

June 8, 2020

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***LETTER DECISION AND ORDER ON  
MOTION TO DISMISS AND MOTION  
FOR SUBSTITUTION OF PARTY***

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P.O. Box 5027  
Sioux Falls, SD 57117-5027

RE: HF No. 94, 2018/19 –Keith Dammer v. Myrl and Roy’s Paving Inc., and Twin City  
Fire Insurance Company

Dear Counsel:

The Department of Labor & Regulation has received Myrl and Roy’s Paving Inc., and Twin City Fire Insurance Company’s Motion to Dismiss and Keith Dammer’s Motion to Substitute. This letter decision will respond to both motions and all responsive briefs. The Department conducted a telephonic hearing on the Motions on May 21, 2020. Claimant was represented by Sarah Rost of Radke Law Office, P.C. Employer/Insurer was represented by J.G. Shultz of Woods, Fuller, Shultz & Smith, P.C.

Keith Dammer (Decedent) suffered a work-related injury on April 10, 2019 while employed by Myrl and Roy’s Paving Inc. which was at all times pertinent insured for workers’ compensation purposes by Twin City Fire Insurance Company (jointly as

Employer/Insurer). The Decedent filed a Petition for workers' compensation benefits on March 8, 2019. Employer/Insurer did not answer Petition. On March 18, 2019, Decedent's counsel received a copy of the Independent Medical Exam (IME) which was read as favorable to Decedent. After that date, Employer/Insurer and Decedent made efforts to determine how past due benefits and medical expenses would be paid.

The Decedent passed away on May 20, 2019 from causes unrelated to his work injury. On October 10, 2019, Dawn Dammer (Dammer), the Decedent's widow was appointed as personal representative of Decedent's estate. On November 18, 2019, Dammer filed an Amended Petition for temporary benefits and medical expenses.

Additional facts may be developed in the issue analysis below.

### ***MOTION TO DISMISS***

Employer/Insurer has moved the Department to dismiss the Petition in this matter because Decedent's death forecloses payment of benefits to his dependents. As the Decedent's death was unrelated to the work injury, the applicable statute is SDCL 62-4-11 which states, in pertinent part:

If an employee receives an injury for which a specific schedule of payments is provided by § 62-4-6; and the employee thereafter dies from causes other than the injury before the full payment of all installments due for the specific injury have been paid to the employee, the employer shall pay the balance due under the specific schedule of payments as provided in § 62-4-6, to the employee's dependents as provided in §§ 62-4-12 to 62-4-22, inclusive.

Employer/Insurer argues that SDCL 62-4-11 does not provide a basis for recovery here because there were no benefits due at the time Decedent died. The issues in the Petition had not been adjudicated. Employer/Insurer further argue the Court has affirmed that the

Workers' Compensation Act establishes that an employee's death, which occurs for reasons unrelated to employment, forecloses claims for future benefits.

Our act is designed to compensate an employee or his family for the loss of his income-earning ability which loss is occasioned by an injury, disablement, or death because of employment-related accident, casualty, or disease. The act guarantees employees compensation irrespective of tort law considerations and in return employees forego the right to a one hundred percent recovery. Employers, on the other hand, accept responsibility for injuries they might not otherwise be responsible for at common law and in return their liability is fixed and limited. *Stevenson v. Douros*, 58 S.D. 268, 235 N.W. 707 (1931). With the exception of certain times (such as medical, hospital, and burial expenses), SDCL Chapter 62-4 provides that compensation shall be paid pursuant to definite schedules. See SDCL 62-4-3, 4, 5, 6, 7, and 12 et seq. All of the schedules are based upon the employee's loss of wage-earning power; that is, what would the employee have expected to earn if he had not been victimized by the employment-related accident, casualty, or disease. See SDCL 62-4-24, 25, 26, 27, and 28.

*Caldwell v. John Morrell & Co.*, 489 N.W.2d 353, 362 (S.D. 1992).

The South Dakota Supreme Court addressed a matter related to the survivorship of benefits in *Fredekind v. Trimac Ltd.*, 1997 SD 79, 566 N.W.2d 148. In *Fredekind*, Fredekind suffered an injury that was deemed compensable. The parties reached an oral settlement, but Fredekind died of non-work-related causes prior to the finalization and Departmental approval of the agreement. On appeal, the circuit court ruled that the settlement was invalid because it was not signed and submitted for Departmental approval. The Court held that a deceased claimant's widow could not recover workers' compensation benefits because SDCL 62-4-11 requires payments to have been due prior to the claimant's death. In the current matter, Employer/Insurer argues that as there has been no adjudication, there are no benefits that are due as required by SDCL 62-4-11. Employer/Insurer further asserts that the fact in this matter are more compelling than in *Fredekind*, because in this matter there has been no adjudication or oral agreement.

Rather the parties were simply in the process of determining how past due benefits and medical expenses would be paid when Decedent died. Therefore, it argues, *Fredekind* affirms the principle that SDCL 62-4-11 does not provide a basis for recovery, because there were not benefits due to Decedent when he died.

Dammer asserts that the current matter is distinguishable from *Fredekind*. She argues that the survivor in *Fredekind* was seeking prospective benefits that had not been determined, but in this matter, she seeks indemnity benefits and medical expenses that have already accrued. Larson's Workers' Compensation Law states, "the right to receive future workers' compensation benefits is not inheritable. However, accrued but unpaid benefits are inheritable." 4 Arthur Larson, *Larson's Worker's Compensation Law*, 89, 89.05 (2001). Dammer also raises the argument that denying her petition would be against public policy and a denial of her due process rights. She argues that she has a property interest in these benefits, and public policy would not allow property rights due to an employee at the time of death to become "not due" solely because the employee passed away. Additionally, the United States District of the South Dakota Western Division held, "[a] conversion occurs whenever there is a serious interference to a party's rights in his property." *Kevin Hayes v. Acuity, a Mutual Insurance Company*, Civ. 17-5015-JLV, citing *Denke v. Mamola*, 437 N.W.2d 205, 207 (S.D. 1989) (additional citations omitted).

Dammer further argues that SDCL 62-4-11 applies to permanent partial disability benefits under SDCL 62-4-6 and not the specific benefits she seeks in her Amended Petition.

Dammer offers SDCL 15-4-1 to establish that her receipt of benefits survives the Decedent's death. SDCL 15-4-1 states, "All causes of action shall survive and be brought, notwithstanding the death of the person entitled or liable to the same. Any such action may

be brought by or against the personal representative or successors in interest of the deceased.”

Employer/Insurer respond that SDCL 15-4-1 is not available in workers’ compensation cases, because when South Dakota enacted the Workers’ Compensation Act of 1917, the legislature intended to provide workers with an “exclusive remedy and eliminate[ ] the necessity of proving negligence and, for the most part, fault.” *Schipke v. Grad*, 562 N.W.2d 109, 112 (S.D. 1997). Employer/Insurer further argue, that “[p]roceedings under Workmen’s Compensation Law. . . are purely statutory, and the rights of the parties and the manner of the procedure under the law must be determined by its provisions.” *Caldwell* at 364 (citations omitted). It also argues that there is no statute that provides the Department with the authority to apply the rules of civil procedure, and that such rules are limited to other courts and not administrative proceedings.

The Department is persuaded by Dammer’s argument. The Court in *Fredekind* did not address past due costs or benefits. Dammer is not seeking permanent or prospective benefits in the Amended Petition. Indemnity benefits and medical costs that have already accrued are due and establishing whether such benefits and costs are related to the work injury are appropriate issues for the Department’s consideration under Chapter 62.

Dammer has provided case examples from other jurisdictions that the Department also finds persuasive. In *Warrick v. Cheatham County Highway Dept.*, 60 S.W.3d 815, 816 (2001), the Tennessee Supreme Court held that “the sole issue before this court is whether an adjudicated claim for benefits survives the non-work-related death of the worker. After careful consideration, we hold that a worker’s personal representative may recover benefits on behalf of the deceased employee from the time of the injury to the time

of death, even though the worker's death was unrelated to the employment. Thus, workers' compensation claims do not terminate upon the non-work-related death of the employee merely because the claim has not been adjudicated prior to the worker's death." The *Warrick* Court also held, "[j]ustice will not be served by denying benefits to those rightfully entitled to receive them merely because they fail to live long enough to survive delays inherent in the judicial process." *Id* at ¶ 3. The Department agrees with the Tennessee Court's rationale that it would be unjust to deny a potential claim for benefits accrued merely because Decedent died before the rights to such benefits were finalized.

Regarding the application of the SD rules of civil procedure, while there is no explicit permission to apply the rules, the Department has routinely done so when such application seemed appropriate. The Court has held, "[t]he logical conclusion is that worker's compensation proceedings are not governed by the rules of civil procedure unless otherwise ordered by the hearing office." *Sowards v. Hills Materials Co.*, 521 N.W. 2d 649, 652 (S.D. 1994) (Citations omitted). From *Sowards* it is apparent that while the Department is not obligated to follow the rules of civil procedure, it may do so at its discretion.

### ***MOTION FOR SUBSTITUTION OF PARTY***

Employer/Insurer argue that it is inappropriate for Dammer to amend the Petition to substitute the name of the injured worker with the name of the injured worker's personal representative. Employer/Insurer asserts that there is no statutory authority that allows such a substitution. SDCL 62-3-2, in pertinent part, states:

The rights and remedies granted to an employee subject to this title, on account of personal injury or death arising out of and in the course of employment, shall

exclude all other rights and remedies of the employee, the employee's personal representatives, dependents, or next of kin, on account of such injury or death against the employer or any employee, partner, officer, or director of the employer, except rights and remedies arising from intentional tort.

Employer/Insurer argues that this statute establishes the exclusive remedy available in workers' compensation, and that if the Department allows Dammer, as widow and personal representative of Decedent, to proceed as Claimant, it would be acting beyond its limited authority under statute.

Dammer argues that as SDCL 62-1-3 defines an employee as “. . . including as to a deceased employee, the employee's personal representative. . .” It is apparent that the Legislature intended that an employee/claimant's personal representative should be able to continue in a deceased employee's stead. Employer/Insure argue that this definition is intended to apply to instances where the employee died due to the work injury and not, as in this matter, where the employee died of unrelated issues.

Dammer further argues that SDCL 15-6-15(a) supports her amendment to the Petition. This statute states:

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has neither been placed upon the trial calendar, nor an order made setting a date for trial, he may so amend it at any time within twenty days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

No answer had been filed before the Amended Petition. For the reasons stated above, the Department is able to apply Title 15 if it so chooses. Therefore, the Department has the

authority to apply SDCL 15-6-15(a) and to allow Dammer to be substituted for Decedent in this matter. The Department concludes that it is appropriate to allow Dammer to continue this matter as the personal representative for Decedent in order to resolve any accrued benefit interests.

**ORDER:**

In accordance with the decisions above, Claimant's Motion for Substitution of Party is granted. The caption will be amended to reflect that the Claimant is Dawn Dammer as the personal representative of Keith Dammer's Estate. Employer and Insurer's Motion to Dismiss is Denied.

The Parties will consider this letter to be the Order of the Department.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

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Michelle M. Faw  
Administrative Law Judge