SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION
DIVISION OF LABOR AND MANAGEMENT

LANCELOT "LANCE" JOHNSON, **HF No. 18, 2013/14**

Claimant,

v. **DECISION AND ORDER ON MOTION TO DISMISS**

LOWE ROOFING, INC.,

Employer,

and

AMERICAN CASUALTY COMPANY, directly or through or including GALLAGHER BASSETT SERVICES, INC., its claims agent and/or claims representative,

Insurer.

Employer/Insurer filed a Motion to Dismiss SDCL 58-12-3 on January 15, 2016; it will be treated as a motion for Summary Judgment pursuant to ARSD 47:03:01:08:

> ARSD 47:03:01:08. 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.

Employer/Insurer's Motion shall be granted. The following will serve as the Division of Labor and Management's final decision on the merits of the case, incorporating such findings of fact and conclusions of law as are discussed herein.

The Division is mindful of the rule that attorney's fee claims under 58-12-3 are generally sufficiently fact-based as to render them inappropriate for dismissal without a hearing on the merits. Tracy v. T & B Construction, 85 SD 337, 343, 182 N.W.2d 320 (1970). Employer/

Insurer's argument that the case should be dismissed for insufficient factual support is rejected as premature and unwarranted based on the record.

The other basis for Employer/Insurer's motion, however, is the claim for benefits in this case was settled by stipulation, approved by the Department, on September 23, 2013, and a claim settled by stipulation is not a judgment or award which was "rendered" within the meaning of SDCL 58-12-3. The statute reads, in pertinent part, with the language most disputed in the motion being emphasized:

> In all actions or proceedings hereafter commenced against any … insurance company …, if it appears from the evidence that such company … has refused to pay the full amount of such loss, and that such refusal is vexatious or without reasonable cause, the Department of Labor and Regulation … shall, if judgment or an award is rendered for plaintiff, allow the plaintiff a reasonable sum as an attorney's fee to be recovered and collected as a part of the costs, ….

The Division has previously held that a settlement does not activate the provisions of SDCL 58-12-3, as no judgment or award was rendered pursuant to a hearing on the merits. Sachau v. Nash Finch Company and Farmers Inc., 1993 WL 515774, at 2 (SD Department of Labor, 1993).

The Division's former ruling is persuasive here. Attorney's fees awards are cost awards, granted under Title 58 and limited to the conditions in 58-12-3. Tracy, at 85 SD at 340 noted: "Ordinarily the terms 'cost' and 'expenses' as used in a statute are not understood to include attorney's fees and the court may allow attorney's fees as costs for or against any party to an action only in cases where specifically provided by statute." The Sachau decision correctly noted costs cannot be assessed by the Department unless a hearing was held. Sachau at 2, referencing SDCL 62-7-15.

No authority has been cited by either party defining what it is to "render" a workers' compensation award; in the context of a judgment, however, the Texas Supreme Court held, "The rendition of a judgment is a present act … which decides the issues upon which the ruling is made." Reese v. Piperi, 534 S.W.2d 329, 330 (Tex. 1976). A California appeals court did not

define “render” as such, but found tribunals approving settlements “have [no] right or … duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of a dispute.” 7-Eleven Owners for Fair Franchising v. Southland Corp., 102 Cal. Rptr. 2d 777, 784 (Cal. App. 2000). It is therefore appropriate to conclude, as Florida has done in several appellate decisions, that a law requiring the “rendition of a judgment” against an insurer for an attorney’s fee allowance to be made was not satisfied by a settlement. For example, in Travelers Indemnity Co. v Chisholm, 384 So.2d 1360, 1361 (Fla. App, 1980), the court found “[a]ppellee never recovered a favorable judgment or decree against the appellant. Therefore the trial court had no legal basis for its award of attorney’s fees.” Because 58-12-3 calls for not just an award per 62-7-5, but a “rendered award,” the Department, not the parties, must decide the relevant issues on the merits for the matter to be susceptible to an attorney’s fee claim. A settled award is not a “rendered” award within the meaning of SDCL 58-12-3. Claimant’s petition is dismissed.

Dated this _____ day of February, 2016.

SOUTH DAKOTA DEPARTMENT OF
LABOR & REGULATION

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James E. Marsh
Director