SOUTH DAKOTA DEPARTMENT OF LABOR

OFFICE OF THE SECRETARY

DECLARATORY RULING
Re: SDCL § 62-7-38

This matter comes before Craig Johnson, the Secretary of the South Dakota Department of Labor, as a petition for declaratory ruling under SDCL 1-26-15 and ARSD 47:01:01:04. The Secretary has determined that this is not a matter of widespread impact, so that a public hearing is unnecessary. The record consists of comments which were submitted to the Secretary on June 27, 2000.

The facts which the Department was asked to assume are as follows: 1) Claimant had a previous workers' compensation injury to her back with "employer A" and was on disability for two years. 2) Claimant returned to work and sustained either a new injury or an aggravation of her previous back injury in 1997 with a second employer that will be referred to as "employer B." She continued to treat, and employer B's insurer continued to pay benefits. 3) In September, 1998, Claimant went to work for "employer C" as a janitor, and worked there until August, 1999. During the first half of 1999, Claimant continued to seek back treatment, and employer B's insurer continued to pay even though she was working for employer C. At some point, employer B quit paying benefits, claiming that they were unable to obtain the necessary information for their investigation. 4) Claimant continued to treat and now claimed that her back condition was made worse by her work at employer C, and that employer Claimant should pay medical benefits and temporary total disability benefits. Further, Claimant's treating doctor has given an opinion that the work contributed independently to the need for treatment at employer C's place of employment; however, there is no medical opinion that there was an aggravation of the previous back condition at employer C's place of employment. 5) Additionally, employer C has obtained a medical opinion that

there was no compensable injury that occurred at employer C's place of employment. That doctor has also rendered an opinion that the work at employer C did not contribute independently to the need for treatment, nor was there an aggravation of a preexisting condition while working for employer C. 6) Claimant now alleges that under SDCL § 62-7-38, employer C must pay ongoing benefits. 7) There is no petition for hearing on file, and it does not appear that Claimant intends to file one.

§ 62-7-38 provides:

> In cases where there are multiple employers or insurers, if an employee claims an aggravation of a preexisting injury or if an injury is from cumulative trauma making the exact date of injury undeterminable, the insurer providing coverage to the employer at the time the aggravation or injury is reported shall make immediate payment of the claim until all employers and insurers agree on responsibility or the matter is appropriately adjudicated by the Department of Labor pursuant to this chapter.

Petitioner takes the position that employer C should not be required to pay the claim under SDCL § 62-7-38, essentially because no petition for hearing has been filed. It asks the Department's view of the application of the statute under the assumed facts.

It is true that the statute seems to create an unmanageable situation for employer C otherwise. If employer C begins to pay the claim, it cannot stop doing so unless a settlement is reached or the Labor Department adjudicates the matter. But, as Petitioner rightly points out, the Department cannot adjudicate the claim once payment has been made, as it is then a dispute between insurers over either indemnity or contribution, over which the Department has no jurisdiction. Kermmoade v. Quality Inn, 2000 SD 81, ¶ 26; Medley v. Salvation Army, 267 N.W.2d 201 (S.D. 1978).

Nor does the statute on its face permit employer C to refuse the claim on grounds other than causation (notice, misconduct, misstatements on the employment application, non-employee relationship, etc.)

It is therefore the position of the Department of Labor that §62-7-38 should only be applied when a petition for hearing has been filed by a party to the claim, and the only issue affecting the primary liability of the parties in the litigation is whether the claimed injury and resulting condition arose out of and in the course of employment which the parties insure.

Dated this 20th day of July, 2000.

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Craig Johnson
Secretary
South Dakota Department of Labor