October 17th, 2017

Jennifer Van Anne
Woods, Fuller, Shultz & Smith
PO Box 5027
300 S. Phillips Avenue, Suite 300
Sioux Falls, SD 57104-6322

Michael Bornitz
Cutler & Donahoe, LLP
PO Box 1400
Sioux Falls, SD 57101

LETTER DECISION AND ORDER

RE: HF No. 36, 2005/06 – Estate of Kevin Livingston v. Dunham's Athleisure Corp. & Fireman's Fund Insurance Co.

Dear Ms. Van Anne and Mr. Bornitz:

This letter addresses the following submissions by the parties:

September 15th, 2017	Claimant's Motion to Amend Petition
September 28th, 2017	Employer and Insurer's Response to Claimant's Motion to Amend Petition
October 6th, 2017	Claimant's Reply to Employer and Insurer's Response
October 9th, 2017	Employer and Insurer's e-mail responding to Estate's Response

ISSUE PRESENTED

May Estate amend the original petition for the purposes of adding a claim for death benefits?

FACTS AND PROCEDURAL HISTORY

The facts of this case are detailed in an earlier letter decision. Relevant here is the fact that the Department granted the Estate's motion to substitute itself for Claimant in this case for the purpose of determining whether any TTD or medical benefits were

due to Claimant between the time of his injury and his untimely demise. For the purposes of that motion, the Department presupposed that Claimant's death was unrelated to his injury, though that particular issue was never contested by the parties in that motion. On September 15th, 2017, the Estate filed a motion to amend the original petition to allege Claimant's death was a result of pain medications which Claimant was taking for a work-related injury Claimant suffered while working for Dunham's. Claimant's death certificate listed his cause of death in part I as "presumed myocardial infarction". Part II of the death certificate listed "hepatitis C, abnormal liver function, [and] long term drug therapy" as causes of death. No autopsy was performed and Claimant was cremated. Employer/Insurer objected to amending the petition arguing first that doing so would be futile since no benefits were payable to the Estate on Claimant's behalf, and second that it would be unduly prejudiced by the fact that Claimant was cremated and no autopsy was performed.

ANALYSIS

"*The test for allowing an amendment under SDCL 15-6-15(b) is whether the opposing party will be prejudiced by the amendment;* i.e., did he have a fair opportunity to litigate the issue, and could he have offered any additional evidence if the case had been tried on the different issue." *Isakson v. Parris*, 526 N.W.2d 733, 736 (S.D. 1995)(emphasis original.)

The Estate acknowledges that no autopsy was performed on Mr. Livingston. Neither is one possible at this point since Mr. Livingston was cremated. The Estate nevertheless contends that it can meet its burden of proving causation through

examination of Claimant's medical records and the testimony of Claimant's treating physician and the coroner who attended to Claimant at his death. Though it is unclear whether this alone would meet Claimant's burden, the South Dakota Supreme Court has previously ruled that an autopsy is not required for determining a cause of death in a workers compensation case. (See *Campbell v. City of Chamberlain*, 78 S.D. 245, 100 N.W.2d, 710 (1960)).

Employer/Insurer argues that to allow the Estate to amend the petition at this point would be unduly prejudicial as it will not be able to obtain physical evidence by which it may refute the Estate's claims. To support its position, Employer/Insurer cites *Thyen v. Hubbard Feeds, Inc. and Sentry Insurance*, 2011 SD 61, 804 N.W.2d 435. In *Thyen*, the claimant suffered an allergic reaction to feed which may have contained toxic mold. The Department denied Claimant's petition for benefits and Claimant appealed to the Circuit Court arguing that employer had deprived him of evidence by destroying the original feed to which Claimant was exposed. The circuit court also upheld the denial of benefits, after which time the claimant appealed to the Supreme Court. That court reversed, ruling that the Department had erred by not considering whether or not employer had engaged in spoliation of evidence. The Court explained, "When [spoliation] is established, a fact finder may infer that the evidence destroyed was unfavorable to the party responsible for its destruction." *Thyen,* ¶ 16 (quoting State v. *Engesser,* 2003 S.D. 47, ¶ 44, 661 N.W.2d at 753).

However, the Court also noted that a necessary element of proving spoliation of evidence was that a party destroyed evidence in bad faith with the intent to conceal unfavorable evidence. In *Engesser*, the Court differentiated between purposeful

spoliation and destruction that was merely negligent. The Defendant in *Engesser* appealed his conviction for vehicular homicide in part on the argument that the trial court had erred in refusing a jury instruction that law enforcement had destroyed exculpatory evidence in the case. The Court rejected the defendant's argument, explaining:

> The defendant's argument seems to presuppose that any evidence destroyed at the hands of the police, whether by mistake, inadvertence, oversight, misjudgment, negligence, or ignorance, warrants an adverse inference instruction. That is incorrect. A proper application of the rule requires a showing of an intentional act of destruction. Only intentional destruction will sustain the rule's rationale that the destruction amounts to an admission by conduct of the weakness of one's case.

Engesser, ¶ 44.

Here, there is no evidence that the Estate cremated Claimant's body with the intent to destroy unfavorable evidence. Allowing the Estate to amend the petition alone does not constitute undue prejudice to Employer/Insurer. Claimant is also deprived of physical evidence in this case, and Claimant retains the burden of proving causation. In the event that the Estate is unable to meet this burden, Employer/Insurer may request summary judgment.

Assuming the Estate is able to establish a causal link between Claimant's death and his pain medications, the Department must also consider what benefits Claimant might recover. First, death benefits are payable to a claimant's spouse or minor children. SDCL 62-4-12 provides:

> The amount of compensation which shall be paid for an injury to the employee resulting in death, if the employee leaves a spouse, child or children, shall be paid at the rate provided by § 62-4-3 for life or until remarriage in the case of a spouse. If the spouse remarries, two years' benefits shall be paid to the spouse

> in a lump sum. The amount of compensation which shall be paid for an injury to the employee resulting in death, if the employee leaves any children and no spouse, shall be paid at the rate provided by § 62-4-3 until the child is age eighteen or for life in the case of any child who is physically or mentally incapable of self-support or until age twenty-two for any child enrolled as a full-time student in any accredited educational institution. If any child is not in the custody of the surviving spouse, the compensation shall be divided pursuant to the provisions of § 62-4-12.1.

In the event that a worker leaves no surviving spouse or minor children, SDCL 62-4-14 provides:

> [If] the employee leaves any parent, grandparent, or minor sibling, *who were dependent upon the employee for support at the time of the employee's injury*, [benefits] shall be such a percentage of the sum provided in § 62-4-12 as the average annual contributions which the deceased made to the support of the parent, grandparent, or minor sibling during two years preceding the injury bear to the employee's earnings during the two years. (emphasis added).

Finally, in the event that a deceased claimant does not leave behind parents, grandparents, or minor siblings, SDCL 62-4-15 provides:

> [If] the employee leaves collateral heirs *dependent at the time of the injury* to the employee upon the employee's earnings, [benefits] shall be such a percentage of the sum provided in § 62-4-12 as the average annual contributions which the deceased made to the support of the collateral dependent heirs during two years preceding the injury bear to the employee's earnings during the two years. (emphasis added).

Examination of these statutes makes clear that death benefits are payable only to those heirs who may demonstrate that they were dependent upon a worker for support. In this case, it is undisputed that Claimant was not married at the time of his death. Claimant is survived by one daughter who had already reached the age of majority by the time of his death. The Estate has put forth no other potential survivors who may claim death benefits under either SDCL 62-4-14 or 15. Since no statute allows for a Decedent's Estate to claim benefits on behalf of itself, the Estate cannot be

awarded death benefits even if it could prove that Claimant's death was the result of the pain medications prescribed to Claimant as a result of his work-related injury.

The Estate is not completely without remedy. Under, SDCL 62-4-16, "The employer shall pay the burial expense and the expense of a headstone grave marker for an employee whose death resulted from an injury, in an amount not to exceed the sum of ten thousand dollars." Since nothing in this section limits payment of burial expenses to a dependent survivor, Claimant's estate could claim them up to $10,000 for costs associated with Claimant's funeral and burial. In the event the Estate can meet its burden of proving causation, the Estate may recover burial benefits as provided by SDCL 62-4-16, to a maximum of $10,000.

ORDER

The Estate's motion to amend its petition is GRANTED. This letter shall constitute the Department's Order in this matter.

Sincerely,

/s/ Joe Thronson
Joe Thronson
Administrative Law Judge