May 4, 2011

Michael J. Simpson
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LETTER DECISION & ORDER

Rick W. Orr
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PO Box 1030
Sioux Falls, SD 57101-1030

RE: HF No. 105, 2009/10 – Erwin "Don" Knapp v. Hamm & Phillips Service Company, Inc. and Liberty Mutual Insurance Company

Dear Mr. Simpson and Mr. Orr:

I am in receipt of following submissions in the above- referenced matter:

- Motion to Substitute Parties

- Employer/Insurer's Brief in Opposition to Motion to Substitute Parties

- Claimant's Response to Employer/Insurer's Brief in Opposition to Motion

- Employer/Insurer's Motion for Summary Judgment and supporting documents

- Stipulation RE: Evidence to be considered by Department of Labor RE: Employer/Insurer's Motion for Summary Judgment

- Claimant's Response to Employer/Insurer's Motion for Summary Judgment

- Employer/Insurer's Brief in Support of Motion for Summary Judgment

I have carefully considered all of these submissions in addressing each of these Motions. I will address each Motion separately.

Erwin “Don” Knapp (Knapp or Claimant) suffered an injury on or about September 30, 2008 while working near an oil rig in North Dakota. Claimant filed a Petition for Hearing in South Dakota. Subsequently, Claimant died from causes unrelated to his work related injury. At the time of his death, numerous issues related to Claimant’s workers’ compensation action remained outstanding, including whether any past benefits were due as well as Employer/Insurer’s Motion for Summary Judgment.

Claimant’s Motion to Substitute Parties

Sharon Knapp(Mrs. Knapp), moves the Department to be substituted as Claimant in the place of her husband Erwin “Don” Knapp pursuant to SDCL§ 15-4-1, which provides,

> All causes of action shall survive and be brought, notwithstanding the death of the person entitled or liable to the same. Any such action may be brought by or against the executor or administrator or successors in interest of the deceased.

Employer/Insurer contends that SDCL§ 15-4-1 is not applicable because “statutes of specific application take precedence over statutes of general application*.” Schafter v. Deuel County Bd. Of Comm’rs*, 2006 SD 106 ¶10, 725 NW 2d 241, 245 (citations omitted). Employer/Insurer argues that SDCL §62-4-11 is specific in nature and is the only statute that authorizes the payment of workers’ compensation benefits to the dependents of a deceased employee when the employee’s death is unrelated to the work injury. This statute is only applicable when the Claimant has been awarded benefits pursuant to SDCL§ 62-4-6. Employer/Insurer argues *Fredekind v. Trimac*, *Ltd*, 1997 SD 79, ¶7, 566 NW2d 148, is controlling. In *Fredekind*, the South Dakota Supreme Court held that where there was no approved settlement agreement between the parties, there were no installment payments due and therefore there was no right to survivorship. Employer/Insurer argues that in the case at hand there was no installment or balance of payments due to Claimant at the time of his death. Given that there was no settlement agreement in place or balance of payments due at the time of Claimant’s death, SDCL §62-4-11 does not give the surviving spouse a statutory right to pursue the deceased claimant’s action and Claimant’s cause of action for past benefits abates at the time of Claimant’s death, preventing any payment of past benefits to Claimant’s dependents.

Workers’ compensation is generally intended to provide for workers when they cannot work, it was not intended to be a death benefit in cases where the Claimant’s death is unrelated to the work injury. *Id* at ¶9. Mrs. Knapp argues that SDCL §62-4-11only applies to an award of future benefits. In this case, Mrs. Knapp is not seeking an award of future benefits, but rather seeking to recover past benefits that were accrued during Claimant’s lifetime. Therefore, Mrs. Knapp argues that the general survivor statute ought to apply.

This case is distinguishable from *Fredekind*. It is not known what benefits or payments the oral settlement encompassed, the Supreme Court’s ruling was based on the fact that the parties had not yet sought the Department’s approval of the agreement as

required by statute, when Claimant died. The court never ruled on what type of benefits if any survived if the settlement had been properly submitted to the Department.

The language of the §SDCL 62-4-11, refers to payments of "all installments due for said specific injury" and the employer paying "the balance due" for future benefits. While Mrs. Knapp is not able to recover future workers' compensation benefits that Claimant may have ultimately shown he was entitled to because they were not installment payments as described in SDCL §62-4-11, Mrs. Knapp may be able to recover past benefits owed and medical expenses that Claimant incurred prior to Claimant's death that he was reasonably entitled to. The claim for benefits for properly submitted medical benefits and disability payments that had accrued during Claimant's lifetime do not abate at the time of Claimant's death. To hold otherwise would allow the Employer/Insurer the advantage the Claimant's death and receive an underserved windfall. Mrs. Knapp's Motion to substitute parties is hereby granted.

Employer/Insurer's Motion for Summary Judgment

Prior to Claimant's death, Employer/Insurer made a Motion for Summary Judgment. The parties submitted a Stipulation RE: Evidence to be considered by the Department regarding this motion.

Pursuant to ARSD 47:03:01:08, Employer/Insurer move the Department for entry of summary judgment and a dismissal of the petition for hearing. ARSD 47:03:01:08 governs the Department of Labor's authority to grant summary judgment:

> 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 of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that

Beginning in June of 2008, Erwin "Don" Knapp was employed by Hamm & Philips Service Co.(Hamm & Philips), which was located in Marmarth, North Dakota. He was hired to drive tanker trucks hauling water for oil wells. During his employment, Claimant resided in Camp Crook, SD. Hamm & Philips does not have a facility in South Dakota, so for convenience, Claimant would often leave his work truck in Buffalo, SD at Continental Resources, a business that was not owned or affiliated with Hamm & Philips, but was a customer of Hamm & Philips. After picking up his truck, Claimant would drive to and from oil wells located in South Dakota, North Dakota and Montana.

On or about September 30, 2008, Claimant was working near and oil rig in North Dakota when he tripped and fell backwards over a box. North Dakota Workforce Safety and Insurance (WSI) was notified of the injury on October 8, 2008. WSI accepted liability for the injury, but denied liability for degenerative changed in Claimant's cervical

spine. Claimant received medical and disability benefits in the amount of $689 per week.

On September 1, 2009, WSI issued a decision denying further liability for Claimant's injury based on a neuropsychological evaluation conducted by WSI's medical consultant. Claimant's treating physician did not provide any data to contradict the opinion. Claimant submitted a written request for reconsideration to WSI. On November 10, WSI issued a written decision and order denying further liability for the claimant. WSI determined that there was no objective medical evidence indicating Claimant's current problems related to the head injury and post-concussive syndrome were caused by the work injury. Claimant had 30 days from the date of that decision to request assistance from the WSI Decision Review Office.

On December 7, 2009, Claimant filed the Petition for Hearing with the South Dakota Department of Labor (Department) seeking benefits from his September 30, 2008 injury.

WSI received Claimant's request for assistance from the WSI Decision Review Office on December 14, 2009, despite being past the 30 day period, the Review Office examined the case and issued a Certificate of Completion. The Certificate of Completion indicated that if he wanted to further dispute the WSI decision he could request a hearing within 30 days. If not request was filed, the WSI order would be considered final and would not be reheard or appealed. Claimant did not file a request for hearing with WSI or any appeal of the November 10, 2009 decision.

Employer/Insurer moves the Department to grant summary judgment due to lack of jurisdiction. Employer/Insurer argues that the proper jurisdiction is North Dakota, a jurisdiction where the Claimant has already brought an action and it was determined he was no longer entitled to benefits. Employer/Insurer further argues that the present claim for benefits before the Department is barred by res judicata.

Claimant argues that Claimant resided and worked in South Dakota a portion of the time, therefore South Dakota has a legitimate interest in this case. Claimant further argues that the United States Supreme Court has recognized successive awards of workers compensation benefits citing *Thomas v. Washington Gaslight Co*., 448 US 261 (1980) where an injured worker received benefits in Virginia and then received supplemental benefits in the District of Columbia. This case is distinguishable because benefits were never denied in *Thomas*.

The South Dakota Supreme Court has never addressed this issue before. The Department adopts the three part test set forth in Professor Larson's treaties on Workers Compensation law. Professor Larson states, "In the majority of states, the local statute will be applied if the place of injury, or the place of hiring, or the place of employment relation is within the state. Two-thirds of the states will take jurisdiction of out-of-state injuries if either the place of hiring or the place of employment relation is within the state. These two factors figure in most of the other states in different combinations." *Larson's Workers' Compensation Law* § 143 (2000).

There is no factual dispute that Claimant was injured in North Dakota, this factor does not establish jurisdiction with the South Dakota Department of Labor.

The second factor, the place of hiring is also not disputed. Claimant was living in Montana at the time he was hired by Hamm & Philips. He stopped in the Lonesome Dove, North Dakota office and filled out an application. Although living in Montana, Claimant also retained a home in Camp Crook, South Dakota and indicated his intent to move back to that area. He was interviewed by Shane Briggs in North Dakota and was hired. Claimant was trained in Marmarth, North Dakota. Despite having a South Dakota address and a South Dakota driver's license, it is clear that Claimant was hired in North Dakota. This factor does not establish jurisdiction with the South Dakota Department of Labor.

The third and final factor to be considered is the place of the employment relation. Claimant argues that he worked a substantial amount of time in South Dakota as well as North Dakota and Montana. Claimant began working out of the Marmarth, North Dakota shop. He states that from July 2008 to September 2008, be began working out of the "Buffalo, SD shop" which was located 30 miles from his home in Camp Crook. He further testified that he turned in his time sheets and inspection sheets in a wooden box located at the "Buffalo shop". Claimant was paid at which ever location he happened to be at on pay day. If he was working in Buffalo, the supervisor would drive the paychecks down to Buffalo, if he was working out of the Marmarth shop, he would be paid there.

Claimant's argument that he spent a majority of time working out of the Buffalo shop is not persuasive. The "Buffalo shop" is not owned or operated by Hamm & Philips. Rather, the yard was owned and operated by another company that is not affiliated with Employer. Because of their long standing working relationship, the company allowed Employer to have certain employees park their vehicles there as a matter of convenience because many of the workers had residences closer to Buffalo, such as Claimant. Residence in South Dakota alone is not sufficient to establish jurisdiction in the state of South Dakota.

The time sheets and inspection sheets were not turned into a Buffalo, SD office of the Employer, rather Employer had arranged for a drop box in Buffalo that was then taken to the North Dakota office to be turned in to Employer's main office. Paychecks were not issued in South Dakota, but rather issued by Employer in North Dakota and the supervisor delivered them to the Claimant wherever he happened to be working, sometimes that would be in South Dakota, sometimes that would be in North Dakota or Montana.

While it is true that his employment required Claimant to travel to South Dakota and Montana, the place of employment relation remained in North Dakota. The evidence does not support a finding that the employment relationship was fixed in South Dakota. This factor does not establish jurisdiction with the South Dakota Department of Labor.

Claimant failed to satisfy any of the three factors to establish jurisdiction in South Dakota, therefore the Department lacks jurisdiction in this matter. Employer/Insurer's Motion is granted, Claimant's petition for hearing shall be dismissed with prejudice.

This letter shall serve as the Department's Order.

Sincerely,

/s/ *Taya M Runyan*

Taya M. Runyan
Administrative Law Judge