July 14, 2015

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LETTER DECISION AND ORDER

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RE: HF No. 28, 2013/14 – Craig Tuschen v. Servall Uniform & Linen Supply and St. Paul Fire & Marine Co.

Dear Mr. Simpson, Mr. Larson and Ms. Hensley:

Submissions:

This letter addresses the following submissions by the parties:

March 4, 2015	[Employer and Insurer's] Motion for Summary Judgment;
	[Employer and Insurer's] Brief in Support of Motion for Summary Judgment;
	Affidavit of Charles A. Larson;
June 5, 2015	Claimant's Response to Employer/Insurer's Motion for Summary Judgment;
	Affidavit of Michael J. Simpson;
June 11, 2015	Employer and Insurer's Brief in Reply to Claimant's Response to Motion for Summary Judgment.

Facts:

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

1. Craig Tuschen (Claimant) was employed by Servall Uniform & Linen Supply (Employer) on April 12, 2002, when he stepped off a truck and injured his right knee.

2. Employer and St. Paul Fire & Marine Insurance Co. (Insurer) accepted Claimant's April 12, 2002, work injury as compensable and paid benefits accordingly.

3. Claimant had arthroscopic surgery, injections and physical therapy and was given an impairment rating.

4. As a result of the injury on April 12, 2002, Claimant had surgery performed by Dr. Timothy Gill on September 13, 2002.

5. On September 8, 2003, Dr. Gill informed Claimant that he had no further treatment recommendations, but that Claimant may require further surgery or possible knee replacement in the future.

6. Insurer's last payment of medical benefits to Claimant was on October 1 2003, and the last payment of indemnity benefits was on March 3, 2004.

7. Claimant filed a Petition for Hearing on August 5, 2013, alleging that he has not recovered from the 2002 injury and is in need of medical treatment.

8. The deposition of Dr. Clark Duchene was taken on January 29, 2015. Several times throughout this deposition, Dr. Duchene testified that Claimant's current condition is a result of the natural progression of the April 2002 injury. When asked if Claimant has had a change in his medical condition from 2002 to the current time, Dr. Duchene responded, "[T]here has been a progression in the radiographic findings of his knee."

Analysis:

Summary Judgment:

Employer and Insurer filed a Motion for Summary Judgment in this case. ARSD 47:03:01:08 governs the Department of Labor's authority to grant summary judgments. That regulation states:

> A claimant or an employer or its insurer may, anytime 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.

Medical causation is a jury question, i.e., a question of fact. See, Lewis v. Sanford Medical Center, 2013 S.D. 80; Sabol v. Johnson, 443 N.W.2d 656 (S.D. 1989). When the question of causation in this case is viewed in the light most favorable to the non-moving party, there is no dispute of sufficient material facts to determine whether Employer and Insurer are entitled to judgment as a matter of law.

Unforeseeable condition:

Employer and Insurer's position is that the three year statute of limitation imposed by SDCL 62-7-35.1 bars Claimant's present request for medical treatment. SDCL 62-7-35.1 provides:

> 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 he is not barred by this statute because he is entitled to a review 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 and Regulation 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.

Employer and Insurer counter by arguing that Claimant cannot reopen his claim because Claimant's need for future surgery was foreseeable in 2003. The Department disagrees with their conclusion in this case.

Employer and Insurer rely on several South Dakota cases to support of their position. In McDowell v. Citibank, 2007 S.D. 52, ¶12, 734 N.W.2d 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 injury or condition must be unforeseeable at the time of the settlement. If the requirement applies in this case, at what point in time

would the injury or condition need to be foreseeable, at the time of the injury, a year after the injury as was the case here or at the time of the petition for hearing.

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 case, it would be profoundly unfair to deny the claimant an opportunity to reopen his claim if the change in his condition is proven to be related to his original work-related injury.

Order:

For the reasons stated above, it is hereby, ordered that 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
Department of Labor & Regulation
Division of Labor & Management