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September 22, 2010

VIA E-MAIL

Director James Marsh
South Dakota Department of Labor
Division of Labor and Management
700 Governors Drive
Pierre, SD 57501-2291

Re: Independent Medical Examinations and the Need for Statutory Change
GPNA File No. 00500.0216

Dear Director Marsh:

Independent medical evaluations (IMEs) are not only a statutory right of employer/insurers, but also a fundamental part of the workers' compensation system. There would be no way to independently evaluate an employee's reported injury or medical condition without an IME, and consequently it would be impossible to determine what benefits an employee may be entitled to receive.

SDCL § 62-7-1 provides for IMEs:

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.

This statute clearly states that employer/insurers may select the physician who will conduct the IME and places no limitation on that right other than that the physician be "duly qualified." The issue has escalated since a 2009 Department of Labor decision, *Jepsen v. Rogers*, HF no. 64,

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2008/09. It has now become routine for claimants' attorneys to refuse IMEs in states other than South Dakota by physicians not licensed in South Dakota.

The Jepsen decision was based upon the interpretation of SDCL § 62-7-1 and 62-1-1.1 in conjunction with Title 36. SDCL § 62-1-1.1 defines "medical practitioner" as "a health care provider licensed and practicing within the scope of his profession under Title 36." Title 36, specifically SDCL § 36-2-2, requires individuals practicing medicine in South Dakota to be licensed in South Dakota.

Limiting IMEs to physicians licensed in South Dakota shrinks the pool of independent examiners to a relatively small number of physicians. Employers/insurers are forced to select a physician from the few doctors qualified and willing to perform IMEs (and who will testify) who practice in South Dakota, plus the small number of physicians from surrounding states who have obtained a license to practice in South Dakota.

Even when qualified South Dakota physicians can be found to conduct IMEs, they are often barred from doing so because their partners in practice have been involved in the claimant's treatment.

Restricting IME physicians to those licensed in South Dakota essentially strips employer/insurers of their right to "select a qualified physician or surgeon," and causes extreme prejudice to them when they are forced to resort to IME examiners who are not qualified to address the issues involved.

The problem is magnified when a claimant's injury or condition is somewhat unique or specialized, as it is virtually impossible to find a doctor licensed in South Dakota within certain medical specialties to conduct IMEs. The fact is, South Dakota has only two major medical centers, and those two medical centers do not have all the specialists needed to evaluate every injury and condition that arises.

For example, our office recently handled a claim involving a voice disorder. The closest voice disorder specialist was located at the Mayo Clinic and happened to be the claimant's treating physician. The only qualified specialists willing to conduct IMEs that we could locate were in Massachusetts and California.

There is no rationale behind requiring that IME physicians be licensed in South Dakota, when at the same time IMEs can be conducted at any place "reasonably convenient" for the claimant. It is just as convenient for a claimant to fly from Rapid City to Minneapolis or Denver as it is to fly or drive from one end of South Dakota to the other.

The South Dakota Legislature obviously did not intend to restrict the employer/insurers' right to IMEs to the extent that the right is virtually meaningless. A simple statutory change would allow IMEs to be conducted by any licensed practitioner, regardless of whether he or she is licensed in

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South Dakota or some other state. The legislature merely needs to eliminate the words "under Title 36" from SDCL § 62-1-1, so that the statute provides:

For purposes of this title only, a health care provider licensed and practicing within the scope of his profession is a medical practitioner.

Sincerely,

/s/ Daniel E. Ashmore

Daniel E. Ashmore

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