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LETTER DECISION & ORDER

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RE: HF No. 112, 2009/10 - Jeffery I. Whitesell v. Rapid Soft Water & Spas, Inc. and
Acuity and Zurich North America

Dear Counsel:

The Department has received the following submissions:

- Claimant's Motion for Order that Employer and Acuity May not Terminate Benefits Except Pursuant to SDCL 62-7-33
- Employer/Insurer's Acuity's brief in Response to Motion for Order that Employer and Acuity May not Terminate Benefits Except Pursuant to SDCL 62-7-33
- Claimant's Reply Brief in Support of Motion for Order that Employer and Acuity May not Terminate Benefits except Pursuant to SDCL 62-7-33
- Claimant's Supplemental Brief in Support of Motion for Order that Employer and Acuity May not Terminate Benefits Except Pursuant to SDCL 62-7-33

- Employer/Insurer Acuity's Brief in Response to Claimant's Supplemental Brief on Motion For Order that Employer and Acuity May not Terminate Benefits Except Pursuant to SDCL 62-7-33

- Claimant's Reply Brief re: Supplemental Brief in Support of Motion For Order that Employer and Acuity May not Terminate Benefits Except Pursuant to SDCL 62-7-33

A bifurcated hearing on the issue of causation was held on March 9, 2011, pursuant to SDCL 62-7-12. On October 28, 2011, the Department issued its decision on the issue of causation and on November 21, 2011, entered Findings of Fact, Conclusions of Law and a final order. Department entered Amended Findings of Fact, Conclusions of Law on April 24, 2012. The Department held that Employer/Insurer Acuity (Acuity) was responsible for medical expenses and compensation benefits for Whitesell's low back and neck injuries after October 12, 2009. The Department retained jurisdiction over the remaining issues including but not limited to the nature and extent of Claimant's disability and future medical expenses.

On March 16, 2012, Whitesell saw Dr. Randal Wojciehoski, a podiatrist and osteopath in Minneapolis, for an independent medical examination (IME) at the Request of Acuity. On April 25, 2012, Dr. Wojciehoski issued his report in which he opined that Whitesell had reached maximum medical improvement. He further opined that the October 2009 fall did not contribute independently to the lumbar spine work restrictions or the need for lumbar spine treatment and that the October 2009 fall is not a major contributing cause to any work restrictions relative to his cervical spine and that no additional treatment was necessary for the cervical spine. On May 4, 2012, based up on the IME by Dr. Wojciehoski, Acuity denied further claims.

Claimant now moves the Department for an Order that Employer/Insurer may not terminate his benefits except pursuant to SDCL 62-7-33. Claimant argues that SDCL 62-7-33 is the proper recourse in this situation. SDCL 62-7-33 provides,

Any payment, including medical payments under §62-4-1, and disability payments under §62-4-3 if the earnings have been substantially changed since the date of injury, made or to be made under this titles 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 condition of the employee warrants such action. Any case in which there has been a determination of permanent total disability may be reviewed by the department not less than every five years.

Claimant argues that the Department ruled that Acuity is responsible for benefits based on Whitesell's neck and back injuries of October 12, 2009, and therefore the issues are res judicata.

Acuity argues that Claimant misunderstands or misconstrues the May 4, 2012, denial. Acuity contends that the IME addressed whether or not the work injury *remained* a major contributing cause for his condition and need for treatment. They argue that the denial was to future medical benefits. Acuity further argues that Dr. Wojciehoski's opinions do not address causation, but rather the second phase of litigation, specifically nature and extent of injury.

Acuity's contention that the requirement that an injury "remains a major contributing cause" in SDCL 62-7-1(7) entitles them to deny future benefits without showing a change in condition is rejected. The Seventh Judicial Circuit has recently ruled on this issue, which provides some guidance in this situation. "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 SDCL 62-4-1.1 permits an employer/insurer to decline individual bills as not compensable, it does not permit them to decide to unilaterally ignore the Department's decision. If a party desires to cease payments, the proper mechanism is SDCL 62-7-33." *Stanton v. United Parcel Service and Liberty Mutual Insurance Group*, Civ. 12-268 (September 5, 2012).

If Acuity believes that Claimant's condition has changed or that his employment no longer remains a major contributing cause of his condition or need for treatment, SDCL 62-7-33 provides the proper mechanism to cease payments. Claimant's Motion for Order that Employer and Acuity May not Terminate Benefits Except Pursuant to SDCL 62-7-33 is granted.

This letter shall serve as the Department's Order.

Sincerely,

/s/ Taya M. Runyan

Taya M. Runyan
Administrative Law Judge