January 28, 2016

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Letter Decision and Order

Richard L. Travis
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RE: HF No. 141, 2013/14 – David W. Wetch v. Midcontinent Media, Inc., and Crum & Forster Commercial Inc.

Dear Counsel:

Submissions:

This letter addresses the following submissions by the parties:

September 15, 2015	[Claimant's] Motion for Partial Summary Judgment;
	Affidavit of David S. Barari in Support of Claimant's Motion for Partial Summary Judgment;
November 6, 2015	Employer and Insurer's Response to Claimant's Motion for Partial Summary Judgment;
November 20, 2015	[Claimant's] Reply Brief in Support of Motion for Partial Summary Judgment;
November 20, 2015	Supplemental Affidavit of David S. Barari in Support of Claimant's Motion for Partial Summary Judgment.

Facts:

This letter addresses the following submissions by the parties and related facts:

1. David V. Wetch (Claimant) suffered a work injury on July 30, 1991, when he suffered a spinal cord injury while employed by Midcontinent Media, Inc. (Employer) in South Dakota.

2. At the time of Claimant's 1991 injury, Employer was insured by Crum & Forster Commercial Ins. (Insurer) for purposes of workers' compensation.

3. Claimant entered into a Settlement Agreement as to Compensation for Permanent and Total Disability with insurer in 1994 regarding the July 30, 1991 injury. That Agreement states in part:

> Nothing within this Agreement impairs Claimant's entitlements under SDCL 62-4-1.

4. Since entering into the settlement agreement, Claimant has received medical care and treatment.

5. On August 1, 2011, Claimant's treating physician, Dr. Michael C. Goodhope, sent a letter of medical need and prescription to Insurer. Dr. Goodhope indicated a medical need for Soma, lidocaine cream aspirin, physical therapy, a walker, car hand controls, pull bar, TENS unit, and lift chair.

6. On January 20, 2012, Insurer sent Claimant for an Independent Medical Evaluation (IME) with Dr. Randal Wojciehoski. Dr. Wojciehoski opined that Claimant's work related injury has contributed to 50 percent of Claimant's current physical condition, and further opined that the work related injury contributes in part to Claimant's need for some medical treatment.

7. On April 5, 2012, Employer and Insurer mailed a letter to Claimant, with Dr. Wojciehoski's IME report attached. Employer and Insurer stated,

> The physician has indicated the following items are related in part to the work injury of 7-30-91 and we will pay fifty percent of the items noted below.
>
> 1. Use of Soma 50% work related
> 2. Need for the walker is 50% related to the work injury
> 3. Need for a pull bar at home is 50% related to the work injury
> 4. Need for a lift chair is 50% related to the work injury
>
> Please note we will pay fifty percent of what is considered medically reasonable and necessary, however, anything in excess will be your responsibility.

8. Insurer paid 50% of Claimant's walker, grab bars, shower head, installation, and lift chair.

9. On January 24, 2014, Claimant's power of attorney, Alanna D. Turnbaugh, sent Insurer a letter with prescriptions from Claimant's physician enclosed, along with a copy of an account summary of the physical therapy bills. Enclosed were prescriptions dated January 13, 2014, for a lift chair, portable hand controls for a vehicle, and for a Life Assessment. The letter states in part:

> We have enclosed the physician's prescriptions for exercise equipment, the treadmill and a Gold Home Gym. Also with the prescriptions is the cost of both; Treadmill was $203.49 bought through Wal-Mart, and the Gold Home Gym was $327.51 and then we had to hire a man to put the gym together which cost $50.00.

10. On February 10, 2014, Employer and Insurer sent Claimant a follow up letter stating they will only pay 50% of what had previously been stated. The letter also advised to send cash receipts for the items and Insurer would reimburse 50% of the receipt.

11. On March 25, 2014, Claimant filed a Petition for Hearing pursuant to SDCL 62-7-12 and 62-7-33.

12. An Answer was made by Employer and Insurer on April 28, 2014.

13. Claimant, through assistance of counsel, obtained a Life Assessment Evaluation from Nurse Linda Graham, R.N., M.A., C.L.C.P., Certified Nurse Life Care Planner, following the prescription of Dr. Goodhope. On February 3, and August 24, 2015, bills for services by Linda Graham for a Life Assessment in the amount of $9,000 and $4,000 were submitted.

14. On August 17, 2015, Dr. Goodhope signed the Home Health Certification and Plan of Care, Form 485, reflecting the course of treatment discussed and summarized in the Graham Report.

15. Claimant filed this Motion for Partial Summary Judgment on September 15, 2015.

16. Other facts may be discussed in the analysis below.

Motion for Partial Summary Judgment

Claimant filed a Motion for Partial Summary Judgment pursuant to ARSD 47:03:01:08 which governs the Department of Labor's authority to grant summary judgments. That regulation states:

> ARSD 47:03:01:08. 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.

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. To successfully resist the motion, the non-moving party must present specific facts that demonstrate the existence of genuine issues of material fact. Mere allegations that are devoid of specific facts will not prevent the issuance of summary judgment. *Werner v. Norwest Bank South Dakota, N.A.,* 499 N.W.2d 138 (S.D. 1993). When determining whether a genuine issue of material facts exists, the evidence must be viewed in a light most favorable to the non-moving party. *Wilson v. Great N. Ry*., 157 N.W.2d (S.D. 1968). There is no issue of material fact in this case.

Claimant's Motion is for an Order that Employer and Insurer May Not Deny Medical Benefits, Fail to Pay Medical Bills, or Not Authorize Treatments in the above-referenced matter. Claimant's case is premised upon these legal arguments, some of which will be addressed below: 1) The doctrines of res judicata and judicial estoppel preclude Employer and Insurer from contesting, denying, or delaying Claimant's receipt of previously foreseen medical care; 2) Employer and Insurer's IME does not support denial of 50% of approved benefits, but instead requires them to fully pay admitted care; 3) Employer and Insurer were required to follow SDCL 62-7-33 and show a change in condition in order to terminate medical benefits.

Claimant, first, argues that he is entitled to summary judgment because Res Judicata and judicial estoppel bar Employer and Insurer from contesting, denying, or delaying medical expenses/treatment that were foreseeable pre-settlement. In this case, the Department approved a settlement agreement on November 8, 1994. This settlement agreement has the same effect as a prior Department decision and determination. See *Larsen v. Sioux Falls School Dist. 49-5*, 509 N.W.2d 703, 709 (S.D. 1993). The South Dakota Supreme Court has clearly stated that a settlement agreement is res judicata as to facts contained therein. *Kermmoade v. Quality Inn*, 612 NW2d 583, 587 (S.D. 2000). In that opinion, the Court went on to write:

> We have often stated that once an agreement is accepted under the statute, the parties are bound to it. *See* SDCL 62-7-5; *Larsen,* 509 N.W.2d at 708; *Whitney,* 453 N.W.2d at 850; *Call v. Benevolent & Protective Order of Elks,* 307 N.W.2d 138, 139 (S.D.1981). In *Larsen,* we noted that,
>
> > a settlement of a compensation claim which is properly approved per SDCL 62-7-5 operates as an adjudication of the facts agreed upon in the settlement *including the employer's obligation to pay compensation.* [Citation omitted.] Thus, a matter may not be later reopened absent an express reservation of jurisdiction by Department or a change in the employee's physical condition which change is a result of his working injury.
>
> 509 N.W.2d at 708 (emphasis added).

Kermmoade at 589. In this matter, the settlement agreement expressly reserved Claimant's entitlement under SDCL 62-4-1. Under the settlement agreement, Claimant has a permanent and total disability. Employer and Insurer argue that the settlement does not give carte blanche to Claimant for all medical treatment, as he does suffer from cerebral palsy. Claimant's treating physician, Dr. Goodhope, has recommended a list of medical needs and prescriptions for Claimant that he believes are necessary to assist with issues that Claimant has with chronic neck pain and paralysis on the right side following his work injury suffered in 1991. Some of the recommended medical needs are a TENS unit, a wheelchair, cane, crutches, an appropriate vehicle with hand controls, physical therapy and hydrotherapy, future care for shoulder pain and deterioration, and supervised living accommodations. Employer and Insurer, prior to the settlement agreement, also knew from the IME report in 1993 that Claimant would need home care, services, and continuing home exercise therapy.

Claimant makes the argument, and it is well-settled in S.D. work comp law, that the Employer and Insurer have the duty to prove that a recommended treatment is not related to the injury, if the treating physician has recommended it to the Claimant.

> Once notice has been provided and a physician selected or, as in the present case, acquiesced to, the employer has no authority to approve or disapprove the treatment rendered. It is in the doctor's province to determine what is necessary, or suitable and proper. When a disagreement arises as to the treatment rendered, or recommended by the physician, it is for the employer to show that the treatment was not necessary or suitable and proper.

Hanson v. Penrod Const. Co., 425 N.W.2d 396, 399 (S.D. 1988). Employer and Insurer have not argued there is a change in employee's physical condition pursuant to SDCL §62-7-33 and have not requested that the settlement be reopened.

Claimant's injury occurred on July 30, 1991, so the law in place at the time of injury is the prevailing law. "[T]he law in effect at the time the employee is injured is what controls the rights and duties of the parties in workers' compensation cases." *Sopko v. C&R Transfer, Co., Inc*., 2003 S.D. 69, ¶12, 665 N.W.2d 94, 97. At that time, SDCL § 62-1-1's definition of "injury" only needed to establish that Claimant's injury arose out of and in the course of the employment. In other words, Claimant only needed to establish that his employment was "a contributing factor" to his injury for the injury and treatment to be fully compensable as a workers compensation injury. The analysis provided:

> Before an employee can collect benefits under our worker's compensation statutes, he must establish, among other things, that there is a causal connection between his injury and his employment. That is, the injury must have "its origin in the hazard to which the employment exposed the employee while doing his work." This causation requirement does not mean that the employee must prove that his employment was the proximate, direct, or sole cause of his injury; rather, the employee must show that his employment was "a contributing factor" to his injury.

Caldwell v. John Morrell & Co., 489 N.W.2d 353, 357-58 (emphasis original) (citations and footnote omitted) (SD 1992). Pursuant to the terms of the November 8, 1994 settlement agreement, Employer and insurer agreed to pay to Claimant benefits in conformance with SDCL § 62-4-1 as to compensation for Permanent and Total Disability. SDCL § 62-4-1 provides, in relevant part:

> The Employer shall provide necessary first aid, medical, surgical, and hospital services, or other suitable and proper care including medical and surgical supplies, or apparatus, artificial members and body aids during the disability or treatment of an employee within the provisions of this title.

SDCL § 62-4-1. Employer and Insurer argue that just because a settlement agreement acknowledges a Claimant's entitlement to future medical benefits under SDCL § 62-4-1, does not mean that an Employer or Insurer's ability to contest the compensability of such benefits is terminated. However, because SDCL § 62-4-1.1 did not exist in 1991 at the time the Claimant was injured, Employer and Insurer do not have the benefit under that statute to deny all or a portion of the bill on the basis that the injury is not compensable, or the service or charge is excessive or not medically necessary. Employer and Insurer can however follow the statutory procedure established by the legislature in SDCL § 62-7-33, to which Claimant argues that Employer and Insurer have not proceeded under.

> SDCL § 62-7-33. 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. The Claimant argues that in the absence of Employer and Insurer initiating and proving a change of condition in those proceedings the settlement agreement operates to

bar Employer and Insurer's arguments and denials. In this case, Employer/Insurer did not make a request to the Department for a review of the medical payments being made to Claimant. They claimed a 50% reduction to compensable benefits that they consider medically reasonable and necessary based upon an IME that found the work-related injury led to 50% of Claimant's disability and the remaining 50% was from degenerative changes of the lower extremities from increased age, a history of cerebral palsy and cervical myelopathy.

The Courts and the Department have consistently held that Employer and Insurer cannot deny or avoid payment of benefits, without proceeding to the Department under SDCL § 62-7-33, to establish a change in condition. Then whether the injury is a major contributing cause becomes an issue only after the Employer and Insurer establishes a change in condition. *See Hayes v. Rosenbaum Signs & Outdoor Advertising, Inc. et al., 853 N.W.2d 878, 2014 S.D. 64, ¶29; Stuckey v. Sturgis Pizza Ranch*, 2011 SD 1, ¶27, 793 N.W.2d 378, 389. The Court in *Stanton* held:

> SDCL § 62-7-1 entitles an employer to an IME, it does not entitle them to reduce payments. In addition, S.D.C.L. § 62-4-1.1 does not allow an employer/insurer to unilaterally determine that the injury is no longer a major contributing cause. "Only after a party asserting a 'change in condition' has met the required burden may the Department reopen a previous award." Owens v. F.E.M. Elec. Ass'n.Inc., 2005 SD 35, ¶ 18, 694 N.W.2d 274, 280 (citing Sopko v. C. & R. Transfer Co., Inc., 1998 SD 8, ¶12, 575 N.W.2d 225, 231). Whether an injury is a major contributing cause is the issue at a hearing to obtain benefits. S.D. Codified Laws §62-1-1(7). After an award is final, whether the injury is a major contributing cause becomes an issue only after the employer/insurer establishes a change in condition. *See,* S.D. Codified Laws 62-7-33. Although S.D.C.L. § 62-4-1.1 permits an employer/insurer to decline individual bills as not compensable, it does not permit them to unilaterally ignore the Department's decision. **If a party desires to cease payments, the proper mechanism is S.D.C.L. §62-7-33.**

Stanton v. United Parcel Service and Liberty Mutual Insurance Group, Civ. 12-268, S.D. 7th Judicial Circuit (2012), J. Thorstenson. (emphasis added).

Employer and Insurer, in this matter have no basis to assert a 50% reduction of the expenses and treatments identified as related to the work injury and are responsible for 100% of those expenses. Prior to denying medical benefits, failing to pay medical bills, or not authorizing treatments, Employer and Insurer must prove a change of condition under SDCL § 62-7-33. Until such time, the settlement agreement signed by the parties and approved by the Department on November 8, 1994, and the facts contained therein, are considered to be the Order of the Department.

Order

In accordance with the above analysis and by Order of the Department Claimant's Motion for Partial Summary Judgment is **Granted** in its entirety.

Therefore, 1) The doctrine of res judicata bars Employer and Insurer from denying benefits regardless of the fact they procured an IME that stated Claimant's current condition and need for treatment is only 50% related to Claimants work-related injury. Res Judicata applies to the settlement and all foreseen consequences as it is an Order of the Department, thus medical care determined to be reasonable and appropriate prior to the settlement agreement is

compensable; 2) Employer and Insurer are responsible for paying 100% of the medical care and treatment approved by Dr. Wojciehoski; 3) Employer and Insurer are instructed to approve and pay for the medical necessities that Claimant's treating physician indicates are related to the work-related injury. The question of what is "related" and what is not "related" may only be answered by the Claimant's treating physician or if the settlement is reopened due to change of condition. 4) Employer/Insurer are required to follow SDCL 62-7-33 and show a change in condition in order to end or diminish medical benefits

This letter shall constitute the Department's Order in this matter

Sincerely,

/s/ Sarah E. Harris
Sarah E. Harris
Administrative Law Judge