January 30, 2013

Michael M. Hickey
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Letter Decision and Order

Michael S. McKnight
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RE: HF No. 43, 2011/12 – Daniel Gettert v. Horst Masonry Construction, Inc. and Acuity

Dear Mr. Hickey and Mr. McKnight:

This letter deals with a Motion for Partial Summary Judgment filed by the Employer and Insurer dated November 13, 2012. In worker's compensation cases, motions for summary judgment are governed by ARSD 47:03:01:08. That regulation provides:

> 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.

ARSD 47:03:01:08.

The Employer and Insurer's motion is based on the three year statute of limitation imposed by SDCL 62-7-35.1. That provision states in pertinent part:

> 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.

SDCL 62-7-35.1

Here, Claimant suffered a work-related injury on April 4, 2007. The last payment of benefits made by Insurer for this injury was issued on August 31, 2007. Claimant filed a Petition for Hearing dated August 19, 2011.

Claimant contends that the doctrine of equitable tolling should apply in this case and bills from Black Hills Chiropractic between the date of August 13, 2007, and December 13, 2008, in the sum of $733.00 should be paid by Acuity. Claimant states that Black Hills Chiropractic mistakenly sent these bills to Claimant's heath care insurer rather than Acuity.

The doctrine of equitable tolling should apply where a party acts diligently, "only to find himself caught up in an arcane procedural snare." Warren v. Department of Armey, 867 F.2d 1156, 1160 (8th Cir 1989). "As a general rule, equitable tolling is a remedy reserved for circumstances that are truly beyond the control of the plaintiff." Hill v. john Chezik Imports, 869 F.2d 1122, 1124 (8th Cir 1989). Claimant cites, Dakota Truck Underwriters v. SD Subsequent Injury Fund, 2004 SD 120, 689 NW2d 196, as his authority that the doctrine applies in South Dakota workers' compensation cases.

In that case, the plaintiff had a number of potential claims against the Subsequent Injury Fund (SIF). However, the Department had not yet issued a decision involving the claims or approved a settlement of the matter as of June 30, 1999. Therefore, the plaintiff was prevented from filing a claim against the SIF by SDCL 62-1-34.1 which stated in part: "No claims may be filed prior to a decision or approval of a settlement from the department."

On June 30, 1999, the South Dakota legislature repealed 62-7-34.1 and enacted a provision which barred any claims filed after June 30, 1999. In effect, the plaintiff was prevented from filing a claim by statute on one day and barred by a statute of limitation on the next. In such a case, the doctrine of equable tolling was appropriate because the plaintiff found itself, "caught up in an arcane procedural snare." That is not the case here.

SDCL 62-7-35.1 bars claims if a written petition for hearing is not filed within three years "from the date of the last payment of benefits." Consequently, the statute implies the responsibility on Claimant to monitor the date of the last payment of benefits whether made to himself or a health care provider. In this regard, Claimant did not "act diligently" in monitoring these payments. A cursory review of the Chiropractor's billing statements or the health care insurance company's statement of benefits would have alerted Claimant that the wrong insurance company was processing the claims. In addition, this was not an isolated event which could have slipped the notice of Claimant. This practice went on from August 13, 2007 and December 13, 2008.

Therefore, the Department concludes that the mistake made by Black Hills Chiropractic was not "truly beyond the control" of Claimant. Employer and Insurer's motion for Partial Summary judgment is granted. This letter shall constitute the order in this matter.

Sincerely,

/s/ Donald W. Hageman
Donald W. Hageman
Administrative Law Judge