March 31, 2009

Wm. Jason Groves
Groves Law Office
PO Box 8417
Rapid City, SD 57709

LETTER DECISION & ORDER

Comet H. Haraldson
Woods, Fuller, Shultz & Smith PC
PO Box 5027
Sioux Falls, SD 57117-5027

RE: HF No. 148, 2006/07 – Karen Wagner v. Rapid City Regional Hospital and Farm Bureau Mutual Insurance Company

Dear Mr. Groves and Mr. Haraldson:

I am in receipt of Employer and Insurer's Motion to Strike Records from Dr. Seljeskog Affidavit, Motion to Strike Records from Dr. Waller Affidavit, and Motion to Strike Records from Angela Karsky, PA-C Affidavit in the above-referenced matter. I am also in receipt of Claimant's letter dated March 19, 2009, and Employer/Insurer's Response in Support of Motions to Strike Records from Affidavits of Angela Karsky, PA-C, Dr. William Waller, and Dr. Edward Seljeskog.

Employer/Insurer moves the Department for an order striking documents and records from the Affidavits of Dr. Seljeskog, Dr. Waller and Angela Karsky, PA-C as those documents and records were not generated by those physicians. Employer/Insurer argues that Claimant is improperly attempting to introduce the records and documents into evidence through these physicians. Employer/Insurer further argues that this is an improper use of hearsay evidence and an improper use of SDCL 19-16-8.2. SDCL 19-16-8.2 states in relevant part,

> In …worker's compensation proceedings, the written report of any practitioner of the healing arts as defined in chapter 36-2 may be used for all purposes in lieu of deposition or in-court testimony of such practitioner of the healing arts provided that the report so offered into evidence has attached to it an affidavit signed by the practitioner of the healing arts issuing such report which verifies that the report constitutes all of his report, and that if called upon to testify he would testify to the same facts, observations, conclusions, opinions and other matters as set forth in

> such report with reasonable medical probability. The affidavit shall include or incorporate an attached exhibit by reference the qualifications of the practitioner of the healing arts whose report is being offered…
>
> Any party may object to the receipt into evidence at trial of such report or any portion thereof on any legal ground other than hearsay…

Claimant argues that while the records and documents attached to the affidavits are not the doctors' opinions, but they are a part of the doctors' files and are included as an evidentiary base which the doctors review in preparation of their own reports. Claimant further argues that SDCL 19-16-8.2 speaks to the admissibility of the opinions of the doctor, but does not exclude the other documents reviewed or the evidentiary basis available to make those opinions.

The rules of evidence apply to administrative proceedings, however SDCL 1-26-19 allows the Department to accept any relevant and credible evidence in written form when the hearing would be expedited and the interests of the parties would not be prejudiced. SDCL 1-26-19(1) provides,

> Irrelevant, incompetent, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied under statutory provisions and in the trial of civil cases in the circuit courts of this state, or as may be provided in statutes relating to the specific agency, shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not otherwise admissible thereunder may be admitted except where precluded by statute if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form[.]

Employer/Insurer admit that many of the operative reports, clinic notes, and progress notes, may be properly introduced elsewhere through the affidavits of the practitioners that generated them or through the practitioner's own testimony.

[O]ur workers' compensation laws and administrative rules are remedial in nature and should be liberally construed to achieve their purposes. *Dudley v. Huizenga*, 2003 SD 84 ¶1, 667 NW2d 644.

> One of the primary purposes of the South Dakota Worker's Compensation Act is to provide an injured employee with a remedy which is both expeditious and independent of proof of fault. In order to accommodate this purpose, worker's compensation procedure is generally as summary and informal as is compatible with

> an orderly investigation of the merits. The whole idea is to get away from the cumbersome procedures ... and to reach a right decision by the shortest and quickest possible route. This informality not only prevents the defeat of claims by technicalities, but simplifies and expedites the achievement of substantially just results.

Sowards v. Hills Materials Co., 94 SDO 826, 521 NW2d 649 (SD 1994)(citations omitted). An order to strike reliable evidence that Employer/Insurer admit would be otherwise admissible with additional affidavits is an extreme remedy. Employer/Insurer's Motions to Strike are denied.

This letter shall serve as the Department's Order.

Sincerely,

Taya M. Dockter
Administrative Law Judge