

March 4, 2005

**LETTER DECISION**

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RE: HF No. 24, 2004/05 – Richard Martin Randow v. Thomas Blair, d/b/a Whistler Gulch Campground and Berkley Risk Administrators

Dear Counsel:

I am in receipt of Insurer's Motion for Summary Judgment, Employee's Memorandum Opposing Summary Judgment (or Motion to Compel) and Insurer's Motion for Extension of Time to Answer Interrogatories and Insurer's Reply Brief on Motion for Summary Judgment.

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.

Insurer alleges that there are no genuine issues of any material fact as to whether Insurer was on the risk at the time of Claimant's injury.

Berkley Risk Administrators Co., LL C (“Berkley”) acts as the provider of the administrative services to Continental Western Insurance Company (“CWIC”). CWIC is a servicing carrier of the South Dakota Worker’s Compensation Insurance Plan. (“Assigned Risk Plan”), the administrator of which is the Nation Council on Compensation Insurance, Inc. The Affidavit of Teresa Deuchar (“Deuchar Affidavit”) was submitted with Insurer’s Motion for Summary Judgment. Deuchar is a Claims Examiner for Berkley. She handled Claimant’s claim.

CWIC provides worker’s compensation coverage through the assigned risk plan for Employer Thomas Blair, d/b/a Whistler Gulch RV Park Campground under policy number WC 40-40-010054-00, which policy was issued to ABMC2 Ltd., d/b/a Whistler Gulch RV Park Campground. As shown by Deuchar’s Affidavit, the effective date of said policy is July 13, 2004 to July 13, 2005.

Claimant’s Notice of Injury of August 3, 2004, and his Petition for Hearing of August 9, 2004, allege that Claimant suffered a work-related injury on July 14, 2004. CWIC was on the risk on July 14, 2004, and therefore it conducted an investigation of the claim and filed an answer.

On October 1, 2004, Claimant filed an “Amended Notice of Injury” wherein he alleged that his work-related injury actually occurred on June 22, 2004.

Claimant gave deposition testimony in this matter on December 3, 2004. He is a high school graduate, has served in the Navy and has owned two businesses. At his deposition, Claimant admitted that his injury did not occur on July 14, 2004. Claimant alleged that his injury occurred on June 23, 2004, because that was the day he visited the emergency room. Insurer was not on the risk on either June 22 or June 23, 2004. Claimant cannot now claim a better version of the facts than his prior testimony and ‘cannot now claim a material issue of fact which assumes a conclusion contrary to his own testimony.’” Vaughn v. John Morrell & Co., 2000 SD 31, ¶ 36, 606 N.W. 2d 919, \_\_\_\_ (further citations and quotations omitted).

There are no genuine issues of material fact. Insurer clearly was not on the risk at the time of the alleged injury. Accordingly, the Insurer is entitled as a matter of law to an order dismissing it as a party to this proceeding. Insurer’s Motion for Summary Judgment is granted. Insurer is directed to submit an Order consistent with this decision.

In addition, the issue of whether the Department retains jurisdiction over this matter depends on whether Employer had worker’s compensation coverage on June 22 and June 23 of 2004. SDCL 62-5-7 states:

Any employer other than the state, a municipality, or other political subdivision of this state, who has failed to comply with the provisions of §§ 62-5-1 to 62-5-5, inclusive, shall be deemed to have elected not to operate under the provisions of this title.

SDCL 62-3-11 states:

Any employee, who is employed by an employee who is deemed not to operate under this title in accordance with § 62-5-7, or the dependents of such deceased employee, may elect to proceed against the employer in any action at law to recover damages for personal injury or death; or may elect to proceed against the employer in circuit court under the provisions of this title, as if the employer had elected to operate thereunder by complying with §§ 62-5-1 to 62-5-5, inclusive, and the measure of benefits shall be that provided by § 62-4-1 plus twice the amount of other compensation allowable under this title; provided that such employer or his dependents shall not recover from both actions.

At this time, the Department's file contains no indication that Employer had worker's compensation coverage on June 22 and June 23 of 2004.

Sincerely,

Heather E. Covey  
Administrative Law Judge