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RE:HF No. 138, 2019/20 – Midcontinent Media, Inc. and Crum & Forster Commercial Ins. v. David V. Wetch

Dear Mr. Barari, Mr. Groves, and Mr. Von Wald:

This letter decision will address Insurer's Motion to Take Depositions of Claimant and Treating Physician or, in the Alternative, for Limited Continuance. All responsive briefs have been considered. Claimant has requested the Department take judicial notice of Claimant's entire workers' compensation file, HF #141, 2013/14; HF # 93, 1992/93. The Department takes judicial notice of the file.

On March 27, 2020, Midcontinent Media, Inc. and Crum & Forster Commercial Insurance (Insurer) filed a written request to the Department of Labor & Regulation (Department) to do three things: to review medical/care payments pursuant to SDCL 62-7-33, to order an investigation, and to set a hearing pursuant to SDCL 62-4-47 and 62-4-48. On May 12, 2020, the Department issued an Order and Notice of Hearing, ordering that Insurer conduct an investigation of the circumstances surrounding David J. Wetch's (Claimant) injury. The Department ordered the investigation was to be completed within ninety (90) days after receipt of the Order and that the hearing would

be held after the completion of the investigation. On June 17, 2020, the Department issued an Amended Order to order further confidential investigation and a hearing. The Department ordered that the investigation be completed within ninety (90) days after receipt of the Amended Order.

On August 11, 2020, Insurer requested to take Claimant's deposition. On August 13, 2020, Claimant's counsel advised Insurer that Claimant was in quarantine due to COVID-19 and would be unable to participate in a deposition. Due to scheduling conflicts, counsel for Insurer was unable to depose Claimant on the date he was available. On September 15, 2020, prior to the expiration of the investigation period, Insurer's counsel made another request to schedule Claimant's deposition but did not receive a response from Claimant's counsel.

On August 12, 2020, Insurer contacted Dr. Goodhope and requested his availability for a confidential interview or deposition. Dr. Goodhope offered only one date, and the interview would be conducted by telephone while the doctor was driving. Insurer concluded that an interview under those conditions would be unproductive as the doctor's medical records would be unavailable to him. Also, Insurer's counsel was not available on that date. Dr. Goodhope has not provided Insurer with a date for confidential interview or deposition that would be conducted in person or by a remote means that would allow the doctor to access his medical records for review. Claimant now argues that the time given to Insurer to complete the investigation has ended and further investigation is not permitted. Claimant filed a Motion for Summary Judgment on September 16, 2020. The Department stayed the Motion until the matter referenced in this letter is resolved.

In the matter at hand, Insurer moves the Department to allow it additional time to depose Claimant and his treating physician due to complications outside of Insurer's control despite taking reasonable steps. Insurer argues that it has worked diligently to complete the investigation within the ninety says ordered by the Department but has been hindered by issues related to the COVID-19 pandemic. Insurer further argues that Claimant's assertion that Insurer is now out of time for further investigation is not made in good faith under the circumstances.

Claimant argues that the investigation was required to be completed during the ninety day timeline under SDCL 62-4-48, which provides,

> The department shall order an investigation by the insurer, self-insured employer or administrator of a self-insured plan of the facts contained in a written request made pursuant to § 62-4-47. The investigation shall be completed within ninety days after receipt of the order. After a contested case hearing conducted pursuant to chapter 1-26, the department may order that the claimant's payments be continued, modified, or terminated. If the department has reason to believe that criminal insurance fraud has been committed, it shall disclose its information to law enforcement officers and may assist in the criminal investigative process.

Claimant argues that the use of "shall" in the statute means it is a mandatory timeline.

The Department's authority to grant continuances is governed by ARSD 47:03:01:24 which provides, "The department may grant continuances in its discretion." The South Dakota Supreme Court (Court) has stated, that while "the form of verb used in a statute, i.e., whether it says something 'may,' 'shall' or 'must' be done, is the single most important textual consideration determining whether a statute is mandatory or directory, it is not the sole determinant." *In re Estate of Flaws*, 2012 S.D. 3, ¶ 18, 811 N.W.2d 749, 753 (citations omitted).

> Other considerations, such as legislative intent, can overcome the meaning which such verbs ordinarily connote. 2A Sutherland Stat. Const. § 57.03 at 643–44 (4th ed.1984). In our search to ascertain the legislature's intended meaning of statutory language, we look to the words, context, subject matter, effects and consequences as well as the spirit and purpose of the statute.

Id. Therefore, "[the] effect of the word 'shall' may be determined by the balance of the statute or rule." *Discover Bank v. Stanley*, 2008 S.D. 111, ¶ 21, 757 N.W.2d 756, 762-63. "The Court must look at the statute as a whole, as well as enactments relating to the same subject." *Kayser v. S. Dakota State Elec. Comm'n*, 512 N.W.2d 746, 747 (S.D. 1994) (citation omitted). Upon review of SDCL 62-4-48 in its entirety, the Department concludes that the legislature intended it to facilitate an investigation and to resolve issues related to potential fraud. ARSD 47:03:01:24 allows the Department to grant continuances at its discretion. The Department finds that it may exercise that discretion in this matter regarding an extension of the investigation period provided by SDCL 62-4-48, if such an extension is deemed appropriate. The Court has provided a four-part test to guide the Department in its decision to grant continuances.

> (1) whether the delay resulting from the continuance will be prejudicial to the opposing party; (2) whether the continuance motion was motivated by procrastination, bad planning, dilatory tactics or bad faith on the part of the moving party or his counsel; (3) the prejudice caused to the moving party by the trial court's refusal to grant the continuance; and (4) whether there have been any prior continuances or delays.

Meadowland Apartments v. Schumacher, 2012 S.D. 30, ¶ 17, 813 N.W.2d 618, 623. The Department will conduct the analysis set forth by *Schumacher* in the following sections.

Prejudice to the parties

This section will address parts one and three of the four-part test provided by *Schumacher* regarding prejudice to the parties. Insurer argues that there is no prejudice to Claimant if a continuance is granted and that the continuance was requested before the investigation time period had expired. Claimant is currently receiving benefits and will continue to receive them unless otherwise ordered by the Department. Insurer further argues that being required to respond to Claimant's Motion for Summary Judgment without the depositions of Claimant and Dr. Goodhope would severely prejudice its position. The depositions are important to the investigation. Insurer argues it has a right to take Claimant's deposition under SDCL 1-26-9.2 which provides,

> Each agency and the officers thereof charged with the duty to administer the laws and rules of the agency shall have power to cause the deposition of witnesses residing within or without the state or absent therefrom to be taken or other discovery procedure to be conducted upon notice to the interested person, if any, in like manner that depositions of witnesses are taken or other discovery procedure is to be conducted in civil actions pending in circuit court in any matter concerning contested cases.

The available discovery methods are provided by SDCL 15-6-26(a) which states,

> Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under § 15-6-26(c), the frequency of use of these methods is not limited.

"Discovery rules are designed 'to compel the production of evidence and to promote, rather than stifle, the truth finding process.' " *Dudley v. Huizenga*, 2003 S.D. 84, ¶ 11, 667 N.W.2d 644, 648 (citations omitted). Insurer argues that it would be prejudiced when responding to Claimant's brief without the depositions of Claimant and Dr. Goodhope. Insurer also argues that the depositions will narrow the issues thus aiding the Department in ruling on this matter's complicated record.

Claimant argues that Insurer has had an opportunity to depose both Claimant and Dr. Goodhope in other proceedings. Claimant asserts that he will experience significant prejudice if subjected to additional delay or an unwarranted "fishing expedition" type deposition. Claimant argues that Insurer has no need for additional depositions or an extension of the investigatory period because it has already taken depositions on these issues, litigated them, and then admitted compensability of the claim. Claimant further asserts that Insurer is not prejudiced by delays it has caused.

The Department concludes that as Claimant is currently receiving benefits and will continue to receive benefits through any potential continuance, Claimant would not be prejudiced. However, requiring Insurer to respond to a motion for summary judgment without the opportunity to depose both Claimant and Dr. Goodhope would be a deprivation of Insurer's right to "a reasonable opportunity to secure evidence on [its] behalf." *Tosh v. Schwab*, 2007 S.D. 132, 743 N.W.2d 422, 430. The Department finds that denying the continuance would prejudice Insurer and granting a continuance does not prejudice Claimant.

Motivation for Continuance and Prior Continuances

This section will address parts two and four of the four-part test provided by *Schumacher* regarding the motivation for continuance and whether there have been prior continuances. Insurer argues that it has diligently worked to complete the investigation during the time frame provided by the Amended Order. However, the effects of the COVID-19 pandemic have been a repeated hindrance to both the process of the investigation and the practice in general. Accommodations to CDC restrictions, emergency orders, and office policies have made it difficult to proceed. Insurer claims its motivation is to secure evidence that it has attempted to acquire during the

appropriate statutory period. The pandemic and the parties' schedules prevented Insurer from completing the investigation. Insurer argues that it has not asked for any previous continuances or delays related to its request for an investigation. However, it asserts that Claimant requested a delay which resulted in the Amended Order. Insurer further asserts that the requested depositions will not delay the proceedings as Insurer requests the depositions be held prior to the response date for the summary judgment.

Claimant argues that Insurer has attempted to litigate the same issues before and that it has admitted defeat only to attempt to continue litigating on new defenses and arguments. Claimant argues that res judicata, judicial estoppel, and issue preclusion apply in this matter. Claimant further argues that Insurer's request is futile and a waste of administrative resources. Claimant believes Insurer is abusing this process and the legal system by admitting compensability and then later denying it. Claimant also asserts this matter is an attempt to delay resolution of matters pending before Federal District Court.

Claimant further argues that the parties discussed holding a deposition on August 11-13, 2020, and that Insurer has failed to provide the Department with this evidence. Claimant was in quarantine when Insurer attempted to schedule a deposition, then when he was available, Insurer was unavailable. On September 15, 2020, Insurer emailed the Department regarding an extension to investigate. The ALJ who was assigned to the matter at the time responded by stating that he was unsure if he had the authority to grant an extension. In the meantime, Insurer's counsel had emailed Claimant again stating that Insurer had a busy schedule proposing dates for the deposition in late September or early October. Claimant believes this indicates that the delay was due to Insurer's lack of diligence. Claimant also argues that while Insurer has not asked for a continuance in this specific case, Insurer has failed to follow SDCL 62-7-33 to challenge benefits, has engaged in dilatory litigation tactics, and asked for additional time in other proceedings.

The Department finds that Insurer's motion for continuance is not motivated by procrastination, bad planning, dilatory tactics or bad faith. The Department further finds that Insurer has not requested previous delays in regards to its investigation.

Applying the tests set forth in Schumacher, the Department agrees with Insurer. Insurer mentioned busy schedules as part of the difficulty in scheduling the deposition and, therefore, has not been misleading on that point. Scheduling issues are common and are not always under a party's control. The Department is aware of the effect the COVID-19 pandemic has had on people's lives and their schedules. In this present matter, Claimant was himself under quarantine for a time and unavailable. Furthermore, the depositions at issue in this Motion were sought and requested before the investigatory period had run out. The Department concludes that Insurer has been diligent in its attempt to investigate within the ninety-day period. The Department does not find Claimant's arguments about procedures before other tribunals to be persuasive for the purposes of the current motion. The Department has concluded, as stated above, that SDCL 62-4-48 requires it to facilitate an investigation and that is what the Department intends to do in this matter.

In conclusion, for the above reasons, the Department finds that it has the authority to grant a continuance and such a continuance is appropriate in this matter. Insurer will be permitted to take the depositions of Claimant and Dr. Goodhope. Insurer must provide the Department with documentation showing that the depositions have been scheduled within 30 days of the receipt of this decision. Insurer must then make a diligent and good faith effort to complete the depositions and must keep the Department informed if there are any delays. Claimant must likewise make a good faith effort to make himself available for deposition. Permitting the depositions of Claimant and Dr. Goodhope is meant to allow Insurer to complete its investigation and previously sought depositions, not to extend this matter indefinitely.

Order:

In accordance with the conclusions above, Insurer's Motion to Take Depositions of Claimant and Treating Physician or, in the Alternative, for Limited Continuance is GRANTED.

This letter shall constitute the Department's order in this matter.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

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Michelle M. Faw