September 30, 2019

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LETTER DECISION AND ORDER

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RE: HF No. 49, 2018/19 – William May v. Spearfish Pellet Co., LLC. And Western National Mutual Insurance, Co.

Dear Mr. Simpson and Ms. Geisler Holm:

This letter addresses the following submissions by the parties:

November 14, 2018- Claimant's Motion to Determine that February 24, 2014 Letter is a Petition for Hearing

Affidavit of Michael Simpson

June 17, 2019- Employer/Insurer's Response to Motion

Affidavit of Gay Buchholz

August 19, 2019- Claimant's Reply Brief

In addition, a telephonic hearing was held September 6, 2019. Claimant was represented by his attorney of record, Michael Simpson, and Employer/Insurer was represented by its attorney of record, Kristi Geisler Holm.

ISSUE PRESENTED: DOES CLAIMANT'S FEBRUARY 24, 2014 LETTER CONSTITUTE A VALID PETITION FOR HEARING UNDER ARSD 47:03:01:02?

FACTS

Claimant, William May, was employed by Spearfish Pellet Co. on February 10, 2009, when he suffered in injury to his left shoulder. Employer/Insurer treated the injury as compensable and paid for two surgeries September 20, 2010, and December 14, 2011. On May 3, 2010, Claimant slipped and fell at work, this time injuring his right shoulder. Employer/Insurer also treated this injury as compensable and paid for a November 7, 2010 surgery on the right shoulder.

On April 12, 2012, Claimant's treating physician, Dr. Lawlor, assigned Claimant a fifteen percent impairment rating for his left shoulder and an eleven percent rating for his right shoulder. Employer/Insurer paid Claimant benefits through 2014. On January 24, 2014, Employer/Insurer sent claimant a letter explaining its reason for denying further benefits. It alleged that Employer was able to provide Claimant work within his restrictions, but that Claimant did not return to work. Claimant disputed this claim, and wrote a letter to Insurer's claims adjuster, Gay Buchholz requesting the decision be reviewed. A copy of the letter was also sent to the Department.

While Employer/Insurer discontinued payment of disability benefits, it did continue to pay for Claimant's medical treatment. However, Claimant took no further action on the denial of benefits until 2017 when he retained counsel. On March 8, 2017, Claimant's attorney wrote to Buchholz alleging that Claimant's 2014 letter constituted a petition for hearing under ARSD 47:03:01:02. Buchholz responded that she informed Claimant that he had two years to file a petition for hearing with the department and that she did not consider this letter to be a valid petition. Claimant then filed a motion with

the Department asking it to determine that the February 24, 2014 letter Claimant sent to the Department and Insurer was a valid petition.

ANALYSIS

The requirements for filing a petition for workers compensation benefits is found in ARSD 47:03:01:02

> The petition shall be in writing and need follow no specified form. It shall state clearly and concisely the cause of action for which hearing is sought, including the name of the claimant, the name of the employer, the name of the insurer, the time and place of accident, the manner in which the accident occurred, the fact that the employer had actual knowledge of the injury within 3 business days or that written notice of injury was served upon the employer, and the nature and extent of the disability of the employee. A general equitable request for an award shall constitute a sufficient prayer for awarding compensation, interest on overdue compensation, and costs to the claimant. A letter which embodies the information required in this section is sufficient to constitute a petition for hearing.

Employer/Insurer first argue that the Department has already made a determination that the letter does not constitute a valid petition. Employer/Insurer argue that the Department is bound by the e-mail response DLR employee Bonnie Ackerman sent to Buchholz indicating the letter did not have the required information. This argument is without merit. This ALJ is not bound by the legal opinion expressed in an ex-parte e-mail solicitation for advice, and Employer/Insurer cannot claim to have reasonably relied on this e-mail. Had Employer/Insurer wished to gain the Department's opinion on what constituted a valid petition for hearing, the correct avenue would have been to follow the guidelines outlined in ARSD 47:01:01:04.

Claimant contends that the rule outlining the procedure for filing a petition for hearing is ambiguous. "A statute or portion thereof is ambiguous when it is capable of being understood only by reasonably well-informed persons in either of two or more senses."

Petition of Famous Brands, Inc., 347 N.W.2d 882, 886 (S.D. 1984)(quoting *National Amusement Co. v. Wisconsin Dep't of Taxation,* 41 Wis.2d 261, 267, 163 N.W.2d 625, 628 (1969). Alternatively, our Supreme Court has noted:

> When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed. Since statutes must be construed according to their intent, the intent must be determined from the statute as a whole, as well as enactments relating to the same subject. But, in construing statutes together it is presumed that the legislature did not intend an absurd or unreasonable result.

Martinmaas v. Engelmann, 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611 (quoting *Moss v. Guttormson,* 1996 SD 76, ¶ 10, 551 N.W.2d 14, 17)).

The first interpretation is straight-forward; ARSD 47:03:01:02 requires that a petition *shall* be in writing and "*shall* state clearly and concisely the cause of action for which hearing is sought. It then expands on what constitutes a clear and concise cause of action. Namely, it must include the following seven specific things: 1) the name of the claimant, 20 the name of the employer, 3) the name of the insurer, 4) the time and place of accident, 5) the manner in which the accident occurred, 6) the fact that the employer had actual knowledge of the injury within 3 business days, and 7) the nature and extent of the disability of the employee.

Claimant argues that the rule may also be interpreted so that the last two sentences "soften" the previous requirements imposed by the rule. The Department disagrees with Claimant's alternate interpretation of ARSD 47:03:01:02. First, the second-to-last sentence, which indicates a claimant must only include a general equitable claim for benefits, applies only to the remedy requested by Claimant and not

the entire rule. "*A general equitable request for an award shall constitute a sufficient prayer for awarding compensation, interest on overdue compensation, and costs to the claimant.*" ARSD 47:03:01:02 (emphasis added). Second, the last sentence supports the contention that the previous criteria are a prerequisite for a valid petition. A plain reading of the rule indicates that the term "information required" refers to the previously listed items. To read the rule otherwise would render the seven items listed superfluous. "We presume the Legislature does not insert surplusage into its enactments." *Nielson v. AT & T Corp.*, 1999 S.D. 99, ¶ 16, 597 N.W.2d 434, 439. The Department finds that the only logical interpretation is that, for a petition to "clearly and concisely" state a cause of action, it must include each of the eight things mentioned by the rule.

In this case, Claimant's letter did not include several pertinent pieces of information. Claimant's letter does not clearly identify a specific injury for which he is seeking compensation. Though Claimant argues here that his shoulders were the cause of his current condition, much of claimant's letter discusses a myriad of heart problems. As such, Claimant's letter fails to state a time and place of a specific accident, the manner in which the accident occurred, the nature and extent of the disability, or that his employer received proper notice of his injury.

Claimant argues that as long as his letter to Insurer and the Department contains most of the information regarding his accident, it constitutes a valid petition. To support his argument, Claimant cites *Dudley v. Huizenga*, 2003 S.D. 84, 667 N.W.2d 644. However, *Dudley* is distinguishable from the one now before the Department. In *Dudley*, claimant's attorney missed a deadline for designating an expert witness and the Department granted insurer's

motion to strike the expert and motion for summary judgment. The circuit court upheld the summary judgment and Claimant then appealed to the Supreme Court. That court reversed the Department's original order granting summary judgment. It noted "[c]onsidering the remedial nature of workers' compensation, sanctions for discovery violations in administrative proceedings should have at least the same restraints as comparable sanctions for discovery violations in civil courts." Id. at ¶ 13.

The basis for the Department's dismissal in Dudley were two administrative rules; ARSD 47:03:01:16, and ARSD 47:03:01:05.02. Under both rules, the Department has a number of sanctions available for failure to comply with discovery. Since dismissal was only one of the options available, the court found choosing to dismiss the case was contrary to the remedial nature of workers compensation. In this case, unlike in *Dudley*, the Department is left with no discretion. The language of ARSD 47:03:01:02 clearly states what a petition for hearing must include.

CONCLUSION

Claimant's motion to determine that the February 24, 2014 letter constituted a petition is DENIED. Further, Claimant's petition is barred by the statute of limitations. This letter shall constitute the Department's order on this matter.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

/s/ Joe Thronson
Joe Thronson
Administrative Law Judge