SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION
DIVISION OF LABOR AND MANAGEMENT

NANCY PALMQUIST,

Claimant, **HF No. 85, 2009/10**

vs.

LUVERNE TRUCK EQUIPMENT, INC., **ORDER ON MOTION FOR SUMMARY JUDGMENT**

Employer,

and

TRAVELERS,

Insurer.

Employer/Insurer filed a Motion for Summary Judgment relative to this matter on or about January 29, 2016. Claimant responded to that Motion and filed a cross-motion for Summary Judgment on March 17, 2016, and Employer/Insurer added a Motion to Strike filed on May 11, 2016. The Department, having considered all submissions, including briefs, affidavits, and case citations, and being fully advised in the premises, issues this decision and order addressing all the motions. The matter is addressed pursuant to ARSD 47:03:01:08:

> 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 parties have asserted various facts in connection with the claim, some disputed, some not. Here are the facts the department understands to be undisputed:

1. Claimant was employed by Employer on or before November 26, 1997;
2. Claimant injured her right knee on November 26, 1997, and that injury was work-related;
3. The department approved an SDDOL Form 111 on December 12, 2000, signed by Linda Nutting, Insurer's representative, and the Claimant. This form included the following recitations: "If additional medical treatment is required in the future

as a result of such injury, the employer/insurer shall be obligated to pay such future medical expenses … This memorandum is a receipt only. It does not constitute an agreement, stipulation, or release … the employee does not waive his/her right to pursue any benefits to which he/she may be entitled."

4. In a letter dated February 6, 2002, sent to the Claimant and received by the department, Insurer denied all benefits. It included the following paragraph: "If you feel you have any evidence or documents which dispute these findings, we would be happy to review our present position to deny your claim based upon receipt of the information. If you feel our decision to deny your claim is incorrect, you have the option of commencing an arbitration proceeding with the South Dakota Dept. of Labor under the terms of the statute. You have two years from the date of the injury to commence that proceeding."
5. Insurer reconsidered its position and continued to pay both medical and indemnity benefits to Claimant until 2007. In an undated letter, Insurer formally notified the Claimant it was withdrawing the denial.
6. Claimant sent a handwritten letter to the department which was received on April 29, 2002. The letter said: "This letter is being written for a arbitration proceeding. For the date of injury 11-26-97 for Nancy S. Palmquist Employer Luverne truck equipment in Brandon, S.D. Claim file 043-CB-BWD4368N insurance carrier Travelers insurance – Enclose is a copy of the letter I receive from them. Thank you Nancy Sue Palmquist 304 W Lincoln St Luverne MN 56156 (the social security number was provided, but is omitted here for the sake of Claimant's privacy.)
7. Claimant did not withdraw the request made in her 2002 letter;
8. On May 29, 2007, Insurer sent Claimant and the department a letter denying further medical treatment for the November 26, 1997 injury. This letter made no mention of Claimant's right to a hearing or the two-year limit referred to in the previous denial letter;
9. Insurer paid a medical bill in January, 2008 for services rendered in January, 2007;
10. Claimant filed a petition for hearing and mediation request on the department's standard forms, which were received by the department on August 13, 2009;
11. Employer/Insurer filed an answer to Claimant's petition on December 9, 2009. It filed an answer to amended petition on August 14, 2013, which added the claim of Claimant's failure to file her petition within the limitation period established by SDCL 62-7-35;
12. Claimant settled the indemnity portion of her claim with Employer/Insurer on July 14, 2015. The agreement reserved Employer/Insurer the right to litigate any issues about Claimant's past, current or future medical benefits. The department approved this agreement on July 20, 2015.

Additional factual recitations shall be made as necessary.

ANALYSIS & DECISION

Employer/Insurer moves by way of summary judgment for dismissal of Claimant's petition and claims due to the passing of the two-year statute of limitations period in 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.

Two years passed between Employer/Insurer's denial of benefits in May, 2007 and Claimant's filing of a petition for hearing form in August, 2009. The only issue is whether this requires the dismissal of her claim. In that regard, the first step is to examine whether Claimant's 2002 letter constituted a petition.

SDCL 62-7-12 allows a claimant or employer to request a hearing according to department rules. ARSD 47:03:01:02 sets out the requirements for a petition for hearing:

> 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.

Here, Claimant's April 29, 2002 letter gave her name, the employer's name, the insurer's name, the date she claimed she was injured, and that she wanted arbitration. It did not say where she was injured, the manner in which she was injured, that the employer was given notice of the claim, the nature and extent of her disability, and did not make a general request for an award.

The provisions involved here should be interpreted within their plain meaning where possible, with the object of promoting justice. A limitations statute exists to eliminate the prosecution of stale claims; it is not a mere

technicality, and adherence with it is strictly required. *Dakota Truck Underwriters v South Dakota Subsequent Injury Fund,* 2004 SD 120, ¶17, 689 N.W.2d 196, 201. A hearing petition should contain sufficient information that a defendant is notified of a claim against it, and prompt some kind of response either accepting or challenging the claims being made against it. *C.f. Moore v Michelin Tire Co, Inc.,* 1999 SD 152, 603 N.W.2d 513. The April 29, 2002 letter does not provide this notice or prompt any response, and is therefore held not to constitute a petition for hearing under ARSD 47:03:01:02.

Claimant must then evoke some legal ground for avoiding the claim bar in SDCL 62-7-35, triggered by the passage of time from Employer/Insurer's denial letter in 2007. She asserts she can demonstrate a change of condition to do so, citing *Owens v. F.E.M. Electric Assn., Inc.,* 2005 S.D. 35, 694 N.W.2d 274.

In *Owens*, the employee suffered a shoulder injury in a work-related motor vehicle accident, which he claimed also caused a back injury. Both claims were denied in writing, two years passed, and the Court concluded his claim was barred under SDCL 62-7-35. *Owens,* 2005 S.D. 35, ¶2-3, 694 N.W.2d at 274. Owens further claimed, however, that his claim should be reopened under SDCL 62-7-33. This claim was also denied, but the Court did so by reasoning this way:

> Assuming, arguendo, that Owens could prove causation, there is no doubt that the herniated disc which manifested itself on May 5, 1999 would have been a change in condition had it occurred after the limitations period had run on his claim for injuries from the October 1998 accident. The proper procedure for Owens would have been to request a hearing for review of Federated's denial of the portion of his claim relating to his back injury. Allowing application of SDCL 62-7-33 before the two year time limitations period expired would strip the effectiveness of the two year limit on requesting a hearing to review a claim. Because Owens, by his own admission and by the post-surgical reports of Dr. Rak, did not experience a change in condition after June 25, 2001, he did not experience a change in condition under SDCL 62-7-33.

Owens, 2005 SD 35, ¶20, 694 N.W.2d at 280.

This flies in the face of the clear language of 62-7-35, which says all claims which have been denied in writing and for which no petition for hearing has been filed are "forever barred." 62-7-35.1, which closes claims in which no benefits have been paid for three years, expressly allows reopening for claims in which a change of condition can be demonstrated, but no similar language is in 62-7-35. To allow reopening under 62-7-35 would be contrary to the Legislature's apparent intent. Claimant makes an associated argument that SDCL 62-3-18 says the legal obligation to pay benefits cannot be relieved by operation of other rules or regulations, but this obligation only exists, if at

all, where a change of condition can be demonstrated as a means of avoiding the 62-7-35 limitation period, and it has been concluded that claim is not available.

Assuming for the sake of addressing the issue that Claimant were able to avoid the application of 62-7-35 by claiming a change of condition under 62-7-33, the record does not establish a genuine issue of material fact that Claimant experienced such a change. Claimant must prove, given the circumstances of her claim, that a change of condition occurred, the change derived from an known injury with its disabling character unknown, and the unknown injury is causally connected to employment, or the unknown disabling character is causally connected to the original, compensable injury. *McDowell v Citibank,* 2007 S.D. 52, ¶12, 734 N.W.2d 1, 5. Were the dicta in *Owens* to be accepted as a correct statement of the law, Claimant must prove that change in condition occurred after two years from the May 29, 2007 denial. *Owens*, 2005 SD 35, ¶20, 694 N.W.2d at 280.

Claimant must first demonstrate a change in her physical condition that affects her earning capacity. *McDowell,* 2007 SD 52, ¶14, 734 N.W.2d 1, 6. Claimant has had continuous pain in her right knee since her injury. She has had five arthroscopic surgeries in the knee between 1998 and 2014, and been left with the same symptoms. Nor has her earning capacity changed. In 2007 she was employed at McDonald's working two to three hour shifts for a total of ten to fifteen hours a week. From 2008 to 2012, her employment actually increased, as she worked twenty-five hours a week at a Shell gas station from 2008 to 2010, and twenty hours a week at Sam's Club from 2010 to 2012. Since 2012, she has worked at Casey's General Store for eighteen hours a week. She has not presented material facts that her physical or earning capacities have changed from 2007 to the present.

Nor is there anything unknown about the disabling character of her injury. Her physician, Dr. VanDemark, acknowledged there has never been a time since her injury that she has not been affected by her work injury, and her many surgeries and regular reports of knee pain attest to that. Her doctors have been suggesting she have a knee replacement as far back as 2003. Dr. VanDemark commented that any changes in her knee since 2007 are "the natural progression of a knee that's had a meniscectomy done." For the sake of this ruling, as for summary judgment purposes any inferences from the facts must be taken in a manner most favorable to the Claimant, it is taken as a given that such changes were a product of the work injury – degenerative arthritis caused by the trauma of injury and the treatment necessitated by it. Nonetheless, there is nothing about the disabling nature of her injury that has not been known for years before 2007. Claimant has not presented material facts that demonstrate she experienced a change in her physical and economic condition to warrant reopening under 62-7-33.

Claimant's additional arguments for avoiding the 62-7-35 limitation rest in equity: equitable tolling, equitable estoppel, waiver, and mend the hold. They will be addressed in turn.

For a limitation statute's application to be equitably tolled, there must be circumstances that are "truly beyond the control of the plaintiff." The doctrine should be applied "where a party acts diligently, only to find himself caught up in an arcane procedural snare." *Dakota Truck Underwriters v SD Subsequent Injury Fund,* 2004 SD 120, ¶20, 689 N.W.2d 196, 202 (citations omitted.) The *Dakota Truck Underwriters* Court noted that in workers' compensation cases, 'the making or filing of a claim within the required time is jurisdictional ... being an essential element of the right to compensation.' Where the making or filing of a timely claim is jurisdictional it cannot be waived or avoided on equitable grounds such as by a waiver or an estoppel." *Dakota Truck Underwriters,* 2004 SD 120, ¶21, 689 N.W.2d at 202. Assuming such a claim can be made, three things must be shown: "(a) a timely notice, (b) lack of prejudice to the defendant, and (c) reasonable and good-faith conduct on the part of the plaintiff. *Dakota Truck Underwriters,* 2004 SD 120, ¶24, 689 N.W.2d at 202.

Claimant has not identified facts that create an issue about whether 62-7-35 should be equitably tolled. No facts have been asserted that made filing beyond Claimant's control, that she did not receive a timely notice of her denial, or that Employer/Insurer would not be prejudiced by her late filing. Equitable tolling would not be appropriate.

The *Dakota Truck Underwriters* Court explained the doctrine of equitable estoppel this way:

> In order to constitute an equitable estoppel ... representations or concealment of material facts must exist; the party to whom it was made must have been without knowledge of the real facts; the representations or concealment must have been made with the intention that it should be acted upon; and the party to whom it was made must have relied thereon to his prejudice or injury …estoppel cannot exist if any of these essential elements are lacking, or if any of them have not been proven by clear and convincing evidence.

Dakota Truck Underwriters, 2004 SD 120, ¶32, 689 N.W.2d at 204 (citations omitted.)

Here, Claimant asserts that because the 2007 denial letter, unlike the 2002 one, did not recite Claimant's right to a hearing and the two-year limitation period, she was lulled into inaction and the petition filing period expired. The insurer had paid benefits in 2002 after denying them, and Claimant asserts she expected the same thing again in 2007. A bill was paid in 2008, an act she claims gave her a false sense of security about Insurer's intentions.

These claims do not give rise to a claim for equitable estoppel. Claimant did not know about the payment of the medical bill. She did know Insurer was denying her claims, and that she had to file a petition to contest the denial; she had filed what she believed was such a request in 2002. Nothing Employer/Insurer communicated to her could be read in such a way that she would reasonably believe she did not have to file a petition to protect her rights; instead, it told her it might consider mediation but would need more information before agreeing to participate in that. These actions do not demonstrate Insurer's intention to encourage Claimant to not file a petition, and do not give grounds for Claimant to avoid the application of 62-7-35.

Nor may the limitation period be avoided due to waiver or the closely related equitable doctrine of mend the hold (an equitable doctrine based on the principle that an insurer should not be allowed to change its basis for refusing to pay a claim, *See Harbor Insurance Co. v. Continental Bank Corp.* 922 F.2d 357 (7th Cir. 1990)). Returning to *Owens,* the Court held a payment for medical expenses after a denial was made does not operate as a waiver, simply as a commitment to pay claims previously approved. *Owens*, 2005 SD 35, ¶16, 694 N.W.2d at 280-81. It has long been held that an insurer does not incur liability merely by paying a bill, as insurers would be discouraged from paying promptly. *Martz v Hills Materials,* 2014 SD 83, ¶21, 847 N.W.2d 413, 419; *Tiensvold v Universal Transport, Inc.,* 464 N.W.2d 820, 825 (S.D. 1991). Similar reasoning is applied to deny the application of mend the hold to insurer's payment of a single medical bill for services incurred while it still considered itself liable. Claimant also argues Employer/Insurer should not be permitted to make use of the statute of limitations defense when it did not raise it in its original answer, but jurisdictional claims such as this can be made at any time. *Medley v. Salvation Army, Rapid City Corps,* 267 N.W.2d 201, 203 (S.D. 1978).

Claimant has not presented material facts which prevent the application of 62-7-35, Employer/Insurer's motion for summary judgment must therefore be GRANTED, and Claimant's motion for summary judgment DENIED. Any additional issues are rendered moot.

It is so ORDERED.

Dated this 26th day of July, 2016.

SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION

___/s/ Sarah E. Harris_____
Sarah E. Harris
Administrative Law Judge