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RE: HF No. 1, 2005/06 – Westway Construction, Inc. v. Berkley Risk Administrators Company, LLC, as Administrator, and for and on behalf of the Insurer, Tri-State Insurance Company

Dear Counsel:

The Department is in receipt of the Motion to Dismiss of Berkley Risk Administrators Company, LLC, as Administrator, and for and on behalf of the Insurer, Tri-State Insurance Company (Berkley). Westway Construction, Inc. (Westway) has submitted its Brief in Opposition to Berkley's Motion to Dismiss.

This matter involves an injury sustained in Nevada by a Utah resident working for a company out of Washington, insured by a Minnesota corporation with its principal place of business in Iowa. The insurance corporation uses the administration services of Berkley out of South Dakota. Litigation has commenced with the Utah Labor Commission, in the Sixth Judicial Circuit Court, Hughes County, State of South Dakota, and in the United States District Court for the District of Utah, Central Division.

The injured employee is not a party to the action filed with the South Dakota Department of Labor. The controversy Westway wishes heard by the South Dakota Department of Labor involves only Westway and Berkley. The South Dakota Supreme Court has clarified on every opportunity presented it that disputes not involving injured

employee's entitlement to benefits are not within the provinces of the Department of Labor, Division of Labor and Management. They are reserved to the Circuit Courts. See Medley v. Salvation Army Rapid City Corps., 267 N.W.2d 201 (S.D. 1978); Truck Insurance Exchange v. Kubal, 1997 S.D. 37, 561 N.W.2d 674; Kermmoade v. Quality Inn, 2000 S.D. 81, 612 N.W.2d 583.

SDCL 62-7-12 in conjunction with SDCL 62-1-2 does not contemplate an employer filing with the Department of Labor a petition for hearing against an insurance company. SDCL 62-7-12 speaks to a controversy involving an employer and an injured worker. The injured worker has invoked the jurisdiction of the Labor Commission in the State of Utah and the parties to the above-referenced Petition are already before that tribunal.

The clear dictate of the South Dakota Supreme Court, as well as the language of SDCL 62-7-12, mandate that the above-referenced file be dismissed for lack of jurisdiction. Berkley is directed to submit an Order consistent with this decision.

Sincerely,

Heather E. Covey
Administrative Law Judge