

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

DARIN SCHUELKE,
Claimant,

HF No. 85, 2010/11

v.

DECISION

BELLE FOURCHE IRRIGATION DISTRICT,
Employer,

and

FIRST DAKOTA INDEMNITY COMPNAY,
Insurer,

This is a workers' compensation proceeding brought before the South Dakota Department of Labor and Regulation pursuant to SDCL 62-7-12 and Chapter 47:03:01 of the Administrative Rules of South Dakota. This matter has been submitted to the Department of Labor and Regulation for a decision based on the written record which consists of Claimant's deposition and a joint medical record exhibit.

Issues

1. Whether Claimant's Claim is barred by SDCL 62-7-35.1
2. Causation

Facts

Based upon the evidence presented, the following facts have been established by a preponderance of the evidence:

1. Darin Schuelke (Schuelke Claimant) lives in Newell, South Dakota. He has worked for the Belle Fourche Irrigation District (Employer) since 1988.
2. He works as an operator, running the backhoe and excavator to dig trenches for pipelines. After a number of years, he began to develop pain in his hands, arms and shoulders.
3. Claimant filled out a first report of injury on February 22, 2000, for a cumulative injury that arose out of and in the course of his employment.
4. Employer/Insurer accepted the claim as compensable and paid medical benefits pursuant to South Dakota workers' compensation laws.
5. Claimant continued to seek treatment for his injury including, but not limited to surgery and physical therapy for his upper extremities.
6. On May 13, 2003, Dr. Thomas J. Brennan assigned a 26% upper extremity impairment rating that was paid by Insurer.

7. On March 11, 2004, Claimant saw Dr. Wayne Anderson for a follow up appointment. His EMG was normal and after much discussion with his doctor about there not being any more treatment options available, Claimant decided not to pursue further treatment options and “put up with things the way they are.”
8. The last payment for medical expenses Employer/Insurer made on Claimants behalf occurred on August 4, 2004.
9. Claimant did not seek further medical treatment related to his work injury until November 12, 2007. At that time Claimant saw Dr. Dale Hogan, his family doctor at the Newell Regional Medical Clinic. Claimant reported to Dr. Hogan that he had continuous problems with upper extremities for the past 10 years.
10. Claimant was later referred to orthopedic surgeons, Dr. Michael Kadrmas and Dr. David Lang, for further treatment.
11. Dr. Lang opined that the current treatment was related the original claim.
12. Dr. Dietrich also opined that his current condition was related to the original injury.
13. Claimant filed a subsequent first report of injury on October 5, 2009, related to his February 2000 injury.
14. Employer/Insurer denied benefits pursuant to SDCL 62-7-35.1 because three years had passed since he had last received workers’ compensation benefits.
15. Claimant filed a Petition for Hearing with the South Dakota Department of Labor on December 20, 2010.
16. Claimant remains employed as an operator for Employer.

Other facts will be determined as necessary.

Analysis

SDCL 62-7-35.1 provides the statute of limitations period when an employer provides workers’ compensation benefits to an employee for a period of time, gives no denial notice, and then the matter lies inactive. SDCL 62-7-35.1 provides,

In any case in which any benefits have been tendered pursuant to this title on account of an injury, any claim for additional compensation shall be barred, unless the claimant files a written petition for hearing pursuant to § 62-7-12 with the department within three years from the date of the last payment of benefits. The provisions of this section do not apply to review and revision of payments or other benefits under § 62-7-33.

Claimant argues that because this case involves a cumulative trauma condition, there is simply no date of injury. He contends that Claimant sustains injuries to his upper extremity every time he works. Claimant relies on *Thiewes v. State of South Dakota Unified Judicial System*, HF # 160, 2007/08, in which the Department of Labor concluded, for purposes of establishing Claimant’s workers’ compensation rate, the last day Claimant was able to work was the date of injury. In the case at hand, Schuelke

contends that SDCL 62-7-35.1 cannot apply, because in a cumulative trauma new injury is occurring every day he continues to work.

Claimant's reliance on *Thiewes* is misplaced. The statute of limitations set forth in SDCL 62-7-35.1 does not begin to run on the date of injury. The triggering event for the statute of limitations is the cessation of benefits. In *Thiewes*, Claimant continues to receive regular treatment for over 18 years before he was unable to work, there was no cessation of benefits that would have triggered SDCL 62-7-35.1. In this matter, Schulke discontinued treatment and did not receive workers' compensation for a period of more than three years.

The South Dakota Supreme Court has held that "the expiration of the three-year period is dispositive." *Thurman v. Zandstra Construction*, 2010 S.D. 46, ¶10, 785 N.W.2d 268. The Court further held that it is "clear when an employer has made no payment for three years, SDCL 62-7-35.1 applies because the triggering event under SDCL 62-7-35.1 is simply a cessation of the benefits without [the employer providing] notice of the dispute." *Id.* (citing *Faircloth v. Raven Indus.*, 2000 S.D. 158, ¶8, 620 N.W.2d at 201).

The last payment for medical expenses Employer/Insurer made on Claimants behalf occurred on August 4, 2004. Schulke did not file a petition for benefits until December 20, 2010, more than three years after the cessation of benefits. While the Claimant's attitude to tough it out is commendable, he should have filed a petition to preserve his eligibility for workers' compensation benefits within the 3 year period before 62-7-35.1 applied. Claimant's petition for benefits is barred pursuant to SDCL 62-7-35.1.

Conclusion

Employer/Insurer shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within ten (10) days from the date of receipt of this Decision. Claimant shall have ten (10) days from the date of receipt of Employer/Insurer's proposed Findings of Fact and Conclusions of Law to submit objections thereto or to submit proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Employer/Insurer shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 16th day of October, 2012.

SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION

/s/ Taya M. Runyan

Taya M. Runyan
Administrative Law Judge

