

December 4, 2017

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**LETTER DECISION AND ORDER**

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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:

November 2, 2017	Employer/Insurer's Motion to Terminate Benefits
November 9, 2017	Claimant's Brief in Opposition to Employer/Insurer's Motion to Terminate Benefits
November 15, 2017	Employer/Insurer's Reply Brief in Support of Motion to Terminate Benefits

**Issue Considered: Does the Department have jurisdiction to rule on Employer/Insurer's Motion to Terminate Temporary Benefits?**

**FACTS**

Claimant filed a petition for workers compensation benefits on October 15, 2016. Claimant alleged that he sustained an injury when he fell off a ladder while at work. Employer/Insurer treated Claimant's injury as compensable and began paying temporary benefits. On September 7, 2016, Claimant's physician released Claimant to

return to work. Claimant allegedly suffered another injury on December 21, 2016. At the request of Employer/Insurer, Claimant obtained an IME from Dr. Thomas Ripperda on September 11, 2017. Dr. Ripperda's professional opinion was that Claimant had reached maximum medical improvement and assigned Claimant a whole person impairment rating of 3%. Employer/Insurer then filed a Motion with the Department requesting an order finding Employer/Insurer had a reasonable basis to discontinue paying temporary disability benefits and instead pay Claimant the impairment rating. While Claimant resisted this motion, Claimant has not actually disputed Employer/Insurer's decision to discontinue temporary total benefits.

### **ANALYSIS**

No section of South Dakota's workers compensation code sets out a procedure for termination of temporary benefits by an insurer. The power to terminate benefits is implicitly granted by SDCL 62-1-1. This statute defines temporary benefits as those "beginning on the date of injury, subject to the limitations set forth in § 62-4-2 [requiring a seven day waiting period before receiving temporary benefits], and continuing until the employee attains complete recovery or until a specific loss becomes ascertainable, whichever comes first." So long as one of the two prerequisites set out in SDCL 62-4-2 is met, Employer/Insurer is not required to obtain an order from the Department prior to terminating temporary benefits.

Since there is no requirement that the Department issue an order before Employer/Insurer ends temporary benefits, the question then becomes whether the Department *may* entertain such a motion from Employer/Insurer. The Department's

authority to hear workers compensation hearings is found in SDCL 62-7-12, which states:

If the employer and injured employee or his representative or dependents fail to reach an agreement in regard to compensation under this title, either party may notify the commissioner and request a hearing. It shall thereupon be the duty of the commissioner to fix a time and place for such hearing and notify the parties thereof.

The South Dakota Supreme Court examined the meaning of SDCL 62-7-12 in *Medley v. Salvation Army, Rapid City Corps*, 267 N.W.2d 201, 202 (S.D. 1978). *Medley* involved a dispute between two insurance companies regarding coverage of a Salvation Army employee who was killed in the 1972 Rapid City flood. Employer's insurer, Western Surety, admitted coverage but petitioned the Department for a determination that the previous insurer, Aetna, was obligated to contribute. The Department ruled in favor of Aetna. The circuit court reversed the Department's ruling and found that Aetna was obligated to contribute to the award of benefits.

Upon appeal, the Court dismissed the petition. Noting that since none of the parties were actually disputing the right of claimant's widow to collect benefits, "the Department of Labor was without jurisdiction to hear and determine the petition of Western Surety, and the circuit court was without appellate jurisdiction since the issue was not cognizable under title 62, SDCL." *Medley*, 267 N.W.2d at 203.

The Court elaborated:

On the other hand, when the rights of the employee in a pending claim are not at stake, many commissions disavow jurisdiction and send the parties to the courts for relief. This may occur when the question is purely one between two insurers, one of whom alleges that he has been made to pay an undue share of an award to a claimant, the award itself not being under attack. (footnote omitted)

*Id.*

Here, Claimant acknowledges that Employer/Insurer is within its right to terminate temporary benefits since Claimant has received an impairment rating. Since the Department is only authorized to rule on issues in dispute, it is without jurisdiction to rule on Employer/Insurer's motion. Compare *Kassube v. Dakota Logging*, 2005 S.D. 102, 705 N.W.2d 461 (Department had jurisdiction over dispute between insurers when claimant's right to benefits was contested.)

### **ORDER**

Since Claimant is not contesting Employer/Insurer's ability to discontinue temporary benefits in this case, the Department lacks jurisdiction to consider Employer/Insurer's motion. Therefore, this motion is hereby DISMISSED with prejudice. This letter shall constitute the order of the Department.

Sincerely,

/s/ Joe Thronson  
Joe Thronson  
Administrative Law Judge