

**SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT**

**PAMELA MCDOWELL,
Claimant,**

HF 179, 1999/00

v.

**CITIBANK, Employer, and
PLANET INSURANCE COMPANY,
Insurer**

DECISION

This is a workers' compensation proceeding before the South Dakota Department of Labor pursuant to SDCL 62-7-12 and ARSD 47:03:01. Brian L. Radke, of Radke Law Office, P.C., represents Claimant. Kristi Geisler Holm, of Davenport, Evans, Hurwitz & Smith, L.L.P., represents Employer/Insurer.

Overview:

On or about December 10, 1991, Claimant suffered an injury to her wrist and hands while in the employ of Employer.

Claimant filed a petition for workers' compensation benefits in 1993. At that time, she claimed she was permanently and totally disabled due to her 1991 injury.

In March 1996, Claimant entered into a "Compromise Agreement as to Compensation and Stipulation for and Judgment of Dismissal" (settlement agreement) with Employer/Insurer. In exchange for a lump sum payment, Claimant released all past, present and future claims against Employer/Insurer, including her claim for permanent total disability under the odd lot doctrine. Employer/Insurer remained responsible for future compensable medical expenses. This settlement agreement was approved by the Department on March 15, 1996.

On February 11, 2000, Claimant filed a petition to reopen her claim for workers' compensation benefits, pursuant to SDCL 62-7-33. In support of this petition, Claimant is alleging a substantial and material change in her physical and mental condition.

Claimant's petition to reopen her claim presents the following issues:

Issues:

1. Whether Claimant's current condition is causally related to her 1991 work injury.
2. Whether Claimant experienced a change in condition so as to entitle her to reopen her workers' compensation claim pursuant to SDCL 62-7-33.
3. Whether Claimant is entitled to additional workers' compensation benefits.

Although there is evidence in the record to support a conclusion that Claimant may be suffering more pain now than she was at the time of the subject 1996 settlement agreement, it is my determination that Claimant failed to prove any change in her physical condition has adversely affected her earning capacity. Because Claimant's earning capacity has not changed since the 1996 settlement agreement, she is not entitled to reopen her claim and she is not entitled to additional workers' compensation wage-replacement benefits.

Because I have determined that Claimant is not entitled to reopen her claim, I do not reach the issue of whether there has in fact been a substantial and material change in Claimant's physical condition, or the issue of whether Claimant's current condition is causally related to her 1991 work injury.

Factual summary

At the time of the 1996 settlement agreement, Claimant had not worked, or even sought work, in nearly two years. She claimed at that time that she was disabled from further employment because of severe pain due to her 1991 injury.

Claimant had been awarded social security benefits, retroactive to her last date of employment with Employer in 1992, before she entered into the 1996 settlement agreement. In 1998, after receiving some six years of social security benefits, Claimant verified to the Social Security Administration (SSA) that her condition had not changed and she remained totally incapacitated from any gainful employment due to her pain. SSA then concluded that Claimant remained eligible for continued benefits.

The parties agree that Claimant was permanently and totally disabled at the time of the 2003 workers' compensation hearing on Claimant's petition to reopen her claim.

The parties disagree as to whether Claimant was permanently and totally disabled at the time she entered into the 1996 settlement agreement.

Authority and Analysis

Claimant has the burden of proving all facts essential to her claim for workers' compensation benefits. *Day v. John Morrell & Co.*, 490 N.W.2d 720, 724 (SD 1992).

SDCL 62-7-33 provides that the Department has continuing jurisdiction to adjust payments made to an injured employee, provided that the claimant can establish a change in his or her physical condition since the time of the prior award or settlement.

A compensation award is res judicata as to the condition of the injured employee at the time it is entered, but does not preclude subsequent awards upon a showing that his physical condition has changed. On review of an award the inquiry then is limited as to **whether disability resulting from the injury may have increased or diminished beyond what the award contemplated.**

Stowslund v. Jack Rabbit Lines, 58 N.W.2d 298, 299 (SD 1953) (emphasis added).

McDowell argues that she is entitled to additional benefits simply because she has established a substantial change in her medical condition. However, the law requires that Claimant must show more than a mere change in her physical condition. Claimant must establish that she has undergone a change in condition that has affected her earning capacity:

“A change in condition refers to a condition different from that which existed when the award was made. It must be a material and substantial change. As a general rule, **it must be a change in the physical condition of the employee, affecting his earning capacity.**”

This remains the law today.

Whitney v. AGSCO Dakota, 453 N.W.2d 847, 851 (SD 1990) (quoting *Stender v. City of Miller*, 82 S.D. at 338, 145 N.W.2d 913, 915).

In order to determine whether Claimant suffered a material and substantial change in her condition which has affected her earning capacity, it is necessary to establish Claimant's earning capacity at the time of the settlement agreement.

Claimant argues, incorrectly, that "her pre-settlement physical condition can only be ascertained from the terms of the Compromise Settlement Agreement so long as the settlement agreement is unambiguous."

Claimant relies on *Sopko v. C & R Transfer Co., Inc.*, 1998 SD 8 ¶ 17, 575 NW2d 225, for the proposition that "Parol evidence is not admissible where the agreement to be interpreted is integrated, unambiguous and the parties' intent clear." Claimant's reliance on *Sopko* for this principal is misplaced. When the parties entered into the 1996 settlement agreement, there was a dispute as to the extent of Claimant's injury and disability. The parties resolved their dispute with neither admitting the nature and extent of Claimant's injury and disability. The settlement agreement does not speak for itself.

Furthermore, the facts surrounding Claimant's pre-settlement condition are not being examined at this point for the purpose of interpreting their 1996 settlement agreement. The parties' intention or understanding at that time is not relevant. What is important is Claimant's condition and earning capacity at the time of that agreement. The facts available at the time of the settlement agreement must be examined in order to determine a starting point necessary to assess whether Claimant has proven a material and substantial change in her condition.

In addition, Claimant relies only on the argument that her physical or mental condition has changed. This ignores the more important issue that Claimant must also prove a vocational change for the worse.

Employer/Insurer go into great detail, both in the testimony elicited from Claimant at the hearing and in Employer/Insurer's post-hearing brief, to establish that Claimant's disability has not changed for the worse in the time since the 1996 settlement agreement.

Claimant has not been able to secure or maintain employment since a point in time prior to the compensation agreement. She has not worked since 1994 because of her upper extremity pain. She applied for SSA disability in 1995, and thoroughly documented her physical condition, under oath, for that purpose. In 1998, she was required to recertify her SSA disability status, and again, under oath, documented her inability to work, due to pain, as well as the fact that her disabling condition had not changed from 1995 to 1998.

The records and testimony of Claimant's medical providers, including Dr. Schutt and Dr. Eleeson, establish Claimant's inability to work, because of her pain, from and after 1994.

Claimant argues that her vocational expert, Rick Ostrander, testified that her change in medical and psychological condition has left her unemployable. This misstates Ostrander's testimony.

More accurately, Ostrander testified that Claimant was unable to work before she entered into the 1996 settlement agreement, at the time of the 1996 agreement, and continuing to the date of the 2003 hearing. Claimant's ability to work has not changed.

Limited to the conclusion that Claimant has not proven a change in her earning capacity, I hereby adopt the factual determinations, conclusions, argument, and authority contained in Employer/Insurer's brief.

Counsel for Employer/Insurer shall submit proposed Findings of Fact and Conclusions of Law, and an Order, consistent with this Decision, within 10 days of the receipt of this Decision. Counsel for Claimant shall have 10 days from the date of receipt of Employer/Insurer's proposed Findings of Fact and Conclusions of Law to submit objections or submit proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for Employer/Insurer shall submit such stipulation together with an Order consistent with this Decision.

Dated: April 30, 2004.

SOUTH DAKOTA DEPARTMENT OF LABOR

Randy S. Bingner
Administrative Law Judge