September 29, 2014

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Letter Decision and Order

Christina L. Klinger
May, Adam, Gerdes & Thompson LLP
PO Box 160
Pierre, SD 57501

RE: HF No. 87, 2013/14 – Donald Sharp v. Bison Grain Company and Continental Western Insurance Company

Dear Mr. Hagg and Ms. Klinger:

Submissions:

This letter addresses the following submissions to the Department of Labor and Regulation by the parties:

August 5, 2014	[Employer and Insurer's] Motion for Summary Judgment;
	[Employer and Insurer's] Memorandum in Support of Motion for Summary Judgment;
	Affidavit of Teresa Boe;
August 11, 2014	[Employer and Insurer's] Statement of Material Facts;
August 18, 2014	Claimant's Reply to Employer's Motion for Summary Judgment;
	Claimant's Response to Statement of Material Facts;
September 3, 2014	Employer and Insurer's Reply to Response to Claimant's Reply to Employer's Motion for Summary Judgment.

Facts:

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

1. On March 23, 2006, Donald Sharp (Claimant) was employed with Bison Grain Company (Employer).

2. On March 23, 2006, Employer was insured by Continental Western Insurance Company (Insurer) for purposes of worker's compensation.

3. On March 23, 2006, Claimant sustained a work related injury.

4. Employer and Insurer paid benefits to Claimant for the injury sustained on March 23, 2006.

5. On September 4, 2007, Claimant was placed at maximum medical improvement and received an 18% impairment rating for his work related injury.

6. The last date for any type of payment by Insurer for medical expenses was made on behalf of Claimant on April 11, 2008. The last payment for Temporary Total Disability benefits made to Claimant was September 24, 2008.

7. In January 2007, Claimant was returned to work in his regular capacity for Employer.

8. From September 24, 2008 to July 31, 2012, Claimant did not request further medical treatment for his March 2006 injury.

9. From January of 2007 to August 2012, Claimant continued to work for Employer.

10. Claimant experienced a lot of pain between 2007 and 2012 in his back and shoulders. Claimant talked to Employer's manager two or three times a year regarding his continued pain.

11. From January 2007 through August 2012, Employer was insured for the purposes of worker's compensation with Farmland Mutual Insurance Company.

12. On July 31, 2012, Claimant requested that treatment be authorized by Insurer. An evaluation was authorized for the purpose of investigation. On September 18, 2012, Insurer denied treatment based on statute of limitation. Insurer concluded from its investigation that Claimant had no significant changes to his condition and that the complaints were not related to the work injury.

13. In a letter dated January 31, 2014, Dr. Dietrich stated that Claimant had undergone a change of condition between 2006 and 2012.

14. Claimant filed a Petition for Hearing on December 6, 2013.

15. Additional facts may be discussed in the analysis below.

Motion for Summary Judgment:

Employer and Insurer filed a Motion for Summary Judgment. ARSD 47:03:01:08 governs the Department of Labor and Regulation's authority to grant summary judgment in workers' compensation cases. That regulation provides:

A claimant or an employer or its insurer may, any time 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.

ARSD 47:03:01:08. 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. "A trial court may grant summary judgment only when there are no genuine issues of material fact." Estate of Williams v. Vandeberg, 2000 SD 155, ¶ 7, 620 N.W.2d 187, 189, (citing, SDCL 15-6-56(c); Bego v. Gordon, 407 N.W.2d 801 (S.D. 1987)). "In resisting the motion, the non-moving party must present specific facts that show a genuine issue of fact does exist." Estate of Williams, 2000 SD 155 at ¶ 7, (citing, Ruane v. Murray, 380 NW2d 362 (S.D.1986)).

Statute of Limitation:

In their motion, Employer and Insurer contend that the statute of limitation imposed by SDCL 62-7-35.1 bars further compensation in this case for the March 2006 injury because more than three years passed between the last payment of benefits to Claimant which occurred on September 24, 2008, and Claimant's Petition for Hearing filed December 6, 2013. SDCL 62-7-35.1 states:

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.

SDCL 62-7-35.1.

Review Pursuant to SDCL 62-7-33

Claimant responded to the Motion for Summary Judgment arguing that the statute of limitations imposed by SDCL 62-7-35.1 is not applicable here, because he is seeking a review of his benefits pursuant to SDCL 62-7-33. SDCL 62-7-33 states:

Any payment, including medical payments under § 62-4-1, and disability payments under § 62-4-3 if the earnings have substantially changed since the date of injury, made or to be made under this title may be reviewed by the Department of Labor pursuant to § 62-7-12 at the written request of the employer or of the employee and on such review payments may be ended, diminished, increased, or awarded subject to the maximum or minimum amounts provided for in this title, if the department finds that a change in the condition of the employee warrants such action. Any case in which there has been a determination of permanent total disability may be reviewed by the department not less than every five years.

SDCL 62-7-33.

Statute of Limitations

Employer and Insurer respond by arguing that a review here is inappropriate and dismissal is required because Claimant's Petition for Hearing does not specifically state that he seeks review under SDCL 62-7-33. The requirements of a Petition for Hearing are set forth in ARSD 47:03:01:02. That regulation states:

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.

ARSD 47:03:01:02.

In order to qualify for a review under the provisions of SDCL 62-7-33, Claimant must show both a substantial change of earnings and a change of condition. Claimant's Petition contains all the facts required by the ARSD 47:03:01:02. In addition it avers that "Claimant is unable to work at his usual and customary employment" and that he has had a "change of Claimant's condition"[1] As such, it alleges sufficient facts to support a review by the Department pursuant to SDCL 62-7-33.

The regulation does not require that the statute under which Claimant is seeking benefits be specifically cited in a petition for hearing. All that is required is that it provides "[a] general equitable request for an award" and Claimant's Petition does so.

[1] Petition for Hearing, ¶ 9.

Statute of Limitations

Employer and Insurer next argue that SDCL 62-7-35.1 bars Claimant's action because his change of condition occurred within the three years statute of limitation. Thus requiring Claimant to file a Petition for Hearing under the holing in Owens v. F.E.M. Electric Assn., Inc., 2005 S.D. 35,¶ 20, 694 N.W.2d 274. The Department disagrees.

First, even if the change of condition occurred before the three years statute in SDCL 62-7-35.1 ran, the statue explicitly states that "[t]he provisions of this section do not apply to review and revision of payments or other benefits under § 62-7-33." The decision in Owens dealt with the two year statute of limitations imposed by SDCL 62-7-35. That statute does not contain such language and, therefore, is not excluded in SDCL 62-7-33 reviews.

Second, the fact that Claimant complained of pain prior to the running of the statute does not necessarily mean that his change condition occurred prior to the running of the statute. When viewed in the light most favorable to the Claimant, the fact that Claimant was still capable of working when he made his complaints of pain to his manager indicates that the change of condition which rendered him incapable of working still had not occurred.

Dispute of Facts

Finally, "A trial court may grant summary judgment only when there are no genuine issues of material fact." Estate of Williams v. Vandeberg, 2000 SD 155, ¶ 7, 620 N.W.2d 187, 189, (citing, SDCL 15-6-56(c); Bego v. Gordon, 407 N.W.2d 801 (S.D. 1987)). In this case, Dr. Dietrich has opined that Claimant has had a change of condition, while Teresa Boe's affidavit states that the Insurer's investigation revealed no significant change of condition. Whether Claimant underwent a change of condition is an essential factor in determining whether Claimant is entitled to a SDCL 62-7-33 review. Consequently, there is an issue of material fact remaining and Employer and Insurer's Motion for Summary judgment must be denied.

Order:

In accordance with the discussion above, Employer and Insurer's Motion for Summary Judgment is denied. This letter shall constitute the Department's Order in this matter.

Sincerely,

_/s/ Donald w. Hageman___
Donald W. Hageman
Administrative Law Judge