

Dennis W. Finch  
Finch Maks, Prof. L.L.C.  
1830 West Fulton Street, Ste. 201  
Rapid City, SD 57702

ORDER ON MOTION  
FOR SUMMARY JUDGMENT

Kristi Geisler Holm  
Davenport Evans Hurwitz & Smith LLP  
PO Box 1030  
Sioux Falls, SD 57101-1030

RE: HF No. 39, 2013/14 – Fort Pierre Livestock and Meadowbrook Insurance Group vs. Mark Melvin

Dear Mr. Finch and Ms. Holm:

The Department is in receipt of and has considered Employer and Insurer's Motion for Partial Summary Judgment, Claimant's Opposition to the Motion, and Employer and Insurer's Reply in Support of the Motion, along with all supporting briefs, exhibits, and affidavits. After being fully advised, the Department makes the following Order on Motion for Partial 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 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.

The party seeking summary judgment bears the burden of demonstrating the lack of any genuine issue of material fact, and all reasonable inferences from the facts are viewed in the light most favorable to the non-moving party. *Railsback v. Mid-Century Ins. Co.*, 2005 SD 64, ¶6, 680 N.W.2d 652, 654.

**Undisputed Facts:**

1. Employer and Insurer filed a Petition for Hearing on August 26, 2013 alleging an overpayment of indemnity benefits to Claimant.

2. Claimant was injured in a work-place incident on February 11, 1995, while employed with Employer.
3. Employer and Insurer have been paying medical and indemnity benefits to Claimant since the time of his accident. Indemnity benefits included Permanent Partial, Temporary Total, and Permanent Total Disability Benefits.
4. There are no settlement agreements between the parties nor has there been any Order from the Department regarding this injury or the benefits Employer and Insurer have paid.
5. On June 16, 2011, Employer and Insurer, through their counsel, Mr. Comet Haraldson, sent a letter to the Department of Labor and Regulation, the Claimant, and his attorney, denying payment to Claimant of "all weekly benefits...for indemnity under workers compensation."
6. Claimant was advised on June 16, 2011, that he had two years in which to file a petition for hearing with the Department.
7. Following the filing of a Petition by Employer and Insurer, Claimant filed a Counterclaim on September 26, 2013.

## **ANALYSIS & DECISION**

Employer and Insurer's Motion for Partial Summary Judgment is based upon SDCL § 62-7-35, the statute of limitations for filing a petition for hearing. The statute states:

The right to compensation under this title shall be forever barred unless a written petition for hearing pursuant to § 62-7-12 is filed by the claimant with the department within two years after the self-insurer or insurer notifies the claimant and the department, in writing, that it intends to deny coverage in whole or in part under this title. If the denial is in part, the bar shall only apply to such part.

SDCL §62-7-35. Employer and Insurer argue that the Claimant's counterclaim was filed beyond the two-year statute of limitations and that the counterclaim should be dismissed.

Employer and Insurer clearly stated in the June 2011 denial letter, sent to Claimant, the Department, and Claimant's attorney, that further indemnity benefits are denied. The letter did not specify the type of indemnity benefits, only that any and all indemnity benefits are denied and will no longer be paid to Claimant. Mr. Haraldson was very clear in his letter that Claimant had two years in which to file a petition for hearing with the Department. In this case, as the nature and extent of the injury is not in dispute, the type of indemnity benefits is not a material question of fact.

Claimant makes the argument that Employer and Insurer are required to show a change of condition pursuant to SDCL §62-7-33 prior to denial of benefits. This argument does not explain why Claimant waited longer than two years before filing his Petition.

Claimant's Petition for Hearing was made after Employer and Insurer's Petition for Hearing. The Claimant's Petition was a permissible counterclaim. The Supreme Court has ruled that the statute of limitations also applies to a counterclaim. See generally, *Murray v. Mansheim*, 2010 S.D. 18, 779 N.W.2d 379. In the *Murray* case, the original suit in tort was brought a few days prior to the running of the statute of limitations. The defendant filed their answer to the suit and filed a counterclaim. The defendant's filings occurred days after the statute of limitations had passed. The counterclaim was not permitted to go forward and the Supreme Court upheld the lower court's grant of partial summary judgment for the counterclaim. *Murray v. Mansheim*, 2010 S.D. 18.

In this case, Employer and Insurer waited over two years from the date of denial of benefits before filing their Petition for Hearing with the Department. Their Petition was for reimbursement of an overpayment. Claimant was given those two years to file a Petition for Hearing based upon the June 2011 denial; however, he failed to do so. Claimant was still bound by the two-year statute of limitations; the filing of a petition by Employer and Insurer did not increase Claimant's time for filing.

In conclusion, Claimant missed his deadline to file a Petition for Hearing regarding the denial of benefits. Further discovery by Claimant, as he has now requested, will not uncover new material questions of fact, as this is a very limited question pertaining to filing deadlines. There are no material facts in dispute. Employer and Insurer are entitled to judgment as a matter of law. Employer and Insurer's Motion for Partial Summary Judgment is granted. The Counterclaim or Claimant's Petition for Hearing, is dismissed. This letter serves as the Department's Order.

Dated this 28<sup>th</sup> day of January, 2014.

BY THE DEPARTMENT,

---

Catherine Duenwald  
Administrative Law Judge