

October 5, 2015

Michael J. Simpson
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**Letter Decision on Motion to Determine
Applicability of Medical Fee Schedule**

Christina L. Klinger
May, Adam, Gerdes & Thompson LLP
PO Box 160
Pierre, SD 57501

RE: HF No. 103, 2013/14 – Mark Freeman v. Gold Diggers, Inc. and Riverport Insurance
Company

Dear Mr. Simpson and Ms. Klinger:

Submissions:

This letter addresses the following submissions by the parties:

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| September 11, 2014 | Motion to Determine Applicability of Medical Fee Schedule and to Direct Payment of Medical Bills through Claimant's Counsel; |
| July 30, 2015 | Employer/Insurer's Response to Claimant's Motion to Determine Applicability of Medical Fee Schedule; Affidavit of Jackie White; Affidavit of Larry Romanko; |
| September 4, 2015 | Claimant's Reply to Employer's Response to Claimant's Motion to Determine Applicability of Medical Fee Schedule and to Direct Payment of Medical Bills through Claimant's Counsel. Affidavit of Mark Freeman; Affidavit of Michael J. Simpson. |

Facts:

When construed in the light most favorable to the non-moving party, the facts of this case are as follows:

1. On August 4, 2013, Claimant was treating at Mayo Clinic for his left hip. This treatment was not casually related to his employment.
2. Claimant, Mark Freeman, was employed with Gold Diggers, Inc., on September 12, 2013, when he suffered an injury arising in the course of his employment. In that, Claimant tripped and fell and fractured his left hip.
3. On September 12, 2013, Employer was insured with Riverport Insurance Company.
4. Claimant was treated at Mayo Clinic for this incident.
5. In a letter dated November 1, 2013, Insurer conditionally denied Claimant's claim due to "incomplete medical records."
6. On December 18, 2013, Claimant's counsel provided additional medical records to Employer/Insurer and asked that the claims adjuster immediately process the claim.
7. On January 17, 2014, Claimant filed a Petition for Hearing.
8. On February 24, 2014, Employer/Insurer filed an Answer to the Petition for Hearing, claiming that "Claimant's fall and injury were a result of an idiopathic fall without an employment contributing hazard and therefore not compensable."
9. As a result of his medical treatment, Claimant has incurred medical expenses. The medical bills paid by a third-party insurer are \$1,886.95. The remainder of the medical expenses were unpaid.
10. On March 21, 2014, Dr. Harlow completed an independent medical exam (IME) of Claimant.
11. On March 31, 2014, Employer/Insurer accepted compensability for Claimant's injuries.
12. On April 2, 2014, Employer/Insurer filed an Amended Answer to the Petition for Hearing.
13. Employer/Insurer paid outstanding benefits, including the unpaid medical expenses directly to the medical provider at the fee schedule rate.

Employer/Insurer also reimbursed the third party insurer pursuant to SDCL 62-1-1.3.

14. Claimant filed a Motion to Determine Applicability of Medical Fee Schedule and to Direct Payment of Medical Bills through Claimant's Counsel on September 11, 2014.

15. Additional facts may be discussed in the analysis below.

Applicability of the Medical Fee Schedule & payment of medical bills through Claimant's attorney:

Claimant filed a motion to determine the applicability of the Medical Fee Schedule and moves the Department to require that Employer/Insurer pay the full amount of medical expenses incurred. Claimant further requests that the Department require that Employer/Insurer pay the additional amount not paid (face value minus fee schedule amount) through Claimant's attorney.

Employer/Insurer argues that Claimant does not have standing to bring this case because Claimant did not make payment and therefore is not entitled to reimbursement. However, Claimant is ultimately responsible for the payment of his medical expenses and any other expenses associated with them. As such Claimant must assure that his medical bills and any expense he incurred in the process of getting those medical bills paid are fully satisfied. Therefore, I find that Claimant has standing to bring his claim.

Claimant asserts that Employer/Insurer should be required to pay Claimant's medical expenses through his attorney's law firm without benefit of the reduced fee schedule pursuant to SDCL 62-1-1.3 and *Wise v. Brooks Construction Services*, 2006 SD 80, 721 NW2d 461. SDCL 62-1-1.3 states in relevant part:

If an employer denies coverage of a claim on the basis that the injury is not compensable under this title due to the provisions of subsection 62-1-1(7)(a), (b), or (c), 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 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.

The South Dakota Supreme Court, in *Wise*, provided:

If Employer had accepted responsibility for Wise's injury they would have been entitled to the benefits of the fee schedule. Because they denied Wise's claim, Wise, not Employer, incurred the expense of his treatment and surgery. An employer cannot deny coverage and then, once a claimant has incurred

expenses, only pay the expenses it chooses according to the medical fee schedule. An employer loses its access to the medical fee schedule when it denies coverage. Therefore, under SDCL 62-1-1.3, the medical fee schedule is not applicable in this case. Thus, Employer is liable for the full amount of the medical expenses incurred by Wise.

Id. at ¶ 38.

Employer/Insurer argue that *Whitesell v. Rapid Soft Water, et al*, 2014 SD 41, 850 NW 2d 840 (SD 2014), controls this case. In both *Wise* and *Whitesell*, Employer/Insurer maintained its denial of benefits and Claimant's entitlement to benefits was later determined through the hearing process before the Department of Labor. In *Wise*, the employer initially denied coverage. The employee incurred medical fees. The Department found the injury to be compensable. The employer then sought to reimburse the employee based on ARSD 47:03:05:05's fee schedule. The Supreme Court held the employer was "liable for the full amount of medical expenses incurred by [the employee]. *Wise* at ¶38. The Supreme Court also stated that fee payment can be made through the employee's attorney. *Id.* at ¶39.

In *Whitesell*, the employer initially denied coverage and a third-party insurer then paid the health provider at a discounted rate. Based on *Wise*, *Whitesell* argued that Employer/Insurer should pay for the full amount of medical services provided, through Claimant's attorney, and should not be able to take advantage of the health insurer's discounted rate. This would allow claimant's attorney to charge an attorney fee on the full amount of the bills. *Whitesell* at ¶4. The Supreme Court however distinguished *Whitesell* from *Wise*, holding that *Wise* stated that ARSD 47:03:05:05 does not provide SDCL 62-1-1.3's reimbursement amount. *Id.* at ¶19. Instead, SDCL 62-1-1.3 requires that the Employer/Insurer immediately "reimbursed the parties not liable for all payments made, including interest[.]" which is what Employer/Insurer did in *Whitesell*. *Id.* Thus satisfying its obligations under SDCL 62-1-1.3.

In the case at hand, both *Wise* and *Whitesell* need to be applied. As soon as an IME was completed and reviewed by Employer/Insurer, the claim was voluntarily accepted. SDCL 62-1-1.3 provides that once a denial is made, any other insurer covering bodily injury shall pay according to its policy. If it is later determined the injury is compensable, such as in this case, Employer/Insurer shall immediately reimburse the parties not liable for all payments made. If the other insurer paid more than the fee schedule, the Insurer is responsible for full reimbursement to the other insurer. In this case, the only medical bill paid by Claimant's third-party insurer was in the amount \$1,886.95. To which, Employer/Insurer immediately reimbursed the third-party insurer in accordance with SDCL 62-1-1.3. The remainder of the medical expenses were not paid by the third-party insurer or Claimant but were left unpaid until Employer/Insurer began working directly with the medical provider for payment using the fee schedule. Claimant, just as in *Wise*, argues that when Employer/Insurer denied the claim, they lost the right to use the fee schedule. The Supreme Court agreed with *Wise*, finding that "an employer loses its access to the medical fee schedule when it denies coverage." *Wise* at ¶38.

In this situation, just as in *Wise*, Employer/Insurer is not entitled to pay benefits pursuant to the Medical Fee Schedule for any expenses not already paid by Claimant's third-party insurer prior to the claim being accepted. Thus any bill for services performed prior to March 31, 2014, the date that Insurer accepted the claim as compensable, which was not paid by a third-party insurer, must be paid in full without the benefit of the fee schedule.

Claimant further argues that it is settled law in South Dakota that the Department can order Employer/Insurer to make payments through Claimant's counsel. *Lagge v. Corsica Co-Op*, 2004 SD 32, ¶38, 677 NW 2d 569, 578. The law in South Dakota allows the Department discretion in ordering payment of medical bills through Claimant's attorney. The Supreme Court in *Lagge v. Corsica Co-Op*, stated, "SDCL 62-4-1, our statute concerning medical expenses, is silent on how a claimant's medical expenses should be paid. The statute requires an employer to provide necessary medical care, but does not specify to whom payment for that care should be made." *Id* at ¶36. The Court went on to state, "payment through a claimant's attorney is commonly done and is contemplated by statute." *Id* at ¶38. Accordingly, in this matter, Employer/Insurer shall make payments through Claimant's attorney.

This letter shall constitute the Department's Order in this matter.

Sincerely,

 /s/ Sarah E. Harris
Sarah E. Harris
Administrative Law Judge
Division of Labor & Management
Department of Labor & Regulation