October 8, 2020

Michael S. Beardsley
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LETTER DECISION AND ORDER

Justin Bell
May, Adam, Gerdes & Thompson LLP
P.O. Box 160
Pierre, SD 57501

RE: HF No. 37, 2017/18 Crystal Geiman v. State of South Dakota and South Dakota Bureau of Human Resources

Dear Mr. Beardsley and Mr. Bell:

This letter addresses the following submissions by the parties:

July 17, 2020	Employer/Insurer's Motion for Partial Summary Judgment
August 12, 2020	Claimant's Response to Motion for Partial Summary Judgment
August 24, 2020	Employer/Insurer's Memorandum in Support of Partial Summary Judgment

ISSUE PRESENTED: IS EMPLOYER/INSURER ENTITLED TO PARTIAL SUMMARY JUDGMENT AS A MATTER OF LAW?

FACTS

Claimant, Crystal Geiman, is employed by the Unified Judicial System (UJS) as a probation officer in Pennington County, South Dakota. On February 8, 2012, Claimant was injured in a parking ramp adjacent to her office. Claimant was exiting her vehicle when she slipped on a patch of ice and fell. Claimant struck her head and neck on the running board of her pickup and landed on her left elbow and hip. Claimant filed a claim for workers compensation benefits, and Employer/Insurer paid for Claimant's medical treatment through April 5, 2013. Since Claimant's accident, she has continued to work full time for Employer, though it has provided Claimant with accommodations. Employer/Insurer filed a motion for partial judgement arguing that Claimant is not entitled to workers compensation benefits. It also contends that Claimant is not eligible for medical payments beyond Claimant's out-of-pocket costs to meet her deductible of her health insurance.

A. Claimant's Claim for Permanent Total Disability

Employer/Insurer argues that Claimant is not entitled to permanent total disability benefits because she has continued to work full time for employer. Employer/Insurer also contends it has no intention of removing Claimant's accommodations. Claimant counters that she is permanently and totally disabled under the odd-lot doctrine. She contends that summary judgment is improper at this time because the Department must evaluate the testimony of experts to determine if Claimant is indeed permanently and totally disabled.

Both parties have cited *McClaflin v John Morrell & Co.,* 2001 SD 86, 631 N.W. 2d 180 to support their respective arguments. *McClaflin* involved a claimant who developed carpel tunnel syndrome from his work for employer. In 1996, Claimant underwent surgery and later returned to work for employer in its coat room. Despite working full time at a wage of $10.00 per hour, the claimant filed a petition for hearing alleging that he was permanently and totally disabled under the odd-lot-doctrine. The Department granted claimant Cozine and odd-lot benefits for his injury. The circuit court affirmed the award of odd-lot benefits on the basis that Claimant was not employed in the competitive job marked, but suspended the benefits because claimant was employed full time. The Supreme Court rejected this reasoning noting "[u]nder our workers' compensation jurisprudence, we have never allowed recovery based on [a competitive market] test employed by the circuit court. We decline to adopt such an extension." *Id. at* ¶ 11. While the Court denied benefits based upon the theory that Claimant was employed in a "favored position", it did instruct the circuit court to retain jurisdiction of the case:

> Although Claimant is not in a position of "favored work," his current position in the coatroom allows Employer to shield itself from liability under our workers' compensation laws. As it stands, Claimant cannot meet his initial burden because he is currently employed by Employer. As we are mindful that Employer could now fire Claimant without cause because South Dakota is an "at-will" jurisdiction, we direct the circuit court to retain jurisdiction over this matter should Claimant no longer work for Employer. If Claimant can show, once no longer employed by Employer, that he is obviously unemployable and Employer cannot meet its corresponding burden, then the circuit court should instruct Employer to pay Claimant odd-lot benefits.

Id. at ¶ 14.

In this case, Claimant has continued to work full time in her position since her accident; albeit with restrictions. She therefore is not entitled to odd-lot benefits at this time. However, should Employer/Insurer decide to end Claimant's employment, she may then become eligible for such benefits. The Department will therefore retain jurisdiction over this case.

B. Claimant's Claim for Medical benefits

In the event that a party pays for medical care out of his pocket and his injury is later determined to be compensable, SDCL 62-1-1.3 provides for reimbursement by employer

> 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 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.

There is no dispute that Claimant can recover medical expenses which he personally paid. Employer/Insurer acknowledges "Claimant has paid some amount [of] out-of-pocket expenses. One of the issues to be resolved is whether out-of-pocket expenses claimed [by] Claimant are causally related to the injury and are compensable." By its own admission, the compensability of these out-of-pocket expenses *is at issue in this case*. On this basis alone, summary judgment is inappropriate.

Claimant argues that Title 62 does not grant the Department jurisdiction to decide subrogation and reimbursement issues. However, the Supreme Court has previously

interpreted SDCL 62-1-1.3 as allowing the Department to consider the issue of subrogation. *Whitesell v. Rapid Soft Water & Spas, Inc.* involved the issue of whether in insurer who reimbursed a third-party insurer under SDCL 62-1-1.3 received the benefit of the insurer's discounted rates. The Department originally found that insurer had fulfilled its statutory obligation under SDCL 62-1-1.3, and the Supreme Court agreed. "In this case, Employer reimbursed Tricare and Whitesell for all payments made. Accordingly, the Department found Employer satisfied its obligations under SDCL 62–1–1.3. We agree." 2014 S.D. 41, ¶ 17, 850 N.W.2d 840, 844. By affirming the Department's decision that employer/insurer had met its obligation to pay claimant's outstanding medical bills, the Court acknowledged that it had jurisdiction to consider this issue. Thus, the Department has jurisdiction to decide subrogation or reimbursement issues.

Employer/Insurer also argues that Claimant is not entitled to reimbursement of medical expenses in this case because the State of South Dakota is both Employer and Insurer. It contends that the state cannot, or elected not to, seek reimbursement for itself. Because there are issues regarding whether Claimant's out-of-pocket expenses are related to a workplace injury and reimbursable, summary judgment is denied. The Department need not here consider whether Claimant is precluded from seeking reimbursement for claims paid by his health insurance provider.

ORDER

While Claimant is not currently entitled to odd-lot benefits, she may become eligible in the future should her employment with the State of South Dakota end. Likewise, questions remain as to whether Claimant's out-of-pocket costs are related to a workplace injury. Employer/Insurer's motion for partial summary judgment is DENIED. This letter shall constitute the Department's opinion on this matter.

Sincerely,

/s/ Joe Thronson
Joe Thronson
Administrative Law Judge