August 8, 2012

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Letter Decision and Order

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Re: HF No. 92, 2010/11- Barbara Waterman v. Morningside Manor and MHA Insurance Company

Dear Ms. Nasser and Mr. Larson:

Submissions:

This letter addresses the following submissions by the parties:

May 29, 2012	Employer and Insurer's Motion for Summary Judgment on Issue of Statute of Limitations;
	Employer and Insurer's Brief in Support of Motion for Summary Judgment on Issue of Statute of Limitations;
	Affidavit of Charles A. Larson in Support of Employer and Insurer's Motion for Summary Judgment on Issue of Statute of Limitations;
July 2, 2012	Claimant's Brief in Opposition to Employer/Insurer's Motion for Summary Judgment;
	Affidavit of Jolene R. Nasser in Support of Claimant's Opposition to Employer/Insurer's Motion for Summary Judgment on Issue of Statute of Limitations; and
July 16, 2012	Employer and Insurer's Reply Brief In Support of Motion for Summary Judgment on Issue of Statute of Limitations.

Facts:

The material facts of this case are as follows:

1. Barbara Waterman (Claimant) was employed by Morningside Manor (Employer) from June 2008 through October 2010.

2. On November 11, 2008, Claimant suffered a compensable injury to her lower back while assisting a resident of Employer's facility.

3. Employer was insured by MHA Insurance Company (Insurer) during all times relevant in this case for purposes of workers' compensation.

4. On December 8, 2008, an MRI of Claimant's back indicated a bulging or herniated disc at L5-S1 nerve root level which compressed the exiting L5 nerve root, a disc protrusion at L3 and L4, and disc desiccation at L4 and L5.

5. Following her November 2008 injury, Claimant was treated conservatively with a combination of physical therapy, chiropractic care, epidural floods, and oral medications to manage pain and inflammation.

6. Claimant returned to work with restrictions on December 22, 2008.

7. Claimant was released from restrictions on May 13, 2009.

8. On June 15, 2009, Insurer sent Claimant a letter stating that it had received medical records indicating that Claimant had reached maximum medical improvement and assigned a 0% impairment rating. The letter goes on to state in paragraphs 2 and 3:

> Based on the fact that you have returned to work without restrictions and you are done treating, plus the fact that Anne Zwiefel, CNP, has assigned a 0% impairment rating and places you at MMI, you are entitled to no further benefits under workers' compensation for your claim that occurred on 11/09/08.
>
> If you disagree with this denial for further benefits, you have the right to file a petition for hearing with the Department of Labor within two years of the date on this letter. Absent such petition, your claim will be forever barred from coverage.

9. Claimant began experiencing increased pain in her hip and lower back after performing a "lift" of a resident during the overnight shift of October 3-4, 2010.

10. On November 19, 2010, Insurer sent Claimant a letter denying benefits for the October 2010 injury.

11. On December 27, 2010, Claimant filed a Petition for Hearing seeking workers' compensation benefits for an injury that occurred on October 3, 2010.

12. On January 8, 2011, Claimant's treating chiropractor and expert, Ryan Schiesow D.C. testified during deposition that Claimant was suffering from a recurrence of her November 2008 injury.

13. On March 16, 2012, Claimant filed an Amended Petition for Hearing seeking benefits for the recurrence of the November 2008 injury or, in the alternative, benefits for the aggravation of the November 2008 injury which occurred on October 3, 2010. Claimant also seeks, in her Amended Petition for Hearing, a review of the benefits for her November 2008 injury pursuant to SDCL 62-7-33.

14. On May 31, 2012, Claimant's deadline for disclosing and identifying experts together with expert's reports expired.

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

Summary Judgment:

Employer and Insurer have filed a Motion for Summary Judgment. ARSD 47:03:01:08 governs Summary Judgments considered by the Department of Labor and Regulation in worker's 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)).

In this case, there are no genuine issues of material fact in dispute. The Department must then determine whether Employer and Insurer are entitled to judgment as a matter of law.

November 2008 incident:

Employer and Insurer first argue that they are entitled to Summary Judgment with regards to the November 2008 incident. They contend that they sent a letter to Claimant on June 15, 2009, denying any further benefits for Claimant's November 2008 injury. They state that the claim contained within Claimant's Amended Petition for Hearing, filed March 16, 2012, which alleges a recurrence of her November 2008 injury is barred by the 2-year statute of limitations imposed by SDCL 62-7-35. That statute states:

> 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.

SDCL 62-7-35. The Claimant challenges Employer and Insurer's assertion with three arguments.

Relate back doctrine:

Claimant first argues that her claim is not barred because the filing date of the Amended Petition for Hearing relates back to the filing date of the original Petition for Hearing in accordance with SDCL 15-6-15(c). That statute states in part:

> Whenever the claim or defense asserted in the amended pleading arose out of the Conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

SDCL 15-6-15(c).

Dictionary.com, defines "occurrence" as "2. something that happens; event; incident:"[1] Employer and Insurer correctly point out that the claim asserting a recurrence of the November 2008 injury in the Amended Petition for Hearing does not arise out of the same incident or "occurrence" asserted in the original Petition for Hearing. In the original Petition, Claimant alleged that the October 2010 injury was the cause of her lower back problems. No mention is made of the November 2008 injury. Consequently, the date of the Amended Petition does not relate back to the date of the original Petition for Hearing with regard to the claim arising from the November 2008 injury.

3-year Statute of Limitations:

The Claimant next argues that the 3-year statute of limitations imposed by SDCL 62-7-35.1 applies in this situation not the 2-year limitation of SDCL 62-7-35. She argues that the 2-year statute of limitations is not applicable because the letter sent by Insurer to Claimant on June 15, 2009, was not a denial letter within the meaning of SDCL 62-7-35. She contends that the letter does not deny or dispute any claims for benefits. It simply states that all benefits due have been paid.

At first glance, this argument seems plausible. When read in isolation, the second paragraph of the letter denies no benefits. However, the paragraph strongly implies that future claims will be denied. This conclusion is verified when the second paragraph is read together with the third which states:

> If you disagree with this denial for further benefits, you have the right to file a petition for hearing with the Department of Labor within two years of the date on this letter. Absent such petition, your claim will be forever barred from coverage.

When read together, it is clear that the Insurer intends to deny all future claims related to the November 2008 injury. SDCL 62-7-35 bars all claims unless a petition for hearing is filed within two years of the Insurer's notification that "it intends to deny coverage." This statutory language acts to bar both present and future claims.

Furthermore, the South Dakota Supreme Court has found that a claim was barred by the 2-year statute of limitation when the insurer's notification stated that the claimant's injuries were resolved and that it was denying "any future claims". Owens v. F.E.M. Electric Assn., Inc., 2005 SD 35, ¶ 4, 694 NW2d 274. Here, the Amended Petition for Hearing was not filed within two years of the insurer's notification, in writing, that it intended to deny further coverage. Consequently, the claim related to Claimant's November 2008 injury is now time barred.

Benefit Review under SDCL 62-7-33:

[1] http://dictionary.reference.com/browse/occurrence?s=t&ld=1064 (July 21, 2012)

Finally, Claimant requests that the Department reopen her claim for the November 2008 injury under SDCL 62-7-33. She argues that the 2-year statute of limitations does not apply to cases that qualify for reopening under that statute. 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 and Regulation 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 92-7-33. Claimant argues that she has experienced a change of condition. Therefore, she is entitled to a review of her benefits by the Department. The South Dakota Supreme Court has addressed the question of whether a SDCL 62-7-33 review is barred by the 2-year statute of limitations imposed by SDCL 62-7-35 in Owens, 2005 SD 35.

In that case, Owens was involved in a work-related one-vehicle accident on October 16, 1998, in which he injured his shoulder. On May 5, 1999, Owens collapsed on the floor at home after getting out of bed suffering leg and back pain. On June 1, 1999, Federated, the insurer sent a letter denying the claim for the back injury citing a lack of medical evidence and the fact that the claim did not arise out of a work related injury or accident. On June 25, 1999, Federated informed Owens by letter that it was denying all future claims arising from the October 1998 accident. The denial was based upon the insurer's finding that the injuries that arose from the October 1998 accident had been resolved leaving no permanency.

When confronted with the 2-year statute of limitations question the Court stated:

> 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.

Id. at ¶ 20.

In this case, Claimant's change of condition occurred on October 3, 2010, prior to the running of the 2-year statute of limitations which occurred on June 15, 2011. Therefore, the claim arising from Claimant's November 2008 injury is barred by SDCL 62-7-35.

October 3, 2010 incident:

Employer and Insurer also argue that they are entitled to Summary Judgment regarding any alleged injury sustained in October 2010 because Claimant's expert has opined that the cause of Claimant's current condition is a recurrence of the November 2008 injury, not a new aggravation of the old injury. The Department agrees.

Claimant has the burden of proving all facts essential to sustain an award of compensation. Darling v. West River Masonry, Inc., 777 N.W.2d 363, 367 (SO 2010); Day v. John Morrell & Co., 490 N.W2d (SD 1967). When medical evidence is not conclusive, Claimant has not met the burden of showing causation by a preponderance of the evidence. Enger v. FMC, 565 N.W.2d 79, 85 (S.D. 1997).

"The testimony of professionals is crucial in establishing this causal relationship because the field is one in which laymen ordinarily are unqualified to express an opinion." Day v. John Morrell & Co., 490 N.W.2d 720, 724 (S.D. 1992). "A medical expert's finding of causation cannot be based upon mere possibility or speculation. Instead, "[c]ausation must be established to a reasonable medical probability." Orth v. Stoebner & Permann Const., Inc., 2006 SD 99, ¶ 34, 724 NW2d 586, 593 (citation omitted).

In this case, Claimant's expert has opined that the cause of her lower back condition was the November 2008 injury and not the result of a new injury on October 3, 2010. Without an expert opinion stating that Claimant's condition was caused by the October 2010 incident, she cannot prevail on that claim.

Claimant's deadline to disclosing and identifying experts together with expert reports expired on May 31, 2012, without requesting an extension of that deadline. Absent expert testimony, Claimant has failed to meet her burden of showing that her current condition was caused by the October 2010 incident. Consequently, Employer and Insurer are also entitled to Summary Judgment on that issue.

Order:

In accordance with the discussion above, Employer and Insurer's Motion for Summary Judgment is granted. The claim contained within Claimant's Amended Petition for Hearing alleging a recurrence of the November 2008 injury is barred by the 2-year statute of limitations imposed by SDCL 62-7-35 as is a SDCL 62-7-33 review. In addition, Claimant has failed to meet her burden of proof that her current condition resulted from the October 2010 incident. This letter shall constitute the Department's Order in this matter.

Sincerely,

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