

May 30, 2012

Mark Allen Koehn  
Scott Armstrong  
Attorney at Law  
PO Box 9655  
Rapid City, SD 57709-9655

**Letter Decision and Order**

Richard L. Travis  
May & Johnson, PC  
PO Box 88738  
Sioux Falls, SD 57109-8738

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

Dear Counsel:

***Submissions:***

This letter addresses the following submissions by the parties:

January 25, 2012	[Claimant's] Certified Question Regarding Whether a Claimant Engaging in Discovery Re: SDCL 58-12-3 'Vexatious or Without Reasonable Cause' Conduct is Precluded as a Matter of Law from Discovery Inquiries as to Rule 404(b) 'Other Acts' (Claimant's Brief Requesting Remedy);
March 1, 2012	Employer and Insurer's Response to Claimant's Certified Question (Brief Requesting Remedy);
March 19, 2012	Claimant's Reply to Employer and Insurer's Response to Claimant's Certified Brief (Brief Requesting Remedy).

***Facts:***

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

1. Timothy Andrews (Claimant) is pursuing an action against Twin City Fire Insurance, Hartford Accident and Indemnity Company (Insurer) for “vexatious” refusal to pay claim or refusal without good cause, pursuant to SDCL 58-12-3.
2. Nicole Heglin (Heglin) adjusted Claimant’s workers’ compensation claim on behalf of Insurer.
3. On September 8, 2010, Claimant deposed Heglin concerning the handling of his claim. During the deposition, Claimant’s counsel asked Heglin about other claims which she adjusted on behalf of Insurer. Employer and Insurer objected and instructed Heglin not to answer.
4. In response to the Insurer’s unwillingness to voluntarily provide information related to other claims that Heglin has handled on behalf of the Insurer, Claimant filed a certified question with the Department seeking discovery and the production of all documents related to all other claims that Heglin has handled on behalf of the Insurer.
5. Additional facts may be discussed in the analysis below.

***Certified Question:***

Claimant has filed the following certified question with the Department:

Whether Nicole Heglin was properly instructed not to answer any questions pertaining to her claim handling practices or claim handling strategies for any other claims to which she had been assigned by the Hartford other than the Timothy Andrews claim.

***Discovery:***

Discovery in South Dakota workers’ compensation cases is governed by SDCL 1-16-9.2. That statute specifically governs discovery and provides:

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 1-16-19.2.

SDCL 15-6-26(a) provides the available discovery methods. That statute states:

Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under § 15-6-26(c), the frequency of use of these methods is not limited.

SDCL 15-6-26(a). SDCL 15-6-26(b) governs the scope of discovery, and provides in subsection 1:

(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

SDCL 15-6-26(b)(1).

In this case, Claimant seeks information by deposition and by the production of documents about claims other than Claimant's. This information is not relevant to any issue involved in this case and the request is not reasonably calculated to lead to the discovery of admissible evidence.

Claimant frames his argument around SDCL 19-12-5 (Rule 404(b)). He contends that the information he seeks would be admissible as an exception to that rule. SDCL 19-12-5 states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

SDCL 19-12-5 (Rule 404(b)). Claimant argues that the information he seeks would be admissible to show "intent" or "motive" in the present case. However, there is no indication that either "intent" or "motive" would be any more forthcoming in the cases sought than in the case at bar, particularly as that intent or motive pertains to Claimant.

Not only is Claimant involved in a "fishing expedition", but is unlikely that there are any fish in the pond in which Claimant is asking to fish. Moreover, there is no presumption that Insurer "vexaciously" denied or denied claims "without reasonable cause" in any of the cases sought by Claimant. Consequently, the merits of each of those cases would

need to be tried in turn before any pattern of abuse could be shown. Such an inquiry is well beyond the scope of this forum.

Courts have considered similar discovery requests in bad faith claims. Those Courts concluded that discovery related to “other claims” is irrelevant and immaterial to the question of whether the insurer acted reasonably in handling a particular claim. See, U.S. Fire Ins. Co. v. Clearwater Oaks Bank, 421 So. 2d 783, 784 (Fla. Dist. Ct. App.1982); St. Paul Reinsurance Co. v. Commercial Fin. Corp., 197 F.R.D. 620, 644 (N.D.Iowa 2000); Fidelity and Deposit Co. of Maryland v. McCulloch, 18 F.R.D. 516, 525-26 (E.D.Pa.1996); Leksi v. Federal Ins. Co., 129 F.R.D. 99 (D.N.J.1989); Missouri Pacific Railroad Co. v. Aetna Cas. & Surety Co., 1995 WL 861146, at 2 (N.D.Tex. May 17, 1995).

**Order:**

In accordance with the analysis above, the Department concludes that Nicole Heglin was properly instructed not to answer any questions pertaining to her claim handling practices or claim handling strategies for any other claims to which she had been assigned by the Hartford other than the Timothy Andrews claim. Therefore, Insurer is not required to answer any questions or produce any documents related to any claims other than Claimant’s. This letter shall constitute the Department’s Order in this matter.

Sincerely,

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