

March 19, 2009

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**Letter Decision and Order**

Daniel E. Ashmore  
Gunderson, Palmer,  
Nelson & Ashmore, LLP  
PO Box 8045  
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Re: HF No. 125, 2007/08 – Vickie R. Stierwalt v. Best Western Town and Country and Hartford Insurance Company

Dear Mr. Simpson and Mr. Ashmore:

This letter addresses the following submissions by the parties:

January 7, 2009	[Employer/Insurer's] Motion to Dismiss Claim of Surviving Spouse.
January 30, 2008	Claimant's Response to Employer/Insurer's Motion to Dismiss Claim of Surviving Spouse.
February 6, 2009	[Employer/Insurer's] Reply to Claimant's Response to Motion to Dismiss Claim of Surviving Spouse.

*FACTS*

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

1. Vickie Stierwalt (Claimant) suffered a work related injury on December 26, 2002, while working for Best Western Town and Country (Employer) as a housekeeper.
2. Claimant's work-related injury caused her pain in her lower back and left leg.

3. Farmers' Insurance provided Employer with workers' compensation coverage at the time of Claimant's December 26, 2002, injury.
4. Farmers' Insurance accepted responsibility for Claimant's December 26, 2002, injury and paid Claimant medical benefits for her ongoing treatment.
5. The Employer's business was sold to a new owner in September of 2005. The new owner recognized the work limitations caused by Claimant's back injury. Consequently, the new owner gave Claimant the position of head housekeeper which was less strenuous than the housekeeping position she previously held.
6. On September 4, 2007, Claimant was fired from her position with Employer for failing to perform her duties.
7. In late September or early October of 2007, Claimant worked at Day's Inn for one day as a housekeeper.
8. On October 2, 2007, Claimant saw her doctor and reported that her back pain was out of control.
9. Claimant submitted the medical bills from her October 2, 2007, doctor's appointment to Farmers' Insurance. Farmers' Insurance denied the claim alleging that her pain was due to an intervening event.
10. On or about November 13, 2007, Claimant reported a new injury to Farmer's Insurance. Employer indicated that they were not aware of a new injury. Employer/Insurer denied this claim.
11. In March of 2008, Claimant filed a petition for worker's compensation benefits. Claimant named Best Western Town & Country, employer and Hartford Insurance Company, insurer, as parties in that action.
12. Claimant died on June 19, 2008. Claimant's death was unrelated to any work related injury. At the time of Claimant's death, the parties had not reached a settlement agreement, the case had not gone to hearing and no award of benefits had been ordered.
13. On September 8, 2008, claimant's attorney asked for a settlement of this claim on behalf of claimant's surviving spouse, Paul Stierwalt.

#### *MOTION TO DISMISS CLAIM OF SURVIVING SPOUSE*

In South Dakota, "[p]roceedings under the Workman's Compensation Law ... are purely statutory, and the rights of the parties and the manner of procedure under the law must be determined by its provisions." Caldwell v. John Morrell & Co., 489 NW2d 353, 364 (SD 1991). "In order to collect the benefits authorized by the South Dakota Legislature, a worker must meet the requirements of state statute." Aadland v. St. Luke's Midland Reg'l Med. Ctr., 537 NW2d 666, 669 (SD 1995). The only provision in South Dakota law that authorizes the payment of workers'

compensation benefits to the dependants of a deceased employee, when the employee's death was unrelated to the work injury, is SDCL 62-4-11. That statute states:

SDCL 62-4-11. If an employee receives an injury for which a specific schedule of payments is provided by § 62-4-6; and the employee thereafter dies from causes other than the injury before the full payment of all installments due for the specific injury have been paid to the employee, the employer shall pay the balance due under the specific schedule of payments as provided in § 62-4-6, to the employee's dependents as provided in §§ 62-4-12 to 62-4-22, inclusive.

In this case, SDCL 62-4-11 fails to provide the Claimant's surviving spouse the necessary stranding to pursue his claim. There are no "installments" or "balance due" as required by this statute.

The South Dakota Supreme Court interpreted SDCL 62-4-11 in Fredekind v. Trimac, Ltd., 1997 SD 79, ¶ 7, 566 NW2d 148, 151. In that case, the court found that an oral settlement agreement which had not been submitted in writing to, and approved by, the Department of Labor, as required by SDCL 62-7-5<sup>1</sup>, did not constitute an "installment" or "balance due". Id. Consequently, the surviving spouse in Fredekind was not entitled to the benefits that were agreed to by the Employer and Insurer in the oral agreement. Id.

Claimant correctly argues that the Fredekind case differs from the one at bar. There has been no oral agreement reached here. On the other hand, it is clear that the Supreme Court interpreted SDCL 62-4-11 narrowly in Fredekind. The court found that there were no sums "due" after an oral agreement was reached and no dispute remained between the parties. It seems clear then that no sums are "due" in this case where the issues are still in dispute.

While it is conceivable that a surviving spouse may fall within the provisions of SDCL 62-4-11 after the case has gone to hearing and an award ordered, that is not the situation here. The surviving spouse in this case is not granted a statutory right to pursue his claim by SDCL 62-4-11.

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<sup>1</sup> SDCL 62-7-5 states:

If the employer and employee reach an agreement in regard to the compensation under this title, a memorandum of the agreement shall be filed with the department by the employer or employee. Unless the department within twenty days notifies the employer and employee of its disapproval of the agreement by letter sent to their addresses as given in the memorandum filed, the agreement shall stand as approved and is enforceable for all purposes under the provisions of this title.

*ORDER*

For the reasons discussed above, Employer/Insurer's Motion to Dismiss Claim of Surviving Spouse is granted. This case is dismissed with prejudice.

Sincerely,

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Donald W. Hageman  
Administrative Law Judge