August 17, 2010

J. G. Shultz
Woods, Fuller, Shultz & Smith PC
P.O. Box 5027
Sioux Falls, SD 57117-5027

Letter Decision and Order

Greg L. Peterson
Melissa E. Neville
Bantz, Gosch & Cremer, Prof. LLC
PO Box 970
Aberdeen, SD 57402-0970

RE: HF No. 168, 2004/05 – MEI Corporation and Fireman's Fund v. Ron Bonnet

Dear Counsel:

The above captioned matter is a workers' compensation case brought before the South Dakota Department of Labor Division of Labor and Management (Department) pursuant to SDCL 62-7-12 and ARSD 47:03:01. This case was heard by Donald W. Hageman, Administrative Law Judge, on March 10 and 11, 2010, in Aberdeen, South Dakota. Ron Bonnet (Claimant) was represented by Greg Peterson and Melissa Neville. J. G. Schultz represented MEI Corporation (Employer) and Fireman's Fund (Insurer). The Department deferred ruling on several questions until after the hearing and requested post-hearing briefs on those questions. The parties agreed that these preliminary questions would be decided prior to briefing and deciding this case on its merits. This letter deals with those preliminary issues.

Preliminary issues:

1. Whether payments of authorized medical expense should be paid to Claimant's Counsel?

    a. Whether the collateral source rule bars the admittance of evidence of Medicare payments and offsets and insurance write-offs made to

2. Whether Claimant's Wyoming workers' compensation file, which was offered by Employer and Insurer as Exhibits 37-52, should be admitted into evidence?

3. Whether Claimant can submit additional post-hearing rebuttal testimony?

Background:

The following is a brief background of this case:

1. Claimant slipped and fell at work injuring his back on or about March 15, 1984, while employed by Employer in South Dakota.

2. At the time of Claimant's March 1984 injury, Employer was insured by Insurer for purposes of workers' compensation.

3. Insurer paid for the medical expenses associated with Claimant's March 1984 injury through March 11, 1994.

4. Claimant entered into a settlement agreement with Insurer in 1987 regarding the March 1984 injury.

5. On August 18, 2000, Claimant again slipped and fell at work, while employed by a different employer in Cody, Wyoming. Claimant injured his back, the right side of his ribs, and his head in the August 2000 fall.

6 Claimant filed a Wyoming workers' compensation claim for his August 2000 injuries.

7. Ultimately, the Wyoming Medical Commission Hearing Panel issued a decision dated January 9, 2004, which found that Claimant's medical condition at that time was not related to the August 2000 injury.

8. After the Wyoming Medical Commission's January 2004 decision, Claimant sought coverage for his medical expenses from Employer and Insurer. Employer and Insurer denied coverage. After Employer and Insurer's denial, the majority of Claimant's medical expenses were paid by Medicare and Humana Insurance Company.

9. After Employer and Insurer denied coverage, Claimant filed this action seeking compensation for his medical condition and those medical expenses incurred since August 1, 2002. Claimant now alleges that his medical condition and expenses since August 1, 2002, are attributed to his March 1984 fall.

10. Prior to hearing, Claimant filed a Motion for Full Faith and Credit or judicial Notice of Wyoming's Findings of Fact. On February 4, 2007, Department denied Claimant's motion.

11. Employer and Insurer then filed a Motion for Summary Judgment and Alternative Motion for Partial Summary Judgment. The basis of Employer and Insurer's motions was Judicial Estoppel due to Claimant's position in the Wyoming proceedings and the Settlement Agreement executed by the parties which dealt with the 1984 injury. On August 11, 2009, the Department denied both of Employer and Insurer's motions.

12 Shortly before the hearing, Claimant filed a Motion to Pay Authorized Medical Expenses to Counsel. This motion is one of the issues dealt with in this letter.

13 Other facts may be discussed in the discussion below.

Collateral Source Rule:

Claimant filed a Motion for Payment of Authorized Medical Payments to Counsel prior to hearing. Employer and Insurer voiced no objection to making payments to Claimant's attorney if they are ultimately found to be liable, on the condition that they are required to pay only those amounts actually paid to the medical providers and not the amount originally billed. In other words, Employer and Insurer do not believe they should be required to pay charges covered by Medicare payments and set-offs or write-offs given to Humana.

In support of their position, Employer and Insurer ask that documents which reflect the Medicare payments and set-offs and insurance write-offs be admitted into evidence. Claimant objects to the admittance of these documents arguing that their admission is barred by the collateral source rule.

First, the South Dakota Supreme Court approved the payment of workers' compensation benefits to claimant's attorney in *Wise v. Brooks Construction*, 2006 SD 80, ¶ 39, 721 NW2d 461. In that case, the Court reviewed an order by the Department that directed the employer to pay benefits directly to the claimant's attorney. The court stated:

> "[t]he Department's order is not in contravention with any statute. Furthermore, payment through a claimant's attorney is commonly done and is contemplated by statute." "The Department did not err in requiring [Employer] to pay for [Wise's] medical care through his counsel." (citations omitted)

Id. Consequently, a similar order would be appropriate in this case.

The next question is whether the collateral source rule is applicable in South Dakota worker's compensation cases. 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).

The analysis begins by considering SDCL 62-1-1.3. That statute contemplates cases like this in which a workers' compensation insurer denies coverage and medical expenses are paid by a third party. That statute states the following:

> 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 not work 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 62-1-1.3, (emphasis added). This statute requires reimbursement for expenses paid plus interest.

Dictionary .com, http://dictionary.reference.com/browse/reimburse, (August 12, 2010) defines "reimburse" as "1. to make repayment to for expense or loss incurred… 2. to pay back; refund; repay." These definitions all indicate that the employer and Insurer are only required to repay for the amounts actually paid to the medical providers. This interpretation precludes any requirement that Employer and Insurer pay for amounts set-off or written-off.

While discussing statutory interpretation, the South Dakota Supreme Court has stated:

> This Court interprets statutes "to discover the true intent of the legislature in enacting laws, which is ascertained primarily from the language employed in the statute." *Id.* (citing *Sanford v. Sanford*, 2005 SD 34, ¶13, 694 NW2d 283, 287). "The intent of a statute is determined from what the Legislature said, rather than what the courts think it should have said." *Id.* (citing *Martinmaas v. Engelmann*, 2000 SD 85, ¶49, 612 NW2d 600, 611).

Wise v. Brooks Construction, 2006 SD 80, at ¶ 35. The language in SDCL 62-1-1.1 conflicts with the collateral source rule which would bar the evidence of set-offs and write-offs. Therefore, it must be concluded that the legislature did not intend for the collateral source rule to apply in workers' compensation cases. Employer and Insurer's evidence of Medicare payments, set-offs and insurance write-offs will be admitted.

Wyoming Workers' Compensation File:

During the hearing, Employer and Insurer offered Exhibits 37-52, which contain documents from Claimant's Wyoming workers' compensation file. Claimant objects to the admittance of those exhibits. Claimant argues that the documents are hearsay, duplicative, ambiguous and, in some cases, the mere argument of counsel. The record was held open after the hearing to provide Employer and Insurer with the opportunity to submit a certification of the documents from the Wyoming Department of Labor for purposes of authentication. That certification has since been received by the Department. The Department now takes judicial notice of that certification.

The admittance of evidence in workers' compensation cases is governed by SDCL 1-26-19. That statute provides in part.

> In contested cases:
>
> 1) Irrelevant, incompetent, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied under statutory provisions and in the trial of civil cases in the circuit courts of this state, or as may be provided in statutes relating to the specific agency, shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not otherwise admissible thereunder may be admitted except where precluded by statute if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form.

SDCL 1-26-19.

As previously mentioned, the exhibits in question have been certified by the Wyoming Workers' Safety and Compensation Division which is sufficient to establish foundation for the documents. SDCL 19-17-5. (Rule 902 (4)).[1] These documents also fall within the public records exception to the hearsay rule under the provisions of SDCL 19-16-12 (1) (Rule 803 (8)).[2] These documents reflect the activities of Wyoming Workers' Safety and Compensation Division.

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[1] SDCL 19-17-5. (Rule 902 (4)) states:

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to a copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with § 19-17-2, 19-17-3 or 19-17-4 or complying with any law of the United States or state thereof.

[2] SDCL19-16-12 states in part:\

Exhibits 40-49 contain the bulk of the agency's record in Claimant's Wyoming workers' compensation case. These documents are relevant to the judicial estoppel issue should Claimant appeal the Department's denial of his Motion for Summary Judgment and Alternative Motion for Partial Summary Judgment. Claimant points out that many of these documents have already been admitted and their remittance here would be cumulative. Claimant also argues that some of the documents contain counsel's arguments which should not be admitted.

Some duplication may occur if these exhibits are admitted into evidence and some contain counsel's arguments, however, many documents would be excluded if the exhibits are not admitted and the documents may contain statements against interest or evidence of judicial estoppel. For these reasons Exhibits 40-49 will be admitted into evidence.

Exhibits 37-39 are letters between the Wyoming Department of Labor and the South Dakota Department of Labor. Exhibit 37 is a letter from the Wyoming DOL to the South Dakota DOL requesting a copy of Claimant's workers' compensation file from his 1984 injury. Exhibit 38 and 39 are letters from the South Dakota DOL to the Wyoming DOL requesting a $20.00 fee for the copies. These letters deal passively with this case. However, they have no probative value related to any legal issue yet to be decided. Therefore, exhibits 37-39 will not be admitted into evidence.

Exhibits 50-52 are letters from the Wyoming DOL to Claimant regarding some of the claim's filed in Wyoming after Claimant's 2000 injury. During the hearing, the Department refused to admit those exhibits for lack of foundation. However, the Wyoming DOL certification has corrected that problem. Consequently, those exhibits will now be admitted.

Post-Hearing Rebuttal Testimony:

At the conclusion of the hearing, the Department held the record open to receive certification of documents offered by Employer and Insurer during the hearing. Several days after the hearing, Claimant asked for an opportunity for Dr. Ogilvie to rebut Dr. Anderson's hearing testimony.

Employer and Insurer's request to provide the Wyoming certification came during the hearing and the certification involved exhibits which had been offered during the hearing. Claimant's request differs significantly. Claimant's request came well after the hearing and the request presents a "slippery slope" whereby the requests for rebuttal may be continuous. Therefore, Claimant's request is denied.

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth:

1) The activities of the office or agency;

Order:

Claimant's Motion for Payment of Authorized Medical Payments to Counsel is granted. However, Employer and Insurer will only be required to reimburse the parties the sums actually paid to the medical providers, if compensability is ultimately found. Employer and Insurer's request to admit evidence of Medicare payments and off-sets and insurance write-offs is also granted. Exhibits 37-39 are not admitted. Exhibits 40-52 are admitted. Claimant's request to provide additional rebuttal testimony is denied.

Claimant shall submit to the Department his post-hearing brief on the merits of the case within 30 days of the receipt of this letter. Employer and Insurer shall have 30 days from the receipt of Claimant's brief to submit their responsive brief. Claimant shall have 15 days thereafter to submit his reply brief. This letter shall constitute the order in this matter.

Sincerely,

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Donald W. Hageman
Administrative Law Judge