

April 3, 2017

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**LETTER DECISION AND ORDER**

Katie Hruska  
May, Adam, Gerdes & Thompson LLP  
P.O. Box 160  
Pierre, SD 57501

RE: HF No. 65, 2016/17 – Lloyd Curtis Johnson v. Midwest Construction, Inc. and  
Acuity Insurance

Dear Counselors:

This letter addresses the following submissions by the parties:

|                   |  |
|-------------------|--|
| February 20, 2018 | Claimant's Motion to Reinstate Temporary Total Disability Benefits |
|                   | Claimant's Memorandum in Support of Motion                         |
|                   | Affidavit of Michael S. Beardsley                                  |
| March 2, 2018     | Employer/Insurer's Response to Motion                              |
|                   | Affidavit of Katie Hruska  |
| March 6, 2018     | Claimant's Reply in Support of Motion                              |

**Issue Considered: Is Claimant entitled to reinstatement of TTD benefits pending the outcome of a full evidentiary hearing?**

**FACTS**

Claimant suffered a work-related injury March 28, 2016 when he fell from a ladder and injured his buttocks, hip, lower back, and neck. Employer/Insurer treated Claimant's injury as compensable and began paying disability benefits. On April 14,

2016, Claimant received a series of x-rays which showed no significant injury. Claimant then received an MRI on April 21, 2016. Seven days later, Dr. Noel Chicoine, Claimant's primary physician, reviewed the MRI and diagnosed Claimant with a bulging disc abutting right L4-5. Dr. Chicoine later updated his diagnosis to include a ruptured lumbar disc.

Over the course of the next several months, Claimant was seen by various doctors and received various treatments for his injury including several injections and physical therapy. On September 11, 2017, Claimant underwent an independent medical examination (IME) with Dr. Thomas Ripperda, MD. It was Dr. Ripperda's opinion that Claimant's cervical spine had resolved itself and that Claimant's pain was likely due to soft tissue contusion affecting the right hip and buttocks. Dr. Ripperda further opined that Claimant had reached MMI and placed work restrictions on Claimant of occasional lifting of 50 lbs. and frequent lifting of 25 lbs. Dr. Ripperda also restricted Claimant from working on uneven surfaces and going up and down ladders. Dr. Ripperda assigned a three percent whole body rating. Employer/Insurer paid Claimant the impairment rating and discontinued temporary benefits.

Claimant challenged Employer/Insurer's discontinuance of temporary benefits based on Dr. Chicoine's opinion that Claimant had not yet reached maximum medical improvement (MMI).

## **ANALYSIS**

The definition of temporary disability, found at SDCL 62-1-1(8), is "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. (Emphasis added). Subsection 2 of this statute provides “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”

SDCL 62-4-5 governs the payment of permanent partial disability payments:

If, after an injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing the employee's usual and customary line of employment, or if the employee has been released by the employee's physician from temporary total disability and *has not been given a rating to which § 62-4-6 would apply*, the employee shall receive compensation, subject to the limitations as to maximum amounts fixed in § 62-4-3, equal to one-half of the difference between the average amount which the employee earned before the accident, and the average amount which the employee is earning or is able to earn in some suitable employment or business after the accident. (Emphasis added).

Neither SDCL 62-1-1(2) nor SDCL 62-4-5 specifies who is entitled to make the determination that an ascertainable loss has occurred or that a rating is assignable. So far, Claimant has been seen by various doctors who have provided various opinions regarding treatment prognosis. Most importantly, the IME doctor, Dr. Ripperda, and Dr. Chicoione have differing opinions as to whether Claimant has reached MMI. As with any other factual determination, the Department must weigh the evidence on each side to determine which opinion is more persuasive.

Employer/Insurer argue that the issue of TTD benefits should be considered at a full evidentiary hearing. The Department agrees with Employer/Insurer. SDCL 62-7-33 provides an avenue by which a party may contest the payment of benefits. It states in relevant part:

Any payment, including medical payments under § 62-4-1, and disability payments under § 62-4-3 if the earnings have substantially changed since the date of injury, made or to be made under this title may be reviewed by the Department of Labor and Regulation pursuant to § 62-7-12 at the written request of the employer or of the employee and on such review payments may be ended, diminished, increased, or awarded subject to the maximum or minimum amounts provided for in this title, if the department finds that a change in the condition of the employee warrants such action.

This statute dictates that a review of benefits be pursuant to SDCL 62-7-12. That statute provides “If the employer and injured employee or the employee's representative or dependents fail to reach an agreement in regard to compensation under this title, either party may notify the Department of Labor and Regulation and request a hearing according to rules promulgated pursuant to chapter 1-26 by the secretary of labor and regulation.”

Finally, workers compensation hearings are conducted in accordance with SDCL 1-26-18:

Opportunity shall be afforded all parties to respond and present evidence on issues of fact and argument on issues of law or policy... A party to a contested case proceeding may appear in person or by counsel, or both, may be present during the giving of all evidence, may have reasonable opportunity to inspect all documentary evidence, may examine and cross-examine witnesses, may present evidence in support of the party's interest, and may have subpoenas issued to compel attendance of witnesses and production of evidence in the party's behalf.

These statutes, when read together, provide for a full evidentiary hearing to consider a review of benefits. Nothing in the code specifically grants the Department the ability to consider reinstatement of benefits before that hearing. In this case, Claimant bases his motion on a one-page letter from Dr. Chicoine in which he opines Claimant has not yet reached MMI. At the time of this hearing, neither Dr. Ripperda nor

Dr. Chicoine had been deposed. Before the Department rules on when Claimant's TTD benefits were properly terminated, the parties must have the opportunity to examine and cross-examine Dr. Ripperda and Dr. Chicoine as provided by SDCL 1-26-18. The Department feels that further testimony of these experts is necessary to decide when an ascertainable loss occurred. At the full hearing, should the Department find that Insurer prematurely ended temporary benefits, it may retroactively award further TTD benefits as well as prejudgment interest pursuant to SDCL 54-3-4.

### **ORDER**

For the above reasons, Claimant's motion is DENIED at this time. The Department will reconsider the proper termination of TTD benefits at the full evidentiary hearing. This letter shall constitute the Department's order on this matter.

Sincerely,

/s/ Joe Thronson  
Joe Thronson  
Administrative Law Judge