

February 5, 2009

BY FACSIMILE & US MAIL

Jack Der Hagopian  
Der Hagopian Law Office PC  
401 E. 8<sup>th</sup> Street, Ste. 321  
Sioux Falls, SD 57103

LETTER DECISION & ORDER

J. G. Shultz  
Woods, Fuller, Shultz & Smith PC  
PO Box 5027  
Sioux Falls, SD 57117-5027

RE: HF No. 123, 2007/08- Albert Atayants v. Joe E. Leggett d/b/a/ Leggett Painting and State Farm Insurance

Dear Mr. Der Hagopian and Mr. Shultz:

The Department is in receipt of Employer/Insurer's Motion to Quash Subpoena for Deposition and Subpoena Duces Tecum and Motion for Protective Order in the above-referenced matter. The Department has also received Employer/Insurer's Brief in Support of Motions, Claimant's Brief in Opposition to Employer and Insurer's Motion to Quash Subpoena for Deposition and Subpoena Duces Tecum, and Employer/ Insurer's Reply to Claimant's Opposition to Employer and Insurer's Motion to Quash Subpoena for Deposition and Subpoena Duces Tecum. A telephonic status conference was held January 29, 2009, at which time parties also presented oral arguments on the motion. I have carefully considered the parties' submissions and arguments in addressing the motion.

Claimant's attorney issued a subpoena and subpoena duces tecum to V. Kay Thomas on December 19, 2008. The subpoena compelled Ms. Thomas to appear for a deposition on January 7, 2009, and a produce all records, files and memoranda or other documents concerning the above referenced case, including but not limited to Ms. Thomas' nurse case manager file.

The parties have agreed to postpone the deposition of Ms. Thomas until the pending motion has been resolved.

### ***Motion to Quash Subpoena and Subpoena Duces Tecum***

Employer/Insurer argues that the subpoena and subpoena duces tecum are invalid in that Ms. Thomas is an agent of the Insurer in this matter making a subpoena under SDCL §15-6-45 procedurally inappropriate. Employer/Insurer argues that a subpoena is necessary to compel someone who is not a party to appear for the taking of a deposition or for production of various material things and electronic information. Employer/Insurer argues that Claimant should have proceeded under SDCL §15-6-34 when seeking any documents from Ms. Thomas.

Employer/Insurer's argument is without merit. SDCL §15-6-30(a) governs when depositions may be taken, the statute provides in pertinent part,

After commencement of the action, any party may take the testimony of *any person, including a party*, by deposition upon oral examination... The attendance of witnesses may be compelled by subpoena as provided in §15-6-45.

SDCL §15-6-30(a) emphasis added.

A subpoena to attend a deposition issued pursuant to SDCL §15-6-45(d) may,

Command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain evidence relating to any of the matter within the scope of the examination permitted by §15-6-26(b), but in that event the subpoena will be subject to the provisions of §§15-6-26(c) and §15-6-45(b).

While Employer/Insurer is correct that a Motion to Compel would also be an appropriate means of compelling the sought after discovery, it is not the exclusive means. The subpoena and subpoena duces tecum are appropriate discovery methods in this matter. Employer/Insurer's Motion to Quash Subpoena and Subpoena Duces Tecum is denied.

### ***Motion for Protective Order***

Employer/Insurer initially argued that the entire nurse case managers file is made up entirely of materials protected by the attorney client privilege and/or the work product privilege and this cannot be produced under South Dakota law. Employer/Insurer argued that an agency relationship exists between Insurer and Ms. Thomas, which is important because then work product privilege contained in SDCL §15-6-26(b)(3) protects the materials in Ms. Thomas' nurse case manager file. Employer/Insurer contended that all materials in the nurse case manager's file were prepared in anticipation of litigation by an agent and/or representative of the Insurer, a named party in this matter.

Employer/Insurer, in its Reply to Claimant's Opposition to Employer/Insurer's Motion to Quash Subpoena for Deposition and Subpoena Duces Tecum agreed to focus the scope of the Motion for Protective Order. Employer/Insurer filed an updated *Vaughn Index* pursuant to the requirements of SDCL §15-6-26(b)(5), which removed a number of categories of documents for which the work product and attorney client privileges were originally asserted.

Employer/Insurer claims the work product privilege remains applicable for three categories of documents in Ms. Thomas' file. First, Ms. Thomas' invoices for her vocational consultation services because they were prepared in anticipation of litigation and reflect activities undertaken on behalf of the Employer/Insurer. Second, email communications between Ms. Thomas and the Adult Learning Center, as they were also prepared in anticipation of litigation and reflect activities undertaken on behalf of the Employer/Insurer. Finally, the handwritten notes generated personally by Ms. Thomas throughout her work in this matter. Employer/Insurer argues that the handwritten notes contain mental impressions, conclusions, and opinions on the issues involved in this matter.

The duties of nurse case manager are set forth in statute and regulated by the Department of Labor. SDCL §58-20-24 states that workers' compensation policies must "provide medical services and health care to injured workers for compensable injuries and diseases under a case management plan that meets the requirements established by the rules promulgated by the Department of Labor." Utilization of a case management plan is required whether or not litigation ensues.

ARSD 47:03:04:01(2) defines case management as, "on-going coordination of medical services to an injured employee." The case management plan is defined in ARSD 47:03:04:01(3) as "a plan certified by the department that is designed to manage the quality, cost, and utilization of medical services or treatment provided to an injured or disabled employee for injuries and diseases compensable under SDCL title 62."

The duties of a nurse case manager are more specifically outlined in ARSD 47:03:04:08 as:

- (1) Developing a treatment plan to provide medical services to an injured or disabled employee;
- (2) Systematically monitoring the treatment rendered and the medical progress of the injured or disabled employee;
- (3) Ensuring that the injured or disabled employee is following the prescribed treatment plan;
- (4) Formulating a plan for return to work when medically and vocationally appropriate for the employee.

A relationship between the Insurer and the nurse case manager does exist, however that does not imply that everything prepared or obtained by the nurse case manager is

automatically work product prepared in anticipation of litigation. While it is often the case, litigation does not ensue from every injured worker's claim.

The courts have repeatedly recognized that, while litigation often results from an insurance company's denial of a claim, it cannot be said that any document prepared by an insurance company after such a claim has arisen is prepared in anticipation of litigation within the meaning of Rule 26(b)(3). The nature of the insurance business is such that an insurance company must investigate a claim prior to determining whether to pay its insured. If a different rule were applied, few, if any, documents prepared by an insurer would ever be discoverable as all could be said to have been prepared in anticipation of litigation any time after a claim has arisen. Such a result is logically absurd.

*Athey v. Farmers Ins. Grp.*, 1997 DSD 8, ¶10. Attorney 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) ... ." *Kaarup v. St. Paul Fire and Marine Ins. Co.*, 436 NW2d 17, 21 (SD 1989).

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.

*Tebben v. Gil Haugan Construction, Inc.*, 2007 SD 18, 729 NW2d 166.

The *Vaughn Index* submitted by Employer/Insurer lists 9 documents that fall into the category of invoices for vocational consultation. The invoices are dated May 22, 2007 through October 14, 2008. Employer/Insurer argues that these materials are entitled to the protection of the work product privilege under SDCL § 15-6-26 (b)(c) and that these documents were prepared in anticipation of litigation and reflect activities undertaken on behalf of the Employer/Insurer.

The Department received Claimant's petition for hearing on March 3, 2008. Several of invoices for vocational consultation are dated several months prior to the petition for hearing even being filed. As defined by the administrative rules, the nurse case manager is responsible for working with the claimant, insurer, and physicians and others to formulate "a plan to return to work when medically and vocationally appropriate for the employee." Ms. Thomas' invoices were prepared as part of her duties as nurse case manager and not protected as work product prepared or obtained because of the prospect of litigation. Employer/Insurer's Motion for Protective Order as to the invoices for vocational consultation is denied.

The *Vaughn Index* submitted by Employer/Insurer lists 14 documents that fall into the category of fax or email communications between Ms. Thomas and the Adult Learning Center. These communications are dated May 2007 through September 2008. Ms. Thomas' fax and email communications were prepared as part of her duties as nurse case manager. In light of the nature of these documents, it cannot be said that these documents were prepared or obtained because of the prospect of litigation. Employer/Insurer's Motion for Protective Order as to the email communications between Ms. Thomas and the Adult Learning Center is denied.

The *Vaughn Index* submitted by Employer/Insurer lists 9 documents that fall into the category of handwritten notes generated personally by Ms. Thomas throughout her work in this matter. These notes are regarding conferences with physicians, educational classes, and interviews with the claimant. These documents were not prepared in anticipation of litigation, but rather in the commission of her statutorily required position as nurse case manager whose goal it is to coordinate an injured employees health care and return to work. Employer/Insurer's Motion for Protective Order as to the handwritten notes generated personally by Ms. Thomas throughout her work in this matter is denied.

The *Vaughn Index* submitted by Employer/Insurer lists one document that was described as correspondence between Ms. Thomas and Mr. Shultz, attorney for Employer/Insurer. That document is privileged pursuant to SDCL §19-13-3 and do not have to be produced as they are outside the scope of discovery. Employer/Insurer's Motion for Protective Order as to correspondence between Ms. Thomas and Mr. Shultz is granted.

Sincerely,

Taya M. Dockter  
Administrative Law Judge