

August 11, 2010

Good afternoon, Mr. Marsh,

This is to inform you that I plan to be in attendance at the next Workers' Compensation Advisory Committee Meeting on Monday, August 23, 2010 through the DDN site in Rapid City.

We have received the information from Mr. Merle Scheiber of what was learned by the Division of Insurance staff that checked with the workers' compensation insurance carrier of our son's employer relating to our contact efforts with them. We wish to offer our thanks to Mr. Scheiber and his staff.

After nearly three years of our dealing with this matter, the one thing that we regret is that we weren't more knowledgeable of the inner-workings of the workman's comp system before Brian was killed. It certainly would have caused far less anxiety for us early on if we had been as informed as we are now. Granted, we still feel as though we only know a small portion of how the system works. But, God forbid, if we are ever placed in a similar situation, you can rest assured that we will be far less accepting of, nor place any credence in, any information we are told without verifying the person's credentials first – and we would strongly recommend the same to anyone who finds themselves in a situation similar to ours.

We would like to believe that our family is typical of average South Dakota citizens. If the rest of the 700,000+ people who share this state with us already know what we've now learned, then I guess we were even less knowledgeable and informed of the workers' compensation matters than we thought.

It appears as though the matter of the "Workers' Compensation representative" who we met in the Intensive Care Unit of the hospital, and who gave us apparently erroneous information about reimbursements, is back in the hands of the Department of Labor since she is/was employed by a company who is licensed through the SD Department of Labor. I suppose much of the frustration resulting from our contact with her could have been avoided if we would have known that this person was a medical case manager (nurse) and not a workers' compensation insurance adjuster. When she approached us in the hospital and offered to answer some worker's comp questions for us, we just believed that she was a qualified, trained and licensed representative to do that. She gave us her business card showing that she worked for a particular company. But, we didn't recognize that company from any other company or know what service they were in the business of providing (that is medical care/case management versus worker's benefits). Unfortunately, whether because of our state of mind at the time or level of knowledge of the workers' comp system, we didn't think of clarifying any of that.

So, unfortunately when this person sat down with us, we felt she knew what she was talking about and we believed what she told us. A lesson learned for us.

Regarding the answer from the insurance company regarding us retaining an attorney and therefore it not being acceptable for them to speak with us directly, I can somewhat understand what they have interpreted there. We actually hired our attorney to help us settle Brian's estate and to get me named as Brian's personal representative so we could finalize his bills and other financial matters. This is a practice I believe most average people would do who are not law-trained professionals. In fact, our attorney told us early on that if we chose to go forward with any action against the company or worker's comp we would need to contact an attorney who dealt specifically with those types of issues as she was not versed in those portions of the law.

Nonetheless, within about two weeks after Brian died, our attorney did in fact write to the insurance company to obtain a copy of the insurance policy for Brian's employer so we could get a sense as to what was and was not covered as we were still sorting things out. We further had the check for the \$5000 burial expense reimbursement sent to our attorney as well as she felt it best to deal with it that way. So, with all that, we can see how the company would believe our attorney was retained by us to file a worker's comp action even though, in reality, she wasn't.

As I have mentioned in the past, we were never able to actually acquire an attorney to represent us in any action against the workers' compensation insurance company or Brian's employer because we were non-dependents. Still, when we attempted to make contact with the insurance adjuster some four and a half months after Brian died (on March 17, 2008) to get clarification on what we were originally told by the person at the hospital, we did not specifically mention that we were not being represented by any attorney. In hindsight, we perhaps should have had our attorney write the letter instead of us doing it ourselves or very clearly clarify that we didn't have a specific attorney for any action against the company or worker's comp. I don't know if that would have made any difference in getting a response from the company, but another lesson learned for us.

The really sad thing about all this is, rather than to flat ignore our correspondence, wouldn't it have been common courtesy to at least write us to inform us to communicate through our attorney? Then we would have had the chance to explain that we don't have an attorney for the worker's comp issues – only to take care of the estate issues as required by South Dakota law. Or is that asking too much?

All of this brings us back to the suggestion we had mentioned at the very beginning of our efforts with the Worker's Compensation Advisory Council regarding the need to have a document prepared to give to families such as ours who face these matters. According to information presented during a past council meeting, on average, 25 South Dakota workers are killed each year in work-related situations. Since none of the other families have apparently come forward, perhaps that means that our situation is unique and/or everyone else has had nothing but positive experiences dealing with the worker's comp companies handling the death of their loved ones. Still, a document detailing general information about resources available to the family and what to expect from worker's comp could pay huge dividends. That, as we have now learned, would have saved us a great deal more heartache than what we had to endure beyond our loss of Brian.

For your reference, I have drafted such a document and have included that in my correspondence today. Perhaps it may serve as a starting point. I know that the suggestion has been made to inform families at the time of a crisis to check the Department of Labor's website for information. With all due respect, when we needed the information, going on-line was not a priority for us – we just wanted answers and the person who met with us seemed to be that source (albeit a bad one). Having something to read afterwards would have been extremely helpful and yes, could have even prompted us to check the DOL website. My document is a suggestion and, we believe, summarizes what we would like to communicate to other families who are forced to experience what we did. Parts of it may seem harsh but, so is reality. This is the kind of thing in which postponing or sugarcoating the facts serves no purpose.

So, thanks once again for all your work.

Sincerely,

Doug Pavel

You are receiving this information as a family member of a worker critically injured or killed in a work-related incident. It is hoped that the information in this document may aid you in making decisions as you deal with your loved ones' situation. This document is not intended to provide all of the information you will likely need, but it may provide basic information to direct you to who may answer some of the critical questions you undoubtedly have at this point. Additionally, the information provided in this document should in no way be considered legal advice. For specific information about your legal rights, you should consult your personal attorney.

Workers' Compensation representatives typically communicate directly with the affected worker concerning workers' compensation benefits. However, because of the very nature of situations involving critically injured or deceased workers, the immediate family's need for accurate, factual information is vital.

The assistance of an attorney (and particularly an attorney who specializes in workers' compensation cases) may be helpful in explaining the laws relating to workers' compensation benefits. Be aware that the retention of an attorney will limit the ability of the workers' compensation insurance company to communicate directly with the family. In situations in which an attorney has been retained, most companies will be required to discuss details of the pending case and benefits relating to the injured or deceased worker only with the family's attorney rather than the individual family members.

Also note that there are many people involved in the workers' compensation process. The explanation of benefits and laws relating to workers' compensation should be done only by those who are knowledgeable, trained and licensed to discuss those details.

To assist you better, and to eliminate the possibility of unnecessary confusion later, please note that the person presenting you with this information may or may not be trained and licensed to discuss specific benefit information.

**For your reference, the person meeting with you and presenting this document to you is:**

(Name) \_\_\_\_\_

(Position or Job Title) \_\_\_\_\_

(Representing) \_\_\_\_\_

(Contact Information) \_\_\_\_\_

This person IS or IS NOT (circle one) licensed to discuss specific benefits.

DATE \_\_\_\_\_ TIME \_\_\_\_\_

If the person meeting with you IS NOT licensed to discuss specific worker's compensation benefits, the person who is licensed to discuss benefits relating to your loved one's incident is:

(Name)\_\_\_\_\_

(Company)\_\_\_\_\_

(Contact Information)\_\_\_\_\_

**SOME KEY POINTS** relating to workers' compensation benefits for individuals other than the worker are provided below. Some of the information may be difficult to receive at this point, especially given the circumstances which have brought you to receive this document. However, so that informed decisions may be made early on by the worker's family, it is recognized that it may be best for certain general details of the benefits, which may or may not be available through workers' compensation, to be made known as soon as practical. It is hoped that by doing this, additional anxiety, frustration and unnecessary misunderstanding may be prevented later. Again, you should consult with a licensed workers' compensation insurance adjuster and/or your personal attorney to discuss any specifics relating to your loved one's case.

- **Any medical expenses** relating to the treatment and care of the injured or deceased worker for injuries received as a result of a work-related incident will generally be paid by the employer (typically through the employer's workers' compensation insurance carrier).
- **In the event the injuries result in the death of the employee**, the estate of the deceased worker may be reimbursed up to \$7,500 for the cost of burial expenses and a headstone as provided in SDCL 62-4-16.
- **In the event the injuries result in the death of the employee**, the estate of the deceased worker may be reimbursed for the cost of transporting the body of the employee to the place of burial as provided in SDCL 62-4-16.
- **There is generally no compensation or reimbursement available** to dependent or non-dependent family members who must travel to be with an injured worker while hospitalized.
- **There is generally no compensation or reimbursement available** to family members (either dependent or non-dependent) who incur travel, legal or other expenses while dealing with the personal matters or estate of a critically injured or deceased worker.
- **Dependents of the worker** (spouse, child(ren), parent(s), grandparent(s), minor brother(s) and minor sister(s) in particular) may be entitled to certain death benefits should the worker die of injuries received in a work-related incident as provided in SDCL 62-4-12 through 62-4-15. A licensed insurance adjuster

working for the employer's workers' compensation insurance carrier (contacted through your personal attorney) is the best person to discuss the specifics.

- **Non-dependent family members** are entitled **only to benefits specifically provided by South Dakota Law** relating to burial and transportation costs as noted above (SDCL 62-4-16)
- **Non-dependent family members are NOT entitled to compensation for the death of a worker** from the worker's employer, representatives of the worker's employer, the employer's liability insurance carrier or the workers' compensation insurance carrier except in cases in which the injuries to the worker were **INTENTIONALLY caused** by the employer or representative of the employer (SDCL 62-3-2).
- **The filing of a wrongful death claim** against the worker's employer or representative of the worker's employer **is unlikely** in South Dakota except in case arising from Intentional Tort as noted in SDCL 62-3-2 and as affirmed by the South Dakota Supreme Court.

You may view all of the South Dakota Codified Laws relating to workers' compensation in South Dakota by going to <http://dol.sd.gov/workerscomp/statutes.aspx>.

Again, the information provided in this document should in no way be considered legal advice. For specific information about your legal rights, you should consult your personal attorney.

The following state agencies may also be contacted for assistance:

Workers' Compensation Division of Labor & Management  
South Dakota Department of Labor  
700 Governors Drive  
Pierre, SD 57501-2291

Telephone (605) 773-3681

South Dakota Department of Revenue & Regulation  
Division of Insurance  
445 East Capitol Avenue  
Pierre, SD 57501

Telephone (605) 773-3563