

December 9, 2009

James D Leach
Attorney at Law
1617 Sheridan Lake Rd
Rapid City SD 57702-3483

Letter Decision and Order

Comet H Haraldson
Scott Hendricks Leuning
Woods Fuller Schultz & Smith PC
PO Box 5027
Sioux Falls SD 57117-5027

RE: HF No. 46, 2008/09 – Rapid City Regional Hospital and Farm Bureau Mutual Insurance Company v. Earla M. Hunter

Dear Mr. Leach, Mr. Haraldson and Mr. Leuning:

Submissions:

This letter addresses the following submissions by the parties:

September 17, 2009	[Claimant's] Motion to {1} Compel Discovery or to Excluded All Testimony and Reports from Marvin Logel, Ph.D. and Thomas Gratzler, M.D., and {2} Require Employer and Insurer to Produce Materials;
October 13, 2009	[Employer and Insurer's] Opposition to Claimant's Motion to Compel;
October 16, 2009	[Claimant's] Reply Brief in Support of Motion to {1} Compel Discovery or to Exclude All Testimony and Reports from Marvin Logel, Ph.D. and Thomas Gratzler, M.D., and {2} Require Employer and Insurer to Produce Materials.

Background:

The facts of this case, as reflected by the above submissions and documentation, are as follows:

1. Earla M. Hunter (Claimant) has submitted to two MMPI's¹ at the request of Rapid City Regional Hospital (Employer) and Farm Bureau Mutual Insurance Company (Insurer) over the course of two Workers' Compensation cases. The second MMPI was administered during this case and the raw data and reports resulting from the MMPI are the focus of Claimant's Motion.
2. Claimant has requested production of all raw MMPI data, raw scores, test scales, validity scales and test results from Employer and Insurer. Dr. Logel and Dr. Gratzner have formulated opinions and written reports based on that data. Claimant seeks this information to evaluate the validity of those opinions and reports.
3. Claimant has also requested that Employer and Insurer produce reference materials cited in Dr. Logel's report. These reference materials consist of four textbooks. Claimant has asked the textbooks be sent to her attorney's office for examination. Claimant indicates the textbooks will be returned by mail within three days of their receipt.
4. To date, Employer and Insurer have not provided the raw data or reference materials requested by Claimant. Employer and Insurer state Dr. Logel will only send the raw data to another neuropsychologist, unless directed to do so by a court order. Employer and Insurer have also offered to make the reference materials available to Claimant for examination at Dr. Logel's office in Minneapolis, MN. Alternatively, the Claimant can obtain the materials from libraries or bookstores.
5. Other facts may be discussed in analysis below.

Raw Data

Claimant has moved the Department of Labor to compel Employer and Insurer to provide her with the raw data from her second MMPI or exclude all testimony and reports from Dr. Logel and Dr. Gratzner. The admissibility of expert testimony and reports is governed by SDCL 19-15-6. That statute states:

19-15-6. (Rule 705(c)) The report or finding described in § 19-15-5.2² shall not be admissible unless the party offering it shall have given notice to the adverse party a reasonable time before trial of his intention to offer it, together with a copy of the report or finding, or so much thereof as may relate to the controversy, and

¹ Minnesota Multiphasic Personality Inventory.

² SDCL 19-15-5.2 pertains to the admissibility of reports of impartial experts.

shall also have afforded him a reasonable opportunity to inspect and copy any records or other documents in the offering party's possession or control, on which the report or finding was based, and also the names of all persons furnishing facts upon which the report or finding was based, except that it may be admitted if the trial court finds that no substantial injustice would result from the failure to give such notice. (emphasis added).

SDCL 19-15-6 makes clear Claimant is entitled to review the raw data she has requested or the testimony and reports of Dr. Logel and Dr. Gratzner are inadmissible. In addition, Employer and Insurer have not claimed the information is privileged and state they are not opposed to providing the raw data if ordered to do so. Therefore, Claimant's motion is granted.

Reference Materials

Claimant has also asked Employer and Insurer produce the textbooks which Dr. Logel cites as reference materials in his report by sending them to Claimant's attorney. Claimant indicates that she will return the textbooks by mail within three days of their receipt.

Employer and Insurer do not dispute Claimant's right to examine the reference materials. However, they contend they should not be required to ship a portion of Dr. Logel's library, to Claimant. Employer and Insurer have offered to make the textbooks available to Claimant at Dr. Logel's office or, they argue, Claimant can acquire the materials from libraries or bookstores.

In Workers' Compensation cases, motions to compel discovery are governed by SDCL 1-16-9.2. That statute states:

SDCL 1-16-19.2. 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 there from 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 15-6-34(b) states, that discovery requests "shall specify a reasonable time, place, and manner of making the inspection and performing the related acts." In this case, it is not unreasonable for Employer and Insurer to make the textbooks available to Claimant at Claimant's attorney's office. Therefore, Claimant's motion is granted.

Order

In accordance with the above analysis, Employer and Insurer shall provide the raw data from Claimant's second MMPI within thirty days of the receipt of this order or the testimony and reports of Marvin Logel, Ph.D. and Thomas Gratzner, M.D. are inadmissible in this case. Employer and Insurer shall also make the reference materials cited by Dr. Logel in his report available to Claimant for examination at Claimant's attorney's office within thirty days of the receipt of this order. Claimant shall then mail the materials back to Dr. Logel's office within three days of their receipt. This letter shall constitute the Department's Order in this matter.

Sincerely,

Donald W. Hageman
Administrative Law Judge