

January 13, 2021

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RE: HF No. 53, 2019/20 – State Auto Insurance Companies v. Aaron Hansen

Dear Mr. Shultz and Mr. Culhane,

This letter will address Insurer's Motion for Terms and Claimant's Motion for Attorney's Fees and Disbursements. All responsive briefs have been considered. Aaron Hansen (Claimant) was driving when his vehicle was rear-ended by a semi-tractor and trailer on February 21, 2019. His blood alcohol level was .055. Claimant's supervisor, Eric Meyer (Meyer) was a passenger in the vehicle. Both men were injured. State Auto Insurance Companies (Insurer) filed a Petition for Hearing alleging that Claimant was not in the course and scope of his employment at the time of the accident. Claimant filed a Motion to Dismiss the Petition, which was denied by order dated May 20, 2020.

On October 6, 2020, counsel for Insurer, J.G. Shultz (Shultz) traveled to Watertown, South Dakota from Sioux Falls, South Dakota to attend the noticed deposition of Claimant. When Shultz appeared at the deposition, he discovered that in attendance were not only Claimant and his attorney, Seamus Culhane (Culhane), but also Meyer. The deposition did not proceed because Culhane refused to instruct Meyer to sequester himself from the deposition. The present motions followed.

Insurer argues that under SDCL 19-19-615, a request for sequestration of witnesses would be granted to any person unless one of the listed exceptions applied. SDCL 19-19-615 provides,

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

- (a) A party who is a natural person;

- (b) An officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;
- (c) A person whose presence a party shows to be essential to presenting the party's claim or defense;
- (d) A person authorized by statute to be present; or
- (e) A victim of a crime and his parent or guardian following the victim's testimony.

Insurer asserts that none of the exceptions listed in SDCL 19-19-615 apply to Meyer, and therefore, Culhane should have instructed him to leave the deposition. Insurer further alleges that Culhane acted with incivility following Shultz's request by telling him to "pound sand." Insurer also asserts that having Meyer present was an attempt to influence Claimant's testimony, and therefore, the deposition did not proceed. Insurer requests the Department of Labor & Regulation grant it terms under SDCL 15-6-30(d) which states,

- (3) If the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.

Insurer requests costs of travel, attorneys' fees, and reporter costs for times spent at the attempted deposition.

Claimant responds that sequestration was not required as there had not been an official sequestration order requested nor entered, and that Insurer cannot show good cause to exclude Meyer from Hansen's testimony. Claimant argues that the provisions of SDCL 15-6-26(c) require that if Insurer wished to limit discovery in some way, they must first have conferred with Claimant in good faith to resolve the matter. Claimant asserts that SDCL 15-6-26(c) is the appropriate law in this matter because through that statute the Department could order that discovery be conducted with no one present except persons designated by the court. See *SDCL 15-6-26(c)(5)*. Claimant further argues that as a representative of Meyer & Associates, Meyer could not be excluded from the testimony, and that he falls under the exceptions of 19-19-615, specifically, 19-19-615(a) and (d). Claimant asserts that the sequestration was merely requested by counsel under SDCL 19-19-615 and not ordered by the Court as would be done under SDCL 15-6-26(c). Claimant believes he should be compensated for attorney's fees and costs associated with the attempted deposition under SDCL 15-6-30(g)(1) which states, in pertinent part,

If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the

court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by that party and that party's attorney in so attending, including reasonable attorney's fees.

Claimant argues that Insurer failed to proceed with the noticed deposition, and therefore, he is entitled to expenses under the statute.

Insurer responds that Shultz did attend but could not go forward with the deposition as it was impeded by Culhane's conduct. Therefore, Insurer argues, SDCL 15-6-30(g)(1) does not apply. Additionally, Insurer argues that Culhane's decision not to reveal his intent to have Meyer attend the deposition resulted in an ambush, and if it had been revealed beforehand, they could have discussed the matter. Additionally, Insurer argues that Culhane was unwilling to discuss the application of SDCL 19-19-615 and merely dismissed it as inapplicable.

The Department finds Claimant's good faith arguments to be without merit. Claimant asserts that Insurer should have attempted to resolve the discovery issue in good faith. However, Culhane's decision not to inform Shultz that he intended to have Meyer attend the deposition was not acting in good faith. Had Culhane notified Shultz that he intended to have Meyer attend Claimant's deposition, Shultz would have had the opportunity to discuss the matter with Claimant and, if they could not resolve the issue themselves, seek a protective order under SDCL 15-6-26(c) to avoid unnecessary expense. Instead, Culhane chose to reveal Meyer at the deposition and then refused to sequester him. Sequestration under SDCL 19-19-615 would have resolved the issue and allowed the deposition to proceed without prejudice to either party. In addition to refusing to sequester Meyer, Culhane also refused to engage in discussion about the applicability of SDCL 19-19-615 nor did he raise alternative legal support for Meyer's attendance at the deposition. Neither Meyer nor Meyer and Associates are named parties in this matter. Therefore, he is not a natural person for purposes of Hansen's Petition for Hearing. The Department is also not persuaded that Meyer is authorized by statute to be present.

Authority to impose fees is granted under SDCL 15-6-30(d) which provides, in pertinent part,

(3) If the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.

The Department's specific authority to sanction is provided under ARSD 47:03:01:05.02, which states,

If any party fails to comply with the provisions of this chapter, the Division of Labor and Management may impose sanctions upon such party pursuant to SDCL 15-6-37(b).

However, attorney fees may be imposed only for a violation of a discovery order.

ARSD 47:03:01:05.02 and SDCL 15-6-37(b) permit the Department to require fees be paid only in instances where there has been a violation of an order. In this matter, the Department made no order regarding Claimant's deposition. Therefore, the Department lacks the authority to grant fees or costs to either party.

Order:

In accordance with the conclusions above, Insurer's Motion for Terms is DENIED

Claimant's Motion for Attorney's Fees and Disbursements is DENIED

This letter shall constitute the Department's order in this matter.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

Michelle M. Faw