

October 31, 2010

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**Letter Decision and Order**

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RE: HF No. 112, 2007/08 – Bess M. Hemmer v. Tea Area School District and  
Continental Western Group

Dear Counsel:

***Submissions:***

This decision addresses the following submissions by the parties:

August 24, 2011	Employer and Insurer's Motion for Partial Summary Judgment;
	Employer and Insurer's Brief in Support of Motion for Partial Summary Judgment;
	Affidavit of Mike Beyer;
September 22, 2011	Claimant's Response to Employer and Insurer's Motion for Partial Summary Judgment; and
September 27, 2011	Employer and Insurer's Reply Brief Supporting Motion for Partial Summary Judgment.

**Background:**

Bess M. Hemmer (Claimant) alleges that she suffered a work-related injury while working late the Tea Area School (Employer). She maintains that the injury required medical treatment in 2008 and ultimately surgery. Employer and Continental Western Group (Insurer) denied coverage for the claim. Claimant received a \$13,150.12 charitable write-off from Sanford Hospital and an additional \$4,963.02 adjustment deduction for the surgery.

Putting aside the question of liability, Employer and Insurer have moved the Department for partial summary judgment to prohibit recovery of any medical expenses which Claimant has not paid due to charity or otherwise. Claimant argues that the ‘collateral source rule’ prohibits the reduction of her damages for the amounts she received in write-offs.

**Summary Judgment:**

ARSD 47:03:01:08 governs the Department’s authority to grant summary judgment in South Dakota 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. Vandenberg, 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)).

In this case, there are no genuine issues of material fact. Therefore, the issue can be determined as a matter of law.

### ***Collateral Source Rule:***

The collateral source rule has been adopted by the South Dakota Supreme Court in tort and medical malpractice cases. Cruz v. Groth, 2009 SD 87, 763 NW2d 910. In that case, the rule was described as follows:

As a rule of evidence, it prohibits a defendant from offering proof of a plaintiff's collateral source benefits, received independent of the tortfeasor, that compensate the plaintiff, in whole or in part, for his or her injury. As a rule of damages, it prohibits a defendant from reducing personal liability for damages because of payments received by the plaintiff from independent sources.

Id. at ¶ 9, (citations omitted). However, the South Dakota Supreme Court has not decided whether the collateral source rule applies in workers' compensation cases in South Dakota; nor has the legislature codified the rule in this state.

In a 2010 decision, the Department held that the collateral source rule is not applicable in South Dakota worker's compensation cases and that SDCL 62-1-1.3 only required an insurer to repay the claimant for amounts actually paid to medical providers. See MEI Corp. & Fireman's Fund v. Ron Bonnet, 2010 SD Wrk. Comp. LEXIS 15, HF No. 168, 2004/05, Letter Decision and Order dated August 17, 2010. The Department finds nothing in this case to alter its conclusions in the Bonnet matter.

First, the collateral source rule generally refers to benefits received independent of the "tortfeasor." See Cruz at ¶ 9. The rationale for the rule is to prevent tortfeasors from benefiting or realizing a windfall from the benefits received through provider write-offs or other payments by third parties. Tower Automotive v. Ill. Workers Comp. Comm., 943 NE2d 153, 162 (Ill. App. 2011). However, unlike tort cases, there are usually no tortfeasors or wrongdoer in workers compensations cases (see Id. at 163) and there is none indicated in this case.

Next, the benefits provided in workers' compensation cases in this state are purely statutory. See Fredekind v. Trimac Ltd., 1997 SD 79, ¶ 5, 566 NW2d 148. 149. whereas, the collateral source rule is a creature of the common law. In its earliest forms it was articulated in cases of equity and admiralty. Smock v. State of California, 138 Cal. App.4th 883, 886 (2006).

An agency has only such power as expressly or by necessary implication is granted by legislative enactment; agency may not increase its own jurisdiction and, as a creature of statute, has no common-law jurisdiction nor inherent power such as might reside in a court of general jurisdiction.

O'Toole v. SD Retirement System, 2002 S.D. 77, 648 N.W.2d 342 citing Lee v. Div. of Fla. Land Sales & Condominiums, 474 So.2d 282, 284 (Fla App5Dist 1985)." In other words, the Department cannot impose a common law rule, like the collateral source rule, unless it has been codified or its use has been sanctioned by the legislature. Neither has occurred in South Dakota.

Finally, the collateral source rule conflicts with the express language of SDCL 62-1-1.3. That statute deals with the situation posed by this case where an insurer denies coverage and the injury is later found to be compensable. In those instances, the statute states that 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 62-1-1.3. In this case, the payments made by Claimant did not include the write-offs.

**Order:**

In accordance with the analysis above, the Department finds that the collateral source rule is not applicable in South Dakota workers' compensation cases and, Employer and Insurer are not required to reimburse Claimant for sums written-off by the medical providers as charity or otherwise. This letter shall constitute the order in this matter.

Sincerely,

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