

July 20, 2005

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LETTER DECISION

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RE: HF No. 227, 2003/04 – William Schied v. Capital Motors and First Dakota Indemnity

Dear Counsel:

I am in receipt of Claimant's Motion for Summary Judgment, Employer/Insurer's Motion for Summary Judgment, Claimant's Reply Brief on Motion for Summary Judgment and Employer/Insurer's Reply Brief Supporting Motion for Summary Judgment, along with supporting affidavits and exhibits.

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.

Employer/Insurer filed a Petition for Hearing requesting that the Department review the workers' compensation case of William J. Schied v. Capital Motors and First Dakota Indemnity pursuant to SDCL 62-7-33. Employer/Insurer's request includes a demand for reimbursement of workers' compensation benefits paid to Claimant. Claimant objects to the requests.

SDCL 62-7-33 states in full:

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.

Claimant's first issue with Employer/Insurer's Motion for Summary Judgment and one of the reasons for Claimant's own Motion for Summary Judgment is that it has not been five years since the determination of the Department became final. The original determination of the Department was made on July 16, 2001. Employer/Insurer filed a petition for review with the Secretary of the Department of Labor, which resulted in an Order of Remand on October 22, 2001. The Department issued its Decision on the Order of Remand on February 19, 2002. Employer/Insurer appealed to Circuit Court and to the Supreme Court. The Supreme Court decided Capital Motors, LLC v. Schied, 660 N.W.2d 242 (S.D. 2003) on April 2, 2003. The Supreme Court determined that Claimant had met his burden to demonstrate permanent total disability since the date of his injury, June 12, 1999. Benefits were retroactively paid to the June 12, 1999, injury date. Claimant's permanent total disability began on June 12, 1999.

The statute provides that "any case . . . may be reviewed by the department not less than every five years." The Department's last review was completed on February 19, 2002. It has not been five years since the Department's review of Claimant's permanent total disability. While it has been five years since Claimant's permanent total disability award took effect (retroactively), the statute does not provide that the effective date of the determination begins the five year period. Instead, it provides that the Department may review a determination of permanent total disability "not less than every five years." It has not been five years since the Department reviewed this matter. Employer/Insurer's Motion for Summary Judgment is denied. Claimant's Motion for Summary Judgment is granted in part. The Department will not review the determination of permanent total disability until five years has elapsed from the date of its last review or determination, February 19, 2002.

Claimant shall submit a proposed order conforming to this letter decision for the Department's signature by July 29, 2005. Employer/Insurer may submit objections thereto by August 8, 2005.

Sincerely,

Heather E. Covey
Administrative Law Judge