SOUTH DAKOTA DEPT. OF LABOR & REGULATION

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VIA EMAIL

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DECISION ON EMPLOYER AND INSURER'S MOTION TO STRIKE and CLAIMANT'S 2ND MOTION FOR SUMMARY JUDGMENT

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RE: HF No 62, 2018/19 – Andrew Cox v. Prinsco, Inc. and American Contractors Insurance Group (ACIG)

Greetings:

This letter decision addresses Employer and Insurer's Motion to Strike or Alternative Motion to Allow Discovery and Provide Supplemental Expert Opinion and Claimant's 2nd Motion for Summary Judgment. All responsive briefs have been considered.

Prinsco, Inc. (Employer) and American Contractors Insurance Group (Insurer) have moved to strike a portion of the opinion of Dr. Reynolds. On August 27, 2021, Andrew Cox (Cox) served his Designation of Experts which included a response (Response) from Dr. Reynolds. In the Response, Dr. Reynolds neglected to provide the date at which he believed Cox reached maximum medical improvement (MMI). On

December 21, 2022, Cox provided an additional document from Dr. Reynolds clarifying the date he reached MMI as April 30, 2019. Employer and Insurer assert that the inference from Dr. Reynolds's initial Response was that he did not know or had no opinion of when Cox achieved MMI and that the update is a new expert medical opinion specifying the date. They assert that Dr. Reynolds's opinion on the date of MMI should be struck pursuant to SDCL 15-6-37(c)(1).

The South Dakota Supreme Court (Court) has held that "proceedings under Work[er's] Compensation Law . . . are purely statutory, and the rights of the parties and the manner of procedure under the law must be determined by its provisions." *Martin v Am. Colloid Co.,* 2011 S.D. 57, ¶ 12, 804 N.W.2d 65, 68. (Citing *Caldwell v. John Morrell & Co.,* 489 N.W.2d 353, 364 (S.D.1992)). However, "[t]he Department of Labor frequently observes the rules of civil procedure, particularly when … the parties are represented by excellent legal counsel. The rules of civil procedure provide litigants with the benefit of centuries of evolving jurisprudence. These rules are time tested and have weighed the conflicting policies confronted while litigating cases." *Homan v. Wal-mart & Am. Home Assurance Co*, 2009 WL 3199118, at *3 (S.D. Dept. Lab. Sept 30, 2009). In this matter, both parties are represented by counsel and the Department concludes that looking to the rules of civil procedure will be particularly helpful in resolving this matter.

In the *Weber* case, the Court considered SDCL 15-6-37(c)(1).

> The provisions of SDCL 15-6-26(e) further impose a continuing obligation upon parties to supplement their earlier responses if they were either incomplete or "if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." SDCL 15-6-26(e)(1)-(2).

> Included among the broad range of sanctions available to circuit judges who determine a party has failed to properly supplement its earlier discovery responses is the express authority to exclude the evidence that was not disclosed. However, this authority is tempered by the requirement that the court assess the violation for harmlessness:
>
> > A party that without substantial justification fails to disclose information required by subdivision 15-6-26(e)(1), or to amend a prior response to discovery as required by subdivision 15-6-26(e)(2), is not, *unless such failure is harmless*, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions.
> >
> > SDCL 15-6-37(c)(1) (emphasis added).
>
> Here, even if Weber failed to seasonably amend or supplement his response to the Appellants' interrogatory seeking expert witness information, Weber did timely disclose Wagner and Drs. Bosch and Janssen as experts pursuant to the court's scheduling order on October 30, 2017.

Weber v. Rains, 2019 S.D. 53, ¶¶ 24-26, 933 N.W.2d 471, 478–79 (Emphasis original)

> Against this legal and factual backdrop, we are unable to accept the Appellants' principal argument that they were “ambushed” at trial with expert medical testimony that Weber's injuries were permanent. Nor can we safely proceed on the Appellants' view that a discovery violation necessarily occurred and move directly to the prejudice considerations we set out in *Papke v. Harbert*, 2007 S.D. 87, ¶ 55, 738 N.W.2d 510, 529.

Id. at ¶ 27.

Applying the Court’s analysis to this matter, the Department cannot conclude that failing to provide the date of MMI is harmless pursuant to SDCL 15-6-37(c)(1). Without a date, Employer and Insurer were unable to respond to Dr. Reynolds’s opinion on MMI.

The Department will therefore proceed to the issue of prejudice in relation to the date opinion.

In *Papke*, the Court stated,

> [In *Kaiser]* We recognized that the purpose of pretrial discovery is to allow "the parties to obtain the fullest possible knowledge of the issues and facts before trial." Therefore, a litigant is "under a duty to seasonably [ ] supplement [its] response with respect to any question directly addressed to ... the subject matter on which [the litigant] is expected to testify, and the substance of this testimony." Under SDCL 15–6–37(b), sanctions may be imposed by a court for a party's failure to supplement responses. (one sanction identified is to exclude the proffered testimony). The purpose of a sanction, the Kaiser Court recognized, is " 'to compel production of evidence and to promote, rather than stifle, the truth finding process.' "

Papke at ¶ 55 (Internal citations omitted).

> In Kaiser, we noted three areas of concern: (1) the time element and whether there was bad faith by the party required to supplement; (2) whether the expert testimony or evidence pertained to a crucial issue; and (3) whether the expert testimony differed substantially from what was disclosed in the discovery process.

Id. at ¶ 56.

The Department will apply the three-part analysis provided in *Papke*. First, the Department concludes that Cox was not acting in bad faith. In the Response, Dr. Reynolds indicated that yes, Cox had reached MMI, but he then neglected to indicate when it had been reached. Employer and Insurer have stated that they inferred from the Response that Dr. Reynolds did not know or had no opinion on when Cox reached MMI. The pertinent question in the Response was actually a two-fold inquiry presented in a "mark the box" format. The first question was "Has your patient reached maximum medical improvement?" Dr. Reynolds marked by the word "yes." The second question, "On what date?" Dr. Reynolds did not provide a date. Instead of merely assuming what

Dr. Reynolds intended by not providing an answer, Cox chose to ask for clarification. The Department considers it reasonable to do so and that it was not bad faith. The remaining issues of the time element, whether the addition of the date pertains to a crucial issue, and whether it differs substantially from what was disclosed in the discovery process will be considered together.

> In *Papke*, the Court applied the three-part analysis to the testimony of a doctor.
>
> > Dr. Goetz's opinion on causation was not disclosed during the discovery process. Not until the morning of his testimony was Papke notified that he even held an opinion on causation. In *Kaiser,* the expert expressed an opinion during the discovery process, but then in trial used new evidence to support that opinion, evidence that was untimely submitted. Here, Dr. Goetz gave no opinion on causation during the discovery process. His late revelation is more troubling than the one in *Kaiser.* Secondly, the issue of causation went to the heart of Papke's case, as she had to prove that defendants' conduct proximately or legally caused her injuries. Thus, the testimony pertained “to a crucial issue.” Finally, because Dr. Goetz did not have an opinion on causation during his deposition, and then expressed an opinion on causation at trial, his testimony differed substantially.

Id. at 87 (Citations omitted)

In the Response, Dr. Reynolds’s indicated he had an opinion as to whether Cox had reached MMI when he marked an “x” in the space indicating the answer “yes.” Cox contends that the failure to provide a date was simply an oversight on the part of Dr. Reynolds and clarification does not prejudice Employer and Insurer who already retained their own expert to opine on the matter of MMI. He also asserts that Employer and Insurer have been provided with all of the medical records and could have sought depositions from his medical expert at any time they deemed necessary. Cox further argues there is no prejudice against Employer and Insurer and no need to reopen

discovery to allow additional expert opinion when their expert, Dr. Melin, already addressed the MMI issue.

Employer and Insurer assert that the opinion of Dr. Reynolds is late. They argue that Cox offered the Response along with his Motion for Summary Judgment dated May 16, 2022, as an opinion upon which he intended to rely for his claims for temporary total disability benefits (TTD) and permanent partial disability benefits (PPD), and he should not be able to provide a new medical opinion regarding the same claims. Additionally, Employer and Insurer further assert that Cox had access to the January 20, 2022, opinions of Dr. Melin, but did not seek Dr. Reynolds's opinion on the date of MMI until 2023. They argue Cox's attempt to solicit a new opinion did not come about until two weeks after their December 9, 2023, letter to the Department outlining their position on TTD and referring to Dr. Melin's opinion on that analysis. They conclude that Cox should not be allowed to produce an expert opinion dated January 11, 2023, in support of his 2022 Motion for Summary Judgment.

Unlike the doctor in *Papke* who did not provide an opinion prior to trial, Dr. Reynolds did provide an opinion on whether Cox had reached MMI. His opinion as to the *date* that Cox reached MMI, however, is new evidence that significantly affects the calculation of benefits to which Cox may be entitled. Therefore, while the opinion does not affect the previously decided causation issues, it is crucial to the issues still before the Department. The addition of the date is consistent with the fact that Dr. Reynolds indicated he had an opinion on Cox reaching MMI. However, it is inconsistent in that there was no opinion on the date and now there is an opinion on the date.

The Department concludes that while Employer and Insurer would experience prejudice if the clarification to the Response was allowed, the prejudice is mitigated by allowing them time to seek additional information, including an additional expert opinion regarding maximum medical improvement. Further, as the date that Cox reached MMI is crucial to the facts addressed in his 2nd Motion for Partial Summary Judgment, it is necessary to stay the decision on the motion until additional information has been provided.

It is hereby ORDERED that Employer and Insurer's Motion to Strike is DENIED.

It is further ORDERED that Employer and Insurer's Alternative Motion to Allow Discovery and Provide Supplemental Expert Opinion is GRANTED.

It is further ORDERED that Employer and Insurer may have until August 18, 2023, to seek additional information on the issue of MMI. They then will have an additional 20 days to provide a supplemental brief to the Department in response to Cox's motion. Cox will then have 15 days to offer a final reply.

It is further ORDERED that Claimant's 2nd Motion for Summary Judgment is stayed until such time as the above supplemental briefing has been received by the Department or the briefing schedule time has run.

The parties shall consider this decision the order of the Department.

Sincerely,

Michelle M. Faw
Administrative Law Judge