

January 17, 2019

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**LETTER DECISION AND ORDER**

Rebecca L. Mann  
Gunderson, Palmer, Nelson & Ashmore, LLP  
P.O. Box 8045  
Rapid City, SD 57709-8045

RE: HF No. 80, 2017/18 – Anneke DeHart v. Border Foods of Wyoming, LLC, d/b/a  
Taco Bell and PMA Insurance Company

Dear Ms. Lewis and Ms. Mann:

This letter addresses the following submissions by the parties:

November 20, 2018	Employer/Insurer's Motion to Dismiss Employer/Insurer's Brief in Support of Motion Affidavit of Rebecca L. Mann
December 13, 2018	Claimant's Memoranda in Support of Motion to Amend Claimant's Memoranda in Opposition to Motion to Dismiss Affidavit of Barbara Anderson Lewis
December 26, 2018	Employer/Insurer's Response to Motion to Amend Employer/Insurer's Reply to Claimant's Opposition

**QUESTION PRESENTED: IS EMPLOYER/INSURER ENTITLED TO DISMISSAL?**

## **FACTS**

On August 24, 2017, Claimant suffered a work-related injury while employed at a Taco Bell restaurant owned by Employer. Claimant was seen at Black Hills Urgent Care on the same day and was taken off work until further notice. Claimant had a follow-up appointment August 27, 2017 and presented again on August 31, 2017. At that time, she was released back to work with no restrictions. Claimant also had a scheduled follow-up for September 7 but was unable to attend the appointment. Claimant did not reschedule. Claimant then sought the treatment of Dr. Karla Polito, who referred claimant to a specialist. Gallagher Basset, a third-party administrator of Insurer's workers compensation cases, received Dr. Polito's request on October 30, 2017 and approved it on November 4.

A dispute subsequently arose regarding whether Claimant was entitled to any indemnity benefits for her injury. Claimant retained counsel and sent a letter to Employer/Insurer on January 19, 2018 requesting TTD benefits. Employer/Insurer claim that it did not receive a letter from any of Claimant's treating physicians indicating that Claimant could not return to work and denied the claim. On February 28, 2018, Claimant filed a petition with the Department seeking workers compensation benefits. On March 7, 2018, Claimant's attorney sent a letter to Dr. Christopher Dietrich asking about Claimant's work status. Dr. Dietrich responded that Claimant had been on work restrictions since her accident and was unable to work. Insurer began paying Claimant TTD benefits on March 19, 2018. Employer/Insurer then filed a motion to dismiss

Claimant's petition arguing that since it had paid Claimant TTD benefits, no case in controversy existed and the Department was without jurisdiction to hear the petition.

### **ANALYSIS**

At issue in this case is not whether Employer/Insurer acted unreasonably in denying Claimant workers compensation benefits for her injury. Rather, the issue is whether Claimant may amend her petition to allege that Employer/Insurer's conduct entitles her to attorney's fees pursuant to SDCL 58-12-3. This statute provides:

In all actions or proceedings hereafter commenced against any employer who is self-insured, or insurance company, including any reciprocal or interinsurance exchange, on any policy or certificate of any type or kind of insurance, if it appears from the evidence that such company or exchange has refused to pay the full amount of such loss, and that such refusal is vexatious or without reasonable cause, the Department of Labor and Regulation, the trial court and the appellate court, shall, if judgment or an award is rendered for plaintiff, allow the plaintiff a reasonable sum as an attorney's fee to be recovered and collected as a part of the costs, provided, however, that when a tender is made by such insurance company, exchange or self-insurer before the commencement of the action or proceeding in which judgment or an award is rendered and the amount recovered is not in excess of such tender, no such costs shall be allowed. The allowance of attorney fees hereunder shall not be construed to bar any other remedy, whether in tort or contract, that an insured may have against the same insurance company or self-insurer arising out of its refusal to pay such loss.

Employer/Insurer argue that the Department no longer has jurisdiction over this case since it has paid Claimant all benefits to which she was entitled. In her petition for hearing, Claimant's prayer for relief specified "unless the Employer admits said claim and agrees to pay benefits as prayed herein, that an award be made against the Employer requiring payment to Claimant..." Claimant is not arguing that she is entitled to more benefits than what have been paid by Employer/Insurer. Rather, Claimant amended her petition for the sole purpose of obtaining attorney's fees. On various

occasions, the Department has considered whether a claimant can request attorney's fees under SDCL 58-12-3 when a petition does not go to a full hearing. In *Re: Stanley Sachau vs. Nash Finch Co. & Farmers Ins.*, the Department was asked to award attorney's fees in a contested case even though the insurer admitted that claimant was permanently and totally disabled a day before the hearing. The Department denied attorney's fees, noting:

Furthermore, the applicable statutes clearly require that a hearing on the claim be held and that the party seeking fees prevail at the same. A settlement or admission does not activate the provisions of the statute. Since there was no judgment or award pursuant to a hearing on the merits of permanent total disability, the Department is not authorized by statute to assess fees on this claim.

HF No. 396, 1992/93, 1993 WL 515774, at \*2 (S.D. Dept. Lab. Aug. 9, 1993).

in *Lancelot Johnson v. Lowe Roofing, Inc. and American Casualty Co.*, the Department again considered the issue of whether attorney's fees should be awarded under SDCL 58-12-3 when a petition was resolved prior to a hearing. The Department again determined that it could not:

It is therefore appropriate to conclude... that a law requiring the "rendition of a judgment" against an insurer for an attorney's fee allowance to be made was not satisfied by a settlement... Because 58-12-3 calls for not just an award per 62-7-5, but a "rendered award," the Department, not the parties, must decide the relevant issues on the merits for the matter to be susceptible to an attorney's fee claim. A settled award is not a "rendered" award within the meaning of SDCL 58-12-3.

HF No. 18, 2013/14, 2016 WL 1266428, at \*2 (S.D. Dept. Lab. Feb. 2016)

Both cases stand for the proposition that it is necessary for a petition to advance to a hearing before the Department can consider attorney's fees under SDCL 58-12-3. When an insurer ultimately acquiesces to Claimant's demand for benefits, as in this case, the Department cannot consider attorney's fees.

Claimant argues that since she could file a petition seeking only attorney's fees, judicial economy dictates that she should be able to amend her petition. In support of this position, Claimant cites to *Tovares v. Gallagher Basset Services, Inc.*, a South Dakota Federal District Court opinion. However, Claimant's reliance on *Tovares* is misplaced. *Tovares* involved a bad faith claim against an insurer in federal court. The defendant insurer filed a motion to dismiss arguing among other things, that Claimant was not entitled to attorney's fees. The district court upheld a magistrate denial of the motion, noting that "[f]or purposes of resolving defendants' motions to dismiss, it appears plaintiff may be entitled to attorney's fees under either SDCL § 58–33–46.1 or § 55–12–3 [sic]." *Tovares v. Gallagher Bassett Servs., Inc.*, No. CV 16-5051-JLV, 2017 WL 4041983, at \*9 (D.S.D. Sept. 12, 2017). An award of attorney's fees in *Tovares* were not based solely on SDCL 58-12-3. Rather, the district court found that plaintiff's suit was also based on a claim for misrepresentation of an insurance policy under SDCL 58-33-46.1. The Department does not have jurisdiction to consider such a claim.

### **CONCLUSION AND ORDER**

Claimant's motion to amend her petition is DENIED. Employer/Insurer's motion to dismiss is GRANTED. This letter shall constitute the Department's order in this matter.

Sincerely,

/s/ Joe Thronson  
Joe Thronson  
Administrative Law Judge