July 31, 2015

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Letter Decision on Motion for Summary Judgment

Rebecca L. Mann
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RE: HF No. 193, 2013/14 – Mark E. Swedzinski v. Ridgetop Holdings, Inc., d/b/a Davis Erection, Inc. and/or Crane Rental & Rigging, Inc.

Dear Mr. Weidenaar and Ms. Mann:

Submissions:

This letter addresses the following submissions by the parties:

April 24, 2015	[Employer/Insurer's] Motion for Summary Judgment.
	[Employer/Insurer's] Statement of Material Facts.
	[Employer/Insurer's] Brief in Support of Motion for Summary Judgment.
	Affidavit of Rebecca L. Mann [in Support of Employer/Insurer's Motion for Summary Judgment].
June 3, 2015	[Claimant's] Brief in Resistance to Employer and Insurer's Motion for Summary Judgment.
	[Claimant's] Response to Statement of Material Facts.
	Affidavit of Dr. Allen Unruh [in Resistance to Employer/Insurer's Motion for Summary Judgment].

	Affidavit of Mark E. Swedzinski [in Resistance to Employer/Insurer's Motion for Summary Judgment].
June 26, 2015	[Employer/Insurer's] Reply to Brief in Resistance to Motion for Summary Judgment.
	Affidavit of Rebecca L. Mann.

Facts:

When construed in the light most favorable to the non-moving party, the facts of this case are as follows:

1. Claimant, Mark E. Swedzinski, was employed with Topping-Out, Inc., d/b/a Crane Rental & Rigging on July 25, 2008, when he suffered a work related injury to his lower back.

2. On July 25, 2008, Employer was insured with Zurich American Insurance Co.

3. Claimant treated with his longstanding chiropractor, Dr. Allen Unruh, for the injury from July 28, 2008 through August 15, 2008.

4. Insurer paid for the July and August 2008 chiropractic treatments along with other medical benefits in 2008.

5. Claimant continued treating with Dr. Unruh for back pain from October 10, 2008 through October 20, 2008 for what turned out to be a kidney stone.

6. The October 2008 chiropractic treatment was not submitted to Insurer for payment.

7. On December 3, 2008, Dr. Unruh placed Claimant at maximum medical improvement (MMI) as of August 18, 2008 with no permanency associated with the injury.

8. Insurer paid three weeks of TTD on December 9, 2008, and an interest payment on January 7, 2009.

9. Insurer's last payment of medical benefits to Claimant was on January 7, 2009.

10. Claimant continued to treat with Dr. Unruh thereafter for back pain on a regular basis attending 36 sessions from December 22, 2008 through July 23, 2010.

11. Claimant treated with Dr. Unruh for back pain on October 6, 2010, charges from this treatment were submitted to Claimant's health insurance.

12. On November 3, 2010, Insurer approved x-rays and an MRI request by Dr. Unruh.

13. On December 15, 2010, Claimant treated with Dr. Unruh for an "updated examination of initial symptoms regarding his work comp injuries." A lumbar spine x-ray was also completed.

14. Claimant continued to treat with Dr. Unruh for back pain from December 21, 2010 through December 30, 2011.

15. Claimant continued treating with Dr. Unruh for back pain from March 19, 2012 through October 15, 2014.

16. On April 11, 2012, Dr. Unruh wrote Insurer and indicated Claimant has had "chronic and reoccurring pain in his lumbar spine and mid-back ever since [the July 25, 2008] incident."

17. Insurer notified Claimant on June 10, 2013, that any claims for additional compensation were barred pursuant to SDCL 62-7-35 under the three year statute of limitations.

18. Claimant filed a Petition for Hearing on June 6, 2014.

19. Employer/Insurer filed a Motion for Summary Judgment on April 24, 2015.

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

***Analysis*:**

Summary Judgement:

Employer and Insurer filed a Motion for Summary Judgment in this case. 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. The burden is on the moving party to clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law. Estate of Elliott, 1999 SD 57, ¶15, 594 NW2d 707, 710 (citing Wilson, 83 SD at 212, 157 NW2d at 21).

Statute of Limitation:

In their motion, Employer and Insurer contend that the statute of limitation imposed by SDCL 62-7-35.1 bars further compensation in this case for the July 2008 injury because more than three years passed between the last payment of benefits to Claimant which occurred on January 7, 2009, and Claimant's Petition for Hearing filed June 6, 2014. 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).

Review Pursuant to SDCL 62-7-33:

Claimant responded to the Motion for Summary Judgment argues that the statute of limitations imposed by SDCL 62-7-35.1 should not be applicable here, because Insurer systemically avoided payment to Claimant or Claimant's medical care provider's by ignoring the medical bill submissions.

Claimant also argues that the statute of limitations imposed by SDCL 62-7-35.1 is not applicable here, because he is entitled to a review of his benefits pursuant to SDCL 62-7-33. That provision 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.

Statute of Limitations:

Employer and Insurer also argue that a review pursuant to SDCL 62-7-33 is inappropriate and dismissal is required because Claimant does not meet the "change in condition" exception to the three-year statute of limitations. Employer and Insurer rely on Owens v. F.E.M. Electric Assn., Inc., 2005 S.D. 35, ¶ 20, 694 N.W.2d 274, which holds that a change in condition must manifest after the limitations period has expired. The Department disagrees, as this case is distinguishable from the case at bar. The decision in Owens dealt with a formal notice that denies or disputes an employee's claim and thus dealt with the two years statute of limitations imposed by SDCL 62-7-35.

The South Dakota Supreme Court has held that "SDCL 62-7-35.1 furnishes the limitations period when the employer provides the employee with benefits for a period of time, gives no denial notice, and then the matter lies inactive." Faircloth v. Raven Indus., Inc., 2000 SD 158, ¶8, 620 NW2d 198, 201. Even if the change of condition occurred before the three year statute in SDCL 62-7-35.1 ran, the statute explicitly state that "[t]he provisions of this section do not apply to review and revision of payments or other benefits under § 62-7-33."

Also, the fact that Claimant consistently treated with his long-standing chiropractor on a regular basis or complained of pain prior to the running of the statute does not necessarily mean that his change in condition occurred prior to the running of the statute.

Employer and Insurer reply by arguing that SDCL 62-7-35.1 bars Claimant's action because even if Dr. Unruh submitted bills to Insurer that were ignored, that does not toll the statute of limitations. Claimant's remedy was to file a petition for a hearing under the holding in Owens v. F.E.M. Electric Assn., Inc., 2005 S.D. 35, ¶ 20, 694 N.W.2d 274.

However, SDCL 62-7-35.1 allows for an exception in that the statute explicitly states that "[t]he provisions of this section do not apply to review and revision of payments or other benefits under § 62-7-33." In order to qualify for a review under the provisions of SDCL 62-7-33, Claimant must show both a substantial change of earnings and a change of condition. Claimant's Petition avers that "Claimant's physical limitations prevent him from returning to his usual and customary line of employment"[1] and that "the MRI on July 23, 2013, revealed a worsening of the herniation at L5-S1."[2] Under this statute, the Department has continuing jurisdiction to review "any payment" when there has been a physical change in the employee's condition from that of the last award. As such, sufficient facts exist to support a review by the Department pursuant to SDCL 62-7-33.

[1] Petition for Hearing, ¶ 8.
[2] Unruh Affidavit, ¶ 20.

Unforeseeable condition:

Employer and Insurer next argue that Claimant cannot reopen his claim because a "change in condition" which justifies reopening a claim must not be foreseeable at the time the statute of limitation ran. Employer and Insurer argue that any change in condition was foreseeable before the SDCL 62-7-35.1 statute expired on January 7, 2012. The Department disagrees with their conclusion in this case.

Employer and Insurer rely on several South Dakota cases in support of their position. In McDowell v. Citibank, 2007 SD 52, ¶ 12, 734 NW2d 1, the Court stated:

> The requirements for reopening a workers' compensation settlement under SDCL 62-7-33 are well settled. Three things must be shown:
>
> > First, the claimant must prove "a change in condition." Second, the claimant must prove that the asserted "change in condition" derives from an injury unknown at the time of settlement or from a known injury with its disabling character unknown. Finally, 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. (emphasis added.) In Sopko v. C & R Transfer Co., 1998 S.D. 8, ¶ 15, 575 N.W.2d 225, 232 the Court stated:

> When an injured worker seeks to reopen a settlement which includes a waiver of future rights, the focus is on whether the asserted change in condition derives from an injury unknown at the time of the settlement or from a known injury with its disabling character unknown.

Id. (emphasis added.) In Kasuske v. Farwell, Ozmun, Kirk & Co., 2006 S.D. 14, ¶ 12, 710 N.W.2d 451, 455 the Court stated, "the Department may refuse to reopen the claim if the "change in condition" was foreseeable at the time of settlement." (emphasis added.)

These cases are clearly distinguishable from the one at bar. In these cases, the claimants had all signed settlement agreements with the insurer in which they were compensated for waiving their rights to future benefits. That is not the situation here. Claimant has not entered into a settlement agreement with Insurer, nor has he been compensated for his waiver of future benefits.

In addition, these cases all indicate that the "change in condition" must be unforeseeable at the time of the settlement. If the requirement applies in this case, then at what point in time would the change in condition need to be foreseeable. The Supreme Court created this "unforeseeable" requirement to justify reopening a claim

where the claimant had previously been paid to waive any future benefits. In this situation, it would be profoundly unfair to deny the claimant an opportunity to reopen his claim if the change in his condition proves to be related to his original work-related injury.

Dispute of Facts:

Finally, Employer and Insurer argue that Claimant is barred from reopening his claim because there was no change in condition. When considering a motion for summary judgment, "[a]ll reasonable inferences drawn from the facts must be viewed in favor of the non-moving party." State Farm Automobile Ins. Co. v. Gertsema, 2010 S.D. 8, ¶ 8, 778 NW2d 609; Estate of Trobaugh v. Farmers Ins. Exch., 2001 SD 37, ¶ 16, 623 NW2d 497, 501.

"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)). There is clearly a diversity of opinions among the experts. In this case, Dr. Unruh has opined that the July 3, 2013 MRI revealed a worsening of the herniation at L5-S1, thus that Claimant has had a change of condition, while Dr. Jensen after reviewing an IME of Claimant performed on January 19, 2015 along with reviewing both April 2, 2012 and July 3, 2013 MRI films states that there is significant improvement between the two MRIs. Whether Claimant underwent a change of condition is an essential factor in determining whether Claimant is entitled to a SDCL 62-7-33 review. While it, admittedly, takes a broad view of the pleadings and evidence thus far provided, some evidence suggests that Claimant's condition falls within the exclusion provided in SDCL 62-7-33. Therefore, Claimant's action against Employer and Insurer are not barred by SDCL 62-7-35.1. Consequently, there is an issue of material fact remaining and Employer and Insurer's Motion for Summary judgment must be denied.

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/ Sarah E. Harris
Sarah E. Harris
Administrative Law Judge
Division of Labor & Management
Department of Labor & Regulation