April 19, 2011

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Letter Decision and Order

Comet H. Haraldson
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RE: HF No. 26, 2010/11 – Josh Halverson v. Menards, Inc. and Meadowbrook Insurance Group

Dear Ms. Amiotte and Mr. Haraldson:

Submissions:

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

January 24, 2011	Employer and Insurer's Motion for Summary Judgment;
	Affidavit of Marly Stoneberg;
	Employer and Insurer's Statement of Undisputed Facts;
	Employer and Insurer's Brief in Support of Motion for Summary Judgment;
February 25, 2011	Claimant's Statements of Genuine Issues of Material Facts in Opposition to Employer and Insurer's Motion for Summary Judgment;
	Claimant's Opposition to Employer and Insurer's Motion for Summary Judgment;
March 22, 2011	Employer and Insurer's Reply to Claimant's Opposition to Employer and Insurer'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. Josh Halverson (Claimant) sustained a work injury on July 7, 2000, while working for Menards, Inc. (Employer).

2. After his injury Claimant sought medical treatment. He was diagnosed with a left L5 disc herniation. Claimant underwent lower back surgery on October 17, 2001.

3. Meadowbrook Insurance Group (Insurer) initially accepted responsibility for the Claimant's injury and began paying medical expenses and temporary total disability benefits.

4. Following his work injury, Claimant did not work in any capacity for several years. During this time, Insurer continued to pay workers' compensation benefits to and on behalf of Claimant through February of 2003.

5. A functional capacity evaluation (FCE) conducted on July 30, 2002, concluded that Claimant sustained a 20% whole person impairment resulting from the work injury but was capable of working a sedentary job, with restrictions on specific work activities. Based on these results, Dr. Myung Cho released Claimant to work with the restrictions outlined in the FCE.

6. In February of 2003, Claimant began working for Premier Bankcard in a full-time, sedentary job. When Claimant began to work, Insurer ceased paying Claimant weekly TTD.

7. Insurer made a lump-sum payment for Claimant's permanent partial disability benefits (PPD) benefits on February 5, 2003.

8. The last medical bill received by Insurer for Claimant's work injury was paid on February of 2003.

9. From March of 2003 through May of 2007, Claimant did not receive any medical treatment for his low-back, and he did not submit any medical bills to Insurer. Claimant controlled his pain with over-the-counter medications.

10. Insurer did not pay any workers' compensation benefits to or on behalf of Claimant after March of 2003 for a period of over 50 months.

11. Claimant continued to work actively from February of 2003 through May of 2007.

12. In June of 2007, Claimant returned to a physician to seek new medical treatment on his low back. Claimant alleges that his back pain worsened at that time, causing him to seek medical assistance.

13. Claimant quit his job soon after seeking the new medical treatment and he has not returned to work in any capacity since the summer of 2007.

14. In late-2007, Claimant began submitting his new medical bills to Insurer for payment; Claimant also demanded that Insurer recommence his weekly TTD payments.

15. On February 15, 2008, an MRI of Claimant's lumbar spine was performed which revealed an enhancing epidural scar which partially surrounded the left S1 nerve root.

16. Dr. Berg opined that Claimant's pain in February of 2008 was caused by the scar tissue that partially surrounded the S1 nerve root and that the scar tissue resulted from his back surgery.

17. Dr. Berg also opined that Claimant was not capable of even minimal employment.

18. In response to a letter dated February 8, 2011, Dr. Lim opined that Claimant's work-related injury continued to remain the major contributing cause of Claimant's current pain and need for medical care and treatment.

19. Dr. Lim noted that Claimant's work-related injury had not significantly worsened and that Josh required the same amount of pain medications. However, in response to a letter dated February 23, 2011, Dr. Lim opined that Claimant's disabling pain, which increased in 2007 due to scar tissue, constituted a significant worsening of his physical condition.

20. Paragraph 5 of Claimant's verified answer dated August 20, 2010, asserts the affirmative defense that Claimant has sustained a significant worsening of his previous condition.

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

Motion for Summary Judgment:

Employer and Insurer have 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:

Employer and Insurer contend that the statute of limitation imposed by SDCL 62-7-35.1 bars further compensation in this case because more than three years have passed since they have paid any benefits for Claimant's July 7, 2000 injury. 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 (emphasis added). Claimant argues that the statute of limitations imposed by SDCL 62-7-35.1 is not applicable because he is entitled to review of his benefits pursuant to SDCL 62-7-33. Therefore, the focus of the analysis here must shift to that statute.

SDDCL 62-7-35.1 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. In order to reopen or review a worker's compensation claim under SDCL 62-7-33, a claimant must meet three requirements. McDowell v. Citibank,2007 SD 52, ¶ 12, 734 NW2d 1, 5. The claimant must first be able to prove a change in condition. Id. Secondly, the claimant must prove that the change in condition "derives from an injury unknown at the time of settlement or from a known injury with its disabling character unknown." Id. Lastly, "a claimant must prove that the unknown injury is causally connected to employment, or that the unknown disabling character is causally connected to the original, compensable injury." Id.

When the facts of this case are viewed in the light most favorable to the Claimant, they indicate that Claimant's pain has significantly increased, since he last received benefits, to the point where he can no longer work and is unemployable. Claimant's change of condition came about in 2007 due to the formation of scar tissue on the S1 nerve root and

that the scar tissue formed as a direct result of the back surgery Claimant underwent to treat his work injury.

These facts present a *prima facie* case for reviewing Claimant benefits pursuant to SDCL 62-7-33. Consequently, issues of fact exist and Employer and insurer are not entitled to a judgment as a matter of law.

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