May 15, 2014

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Letter Decision and Order

J. G. Shultz
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RE: HF No. 31, 2013/14 – Jason Klinkner v. Lamont Company, Inc. and Midwest Family Mutual Insurance Company

Dear Ms. Semmler and Mr. Shultz:

Submissions:

This letter addresses the following submissions by the parties:

February 26, 2014	Claimant's Second Motion to Compel Discovery and for Attorney's Fees;
	Memorandum in Support of Second Motion to Compel Discovery;
	Affidavit of Kara C. Semmler;
April 2, 2014	Employer and Insurer's Motion for Protective Order and Opposition to Claimant's Second Motion to Compel;
	Affidavit of Counsel;
April 10, 2014	Claimant's Response to Employer and Insurer's Motion for Protective Order and Opposition to Claimant's Second Motion to Compel; and

May 2, 2014	Employer and Insurer's Reply Re: Motion for Protective Order.

Facts:

This letter addresses the following facts as reflected by the submissions:

1. Jason Klinkner (Klinkner) was employed by Lamont Company, Inc. (Lamont), who was insured for workers' compensation purposes by Midwest Family Mutual Insurance Company (Insurer) during all time relevant in this case.

2. Klinkner suffered a work-related injury to his left hand on April 7, 2012.

3. Klinkner sought treatment for his injury and eventually returned to work.

4. Klinkner left his employment with Lamont on July 9, 2012, allegedly, due to his work-injury and again sought medical care for his left hand.

5. After he left his job, Claimant continued to receive benefits from Insurer. He underwent two surgeries which were both covered by Insurer.

6. When the surgeries seemed unhelpful, Lamont and Insurer retained a nurse case manager to manage Klinkner's case. The initial contact by the nurse case manager with Klinkner was on April 2, 2013.

7. On April 9, 2013, Klinkner's counsel made contact with the nurse case manager. On April 10, 2013, Klinkner's counsel made contact with Insurer.

8. Klinkner filed a Petition for Hearing dated August 14, 2013.

9. Lamont and Insurer filed an Amended Joint Answer, dated August 28, 2013, denying that Klinkner is entitled to any further benefits and counterclaimed for reimbursement of expenses paid in the past.

10. Lamont and Insurer assert that the Klinkner's injury resolved and he was able to return to regular duty as a concrete finisher without restrictions.

11. On September 9, 2013, Klinkner made an informal written request to Lamont and Insurer for discovery materials. No response was made to Klinkner's request.

12. On October 8, 2013, Klinkner sent a written inquiry regarding the September 9, 2013, request for discovery materials.

13. On November 1, 2013, Lamont and Insurer requested that Klinkner resubmit its request through the formal discovery process.

14. Per that request, Klinkner sent interrogatories and requests for production to Lamont and Insurer on November 5, 2013. Lamont and Insurer again failed to respond.

15. Klinkner sent written inquiries regarding the lack of response on December 12, 2013, December 27, 2013 and January 6, 2014. No response was received to any of these inquires.

16. On January 14, 2014, Klinkner filed a Motion to Compel Discovery. The Department set February 4, 2014, as a response deadline for Lamont and Insurer to submit resistance.

17. On February 4, 2014, Lamont and Insurer submitted replies but objected to production of the nurse case manager's file contending that it was not subject to discovery because it was created in anticipation of litigation.

18. On February 7, 2014, Klinkner sent a letter to Lamont and Insurer in a good faith attempt to secure the material without Department action.

19. Lamont and Insurer did not acknowledge or respond in any way to Klinkner's February 7, 2014 inquiry.

20. Klinkner's Second Motion to Compel Discovery and for Attorney's fees followed.

21. Additional fact will be discussed in the analysis below.

Motion to Compel:

This letter addresses Klinkner's Motion to Compel and Lamont and Insurer's Motion for Protective Order. Discovery in South Dakota workers' compensation cases is governed by SDCL 1-26-9.2. That statute states:

> Each agency and the officers thereof charged with the duty to administer the laws and rules of the agency shall have power to cause the deposition of witnesses residing within or without the state or absent therefrom to be taken or other discovery procedure to be conducted upon notice to the interested person, if any, in like manner that depositions or witnesses are taken or other discovery procedure is to be conducted in civil actions pending in circuit court in any matter concerning contested cases.

SDCL 1-26-9.2.

The South Dakota Supreme Court has stated:

> Discovery rules are designed "to compel the production of evidence and to promote, rather than stifle, the truth finding process." Magbuhat v. Kovarik, 382

> N.W.2d 43, 45 (S.D.1986) (citing Chittenden & Eastman Co. v. Smith, 286 N.W.2d 314, 316 (S.D.1979)). The purpose of workers' compensation is to provide for employees who have lost their ability to earn because of an employment-related accident, casualty, or disease. Rawls v. Coleman-Frizzell, Inc., 2002 SD 130, ¶ 19, 653 N.W.2d 247, 252.

Dudley v. Huizenga, 2003 SD 84, ¶ 11, 667 NW2d 644. 648.

The Supreme Court also stated in Kaarup v. St. Paul Fire and Marine Ins. Co., 436 N.W.2d 17, 19-20 (S.D. 1989) that:

> We previously concurred with the United States Supreme Court's construction of the discovery rules set forth in the seminal case of Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). State By and Through Dept. Of Transp. v. Grudnik, 90 S.D. 571, 243 N.W.2d 796 (1976). The Supreme Court stated in Hickman, supra:
>
> > …the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise. But discovery, like all matters of procedure, has ultimate and necessary boundaries.
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> 329 U.S. at 507, 67 S.Ct. at 392, 91 L.Ed. at 460.

Klinkner filed his motion to compel when Lamont and Insurer objected to the discovery of the nurse case manager file because it was shielded from discovery by the work product doctrine.

Attorney Work Product:

The work product doctrine is discussed by the South Dakota Supreme Court in Kaarup, 436N.W.2d 17 at 21. There it stated:

> An attorney's work product is defined by SDCL 15–6–26(b)(3) as "documents and tangible things ... prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer or agent)...." The test we apply for determining whether a document or tangible thing is attorney work product is whether "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or

obtained because of the prospect of litigation." 8 C. Wright and A. Miller, supra, § 2024 at 198.

Id.

In this case, Lamont and Insurer argue that they anticipated litigation from the time they first became aware of fact that Klinkner had hired an attorney on April 9, 2013. Klinkner, on the other hand, argues that litigation could not be anticipated prior to Insurer's denial of Klinkner's benefits which took place on August 28, 2013.

The Department disagrees with both of these arguments. The fact that a claimant retains counsel to insure that his rights are being protected does not automatically signal that litigation is imminent. As the Department has stated before, counsel is sometimes hired to forestall litigation in the future. In this case, there was no indications that Klinkner's attorney was focused on anything but insuring that the claims process proceeded smoothly. Klinkner's attorney initially wrote Insurer about replacing a TENS unit. There is no evidence that Klinkner intended to do anything but cooperate with the Insurer and nurse case manager on April 9, 2013. The Department does not find a request to have future correspondence forwarded to counsel particularly threatening. The Department also does not find the date of denial to be pivotal in this case as Klinkner argues. While it is true that in most cases that litigation is unlikely prior to a denial of benefits, something happened in this case which is not clear from the facts set forth in the parties submissions which prompted Klinkner to file a Petition for Hearing prior to an official denial. Consequently, the Department finds August 14, 2013, the date Klinkner filed his Petition for Hearing, the date at which Lamont and Insurer could anticipate litigation.

It is also possible that some entries in the nurse case manager's file following August 14, 2013, may be discoverable but no argument was made regarding such documents so the Department deems that issue waived.

Hardship:

Lamont and Insurer also argue that Klinkner has not shown that acquiring the information would cause him unnecessary hardship. However, that requirement is only effective if material is work product.[1] In light of the decision above, the lack of hardship only applies to those entries from the nurse case manager file dated after the Petition for Hearing.

[1] SDCL 15-6-26(b)(3): Trial preparation: materials. Subject to the provisions of subdivision (4) of this section, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (1) of this section and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including such other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental

Order:

In accordance with the decision above, Klinkner's Motion to Compel Discovery is granted in part and denied in part. Lamont and Insurer's Motion for Protective Order is, likewise, granted in part and denied in part. Lamont and Insurer shall produce those portions of the nurse case manager file dated prior to August 14, 2013, the date Klinkner filed his Petition for Hearing. A protective order is also issued shielding from discovery those portions of the nurse case manager file dated after the Petition for Hearing was filed. This letter shall constitute the Order in this matter.

Sincerely,

__/s/ Donald W. Hageman____
Donald W. Hageman
Administrative Law Judge