SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION
DIVISION OF LABOR AND MANAGEMENT

CRAIG TUSCHEN, HF No. 28, 2013/14

Claimant,

v. DECISION

SERVALL UNIFORM & LINEN SUPPLY,

Employer,

and

ST. PAUL FIRE & MARINE INSURANCE COMPANY,

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor & Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. This case was heard by Donald W. Hageman, Administrative Law Judge on October 20, 2015, in Rapid City, South Dakota. Claimant, Craig Tuschen, was represented by Michael J. Simpson. The Employer and Insurer, Servall Uniform & Linen Supply and St. Paul Fire & Marine Insurance Company were represented by Charles A. Larson.

**Issue:**

This case presents the following legal issue:

> Whether Craig Tuschen's claim for additional medical treatment for his right knee is barred by the three year statute of limitation imposed by SDCL 62-7-35.1

***Facts:***

The Department finds the following facts by a preponderance of the evidence:

1. Craig Tuschen (Tuschen) 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. As a result of the injury on April 12, 2002, Tuschen had surgery performed by Dr. Timothy Gill on September 13, 2002.

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

5. 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.

6. The parties did not enter into a settlement agreement whereby Claimant waived any rights to future benefits.

7. Tuschen 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 Tuschen's current condition is a result of the natural progression of the April 2002 injury. When asked if Tuschen 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."

9. Tuschen's work injury remains a major contributing cause of his right knee's current condition.

10. Tuschen filed a Petition for Hearing on August 5, 2013, seeking additional medical treatment for his right knee and a possible knee replacement in the future.

11. Tuschen continues to work and is not seeking disability payments.

***Analysis:***

Employer and Insurer argue that any additional medical claims made by Tuschen are barred by the three year statute of limitation imposed by SDCL 62-7-35.1. 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. <u>The provisions of this section do not apply to review and revision of payments or other benefits under § 62-7-33.</u>

SDCL 62-7-35.1 (emphasis added.) Tuschen 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 Tuschen cannot reopen his claim because Claimant's need for surgery was foreseeable in 2003. The Department disagrees that unforseebility is a requirement for Tuschen to reopen his case.

Employer and Insurer rely on a line of cases which required that the change of condition be "unforeseeable" before those cases could be reopened. 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.

Indeed, SDCL 62-7-33 does not require that the need for future benefits be unforeseeable. The statute only requires that there be a change of condition and that the condition is causally related to the work injury and Tuschen has proven those elements in this case.

The analysis in Sopko when read in its entirety makes it clear that the Court endorsed the "unforeseeable" requirement to justify setting aside a valid agreement where the claimant had previously been paid to waive the right to any future benefits. In those cases where the Court dealt with the issue of reopening cases where the claimants had not signed settlement agreements, the Court made no mention of an unforeseeably requirement. See Owens v. F.E.M. Electric Assoc., Inc., 694 N.W.2d 274 (SD 2004; Wiedmann v. Merilat, 776 N.W.2d 824 (SD 2009),

Finally, in those cases relied upon by the Employer and Insurer, the change of condition must be unforeseeable at the time of the settlement. Here, there was no agreement so the Employer and Insurer argue that it must be unforeseeable at the time that the statute of limitations ran. However, the Employer and Insurer have provided no authority for their position. Consequently, the Department chooses to ignore this argument.

Tuschen has carried his burden of showing that he has suffered a change of condition and that his current condition is causally linked to his work injury. Consequently he is entitled to additional medical treatment including a possible knee replacement pursuant to SDCL 62-7-33 and his claim is not barred by the three year statute of limitation imposed by SDCLSDCL 62-7-35.1.

***Conclusion:***

Tuschen shall submit Findings of Fact, Conclusions of Law and an Order consistent with this Decision and, if desire, Proposed Findings of Fact and Conclusions of Law within 20 days of the receipt of this Decision. Employer and Insurer shall have an additional 20 days from the receipt of Tuschen's Findings of Fact and Conclusions of Law to submit Objections and/or 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, Employer and Insurer shall submit such stipulation together with an Order.

Dated this 30th day of March, 2016.

_/s/ Donald W. Hageman__
Donald W. Hageman
Administrative Law Judge