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RE: HF No. 16, 2010/11 – Todd Barber v. MWP Construction, Inc. and Acuity Mutual Insurance Company

Dear Mr. Lee and Ms. Mann:

I am in receipt of Claimant's Motion for Order That Employer and Acuity May Not Terminate Benefits in the above-referenced matter. Employer and Insurer have submitted resistance to that Motion and Claimant has filed a Final Response. I have taken all submissions into consideration when deciding this Motion.

The Claimant argues that the previous rulings in the Stanton case and the Kreiter case apply here. The previous rulings do apply, but they are also distinguishable. In the case of *Stanton v. United Parcel Service and Liberty Mutual Insurance Group*, Civ. 12-268, 7th Judicial Circuit, J. Thorstenson on September 5, 2012 issued a decision in a fact scenario similar to this case. A Decision and Order regarding the compensability of Stanton's claim was made years prior. UPS secured an IME of Stanton after this decision was made and subsequently denied all further benefits. The IME did not prove a change of condition, but was based upon facts that were in place prior to the court decision. The Department determined that SDCL §62-7-33 was the proper method of modifying a prior decision of the Department.

In this case, the Department approved a settlement agreement on December 15, 2011. This settlement agreement has the same effect as a prior Department decision and determination. See *Larsen v. Sioux Falls School Dist. 49-5*, 509 N.W.2d 703, 709 (S.D. 1993). "A settlement of a compensation claim which is properly approved per SDCL 62-

7-5 operates as an adjudication of the facts agreed upon in the settlement including the employer's obligation to pay compensation." *Id.*

The Settlement between Claimant and Employer/Insurer encompassed all medical benefits, related to his back injury, for the past, present, and future. Indemnity benefits were not included in this settlement, and were essentially waived by the Claimant. Specific to paragraph 6B of the agreement is Employer/Insurer's obligation to pay future medical benefits. The Parties agreed, in the Settlement, that there is only one (1) way in which future medical benefits would not be covered: 1) by obtaining an approved Medicare Set-Aside at employer/insurer's expense.

The Parties specifically agreed upon this language, "Both parties agree that neither party may reopen this matter upon changes of condition or otherwise before any workers' compensation tribunal or any court." This agreement clearly indicates that this workers' compensation claim between the parties, in regards to Claimant's back injury, is closed even if one of the parties can prove a change in condition. This is an unambiguous contract provision.

Judge Thorstenson wrote in *Stanton*:

> The Department determined that UPS failed to follow the procedural requirements of S.D.C.L. §62-7-33 in denying payment for all future benefits. UPS argues that it does not have to show a change in conditions when a medical professional performs an IME for them and determines that the injury is no longer a major contributing cause. UPS further argues that under the Department's analysis an employer would not be able to deny payment for an unrelated injury such as a broken pelvis because the condition of the original injury has not changed. This argument is disingenuous. S.D.C.L. §62-4-1.1 provides the procedure an employer/insurer must follow when it receives a medical bill. The employer, must, within thirty days, either pay all or any undenied portion of the bill; deny all or a portion of the bill as not compensable, excessive, or not medically necessary; or request additional information to determine the appropriateness of the charge. S.D. Codified Laws §64-4-1.1.
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> S.D.C.L. §62-7-1 entitles an employer to an IME, it does not entitle them to reduce payments. In addition, S.D.C.L. § 62-4-1.1 does not allow an employer/insurer to unilaterally determine that the injury is no longer a major contributing cause. "Only after a party asserting a 'change in condition' has met the required burden may the Department reopen a previous award." Owens v. F.E.M. Elec. Ass'n.Inc., 2005 SD 35, ¶ 18, 694 N.W.2d 274, 280 (citing Sopko v. C. & R. Transfer Co., Inc., 1998 SD 8, ¶12, 575 N.W.2d 225, 231). Whether an injury is a major contributing cause is the issue at a hearing to obtain benefits. S.D. Codified Laws §62-1-1(7). After an award is final, whether the injury is a major contributing cause becomes an issue only after the employer/insurer establishes a change in condition. *See,* S.D. Codified Laws 62-7-33.

> UPS and Liberty contend that the use of "is and remains a major contributing cause …" in S.D.C.L. §62-1-1(7) entitles them to a review without showing a change in condition. If the injury previously was, and now is not, the major contributing cause there must have been some change in condition. The previous major contributing cause has lessened or some other cause has worsened the condition. In either case, the condition of the claimant has changed. An employer/insurer must establish a change in condition to reopen an award. Although S.D.C.L. § 62-4-1.1 permits an employer/insurer to decline individual bills as not compensable, it does not permit them to unilaterally ignore the Department's decision. **If a party desires to cease payments, the proper mechanism is S.D.C.L. §62-7-33.**

Stanton v. United Parcel Service and Liberty Mutual Insurance Group, Civ. 12-268, S.D. 7th Judicial Circuit (2012), J. Thorstenson. (emphasis added).

If they believe that they are not obligated to pay benefits to Claimant, then the proper legal avenue for Employer/Insurer to follow, is S.D.C.L. § 62-7-33. Prior to denying medical benefits, failing to pay medical bills, or not authorizing treatments, Employer/Insurer must prove a change of condition under §62-7-33. Until such time, the settlement agreement signed by the parties and approved by the Department on July 16, 2008, and the facts contained therein, are considered to be the Order of the Department.

In regards to settlement contracts, the S.D. Supreme Court has written:

> "'The law favors the compromise and settlement of disputed claims.'" Kroupa v. Kroupa, 1998 S.D. 4, ¶25, 574 N.W.2d 208, __ (quoting Johnson v. Norfolk, 76 S.D. 565, 572, 82 N.W.2d 656, 660 (1957)). Trial courts have, "the inherent power to summarily enforce a settlement agreement as a matter of law when the terms of the agreement are clear and unambiguous."{fn1} Gatz v. Southwest Bank of Omaha, 836 F.2d 1089, 1095 (8th Cir 1988)(emphasis added). Accord Wende, 530 N.W.2d at 94 (if important facts are not in dispute, courts may summarily enforce settlement agreement on motion by one of the parties); Thomas C. Roel Associates, Inc. v. Henrikson, 295 N.W.2d 136, 137 (N.D. 1980)(trial court has authority to enter judgment in accordance with terms of compromise agreement).

Lewis v. Benjamin Moore & Co., 1998 S.D. 14, ¶8, 574 N.W.2d 887.

Therefore, BY ORDER OF THE DEPARTMENT Claimant's Motion is Granted. Any expenses incurred for Claimant's work-related injury for which settlement has already been made, shall be reimbursed to Claimant by Employer/Insurer in accord with the prior settlement agreement. Prior to denying any treatment or payment for treatment, Employer/Insurer must prove Claimant's condition has changed, and may petition the Department for a hearing.

This letter is considered to be the Order of the Department.

Sincerely,

/s/ Catherine Duenwald

Catherine Duenwald
Administrative Law Judge