

July 21, 2011

J. G. Shultz
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P.O. Box 5027
Sioux Falls, SD 57117-5027

LETTER DECISION & ORDER

James D. Leach
Attorney at Law
1617 Sheridan Lake Road
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RE: HF No. 127, 2010/11 – Safeway, Inc. v. Sandra Ehly

Dear Mr. Shultz and Mr. Leach:

I am in receipt of Claimant's Motion to Dismiss for Lack of Jurisdiction in the above-referenced matter. I have also received Employer's Resistance to Claimant's Motion to Dismiss for Lack of Jurisdiction and Claimant's Reply Brief in Support of Motion to Dismiss for Lack of Jurisdiction. I have carefully considered each of these submissions in addressing the Motion. Additionally, the Department has taken official notice of the pleadings in *Ehly v. Safeway, Inc.*, Civ. 10-5014, for the limited purpose of establishing factual and procedural background of the pending motion.

Claimant worked for Employer at the Safeway store in Spearfish, South Dakota. On December 7, 2005, Claimant sustained an injury at work when a truck owned and operated by Johnson Brothers Liquor Company slid away from the loading dock as Claimant was entering the truck to unload it. The injury was reported and treated as compensable. Claimant received workers' compensation benefits from Safeway.

Claimant later sued Johnson Brothers Liquor Company for damages arising from the accident and a jury verdict was returned in her favor. The matter was appealed, but the parties reached a settlement before the appeal was heard.

Claimant continued to seek medical treatment for her injuries and continued to receive workers' compensation benefits from Safeway. Safeway filed a Petition for Hearing with the Department of Labor and Regulation asking the Department to determine the

amount of Safeway's entitlement to reimbursement from Claimant for medical expenses paid since the jury verdict and Claimant's obligation to pay for future medical expenses.

Claimant moves the Department to dismiss the Petition for lack of jurisdiction. Claimant argues that the Department is without jurisdiction to determine subrogation issues. *Lagge v. Corsica Coop*, HF No. 364, 1990/91; *Boblett v. Northern Hills Trucking*, HF No. 332, 1991/92. Claimant argues that pursuant to SDCL 62-7-12, the Department shall decide disputes with respect to compensation under title 62. Claimant contends that her right to compensation is not disputed and the only dispute is Safeway's right to subrogation which belongs in the circuit court.

Employer asserts that the Department does have jurisdiction in the present case and requests that Claimant's Motion be denied. Employer takes the position that the Department does not have jurisdiction over subrogation claims between two Insurers that does not involve the Claimant, but in cases such as this one where the dispute is between the Employer and the Claimant the Department should have jurisdiction. Employer points to the holding in *Medley v. Salvation Army, Rapid City Corps*, 267 NW2d 201, in which the court determined that the Department was deprived of jurisdiction in part because the rights of the Employee were not at stake. Employer distinguishes the case at hand because the rights of the employee are at stake because future medical expenses are at issue.

The Supreme Court has addressed the issue of subrogation in workers compensation,

The general rule appears to be that, when it is ancillary to the determination of the employee's right, the compensation commission has authority to pass upon a question relating to the insurance policy.... This is, of course, in harmony with the conception of compensation insurance as being something more than an independent contractual matter between insurer and insured.

On the other hand, when the rights of the employee in a pending claim are not at stake, many commissions disavow jurisdiction and send the parties to the courts for relief. This may occur when the question is purely one between two insurers, one of whom alleges that he has been made to pay an undue share of an award to a claimant, the award itself not being under attack.

Truck Ins. Exchange v. Kubal, 561 NW2d 674, SD1997.

Employer's arguments are flawed because it is not Claimant's entitlement to future medical expenses or other rights under the workers' compensation title that are in dispute. Employer has not denied that she is entitled to workers' compensation benefits in the future. The only dispute is regarding the amount that the Employer is willing to pay toward those future expenses and the amount of reimbursement Employer is entitled to as a result of the third party lawsuit. This is purely a subrogation issue and therefore the Department lacks jurisdiction to hear this dispute.

Claimant's Motion to Dismiss for Lack of Jurisdiction is granted. This letter shall serve as the Department's order.

Sincerely,

/s/ Taya Runyan

Taya M. Runyan
Administrative Law Judge