

May 19, 2009

Bram Weidenaar  
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1608 West Russell Street  
Sioux Falls, SD 57104-1330

LETTER DECISION & ORDER

Charles A. Larson  
Boyce, Greenfield, Pashby & Welk LLP  
PO Box 5015  
Sioux Falls, SD 57117-5015

RE: HF No. 64, 2008/09 – Rick Jepsen v. Rogers Ltd, Inc. d/b/a Rogers Jewelers and Cincinnati Insurance Company

Dear Mr. Weidenaar and Mr. McKnight:

I am in receipt of Employer/Insurer's Motion to Extend Expert Deadline and Motion to Approve Physical Therapist, Brief in Support of Motion to Extend Expert Deadlines and Motion to Approve Physical Therapist, and the Affidavit of Charles A. Larson. I am also in receipt or Claimant's Brief in resistance to Motion to Extend Expert Deadline and Motion to Approve Physical Therapist and Employer/Insurer's Reply Brief in Support of Motion to Extend Deadline and Motion to Approve Physical Therapist. I have carefully considered the parties' submissions and arguments in addressing the motion.

***Motion to Approve Physical Therapist***

Employer/Insurer moves the Department for approval of physical therapist, Jonathon Reynolds to perform a Functional Capacity Evaluation (FCE) in this matter. Jonathon Reynolds is a registered physical therapist, licensed to practice in Minnesota.

Employer/Insurer arranged for a FCE in Sioux Falls on April 29, 2009. Claimant refused to attend the exam as Reynolds was not licensed to practice medicine in South Dakota.

Employer/Insurer rescheduled the FCE in Minneapolis, MN for May 4, 2009 and agreed to reimburse Claimant for mileage and expenses. Claimant again refused to attend because Reynolds was not licensed in South Dakota.

SDCL §62-7-1 provides in part,

An employee entitled to receive disability payments shall, if requested by the employer, submit himself or herself at the expenses 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...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 purposes 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.

A medical practitioner is further defined by statute as “a health care provider licensed and practicing within the scope of his profession under Title 36.” SDCL §62-1-1.1.

SDCL §36-10-18(2) defines a physical therapist as a person *licensed in this state* to practice physical therapy under the provisions of this chapter(Emphasis added).

Physical therapy is further defined by SDCL §36-10-18.1, which provides,

For the purposes of this chapter, the practice of physical therapy is the examination and evaluation of patients with mechanical, physiological, and developmental impairments, functional limitation, and disability or other similar conditions in order to determine a diagnosis, prognosis, and therapeutic intervention; alleviation of impairments and functional limitations by designing, implementing, and modifying therapeutic interventions that include therapeutic exercise, functional training in community or work reintegration, manual therapy techniques including soft tissue and joint mobilization, assistive and adaptive devices and equipment, bronchopulmonary hygiene, debridement and wound care, physical agents and mechanical modalities, therapeutic massage, electrotherapeutic modalities, and patient-related instruction; prevention of injury, impairments, functional limitations, and disability including the promotion and maintenance of fitness, health, and quality of life in all age populations; and consultation, education, and research.

Claimant first argues that because Employer/Insurer denied liability and is not paying benefits, Employer/Insurer is not entitled to the compulsory examination as contemplated by SDCL §62-7-1. In this matter, Claimant claims that he is entitled to workers' compensation benefits. There is the possibility that claimant is entitled to benefits, therefore, the exam pursuant to SDCL §62-7-1 may be requested by Employer/Insurer for the purpose of determining the nature, extent, and probably duration of the injury received by the employee, and for the purposes 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. See *Madsen v. Prairie Lakes Health Care Center*, Civ No. 98-247 (September 30, 1998).

SDCL §62-7-1 further requires that the examination be at a time and place reasonably convenient for the employee and performed by a duly qualified medical practitioner. The FCE at issue in this Motion was scheduled near Claimant's residence at a time and place that was reasonably convenient for Claimant; however, Jonathon Reynolds does not meet the definition of duly qualified medical practitioner as he is not licensed in the state of south Dakota.

Employer/Insurer rely on case law in other jurisdictions. Employer/Insurer cites *Shureh v. United Parcel Service*, in which an Oregon court concluded it was reasonable for Claimant to attend an independent medical exam (IME) in another state as long as it was at a place reasonably convenient for the employee. *Shureh v. United Parcel Service*, 107 Or. App. 276, 279, 812 P2d 16, 17. The Oregon statute which was applied in that case is distinguishable from SDCL §62-7-1 in that it did not contain any provision for the exam to be conducted by a duly licensed medical practitioner. See ORS 656.325(1)(a).

Employer/Insurer also rely on several past Department of Labor decisions in which a claimant was ordered to attend an IME at time and place reasonably convenient for claimant, and in some instances that was out of state. However, those decisions only address the portion of the statute that requires the exam to be held at a time and place reasonably convenient for the employee; whether the physician was qualified to conduct the IME was not at issue.

The scheduled FCE with Jonathon Reynolds does not meet the requirements of SDCL §62-7-1. Employer/Insurer is entitled to an FCE with a physician of their choosing provided he or she meets the requirements of SDCL §§62-7-1, 62-1-1.1, and 36-10-18(2). Employer/Insurer's Motion to Approve Physical Therapist is hereby denied.

Ultimately, if an FCE is scheduled that meets all the requirements of a SDCL §62-7-1 exam, SDCL §62-7-3 provides the sole remedy if the claimant refuses to go to the examination. SDCL §62-7-3 allows benefits to be temporarily suspended if an employee refuses to submit to an examination pursuant to §62-7-1 or unnecessarily obstructs the examination.

#### ***Motion to Extend Expert Deadline***

The parties entered into a stipulation for a scheduling order which was approved by the Department on February 6, 2009. The stipulation required Employer/Insurer to disclose its experts by June 15, 2009. Due to circumstances addressed by Employer/Insurer's Motion to Approve Physical Therapist, Employer/Insurer has been unable to arrange a FCE for claimant to date. Employer/Insurer is entitled to an FCE pursuant to SDCL §62-7-1. Employer/Insurer's Motion to Extend Expert Deadline is hereby granted. Employer/Insurer shall have until August 1, 2009, to disclose its expert witnesses.

This letter shall serve as the Department's order.

Sincerely,

Taya M. Dockter  
Administrative Law Judge