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RE: HF No. 63, 2010/11 – Kerri Sue Hubbs v. Bethesda Home of Aberdeen, Inc. and
Continental Western Insurance Company v. FinCor Solutions Integrated
Disability Management

Dear Counsel:

This is the Department's letter decision in the pending Motion for Summary Judgment filed by Insurer FinCor. Parties were given the opportunity to file Briefs and supporting documentation on the Motion.

The question to be answered with this Motion for Summary Judgment is whether there is a genuine issue of material fact. There are no material facts at issue in the Motion before the Department. The issue is strictly a matter of law. ARSD 47:03:01:08 governs the Department of Labor's authority to grant summary judgment.

The material facts are as follows:

1. While working for Employer, Claimant suffered a work-related injury on May 26, 2004.
2. Employer and Insurer at that time, Continental Western Insurance Company, accepted the claim as compensable.
3. Claimant treated with this injury until October 1, 2008.
4. On February 25, 2008, Claimant filed a First Report of Injury with Employer. Claimant described this as being a bad flare-up of her condition that originally occurred in 2004.
5. Employer reported this 2008 injury to their current insurer, FinCor.
6. On May 8, 2008, Dr. Jerry Blow issued a medical opinion that Claimant's current symptoms are the cause of a progression and exacerbation of her symptoms in 2008. This opinion came from an Independent Medical Exam ordered by Continental Western.
7. On June 10, 2008, Dr. Jeff Luther issued a medical opinion that Claimant's current symptoms are caused by the work comp injury of 2004. Dr. Luther did not consider the 2008 event to be a major contributing cause of Claimant's current symptoms. This opinion came from an Independent Medical Exam ordered by FinCor.
8. FinCor issued a formal denial of the compensability of the injury on July 15, 2008. This denial was sent to both Claimant and the Department as required by law.
9. Claimant filed a Petition for Hearing against Employer and Continental Western on October 29, 2010. The Petition stems from the injury reported on May 26, 2004 and that her current symptoms are related to that 2004 injury.
10. Employer and Continental Western answered the Petition on December 1, 2010 and at that same time filed a third-party complaint against FinCor.
11. FinCor filed an answer to the third-party complaint on January 3, 2011. At that time FinCor filed this Motion for Summary Judgment on the third-party complaint.

FinCor makes the argument that the third-party complaint is barred by the two-year statute of limitations as set out in SDCL 62-7-35. The statute reads:

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.

Continental Western counters that Claimant's change in condition, from the time of the incident in February 2008 to the time of the IME with Dr. Blow in May 2008, allows the Department to reopen Claimant's claim against FinCor. SDCL 62-7-33 allows the Department to reopen a claim "if the department finds that a change in the condition of the employee warrants such action."

The “change in condition” was diagnosed by Dr. Blow prior to Dr. Luther’s opinion regarding the 2008 injury. Both medical opinions were given prior to FinCor issuing a letter of denial to Claimant. Claimant then had two years in which to file a Petition against FinCor, but did not do so. Claimant waited about 28 months before filing a Petition against Continental Western.

Continental Western’s action against FinCor is derivative and dependent upon the rights of Claimant against FinCor. In this action, Continental Western cannot make a claim against FinCor that Claimant cannot make as well.

Whether or not there are competing opinions regarding causation of injury is not determinative of this issue. Claimant had two years in which to file a Petition against FinCor and did not do so. Continental Western cannot revive the claim which is barred by the two-year statute of limitations.

The third party claim of Continental Western against FinCor is time barred by SDCL 62-7-35. FinCor’s Motion for Summary Judgment is granted. The third-party claim at issue is hereby dismissed, with prejudice.

FinCor is instructed to prepare proposed Findings of Fact and Conclusions of Law and an Order consistent with this Letter Decision, within 10 days of receipt of this decision. Objections or alternate Findings of Fact and Conclusions of Law may be submitted by the other parties within 10 days of receipt of FinCor’s proposed. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for FinCor shall submit such stipulation together with an Order consistent with this Decision.

Sincerely,

Catherine Duenwald
Administrative Law Judge