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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, Mr. Groves, and Mr. Von Wald:

This letter addresses the following submissions by the parties:

August 15, 2019	Employer/Insurer's Motion for Factual Determination Regarding Supervised Living Accommodations
	Affidavit of Thomas Von Wald
September 9, 2019	Claimant's Response to Motion for Factual Determination
	Affidavit of David S. Barari
September 30, 2019	Employer/Insurer's Reply Brief,
	Supplemental Affidavit of Thomas Von Wald

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: SHOULD THE DEPARTMENT RENDER A DETERMINATION ON THE SUFFICIENCY OF CLAIMANT'S SUPERVISED LIVING ACCOMMODATIONS?

FACTS

As part of his treatment, Claimant has been receiving assistance from in-home care aides. Beginning in December 2018, HomeInstead, a third-party entity, began providing one care giver for around- the-clock care. In addition, it also provided a second care giver between the hours of 8:00 AM and noon, and again between 8:00 PM and midnight. In March 2019, Claimant requested HomeInstead to increase coverage to two caregivers to provide twenty-four-hour care.

A short time later, HomeInstead began reporting to Insurer instances in which Claimant was belligerent and threatening towards staff. The staff claimed that Claimant would often refuse care or order them to leave his property. Claimant often bombarded staff with profanity and on occasion, made threats of violence again them. In June 2019, after numerous incidences of hostile and abusive behavior towards its staff, HomeInstead terminated its services to Claimant. Insurer then arranged for another care service, StayGraceful. On July 1, 2019, at the request of Claimant, StayGraceful asked Dr. Goodhope, Claimant's primary care physician, to reduce in-home assistance to one care giver who would be available between 8 AM and noon, and again between

6 pm and 10 pm. This reduction would leave Claimant without in-home assistance for much of the day and during the overnight hours. Employer/Insurer sought an update from Dr. Goodhope to make sure that the current arrangement is sufficient. Dr. Goodhope's response consisted of circling a portion of the letter sent by StayGraceful with a note indicating he concurred with the decision.

ANALYSIS

Insurer has expressed concern that Claimant may not be receiving adequate round-the-clock assistance despite Claimant's request to reduce the number of hours of in-home care. Specifically, Employer/Insurer allege that since the in-home staffing has been reduced, Claimant has fallen on at least one occasion. As with the previous motion, there is no disagreement between the parties regarding the reduction of in-home care. Rather, Employer/Insurer contends that Dr. Goodhope has not provided a detailed report to justify a reduction in Claimant's in-home care.

Previously, the Department considered a motion by Employer/Insurer to declare two items of care "suitable and proper" under SDCL 62-4-1. It declined to make such a determination, in part, because Employer/Insurer had already provided the care in question. Employer/Insurer argue that this motion is distinguishable from the previous motion because the care is ongoing. Claimant argues that this motion contains the same issue and therefore, there is no need for the Department to make such a determination. Claimant also contends that the Department should not be tasked with approving every conceivable change in his care.

While the Supreme Court left the decision to render a factual determination to the discretion of an administrative agency, the Court noted that a dispute is not necessary before an administrative agency may make such a determination. *In re Petition for Declaratory Ruling re SDCL 62-1-1(6)*, 2016 S.D. 21, 877 N.W.2d 340. Practically speaking, entertaining multiple requests for factual determinations when no dispute existed between the parties would clog the Department's docket and slow resolution of disputes to a snail's pace. Thus, the Department will only make such determinations sparingly.

In addition, the Supreme Court has previously deferred to a treating physician's opinion regarding care. "It is in the doctor's province to determine what is necessary or suitable and proper." *Stuckey v. Sturgis Pizza Ranch*, 2011 S.D. 1, ¶ 23, 793 N.W.2d 378, 387–88. Thus, it is presumed that the care prescribed by Dr. Goodhope is appropriate. In the absence of a dispute between the parties about the care provided to Claimant, and with no medical opinion to contradict Dr. Goodhope's, the Department will not make a determination. Since the Department declines to make a factual determination, no report by Dr. Goodhope is necessary.

Finally, Claimant argues that this factual determination is a pretext for Employer/insurer to deny future care. Since the Department has declined to make the factual determination concerning Mr. Wetch's in-home care, it need not consider these arguments. However, the Department reiterates that it has found on numerous occasions that Employer/Insurer cannot deny Claimant care without alleging a change in condition.

ORDER

Employer/Insurer's motion for a factual determination is DENIED. This letter shall constitute the Department's order in this case.

/s/ Joe Thronson
Joe Thronson
Administrative Law Judge