

February 5, 2009

Angela Cornett
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Letter Decision and Order

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Re: HF No. 155, 2006/07 – Angela Cornett v. Balloons, Bears & Bouquets and
Farmers Insurance Group

Dear Counsel and Ms. Cornett:

This letter addresses the following submissions by the parties:

November 10, 2008 [Employer/Insurer's] Motion to Dismiss; Affidavit of
Michael Horack; Order Granting Motion to Dismiss.

December 12, 2008 Affidavit of Angela Cornett, [Claimant 's] Motion for
Continuance, Motion to Allow Amendment of Petition,
and Resistance to Motion to Dismiss the Petition;
Records Affidavit of Bruce Jon Hagen, DC.

January 15, 2009 Employer/Insurer's Response to Claimant's Motion for
Continuance and Motion to Amend Petition.

January 21, 2009 Letter from N. Dean Nasser on behalf of Angela
Cornett.

FACTS

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

1. Angela Cornett (Claimant) suffered a work related injury on October 13, 1997, while working for Balloons, Bears & Bouquets (Employer). Her injury was compensable under the workers' compensation laws of South Dakota.
2. Mid-Century Insurance Company (Insurer) insured Employer at the time of the October 13, 1997, injury and paid for all of Claimant's medical treatment or indemnity resulting from that injury from February 17, 1998, through May 19, 1999.
3. Claimant did not request or receive any payment from Insurer for medical treatments or indemnity from May 19, 1999, until January 2006.
4. In January of 2006, Claimant requested that Insurer pay for additional medical benefits related to her 1987 injury. Insurer denied this request.
5. On April 13, 2007, the Department of Labor Received a Petition for Hearing from Claimant alleging disabilities as a result of the October 13, 1997, injury.
6. On October 3, 2007, the Department of Labor received Employer/Insurer's Answer to Claimant's Petition for Hearing. In their Answer, Employer/Insurer asserted the affirmative defense that Claimant was barred by SDCL 62-7-35.1 because Claimant had failed to file a petition for hearing within 3 years of its last payment of benefits.
7. On November 10, 2007, Employer/Insurer file a Motion to Dismiss asserting the Claimant's case is barred by SDCL 62-7-35.1.
8. On December 12, 2009, Claimant filed a Motion to Allow Amendment to Petition. Claimant asks permission to amend her Petition for Hearing to indicate that Claimant's "medical condition has substantially and materially changed or deteriorated," as provided in SDCL 62-7-33. Claimant also filed a Motion for Continuance.

MOTION TO ALLOW AMENDMENT OF PETITITON

Claimant's motion to amend her pleading is 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, Employer/Insurer are not prejudiced by the amendment. “[C]laimant has the burden of proving all facts essential to sustain an award of compensation.” Day v. John Morrell & Co., 490 N.W.2d 720 (S.D). The amendment would place the additional burden on Claimant to prove that her medical condition has changed.

Because of this additional burden, the amended claim is potentially easier to defend against than the original claim. 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 her Petition for Hearing.

MOTION TO DISMISS

Employer/Insurer’s Motion to Dismiss is based on SDCL 62-7-35.1. That statute states:

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). 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.

(emphasis added).

Claimant has indicated that her amended Petition for Hearing will allege a “substantial change” of her medical condition as provided by SDCL 62-7-33. Once amended, Claimant’s case will not be barred by SDCL 62-7-35.1 and she will be entitled to demonstrate that her medical condition has changed. Therefore, Claimant’s Motion to Dismiss will not be granted. Whether Claimant’s

case is ultimately barred in the future will depend upon her ability to prove the change of condition at hearing.

MOTION FOR CONTINUANCE

Claimant has moved for a continuance of this case in order to provide her with time to find legal counsel. Claimant originally filed her Petition for Hearing in April of 2007, more than 1 ½ years ago. That is more than sufficient time to find an attorney. In addition, Claimant found counsel to assist her with these motions and there are no deadlines immediately pending in this case. Consequently, she still has time to find counsel, if she still desires to do so. Therefore, Claimant's request for a continuance is neither required nor justified at this time.

ORDER

For the reasons stated above, Claimant's Motion to Allow Amendment of Petition is granted. Employer/Insurer's Motion to Dismiss is denied and Claimant's Motion for Continuance is denied. Claimant shall submit her Amended Petition for Hearing within 20 days of this Decision and Order.

Sincerely,

Donald W. Hageman
Donald W. Hageman
Administrative Law Judge