November 14, 2013

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Letter Decision and Order

Timothy J. Becker
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RE: HF No. 181, 2012/13 – Michael Dudash v. City of Rapid City and Berkley Risk Administrators Co., LLC

Dear Mr. Lee and Mr. Becker:

Submissions:

This letter addresses the following submissions by the parties:

September 9, 2013	[Claimant's] Motion to Compel;
	[Claimant's] Memorandum in Support of Motion to Compel Discovery and Production of Documents;
	Affidavit of Brad J. Lee
October 11, 2013	City and Third Party Administrator's Opposition to Claimant's Motion to Compel Production of Documents;
	Affidavit of Timothy J. Becker
October 22, 2013	[Claimant's] Reply in Support of Motion to Compel Discovery and Production of Documents.

Facts:

This letter addresses the following facts as reflected by the above submissions:

1. Michael Dudash (Dudash) began working for the Street Department of the City of Rapid City (City) in 2001. Over the course of the ensuing 10 years, Dudash was promoted to Street Maintenance Operator 3.

2. On June 21, 2011, Dudash was driving his motorcycle back from an event paid for by the City. A van pulled out in front of him, causing Dudash to “lay his bike down". Dudash slid into the van and struck his head on the tire of the van.

3. Following the accident, Dudash was taken to the emergency room for treatment of his injuries.

4. Dudash received follow-up treatment at Rapid City Health Center. Ultimately, Dudash underwent a CT scan and MRI studies. The results of these tests were all negative.

5. After the collision, Dudash began suffering from headaches and exhibited difficulty speaking, decreased motor skills, anxiety, and depression.

6. Dudash returned to work following the accident but was taken off duty two days later with concussion-like symptoms.

7. Dudash’s claim for workers’ compensation was handled by Teresa Boe (Boe), who was employed by Berkley Risk Administrators Co.’s, LLC (Berkley), nurse case manager, Lori Schaefbauer (Schaefbauer) and City Risk Manager Keith L'Esperance.

8. On August 29, 2011, Dudash was seen by Dr. Brian Tschida, a Board Certified Neurologist at Black Hills Neurological. Tschida’s assessment of Dudash noted headaches, nausea, some blurring of vision, decreased memory, and episodic shaking. Dr. Tschida prescribed medication for Dudash’s headaches and removed him from work duty.

9. On September 14, 2011, Dr. Anderson performed an independent medical evaluation (IME) of Dudash and determined that the collision was a major contributing cause of his headaches and that Dudash could try to perform sedentary work. Dr. Anderson later took Dudash off work when his attempt to return caused him to vomit and admit himself to the emergency room.

10. Dudash was then sent to Sioux Falls for a neuropsychological evaluation with clinical psychologist Michael J. McGrath. On October 4 & 5, 2011, Dr. McGrath evaluated Dudash. Dr. McGrath opined that Dudash's motorcycle collision was a

major contributing cause of his "chronic headaches, disrupted lifestyle, and frustration associated with limitations imposed upon him by his injuries."

11. The City hired a private investigator to conduct surveillance of Dudash from September 12, 2011, through August 17, 2012.

12. In late 2011, the City cancelled Dudash's appointments with his neurologist, Dr. Tschida, and referred him to Dr. Lawlor for general pain treatment.

13. Dudash maintained limited hours doing the types of work he was able to do throughout 2011 and into 2012. On July 25, 2012, Dr. Lawlor authorized an incremental increase in Dudash's hours with some restrictions to see if he could tolerate the additional hours.

14. The City sent Dudash to Dr. Thomas Ripperda, in Sioux Falls. It was Dr. Ripperda's opinion that Dudash was able to perform a medium to light duty position on a full time basis.

15. On June 26, 2012, Dudash underwent a Functional Capacity Exam (FCE) which indicated Dudash was incapable of sustaining the medium level of work for an 8-hour day.

16. On May 13, 2013, the City terminated Dudash's employment for erratic driving.

17. Dudash arranged to get treatment at the University of Colorado Hospital. The City and Berkley refused to authorize any treatment with these doctors, so Dudash used his private health insurance and personal money to travel to Colorado. On June 14, 2013, Dudash was diagnosed with a Functional Neurological Disorder (FND) by Dr. Eryn Lonnquist, a neurologist at the University of Colorado Hospital. Lonnquist noted that all of Dudash's symptoms, including his stuttering and problems walking are likely caused by a FND related to his June 21, 2011 accident.

18. Dudash filed a Petition for Hearing dated May 22, 2013, with the Department seeking permanent total disability benefits along with past and future medical expenses.

19. On June 18, 2013, City and Berkley answered Dudash's Petition for Hearing.

20. On June 27, 2013, the Claimant served his first set of Interrogatories and Requests for Production of Documents on the City. Requests for Production of Documents numbers 12 and 13 state:

    12. Claimant's entire file with Third-Party Administrator, including any and all:

        (a) Correspondence;

(b) Time sheets;
(c) Pay receipts;
(d) Records of hours worked and work schedules;
(e) Notes;
(f) Reports;
(g) Emails;
(h) Photographs; and
(I) Other relevant documents regarding Claimant.

13. Claimant's entire file with the Medical Case Manager, including any and all:

(a) Correspondence;
(b) Time sheets;
(c) Pay receipts;
(d) Records of hours worked and work schedules;
(e) Notes;
(f) Reports;
(g) Emails;
(h) Photographs; and
(I) Other relevant documents regarding Claimant.

21. City and Berkley objected to the requests for production 12 and 13, claiming that they were prepared in anticipation of litigation. Nevertheless City and Berkley provided a redacted copy of the documents and a Vahn List reaffirming its previous objection to the discovery.

22. On September 9, 2013, Dudash filed a Motion to Compel.

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

Motion to Compel:

This letter addresses Dudash's Motion to Compel. Discovery in South Dakota workers' compensation cases is governed by SDCL 1-26-9.2. That statute states:

> 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 1-26-9.2.

The South Dakota Supreme Court has stated:

> Discovery rules are designed "to compel the production of evidence and to promote, rather than stifle, the truth finding process." Magbuhat v. Kovarik, 382 N.W.2d 43, 45 (S.D.1986) (citing Chittenden & Eastman Co. v. Smith, 286 N.W.2d 314, 316 (S.D.1979)). The purpose of workers' compensation is to provide for employees who have lost their ability to earn because of an employment-related accident, casualty, or disease. Rawls v. Coleman-Frizzell, Inc., 2002 SD 130, ¶ 19, 653 N.W.2d 247, 252.

Dudley v. Huizenga, 2003 SD 84, ¶ 11, 667 NW2d 644. 648.

The Supreme Court also stated in Kaarup v. St. Paul Fire and Marine Ins. Co., 436 N.W.2d 17, 19-20 (S.D. 1989):

> We previously concurred with the United States Supreme Court's construction of the discovery rules set forth in the seminal case of Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). State By and Through Dept. Of Transp. v. Grudnik, 90 S.D. 571, 243 N.W.2d 796 (1976). The Supreme Court stated in Hickman, supra:
>
> > …the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise. But discovery, like all matters of procedure, has ultimate and necessary boundaries.
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> 329 U.S. at 507, 67 S.Ct. At 392, 91 L.Ed. at 460.

Dudash's motion was filed when City and Berkley provided a redacted copy of their claims files in response to Dudash's request for production of documents. City and Berkley objected to the production of the claims files, particularly, the redacted portions of those documets, arguing that they were shielded from discovery.

City and Berkley's argument is three pronged. First, they argue that the documents are not relevant in this case. Second, they argue that the documents are protected by the attorney work product doctrine because they were prepared in anticipation of litigation. Finally, they argue that Dudash has not made a showing of hardship.

Relevancy:

The South Dakota Supreme Court discussed the relevancy of documents in discovery requests in Kaarup v. St. Paul Fire and Marine Ins. Co., 436 N.W.2d 17, 20 (S.D. 1989). There it stated:

> The proper standard for ruling on a discovery motion is whether the information sought is "relevant to the subject matter involved in the pending action ...." SDCL 15-6-26(b)(1). This phraseology implies a broad construction of "relevancy" at the discovery stage because one of the purposes of discovery is to examine information that may lead to admissible evidence at trial. 8 C. Wright and A. Miller, supra, § 2008.

Id.

The subject matter of this case deals with the questions of the compensability of the injury, the nature and extent of the injury and permanent total disability. Any facts that tend to prove or disprove these questions are admissible at hearing. There is no question that the claims files at issue here contain such facts. These facts are the basis of the City and Berkley's decision to accept or deny responsibility for the medical treatment of Dudash's condition. Therefore, examination of those files may lead to the discovery of admissible fact and are discoverable unless the information is otherwise privileged. SDCL 15-6-26(b)(1).

Attorney Work Product:

The work product doctrine is discussed by the South Dakota Supreme Court in Kaarup, 436N.W.2d 17 at 21. There it stated:

> An attorney's 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)...." 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." 8 C. Wright and A. Miller, supra, § 2024 at 198.

Id.

First, it must be stated that the purpose of workers' compensation laws are to provide benefits to injured employees. Consequently, litigation is not the primary function of the City or Berkley when dealing with workers' compensation claims. Their primary duty of all insurers, including the City in this case, is to process, investigate and when

appropriate provide the benefits sought by the injured employee. Further, the primary function of claims files is not to assist the Insurer's attorney during litigation. It is to document the progress of a claim as it moves through the claims process. A potential for litigation only exists after sufficient facts are uncovered in the investigation to throw the compensability of the claim in doubt.

In this case the City and Berkley argue that they anticipated litigation early because there were no objective medical findings to account for Dudash's pain. The Department finds this argument to be unpersuasive. Our law does not require objective findings in order to sustain a workers' compensation claim. Vollmer v. Wal-Mart Store, Inc., 2007 S.D. 25, ¶ 25, 729 N.W.2d 377. Pain by its nature is subjective. Yet, pain can be the basis for awards of permanent total disability benefits. [1]

It is difficult to image a situation where an insurer could realistically anticipate litigation while the claim is being investigated and benefits paid. The prospect of litigation is unlikely to arise until the insurer has obtained a medical opinion or accumulated enough facts to justify a denial of coverage of the claim. Even then, there is no reason to believe that the claimant will not accept the denial as the correct, absent some indication from the claimant that he or she believes that the insurer's denial was made in error.

The City's investigation of Dudash's claim continued until at least August 17, 2012, when the private investigator concluded his surveillance. However, the City apparently continued to pay for medical treatment beyond that date. While the City cancelled a couple of appointments in late 2011, they sent him to Dr. Lawlor, thereby continuing to pay some benefits. The City then refused to pay for treatment at the University of Colorado Hospital, but there is no indication that all future medical treatment would be denied. The most definitive date that litigation was a real possibility that can be gleaned from the submissions is May 22, 2012, when Dudash filed his Petition for Hearing. Moreover, there is no indication that an attorney was involved in this case, on behalf of the City and Berkley, prior to that time. While the work product protection does extend to documents prepared by other parties, the protections is premised on the idea that the document is prepared as part of the attorney's preparation for trial. Therefore, the Department finds that the case files prior to the filing of the Petition for Hearing are not work product.

Hardship:

Finally, the City and Berkley argue that Dudash has not shown that acquiring the information would cause him unnecessary hardship. However, that requirement is only effective if material is work product. In light of the decision above, the lack of hardship

[1] "Obvious unemployability may be shown by: (1) showing that his physical condition, coupled with his education, training, and age make it obvious that he is in the odd-lot total disability category, or (2) persuading the trier of fact that he is in fact in the kind of continuous, severe and debilitating pain which he claims."(emphasis added) Fair v. Nash Finch Co., 2007 S.D. 16, ¶ 19, 728 N.W.2d 623

only applies to those redactions following the date of the Petition for Hearing. Consequently, those redactions need not be produced.

Order:

In accordance with the decision above, Dudash's Motion to Compel is granted in part. City and Berkley shall produce an unredacted copy of their claims files prior to the filing of Dudash's Petition for Hearing. This letter shall constitute the order in this matter.

Sincerely,

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