May 7, 2015

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RE: HF No. 141, 2013/14 – David W. Wetch v. Midcontinent Media, Inc. and Crum & Forster Commercial Ins.

Dear Mr. Barari and Mr. Travis:

This letter addresses the following submissions by the parties:

February 2, 2018	Claimant's Fourth Motion for Partial Summary Judgment;
	Affidavit of David S. Barari
May 1, 2018	Employer and Insurer's Response to Claimant's Fourth Motion for Partial Summary Judgment;
March 8, 2015	Claimant's Reply Brief,
	Affidavit of David S. Barari

In addition, a hearing was held April 18, 2018, before the Department of Labor and Regulation, ALJ Joe Thronson presiding. David S. Barari and Jason Groves appeared on behalf of Claimant and Richard Travis appeared telephonically on behalf of Employer/Insurer.

ISSUE PRESENTED:

Is Claimant entitled to partial summary judgment on the issue of whether Employer/Insurer are obligated to pay 100 percent of the cost of Claimant's medical care for a work related pursuant to a 1994 agreement?

FACTS

The facts of this case have been repeated in several previous opinions. Relevant for this decision is that since 2011, Claimant has struggled to obtain payment for needed medical care pursuant to the 1994 agreement. In 2014, Claimant filed a petition with the Department asking that Employer/Insurer be required to pay all past and present medical benefits. Claimant filed his first motion for partial summary judgment in September 2015. In this petition, Claimant alleged that Employer/Insurer unilaterally denied payment of necessary benefits despite being required to do so in the 1994 order. In a letter decision dated January 28, 2016, the Department granted Claimant's motion for summary judgment finding that res judicata barred Employer/Insurer from denying payment absent an allegation of change in condition.

Despite the Department's order, Employer/Insurer continued to delay payment or reimbursement for medical care. Claimant filed a second motion for partial summary judgment in May 2016. The Department issued a letter decision August 2, 2016. The Department opined: "This is the first instance in which Employer/Insurer has delayed approval of the care of Claimant needs, albeit without apparent justification.

David W. Wetch, HF No. 141, 2013/14, 2016 WL 5539719, at *4 (S.D. Dept. Lab. Aug. 2, 2016).

The Department denied the second motion for summary judgment but retained continuing jurisdiction over the case in order to "ensure treatment consistent with its previous orders…" *Id*.

For a third time, Claimant filed a motion for partial summary judgment in August 2016, and the Department granted partial summary judgment in a November 16, 2016 letter decision. Most recently, Claimant filed his fourth motion for partial summary judgment in February 2018. In the motion, Claimant again alleged that Employer/Insurer had failed to provide payment for necessary medical care as outlined by the original agreement and without alleging a change in condition.

At the same time, Claimant has also asked the circuit court for relief by requesting Employer/Insurer be held in contempt for failure to abide by the agreement. The circuit court issued an order holding Employer/Insurer in contempt for its failure to pay 100% of the cost of Claimant's past medical care. However, the court declined to exercise jurisdiction over future treatments as the Department had retained jurisdiction over that issue.

ANALYSIS

I. SUMMARY JUDGMENT

The Department's authority to grant summary judgment is found in ARSD 47:03:01:08:

> A claimant or an employer or its insurer may, anytime after expiration of 30 days from the filing of a petition, move with supporting affidavits for a summary judgment. The division shall grant the summary judgment immediately if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The standard for granting summary judgment is well established. "[The]Court reviews a grant of summary judgment to determine whether the moving party has demonstrated the absence of any genuine issue of material fact and entitlement to judgment on the merits as a matter of law." *Stern Oil Co. v. Brown*, 2012 S.D. 56, ¶ 8, 817 N.W.2d 395, 398. *(*Quoting *Tolle v. Lev,* 2011 S.D. 65, ¶ 11, 804 N.W.2d 440, 444).

This case involves the enforcement of an agreement signed between the Claimant and Employer/Insurer. The South Dakota Supreme Court has noted "once an agreement is accepted under the statute, the parties are bound to it." *Kermmoade v. Quality Inn*, 2000 S.D. 81, ¶ 19, 612 N.W.2d 583, 589 (Internal citations omitted).

The Department previously determined that the 1994 agreement is res judicata, and it reminded Employer/Insurer that if it wished to challenge any benefits due under the agreement, its avenue was to allege a change of condition pursuant to SDCL 62-7-33. As of this writing, Employer/Insurer has neither paid for all care required under the agreement nor has it alleged a change in Claimant's condition. At the hearing, Employer/Insurer provided no explanation as to why it has delayed payments for necessary treatments to this point, only that it promised to pay outstanding medical bills at some unspecified date in the future. The Department finds that there is no dispute in this case and Claimant is entitled to partial summary judgment on this issue.

However, summary judgment in this case seems a hollow victory. As evidenced by the numerous summary judgment motions filed by the Claimant, the Department is without authority to force Employer/Insurer to abide by its word. No statute specifically confers upon the Department the authority to enforce benefits post-award. Conversely, Claimant does have the ability to seek redress in circuit court under either SDCL 62-7-31 or SDCL 21-34-1. First, SDCL 62-7-31 provides:

> Any party in interest may, after expiration of the time for a petition for review or appeal, present a memorandum of agreement, approved by the department, or a certified copy of any portion of an order or decision of the department from which no petition for review or appeal has been filed, together with all papers in connection with the case, to the circuit court for the county in which the injury occurred. Thereupon the court shall render a judgment in accordance with the memorandum of agreement or portion of any order or decision of the department from which no petition for review has been filed, and the court shall notify the parties. The judgment shall have the same effect and in all proceedings in relation thereto be the same as though rendered in an action duly heard and determined by the court except that no appeal may be made on questions of fact.

Second, while the Department does not have the authority to directly hold Employer/Insurer in contempt for failure to abide by its previous orders, SDCL 21-34-1-2 provide a mechanism for an administrative agency to refer a case to the circuit court for that purpose:

> Whenever it is provided in any statute in substance to the effect, that the failure to obey the process, subpoena, order, rule, regulation, judgment, or other legal command of any public officer, department, commission, board, or tribunal, or that violation of any statute may be punished as a contempt of court, or that obedience to anything may be commanded or violation of anything punished as a contempt of court and no other method is specifically provided for invoking the contempt process of the court, the same may be done as provided by this chapter.

At the hearing, Claimant stated that he had attempted to use SDCL 62-7-31 to enforce the agreement but that the circuit court declined to do so since the Department

had retained jurisdiction of this case. Likewise, the circuit court also declined to find Employer/Insurer in contempt for future payments for the same reason. As evidenced by Claimant's repeated motions for summary judgment, retention of jurisdiction by the Department has not had the desired effect of ensuring that Employer/Insurer promptly pays for all necessary care owing to Claimant. It is the Department's belief that Claimant would be better served by seeking a remedy under either of the aforementioned statutes in circuit court.

II. Sanctions

Claimant also requests sanctions against Employer/Insurer for failure to abide by the Department's previous orders. However, the Department's authority to sanction Employer/Insurer is limited. Claimant cites ARSD 47:03:01:16 as a basis for the Department to impose sanctions. This rule provides:

> If a party or the party's attorney fails to obey a scheduling or prehearing order, if no appearance is made on behalf of the party at a scheduling or prehearing conference, or if a party or the party's attorney fails to participate in good faith, the Division of Labor and Management, upon motion or its own initiative, may make such orders with regard thereto that it considers just.

This rule does not confer upon the Department general sanctioning powers for failure to follow the terms of an agreement. Even if this rule conferred upon the Department the authority to grant sanctions, this law became effective in 1992. Claimant's injury occurred in 1991, and therefore this rule does not apply to this case. Unfortunately, no other rule or statute allows the Department to sanction Employer/Insurer for failing to abide by its agreement.

CONCLUSION

Employer/Insurer has provided no justification for failing to comply with its obligations under the 1994 agreement. However, the Department does not have the authority to compel Employer/Insurer to abide by the terms of the agreement. The Department's jurisdiction over this case is based upon Claimant's 2014 petition to enforce the agreement. Though, it is unclear on what basis the Department could reassert jurisdiction from the 1994 agreement short of a petition alleging a change in condition under SDCL 62-7-33. Nonetheless, should the Claimant wish to dismiss his petition, the Department will relinquish jurisdiction so that the circuit court may assume it. Claimant's Motion for Partial Summary Judgment is GRANTED. Claimant's motion for sanctions is DENIED. This letter shall constitute the order of the Department on this matter.

Sincerely,

/s/ Joe Thronson
Joe Thronson
Administrative Law Judge