

**SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT**

MEI CORPORATION,

HF No. 168, 2004/05

Employer,

and

DECISION

FIREMAN'S FUND,

Insurer,

v.

RON BONNET,

Claimant.

This is a Workers' Compensation case brought before the South Dakota Department of Labor, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. The Department conducted a hearing on March 10 and 11, 2010 in Aberdeen, South Dakota. Claimant, Ron Bonnet was represented by Greg Peterson and Melissa Neville. The Employer and Insurer, MEI Corporation and Fireman's Fund, were represented by J.G. Shultz.

Prior to the hearing in this case, the parties filed several motions. In addition several issues arose during the hearing. As a result, the Department has issued a number of letter decisions prior to this. Reference to some of those decisions will be made in this Decision when applicable.

Issue:

This case presents the following legal issues:

1. Whether Bonnet's claim is judicially estopped?
2. Whether the last injurious exposure rule relieves MEI Corporation and Fireman's Fund from liability for Bonnet's current medical condition and medical expenses since 2002?
3. Whether Bonnet can seek permanent total disability pursuant to SDCL 62-7-33?
4. Whether the collateral source rule applies in workers' compensation cases?

5. Whether SDCL 62-4-1 (1973) precludes Bonnet from receiving payment of medical expenses?

Facts:

Based upon the hearing testimony, exhibits and record, the following facts are found by a preponderance of the evidence:

1. On March 15, 1984, Ron Bonnet (Bonnet) was employed by MEI Corporation (MEI) as manager of a Pepsi bottling company.
2. MEI was insured under the worker's compensation laws of the State of South Dakota by Fireman's Fund on March 15, 1984.
3. On March 15, 2004, Bonnet slipped and fell at work, causing an injury to his low back.
4. In the weeks following his fall, Bonnet began to experience pain in his low back. However, he continued working for two months before finally seeking treatment with Dr. K. Stephen Kazi.
5. Dr. Kazi diagnosed Bonnet with bilateral spondylolysis of the L5 vertebrae with subsequent post-traumatic lumbosacral sprain and chronic mechanical low back pain with recent radicular pain. Kazi stated that "this condition was probably pre-existent, but was rendered symptomatic and aggravated by a fall...in March 1984."
6. Dr. Kazi placed Bonnet in the hospital prescribing bed rest, pelvic traction, muscle relaxers and anti-inflammatory medication, with bracing of his lumbosacral spine. Bonnet responded to conservative management and was released on June 23, 1984.
7. Bonnet continued to have problems after being released from the hospital. Dr. Kazi asked Bonnet to consult with neurosurgeon, Dr. Steven Haines. Dr. Haines believed lumbosacral fusion was necessary because of the persisting and disabling nature of Bonnet's injury, but he deferred the final decision to Dr. Kazi.
8. On September 23, 1984, Dr. Kazi performed a bilateral posterolateral spinal fusion from L4 to the sacrum. He was hospitalized after surgery for 11 days.
9. On December 28, 1984, Bonnet was released to part-time light duty work.

10. Three or four months after the fusion, Dr. Kazi x-rayed Bonnet's lumbar spine. He discovered that the fusion had failed and the bone graft was partially reabsorbed.
11. On July 15, 1985, Bonnet was referred to Dr. David Bradford at the University of Minnesota Orthopedic Clinic, who recommended a second fusion, this time with hardware instead of a bone graft.
12. On August 19, 1985, Dr. James Ogilvie performed Bonnet's second posterior spinal fusion of L4 to the sacrum with a Hartzel ring, and a left L5 nerve root decompression. The surgery was performed at the University of Minnesota Hospital.
13. After two surgeries, Dr. Ogilvie indicated that "it is recommended that he [Bonnet] not return to his previous occupation which required repetitive lifting responsibilities. Mr. Bonnet should not be required to lift more than 10 to 15 pounds on a repeat basis."
14. Dr. Ogilvie assigned Bonnet a 22.5% whole body permanent impairment on June 28, 1986. Fireman's Fund paid benefits based on this rating.
15. After Bonnet's second surgery, he continued to experience periodic episodes of lower back and leg pain.
16. On March 28, 1986, Bonnet was reevaluated by Dr. Ogilvie to ascertain the cause of Bonnet's pain which radiated into his right heel and left knee area. Ogilvie found that Bonnet's fusion was solid.
17. On June 20, 1986, Bonnet returned to the University of Minnesota Orthopedic Surgery Clinic with increased right leg and low back pain. Bonnet was examined by Dr. Jack Droggt, who believed Bonnet's pain resulted from his increased activity and scar tissue formation. Straight leg raising test was positive on the right at 45 degrees and positive on the left at 60 degrees. Bonnet was restricted to no lifting and continued taking Darvocet.
18. On August 22, 1986, Bonnet returned to Dr. Ogilvie with progressively severe pain. Ogilvie's clinical exam revealed mild dorsiflexion weakness and sciatica tension on the left. Ogilvie believed the cause of Bonnet's pain to be a lesion and ordered a myelogram.
19. Dr. Ogilvie admitted Bonnet to the University of Minnesota Hospital and Clinic on September 2, 1986. At that time, Bonnet's back pain had increased in intensity to the point that it sometimes radiated into his right leg down to his heel. Bonnet described "a warm type" feeling in his lower back that would build until it exploded in a radicular fashion down his right leg. Bonnet's hospital examination revealed a positive straight leg raising test on his right leg at 45 and 60 degrees,

but negative on the left leg. Ogilvie ordered a myelogram followed by a CT scan of Bonnet's lumbosacral spine, which revealed minimally bulging discs at the L3-4 and L4-5 levels with a vacuum sign at the L5 disc level. Ogilvie also reported lateral stenosis at the L4-5 level on the left with compressed nerve roots in that same area due to hypertrophy of the facet and tight subarticular recessed stenosis. Bonnet was discharged the next day.

20. Bonnet signed a settlement agreement and release of his South Dakota worker's compensation claim. That agreement contained the following language:

Claimant is releasing any and all claims he may have for permanent partial disability or impairment, permanent total disability or impairment, temporary total or partial disability or impairment, rehabilitation, retraining, job placement, mileage, and any other claims he may have, including any claims made or potentially made under the odd lot doctrine.

The agreement then goes on to state:

This Release and Agreement is made with the understanding that any payment, including medical payments under § 62-4-1, made or to be made under this title may be reviewed by the Department of Labor, and upon such review, payments may be ended, diminished, increased or awarded subject to the statutory maximum or minimum, if the Department finds that a change in the condition of the employee warrants such action, pursuant to SDCL 62-7-33.

21. Bonnet continued to hunt both geese and pheasant while living in South Dakota.
22. Bonnet underwent cardiac catheterization in 1991 in Bismarck. After this procedure, his treating surgeon reported that he was "walking a mile a day without problems."
23. Bonnet accepted a position as a sporting goods department supervisor with Wal-Mart in Cody, Wyoming, in 1992. During this time period, Bonnet continued to have pain in both legs and his buttocks, including stabbing pain alternating with numbness, down the lateral sides of both legs and the bottoms of both feet.
24. Bonnet bought his first horse in 1993 after he moved to Cody. He did a lot of hunting on horseback for elk and deer in mountainous terrain. These the hunting trips involved camping.
25. On March 2, 1993, Bonnet was examined at the Cody Clinic. Straight leg raising test was positive on the left and negative on the right. Bonnet was diagnosed with bilateral radiculopathy and prescribed Toradol and Elavil.

26. On March 11, 1993, Bonnet had an EMG of his lower extremities, a myelogram and a CT, all of which were ordered to further evaluate his pain. At the time of these tests, Bonnet was on strong narcotic medication to control his pain.
27. On March 16, 1993, Bonnet was evaluated by Dr. Mary Gaddy, a neurologist, of the Billings Clinic. Gaddy attributed Bonnet's pain to a bilateral S1 nerve root distribution. She wanted to test for abnormalities in that location, so she performed EMG and nerve conduction studies. Gaddy then recommended physical therapy.
28. On a March 25, 1993, Bonnet reported at the Cody Clinic that "jogging, walking or standing...causes pain." He also stated that he "was losing inches around his right leg."
29. Bonnet completed about one month of therapy before returning to Cody Clinic on April 16, 1993, complaining of persisting pain radiating down the back of his left leg to the back of his left foot and underneath it, as well as lumbar back pain. Bonnet continued to treat with medications.
30. From 1988 until 1992, Bonnet's medical records do not mention any low back pain. However, he was getting pain medication from Dr. Collins during that time.
31. Fireman's Fund paid for medical expenses associated with Claimant's 1984 injury and continued to pay such expenses through March 11, 1994.
32. In May of 1995, Bonnet started experiencing heart and lung problems. He was treated by Dr. Stephen Mainini, Pulmonary and Critical Care Associates.
33. On July 16, 1999, during one of several clinic visits, Bonnet reported that he was still having chronic low back pain with weakness in both legs and diminished sensation. Dr. Mainini noted mild muscle atrophy and recommended a lumbar spine MRI to see whether Bonnet had residual scar tissue from his 1984 and 1985 surgeries. Mainini was considering an epidural steroid injection with physical therapy, so he referred Bonnet to Dr. Emery for an orthopedic consult. Mainini diagnosed Bonnet with lower extremity neuropathy and refilled his prescriptions.
34. From June of 1994 until March of 2000, Bonnet worked at several light industrial jobs. His movement from one job to the next was not prompted by his lower back condition.
35. On August 18, 2000, Bonnet was working for West Park Hospital when he slipped and fell, injuring his right ribcage area and hitting the back of his head. He fractured two ribs, and was diagnosed with right trapezius and dorsal muscle strain. Bonnet filed a worker's compensation claim for this injury in Wyoming.

36. Bonnet went to the emergency room after his fall at the hospital. He was diagnosed with rib fractures at the 8th and 9th rib on the right. He had significant pain medication administered as a result of this injury, including Demerol and Toradol. Additional medication was prescribed the next day because of the lack of pain control.
37. On August 31, 2000, Dr. Mainini continued Bonnet's pain medication in the form of MS Contin and added Flexeril.
38. On September 8, 2000, Bonnet was examined by Dr. Robert Kemper's PA, Jennifer Williams, of Pulmonary and Internal Medicine Associates, PC. Treatment with the previously prescribed pain medications was continued and Bonnet was allowed to delay his return to work until September 18, 2000.
39. On September 15, 2000, Bonnet was evaluated by Dr. Kemper personally, because Bonnet was experiencing numbness of his fourth and fifth fingers on both hands and numbness in his lateral thigh and other areas. Bonnet experienced "exquisite ongoing pain" with tenderness of his thoracic spine. Bonnet was not complaining of low back pain at that time. Kemper ordered x-rays and noted, in the view of Bonnet's 1984 injury and surgeries, it was very difficult to sort out the acute problems from the preexisting ones. Dr. Kemper later clarified his comments during deposition testimony for Bonnet's Wyoming case:
- "Nothing that you could definitely say was the result of a new trauma. The thoracic spine and the cervical spine, you know, show mostly mild, degenerative change without any, you know, obvious new compression fractures or anything like that. The lumbar spine showed that the fusion surgery that he had had several years prior looked like it was relatively stable And there was nothing that we could definitely say was an acute injury. . . ."
40. Bonnet did not experience significant lower back and leg pain after his August 2000 accident, until about a month or more after the accident.
41. On October 20, 2000, Bonnet was referred to Dr. Fred McMurry of Yellowstone Neurology for further evaluation. McMurry believed that Bonnet might have right lower extremity radiculopathy and an L4 nerve root disorder. Following a review of x-rays and an EMG, McMurry noted chronic changes for the L5-S1 nerve root distribution. McMurry did not believe Bonnet had any substantial neurologic dysfunction affecting the right leg, so he recommended an epidural block. Bonnet was treated with two injections, which only somewhat helped to alleviate his pain. Bonnet was allowed to return to work on Monday, November 13, 2000, but was sent home from work due to his pain medications.

42. Dr. McMurry stated the following in his November 10 medical notes: "It is my understanding that, as a result of the fall at work on August 18, 2000, he has been experiencing unresolved lower extremity symptoms."
43. Bonnet filed a Wyoming workers compensation claim for his August 2000 injuries.
44. Dr. McMurry later clarified his November 10, 2000, medical note during deposition testimony for Bonnet's Wyoming case. He stated that he suspected a problem stemming from the L4 nerve root. McMurry had reviewed a CT myelogram of Bonnet's lumbar spine and noted the fusion remained solid. He also noted "some degenerative joint changes above the fusion," but "did not see a clear cut disk herniation in the lumbar canal at any level." Nevertheless, McMurry believed "the neurologic findings, particularly with the diminished knee reflex on the right side, [were] supportive of a mild dysfunction of . . . the L4 nerve root." McMurry explained that even though the EMG studies did not find any major problems in the lumbar area, "there were some features of the problem that were very compatible with a nerve that was dysfunctional and irritated." He indicated it "takes actual damage to the nerve before it shows up on the electrical studies."
45. Dr. McMurry also testified about the effects of Bonnet's fusion surgeries on the adjacent segments of Bonnet's spine:

"The problem we get into down the road, a long time down the road from any fusion, is there can be some mechanical problem above the fixed level of the fusion where, essentially, a hypermobility may develop. And that was really more the issue here."

Dr. McMurry explained that when one level is fused, that puts added stress on the levels above and below the fusion because they have to compensate for movement, even in routine bending. McMurry viewed the fusion "as being part of the overall lumbar spine many years later."
46. Bonnet went to the emergency room in West Park Hospital on August 20, 2001, complaining of jaw pain. He underwent coronary bypass surgery on August 29, 2001 and was off work for several months following heart surgery.
47. Bonnet had an independent medical evaluation of his lower back in the state of Wyoming by Dr. Paul Ruttle, who concluded that Bonnet's problems in 2001 were not related to his August 18, 2000 injury.
48. The Wyoming Office of Administrative Hearings found Claimant's August 2000 fall to be compensable in a February 1, 2002, decision the Wyoming worker's compensation judge stated: "the office concludes that, if the symptoms in

question are related to his pre-existing injury, the fall caused a material aggravation of the claimant's condition, also resulting in compensability.”

49. In December of 2002, the Wyoming Workers' Safety & Compensation Division reviewed the case and determined that Claimant's medical expenses and condition beginning about August 1, 2002, were no longer related to his August 2000 fall. In this proceeding, Claimant took the position that his medical condition and expenses after August 1, 2002, were the result of his August 2000 accident.
50. Bonnet disagreed with the Wyoming Workers' Safety & Compensation Division's December 2002, determination and appealed the matter to the Wyoming Office of Medical Commission. At a December 2003 hearing, Claimant argued that his August 2000 injury was the cause of his continuing need for medical treatment.
51. The Wyoming Medical Commission Hearing Panel issued a decision on January 9, 2004, which concluded that Bonnet's complaints of chronic low back pain and bilateral leg symptoms which resulted in his ongoing use of medication and follow-up doctors' visits, up to the August 2000 slip and fall was the result of Bonnet's original South Dakota injury. The Medical Commission agreed with Dr. Ruttle's opinion that Bonnet experienced a temporary exacerbation of his symptoms when he fell in August 2000. Thus, the Commission ruled that any treatment after August 2002 was not related to Bonnet's slip and fall in August 2000. The Commission also noted that by January 2002, Bonnet had returned to work, that his symptoms had subsided, and that he anticipated no future surgery. The Commission explained that after his 15-month break in treatment, Bonnet had "returned to baseline or normal condition" and that Claimant's condition at that time was not related to the August 2000 injury.
52. After the Wyoming Medical Commission's January, 2004, decision Claimant filed this action in South Dakota seeking compensation for his medical condition since August 1, 2002, and related medical expenses incurred. Claimant now alleges that his current condition and medical expenses are attributed to his March 1984 fall.
53. After August 2002, Bonnet experienced an increase of symptoms which led to a number of different treatments and surgery.
54. Over the course of the last nine years, Bonnet has been evaluated by several doctors and has undergone a number of treatments to help with his chronic low back pain. His treatment regimen has included several prescription medications, numerous injections, and an epidural neurolysis procedure to treat the scar tissue from his 1984 and 1985 surgeries, the insertion of a dorsal column stimulator, and most recently, insertion of a drug administration pump.
55. Dr. Ogilvie testified by video deposition on behalf of the Claimant in this case. In preparation for his testimony, Ogilvie who performed Bonnet's second fusion

surgery conducted a medical records review of Bonnet's medical file since his first injury in 1984. Ogilvie is a highly respected orthopedic surgeon who has performed 250 to 300 spine surgeries per year, and estimates that he has performed over 3,000 spine surgeries in his career. Approximately 40% of Ogilvie's practice has been composed of revision surgery. He has had a variety of staff and faculty positions with the University of Minnesota in the Department of Orthopedic Surgery. He has a long tenure as a full-time spine surgeon from 1982 to 2003. Since 2003, he has been a staff surgeon at the Shriners Hospital Intermountain Unit in Salt Lake City, Utah, and a Professor at the Department of Orthopedic Surgery at the University of Utah since 2004. He remains professor emeritus at the University of Minnesota. He is board certified in orthopedic surgery and has written and been published extensively, including multiple peer-reviewed articles. He himself serves as an associate editor and guest editor for several journals and boards, particularly, including the Spine Journal and the Journal of American Academy of Orthopedic Surgeons and peer-reviews articles submitted for publication.

56. Dr. Ogilvie opined to a high degree of medical certainty that Bonnet's current condition is causally linked to his 1984 South Dakota work injury. Ogilvie explained that Bonnet has experienced a persistence of significant symptoms, including bilateral leg pain, from the time of his South Dakota injury right up until the time of his Wyoming injury. Bonnet has discernable adjacent segment disease and facet joints at L3-4 that appear "very enlarged, arthritic, and gnarled," inconsistent with his chronological age, while the facet joints above L3-4 appear normal for his age. Bonnet has chronic low-back pain "propagated by" the South Dakota work injury and the subsequent failed fusion. In addition, none of Bonnet's neurological findings, x-ray findings, or CT myelogram findings, indicate any structural damage to Bonnet's spine from his August 2000 fall. Bonnet did not report any low back symptoms until about a month and a half after his 2000 fall. There were no new objective findings since Bonnet's August 2000 fall, either in the medical record or in the medical images. Ogilvie concluded that Bonnet's medical treatment after August 2002 would likely have been necessary regardless of the August 2000 fall because the changes observed on the CT studies were not traumatic changes, but "progressive, developmental degeneration of the L3-4 facet joints."
57. Dr. Ogilvie noted that Bonnet's personal explanation of his injury "has a lot of variations in it and is probably the least helpful" to understanding his true medical situation. He explained that a patient may be firmly but wrongly convinced of one cause of his pain or other symptoms, while a clinical evaluation reveals another conclusion.
58. Dr. Schabacker testified by video deposition on behalf of the Claimant in this case. Schabacker performed a review of Bonnet's entire medical file. Schabacker is board certified in physical medicine and rehabilitation with a

subspecialty certification in pain. He regularly treats patients referred by other physicians who have failed to relieve their patient's pain. As a pain management specialist, Schabacker has knowledge and expertise in radiology, orthopedics, and neurosurgery. He reviews radiology studies, rather than relying on a radiologist's report.

59. Dr. Schabacker opined to a reasonable degree of medical certainty that Bonnet's 1984 work injury and subsequent fusion surgeries are a major contributing cause of Bonnet's current disability, impairment, and need for treatment. Further, he could not attribute Bonnet's current condition to the August 2000 slip and fall.
60. Dr. Schabacker testified that Bonnet's functional status is significantly limited to the point that he could not see him even in a sedentary occupation due, in part, to his inability to sit for lengthy periods of time. In evaluating Bonnet's posture and gait, Schabacker did not believe Bonnet would be safe or capable of walking more than short distances. He was further of the opinion that given Bonnet's condition, absenteeism from work would be a problem because his pain is variable and affects his ability to function. He testified that Bonnet's inability to work since 2003 is medically supported and consistent with the imaging studies and physical examination.
61. Both Dr. Ogilvie and Dr. Schabacker testified that adjacent segment disease is a common byproduct of spinal fusion surgery. However, much is still unknown about the relationship. The variations and severity of the condition may ultimately be a matter of heredity.
62. Dr. Wayne Anderson testified at the hearing on behalf of the Employer and Insurer. Anderson currently practices medicine in Rapid City, SD. He has practiced medicine for 26 years. He is board certified in occupational medicine which constitutes the majority of his practice and he has a degree in mechanical engineering. Anderson performed a medical records review of Bonnet's entire medical file.
63. Dr. Anderson diagnosed Bonnet's condition as chronic lower back pain. He described Bonnet as post L4 through S1 fusion with additional spondylolysis and spondylolisthesis and evidence of annular tear at L4. Anderson stated that Bonnet's primary problem is spondylolysis and spondylolisthesis at L5-D1. This condition was made symptomatic by his slip and fall landing on his buttocks in 1984. Anderson opined that the 1984 slip and fall was a contributing factor for the need for treatment of his lower back from that date to August 2000. He also opined within a reasonable medical certainty that the August 2000 slip and fall in Wyoming did contribute independently to his disability.
64. Dr. Anderson admitted during his testimony that he would defer to the opinions of Drs. Ogilvie and Schabacker.

65. Additional facts may be discussed in the Analysis of this Decision.

Analysis:

In this case, Bonnet seeks workers' compensation benefits for expenses arising from his medical condition since August 1, 2002. Bonnet has the burden of proving all facts essential to sustain an award of compensation. Day v. John Morrell & Co., 490 N.W.2d 720 (S.D. 1992); Phillips v. John Morrell & Co., 484 N.W.2d 527, 530 (S.D. 1992); King v. Johnson Brothers Construction Co., 155 N.W.2d 193, 195 (S.D. 1967).

Judicial Estoppel:

Employer and Insurer argue that Bonnet's contentions in his Wyoming worker's compensation case judicially bars him from seeking benefits in this case. In a letter decision dated August 10, 2009, the Department ruled that Bonnet was not judicially estopped in this case. The Department declines to modify or alter that decision here.

The Last Injurious Exposure Rule:

Bonnet was involved in two slip and fall accidents. One occurred in South Dakota in March of 1984 while employed by Employer. The second occurred in Wyoming in August of 2000 while working for West Park Hospital. When there are two different employers, and the claimant suffers a subsequent injury, the Department must determine whether the subsequent injury is a mere reoccurrence of a prior condition, or an independent aggravation. The second injury is not an aggravation unless it independently contributes to the claimant's final disability. A recurrence is generally marked by persistent symptoms and the inability to independently link the onset of symptoms to the subsequent injury. Paulsen v. Black Hills Packing Co., 1996 SD 118, ¶12, 554 NW2d 194, 196, (quoting Schuck v. John Morrel & Co., 529 NW2d 894, 900 (SD 1995). "The testimony of professionals is crucial in establishing a causal relationship because the field is one in which laymen ordinarily are unqualified to express an opinion." Day v. John Morrell & Co., 490 N.W.2d 720, 724 (S.D. 1992).

Three doctors provided testimony in this case. Dr. Ogilvie and Dr. Schabacker opined that Bonnet's current condition is causally linked to his 1984 South Dakota slip and fall and not his 2000 Wyoming accident. On the other hand Dr. Anderson opined that Bonnet's Wyoming fall was a major contributing cause of his current condition.

Dr. Ogilvie's and Dr. Schabacker's opinions are more persuasive. Dr. Ogilvie specializes in orthopedic spinal surgery. He has conducted more than 3000 spinal surgeries, including one of Bonnet's, during his career. He has been an educator in the field and his qualifications to provide testimony in this is superior to all others. Dr. Schabacker also has excellent credentials and is particularly qualified to testify about the treatment of pain. In his practice, Schabacker patients with chronic pain are referred to him as a matter of last resort.

Dr. Ogilvie and Dr. Schabacker's opinions are supported by the following facts. Bonnet suffered a lower back injury in 1984. He has had two back surgeries as a result of that injury. He has a history of pain in his back, buttocks and legs since that injury and he suffers from a chronic degenerative condition directly associated with that injury and related surgeries.

Further, Bonnet's Wyoming fall injured his ribs, shoulder and upper back. He did not complain of lower back pain for more than a month after that fall and there are no objective findings on any x-ray, MRI or CT imaging that link the Wyoming fall to his current lower back condition. Consequently, Bonnet has met his burden of proof. Bonnet's South Dakota fall was a major contributing cause of his current lower back condition and his Wyoming injury is not independently linked to that condition.

The 1987 Settlement Agreement and SDCL 62-7-33:

Employer and Insurer argue that Bonnet is precluded from seeking permanent total disability benefits in this case by the 1987 Settlement Agreement which was entered into by both parties. This argument encompasses two separate issues: 1) whether the terms of the settlement agreement allow Bonnet to seek additional benefits at this time; and 2) whether SDCL 62-7-33 allows Bonnet to seek additional benefits.

The Department addressed the second issue in its August 10, 2009, letter decision. There the Department found that SDCL 62-7-33 allows Bonnet to seek additional benefits if he can demonstrate at hearing that he has had a change in his condition resulting from an unknown injury or an unforeseen consequence of a known injury. The Department declines to modify or alter that decision.

However, the first issue deserves some mention here. The Settlement Agreement contains two provisions, both noted in fact 20 above. The first provision releases Employer and Insurer from any and all claims for permanent total disability. The second provides an exception to the first provision when a review of the claim is justified under the provisions SDCL 62-7-33. Consequently, the answer to the first issue mirrors that the second issue. The agreement allows Bonnet to seek additional benefits if the record demonstrates a change in Bonnet's condition resulting from an unknown injury or an unforeseen consequence of a known injury.

The record indicates that Bonnet has had a change of condition since the 1987 agreement was executed. At that time, he suffered periodic episodes of lower back and leg pain which required medication but he had an active life style which included hunting and horseback riding and he held a number of light industrial jobs. His back condition has now deteriorated to the point where he is obviously permanently and totally disabled. The evidence also shows that the extent to which Bonnet's condition has declined was unforeseeable when he signed the agreement. Part of Bonnet's current problem stems for adjacent segment disease. While this condition is a common complication of spinal fusion surgery, much is still unknown about the relationship. Who will be affected and to what extent may ultimately be a matter of heredity.

Consequently, Bonnet has met the conditions of SDCL 662-7-33 and a review indicates that his lower back condition since August 1, 2002, is compensable.

Collateral Source Rule:

Bonnet argues that the Department erred when it admitted evidence showing the payments made for medical treatments by third party payers. They contend that the collateral source rule precludes the admission of those documents. The Department made that ruling in a letter decision dated August 17, 2010. The Department declines to alter that decision. However, a brief discussion of Meyers v. Meyers Oil Company, 88 SD 166, 216 NW2d 820 (1974) is warranted

Bonnet refers to the Meyers case for the first time in his post-hearing reply brief. He argues that this case supports his position. The Department disagrees. In Meyers, the Court found the Insurer liable for the actual amount paid by a third party insurance company. That is consistent with the Department's August 17, 2010, decision and the language of SDCL 62-1-1.3 which requires reimbursement for "all payments made" plus interest. In this case, Bonnet sums which exceed those paid by third party payers, namely Medicare "set-offs" and insurance "write-offs". Therefore, the collateral source rule does not apply in workers compensation cases to the extent that it conflicts with the clear language of SDCL 62-1-1.3.

SDCL 62-4-1 (1973):

Employer and Insurer contend that at the time of Bonnet's 1984 South Dakota injury, SDCL § 62-4-1 (1973) did not allow claimants the initial selection of physicians such as is present in the current version of the statute. Instead, the statute required the employer to provide medical care and allowed an employee to "elect to secure his own physician, surgeon, or hospital services at his own expense." Employer and Insurer argue that Bonnet provided no testimony that he obtained approval for coverage of any medical expenses after Insurer ended those payments.

Employer and Insurer's argument here is without merit. Once Employer and Insurer denied coverage, the injury was "presumed to be not work related for other insurance purposes". SDCL 62-1-1.3. Consequently, Bonnet was no longer obligated to seek approval for his choice of doctors.

Conclusion:

Counsel for Claimant shall submit proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision, within 20 days of the receipt of this Decision. Counsel for Employer and Insurer shall have an additional 20 days from the date of receipt of Claimant's Proposed Findings of Fact and Conclusions of Law to submit objections and/or Employer and Insurer/s Proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions

