June 17, 2020

[redacted]

Letter Decision

[redacted]

RE: HF No. 70, 2019/20 – Clayton G. Walker v. Freeman's Electric Service, Inc. and United Fire Group (UFCS)

Dear Mr. Walker and Ms. Hensley:

This letter is regarding the various motions referenced below and all responsive briefs. Clayton G. Walker (Claimant) filed a Petition for Hearing on December 27, 2019 alleging that he suffered injuries to his right shoulder and head on June 1, 2019 in the course of his employment with Freeman's Electric Service, Inc (Employer) which was at all times pertinent insured for worker's compensation purposes by United Fire Group (Insurer). Employer and Insurer denied Claimant's claim for benefits on December 6, 2019. Other relevant facts will be discussed below.

Claimant's Motion to Recuse ALJ Faw:

Claimant has moved to recuse me in this matter under Canon 3(c) of the Judicial Code of Conduct which states "A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently". He asserts that he has requested a full copy of his "docket" multiple times, and my refusal to provide it violates his 14th Amendment, 6th Amendment, and Due Process rights. He claims that I am not impartial in this matter.

The South Dakota Supreme Court has provided two bases on which to disqualify an administrative law judge, "(1) actual bias on the part of the adjudicator, or (2) the existence of circumstances that lead to the conclusion that an unacceptable risk of actual bias or prejudgment inhered in the proceedings." *Voeltz v. John Morrell & Co.*, 1997 S.D. 69, ¶ 11. In this matter, Claimant has not asserted actual bias or prejudgment inhered in the proceedings. He has merely expressed his displeasure at being denied an additional copy of his "docket," and by docket he appears to mean the official record. The Department sent him a copy of the record on February 28, 2020. I also informed him that it is his responsibility as a Claimant to keep track of documents that are sent to him. Claimant's frustration with the Department for not sending him additional copies of his record does not amount to bias.

Additionally, if Claimant wished to recuse the ALJ assigned to his case, he had an opportunity to do so within 20 days of receiving notice that I was appointed to the case under SDCL 62-4-12.2 which states, in pertinent part, "In any contested case arising under the provisions of Title 62, any party, in person or by counsel, may informally request the hearing examiner who, in the ordinary course, would hear the contested case, to disqualify himself or herself. The requesting party may, but is not obligated to, state reasons for the request. The informal request may be by letter, by oral communication, or by motion not later than twenty days after notice of the appointment of the hearing examiner to the case." Claimant has not proven bias and, therefore, the Motion to Recuse is Denied.

Claimant's Motions for Stenographer, Fees for Expert Witnesses, and Subpoenas

Claimant has moved the Department to pay for subpoenas, expert witness fees, stenographer for depositions, and other costs. Claimant argues that he is indigent and is unable to pay for these costs himself. He asserts that to have a fair trial he must have witnesses and since he cannot afford them himself, the Department should pay for them. He is requesting between $10,000 and $15,000. He asserts that denying this request is a violation of his Federal Constitutional Rights.

Fees and costs related to workers' compensation claims are the responsibility of the parties. The Department's authority is purely statutory, and there is no statute that

gives the Department the right to pay for depositions, stenographers, or witnesses. Claimant has argued that he is entitled to these things, because he is indigent. He has referred to cases where the United States Supreme Court has ruled that criminal defendants are entitled to attorneys or entitlement to transcripts. *Griffin v. Illinois,* 76 S.Ct 585. However, the cases and laws he has cited are related to criminal matters regarding the rights of an accused. Claimant, himself, filed the Petition in this administrative matter. He filed the Petition to engage the administrative process. He is responsible for the costs related to it. Claimant's Motions regarding expenses or costs including, but not limited to, subpoenas and witness fees are Denied.

Employer and Insurer's Motion to Quash Claimant's Deposition Subpoenas:

Employer and Insurer have moved to quash Claimant's deposition subpoenas. Claimant has provided notice for nineteen (19) subpoenas. Employer and Insurer argue that Claimant had requested the depositions take place on March 16, 2020, and he had done so without confirming availability, establishing the purpose of the deposition, or discussing the items sought to be discovered. Employer and Insurer assert the testimony he seeks at these depositions, such as testimony related to fraud, is irrelevant to the issues in this claim and are not subject to discovery. Claimant argues that the witnesses may offer relevant testimony regarding why the claim was denied and fraud committed by United Fire Group. The Department is persuaded by Employer and Insurer. Issues of fraud and the administration of the claim are not relevant to the claim for workers' compensation benefits.

Employer and Insurer further assert that Claimant lacks the authority to issue a subpoena, has not provided Proof of Service or other evidence showing that he has served his Subpoenas on any of the intended deponents, and has not followed the proper form for the subpoenas. SDCL 15-6-45(a) provides,

> Clerks of courts, judges, magistrates, notaries public, referees, and any other public officer or agency so empowered by § 1-26-19.1 or otherwise authorized by law in any matter pending before them, upon application of any person having a cause or any matter pending in court or before such agency, officer or tribunal, may issue a subpoena for a witness or witnesses.
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> Any attorney of record who has been duly admitted to practice in this state and is in good standing upon the active list of attorneys of the State Bar of South

> Dakota may issue a subpoena for a witness or witnesses, and for production, inspection and copying of records and exhibits, in any action or proceeding, or collateral hearing, civil or criminal, in which he is the attorney of record for any party. When an attorney issues a subpoena, he must forthwith transmit a copy thereof to the clerk of the court, or to the secretary or other filing officer of the board or tribunal in which the matter is pending, for filing. Such officer shall file such copy as one of the public records of the action or proceeding.
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> A subpoena shall state the name of the court, or tribunal, the title of the action or proceeding, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. It shall state the name of the person or party for whom the testimony of the witness is required. The seal of the court or officer, or tribunal, shall be affixed to the original and all copies, if issued by a court or officer having a seal. If the subpoena is issued by an attorney, it shall be issued in the name of the presiding officer of the court, or tribunal in which the matter is pending and shall be attested and signed by the attorney, designating the party for whom he is attorney of record.

Claimant is not an attorney and must go through the Department to issue subpoenas. Claimant submitted Motion for Subpoenas. In response, Employer and Insurer submitted the Motion to Quash. SDCL 62-2-6 states, in pertinent part, "[t]he department may subpoena witnesses, administer oaths, and examine such books and records of the parties to a proceeding or investigation as relate to questions in dispute or under investigation." At a party's request, the Department of Labor may issue relevant subpoenas, but the Department does not pay witness or deposition fees.

Employer and Insurer further argue that Claimant's Subpoenas fail to comply with location requirements. SDCL 15-6-45(d)(2) states, "A resident of this state may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of the court. A nonresident of this state may be required to attend only in the county wherein he is served the subpoena, or at such other convenient place as is fixed by an order of the court." Claimant wished to have the depositions in Rapid City, South Dakota. Many of the deponents are from other counties or states, for example, one is from St. Louis, Missouri. Depositions are intended to be convenient for the deponent. If the Department issues a subpoena, it will apply the requirements of SDCL 15-6-45(d)(2). Claimant will be responsible for the costs related to any deposition that is held at his request. Employer and Insurer's Motion to Quash is Granted.

Employer and Insurer's Motion for Summary Judgment:

Employer and Insurer have Moved for Summary Judgment on the grounds that Claimant has not properly met the expert disclosure deadline as required by the Scheduling Order issued by the Department on February 20, 2020. Claimant was to disclose his experts, along with their reports and opinions, by March 30, 2020. By email dated March 30, 2020, Claimant identified Dr. David J. Bradley and Dr. Michael J. Osborn at Mayo Clinic as his experts. Employer and Insurer assert that there is no evidence that either Dr. Bradley or Dr. Osborn has ever treated or examined Claimant. Claimant also did not include the necessary reports or records when he named his experts. Employer and Insurer argue that Claimant has no medical support for the allegations in his Petition. They further argue that they have provided the medical opinion of Dr. Robert Arias who has opined that Claimant's condition and need for treatment was not related to the work injury on June 1, 2019, and that Claimant does not require additional treatment nor work restrictions. They have also provided the medical opinion of Dr. Thomas Ripperda who also opined that Claimant does not require any additional treatment. Employer and Insurer assert that because Claimant has no medical support to substantiate his claim for benefits, and they have two opinions supporting their position, then Employer and Insurer are entitled to judgment as a matter of law.

Claimant asserts there are issues of material fact that remain in this matter such as issues regarding his neurological evaluation and specialist opinions. He also argues that the opinions provided by Employer and Insurer's experts are hearsay and not fact. He further asserts that he is at a disadvantage as a pro se claimant. He also mentions that he had issues with the scheduling order that were not promptly addressed, but that he did meet the deadline for disclosing his experts. In the expert disclosure, he names the doctors and briefly states what the doctors will speak to, but he does not provide reports of the doctors' opinions.

The Department's 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.

The party seeking summary judgment bears the burden of demonstrating the lack of any genuine issue of material fact, and all reasonable inferences from the facts are viewed in the light most favorable to the non-moving party. *Railsback v. Mid-Century Ins.* Co., 2004 SD 64, ¶ 6, 680 N.W.2d 652, 654. "A trial court may grant summary judgment only when there are no genuine issues of material fact." *Estate of Williams v. Vandeberg*, 2000 SD 155, ¶ 7, 620 N.W.2d 187, 189, (citing, SDCL 15-6-56(c); *Bego v. Gordon*, 407 N.W.2d 801 (S.D. 1987)). "In resisting the motion, the non-moving party must present specific facts that show a genuine issue of fact does exist." *Estate of Williams*, 2000 SD 155 at ¶ 7, (citing, *Ruane v. Murray*, 380 NW2d 362 (S.D.1986)).

Claimant argues that he has provided medical experts in a proper and timely fashion. However, Claimant has not provided medical expert opinions or reports. Therefore, he cannot provide the necessary medical causation to prove he is entitled to benefits. "The testimony of professionals is crucial in establishing this causal relationship because the field is one in which laymen ordinarily are unqualified to express an opinion." *Day v. John Morrell & Co.*, 490 N.W.2d 720, 724 (S.D. 1992). "No recovery may be had where the claimant has failed to offer credible medical evidence that his work-related injury is a major contributing cause of his current claimed condition." *Darling v. West River Masonry, Inc.*, 777 N.W. 2d at ¶ 13. Claimant has not provided the necessary expert evidence to prevail in this matter, therefore, Employer and Insurer's Motion for Summary Judgment is hereby Granted.

As the Motion for Summary Judgment has been granted, Claimant's Motions for an Independent Medical Examiner, Motion for Protective Order, Motion for

Declared Emergency, Motion for Evidence Hearing, Motion for Judicial Notice and Motion for Liberally Construed Emphasis are moot.

Conclusion:

Claimant's Motion to Recuse ALJ Faw is DENIED.

Claimant's Motions for Stenographer, Fees for Expert Witnesses, Subpoenas and other costs are DENIED.

Employer and Insurer's Motion to Quash is GRANTED.

Employer and Insurer's Motion for Summary Judgment is GRANTED. This letter shall constitute the order in this matter.

Counsel for Employer and Insurer shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision within twenty (20) days from the date of receipt of this Decision. Claimant shall have an additional twenty (20) days from the date of receipt of Employer and Insurer's Proposed Findings and Conclusions to submit objections thereto and/or to submit their own proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Employer and Insurer shall submit such Stipulation along with an Order consistent with this Decision.

Sincerely,

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Michelle M. Faw
Administrative Law Judge