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Letter Decision on Motions for Summary Judgment

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RE: HF No. 44, 2010/11 – Deborah Lacy v. Weston Investments, Inc., d/b/a Interbake Foods LLC and Zurich American Insurance Company

Dear Counsel:

The Department is in receipt of Claimant's Motion for Summary Judgment on the issue of Statute of Limitations, filed with the Department on September 28, 2011. Employer and Insurer responded on December 7, 2011 and made a Cross-Motion for Summary Judgment. Claimant submitted a final Reply to the Response and Response to the Cross-Motion on January 6, 2012. Employer and Insurer's final Reply to the Response on the Cross-Motion was received on January 25, 2012. The Department, having considered all submissions, including briefs, affidavits, and case citations, and being fully advised in the premises, issues this Letter Order on the 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 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 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.

The guiding principles in determining whether a grant or denial of summary judgment is appropriate are:

> (1) The evidence must be viewed most favorable to the nonmoving party; (2) The burden of proof is upon the movant to show clearly that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law; (3) Though the purpose of the rule is to secure a just, speedy and inexpensive determination of the action, it was never intended to be used as a substitute for a court trial or for a trial by jury where any genuine issue of material fact exists; (4) A surmise that a party will not prevail upon trial is not sufficient basis to grant the motion on issues which are not shown to be sham, frivolous or so unsubstantial that it is obvious it would be futile to try them; (5) Summary judgment is an extreme remedy and should be awarded only when the truth is clear and reasonable doubts touching the existence of a genuine issue as to material fact should be resolved against the movant; and (6) Where, however, no genuine issue of fact exists it is looked upon with favor and is particularly adaptable to expose sham claims and defenses.

Owens v. F.E.M. Electric Association, Inc., 694 N.W.2d 274, 277 (SD 2005).

The material undisputed facts are as follows:

1. While working for Employer, Claimant allegedly suffered a work-related injury on September 9, 2003.
2. Employer and Insurer filed a first report of injury. The claim was given a South Dakota workers' compensation claim number.
3. Employer and Insurer at that time accepted the claim as compensable.
4. Claimant received workers' compensation benefits, including costs of medical treatment, until May 19, 2005.
5. The last payment of any workers' compensation benefits to or on behalf of Claimant was on October 13, 2005 for medical expenses related to an earlier date of service.
6. Claimant was discharged by Employer on May 25, 2005. Claimant met with Employer (Jo Hackett with Human Resources) and Employer's Health Manager (Linda Hall, RN) where she was informed that she was no longer employed by Employer.
7. Claimant stopped sending medical bills to Claimant after that date.
8. In April 2006, Claimant contacted Employer and requested a denial letter or a copy of a denial letter. Employer mailed Claimant a copy of a letter dated May 19, 2005 which denied any workers' compensation benefits to Claimant.
9. The Department of Labor was unable to locate in the Department files, the denial letter supposedly sent to the Department by Employer and Insurer in May 2005 regarding Claimant's reported work injury.
10. On September 13, 2010, Claimant filed a Petition for Hearing the Department of Labor and Regulation.

The arguments on the Motion and Cross-Motion for Summary Judgment on the Issue of Statute of Limitations are premised on SDCL §§ 62-7-35 and 62-7-35.1. In the initial Motion, Claimant seeks a Department ruling that Employer and Insurer had not issued a denial of benefits to Claimant or the Department; therefore the two-year statute of limitations under §62-7-35 was not triggered. Employer makes the argument that Claimant failed to file her Petition for Hearing within two years of the issuance of a denial of benefits by Employer and Insurer. The Cross-Motion by Employer and Insurer argues that in the alternative Claimant did not meet the three-year statute of limitations as set out §62-7-35.1

SDCL § 62-7-35. 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 § 62-7-35.1. 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. The provisions of this section do not apply to review and revision of payments or other benefits under § 62-7-33.

Claimant makes the argument that because Employer and Insurer claim to have properly issued a denial letter in May 2005, that 63-7-35.1 does not apply. That is not how the South Dakota Supreme Court has interpreted these two laws. Both of these statutes of limitations apply in cases such as Claimant's. See in general *Thurman v. Zandstra Construction*, 2010 S.D. 46, 785 N.W.2d 268 It is undisputed that Claimant's last workers' compensation benefit was paid out in October 2005. No matter if a denial was issued or not, Claimant waited over three years before filing a Petition for Hearing with the Department. The issuance of a denial is immaterial as to whether Claimant met the requirements of SDCL 62-7-35.1.

If there was undisputed evidence that Employer and Insurer had properly issued a denial, then Claimant would have only had two years from the date of denial. However, there is a material question of fact whether a denial letter was properly issued in May 2005, so summary judgment is not granted regarding the two-year statute of limitations set out in SDCL 62-7-35.

The issuance of a denial does not toll the statute of limitations set out in SDCL 62-7-35.1. As pointed out by the Supreme Court, "The expiration of the three-year period is dispositive. Faircloth made clear that when an employer has made no payment for three years, SDCL 62-7-35.1 applies "because the triggering event under SDCL 62-7-35.1 is simply a cessation of the benefits without [the employer providing] notice of the dispute." *Thurman* at ¶12 (citing Faircloth v. Raven Industries, 2000 S.D. 158, ¶8, 620 N.W.2d at 201.). As Employer and Insurer pointed out, one of these statutes applies, so Claimant had either two or three years to make her Petition for Hearing.

So basically, if no denial had been issued by Employer and Insurer, as is Claimant's contention, then she had three years to file a Petition after the last payment of benefits. If a denial was issued, then Claimant only had two years to file a Petition for Hearing.

Claimant filed her Petition over five years after the claimed denial, and five years after receiving the final workers' compensation benefits from Employer and Insurer. Claimant failed to file a Petition within three years from the date of the last payment of benefits, by Insurer. Employer and Insurer's Cross-Motion for Summary Judgment is granted, pursuant to SDCL §62-7-35.1. Claimant's Petition is dismissed with prejudice.

The Parties may consider this Letter Decision to the Order of the Department.

Sincerely,

Catherine Duenwald
Administrative Law Judge