

June 20, 2018

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**LETTER DECISION AND ORDER ON  
MOTION TO SUBSTITUTE AND  
MOTION TO DISMISS**

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P.O. Box 5027  
Sioux Falls, SD 57117-5027

RE: HF No. 12, 2013/14 – Kim Gilbert v. Marquardt/Skyway, Inc. and Lumbermen's Underwriting Alliance

Dear Counsel:

This letter addresses the following submissions by the parties:

February 26, 2018	Claimant's Suggestion of Death and Motion for Substitution of Parties and Amendment of Caption (SDCL 15-6-25);
April 3, 2018	Employer and Insurer's Brief in Resistance to Motion to Substitute and Motion to Dismiss;
April 16, 2018	Claimant's Decedent's Answering Brief in Support of His Suggestion of Death and Motion for Substitution of Parties and Amendment of Caption (SDCL 15-6-25), and in Resistance to Employer and Insurer's Motion to Dismiss;
May 7, 2018	Reply to Claimant's Decedent's Resistance to Employer and Insurer's Motion to Dismiss.

**FACTS**

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

1. In late January and early February 2013, Kim Gilbert (Claimant or Gilbert) experienced injuries for which he claimed workers' compensation.
2. In July 2013, Gilbert filed a petition for hearing with the Department of Labor.
3. In August 2017, Gilbert died from causes unrelated to the injuries described in the petition.
4. On February 26, 2018, the Suggestion of Death and Motion for Substitution of Parties and Amendment of Caption was filed.

Additional facts may be developed in the issue analysis below.

Claimant has moved the Department to substitute the Personal Representative of the Estate of Kim Gilbert in this matter following the death of Gilbert. Employer and Insurer have moved to Dismiss this matter. Employer and Insurer have argued that SDCL § 62-4-11 requires that benefits be due at the time of death for recovery to occur after death. SDCL § 62-4-11 directly refers to the fulfillment of the payment of installments due to an employee as provided by § 62-4-6. No other statute specifically preserves benefits where a claimant dies from causes not related to the alleged work injury.

The Court has addressed the survivability of benefits in *Fredekind v. Trimac Ltd.*, 1997 SD 79, 566 N.W. 2d 148. In *Fredekind*, employee died from injuries not related to his alleged work injury before the approval of a settlement agreement. The settlement was deemed invalid because it had not been signed and submitted to the Department for approval. The Court stated that, "In order to collect the benefits authorized by the South Dakota Legislature, a worker must meet the requirements of state statute." *Fredekind* at ¶6 citations omitted. The Court concluded that no payments or benefits were due, because no ruling or agreement had been made.

In the current matter, there has been no hearing, decision, or agreement. Therefore, under SDCL § 62-4-11 no installments of payments are currently due. However, medical payments for the alleged injury have already been paid and past due indemnity benefits may have been incurred. Without the ability to substitute a survivor in these matters, such payments and loss of entitled benefits already accrued would unfairly burden the estate and survivors of claimants and create an unjust gain for Employers and Insurers. The statutory construction of the workers' compensation act is designed to fairly and promptly resolve workers' compensation matters, not to provide an arena to burden or benefit one party at the expense of the other.

SDCL § 62-4-1 states in pertinent part, "The employer shall provide necessary first aid, medical, surgical, and hospital services, or other suitable and proper care including medical and surgical supplies, apparatus, artificial members, and body aids during the disability or treatment of an employee within the provisions of this title." From the initial claim of injury, employer is obligated to provide aid. Whether the services required by SDCL § 62-4-1 are due is an issue to be decided.

This matter may continue to Hearing on the issues of medical payments and past due indemnity benefits. Progressive payments such as those for permanent total disability are not and cannot become due as defined by SDCL § 62-4-11. Therefore, the issue of permanent total disability is not an issue.

***ORDER:***

In accordance with the decisions above, Claimant's Motion for Substitution of Parties and Amendment of Caption is Granted. Employer and Insurer's Motion to Dismiss is Denied.

The Parties will consider this letter to be the Order of the Department.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

*Michelle M. Faw*  
Administrative Law Judge