September 3, 2009

Thomas W. Parliman
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141 North Main Ave., Suite 504
Sioux Falls, SD 57104-6429

***Letter Decision and Order***

Jennifer L. Wollman
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RE: HF No. 68, 2008/09 – Richard Skallerud v. Amesbury Group and Travelers Indemnity co. of America.

Dear Mr. Parliman and Ms. Wollman:

***Submissions***

This letter addresses the following submissions by the parties:

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| June 18, 2009 | Motion to Compel Production of Documents and Answers to Interrogatories; |
| | Affidavit in Support of Motion to Compel Production of Documents and Answers to Interrogatories |
| June 21, 2009 | Employer and Insurer's Motion for Summary Judgment; |
| | Brief in Support of Employer and Insurer's Motion for Summary Judgment; |
| | Affidavit of Avery York; |
| July 22, 2009 | Employer and Insurer's Resistance to Motion to Compel Discovery. |
| July 24, 2009 | Claimant's Resistance to Motion for Summary Judgment; |

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| | Brief in Resistance to Motion for Summary Judgment and Motion to Strike; |
| | Affidavit of Richard Skallerud; |
| | Employer's Answer to Request for Admissions; |
| August 7, 2009 | Reply Brief in Support of Employer and Insurer's Motion for Summary Judgment. |
| August 11, 2009 | Letter from Thomas W. Parliman. |
| August 12, 2009 | Letter from Jennifer L. Wollman. |

***Facts***

The facts of this case as reflected by the above submissions and documentation are as follows:

1. Richard Skallerud (Claimant) was allegedly injured in a work related accident while employed by Amesbury Group (Employer) on or about July 25, 2006. Claimant alleges that he was injured while walking from the loading dock to his vehicle in the parking lot as he was leaving for the day.
2. On July 25, 2006, Employer was insured by Travelers Indemnity Co. of America (Insurer) for purposes of worker's compensation.
3. On September 14, 2006, Insurer sent a letter to Claimant and the Department of Labor. The letter stated in part:

   > Since we have been unable to obtain medical information to determine the extent of your preexisting condition, we do not have support that your employment related activities were a major contributing cause of your condition. Therefore, we must respectfully deny your claim, but we will continue to pursue the medical information. If information is received that would cause us to change our position, Aii [sic] parties will be notified in writing.

4. On October 3, 2006, Claimant sent Insurer an email. The email referred to Insurer's denial of his claim and asked when a reconsideration of the denial could be expected.
5. On December 7, 2007, Employer sent Claimant another letter which stated in part:

   > Our investigation has been completed and, at this time, we must respectfully deny your claim. Based on the information we received.
   >
   > As you are aware, a conditional denial was issued on 9/14/2006 because we had not received all the previously requested information which was

needed to properly evaluate your claim for workers compensation benefits.

Since then we have received the information and had a medical chart review performed by a medical exam specialist. Enclosed is a copy of the [sic] report:

6. On November 7, 2008, Skallerud filed a Petition for Hearing with the Department of Labor requesting workers compensation benefits based on the July 25, 2006 injury.
7. Additional facts may be discussed in the analysis below.

***Motions for Summary Judgment***

Employer and Insurer filed a Motion for Summary Judgment. They contend in their motion that action on Claimant's Petition for Hearing is barred by the two years limitation provided in SDCL 62-7-35.

Summary Judgments are governed by ARSD 47:03:01:08: That regulation states:

> 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.

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 burden is on the moving party to clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law. *Estate of Elliott*, 1999 SD 57, ¶15, 594 NW2d 707, 710 (citing *Wilson*, 83 SD at 212, 157 NW2d at 21). On the other hand, [t]he party opposing a motion for summary judgment must be diligent in resisting the motion, and mere general allegations and denials which do not set forth specific facts will not prevent issuance of a judgment. *Breen v. Dakota Gear & Joint Co*., Inc., 433 NW2d 221, 223 (SD 1988) (citing *Hughes-Johnson Co., Inc. v. Dakota Midland Hosp.*, 86 SD 361, 364, 195 NW2d 519, 521 (1972)). See also *State Auto Ins. Companies v. B.N.C.*, 2005 SD 89, 6, 702 NW2d 379, 382. [T]he nonmoving party must substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy. *Elliott,* 1999 SD 57, ¶16, 594 NW2d at 710 (quoting *Himrich v. Carpenter*, 1997 SD 116, 18, 569 NW2d 568, 573 (quoting *Moody v. St. Charles*

*County*, 23 F3d 1410, 1412 (8thCir 1994))).

McDowell v. Citicorp USA, 2007 SD 53, ¶22, 734 N.W.2d 14, 21.

There is no dispute about the fact related to the Motion for Summary Judgment. On September 24, 2006, Insurer notified Claimant and Department of Labor, by letter that his claim for the July 25, 2006 injury was denied. The letter stated that the parties would be notified in writing if the Insurer received medical information in the future which caused it to change its position. On October 3, 2006, Claimant acknowledged receipt of Insurer's denial in an email and asked Insurer that the denial be reconsidered after reviewing additional medical information. On December 7, 2006, Insurer sent Claimant a letter which informing him that its investigation was complete and, again, denied the claim for the July 25, 2006 injury. Claimant filed a Petition for Hearing with the Department of Labor on November 7, 2008.

The next quest posed by Employer and Insurer's motion is whether the Department of Labor lacks jurisdiction in this case because of the time limitation imposed by SDCL 61-7-35. SDCL 62-7-35 provides as follows:

> 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.

In this case, Insurer's letter of September 14, 2006, notified the Claimant and the Department of Labor that it intended to deny coverage for Claimant's July 25, 2006 injury. Claimant filed a Petition for Hearing on November 7, 2008, more than two years after Insurer's September 14, 2006 letter. Therfore, Claimant is barred from compensation in this case for the July 25, 2006 injury.

Claimant argues that his action is not barred because Insurer's September 14, 2006 letter contained a conditional denial. He asserts that the two year limitation did not begin to run until Insurer sent its final denial letter on December 7, 2006. This argument fall short.

The language in SDCL 62-7-35 does not dictate that the two year limitation begins to run from the last notification when more than one denial is issued. There is also no language in the statute or in Insurer's letters that suggests that the first denial was superseded or withdrawn by the second denial. After the initial denial, Claimant sought a redetermination. After reconsidering the matter, Insurer restated its denial in the December 7, 2006 denial.

There is also no provision that tolls the time limitation in this case. To the contrary, the statute provides that the time limitation can begin to run prior to the actual denial. SDCL

62-7-35 states that compensation is barred unless the claimant files a Petition for Hearing, “within two years after the insurer notifies the claimant and the department, in writing, “that it intends to deny coverage in whole or in part.”

The term, “intends to deny coverage,” is futuristic. The language indicates that the notice need only voice the “intent” to deny coverage and that the “denial” may be made at a later time, presumably when the bills are presented or, as in this case, when a final denial is issued.

Despite this allowance for future denials, it must be noted that the denial contained in Insurer’s September 14, 2006, letter was made in the present tense. The conditional aspect of the notification was that the Insurer may change its position from denial to acceptance if it received information in the future to justify the change. That condition was obviously never met.

Claimant failed to file a petition for hearing with two years of Insurer’s September 14, 2006, written notification that of its intent to deny coverage of Claimant’s July 25, 2006, injury. Consequently, the Department of Labor has no jurisdiction to hear this case.

***Motion to Compel and Motion to Strike.***

The determination that the Department of labor does not have jurisdiction in this case, renders Claimant’s Motion to Compel and Motion to Strike, moot.

***Order***

Employer and Insurer have shown that there is no genuine issue as to any material fact and that they are entitled to a judgment as a matter of law. Therefore, Employer and Insurer’s Motion for Summary Judgment is granted. This case is dismissed with prejudice. This letter shall constitute the order in this matter.

Sincerely,

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