SOUTH DAKOTA DEPT. OF LABOR & REGULATION

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VIA EMAIL

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DECISION ON CLAIMANT'S 2ND MOTION FOR SUMMARY JUDGMENT and EMPLOYER AND TEMPORARY TOTAL DISABILITY ISSUE

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RE: HF No 62, 2018/19 – Andrew Cox v. Prinsco, Inc. and American Contractors Insurance Group (ACIG)

Greetings:

This letter decision addresses Claimant's 2nd Motion for Partial Summary Judgment Concerning Weekly Benefits Payments Plus Interest and Subrogation Due Under SDCL 62-1-1.3. as well as Employer and Insurer's Supplemental Brief Regarding Temporary Total Disability Benefits and Motion Regarding Prejudgment Interest. All responsive briefs have been considered.

Andrew Cox (Cox) has moved the Department of Labor & Regulation (Department) for partial summary judgment. The remaining disputed issues in this matter are:

1. The period of time Cox was eligible for temporary total disability (TTD)/Indemnity benefits, based upon the date his loss became ascertainable;

2. The amount of interest due on periods of TTD/Indemnity once said periods are determined;

3. The amount of interest due on Cox's permanent partial disability (PPD) benefits, based upon the date from which interest should have started, when the loss became ascertainable; and

4. Whether Employer and Insurer must reimburse the health insurance Plan/HealthPartners TPA for subrogation amounts paid by "parties not liable" (SDCL 62-1-1.3) in the amount of $45, 644.01 plus interest ($26,888.18 through 1/27/23).

The Department's authority to grant summary judgment is established in ARSD 47:03:01:08 which 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.

In matters of summary judgment, the moving party 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. *Stromberger Farms, Inc. v. Johnson*, 2020 S.D. 22, ¶ 31, 942 N.W.2d 249, 258-59 (citations omitted). The non-moving party must present specific facts showing that a genuine issue of material facts exists. *Id.* at ¶ 34. "A fact is material when it is one that would impact the outcome of the case 'under the governing substantive law' applicable to a claim or defense at issue in the case." *A-G-E Corp. v. State*, 2006 SD 66, ¶ 14, 719 N.W.2d 780, 785.

Timeframe for TTD/Indemnity benefits

First the Department will determine for which periods Cox was entitled to TTD benefits and/or rehabilitation benefits based upon when his loss became ascertainable. SDCL 62-1-1(8) provides,

> (8) "Temporary disability, total or partial," the time beginning on the date of injury, subject to the limitations set forth in § 62-4-2, and continuing until the employee attains complete recovery or until a specific loss becomes ascertainable, whichever comes first.

SDCL 62-1-1(2) defines ascertainable loss,

> (2) "Ascertainable loss," a loss becomes ascertainable when it becomes apparent that permanent disability and the extent thereof has resulted from an injury and that the injured area will get no better or no worse because of the injury;

The medical experts in this matter do not agree as to when Cox reached MMI. Per the Department decision on Employer and Insurer's Motion to Strike issued July 17, 2023, Employer and Insurer were allowed additional time to seek information in response to Dr. Reynold's opinion on the issue of when Cox reached MMI. Employer and Insurer initially offered the opinion of Dr. Mark Melin. However, Dr. Melin is no longer available to consult on this matter, and so Employer and Insurer have offered the opinion of Dr. Howard Saylor which will be discussed below.

Cox's treating surgeon Dr. Tommy Reynolds opined that Cox did not reach MMI until April 30, 2019, when he had his follow up examination. Dr. Reynolds considered that Cox reported continued improvement in function and pain levels up until his April 30, 2019, appointment with him. Dr. Reynolds assigned Cox permanent work restrictions of no strenuous labor, limited use of arms/arm motion, no heavy lifting, and to avoid or limit repetitive motion. Cox attempted to return to work with employer

following the March 24, 2017, surgery with a reduced schedule, but he resigned on August 23, 2018, after being unable to handle the physical exertion. From August 23, 2018, through July 8, 2019, Cox performed a job search and worked with South Dakota Vocational Rehabilitation services to seek re-employment.

Cox contends that his loss was not ascertainable until such time as he was able to secure employment on July 8, 2019. He asserts he is entitled to 57 weeks of weekly benefits for two-post surgical periods he was unable to work, and then from August 23, 2017, through July 8, 2019, when he was able to secure suitable employment within his physical limitations. He further contends that his vocational loss was not ascertainable until July 8, 2019, when he found work within his restrictions.

Cox argues that it is general practice that most injured workers are not examined for impairment and PPD benefits, and formally placed at MMI, until at least 1-year post-surgery based on the general medical assumption that healing will continue for approximately that timeframe. He asserts that the statutes (SDCL 62-4-6, 62-4-53, 62-4-55, 62-7-41 and 62-4-5.1) contemplate continued benefits during periods of time when an injured employee is attempting to return to work and do not indicate that weekly benefits cease immediately upon a date of MMI. Cox was temporarily totally disabled during his post-surgical periods.

Dr. Melin opined in his independent medical evaluation report that Cox reached MMI on May 9, 2017. He concluded that Cox's January 4, 2017, work injury, combined with the presence of a left cervical rib, resulted in the need for treatment and subsequent temporary disability and impairment during the recovery from the surgical thoracic outlet procedure. He concluded that MMI was reached at the time of discharge

from postoperative physical therapy on May 9, 2017. Dr. Melin also agreed with the permanent restrictions assigned by Dr. Reynolds on April 30, 2019.

After analyzing the medical file including Dr. Reynold's opinion regarding the date of loss, Dr. Saylor opined that Cox's loss became ascertainable on August 14, 2017. In his report, he noted that Cox did not have a follow up after August 2017 and had completed his rehabilitation and outpatient therapy as of May 9, 2017. There were no further surgical follow-ups or imaging. He concluded that on August 14, 2017, Cox's condition was such that it was apparent that permanent disability had resulted from the work-related injury and that the injured area would not get better worse due to the injury.

Employer and Insurer assert that Cox is not entitled to any TTD when he returned to work after May 19, 2017. Thus, since Cox worked full time from May 22, 2017, until Dr. Saylor said his loss became ascertainable on August 14, 2017, Cox is only entitled to TTD for the 8.2 weeks between March 24, 2017, and May 19, 2017. Employer and Insurer further assert that should the Department accept Dr. Reynold's opinion the record is still incomplete. Since Cox's last day of work with Employer was August 23, 2018, and Dr. Reynold's date of ascertainable loss is April 30, 2019, there is a period between those dates where there is a question of whether Cox could work. In fact, Cox did work for Rochester Armored Car for three days. Employer and Insurer argue that since Cox earned wages after he left Employer but before April 23, 2019, he is not entitled to TTD during that period. Employer and Insurer request the Department to allow additional time for Discovery regarding employment and wages Cox may have earned before May of 2019 other than with Employer.

The South Dakota Supreme Court (Court) has determined that the opinion of a non-treating physician may be more persuasive than that of a treating physician[1]. However, in this matter, the Department finds the opinion of Cox's treating physician, Dr. Reynolds, to be the most persuasive. SDCL 62-1-1(2) provides that a loss becomes ascertainable when the injured area will not get better or worse because of the injury. Dr. Reynolds found that Cox had was still reporting pain up around the operative site, that he was taking tramadol and unable to perform repetitive action work at his exam on April 30, 2019. Dr. Reynolds was able to compare Cox's condition from a previous visit, and he concluded that Cox was showing improvement from the last time he had seen him. Therefore, as his condition had continued to change, the Department is persuaded that prior to April 30, 2019, Cox was not at the point where he would "get no better or no worse because of the injury" as require for an ascertainable loss pursuant to SDCL 62-1-1(2). Therefore, Dr. Reynold's opinion that Cox reached MMI on April 30, 2019, is the best supported opinion and most consistent with his ascertainable loss.

Interest Due

The Department will next address the interest due on Cox's benefits. SDCL 62-4-5.1 provides,

> If an employee suffers disablement as defined by subdivision 62-8-1(3) or an injury and is unable to return to the employee's usual and customary line of employment, the employee shall receive compensation at the rate provided by § 62-4-3 up to sixty days from the finding of an ascertainable loss if the employee is actively preparing to engage in a program of rehabilitation as shown by a certificate of enrollment. Moreover, once such employee is engaged in a program of rehabilitation which is reasonably necessary to restore the employee to suitable, substantial, and gainful employment, the employee shall receive compensation at the rate provided

[1] *See Jewett v. Real Tuff.*, 800 N.W.2d 345 (S.D. 2011); *McQuay v. Fischer Furniture*, 808 N.W.2d 107 (S.D. 2011); and *Grauel v S.D. Sch. Of Mines and Tech.*, 619 N.W.2d 260 (S.D. 2000)

> by § 62-4-3 during the entire period that the employee is engaged in such program. Evidence of suitable, substantial, and gainful employment, as defined by § 62-4-55, shall only be considered to determine the necessity for a claimant to engage in a program of rehabilitation.

Cox claims has been engaged in a program with SD Vocational Rehabilitation from just prior to May 20, 2019, through July 8, 2019, and that he is thus is entitled to TTD benefits and/or rehabilitation benefits in the amount of $25,132.72 in benefits due, plus $12,633.50 in interest for a total amount of $37,766.22. Employer and Insurer have requested the Department allow discovery regarding what employment and wages Cox may have earned before May of 2019 other than with Employer.

SDCL 62-4-55 provides, in pertinent part, "Employment is considered suitable, substantial, and gainful if: (1) It returns the employee to no less than eighty-five percent of the employee's prior wage earning capacity". Cox admits that he worked the three days at Rochester Armored Car but was unable to maintain the job due to his condition. Working for three days does not prevent Cox from meeting the eight-five percent requirement set in SDCL 62-4-55. As to Employer and Insurer's request for additional time for discovery, this matter has been ongoing for some time, and it is not appropriate to extend this matter further to allow for discovery that could have been completed earlier. The Department concludes that Cox is entitled to the $25,132.72 plus interest.

Reimbursement

Cox asserts that Employer and Insurer should be required to reimburse the amount of $45,466.01 paid by the health plan/Health Partners (TPA), plus interest in the amount of $29,988.26[2] through Cox's counsel pursuant to SDCL 62-1-1.3 which states,

[2] Calculated through October 2, 2023

> 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 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.

Cox has cited to two cases where the Court addressed payment of medical bills through counsel- *Wise v. Brooks Const. Servs*., 2006 S.D. 80,721 N.W.2d 461 and *Lagge v. Corsica Co-Op*, 2004 S.D. 32, 677 N.W.2d 569.

> [P]ayment through a claimant's attorney is commonly done and is contemplated by statute. SDCL 62–7–36 states that attorney's fees are a percentage of compensation benefits, which include medical expenses. Paying medical expenses directly to the medical care provider could deprive [claimant's] attorneys of the percentage of 'compensation benefits' they are entitled to pursuant to the statute.

Lagge at ¶ 38

Cox urges that if the reimbursement has already been paid, then the information would need to be provided by Employer and Insurer or the TPA administrator. Cox contends that it would be appropriate for the Department to award attorneys' fees due per the attorney's lien.

The present matter is distinguishable from both *Lagge* and *Wise* as both cases involved the payment of medical benefits on behalf of an injured employee and not the matter of subrogation interest between two insurance companies. In *Medley v. Salvation Army, Rapid City Corps*, 267 N.W.2d 201, 203 (S.D. 1978), the Court concluded,

> [W]hen 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.

Medley at 203.

In the present matter, the issue of subrogation is between Insurer and Health Partners. Employer and Insurer argue that the party with the right to assert a reimbursement claim under SDCL 62-1-1.3 is Health Partners which is not seeking reimbursement. The Department agrees. Therefore, following the guidance in *Medley*, the Department will not assert jurisdiction over the issue of subrogation in this matter as neither Insurance company has requested that it do so. Cox's request that the Department require reimbursement through his counsel pursuant to SDCL 62-1-1.3 is denied.

Order

Cox reached MMI on April 30, 2019.

Cox is entitled to the $25,132.72 plus interest.

Cox's request that the Department require reimbursement through his counsel pursuant to SDCL 62-1-1.3 is denied.

Claimant's 2nd Motion for Summary Judgment is granted in part and denied in part.

The parties shall consider this decision the order of the Department.

Sincerely,

Michelle Faw

Michelle M. Faw
Administrative Law Judge