

May 19, 2021

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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 for Review of Materials from Alanna Turnbaugh and all responsive briefs. Claimant has requested the Department of Labor & Regulation’s (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.

Background:

Beginning in 2011, Alanna Turnbaugh (Turnbaugh) provided care and assistance to Claimant, David Wetch (Wetch) for an extended period at the request of Wetch’s mother. Wetch introduced Turnbaugh, who is not his sister, as his “sister” to doctors and others, including to Crum & Forster Commercial Ins. (Insurer). Acting as his sister,

Turnbaugh handled much of the correspondence between Wetch and Insurer over several years. Wetch referred to Turnbaugh as his power of attorney and formally named her as such in two agreements dated July 15, 2016 and November 29, 2018 respectively.

At Wetch's request, Turnbaugh documented her daily interactions and conversations with him in multiple notebooks for the purpose of providing information to Insurer as well as securing payment for services rendered by Turnbaugh to Wetch. On October 24, 2018, Turnbaugh was deposed in connection with Wetch's proceeding against Insurer in circuit court. During her deposition, Turnbaugh voluntarily produced the notebooks. Turnbaugh testified that she was not represented by Wetch's counsel and her notebooks were not prepared at the direction of Wetch's counsel. The notebooks were marked as exhibits during the deposition and Wetch's counsel acknowledged that the notebooks had been reviewed months in advance. No objection was made regarding the notebooks. At the deposition, Turnbaugh testified that her power of attorney was for financial matters or for making medical decisions, not for legal matters.

In December 2019, Turnbaugh terminated her relationship with Wetch and informed Insurer of the termination. Pursuant to the Department's order dated June 17, 2020, Insurer conducted investigation into the circumstance surrounding Wetch's injury and condition. During the investigation, Insurer issued a subpoena to Turnbaugh and obtained information from her, including her most recent notebook, a confidential sworn statement, and a box of relevant documents.

On June 17, 2020, the Department issued an Order that Insurer conduct an investigation to be completed within ninety days of the receipt of the Order. During her confidential sworn statement on August 18, 2020, Turnbaugh disclosed she possessed video surveillance footage from cameras Wetch had requested be installed in his residence. Turnbaugh stated that Wetch had instructed her to destroy the footage, but she did not do so as she wanted to keep track of Wetch's alleged violent behavior. Turnbaugh agreed to provide Insurer a copy of the video footage and was subpoenaed to provide the same. Insurer has not received the video footage from Turnbaugh.

Upon cursory review, Insurer concluded that some of the documents produced by Turnbaugh could potentially contain privileged communications between Wetch and his counsel. Insurer burned the questionable documents onto a CD without further review and delivered the CD to Wetch's counsel by letter date October 1, 2020. The letter requested Wetch's counsel to review the materials, provide a privilege log and return any non-privileged documents to Insurer's counsel. On October 9, 2020, Insurer filed a Motion to Take Deposition of Claimant and Treating Physicians, or, in the Alternative, for Limited Continuance. In process of resolving the motion, Insurer did not request to continue the discovery period for the documents provided on the CD, nor did Insurer reference Turnbaugh's testimony.

On or about October 19, 2020, Turnbaugh submitted a claim by email to Insurer for payment relating to her care and treatment of Wetch. Turnbaugh had not previously mentioned an intent to submit a claim for payment for any services. Insurer responded that Turnbaugh must show Wetch's approval before the request for payment could be

processed. Turnbaugh has provide five additional billing submissions to Insurer along with information from her notebooks.

On or about January 29, 2021, Insurer' counsel asked Wetch's counsel again to produce any non-privileged documents on the CD with a corresponding privilege log. Wetch's counsel responded on February 2, 2021, noting that the issues concerning Turnbaugh had appeared abandoned by Insurer, because Insurer had not raised them in the motion to the Department. Wetch's counsel also asserted that any materials regarding Turnbaugh were protected by the attorney-client privilege, and that all notes, correspondence, and other communications with Turnbaugh be provided for potential privilege review. On February 23, 2021, Wetch's counsel provided a privilege log and documents not found to be privileged to Insurer's counsel on CD.

Insurer submitted this Motion for Review of Materials from Alanna Turnbaugh on March 12, 2021. Insurer's moves the Department to do the following:

- 1) grant Insurer's Motion on the ground no privilege applies (or it was waived) relating to Turnbaugh;
- 2) instruct Claimant to either approve, modify or reject Turnbaugh's claim for payment and give written notice of same to Insurer; and
- 3) order no claim of privilege prevents production of video evidence in Turnbaugh's possession relating to Claimant

Whether privilege applies to Turnbaugh

The first inquiry before the Department is whether Turnbaugh, as Wetch's power of attorney, was subject to privilege, specifically attorney-client privilege and work product privilege. The South Dakota Supreme Court has held,

“Four minimum elements exist to invoke the privilege: (1) a client; (2) a confidential communication; (3) the communication was made for the purpose of facilitating the rendition of professional legal services to the

client; and (4) the communication was made in one of the five relationships enumerated in SDCL § 19–[19–502(b)].” State v. Rickabaugh, 361 N.W.2d 623, 624–25 (S.D.1985). “It is the client, not the attorney, with whom the lawyer-client privilege reposes.” State v. Catch the Bear, 352 N.W.2d 640, 645 (S.D.1984).

Voorhees Cattle Co. LLP v. Dakota Feeding Co., LLC, 2015 S.D. 68, ¶ 10, 868 N.W.2d 399, 405

Wetch asserts that Turnbaugh qualifies as a “representative” which are entitled to privilege under SDCL 19-19-502(b)(4). “A representative of the client is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.” SDCL 19-19-502(a)(2). Additionally, “a ‘client’ is a person . . . who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.” SDCL 19-19-502(a)(1).

During her deposition, Turnbaugh testified that she was provided the power of attorney for financial matters, not legal matters, or for medical decision making. She further testified that when Wetch would meet with his counsel, she would be asked to leave the room in order to preserve attorney-client privilege. Additionally, at her deposition, Wetch’s counsel did not object or assert that Turnbaugh was subject to attorney-client privilege. The agreement establishing Turnbaugh as Wetch’s power of attorney provides that Turnbaugh has authority to handle Wetch’s financial and medical matters, but it does not indicate that she has the authority to obtain legal services or to act on rendered legal advice. For these reasons, the Department finds that Turnbaugh is not a representative for purposes of SDCL 19-19-502(a)(2) or 19-19-502(b)(4), Wetch was not her client pursuant to 19-19-502(a)(1), and therefore, the relationship between her and Wetch is not subject to attorney-client privilege.

Wetch further asserts that the confidential statement made by Turnbaugh on August 18, 2020 was an improper *ex parte* communication. Wetch has offered *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.* as relevant to Turnbaugh's statement. *Midwest Motor Sports*, involved a party and its counsel hiring a private investigator to pose as a consumer in visits to the opposing party's businesses for the purpose of making secret audiotape recordings of conversations in anticipation of trial. *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 144 F. Supp. 2d 1147, 1149 (D.S.D. 2001). In that case, the United States District Court opined,

Supreme Court Justice Stevens, joined by Justices Brennan and Marshall in a dissenting opinion filed in a criminal case, stated:

In civil litigation it is improper for a lawyer to communicate with his or her adversary's client without either notice to opposing counsel or the permission of the court. [citing in footnote Disciplinary Rule 7-104 of the ABA Model Code of Professional Responsibility (1982) and Rule 4.2 of the ABA Model Rules of Professional Conduct (1984)] An attempt to obtain evidence for use at trial by going behind the back of one's adversary would be not only a serious breach of professional ethics but also a manifestly unfair form of trial practice.

Patterson v. Illinois, 487 U.S. 285, 301, 108 S.Ct. 2389, 2399, 101 L.Ed.2d 261 (1988) (Stevens, J., dissenting). Such an attempt to obtain evidence for use at trial by going behind the back of one's adversary is precisely what occurred here, and the Court concludes this attempt is a breach of professional ethics and an unfair form of trial practice.

Id. at 1153.

Wetch asserts that as in *Midwest Motor Sports*, Insurer should have contacted Wetch's counsel before communicating *ex parte* with Turnbaugh.

As they treaded into this area, defense counsel were obliged to proceed with caution. Before directing their investigator to make *ex parte* contacts with represented parties, defense counsel should have asked permission of counsel, or sought guidance from this Court.

Id. at 1160.

However, the Department finds the current matter distinguishable from the facts in *Midwest Motor Sports*. Turnbaugh is not a represented party nor, as discussed above, was she Wetch's representative under SDCL 19-19-502(a)(2). Additionally, at the time of her statement, she was not Wetch's power of attorney and she was no longer assisting him. *Midwest Motor Sports* involved current employees. Additionally, Turnbaugh's confidential statement was properly taken pursuant to SDCL 62-4-49 which states, in pertinent part,

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.

Per the above statute, Insurer's investigation may remain confidential unless evidence will be used at hearing at which time it will become discoverable.

Wetch asserts that Insurer's motion is untimely. Turnbaugh's statement was made August 18, 2020 and Insurer's investigative period expired in September. Insurer sent the letter requesting Wetch's counsel review the potentially privileged material on October 1, 2020.. Thus, Insurer contacted Wetch's counsel to review the materials after the 90-day investigative period. Wetch's counsel then responded on February 2, 2021 after Insurer's second request on January 29, 2021. In his response, counsel noted that he had concluded that the issues concerning Turnbaugh had appeared abandoned by Insurer, because Insurer had not raised them in their motion for an extension of the investigatory time period on

October 9, 2020. The motion had requested additional time to depose certain individuals which did not include Turnbaugh.

The Department concludes that Insurer's efforts to resolve potential privilege concerns is both appropriate and timely. Both SDCL 15-6-37(a) (motion to compel) and SDCL 15-6-26(c) (protective orders), require parties to have made an effort to resolve disputes before filing discovery motions. In this matter, Insurer had discovered the contested materials prior to the initial investigation deadline. Once Insurer became aware of potential issues regarding privilege, he notified Wetch's counsel. Insurer's attempts to resolve a potential privilege issue regarding material discovered during the investigation period with counsel without involving the Department is appropriate and the motion is timely.

Although, as discussed above, the relationship between Wetch and Turnbaugh is not protected by attorney-client privilege, the contested documents and video may be privileged for other reasons (ex. Wetch's conversations with his counsel). For that reason, the Department will review the contested materials *in camera* to determine if any privilege applies.

Turnbaugh's Claim for Payment:

As of March 11, 2021, Turnbaugh has submitted six total claims to Insurer, and each claim included information similar to what was provided in the notebooks. Insurer informed her she would need to show Wetch's approval before the request could be processed. Wetch argues that the issue of whether care, such as that provided by Turnbaugh, is compensable has been previously resolved. He asserts that Insurer should follow the correct procedures to address compensable benefits and submission

of bills. Insurer argue it is attempting to follow procedure and is not resisting making payment to Turnbaugh. However, considering the circumstances of her claim of privilege, Insurer has asked for Wetch's approval before making payments. The Department find that Insurer is willing to pay for Turnbaugh's services if Wetch offers his approval. Therefore, Wetch must submit either an approval or a denial of the payment so Insurer can go forward.

Order:

In accordance with the conclusions above, Insurer's Motion for Review of Materials from Alanna Turnbaugh is GRANTED

Wetch shall provide to the Department the withheld and contested materials. The Department will conduct an *in camera* review, and will then inform Wetch which, if any, materials are to be released. Wetch will have an opportunity to object. Once any objections have been resolved, any materials still to be released will be provided to Insurer. Wetch shall mail a copy of the documents to be reviewed *in camera*, along with an Index, to the Department by June 11, 2021; and

Wetch shall either approve, modify or reject Turnbaugh's claim for payment and give written notice of same to Insurer.

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

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION



Michelle M. Faw
Administrative Law Judge