November 6, 2018

Brad J. Lee
Beardsley, Jensen & Lee Prof. LLC
P.O. Box 9579
Rapid City, SD 57709

LETTER DECISION AND ORDER

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

RE: HF No. 162, 2016/17 – Randy Hveem v. Integrity Management Consulting Services, LLC and Firstcomp Insurance Co.

Dear Mr. Lee and Mr. Shultz:

This letter addresses the following submissions by the parties:

August 23, 2018	Employer/Insurer's Motion for Protective Order
September 12, 2018	Claimant's Response to Employer/Insurer's Motion for Protective Order
October 1, 2018	Employer/Insurer's Reply Brief In Support of Motion

QUESTION PRESENTED: IS EMPLOYER/INSURER ENTITLED TO A PROTECTIVE ORDER BARRING CLAIMANT'S REQUEST FOR DISCOVERY?

FACTS AND PROCEDURAL HISTORY

Claimant, Randy Hveem, filed a petition seeking workers compensation benefits in 2014. As part of his discovery request, Claimant filed a motion to compel production of Employer/Insurer's claims file as well as the case management file on October 18, 2017. Employer/Insurer resisted release of these files arguing that they were work product and contained various privileged documents. The Department conducted an in-camera review of the files. By order dated March 9, 2018, it found approximately 100 pages from the claims file were work product. It also withheld two pages from the case management file which it determined were covered by attorney client privilege.

Claimant later notified Employer/Insurer of his intent to depose Amber Penny, a claims adjuster employed by Insurer. After Insurer refused to make Penny available for deposition, Claimant filed a motion to compel on June 11, 2018. The parties briefed the issue and a telephonic hearing was held before the Department. At that time, Insurer alleged that Amber Penny was no longer an employee of Insurer and lived outside the boundaries of South Dakota. Based on this, the Department opined that it likely did not have the authority to compel Penny to appear at deposition but also indicated this did not preclude Claimant from deposing some other employee of Insurer with knowledge of Claimant's case. The Department denied Claimant's motion to compel by order dated August 8, 2018. Claimant again served a notice on Insurer that it intended on deposing one of its employees regarding Claimant's case. It spelled out a number of questions it intended to ask Employer/insurer including:

1. The facts, information, and all other evidence that Firstcomp Insurance Company gathered and analyzed in making the decision to accept or not accept Randy Hveem's worker's compensation claim as compensable.

2. The basis and evidence why Firstcomp Insurance Company refused to authorize Dr. Ingraham's request on or about November 17, 2014, for approval to perform a lumbar microdiscectomy at L4-5 on Randy Hveem.

3. The evidence and medical opinions that formed the basis for Firstcomp Insurance Company's decision not to approve and pay for Randy Hveem's medical treatment for his low back pain and radicular symptoms prior to his examination with Dr. Hoversten.

4. The evidence and medical opinions that formed the basis for Firstcomp Insurance Company's decision not to approve and pay for Randy Hveem's medical treatment for his low back pain and radicular symptoms prior to his examination with Dr. Hoversten.

5. The basis and reasons why Firstcomp Insurance Company waited over nine months to have Randy Hveem seen by Dr. Hoversten.

6. The evidence and medical opinions that formed the basis for Firstcomp Insurance Company's decision not to approve and pay Randy Hveem indemnity benefits from the date of his injury after his examination with Dr. Hoversten.

7. The evidence and medical opinions that formed the basis for Firstcomp Insurance Company's decision that Randy Hveem was not entitled to temporary total disability benefits from November 24, 2014, through September 10, 2015.

Employer/Insurer filed for a protective order to prevent Claimant from seeking this information. Employer/Insurer argues that the request for this information is not relevant to Claimant's case. It also argues that Claimant was previously denied access for this information by order of the Department. Claimant counters that the information sought is relevant to his case. He also argues that the Department's previous order specifically pertained to files created after a petition was filed. He also argues that Employer/Insurer has failed to show good cause for denying complying with his discovery request. Finally, Claimant argues that Employer/Insurer's amended answer necessitates that he be allowed this information.

ANALYSIS

IS EMPLOYER/INSURER ENTITLED TO A PROTECTIVE ORDER BARRING CLAIMANT'S REQUEST FOR DISCOVERY?

The granting of a protective order is governed by SDCL 15-6-26(c), which provides:

> Upon motion by a party or by the person from whom discovery is sought or has been taken, or other person who would be adversely affected, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending, on matters relating to a deposition, interrogatories, or other discovery, or alternatively, the court in the circuit where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.][1]

A. HARM TO EMPLOYER/INSURER

Claimant asserts that under the Supreme Court's holding in *Bertelsen v. Allstate Ins. Co.,* 2011 S.D. 13, 796 N.W.2d 685, Employer/Insurer has failed to show good cause for a protective order. Specifically, Claimant relies on the Supreme Court's proclamation that "[g]ood cause is established on a showing that disclosure will work a clearly defined and serious injury." Id., at ¶ 57. *Bertelsen* is distinguishable from this case in one respect. *Bertelsen* dealt with the release of trade secrets and other proprietary material. Here, Employer/Insurer do not assert that the information sought are trade secrets but rather information which has previously been protected from discovery. It argues "the Department may grant a protection order to protect Employer

[1] This provision is made applicable to administrative hearings by SDCL 1-26-19.2

and Insurer from having to respond to repeated discovery requests under certain circumstances in which the court finds that justice requires it."

Employer/Insurer contends that no pages were withheld from the claims file before it was turned over to the Department for in-camera review. The Department's previous order remains in force as to the information contained in the pages shielded from previous discovery requests. It determined that this information was work product. Employer/Insurer would suffer considerable harm by being forced to release information which was previously deemed work product. It should not be bombarded by continual attempts by Claimant to chip away at the Department's previous order from other angles.

B. RELEVANCE OF INFORMATION SOUGHT BY CLAIMANT

Since Employer/Insurer has shown good cause not to produce the documents previously excluded from discovery, Claimant must show that production of these files is relevant to his case. SDCL 15-6-26(b)(1) governs discovery. It provides:

> 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.

The Department previously considered a protective order under similar facts in *In Re: Donna M. Chute v. Nifty Fifties, Inc. & Firstcomp*, HF No. 16, 2009/10, 2011 WL 2475185, (S.D. Dept. Lab. June 10, 2011), Claimant requested answers to a number of

interrogatories which were peripheral to her workers compensation petition.

Administrative Law Judge Don Hageman granted the motion, opining:

> In its simplest form, most inquiries in workers' compensation cases are limited to the following: 1) whether claimant suffered an injury which arose out of and in the course of employment. In this case, the answer to this inquiry is yes; 2) whether claimant's work-related injury is a major contributing cause of her current complaint; and 3) whether the treatment sought or provided was reasonable and necessary.
>
> In this case, the majority of Claimant's interrogatories to which Employer and Insurer objected are not reasonably calculated to lead to admissible evidence related to these narrow issues.

Id., at *3.

As in *Chute*, the information requested by Claimant has no relationship to Claimant's case. Claimant must prove the above factors to make a prima facie case for workers compensation benefits. None of the evidence sought by Claimant will reasonably prove an element of this case.

Claimant argues that the evidence he seeks may ultimately be necessary to prove unjust or vexatious refusal of benefits. However, any request for attorney's fees at this juncture is premature. Before Claimant can allege that Insurer unreasonably withheld benefits to which he was due, he first must prove that he was entitled to those benefits.

Claimant also argues that discovery is necessary to prevent Employer/Insurer from creating "sham defenses", and to prevent Employer/Insurer from alleging Claimant did not complain about pain in his back or knee which he attributes to his workplace injury. The Department is not persuaded by these arguments. First, whether or not a particular defense is credible is an ultimate issue for the Department to decide in a

hearing. It is solely within the discretion of Employer/Insurer to put forth whatever defenses it deems credible and necessary. In addition, a record of claimant's subjective accounts of pain is not justification for Claimant to seek potentially privileged material. Just as Claimant could not meet his burden of proof simply by alleging he reported that he suffered pain, neither can Employer/Insurer defend itself by denying that such statements were made to its adjuster.

Finally, Claimant argues that discovery is necessary in light of Employer/Insurer's amended answer in which it alleges Claimant misrepresented his condition or committed willful misconduct. However, Employer/Insurer included an exhibit to its amended answer to support this allegation. Claimant has the right to depose Dr. Elkins about his conclusion. However, beyond that, it is unclear why the other material Claimant seeks is necessary to refute this defense.

CONCLUSION

Employer/Insurer's motion for a protective order is GRANTED as to the questions outlined by Claimant in his notice, as well as any other questions which would require the Employer/Insurer to disclose information included in the previously protected claims file information.

Sincerely,

/s/ Joe Thronson
Joe Thronson
Administrative Law Judge