SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

JOAN M. SAUDER, **HF No. 65, 2002/03**

Claimant, **DECISION ON REMAND**

vs.

PARKVIEW CARE CENTER,

Employer,

and

TRAVELERS INSURANCE COMPANIES,

Insurer,

and

BERKLEY ADMINISTRATORS,

Insurer.

This matter comes before the South Dakota Department of Labor pursuant to the Order for Partial Remand entered by the Honorable Max A. Gors. N. Dean Nasser, Jr. represented Joan M. Sauder (Claimant). R. Alan Peterson represented Employer and Insurer Travelers Insurance Companies (Travelers). Timothy M. Engel represented Employer and Insurer Berkley Administrators (Berkley).

On January 31, 2005, the Department issued a Letter Decision and granted summary judgment as to any claim made by Claimant for an injury against Berkley. In addition, the Department denied summary judgment as to any claim made by Claimant for an injury against Travelers. Claimant appealed to the Sixth Judicial Circuit. On March 23, 2005, Judge Gors dismissed the appeal because the order appealed from was not a final order. On January 5, 2006, the Department granted summary judgment as to any claim made by Claimant for an occupational disease against both Berkley and Travelers. Thereafter, Claimant appealed all issues to the Sixth Judicial Circuit.

On April 12, 2006, Judge Gors remanded this matter to the Department. In the Order for Partial Remand, Judge Gors remanded "the Department's two rulings dated January 31, 2005 and January 5, 2006 for clarification in accordance with the instructions herein contained[.]" Judge Gors ordered:

> [T]hat during said partial remand the Department shall enter findings and conclusions of law, as necessary and appropriate on the following issues:
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> 1. Claimant's assertion that Appellee Berkley and Employer Parkview Care Center are deemed to have accepted compensability of the

Appellant's injury claim by failing to timely deny the claim within 50 total days as prescribed by SDCL 62-6-3; and

2. Claimant's assertion that Appellee Berkley's purported denial of Appellant's claim was "ultra vires" and a nullity since Appellee Berkley stated Tri-State was not on risk for the claim, Berkley is alleged not to be an "insurer" as required by SDCL 62-6-3, Berkley is alleged to have had no authority to [a]ct for Appellee Travelers, and Berkley is alleged to have violated SDCL 62-7-30 by not utilizing certified or registered mail as mandated by said statute; and
3. Claimant's assertion that the conduct of all Appellees considered separately or together "lulled "Appellant" into a false sense of security" regarding the status of her claim thus, estopping Appellees from asserting the statute of limitations[;] and
4. Whether the Department intended by its rulings to dismiss the insurers only, or to dismiss Claimant's claims as against the employer and the insurer(s).

The Department conducted a telephonic status conference on May 15, 2006. The parties agreed to submit additional briefs addressing the four issues raised in the Order for Partial Remand. Claimant relied upon Appellant's Brief dated January 30, 2006. Other briefs were submitted, including Travelers Insurance Companies' Brief Concerning the Department's Decision on Partial Remand, Employer and Insurer Berkley's Supplemental Brief on Remand and Claimant's Responding Memorandum of Law to Department on Remand. The Department received the Administrative Record from the Hughes County Clerk of Courts on July 13, 2006.

Any necessary undisputed facts were specifically set forth in the Department's Letter Decisions dated January 31, 2005, and January 5, 2006.

ISSUE 1 ON REMAND

Claimant's assertion that Appellee Berkley and Employer Parkview Care Center are deemed to have accepted compensability of the Appellant's injury claim by failing to timely deny the claim within 50 total days as prescribed by SDCL 62-6-3.

Claimant completed a First Report of Injury in November 1995. "The law in effect when the injury occurred governs the rights of the parties." Loewen v. Hyman Freightways, Inc., 557 N.W.2d 764, 766 (S.D.1997). In November 1995, SDCL 62-6-3 provided:

> The insurer shall file a copy of the report required by § 62-6-2 with the Department of Labor within ten days after receipt thereof.
>
> The insurer or, if the employer is self-insured, the employer, shall make an investigation of the claim and shall notify the injured employee and the department, in writing, within twenty days from its receipt of the report, if it denies coverage in whole or in part. This period may be extended not to exceed a total of thirty additional days by the department upon a proper showing that there is

> insufficient time to investigate the conditions surrounding the happening of the accident or the circumstances of coverage. If the insurer or self-insurer denies coverage in whole or in part, it shall state the reasons therefor and notify the claimant of the right to a hearing under § 62-7-12. The director of the Division of Insurance, or the secretary of labor if the employer is self-insured, may suspend, revoke, or refuse to renew the certificate of authority, or may suspend or revoke all certificates of authority granted under Title 58 or § 62-5-4 to any company or employer which fails, refuses, or neglects to comply with the provisions of this section. A company or employer which fails, refuses, or neglects to comply with the provisions of this section is also subject to an administrative fine of one hundred dollars payable to the Department of Labor for each act of noncompliance, unless the company or employer had good cause for noncompliance.

Berkley issued a denial letter to Claimant on March 7, 1996. Berkley conceded for purposes of its previous summary judgment motion that it did not issue a denial letter within the time limits in SDCL 62-6-3. Claimant argued that this omission by Berkley barred Berkley's ability to deny compensability of her claim. Claimant's argument is incorrect and must be rejected.

The South Dakota Supreme Court proffered two primary rules of statutory construction. "The first rule is that the language expressed in the statute is the paramount consideration. The second rule is that if the words and phrases in the statute have plain meaning and effect, we should simply declare their meaning and not resort to statutory construction." Petition of West River Elec. Ass'n, 2004 SD 11, ¶ 15 (citations omitted). "When we must, however, resort to statutory construction, '[t]he intent of the legislature is "derived from the plain, ordinary and popular meaning of statutory language."'" Id. (citations omitted).

The language of SDCL 62-6-3 is clear and readily understood. SDCL 62-6-3 specifically sets forth two possible consequences if an insurer fails to send a denial letter within the time allowed by law. The first possible consequence is that "[t]he director of the Division of Insurance, or the secretary of labor if the employer is self-insured, may suspend, revoke, or refuse to renew the certificate of authority, or may suspend or revoke all certificates of authority granted under Title 58 or § 62-5-4 to any company or employer which fails, refuses, or neglects to comply with the provisions of this section." The second possible consequence is the imposition of an administrative fine payable to the Department of Labor. The automatic acceptance of a claim as being compensable is not among the two possible consequences clearly expressed by SDCL 62-6-3.

The failure by an insurer to issue a denial letter within the time allowed by SDCL 62-6-3 does not result in the automatic, irrevocable acceptance of the claim by the insurer. To conclude otherwise would be contrary to the statutes in Title 62 that specifically set forth what a claimant must prove in order to establish a compensable claim. See SDCL 62-1-1(7), which provides the definition of injury ("Our law requires a claimant to establish that his injury arose out of his employment by showing a causal connection between his employment and the injury sustained. The employment need not be the direct nor

proximate cause of the injury in order to establish this causal connection, but rather must be shown to be a contributing factor to the injury. The claimant also must prove by a preponderance of medical evidence, that the employment or employment related injury was a major contributing cause of the impairment or disability." Horn v. Dakota Pork, 2006 SD 6, ¶ 14 (citations omitted)). See also SDCL Chapter 62-8, which sets forth the requirements to establish entitlement to benefits for an occupational disease ("Those seeking compensation for an occupational disease must prove: (1) they suffer from an occupational disease as defined in 62-8-1(6); (2) they are disabled from performing work in the last occupation in which they were injuriously exposed to the hazards of such disease; and (3) the disease is 'due to the nature of [the] occupation or process' in which they were employed before their disablement." Sauer v. Tiffany Laundry and Dry Cleaners, 2001 SD 24, ¶ 9).

Claimant's argument that Employer and Berkley are deemed to have accepted compensability of her injury claim by failing to timely deny the claim within 50 total days as prescribed by SDCL 62-6-3 is rejected. The failure to deny a claim within the time established by SDCL 62-6-3 does not bar an employer and insurer from denying that a claim is compensable. Employer and Berkley are not deemed to have accepted compensability of Claimant's claim by failing to deny her claim within the time prescribed by SDCL 62-6-3.

ISSUE 2 ON REMAND

> *Claimant's assertion that Appellee Berkley's purported denial of Appellant's claim was "ultra vires" and a nullity since Appellee Berkley stated Tri-State was not on risk for the claim, Berkley is alleged not to be an "insurer" as required by SDCL 62-6-3, Berkley is alleged to have had no authority to [a]ct for Appellee Travelers, and Berkley is alleged to have violated SDCL 62-7-30 by not utilizing certified or registered mail as mandated by said statute.*
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> a) *Berkley is alleged not to be an "insurer" as required by SDCL 62-6-3.*

Berkley is not an insurer. However, Berkley is a Third Party Administrator for Tri-State Insurance Company of Minnesota. SDCL Chapter 58-29D specifically authorizes and provides for the licensing of third party administrators. SDCL 58-29D-2 states:

> For the purposes of this chapter, an administrator or third-party administrator or TPA is a person who directly or indirectly solicits or effects coverage of, underwrites, collects charges or premiums from, or adjusts or settles claims on residents of this state, or residents of another state from offices in this state, in connection with workers' compensation[.]

SDCL 62-6-3 does not prohibit an insurer from utilizing an agent to investigate claims and issue notices on behalf of the insurer. SDCL 59-3-1 provides that an agent may perform acts permitted to the principal. This statute reads, "[e]very act which may legally be done by or to any person, may be done by or to the agent of such person for that purpose unless a contrary intention plainly appears."

Any reference to Berkley as an Insurer for Employer refers to Berkley's agency status for Tri-State Insurance Company of Minnesota.

The fact that Berkley is not an insurer has no bearing on the validity of the denial letter that it issued on March 7, 1996. Claimant's argument is rejected.

b) *Berkley is alleged to have had no authority to [a]ct for Appellee Travelers.*

Berkley did not act for Travelers. Berkley issued a valid denial letter to Claimant denying responsibility for any claim of benefits that occurred during the time period in which Tri-State Insurance Company of Minnesota provided workers' compensation insurance to Employer.

c) *Claimant's assertion that Appellee Berkley's purported denial of Appellant's claim was "ultra vires" and a nullity since Appellee Berkley stated Tri-State was not on risk for the claim.*

Claimant filed her First Report of Injury in November 1995, claiming that she suffered an injury on November 9, 1995. Berkley was on the risk to provide workers' compensation coverage for Employer from May 25, 1995, to April 27, 1996.

As previously stated, Berkley did not act for Travelers when it issued the March 7, 2006, denial letter. Berkley issued the denial letter and stated that based upon the medical records, Claimant's "condition preceded our workers [sic] compensation coverage for your employer." Berkley had the authority to review, administer and deny Claimant's claim for the time period Berkley was on the risk. In other words, Berkley did not exceed its authority when it reviewed Claimant's claim for workers' compensation benefits and issued its denial letter. Of course, pursuant to SDCL 62-6-3, Berkley was required to notify Claimant that it was denying her claim for workers' compensation benefits for the time period that Berkley was on the risk. Berkley did not exceed its authority when it issued the March 7, 1996, denial of Claimant's claim on behalf of Tri-State Insurance Company of Minnesota.

Claimant's assertion that Berkley's purported denial of Claimant's claim was "ultra vires" and a nullity since Berkley stated Tri-State was not on risk for the claim is rejected.

d) *Berkley is alleged to have violated SDCL 62-7-30 by not utilizing certified or registered mail as mandated by said statute.*

Berkley sent its denial letter to Claimant on March 7, 1996, by regular mail. Claimant admitted she received the denial letter from Berkley. SDCL 62-7-30 provides:

> All notices or orders provided for in this chapter may be served personally or by registered or certified mail. When served by registered or certified mail, proof by affidavit thereof must be accompanied by post office return receipt. When, however, any party is represented by an attorney, such service must be made on

> such attorney, and may be made either in the manner provided in this section, or in the manner provided by § 15-6-5.

(emphasis added). Claimant was not represented by an attorney when Berkley issued its March 7, 1996, denial letter.

The language of SDCL 62-7-30 is discretionary and permissive in terms of the method of service. The South Dakota Supreme Court "has repeatedly held that the word 'may' should be construed in a permissive sense unless the context and subject matter indicate a different intention." Breck v. Janklow, 2001 SD 28, ¶ 11. See also State v. Burgers, 1999 SD 140, ¶15 (word "may" in a statute should be construed in a permissive sense).

Berkley complied with the requirements of SDCL 62-7-30 when it sent Claimant the denial letter by regular mail. The language of the statute is permissive and Berkley was not obligated to send its denial letter by registered or certified mail. Berkley did not violate SDCL 62-7-30 and its denial letter was legally sufficient.

The arguments presented by Claimant in Issue 2 on Remand are rejected. Berkley issued a valid denial letter on March 7, 1996. Claimant failed to file her Petition for Hearing within two years of receipt of Berkley's denial letter as required by SDCL 62-7-35 and her claim for an injury is barred.

ISSUE 3 ON REMAND

> *Claimant's assertion that the conduct of all Appellees considered separately or together "lulled "Appellant" into a false sense of security" regarding the status of her claim thus, estopping Appellees from asserting the statute of limitations.*

Claimant admitted that she received the March 7, 1996, denial letter from Berkley. Claimant read and understood the denial letter. Claimant understood Berkley's denial letter meant that she "wasn't going to be receiving any workman's comp."

SDCL 62-7-35 provides:

> The right to compensation under this title shall be forever barred unless a written request 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.

This statute is clear and does not provide for any exceptions.

Claimant received the denial letter from Berkley and she had two years to file her written request for a hearing. Claimant filed her Petition for Hearing with the Department on September 16, 2002. Claimant failed to comply with the requirements of SDCL 62-7-35.

Claimant's assertion that the conduct of Berkley and Travelers considered separately or together "lulled Claimant into a false sense of security" regarding the status of her claim thus, estopping Berkley and Travelers from asserting the statute of limitations is rejected.

ISSUE 4 ON REMAND

> *Whether the Department intended by its rulings to dismiss the insurers only, or to dismiss Claimant's claims as against the employer and the insurer(s).*

The term "Employer" is defined by SDCL 62-1-2:

> As used in this title the term "employer" includes the state and any municipal corporation within the state or any political subdivision of this state, and any individual, firm, association, limited liability company, or corporation, or the receiver or trustee of the same, or the legal representative of a deceased employer, using the service of another for pay. Any person performing labor incidental to the person's own occupation who has elected to proceed under the provisions of § 58-20-3 by purchasing workers' compensation insurance to cover the person, is deemed to be an employer under this section irrespective of whether the person is using the services of another for pay. If the employer is insured, it shall include the employer's insurer so far as applicable.

(emphasis added). Employer and its Insurers are not separate entities. Employer selected to have Berkley, as Third Party Administrator for Tri-State Insurance Company, provide workers' compensation insurance from May 25, 1995, to April 27, 1996. Prior to that time, Employer selected Travelers to provide workers' compensation insurance from May 25, 1994, to May 25, 1995.

Each insurer filed an answer on behalf of Employer and Insurer. See Separate Answer of Parkview Care Center and Berkley Administrators and Answer of Travelers Insurance Companies to Claimant's Petition for Worker's Compensation Benefits (filing the Answer "for itself and on behalf of Parkview Care Center").

Employer and its Insurers were not treated as separate entities in the 2005 and 2006 rulings. Claims against both Employer and its respective Insurers were dismissed, with one exception. Employer and Insurer Travelers are still potentially liable for benefits if it is established that Claimant suffered a compensable injury during the time Travelers was on the risk providing workers' compensation coverage to Employer. Employer and Insurer Berkley do not have any potential liability to Claimant for workers' compensation benefits for the period of time that Berkley was on the risk providing workers' compensation coverage to Employer.

Reconsidering the above-stated issues does not alter the result of the previous decisions issued in 2005 and 2006. Those rulings are incorporated herein. Any claim Claimant may have for an injury during the time Berkley was on the risk is dismissed as against Employer and Berkley. Any claim Claimant may have for an injury during the

time Travelers was on the risk has not been dismissed. Claimant's claim for benefits based on an occupational disease pursuant to SDCL Chapter 62-8 is dismissed in its entirety against Employer and its Insurers Berkley and Travelers.

Berkley shall submit Findings of Fact and Conclusions of Law, and an Order consistent with this Decision on Remand, and if necessary, proposed Findings and Conclusions within ten days from the date of receipt of this Decision on Remand. Travelers and Claimant shall have ten days from the date of receipt of Berkley's proposed Findings and Conclusions to submit objections or to submit proposed Findings and Conclusions. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Berkley shall submit Stipulation along with an Order in accordance with this Decision.

Dated this 30th day of August, 2006.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Elizabeth J. Fullenkamp
Administrative Law Judge