

October 17, 2022

Scott Stern, Chair
SD Worker's Compensation Advisory Council
8304 S Regent Park Drive
Sioux Falls, SD 57108
And via email scottstern@gmail.com

Amber L. Mulder
Director of Labor and Management
123 W. Missouri Ave.
Pierre, SD 57501-0405
And via email amber.mulder@state.sd.us

Re: October 20, 2022 WCAC Meeting
Legal reform - case management communications

Dear Chairman Stern and Ms. Mulder:

I am scheduled to be a substitute teacher in the Watertown Public Schools on October 20, 2022, so will be unable to attend the WCAC meeting scheduled for that date. Therefore, I write to request that you incorporate this letter into the record of that hearing, reaffirming my client's intention to introduce legal reform regarding case management communications during the 2023 Legislative Session. My client's position remains consistent and reasonable:

There is never a good excuse for any third-party to conduct a *confidential* relationship with a patient's medical provider.

Either South Dakota believes our citizens have the right to monitor their own medical records and provider communications, or not.

As stated earlier, resolution of disputed workers compensation claims in South Dakota is expected to utilize the fair and open adversarial processes emblematic of civil justice: two sides engaging openly to first discover, and then lay before a neutral decision-maker, the facts of the case. When insurers and their subcontractors instead use the ruse of case management to try to secretly influence medical witnesses, they distort the legal process in a way unfair to injured workers. They also violate the sanctity of the physician-patient relationship.

Given the weight assigned to a treating doctor's opinion, treating doctors in a worker's compensation case sometimes function almost as if they were judges determining entitlement to benefits. But no one would ever suggest one side in a workers compensation case should have confidential communications with an ALJ, as insurers and their subcontractors currently do with treating doctors. SDCL should be reformed to eliminate the possibility of such secret communications, by simply providing:

A case management services provider operating pursuant to SDCL 58-20-24 or 62-5-21 shall include the employee in all communications, both written and oral, with any medical provider regarding questions of compensability, causation, or entitlement to worker's compensation benefits.

This is not burdensome. First, it cannot interfere with routine mechanics of scheduling, as it is explicitly limited in scope to questions of compensability, causation, or entitlement to benefits. Second, it is far more efficient to have transparency and cooperation on the front end, rather than assuming mistakes and misunderstandings can be corrected on the back end of a formal

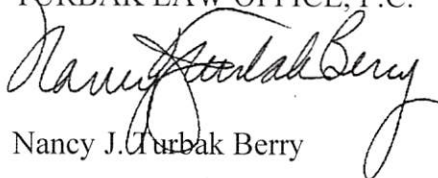
administrative process. With the above statutory change, potentially misleading information and misunderstandings can be caught and corrected in real-time. By contrast, discovery motions and subpoenas are available as potential remedies only after a contested case has been initiated by a claimant filing a formal petition with DLR. Not only has the substantive damage caused by secret communications already been done by the time an insurer's secret communications come to light, but several years of costly litigation already may have occurred.

While South Dakota should solve the problem facing its citizens regardless of whether all other states have done so, I would note that taking the requested step to protect the rights of South Dakota employees would not make South Dakota the first state to do so. In Indiana, for example, any written notes or reports prepared by a Nurse Case Manager (NCM) and provided to a medical provider must also be made available to the injured worker, and if a NCM meet with a physician before or at the conclusion of a medical appointment, the injured worker must be invited to participate as well. <https://www.in.gov/wcb/insurance-carriers/nurse-case-manager-guidelines/>

The original intent of workers compensation is to ensure a compromise between the injured worker and the employer under which the injured worker forgoes a possible tort liability claim in exchange for expedited payment of more limited worker's compensation benefits. The goal for both parties remains to get the injured worker back to work as soon as possible. As such, it is only logical that the injured worker be included in all communications regarding question of compensability, causation, or entitlement to workers compensation.

We kindly ask the committee to allow the reform proposal to proceed to the Legislature for further discussion and vetting. I urge all WCAC members further to express their support for this Legislation. Doing so will be a vote committee members will later be able to look back on with pride.

Yours truly,
TURBAK LAW OFFICE, P.C.



Nancy J. Turbak Berry