June 26, 2008

LETTER ORDER

Raymond Matthews sent certified:
760 D&R Avenue
Box Elder, SD 57719

Charles A. Larson
Boyce, Greenfield, Pashby, & Welk, L.L.P.
PO Box 5015
Sioux Falls, SD 57117-5015

RE: HF No. 68, 2007/08 – Raymond L. Matthews v. National American University and Travelers Insurance

Dear Mr. Matthews and Mr. Larson:

The Department is in receipt of Claimant's Motion to Compel Discovery, Employer/Insurer's response thereto, and Claimant's reply.

Employer/Insurer moves the Department pursuant to SDCL 15-6-37(a)(2) for an order compelling Claimant to answer Employer/Insurer's Interrogatories and Request for Production of Documents. Employer/Insurer also seeks its costs and attorney fees incurred in obtaining the discovery order.

This matter is governed by SDCL Title 62, The South Dakota Workers' Compensation Law, and SDCL Chapter 1-26, Administrative Procedures. SDCL 1-16-19.2 specifically governs discovery and provides:

> 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 15-6-26(a) provides the available discovery methods:

Parties may obtain discovery by one or more of the following methods:

depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under § 15-6-26(c), the frequency of use of these methods is not limited.

SDCL 15-6-26(b) governs the scope of discovery, and provides:

(1) In general. 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 frequency or extent of use of the discovery methods set forth in § 15-6-26(a) shall be limited by the court if it determines that:

(A)(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(iii) discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the party's resources, and the importance of the issues at stake in the litigation.

The court may act upon its own initiative after reasonable notice or pursuant to a motion under § 15-6-26(c).

(2) Insurance agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for

insurance shall not be treated as part of an insurance agreement.

(3) Trial preparation: materials. Subject to the provisions of subdivision (4) of this section, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (1) of this section and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including such other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of subdivision 15-6-37(a)(4) apply to award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial preparation: experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (4)(C) of this section, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in § 15-6-35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (4)(A)(ii) and (4)(B) of this section; and (ii) with respect to discovery obtained under subdivision (4)(A)(ii) of this section the court may require, and with respect to discovery obtained under subdivision (4)(B) of this section the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Employer/Insurer served Claimant with Interrogatories. Claimant responded to the Interrogatories. Employer/Insurer has made a Motion to Compel Discovery, arguing that Claimant's answers are insufficient. Each Interrogatory in question will be addressed separately.

SDCL 15-6-33 governs Interrogatories to Parties and provides, in part:

SDCL 15-6-33(a):

> Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.
>
> Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state

the reasons for the objection and shall answer to the extent the interrogatory is not objectionable. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections, if any, within thirty days after the service of the interrogatories, except that a defendant may serve answers or objections within forty-five days after service of the summons and complaint upon that defendant. A shorter or longer time may be directed by the court or, in the absence of such order, agreed to in writing by the parties. All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown. The party submitting the interrogatories may move for an order under § 15-6-37(a) with respect to any objection to or other failure to answer an interrogatory. A party answering interrogatories must set out the interrogatory immediately preceding the answer thereto.

SDCL 15-6-37(a) provides:

A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) Appropriate court. An application for an order to a party may be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the circuit where the discovery is being, or is to be, taken.

(2) Motion. If a deponent fails to answer a question propounded or submitted under § 15-6-30 or 15-6-31, or a corporation or other entity fails to make a designation under subdivision 15-6-30(b)(6) or § 15-6-31(a), or, a party fails to answer an interrogatory submitted under § 15-6-33, or if a party in response to a request for inspection submitted under § 15-6-34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(3) Evasive or incomplete disclosure, answer, or response. For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(4) Expenses and sanctions.

(A) If the motion is granted or if the requested discovery is provided after the motion was filed, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorneys' fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response or objection was substantially justified or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under § 15-6-26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorneys' fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under § 15-6-26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

Interrogatory 2:

Transcripts and/or notes of any meetings or discussion carried on by National American University supervisors or human resource personnel concerning my injury at work.

Answer:

This discovery request is objected to on the basis that it violates the permissible scope of discovery in South Dakota as it invades the attorney/client privilege and the attorney/work product doctrine. Notwithstanding the objection, and without waiving the objection, Employer and Insurer state there are not applicable documents.

Claimant did not include this request in his Motion, but included it in "Claimant's rebuttal to Employer and Insurer response". Employer/Insurer answered without waiving it objections that there are no applicable documents.

Interrogatory 5 (should be 3) [sic]:

Transcripts and/or notes of the meetings held by human resources which resulted in denying me the same internet access that was granted to many other NAU employees on leave of absence.

Answer:

This discovery request is objected to on the grounds that it exceeds the permissible scope of discovery as the document request is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Notwithstanding said objection, and without waiving the objection, see documents attached under Tab 3.

Claimant argues that he is seeking and must have the "entire record concerning this matter" from Employer/Insurer. The entire claims file of an insurance company is not typically given to an injured worker. The reason for this is that the law recognizes a privilege in some of the information the insurance company puts in the file. The privilege is "waived" or taken away if the insurance company wishes to use some of this privileged information in defense against a claim or lawsuit. Employer/Insurer has answered this Interrogatory.

Interrogatory 4

Transcripts and/or notes of the interrogations of Geri Reed, a former NAU employee, who was a witness to my accident, by NAU supervisory staff and also by Travelers Insurance.

Answer:

This discovery request is objected to on the grounds that it invades the attorney/client privilege and also the attorney/work product doctrine.

Employer/Insurer's objections are sustained as to Claimant's discovery request.

Interrogatory 5

In a letter than [sic] Ben Peck accidentally sent me, he mentioned the hazards of "Being in a Bad Faith City over there: no. I need to know the number of "Bad Faith" complaints or actions that have been registered against Ben Peck individually and/or Travelers Insurance as a group in South Dakota.

Answer

This discovery request is objected to on the basis that it exceeds the permissible scope of discovery as it seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Furthermore, this

discovery request is objected to on the grounds that it is vague and overly burdensome.

Employer/Insurer's objections are sustained. The issues and the Department's authority in this matter do not extend to "bad faith" claims. This information is obtainable from the court system(s) where the "bad faith" actions took place.

Interrogatory 6

I need the number of complaints filed against Dr. Paul Cederberg of Minneapolis, MN who is a paid contract examiner for Travelers Insurance. This number needs to include all complaints to any State Medical Examiner's Office or court system in any state where Dr. Cederberg does examinations or has practiced medicine in any manner.

Answer:

This discovery request is objected to on the basis that it exceeds the permissible scope of discovery as it is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Furthermore, this discovery request is overbroad and unduly burdensome.

Employer/Insurer's objection that this Interrogatory "exceeds the permissible scope of discovery" is overruled. Employer/Insurer's objection that this request is overbroad and unduly burdensome is sustained. Claimant has failed to make the requisite showing that this information is not available by other means.

Claimant also seeks discovery of "transcripts, notes, letters, interviews, recordings of any kind, and any other documents or evidence gathered by any investigative service concerning" Claimant. Claimant is entitled to surveillance footage, but not "transcripts, notes, letters, or other documents or evidence" as those constitute work product and are likely privileged as well. When the Department has ruled that surveillance materials should be produced, it has been with the caveat that Employer/Insurer is entitled to take Claimant's deposition before producing the material. Employer/Insurer shall provide the surveillance material within 30 days after a transcript of Claimant's deposition is delivered to Employer/Insurer or 30 days after receipt of this letter order.

Claimant's requests for attorney fees and medical expenses are denied at this time.

Sincerely,

Heather E. Covey
Administrative Law Judge