citations omitted).

Employer/Insurer argue Claimant failed to meet the statutory notice requirements as prescribed by SDCL §62-7-10 and Employer/Insurer is entitled to summary judgment in this matter.

While it is undisputed that written notice of his injury was not given to Employer within three business days, Claimant argues he falls within one of the statutory exceptions to the notice requirements set forth in SDCL §62-7-10. Claimant argues that Employer had actual knowledge because Employer observed a dramatic change in his condition that should have indicated to a reasonably conscientious manager that the case might involve a potential workers' compensation claim. "To satisfy the actual knowledge notice requirements, there must… be some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case *might* involve a *potential* compensation claim". *Orth*, 2006 SD 99, ¶61. The issue of actual knowledge is one of fact.

Claimant also argues he had good cause for failing to give written notice as he did not realize the seriousness and probable compensable character of his injury until his physicians suggested that Claimant's injury was major contributing case of his neck condition.

> [I]t is well settled that the time period for notice or claim does not begin to run until the claimant, as a reasonable person, should recognize the nature, seriousness and probable compensable character of [the] injury or disease. Whether the conduct in question was reasonable is based on the claimant's education and intelligence, not on the hypothetical reasonable person familiar to tort law. However, the standard creates an objective, not subjective test. (The standard is based on an objective reasonable person with the same education and intelligence as the claimant's).

Kuhle v. Lecy Chiropractic, 2006 SD 16, ¶18, 711 NW2d 244, 248 (citations omitted). The issue of good cause is one of fact.

Employer/Insurer also argue Claimant failed to inform Employer/Insurer of medical treatment pursuant to SDCL § 62-4-43. Claimant contends that he did notify the Employer of his choice of medical practitioners/surgeons as he was getting treatment. Claimant argues that he provided doctors slips from his doctors to the Employer.

Genuine issues of material fact exist as to whether Claimant satisfied either the "actual knowledge" exception to the three day written notice requirement pursuant to SDCL §62-7-10(1) or the "good cause" exception pursuant to SDCL §62-7-10(2). Genuine issues of material fact also exist as to whether Claimant notified Employer/Insurer of his medical treatment pursuant to SDCL §62-4-43. Therefore Employer/Insurer is not entitled to judgment as a matter of law. Employer/Insurer's Motion for Summary Judgment is hereby denied. This letter shall serve as the Department's Order.

Sincerely,

Taya M. Dockter
Administrative Law Judge