October 8, 2013

Glenn J. Boomsma
Breit Law Office PC
606 E. Tan Tara Circle
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Letter Decision and Order

Thomas J. Von Wald
Boyce, Greenfield, Pashby & Welk LLP
P.O. Box 5015
Sioux Falls, SD 57117-5015

Re: HF No. 175, 2011/12 – Rudolf Milbrandt v. Bibbs, Inc. and Risk Administration Services, Inc.

Dear Mr. Boomsma and Mr. Von Wald:

Submissions:

This letter addresses the following submissions by the parties:

September 5, 2013	[Claimant's] Motion for Summary Judgment on Offset Issue;
	[Claimant's] Statement of Undisputed Material Facts;
	Claimant's Brief is Support of Motion for Summary Judgment;
	Affidavit of Claimant;
	Employer and Insurer's Motion for Summary Judgment;
	Employer and Insurer's Brief in Support of Motion for Summary Judgment;
	Affidavit of Thomas J. Von Wald;

September 17, 2013	Claimant's Brief in Opposition to Employer's and Insurer's Motion for Summary Judgment;
September 18, 2013	Employer's and Insurer's Response to Claimant's Motion for Summary Judgment.

Facts:

The relevant facts in this case, as presented in the above submissions, are as follows:

1. Rudolf Milbrandt (Milbrandt) was employed by Bibbs, Inc. (Employer) as a long-haul over the road truck driver during all time relevant in this case.

2. On May 30, 2007, Milbrandt was driving a load near Rock Springs, Wyoming, when he was forced off the road by another driver and sustained injuries to his head, chest, neck, left shoulder and right hip.

3. Risk Administration Services, Inc. (Insurer), Employer's workers' compensation carrier, accepted Milbrandt's initial injuries as compensable.

4. As a result of the May 30, 2007 accident, Milbrandt made a claim against the third party tortfeasor who was responsible for the accident.

5. In June of 2009, Milbrandt successfully negotiated a settlement of $160,000 with the tortfeasor. After reducing the settlement amount for fees, costs and reimbursement to Insurer for workers' compensation benefits paid at the time of the settlement, Claimant was left with a net recovery of $73,541.32.

6. The parties agree that Employer and Insurer are entitled to an offset against worker's compensation benefits in the amount of $73,541.32 pursuant to SDCL 62-4-38.

7. In September of 2011, Milbrandt's right hip bothered him to the point that he needed a hip replacement. At that time, Milbrandt chose to quit working for Employer.

8. In January of 2012, Milbrandt had his right hip replaced.

9. Insurer denied benefits for the hip replacement and in the alternative, has requested an offset or credit in the amount $73,541.32.

10. Milbrandt's hip replacement surgery and post-surgery care and therapy were mostly paid for by Medicare and Blue Cross Blue Shield supplemental insurance.

11. Milbrandt has filed a petition for hearing requesting workers' compensation benefits.

Summary Judgment:

The parties have filed cross-motions for summary judgment to determine how the offset prescribed by SDCL 60-4-38 would be applied, if Milbrandt's hip replacement surgery and treatment are ultimately found to be compensable under worker's compensation.

ARSD 47:03:01:08 governs Summary Judgments which are considered by the Department of Labor & Regulation in workers' compensation cases. That regulation provides:

> A claimant or an employer or its insurer may, any time 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.

ARSD 47:03:01:08. 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. "A trial court may grant summary judgment only when there are no genuine issues of material fact." Estate of Williams v. Vandeberg, 2000 SD 155, ¶ 7, 620 N.W.2d 187, 189, (citing, SDCL 15-6-56(c); Bego v. Gordon, 407 N.W.2d 801 (S.D. 1987)). "In resisting the motion, the non-moving party must present specific facts that show a genuine issue of fact does exist." Estate of Williams, 2000 SD 155 at ¶ 7, (citing, Ruane v. Murray, 380 NW2d 362 (S.D.1986)).

SDCL 62-4-38:

The issue in dispute here involves the interpretation of SDCL 62-4-38. That provision states:

> If an injury for which compensation is payable under this title has been sustained under circumstances creating in some other person than the employer a legal liability to pay damages in respect thereto, the injured employee may, at the employee's option, either claim compensation or proceed at law against such other person to recover damages or proceed against both the employer and such other person. However, in the event the injured employee recovers any like damages from such other person, the recovered damages shall be an offset against any workers' compensation which the employee would otherwise have been entitled to receive.

SDCL 62-4-38 (emphasis added).

Milbrandt argues that the damages recovered from the tortfeasor should be used as an offset against the actual amounts billed by the medical providers which were paid by Medicare and Blue Cross Blue Shield. Employer and Insurer argue that the damages should only be used as an offset against the amounts actually paid by Milbrandt and future benefits to which he may become entitled. They argue that the recovery should not be offset against bills paid by Medicare and Blue Shield. The Department rejects both of these positions.

SDCL 62-4-38 dictates that the damages recovered must be offset against any benefits, "the employee would otherwise have been entitled to receive". In other words, the amount the employee would have been entitled to receive had the damages from the tortfeasor not been recovered.

There is no question that Milbrandt would be entitled to medical expenses if it is ultimately decided that his hip replacement is deemed compensable. SDCL 62-4-1. The question in this case is how much money he would be entitled to receive in workers' compensation benefits. If Insurer had not denied coverage of the hip replacement in this case, Milbrandt would have been entitled to the amount the Insurer would be required to pay under the fee schedule set forth by SDCL 62-7-8 and ARSD 47:03:05.

However, Employer and Insurer denied coverage for the hip replacement. In this situation, SDCL 62-1-1.3 dictates the amount which Insurer must pay. That statute states:

> If an employer denies coverage of a claim for any reason under this Title or any reason permissible under Title 58, such injury is presumed to be nonwork related for other insurance purposes, and any other insurer covering bodily injury or disease of the injured employee shall pay according to the policy provisions. If coverage is denied by an insurer without a full explanation of the basis in the insurance policy in relation to the facts or applicable law for denial, the director of the Division of Insurance may determine such denial to be an unfair practice under chapter 58-33. If it is later determined that the injury is compensable under this Title, the employer shall immediately reimburse the parties not liable for all payments made, including interest at the category B rate specified in § 54-3-16.

SDCL 62-1-1.2 (emphasis added).

In the relevant portion of this statute, the legislature has injected the doctrine of subrogation into the workers' compensation laws. The doctrine of subrogation is common in both contract and insurance law. Under that doctrine an insurer who pays under the terms of a policy, subrogates or acquires the insured's right to proceed against the tortfeasor to collect the sums paid under its policy.

In this case, the cost of the benefits which Milbrandt would be entitled, and to which the offset would apply, if his hip replacement is compensable, is the amounts actually paid by Medicare, Blue Cross Blue Shield and himself. This sum is the amount billed minus any write-offs which Medicare, Blue Cross Blue Shield or Milbrandt may have received from the medical providers.

Order:

Employer and Insurer's Motion for Summary Judgment is denied. Milbrandt's Motion for Summary Judgment on Offset Issue is granted to the extent that the $73,541.32 shall be offset against the sums paid to medical providers for the hip replacement and treatment by Medicare, Blue Cross Blue shield and Milbrandt. This letter shall constitute the order in this case.

Sincerely,

__/s/ Donald W. Hageman__ _____
Donald W. Hageman
Administrative Law Judge