SOUTH DAKOTA
DEPT. OF LABOR
& REGULATION

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RE: HF No. 95, 2015/16 – Timothy R. Van Schoonhoven v. GGNSC Rapid City Meadowbrook Manor and New Hampshire Insurance Co.

Greetings:

This letter decision addresses GGNSC Rapid City Meadowbrook Manor and New Hampshire Insurance Company's (Employer and Insurer) Motion to Dismiss Petition received on October 22, 2021, and Timothy R. Van Schoonhoven's (Claimant) Motion for Summary Judgment received on December 1, 2021. All responsive briefs have been considered.

On or about November 15, 2013, while working for Employer as an RN Charge Nurse, Claimant was assisting a co-worker to lift a resident off the floor when he felt a pinch in his lower back. Employer and Insurer accepted Claimant's workplace injury as compensable. On July 11, 2016, the parties filed a written Settlement Agreement that was approved by the Department of Labor & Regulation (Department.) The Settlement Agreement settled Claimant's claim for permanent total disability benefits for $325,000 and with the exception of surgical treatment for Claimant's weight problems and a

specially equipped van for his wheelchair, the parties agreed that the future medical expense for Claimant's back injury remain the responsibility of Employer and Insurer and claims under SDCL 62-4-1 remain open.

On February 11, 2021, Claimant was sent for a medical examination with Dr. Jeffrey Nipper. Dr. Nipper issued a report dated May 14, 2021, in which he opined that the medical evidence did not support that Claimant suffered any injuries on November 15, 2013, and at most he sustained a low-grade lumbar myoligamentous strain/sprain. As a result of Dr. Nipper's report, Employer and Insurer denied Claimant further medical care.

On August 25, 2021, Claimant filed a Petition for Hearing with the Department alleging that he is entitled to medical benefits pursuant to SDCL 62-4-1, and demanding Employer and Insurer admit the claim. Employer and Insurer did not provide an Answer to the Petition. They filed this Motion to Dismiss the Petition, and an affidavit with a letter from Insurer rescinding the May 18, 2021, denial.

Employer and Insurer assert that Claimant has been paid all requested benefits from his November 15, 2013, work injury, the claim is compensable, and benefits continue to be paid. Thus, they argue that the Petition Claimant filed on or around August 24, 2021, seeks benefits that have been paid or are being paid. Employer and Insurer assert that this matter should be dismissed because the Department of Labor & Regulation (Department) lacks subject matter jurisdiction and because there is no case or controversy for the Department to consider.

Claimant moves for Summary Judgment pursuant to ARSD 47:03:01:08. He asserts that the undisputed facts entitle him to judgment as a matter of law. 15-6-12(a)

provides, in pertinent part, “A defendant shall serve the answer within thirty days after the service of the complaint upon defendant, except when otherwise provided by statute or rule.” ARSD 47:03:01:02:01 states,

> The division shall mail notice of the filing of a petition for hearing to all parties. Any adverse party has 30 days after the date of the mailing of the notice to file a response. The response shall be in writing and need follow no specific form. The response shall state clearly and concisely an admission or denial as to each allegation contained in the petition for hearing.

The Department sent a letter on September 22, 2021, acknowledging the Petition and requiring Employer and Insurer to submit a response to the Petition within 30 days. Workers’ compensation proceedings “are purely statutory, and the rights of the parties and the manner of the procedure under the law must be determined by its provisions.” *Chittenden v. Jarvis*, 297 N.W. 787, 788 (S.D. 1941).

Claimant argues that Employer and Insurer now agree that he is entitled to the ongoing medical expenses that had been previously denied, but they refuse to admit the allegations in the Petition as required by SDCL 62-7-12 and ARSD 47:03:01:01:01. He further argues that while Employer and Insurer assert that there is no case or controversy, there was a dispute that supported the filing of the Petition. At the time of filing the Petition, Claimant had been denied benefits, and the denial was not rescinded until after the Petition was filed. Claimant asserts that had he not filed the Petition, his benefits would still be denied. He further asserts that Employer and Insurer admit they denied the claim, they rescinded the denial after the Petition was filed, and Claimant is entitled to continued benefits for his medical care under SDCL 62-4-1. Claimant argues these admissions require the Department to enter an award in his favor.

Additionally, Claimant argues that Employer and Insurer's Motion to Dismiss relies on matters outside of the pleadings and must be treated as a motion for summary judgment. He asserts that the letter rescinding the denial did not exist at the time Claimant filed his Petition, and thus, the letter along with the affidavit are not pleadings under the statutes and administrative rules. Claimant further asserts that when treating the Motion to Dismiss as a Motion for Summary Judgment, the Department must decide if judgment in favor of Employer and Insurer is appropriate under the undisputed facts. Employer and Insurer agree they denied the claim and Claimant was forced to file a Petition.

Claimant asserts that requiring Employer and Insurer to file a formal answer admitting the claim does not prejudice them. However, Claimant believes a dismissal without an award would prejudice him and requires him to repeatedly bear the burden of proving something that was already settled by agreement or action under SDCL 62-7-12. He also argues that dismissing the claim without an order of judgment deprives him of protection from baseless denials of his benefits. Further, South Dakota law allows the Department to award attorney fees for vexatious denials once a judgment has been made in favor of a claimant.

Employer and Insurer respond that pursuant to SDCL 15-6-12(b), they may raise the defenses of lack of jurisdiction and failure to state a claim upon which relief can be granted by motion rather than in an Answer.

The Department agrees the Employer and Insurer's Motion to Dismiss is appropriate under SDCL15-6-12(b) which provides,

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
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> (1) Lack of jurisdiction over the subject matter;
> (2) Lack of jurisdiction over the person;
> (3) Insufficiency of process;
> (4) Insufficiency of service of process;
> (5) Failure to state a claim upon which relief can be granted;
> (6) Failure to join a party under § 15-6-19.
>
> A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (5) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in § 15-6-56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by § 15-6-56.

The defense of lack of subject matter jurisdiction is an exception to the requirement for a responsive pleading. Employer and Insurer's Motion is appropriately a motion to dismiss and not a motion for summary judgment.

A fact pattern similar to that of Claimant's arose in the matter of *Skjonsberg v. Menard, Inc.*. In *Skjonsberg*, the Department had granted partial summary judgment in favor of Skjonsberg, but the medical expenses had gone unpaid for two years. In response to a second motion for partial summary judgment, the employer and insurer submitted an affidavit stating that the medical bills had been resolved by agreement with the health care providers. The Department granted Skjonsberg's motion, and the Circuit Court affirmed. The South Dakota Supreme Court held that the issue of the payment of Skjonsberg's benefits became moot when they were paid by the employer and insurer.

The Court reversed and remanded the matter with the instruction that it be dismissed. *Skjonsberg,* 922 N.W.2d 784.

The same is true here. As all benefits are being paid, there is no longer a case or controversy for the Department to decide and the issue is moot. The Department lacks subject matter jurisdiction over this matter. Therefore, Employer and Insurer's Motion to Dismiss Petition is GRANTED. Claimant's Motion for Summary Judgment is also moot.

Sincerely,

Michelle M. Faw
Administrative Law Judge

MMF/das