

September 15th, 2017

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LETTER DECISION AND ORDER

Michael Bornitz
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RE: HF No. 36, 2005/06 – 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:

May 24 th , 2017	Claimant’s Motion for Substitution of Parties
July 7 th , 2017	Employer and Insurer’s Additional Response to Claimant’s Motion for Substitution of Parties and Motion for Dismissal of Claim
July 31 st , 2017	Claimant’s Response to Employer and Insurer’s Motion for Dismissal of Claim
August 10 th , 2017	Employer and Insurer’s Reply in Support of Motion for Dismissal of Claim

FACTS AND PROCEDURAL HISTORY

The history of this case is long and convoluted. Claimant and decedent, Kevin Livingston, was injured while working for Employer, Dunham’s Athleisure Corporation, in November, 2003. Claimant timely reported this incident to Employer/Insurer who

treated the injury as compensable. Claimant received extensive treatment over the next two years and eventually returned to work for Employer. In February, 2005, Claimant suffered another work-related injury while attempting to assist other employees with loading a gun safe into a customer's vehicle. Claimant returned to his doctor who initially provided an epidural injection. When the injection failed to relieve Claimant's pain, Claimant's doctor recommended a spinal surgery. Employer did not authorize this second surgery. Employer also discontinued temporary benefits in May, 2005.

Thereafter, Claimant filed a petition with the Department requesting a hearing on eligibility for benefits. A hearing was held on May 10th, 2007. On September 27th, 2007, the Department ruled that the 2003 and 2005 injuries were major contributing factors in Claimant's disability. Employer/Insurer appealed the Department's decision to circuit court. The circuit court affirmed the Department's decision on December 1st, 2008.

The parties then submitted the issue of whether Claimant was entitled to temporary total disability benefits to the Department based on the record established during the 2007 Department hearing. The Department ruled that Claimant's eligibility for TTD benefits ended when his treating physician cleared Claimant to return to sedentary work. Claimant then appealed this decision to the circuit court. The circuit court again affirmed the Department's ruling by a decision issued May 12th, 2010.

Following the circuit court's 2010 affirmance, Claimant underwent other surgeries for which Employer/Insurer has denied payment. Claimant also alleged that he was entitled to TTD benefits from the time of the surgery going forward.

Claimant died on January 19th, 2017 of causes unrelated to his workplace injuries.¹ At the time of Claimant's death, the Department had not yet ruled on the award of any benefits which may have accrued since the circuit court's 2010 decision. Claimant's estate filed a motion to be substituted in Claimant's place. Employer/Insurer countered by resisting this motion and cross-filed a motion to dismiss.

ISSUE PRESENTED

Did Claimant's death from causes unrelated to his workplace injury extinguish all claims to workers compensation benefits to which Claimant may have been entitled during his life?

ANALYSIS

Employer/Insurer argues that Claimant's death automatically extinguished any claim which the Estate may have to any benefits. Only one case in South Dakota, *Fredekind v. Trimac Limited*, 1997 S.D. 79, 566 N.W.2d 148, addresses the issue of whether any workers compensation benefits survive a claimant who dies from causes unrelated to a workplace injury. Employer/Insurer cite *Fredekind* in support of its motion to dismiss as well as two decisions based on *Fredekind*; *Stierwalt v. Best Western Town & Country and Hartford Ins. Co.*, 2009 WL 1025171, and *Knapp v. Hamm & Phillips Serv. Co. and Liberty Mutual Insurance Co.*, Memorandum Decision CIV. 11-25, (Fourth Judicial Circuit, Dec. 19, 2011).

Fredekind involved a claimant who was in the process of negotiating a settlement in a workers compensation case when he suddenly died of a heart attack unrelated to his injury. The parties had agreed to a settlement but had not submitted anything to writing. After the insurer refused to honor the agreement, claimant's wife filed for

¹ Mr. Livingston's death certificate lists the primary cause of death as presumed myocardial infarction.

enforcement of the settlement. The Department ruled that the agreement was binding. On appeal, the circuit court reversed the Department and ruled that the agreement was null and void. Claimant's widow then appealed to the Supreme Court. In affirming the circuit court, the Court noted that all agreements must conform to the requirements set out in SDCL 62-7-5. "[A]uthorizing benefits under an oral settlement not conforming to the written submission and approval requirements of law goes beyond what the Legislature strictly delineated." *Fredekind*, at ¶ 6.

The Court's discussion of SDCL 62-4-11 suggests that a claimant's death from unrelated causes precludes an award of any permanent benefits which have not been awarded. However, *Fredekind* provides no guidance on whether the death of a claimant extinguishes claims for temporary or medical benefits which may have been payable before a claimant's death. Similarly, both *Knapp* and *Stierwalt* only deal with the survivability of permanent benefits².

Other jurisdictions have found that a claimant's death from unrelated causes does not extinguish claims for temporary or medical benefits. The case *In Estate of Huey by Huey*, 837 P.2d 1218 (Colo. 1992) dealt with issues nearly identical to those in this case. As in *Fredekind*, the claimant in *Huey* died of unrelated causes prior to receiving an award by Colorado's industrial board for workers compensation benefits. Claimant's widow specifically sought reimbursement for medical expenses and payment

² The main issue in *Knapp* was one of jurisdiction. The circuit court's decision acknowledged that its ruling on that issue rendered consideration of the survivability of benefits moot. Neither was the latter addressed by the Supreme Court on appeal. (See *Knapp v. Hamm & Phillips Serv. Co.*, 2012 S.D. 82, 824 N.W.2d 785).

of temporary benefits from the time of the claimant's injury until his untimely death. The court in *Huey* noted:

The legislature has not stated, nor did it intend, that dependents are entitled only to the accrued and unpaid portion of compensation benefits *already awarded*... Moreover it amounts to holding that the dependents' recovery of compensation to which the workman was entitled prior to his death is contingent upon circumstances beyond their control: the condition of the Industrial Commission's hearing docket and its promptness in resolving cases. This practice squares with neither reason nor justice.

Estate of Huey by Huey v. J.C. Trucking, Inc., 837 P.2d 1218, 1220 (Colo. 1992)(quoting *Dick* 197 Colo., at 74-75, (Carrigan, J., dissenting)(emphasis original).

The *Huey* Court then explained:

Therefore, the worker's right to compensation under the Act vests or comes into existence when the three conditions set forth in section 8-52-102(1) are fulfilled. There is no language in section 8-50-105(2) which indicates that there must be an award entered before the right to compensation under the Act comes into existence.

Id., at 1221.

The Vermont Supreme Court came to the same conclusion in *Dodge v. Precision Const. Prod., Inc.*, 2003 VT 11, 820 A.2d 207(2003). Like *Huey*, the *Dodge* Court specifically rejected the argument that a preexisting determination was a necessary prerequisite to a finding that temporary benefits were due a claimant.

A worker's right to compensation benefits stems from his employment contract: once employment begins, the Act becomes a part of the contract. (*internal citations omitted*)... The purpose of this compensation is to make the employee injured on the job whole by replacing lost earnings. (*citation omitted*).

Dodge, 2003 VT 11, ¶ 23.

The Department finds the logic in these decisions persuasive and also consistent with the Supreme Court's holding in *Fredeskind*. Unlike permanent disability benefits, which are based on future unearned wages, medical and temporary benefits are meant to compensate a claimant while he/she awaits redress before the Department for losses already incurred. This is apparent when reviewing the statutes relevant to the benefits claimed in this case.

First, regarding medical benefits, SDCL 62-4-1 provides: "The employer *shall* provide necessary first aid, medical, surgical, and hospital services, or other suitable and proper care including medical and surgical supplies, apparatus, artificial members, and body aids during the disability or treatment of an employee within the provisions of this title... The employee shall have the initial selection to secure the employee's own physician, surgeon, or hospital services at the employer's expense." (Emphasis added).

The Supreme Court examined the extent that a claimant may receive care in *Hanson v. Penrod Const. Co*, 425 N.W.2d 396, 399 (S.D. 1988). In *Hanson*, the insurer had contested payment for certain medical services provided to claimant. The Court upheld payment stating:

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, 425 N.W.2d, at 399.

Here, there was a presumption that Claimant became entitled to undergo surgery to correct his injury at the time that his doctor prescribed them. The mere fact that

Claimant died before his claim could be resolved does not automatically extinguish all claims to reimbursement for treatment already received.

Second, claimant also has a presumptive right to receive temporary benefits from the time of his injury. SDCL 62-4-2 sets a seven day waiting period to be eligible for temporary benefits.

No temporary disability benefits may be paid for an injury which does not incapacitate the employee for a period of seven consecutive days. If the seven day waiting period is met, benefits *shall* be computed from the date of the injury. (emphasis added).

Additionally SDCL 62-4-5 provides:

If, after an injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing the employee's usual and customary line of employment, or if the employee has been released by the employee's physician from temporary total disability and has not been given a rating to which § 62-4-6 would apply, the employee *shall* receive compensation, subject to the limitations as to maximum amounts fixed in § 62-4-3, equal to one-half of the difference between the average amount which the employee earned before the accident, and the average amount which the employee is earning or is able to earn in some suitable employment or business after the accident. (emphasis added).

These statutes specifically contemplate a situation in which a claimant may obtain benefits before a determination has been made as to a permanent disability. Until that time, SDCL 62-4-5 allows a claimant to earn temporary benefits to replace the income which he/she is not earning while awaiting a permanent award. Again, there is a presumption that Claimant is entitled to these benefits from the time of his injury. Though claimant's death ended any claim to permanent benefits, Claimant's estate may still assert a claim for any benefits to which Claimant was to receive at the time of his death.

Claimant argues that SDCL 15-4-1 allows for survival of these claims. Employer/Insurer counter that this general survivability statute does not apply to worker's compensation as it conflicts with SDCL 62-4-11. The Department agrees that SDCL 15-4-1 is inapplicable to the extent that it conflicts with more specific workers compensation statutes. However, since the benefits claimed do not fall under SDCL 62-4-11, the Department finds no conflict exists in this case.

CONCLUSION

While the issue of whether Claimant was entitled to any benefits at the time of his death remains in dispute, Claimant's death does not automatically extinguish claims to these benefits.

ORDER

Claimant's motion to substitute Claimant's estate is hereby GRANTED. Employer/Insurer's motion to dismiss is hereby DENIED. This letter shall constitute the Department's Order in this matter.

Sincerely,

/s/ Joe Thronson
Joe Thronson
Administrative Law Judge