November 19, 2018

David S. Barari
Goodsell Quinn LLP
P.O. Box 9249
Rapid City, SD 57709

Jason Groves
Groves Law Office
4440 West Glen Place
Rapid City, SD 57702

Thomas Van Wald
Boyce Law Firm
P.O. Box 5015
Sioux Falls, SD 57117-5015

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

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

This letter addresses the following submissions by the parties:

September 17, 2018	Employer/Insurer's Motion for Factual Determination
	Affidavit of Jeanine Ramstack
	Affidavit of Thomas Von Wald
October 9, 2018	Claimant's Response to Motion for Factual Determination
	Affidavit of David S. Barari
October 24, 2018	Employer/Insurer's Reply Brief,
	Supplemental Affidavit of Thomas Von Wald

ISSUE PRESENTED:

SHOULD THE DEPARTMENT MAKE A FACTUAL DETERMINATION AS TO WHETHER TWO ITEMS OF CARE PROVIDED BY EMPLOYER/INSURER CONSTITUTE SUITABLE AND PROPER CARE UNDER SDCL 62-4-1?

FACTS AND PROCEDURAL HISTORY

Claimant, David Wetch filed a petition to enforce the terms of a 1994 agreement approved by the Department. Since then, Claimant has filed numerous motions for summary judgment. After the most recent, the Department granted Claimant's motion and opined that the circuit court would be better able to enforce the terms of the agreement. Employer/Insurer then filed a motion for a factual determination that two items of care which it provided were sufficient under SDCL 62-4-1. The first involved Employer/Insurer providing a modified van and a driver. The second involved $775 a month paid to Claimant for finding suitable housing. On October 31, 2018, Employer/Insurer also filed a motion for leave to supplement the record in support of its original motion for the factual determination. It took the depositions of Claimant, Claimant's treating physician, Dr. Michael Goodhope, Alanna Turnbaugh, and Claimant's life planner, Linda Graham. These transcripts were not yet complete at the filing of the motion and Employer/Insurer argued that their inclusion into the record was necessary to support its original motion.

ANALYSIS

Claimant argues that since Employer/Insurer has not filed a petition alleging a change in condition, the Department is without jurisdiction to consider the motion now before it. Employer/Insurer counters that the Department reserved ongoing jurisdiction over medical benefits and therefore it can and must make a factual determination requested in the motion. The Supreme Court has previously ruled that worker's compensation awards, whether by agreement of the parties or following an adjudication, are res judicata as to all matters considered unless the Department has reserved continuing jurisdiction over one or more questions. *Larsen v. Sioux Falls Sch. Dist. No. 49-5*, 509 N.W.2d 703, 706 (S.D. 1993)(citing *Call v. Ben. & Protec. Order of Elks,* 307 N.W.2d 138 (S.D.1981)). The agreement reserved continuing jurisdiction with the Department by expressly providing that Claimant could petition for a review of future medical care. Undeniably, the Department has jurisdiction over Claimant's future medical care. Claimant has exercised his right under the original agreement to revisit this issue. As part of its defense to this allegation, Employer/Insurer may allege that the care it has provided is sufficient under the law. Therefore, the Department has the authority to determine whether the care Employer/Insurer provided was sufficient as part of Claimant's petition.

The question remains whether the Department has jurisdiction to consider the sufficiency of two items provided by Employer/insurer independent of Claimant's petition. Employer/Insurer cites *Johnson v. Skelly Oil Co*., 359 N.W.2d 130 (S.D. 1984) in support of its motion. The Department notes that unlike in *Johnson,* Employer/Insurer is seeking a declaration *after* it provided Claimant with a modified van with driver and

the housing modification allowance. Our Supreme Court has noted, “Courts often require adverse claims, based upon present rather than speculative facts, which have ripened to a state of being capable of judicial adjustment.” *Kneip v. Herseth*, 87 S.D. 642, 648, 214 N.W.2d 93, 96 (1974)(quoting 22 Am.Jur.2d, Declaratory Judgments, s 26, at p. 871). However, in *In re Petition for Declaratory Ruling re SDCL 62-1-1(6)*, 2016 S.D. 21, 877 N.W.2d 340, the Supreme Court declined to extend this rule to administrative hearings. In that case, an attorney petitioned the Department for a declaratory ruling that SDCL 62-1-1(6) included discretionary bonuses earned by a claimant in the calculation of an injured worker’s average weekly wage. The Department issued a finding that SDCL 62-1-1(6) did not include any discretionary bonuses earned in the calculation. Upon appeal, the circuit court sua sponte dismissed the petition stating that, in the absence of a case in controversy, the Department was without jurisdiction to make such a determination. The Supreme Court reversed the circuit court’s dismissal of the petition and noted that SDCL 1-26-15 did not specifically premise a declaratory ruling upon a case in controversy.

> [W]e conclude that by excluding the case or controversy language from SDCL 1–26–15, the Legislature excluded an actual case or controversy requirement in agency declaratory proceedings. Appellees' request to read an actual case or controversy requirement in SDCL 1–26–15 would require that we insert SDCL 1–26–14's case or controversy language into SDCL 1–26–15.

Id., at ¶ 9, 877 N.W.2d 340, 344

Thus, even in the absence of Claimant’s petition, the Department has jurisdiction to determine whether the two items provided by Employer/Insurer constitute necessary and proper care under SDCL 62-4-1. However, though the Department has the jurisdiction to make such a ruling, it is not required to do so. The Supreme Court also

noted: “many courts conclude that administrative agencies retain discretion to deny requests for declaratory rulings. Thus, agencies may not be required to rule on every conceivable question someone may have. We leave the scope of that discretion for another day when that issue has been squarely presented.” *Id., at* ¶ 12.

For the time being, the Supreme Court left the issue of a declaratory ruling to the discretion of administrative agencies. In this case, the Department does not feel such a declaration is appropriate at this time. Should this case move forward to a full evidentiary hearing, Employer/Insurer will have every opportunity to argue that the care it provided Claimant was adequate. However, should Claimant dismiss his petition, Employer/Insurer’s vehicle for challenging care is by alleging a change in Claimant’s condition under SDCL 62-7-33. The Supreme Court affirmed this rule in *Stuckey v. Sturgis Pizza Ranch*, 2011 S.D. 1, 793 N.W.2d 378. The court noted “[a]n injured employee's medical expenses are to be paid as they are incurred. When [claimant] incurs medical expenses in the future, Employer may reimburse her or challenge the expenses as not necessary or suitable and proper under SDCL 62–7–33.” *Id.*, at ¶ 27. The Department also discussed ***Stuckey’s*** application to cases in which an insurer wishes to challenge medical care after an award or agreement is in place:

> According to *Stuckey*, the use of SDCL § 62-7-33 is the proper method of challenging the payment of medical or disability expenses, by an employer or insurer, after the issuance of a final judgment by the Department or a Court. Following § 62-7-33 and *Stuckey*, Employer/Insurer has the burden to prove a change in Claimant's condition or that the medical expenses are not “necessary or suitable and proper.” After a ruling has been made regarding workers' compensation benefits, Employer/Insurer does not have the authority to approve or deny medical treatment or deny disability benefits without proper notice to the Department for a review.

Fern Y. Stanton Johnson, Claimant, HF No. 62, 2010/11, 2011 WL 7067098, at *5 (S.D. Dept. Lab. Dec. 1, 2011). Finally, the Department has previously ruled that the 1994 agreement was res judicata. In its decision granting Claimant's third motion for summary judgment, the Department gave these instructions to Employer/Insurer:

> Prior to denying medical benefits, failing to pay medical bills, or not authorizing treatments, Employer and Insurer must prove a change of condition under SDCL 62-7-33. Until such time, the settlement agreement signed by the parties and approved by the Department on November 8, 1994, and the fact contained therein, are considered to be the Order of the Department.

David Wetch v. MidContinent Media, Inc. and Crum & Forster Commercial Ins., HF No. 141, 2013/14, at *6 (S.D. Dept. Lab. January 28, 2016.)

Employer/Insurer is technically correct that this issue has not been before the Department. However, the Department can see no purpose to requesting a factual determination after care has already been provided. Employer/Insurer cannot use this as a basis to deny Claimant future care without alleging a change in condition under SDCL 62-7-33 per previous Department order.

CONCLUSION AND ORDER

Employer/Insurer's motion for a factual determination is DENEID at this time. Should Claimant continue with his petition, the Department shall consider the reasonableness of any care provided by Employer/Insurer at a full hearing. Should Claimant dismiss his petition, the Department shall entertain a motion for a factual determination only in conjunction with a petition for a change in circumstance under SDCL 62-7-33. Having been rendered moot, the Department will not rule on Employer/Insurer's motion for leave to supplement the record.

SOUTH DAKOTA DEPARTMENT OF
LABOR & REGULATION

_____

Joe Thronson
Administrative Law Judge