

August 8, 2008

VIA FACSIMILE TRANSMISSION  
AND FIRST CLASS MAIL

**LETTER DECISION and ORDER**

Jeff Cole  
Zimmer, Duncan & Cole LLP  
PO Box 5503  
Parker, SD 57053-0550

Jennifer L. Wollman  
Woods, Fuller, Shultz, & Smith P.C.  
PO Box 5027  
Sioux Falls, SD 57117-5027

RE: HF No. 91, 2006/07– William Kreis v. American Foods Group and Zurich  
American Insurance Co.

Dear Mr. Cole and Ms. Wollman:

This letter addresses the following submission by the parties:

May 27, 2008	[Claimant's] Motion to Compel, Motion to Deem Request for Admissions Admitted, or in the Alternative, to Require Further Response, and for Attorney's Fees
May 27, 2008	Brief in Support of [Claimant's] Motion to Compel and in Support of Motion to Deem Request for Admissions Admitted, or in the Alternative, to Require Further Response
May 27, 2008	Affidavit in Support of [Claimant's] Motion to Compel and in Support of Motion to Deem Request for Admissions Admitted, or in the Alternative, to Require Further Response (with 15 Exhibits attached)
May 27, 2008 June 13, 2008	Affidavit in Support of [Claimant's] Motion for Attorney's Fees Employer and Insurer's Response to Claimant's Motion to Compel, Motion to Deem Request for Admissions Admitted, or in the Alternative, to Require Further Response and Motion for Protective Order
June 20, 2008	Reply Brief to Employer and Insurer's Response to Claimant's

	Motion to Compel, Motion to Deem Request for Admissions Admitted, or in the Alternative, to Require Further Response and Motion for Protective Order
June 20, 2008	Motion to Allow Claimant to Videotape Employer and Insurer's Independent Medical Examination
June 20, 2008	Brief in Support of Motion to Allow Claimant to Videotape Employer and Insurer's Independent Medical Examination
July 2, 2008	Employer and Insurer's Motion to Extend Expert Disclosure Deadline
July 2, 2008	Affidavit of Jennifer L. Wollman
July 2, 2008	Employer and Insurer's Response to Motion to Allow Claimant to Videotape Employer and Insurer's Independent Medical Examination and Motion to Compel IME
July 7, 2008	Reply Brief to Employer and Insurer's Response to Motion to Allow Claimant to Videotape Employer and Insurer's Independent Medical Examination and Motion to Compel IME
July 11, 2008	Claimant's Resistance to Employer and Insurer's Motion for Extension of Expert Disclosure Deadline
July 17, 2008	Reply in Support of Employer and Insurer's Motion to Extend Expert Disclosure Deadline

Employer/Insurer admits Claimant tore his right rotator cuff as the result of a work-related injury on March 27, 2005 and that the injury did arise out of and in the course of his employment. Employer/Insurer also admits that Claimant tore his left rotator cuff as the result of a work-related injury on November 25, 2005, and that the injury did arise out of and in the course of his employment. Claimant had surgeries on both of his shoulders as the result of the injuries, and sustained impairment on both shoulders. Claimant has alleged in his Petition for Hearing that he is totally disabled under the "odd-lot" doctrine. Employer/Insurer has denied that Claimant is totally disabled under the "odd-lot" doctrine.

**[Claimant's] Motion to Compel, Motion to Deem Request for Admissions Admitted, or in the Alternative, to Require Further Response, and for Attorney's Fees**

*Claimant's Motion to Compel*

Claimant has moved the Department for an order compelling Employer and Insurer to respond to Interrogatories and Requests for Production and compelling Employer and Insurer to provide and/or allow inspection of documents regarding Nancy Fechner, the nurse case manager assigned to Claimant's case by Insurer.

Employer and Insurer object to Claimant's request for the nurse case manager's file, stating, "all materials in the nurse case manager's file were prepared in anticipation of litigation." Employer and Insurer argue that Claimant has failed to make the proper showing under SDCL 15-6-26(b)(3), which provides:

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 his 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 his case and that he 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.

SDCL 15-6-26(b)(5) provides:

Claimant 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 and Insurer provided Claimant and later the Department with a "Vaughn Index", covering 49 documents. These 49 documents can be divided into three main groups. The first group, consisting of five e-mails, is communications between the nurse case manager Nancy Fechner and attorney Jeff Shultz. The five e-mails between nurse case manager Nancy Fechner and attorney Jeff Shultz, dated April 18, 23, and 25, 2007, are privileged pursuant to SDCL 19-13-3 and do not have to be produced.

The second group consists of communications between nurse case manager Nancy Fechner and claims representatives from Zurich NA. Most of these communications are labeled "Progress Report" and some included as a recipient an employee of Employer, AFG, Inc. These "Progress Reports" likely contain "mental impressions, conclusions, opinions, or legal theories" of the nurse case manager or the claims adjuster. Claimant has not made the proper showing to demonstrate "substantial need" for these communications and that he is "unable without undue hardship to obtain the substantial equivalent of the materials by other means."

The third group consists of nineteen (19) communications between the nurse case manager and physicians. Employer and Insurer's "Vaughn Index" describes the "Document Subject" of all but one these emails as "Facsimile cover sheet regarding request for medical documentation." The other is described as "Correspondence regarding notice of managed care plan." These communications have not been shown to fall into the category of "work product" or "Privileged information prepared in

anticipation of litigation. "Cover sheets" merely requesting "medical documentation" and a "notice" of managed care plan sent to treating physicians are not indicative of preparation for litigation. Employer and Insurer are directed to produce these communications within twenty days of the date of this Letter Decision and Order.

Employer and Insurer claim "privileged communication prepared in anticipation of litigation" of a document labeled "Supervisory Injury/Incident Report" and received by AFG from Dale Hayen, the AFG Mitchell Supervisor. If this incident report contains any statement made by and adopted by Claimant, then that statement must be disclosed pursuant to SDCL 15-6-26(b)(3), which provides in part, "A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party." Claimant has failed to make the requisite showing that any other portion of the "Supervisory Injury/Incident Report" should be produced by Employer and Insurer.

*Motion to Deem Request for Admissions Admitted, or in the Alternative, to Require Further Response*

Claimant seeks an order deeming admitted his Requests for Admission 6, 7, 16, 32, 33,34, and 35 and accompanying interrogatories. Claimant asserts that Requests 6, 32, 33, 34, and 35 each are answered with some version of "the document can speak for itself." Requests 7, 32, 33, 34, and 35 are objected to on the basis that the Requests "invade the province of the factfinder." Request 16 is objected to as "irrelevant." Employer/Insurer asserts that its answers comply with SDCL 15-6-36(a).

SDCL 15-6-36(a) provides, in part, that the answers to Requests for Admissions must:

specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made a reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of 15-6-37(c), deny the matter or set forth reasons why he cannot admit or deny it.

**REQUEST FOR ADMISSION NO. 6:** Admit that the Claimant has no vocational training. INTERROGATORY NO. 16, 17, AND 18.

**RESPONSE:** Employer and Insurer admit that Rick Ostrander's report dated October 4, 2006, states that Claimant completed the 10<sup>th</sup> grade only, has no

GED and has not attended any post-secondary training, and that his report speaks for itself.

The response does not conform to the requirements set forth in SDCL 15-6-36(a) and Employer/Insurer is directed to provide a response in compliance with SDCL 15-6-36(a).

**REQUEST FOR ADMISSION NO. 7:** Admit that there are no employment positions that the Claimant can obtain in his community, as defined in SDCL 62-4-52, in his usual and customary line of employment, as defined in SDCL 62-4-54, that will result in him being able to obtain suitable, substantial, and gainful employment, as defined in SDCL 62-4-55, within his physical limitations.

INTERROGATORY NO. 19, 20, 21, AND 39.

**OBJECTION AND RESPONSE:** Employer and Insurer object to this request on the grounds that it calls for a conclusion that is a matter for the factfinder, here, the Department of Labor, and as such, invades the province of the Department. Without waiving the foregoing objection, Employer and Insurer do not have enough information to either admit or deny this Request as the discovery is ongoing and this response will be updated if and when further information is obtained and a decision has been made regarding expert witnesses.

Employer/Insurer's objection is overruled. The request itself is within the parameters of SDCL 15-6-36(a). The response does not conform to the requirements set forth in SDCL 15-6-36(a) and Employer/Insurer is directed to provide a response in compliance with SDCL 15-6-36(a) and 15-6-33.

**REQUEST FOR ADMISSION NO. 16:** Admit that the Claimant has chronic rheumatoid arthritis. INTERROGATORY NO. 46, 47, and 48.

**OBJECTION AND RESPONSE:** Employer and Insurer object to this request on the grounds that it is irrelevant to a determination of the issue in this case, namely, whether Claimant is entitled to any further benefits as a result of his shoulder injuries, including whether he is entitled to any permanent total disability benefits. Without waiving the foregoing objection, Employer and Insurer admit that claimant's medical records contain references to Claimant's treatment for generalized osteoarthritis, degenerative arthritis, and for "rheumatoid factor positive arthritis," and that these medical records can speak for themselves, but Employer and Insurer have not seen any references that Claimant has been diagnosed with "*chronic* rheumatoid arthritis" in the medical records, and as such, Employer and Insurer do not have enough information to either admit or deny that Claimant has chronic rheumatoid arthritis. Discovery is ongoing and this response will be updated if and when further information is obtained.

Employer/Insurer's objection is overruled. The request itself is within the parameters of SDCL 15-6-36(a). The response is in conformity with the requirements set forth in SDCL 15-6-36(a).

**REQUEST FOR ADMISSION NO. 32:** Admit that the Claimant has been tested with the Wide Range Achievement Test Revision 3 and that his reading ability is 6%, at the sixth grade level. INTERROGATORY NO. 94, 95, AND 96.

**OBJECTION AND RESPONSE:** Employer and Insurer object to this request on the grounds that it calls for a conclusion that is a matter for the factfinder, here, the Department of Labor. Without waiving the foregoing objection, Employer and Insurer admit only that Rick Ostrander's October 4, 2006, report sets forth the above as his opinion, and that the document speaks for itself to that extent.

Employer/Insurer's objection is overruled. The request itself is within the parameters of SDCL 15-6-36(a). The response does not conform to the requirements set forth in SDCL 15-6-36(a) and Employer/Insurer is directed to provide responses in compliance with SDCL 15-6-36(a) and 15-6-33.

**REQUEST FOR ADMISSION 33:** Admit that the Claimant has been tested with the Wide Range Achievement Test Revision 3 and that his spelling ability is .5%, at the second grade level. INTERROGATORY 97, 98, AND 99.

**OBJECTION AND RESPONSE:** Employer and Insurer object to this request on the grounds that it calls for a conclusion that is a matter for the factfinder, here, the Department of Labor. Without waiving the foregoing objection, Employer and Insurer admit only that Rick Ostrander's October 4, 2006, report sets forth that above as his opinion, and that the document speaks for itself to that extent.

Employer/Insurer's objection is overruled. The request itself is within the parameters of SDCL 15-6-36(a). The response does not conform to the requirements set forth in SDCL 15-6-36(a) and Employer/Insurer is directed to provide responses in compliance with SDCL 15-6-36(a) and 15-6-33.

**REQUEST FOR ADMISSION NO. 34:** Admit that the Claimant has been tested with the Wide Range Achievement Test Revision 3 and his arithmetic ability is 5%, at the fifth grade level. INTERROGATORY 100, 101, AND 102.

**OBJECTION AND RESPONSE:** Employer and Insurer object to this request on the grounds that it calls for a conclusion that is a matter for the factfinder, here, the Department of Labor. Without waiving the foregoing objection, Employer and Insurer admit only that Rick Ostrander's October 4, 2006, report sets forth the above as his opinion, and that the document speaks for itself to that extent.

Employer/Insurer's objection is overruled. The request itself is within the parameters of SDCL 15-6-36(a). The response does not conform to the requirements set forth in SDCL 15-6-36(a) and Employer/Insurer is directed to provide responses in compliance with SDCL 15-6-36(a) and 15-6-33.

**REQUEST FOR ADMISSION NO. 35:** Admit that the Claimant suffers from severe deficits across all areas of academic functioning which place him at the second to sixth grade level. INTERROGATORY 103, 104, AND 105.

**OBJECTION AND RESPONSE:** Employer and Insurer object to this request on the grounds that it calls for a conclusion that is a matter for the factfinder, here, the Department of Labor. Without waiving the foregoing objection, Employer and Insurer admit only that Rick Ostrander's October 4, 2006, report sets forth the above as his opinion, and that the document speaks for itself to that extent.

Employer/Insurer's objection is overruled. The request itself is within the parameters of SDCL 15-6-36(a). The response does not conform to the requirements set forth in SDCL 15-6-36(a) and Employer/Insurer is directed to provide responses in compliance with SDCL 15-6-36(a) and 15-6-33.

*Motion for Protective Order*

Employer/Insurer's Motion for Protective Order is denied.

*Motion for Attorney's Fees*

Claimant's request for Attorney Fees in connection with his Motion to Deem Requests for Admission Admitted is denied.

**Motion to Allow Claimant to Videotape Employer and Insurer's Independent Medical Examination**

Employer/Insurer has requested that Claimant make himself available for an examination pursuant to SDCL 62-7-1. Claimant has requested permission to videotape this SDCL 62-7-1 examination. SDCL 62-7-2 provides:

The examination provided by 62-7-1 shall be made in the presence of a duly qualified medical practitioner or surgeon employed and paid for by the employee, if the employee so desires. If the examination is made by a surgeon engaged by the employer and the injured employee has no surgeon present at the examination, the surgeon making the examination at the instance of the employer shall deliver to the injured employee, upon the employee's request or that of the employee's representative, a statement in writing of the condition and extent of the injury to the same extent that the surgeon reports to the employer.

Claimant's Motion is denied.

**Motion to Extend Expert Disclosure Deadline**

Employer/Insurer has moved to extend its expert disclosure deadline due to Claimant's refusal to attend a SDCL 62-7-1 examination. Employer/Insurer's Motion is granted. A

telephonic prehearing conference is scheduled for August 25, 2008. The Department will set Employer/Insurer's deadline for disclosing experts, as well as any other necessary deadlines, on or shortly after August 25, 2008.

**Motion to Compel IME**

Employer/Insurer has moved the Department for an order compelling Claimant to attend an SDCL 62-7-1 examination. SDCL 62-7-3 provides the only remedy available for a claimant's refusal to attend an SDCL 62-7-1 examination. Given the circumstances of this matter, the Department declines to compel Claimant's attendance at an SDCL 62-7-1 examination.

Employer/Insurer is directed to provide any required responses as set forth in this Letter Decision and Order within twenty days of the date of this Letter Decision and Order. This letter shall constitute the Department's Order.

Sincerely,

Heather E. Covey  
Administrative Law Judge