February 15, 2011

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Letter Decision and Order

Richard L. Travis
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RE: HF No. 141, 2006/07 – Timothy Andrews v. Ridco, Inc. and Twin City Fire Insurance Company/Hartford Accident & Indemnity Company and Intracorp

Dear Mr. Koehn and Mr. Travis:

Submissions:

This letter addresses the following submissions by the parties:

October 15, 2011	Claimant's Motion to Compel Production and For Evidentiary Sanctions In Connection With the Hartford's Failure to Produce, and Spoliation of the Claims File;
	Claimant's Renewed Motion & Brief in Support of Motion for Summary Judgment Re: TTD Withheld Between 5/23/05 and 7/5/05 (incorporating testimony from the 9/08/10 Deposition of Nicole Heglin);
	Affidavit of Mark A. Koehn;
November 19, 2011	Employer and Insurer's Brief in Opposition to Claimant's Renewed Motion for Summary Judgment Re: TTD Withheld Between 4/28/05 and 7/5/05;

	Employer and Insurer's Response to Claimant's Motion to Compel Production and For Evidentiary Sanctions;
December 6, 2011	Claimant's Motion to Compel Discovery (RE: 08/04/10 Fourth Request for Production of Documents);
	Claimant's Renewed Motion & Brief in Support of Motion for Summary Judgment Re: TTD Withheld Between 5/12/05 and 7/5/05 (incorporating testimony from the 9/08/10 Deposition of Nicole Heglin);
	Claimant's Reply to Defendants' Response to Claimant's Motion to Compel Production and For Evidentiary Sanctions In Connection With the Hartford's Failure to Produce, and Spoliation of the Claims File;
January 7, 2011	Letter from Richard L. Travis to Donald W. Hageman;
January 25, 2011	Claimant's Reply to [Defendants'] Responses and Objections to Claimant's Fourth Request for Production of Documents and Request for Evidentiary Sanctions in Connection With [Defendants'] Spoliation of Evidence and Discovery Abuses;
	Affidavit of Mark A. Koehn.

Facts:

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

1. Timothy Andrews (Claimant) was injured on Friday, March 4, 2005. Claimant alleges that the injury was work-related.

2. On March 4, 2005, Claimant was employed by Ridco, Inc. (Employer) who was insured by Twin City Fire Insurance Company, Hartford Accident and Indemnity Company (Insurer).

3. On March 7, 2005, Claimant went to the Medical Arts Clinic, where he was seen by Jeanie M. Lembke, M.D. Claimant complained of pain in his neck, right shoulder and wrist. Lembke excused Claimant from two days of work.

4. Dr. Lembke referred Claimant to Clark C. Duchene, M.D., of Black Hills Orthopedic & Spine, who saw Claimant on March 21, 2005.

5. On March 21, 2005, Dr. Duchene prescribed physical therapy for Claimant to instruct him on a home exercise program and informed Claimant that he could continue to see a chiropractor if he found such treatment to be beneficial.

6. Dr. Duchene made a no work recommendations for Claimant and did not schedule a follow-up appointment. However, Duchene agreed to see Claimant on an "as needed basis".

7. Claimant saw chiropractor, Patrick Clinch, D.C., later that same day, March 21, 2005, and continued to treat with him in connection with his March 4, 2005 injuries.

8. On March 21, 2005, Dr. Clinch made a return to work recommendation that stated "[p]atient is totally incapable at this time. Patient will be re-evaluated on 04-04-05."

9. On April 4, 2005, Dr. Clinch made a return to work recommendation which restricted Claimant to "Sedentary Work - patient may not use hands for repetitive work."

10. On April 18, 2005, Dr. Clinch made a return to work recommendation which restricted Claimant to "Sedentary Work - patient may not use hands for repetitive work."

11. Insurer paid temporary total disability benefits (TTD) to Claimant for the period of March 10, 2005 through April 28, 2005. On April 28, 2005, Insurer terminated Claimant's TTD.

12. On May 2, 2005, Claimant was released to work by Dr. Clinch but was limited to light work with no use of his hands for repetitive grasping, manipulation, or "[p]ushing & [p]ulling."

13. On May 16, 2005, Dr. Clinch made a return to work recommendation which restricted Claimant to "Sedentary Work - patient may not use hands for repetitive work." This recommendation did not change over the course of Claimant's next three visits to Dr. Clinch.

14. On April 18, 2005, Dr. Clinch made a return to work recommendation which restricted Claimant to "Sedentary Work - patient may not use hands for repetitive work.

15. After examining Claimant on June 8, 2005, Dr. Lawlor ordered additional studies for June 22, 2005, and a follow-up for June 24, 2005. Dr. Lawlor also noted that

"[i]n the interim, we will have him remain off work and will reevaluate after his studies."

16. Following a set of EMG's administered at Dr. Lawlor's office on June 22, 2005, Dr. Lawlor modified Claimant's work recommendations imposing restrictions which included "a maximum lift of 10 pounds. He needs to change position from sitting to standing and walking every 30 minutes as necessary and limit cervical flexing or over head activity to an occasional basis."

17. Employer and Insurer indicated that they will pay Claimant TTD and interest for the June 8, 2005 through June 22, 2005 time period.

18. On June 29, 2005, Employer notified Claimant by letter that he was to report to work on July 5, 2005 to sort boxes.

19. The last work restriction issued by Dr. Clinch, dated July 1, 2005, allowed light work but specifically recommended no repetitive use of his hands.

20. Claimant did not report to work for a job sorting boxes because he concluded that Dr. Clinch's work restrictions precluded him from sorting boxes.

21. Andrews was terminated by his employer on or about July 5, 2005, for refusing to report to work for a job sorting boxes.

22. Claimant filed a Petition for Hearing on March 21, 2007.

23. On April 9, 2010, the Department denied Claimant's Motion for Summary Judgment Re: TTD Withheld Between 4/28/05 and 7/5/05 because Claimant had failed to show that Employer did not have suitable work within his work limitations.

24. Additional facts may be discussed in the analysis below.

Motion for Summary Judgment:

Claimant filed a Motion for Summary Judgment Re: TTD Benefits Withheld Between 04/28/05 and 07/05/05 dated August 11, 2009. In a letter decision dated April 9, 2010, the Department denied Claimant's motion finding that Claimant was released to work with limitations during that time period by a medical provider and that he had not shown that Employer did not have suitable work available within those limitations.

Claimant now asks the Department to reconsider that motion for a substantial portion of the same time period, May 23, 2005 through July 5, 2005. Claimant argues that the Deposition of Nicole Heglin revealed that the Insurer ignored Dr. Clinch's back to work

recommendations. Claimant contends that under the circumstances of this case, the burden should shift to the Employer and Insurer to show that they notified Claimant that suitable work was available. The Department disagrees.

ARSD 47:03:01:08 governs the Department of Labor's authority to grant summary judgment. That regulation provides:

> 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.

ARSD 47:03:01:08. 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.2005 SD 64, ¶6, 680 N.W.2d 652, 654.

Claimant seeks "temporary total disability benefits". As that term implies, Claimant must be totally unable to work, i.e., totally disabled, in order to qualify for these benefits. There is no dispute of facts in this case related to this issue. Dr. Clinch released Claimant to work with certain limitations on May 16, 2005, as he had on several previous occasions. At that point, it must be presumed that Claimant was not totally disabled, unless Employer did not have suitable work.

While Claimant argues that the burden should shift to Employer and Insurer to show that suitable work was available. He cites no authority. Indeed, it is settled law that the claimant is required to prove all essential elements of [his] claim by a preponderance of the evidence. Johnson v. Albertson's, 2000 SD 47, 610 NW 2d 449. Claimant, again, has failed to do so.

Dr. Lawlor removed Claimant from work during the period of June 8, 2005 through June 22, 2005 pending the results of some tests that he had ordered. During this period of time, Claimant clearly qualifies for TTD. Accordingly, Employer and Insurer have indicated that they will pay Claimant TTD and interest during that time period.

After June 22, 2005, Dr. Lawlor released Claimant to work with limitations. At that point in time, both Dr. Clinch and Dr. Lawlor had released Claimant to work with limitations. There is no evidence that Employer did not have work available which met both doctor's limitation criteria during the May 23 through July 5, 2005 time period.

To the contrary, Employer notified Claimant by letter on June 29, 2005, that suitable work was available. Once notified of suitable work, Claimant was obligated to seriously explore the feasibility of doing that work.

Claimant has no medical expertise. Consequently, it is not enough for Claimant to decide on his own that sorting boxes did not fall within his limitations. Except for the June 8 through June 22, 2005, time period for which Employer and Insurer have conceded payment is due, Claimant is not entitled to additional TTD as a matter of law.

Motion to Compel Discovery:

Claimant has filed a Motion to Compel Discovery (RE: 08/04/10 Fourth Request for Production of Documents). Discovery in South Dakota workers' compensation cases is 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 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.

On August 4, 2010, Claimant served Claimant's Fourth Request for Documents to Twin City Fire Insurance Company/Hartford Accident and Indemnity Company. Employer and Insurer objected to several documents requested. The Department will deal with these requests and objections in turn:

- REQUEST FOR PRODUCTION NO. 2. Please provide copies of all documentation relating to "Fraud Best Practices", as referenced in one of the 3/24/05, 7:21 pm, entries in the Hartford's electronic activity log. Include any training documents or any other documents explaining what such practices are.

In its response, Insurer objected to this request on the grounds that it "seeks documents that are irrelevant to the issues currently pending before the Department of Labor, and the Request is not reasonably calculated to lead to the discovery of admissible evidence in respect to the issues pending before the Department."

In an April 9, 2010 letter decision, the Department ruled that Claimant could seek discovery related to a "vexatious or without reasonable cause" claim which he had filed against Insurer in this case. The documents sought here appear to be relevant issues involved in that action. Therefore, those documents must be provided to Claimant by Insurer.

- REQUEST FOR PRODUCTION NO. 3. Please provide a copy of any life insurance policy covering Timothy Andrews ever issued by the Hartford or regarding which the Hartford ever obtained the rights and obligations under such policy or policies.

The Insurer objected to this request on the grounds that it "seeks documents that are irrelevant to the issues currently pending before the Department of Labor, and the Request is not reasonably calculated to lead to the discovery of admissible evidence in respect to the issues pending before the Department." While life insurance policies may be relevant in a tort action of some type, they are beyond the scope of any issue involved in this workers' compensation case. The Insurer is not required to provide those documents in this case.

- REQUEST FOR PRODUCTION NO. 4. In regard to the insurance policy issued by the Hartford to Ridco, covering the period from 10/01/04 to 10/01/05, a copy of which was produced to Claimant on or about June 30, 2010 (hereafter, "the policy"), provide documentary proof of the premium amount actually paid. (The policy identifies the "Total Estimated Annual Premium" at $93,394 and the "Policy Minimum Premium at $950.)"

- REQUEST FOR PRODUCTION NO. 5. In regard to the policy, provide a complete copy or copies of the "Manuals of Rules, Classifications, Rates and Rating Plans" referenced under Item #4 of the policy's Schedule of Operations.

The Insurer objected to both of these requests, stating for each that "[t]his Request seeks documents that are irrelevant to the issues currently pending before the Department of Labor, and the Request is not reasonably calculated to lead to the discovery of admissible evidence in respect to the issues pending before the Department."

In a July 28, 2009 letter decision, the Department ordered the production of the workers' compensation insurance agreement in place at the time of Claimant's alleged work accident pursuant to SDCL 15-6-26(b)(2). However, the precise amount paid for that policy is well beyond any issue at bar here. The Insurer and Employer are not required to provide those documents. On the other hand, "Manuals of Rules, Classifications, Rates and Rating Plans" to the extent that they are referenced in the agreement are relevant and subject to discovery. Insurer and Employer must provide those documents.

Evidentiary Sanctions:

The Claimant complains bitterly in his motions to compel about the documents that Employer and Insurer have not provide which are presumably lost or non-existent. Those documents include e-mails, insurance policy endorsements, various letters and

the Special Investigations Unit files. Employer and Insurer basically answer that they will provide the documents if and when they are available.

Claimant accuses Insurer of spoliation and asks for evidentiary sanctions. The South Dakota Supreme Court has defined spoliation as the failure to preserve, destruction of, or significant alteration of evidence in pending or reasonably foreseeable litigation. ex. rel. Carver v. McKennan Hosp., 2000 SD 151, 619 N.W.2d 682. Where substantial evidence exists to support a conclusion that evidence: (i) was in existence, (ii) was under the control of the accused party, (iii) would have been admissible, and (iv) was destroyed or altered intentionally and in bad faith, the finder of fact may infer that the spoliated evidence would have been unfavorable to the spoliating party. State v. Engesser, 2003 SD 47, 661 N.W.2d 739.

Claimant also seeks sanctions authorized by SDCL 15-6-37(b)(2). That statute states:

> If a party . . . fails to obey an order to provide or permit discovery, including an order made under § 15-6-37(a) . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
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> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
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> (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;
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> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

SDCL 15-6-37(b)(2).

There is no question that Insurer's document retention and claims handling practices were "woeful" in this case. While those practices may show "ineptitude", the Department is not convinced that they were "willful". There is no evidence of a "conspiracy" or "cover-up", Therefore the Department will not order sanctions at this time.

Order:

In accordance with the discussion above, Claimant's Motion for Summary Judgment Re: TTD Withheld Between 5/23/05 and 7/5/05 is denied except for those benefits agreed to be paid by Insurer from June 8, 2005 through June 22, 2005. Claimant's Motion to Compel Discovery is granted in part and denied in part. Claimant's request for evidentiary sanctions is denied. The documents ordered to be produced in this decision shall be provided to Claimant within 30 days. This letter shall constitute the Department's Order in this matter

Sincerely,

___/s/ Donald W. Hageman ___
Donald W. Hageman
Administrative Law Judge