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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:

The Department will begin with the relevant procedural history. Midcontinent Media, Inc. and Crum & Forster Commercial Ins. (Insurer) submitted its request for hearing on March 30, 2020. David V. Wetch (Claimant) submitted a motion for summary judgment on September 16, 2020. Insurer submitted a motion to take depositions or, in the alternative, for a limited continuance on October 3, 2020. Following a telephonic conference with the parties, the Department stayed the motion for summary judgment and established the briefing schedule for the remaining motions.

This letter decision will address Insurer's Motion to File Investigatory Records In Camera and Under Seal. 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.

Insurer has moved the Department to allow investigatory records to be submitted *in camera* and Under Seal because the records and files are confidential. The relevant codified law, SDCL 62-4-49 provides,

All investigative records and files relating to written requests made pursuant to § 62-4-47 are confidential. No disclosure of any such records, files, or other information may be made except as authorized in this section and § 62-4-48. The names of individuals providing evidence in support of a written request are confidential during the pendency of the request and the investigation. If the records or the testimony of the witness supplying the records are to be admitted at the hearing, the records and the testimony, or both, are discoverable and shall be provided to the claimant and the claimant's attorney. The department may release records, files, or other information to the attorney general, the state's attorney, law enforcement officials, and public officials who require the information in connection with their official duties. A violation of this section is a Class 1 misdemeanor.

SDCL 62-4-49

Claimant requests the Department deny Insurer's motion in part and approve in part. Claimant does not oppose a protective order which would allow both parties to file properly designated documents as "confidential." Claimant opposes the filing of documents *in camera*, because he would not be able to review or respond to evidence being used against him in the related summary judgment motion that has been filed. Claimant further argues that allowing such submissions would amount to *ex parte* communications.

Insurer argues that it should not be compelled by the summary judgment to compromise the identity of protected witnesses and confidential informants that ultimately may not be required for hearing. Insurer further asserts that an *in camera* review of evidence that has not yet been selected for hearing is, therefore, necessary. Insurer also argues that *in camera* review is appropriate, because confidentiality is not discretionary for statutorily authorized investigations.

SDCL 62-4-49 requires that disclosure of records be made except as authorized under SDCL 62-4-48 which provides, in pertinent part,

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.

SDCL 62-4-48

Summary judgment is permitted under SDCL 1-26-18 which allows an agency to dispose of a claim 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 a party is entitled to a judgment as a matter of law in pertinent part.” The Department’s specific authority to grant summary judgment is established in administrative rule ARSD 47:03:01:08:

A claimant or an employer or its insurer may, any time 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.

ARSD 47:03:01:08

SDCL 62-4-49 provides that use at a hearing is an exception to the requirement that certain records not be disclosed. As SDCL 1-26-18 allows matters to be disposed of through summary judgment, depending on the evidence provided, the pending Motion for Summary Judgment that has been filed by Claimant may be the final resolution in this matter, and therefore, have the same effect as the hearing referred to in SDCL 62-4-49. The South Dakota Supreme Court has held that, “if the statute has an ambiguity, it should be liberally construed in favor of the injured employees.” *Caldwell v. John Morrell & Co.* 489 N.W 2d 353,364 (S.D. 1992). The Department is persuaded that it is appropriate to resolve the ambiguity of whether resolution by summary judgment in this matter should be considered a hearing under SDCL 62-4-49 in favor of Claimant. However, there is no ambiguity that SDCL 62-4-49 requires these records to be confidential unless they are specifically used in hearing. Therefore, since this matter may be resolved by Claimant’s pending summary judgment, it is effectively a hearing. Therefore, Insurer may file records *in camera* and Under Seal, but any evidence that will be used in response to Claimant’s Motion for Summary Judgment must be released to Claimant. Allowing Insurer to file *in camera* and Under Seal maintains the confidentiality required by the statute and protects the privacy of both witnesses and Claimant. Further, requiring release of documents specifically used as evidence in response to

the summary judgment motion protects Claimant's due process right to respond to evidence.

Order:

In accordance with the conclusions above, Insurer's Motion to File Investigatory Records *In Camera* and Under Seal is GRANTED;

Parties to this matter are hereby ordered to submit confidential documents Under Seal; and

Insurer's investigatory records are to be filed *in camera* and Under Seal. Those used as evidence in summary judgment must be released to Claimant.

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

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

Michelle M. Faw