October 8, 2020

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LETTER DECISION AND ORDER

J. G. Shultz
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Sioux Falls, SD 57117-5027

RE: HF No. 162, 2016/17 – Randy Hveem v. Integrity Management Consulting Services, LLC and Firstcomp Insurance Co.

Dear Mr. Lee and Mr. Shultz:

This letter addresses the following submissions by the parties:

August 19, 2020	Employer/Insurer's Motion to Bifurcate Hearing or in the Alternative Limit Scheduling Order
	Affidavit of J. G. Shultz
September 9, 2020	Claimant's Memorandum in Opposition to Motion to Bifurcate
	Affidavit of Brad Lee
September 24, 2020	Employer/Insurer's Reply Brief in Support of Motion

QUESTION PRESENTED: SHOULD THE DEPARTMENT GRANT EMPLOYER/INSURER'S REQUEST TO BIFURCATE THIS HEARING?

PROCEDURAL HISTORY

Claimant filed a petition for hearing on June 9, 2017. Employer/Insurer filed its original answer on July 21, 2017. After its deposition of Claimant, Employer/Insurer filed an amended answer on August 17, 2018 in which it alleged that Claimant was barred from recovering workers compensation benefits due to willful misconduct or misrepresentation of physical condition. Discovery in this case proved to be contentious. Employer/Insurer filed a motion for a protective order to prevent Claimant from deposing Insurer's claims adjuster and to prevent Claimant from obtaining access to its claims file. On November 6, 2018, the Department granted Employer/Insurer's Motion for a Protective Order. Claimant then filed an intermediate appeal to circuit court. On July 11, 2019, the Honorable Judge Heidi Linngren of the Seventh Circuit reversed the Department's order and remanded the case to the Department for further consideration of the motion. The parties had limited contact with the Department until Employer/Insurer's August 19, 2020 motion to bifurcate.

On July 11, 2018, Claimant filed his designation of expert witnesses.

ANALYSIS

Employer/Insurer request that this hearing be bifurcated so that the Department may first consider its affirmative defenses; specifically, willful misconduct on the part of Claimant. Employer/Insurer argues that bifurcation could save time and resources by eliminating the need to depose various expert depositions and attain medical testimony. Claimant counters that bifurcation will not be judicious in this case because the parties must continue to schedule expert depositions regardless, and that Claimant will be

prejudiced by bifurcation. Claimant also argues that bifurcation will delay Claimant's possibility to obtain benefits. Finally, Claimant argues that bifurcation will increase the cost of litigation by forcing his attorney to research and prepare for two hearings.

SDCL 15-6-42(b) provides for bifurcation in circuit court cases:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the state or federal Constitution or as given by a statute.

When deciding whether to bifurcate a hearing, the Department must weigh two competing interests; judicial expedition on the one hand, and prejudice on the other. Claimant contends that he must depose several witnesses to counter Employer/Insurer's argument that he committed misconduct by exceeding his work restrictions. Employer/Insurer argues that proceeding on its affirmative defenses would eliminate the need for further medical evidence. Claimant would be severely prejudiced if he was forced to proceed to hearing on Employer/Insurer's affirmative defenses before he has had the chance to depose all his necessary witnesses. Conversely, Employer/Insurer have not demonstrated that proceeding to a single hearing will substantially prejudice it. Given that Claimant must still depose witnesses, it is questionable how expeditious a bifurcated hearing would be.

Employer/Insurer also notes that Claimant was made aware of its claim of willful misconduct nearly two years ago but took no steps to pursue discovery regarding those issues. It is unclear the extent that Claimant's inability to depose necessary witnesses

in his case is due to his own actions. Some events in this case were beyond Claimant's control. Claimant could not foresee the disruption that the current pandemic would have on the availability of witnesses. This case also spent several months in limbo pending an appeal to circuit court. At any rate, the dates of the original scheduling order have long since passed, and no new scheduling order was ever entered.

This is not to say that Claimant may have unlimited time to pursue his case. The Department has the authority to sanction parties for failure to complete discovery in a timely manner. ARSD 47:03:01:05.02 provides "If any party fails to comply with the provisions of this chapter, the Division of Labor and Management may impose sanctions upon such party pursuant to SDCL 15-6-37(b). However, attorney fees may be imposed only for a violation of a discovery order." The Department believes the proper remedy against further delay is to issue a new scheduling order rather than forcing Claimant to litigate a hearing for which he would be unprepared. However, the parties are hereby placed on notice that failure to abide by a new scheduling order without justification may result in sanctions according to ARSD 47:03:01:05.02.

ORDER

Employer/Insurer's Motion to bifurcate the hearing, or alternatively to limit discovery, is DENIED. The parties shall submit proposals for a new scheduling order in this matter.

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Joe Thronson
Administrative Law Judge