

SOUTH DAKOTA DEPARTMENT OF LABOR
OFFICE OF THE SECRETARY

in re: SDCL §§ 62-7-3

HF No. 331, 1996/97

DECLARATORY RULING

This matter comes before Craig Johnson, the Secretary of the South Dakota Department of Labor, having been treated as a petition for declaratory ruling under ARSD 47:01:01:04. A hearing was held by telephone on March 13, 1997, before James E. Marsh, Director of the Division of Labor and Management, South Dakota Department of Labor, on behalf of the Secretary, and the ruling here is issued on Secretary Johnson's behalf.

A brief recitation of the assumed facts and relevant law are necessary. A claimant suffered a workers' compensation injury on August 17, 1996. She was informed that she would receive medical and disability benefits from the workers' compensation carrier on the risk. Claimant temporarily went to California to move furniture, and took time off work from November 1, 1996 to November 12, 1996 to do so. Her physician felt that this would aggravate her condition, her physical therapist reported that it was aggravated, but claimant asserts that no aggravation occurred. Her therapist added that her obesity had slowed her recovery.

Claimant was scheduled for an appointment with the physician who had been treating her when she returned from California. She was caught in a snow storm and did not make the appointment. The physician sent a note to the carrier stating that claimant had been noncompliant in pursuing treatment. The carrier subsequently

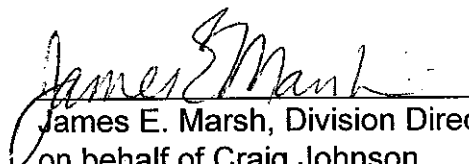
authorized four weeks of physical therapy, but claimant missed many treatment sessions. She asserts that this was due to the weather, the carrier does not agree. The authorization for physical therapy was revoked. Claimant has been billed for missed visits, and the carrier has refused to pay for them.

SDCL 62-7-3 provides that:

If the employee refuses to submit himself to examination pursuant to § 62-7-1 or unnecessarily obstructs the same, his right to compensation payments shall be temporarily suspended until such examination shall have taken place, and no compensation shall be payable under this title for such period.

Here, it is clear that § 62-7-3 would not be properly invoked to suspend benefits. No independent medical examination has ever been requested by the carrier, so that § 62-7-1 would come into play. The Department has not been asked to give an opinion about the impact SDCL §§ 62-4-43 (aggravation of a medical condition by refusal to avail oneself of treatment) or 62-4-37 (negligent conduct of the employee leading to aggravation of the condition and amounting to willful misconduct) would have on this set of facts, nor would it be likely to reduce potential litigation by doing so. Kneip v Herseth, 87 S.D. 642, 214 N.W.2d 93 (1974).

Dated this 24 day of June, 1997.


James E. Marsh, Division Director,
on behalf of Craig Johnson,
Secretary
South Dakota Department of Labor