

November 7, 2011

By facsimile and US Mail

Michael F. Marlow
Johnson, Miner, Marlow,
Woodward & Huff, Prof. LLC
PO Box 667
Yankton, SD 57078

LETTER ORDER

Eric C. Blomfelt
Blomfelt Associates
1499 Blake St. #4H
Denver, CO 80202

RE: HF No. 59, 2010/11 – Annette Rowcliffe v. Truck Insurance Exchange

Dear Mr. Marlow and Mr. Blomfelt:

Mr. Marlow requested the Department issue an order regarding Claimant's attendance at an independent medical evaluation (IME) and her pending surgery with Dr. Metz to place a permanent spinal cord stimulator. Mr. Marlow submitted a brief in support of his request and also submitted the affidavits of Lindsay J. Hovden and Annette Rowcliffe. Mr. Blomfelt submitted Insurer's Response to Claimant's Motion for Protective Order and Claimant submitted a Reply to Insurer's Response to Claimant's Motion for Protective Order. I have reviewed and considered each of these submissions.

Independent Medical Evaluation
SDCL §62-7-1 provides,

An employee entitled to receive disability payments shall, if requested by the employer, submit himself or herself at the expense of the employer for examination to a duly qualified medical practitioner or surgeon selected by the employer, at a time and place reasonably convenient for the employee, as soon as practicable after the injury, and also one week after the first examination, and thereafter at intervals not oftener than once every four weeks. The examination shall be for the purpose of determining the nature, extent, and probable duration of the injury received by the employee, and for the purpose of ascertaining the

amount of compensation which may be due the employee from time to time for disability according to the provisions of this title.

Employer/Insurer has requested that Rowcliffe submit to an independent medical examination (IME) with Dr. Joel Gedan in Minneapolis, MN on November 9, 2011. Employer/Insurer is entitled to an IME at intervals of no less than every four weeks, SDCL §62-7-1 dictates that such an exam be conducted by a duly qualified medical practitioner at a time and place reasonably convenient for the employee.

Dr. Gedan is located 190 miles away from Claimant's residence and argues that travel of that distance is not reasonably convenient and she would rather see a physician in Sioux Falls, SD or Watertown, SD which are 90 and 27 miles away respectively. Claimant argues that travel greater than those distances is painful and requires her to take additional pain medication. Claimant further argues that it is not convenient to be away overnight due to her family obligations. The Department does not take these claims lightly.

Employer/Insurer argues that it attempted to schedule an IME on October 21, 2011, to which Claimant expressed several concerns about the travel required to attend the IME. Employer/Insurer also argues that it is willing to make flight arrangements possible to allow Claimant to fly to Minneapolis to attend her appointment without needing to be gone overnight.

Dr. Gedan, a neurologist and neuropsychiatrist, is licensed to practice in South Dakota and therefore meets the requirement of a duly medical practitioner. The law only requires that the examination be at a time and place reasonably convenient, not that it be most convenient or ideal for Claimant. While there are other physicians located closer to Claimant, Employer/Insurer are within their right to choose which doctor performs the IME, for the purpose of determining the nature, extent, and probable duration of the injury received by the employee, and for the purpose of ascertaining the amount of compensation which may be due the employee, as long as the requirements of SDCL §62-7-1 are met. Also based on the travel arrangements that Employer/Insurer have offered, the IME is reasonably convenient for Claimant. The Department will not issue an order that Claimant need not attend the IME. Claimant may choose to refuse pursuant to SDCL§ 62-7-3.

Surgery to implant permanent spinal cord stimulator

Dr. Jerry Blow, Claimant's treating physician has recommended a spinal cord stimulator. Employer/Insurer requested that Dr. Weimer review the medical records and agreed that a trial stimulator was necessary to determine if a stimulator would be reasonable for Rowcliffe. The procedure to place the trial device was approved by Employer/Insurer.

Dr. Metz placed a trial spinal cord stimulator and Rowcliffe had good results. The device was removed and plans made place the permanent device. Since that time, Employer/Insurer has withheld approval of the surgery pending an IME.

The Supreme Court has held,

Once notice has been provided and a physician selected or, as in the present case, acquiesced to, the **employer has no authority to approve or disapprove the treatment rendered**. It is in the doctor's province to determine what is necessary, or suitable and proper. When a disagreement arises as to the treatment rendered, or recommended by the physician, it is for the employer to show that the treatment was not necessary or suitable and proper.

Hanson v. Penrod Construction Co., 425 NW2d 396,399 (SD 1988).

Pursuant to SDCL §62-4-1, the employer must provide reasonable and necessary medical expenses. It is well established by the South Dakota Supreme Court that the Employer has the burden to demonstrate that the treatment rendered by the treating physician was not necessary or suitable and proper.

The Claimant is entitled to reasonable and necessary care as determined by the treating physician, which in this case is the surgery My Dr. Metz to implant the permanent device. If Employer/Insurer dispute that the surgery was excessive or not medically necessary they must make a showing to that effect after the medical bill is properly submitted. See SDCL §62-4-1.1.

This letter shall serve as the Department's Order

Sincerely,

/s/ Taya M. Runyan

Taya M. Runyan
Administrative Law Judge