August 10, 2009

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Letter Decision and Order

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RE: HF No. 168, 2004/05 – MEI Corporation and Fireman's Fund v. Ron Bonnet

Dear Counsel:

Submissions:

This letter addresses the following submissions by the parties:

May 6, 2009	[Employer and Insurer's] Motion for Summary Judgment and Alternative Motion for Partial Summary Judgment;
	[Employer and Insurer's] Brief in Support of Motion for Summary Judgment and Alternative Motion for Partial Summary Judgment;
May 28, 2009	Affidavit of Ron Bonnet;
June 1, 2009	Affidavit of James W. Ogilvie, MD, In Lieu of Live Testimony;
June 5, 2009	Claimant's Brief in Opposition to Motion for Summary Judgment and Alternative Motion for Partial Summary Judgment;
	Notice of Intent to Use Affidavit of James W. Ogilvie, MD, In Lieu of Live Testimony;
June 9, 2009	Affidavit of Stephen F. Emery, MG, In Lieu of Live Testimony;

June 12, 2009	Affidavit of Fred G. McMurry, MD, In Lieu of Live Testimony;
June 15, 2009	Notice of Intent to Use Affidavit of Stephen F. Emery, MG, In Lieu of Live Testimony;
June 19, 2009	Notice of Intent to Use Affidavit of Fred G. McMurry, MD, In Lieu of Live Testimony;
June 29, 2009	[Employer and Insurer's] Reply Brief in Support of Motion for Summary Judgment and Alternative Motion for Partial Summary Judgment;
	Affidavit of Mary Gaddy, MD;
June 26, 2009	Notice of Intent to Use Affidavit of Mary Gaddy, MD, In Lieu of Live Testimony;
July 8, 2009	Claimant's Request for Hearing on Employer and Insurer's Motion for Summary Judgment and partial Summary Judgment;
July 14, 2009	Letter from J.G. Schultz.

Facts:

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

1. Ron Bonnet (Claimant) slipped and fell at work injuring his back on or about March 15, 1984, while employed by MEI Corporation (Employer) in South Dakota.

2. At the time of Claimant's March, 1984 injury, Employer was insured by Fireman's Fund (Insurer) for purposes of workers' compensation.

3. Insurer paid for the medical expenses associated with Claimant's March, 1984, injury through March 11, 1994.

4. Claimant entered into a settlement agreement with insurer in 1987 regarding the March, 1984 injury. That agreement states in part:

> In exchange for the above benefits, 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 of potentially made under the odd lot doctrine.

5. The 1987 agreement also reserves Claimant's rights under SDCL 62-7-33.

6 On August 18, 2000, Claimant again slipped and fell at work, while employed by a different employer in Cody, Wyoming. Claimant injured his back, the right side of his ribs, and his head in the August 2000 fall.

7. Claimant filed a Wyoming workers compensation claim for his August, 2000 injuries.

8. The Wyoming Office of Administrative Hearings found Claimant's August, 2000 fall to be compensable in a February 1, 2002, decision.

9. 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.

10. Claimant disagreed with the Wyoming Workers' Safety & Compensation Division's December 2002, determination and appealed the issue 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.

11. The Wyoming Medical Commission Hearing Panel issued a decision of January 9, 2004, that concluding that Claimant's condition at that time was not related to the August, 2000 injury.

12. After the Wyoming Medical Commission's January, 2004 decision, Claimant filed this action seeking compensation for his medical condition and those medial expenses incurred since August 1, 2002. Claimant now alleges that his current condition and medical expenses since August 1, 2002, are attributed to his March, 1984 fall.

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

Motion for Summary Judgment

Employer and Insurer filed a Motion for Summary Judgment and Alternative Motion for Partial Summary Judgment, ARSD 47:03:01:08 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.

Judicial Estoppel

Employer and Insurer, first, argue that they are entitled to summary judgment because Claimant is judicially estopped from seeking the benefits requested in this case. They contend that Claimant's current position is inconsistent with his position during his Wyoming workers' compensation proceedings. In this case, Claimant takes the position that his medical condition and medical expenses since August 1, 2002, are the result of his 1984 accident. In his Wyoming case, Claimant took the position that his medical condition and medical expenses since August 1, 2002, were the result of his August, 2000 accident.

The South Dakota Supreme Court discussed judicial estoppel in Watertown Concrete Products, Inc. v. Foster, 2001 SD 79, ¶ 11, 630 NW2d 108, 112-13. In that case, the Court stated:

> When a party successfully maintains a certain position in a legal proceeding, judicial estoppel precludes that party from later assuming a contrary position simply because that party's interests have changed, especially if the change works to the prejudice of one who acquiesced in the position formerly taken by that party.

The Court then elaborated:

> Judicial estoppel cannot be reduced to an equation, but courts will generally consider the following elements in deciding whether to apply the doctrine: the later position must be clearly inconsistent with the earlier one; the earlier position was judicially accepted, creating the risk of inconsistent legal determinations; and the party taking the inconsistent position would derive an unfair advantage or impose an unfair detriment to the opponent if not estopped. New Hampshire, 532 US 742, 750, 121 S.Ct 1808, 1814-15, 149 LE2d 968, 977; see also Gesinger v. Gesinger, 531 NW2d 17, 21 (SD 1995); see also St. Cloud, 465 NW2d at 180.

Id. at ¶ 12.

In this case, Claimant's position is inconsistent with his position during the Wyoming administrative proceedings. However, Claimant's position in those proceedings was not judicially accepted.

Employer and Insurer challenge this conclusion arguing that Claimant‘s position was successful in the Wyoming Office of Administrative Hearings decision. Employer and Insurer’s argument fall short of the mark.

This case deals with Claimant’s medical condition and medical expenses since August 1, 2002. The Wyoming Office of Administrative Hearings issued it decision on February 1, 2002, prior to the time in question here. To the extent that the February 1, 2002, decision dealt with issues after August, 2002 would have been speculative at best. More importantly, both the Division of Workers’ Safety & Compensation and the Wyoming Medical Commission rejected Claimant’s position during those appellate proceedings. Ultimately, Claimant’s position was not judicially accepted in the Wyoming forums.

Further, there is not danger that the determination in this case will conflict with Wyoming’s final determination. Claimant only seeks compensation here for benefits due after August 1, 2002. No benefits were ultimately awarded or paid for the time period during the Wyoming proceedings.

In addition, Claimant does not gain an unfair advantage if he prevails in this case. He would only be paid those benefits which he would be legally entitled. Claimant is not precluded by judicial estoppel from seeking benefits in this case for his condition and medical expenses since August 1, 2002, as a matter of law.

Settlement Agreement

Employer and Insurer next argue that they are entitled to partial summary judgment because Claimant released all claims for permanent total disability resulting from the 1984 accident when the parties entered into a settlement agreement in 1987. That agreement contains the following provision:

> In exchange for the above benefits, 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 of potentially made under the odd lot doctrine.

On the other hand, Claimant argues that the agreement expressly retained the authority of the Department of Labor to review his benefits pursuant to SDCL 82-7-33. That statute states:

> 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 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.

In this case, the release clause of the agreement and the provisions of SDCL 62-7-33 appear to be in conflict. When confronted with a similar conflict in Sopko v. Claimant & r Transfer, Co., 1998 SD 8, ¶ 1, 575 NW2d 225, 225, the South Dakota Supreme Court concluded that "settlement agreements cannot foreclose reopening in the event of a change in condition resulting from an undiscovered injury or an unforeseen consequence of a known injury."

Whether a change in condition exists that resulted from an undiscovered injury or a foreseen consequence of a known injury, is largely a question of fact. When the facts of this case are viewed in the light most favorable to the Claimant, they fail to demonstrate that a change of condition did not occur or that the change was the foreseeable consequence of a known injury. Therefore, the Movents have failed to show that a genuine issue of material fact does not exit and are not entitled to partial summary judgment.

Order

In accordance with the above analysis, Employer and Insurer have failed to show that there is no genuine issue as to any material fact and that they entitled to a judgment as a matter of law. It is therefore, Ordered:

(a) That Employer and Insurer's Motion for Summary Judgment is denied; and

(b) That Employer and Insurer's Alternative Motion for Partial 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