September 30, 2009

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Letter Decision and Order

Daniel E. Ashmore
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RE: HF No. 114, 2008/09 – Irene E. Homan v. Wal-Mart and American Home Assurance Co.

Dear Mr. Simpson and Mr. Ashmore:

Submissions:

This letter addresses the following submissions by the parties:

April 10, 2009	Employer and Insurer's Motion to Strike;
	Employer and Insurer's Brief in Support of Motion to Strike;
May 5, 2009	Claimant's Response to Motion to Strike;
August 25, 2009	Employer/Insurer's Reply to Claimant's Response to Motion to Strike.

Background:

Claimant filed a Petition for Hearing on March 6, 2009. Employer and Insurer have moved to strike paragraphs 16 through 22, inclusive, of Claimant's Petition for Hearing. Employer and Insurer object to these pleadings arguing that they are "immaterial" and "impertinent" as provided in SDCL 15-6-12 (f). They also contend that these pleadings pertain to conduct and statements during compromise negotiations which are inadmissible pursuant to SDCL 19-12-3. On the other hand, Claimant asks that these pleading remain because they ground Claimant's request for attorney's fees as prescribed in Lewis v. SD Department of Transportation, 2003 SD 82, 667 Nw2d 283.

Paragraphs 16 through 22 of Claimant's Petition for Hearing provide as follows:

16. On July 8, 2008, Claimant's attorney wrote to Employer/Insurer's attorney requesting that disability benefits be paid as Claimant had been terminated for drowsiness on the job caused by her strong prescription pain medications. (July 8, 2008 letter attached as Ex. F and incorporated herein by reference). Claimant's attorney argued that Claimant's loss of her employment at Wal-Mart seems directly related to her work injury and need for strong prescription pain medications as "obviously she never had a problem with falling asleep at work before she injured herself and was forced to sit in a wheelchair with her foot up and taking these medications." *Id.* Claimant's attorney argued that disability benefits were appropriate "as there obviously is no other form of regular gainful employment available to Ms. Homan given her need to use a wheelchair with her leg elevated." *Id.* Claimant's attorney asked that if Employer/Insurer would not pay the benefits that any reasons be provided and also requested copies of any documents concerning Irene's termination, warnings or employment status at Wal-Mart. *Id.*

17. On August 12, 2008, Employer/Insurer's attorney emailed Claimant's attorney regarding the termination issue. Employer/Insurer's attorney wrote "as to her termination I have gotten information that she told people the reason she was taking pain medication that made her sleepy was her broken hip pain and not the work injury, so I am making efforts to preserve that information. I suspect the case is far from over. More later." (Email attached as Ex. G and is incorporated by reference herein).

18. On August13, 2008, Claimant's attorney again wrote Employer/Insurer's attorney asking once again that Irene's workers' compensation benefits be reinstated. (August 13, 2008 letter is attached as Ex. H and is incorporated by reference herein). Claimant's attorney noted that in the interim "we have now received a Desiccant from the Department of Labor regarding Claimant's request to have the spinal cord stimulator implanted and also concerning Claimant's proper work restrictions." *Id.* Claimant's attorney argued that "given the Department's Decision, I don't know how Wal-Mart can avoid paying disability benefits since Irene was terminated for drowsiness which is directly related to her numerous strong prescription pain medications. " *Id.*

19. Employer/Insurer did not respond to Claimant's attorney's August, 2008 letter.

20. Other than the August email, Employer/Insurer has never responded to Claimant's attorney's request for the reasons for the denial of disability benefits or for any documents concerning the termination.

21. On December 23, 2008, Claimant's attorney wrote again to Employer/Insurer's attorney asking him to respond to the July 8, 2008 and August 13, 2008 letters. Claimant's attorney reviewed the history of the case and asked once again why Claimant was not receiving disability benefits since she had been terminated from the only position that realistically she can do (and which does not exist in

the regular competitive economy) due to drowsiness caused by her numerous pain medications. (December 23, 2008 letter attached as Ex. H and incorporated by reference herein). Claimant's attorney stated "what perhaps is most frustrating is that my client would like to get off the medications and have a spinal cord stimulator implanted to reduce her pain experience and work more hours, but your client has denied that treatment as well. Talk about a "catch 22" situation!" *Id.* Claimant's attorney asked to get the "information" referenced in Employer/Insurer's email about the pain medications/drowsiness issue so that depositions can be taken "we can get to the bottom of this issue." *Id.* Claimant's attorney concluded "the bottom line here is that my client was terminated back in August and has been denied disability benefits which, is obviously causing quite a hardship. I would like to have any and all reasons for your client's denial of disability benefits at this time so I can do an investigation while the facts are fresh." *Id.*

22. Employer/Insurer has not responded to Claimant's attorney's December 23, 2008, letter and no reasons have been given for the denial of disability benefits other than the Employer/insurer's statement in the August12, 2008 that Irene "told people the reason she was taking the pain medication that made her sleepy was her broken hip pain and not the work injury."

Motion to Strike:

Employer and Insurer's Motion to Strike is based on two statutes, SDCL 15-6-12 (f) and SDCL 19-12-10. The first statute, SDCL 15-6-12 (f) is a rule of civil procedure. That provision states the following:

> SDCL 15-6-12 (f). Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

Claimant correctly argues that the Department of Labor is not bound by the rules of civil procedure in workers' compensation cases. *See* Sowards v. Hills Material Company, 521 NW2d 649, 652 (SD 1988). This provides the Department with the flexibility to "streamline" the hearing process when the issues permit and the parties are unfamiliar with formal court rules and more informality is required.

Employer and Insurer also correctly argue that the Department of Labor frequently observes the rules of civil procedure, particularly when, as in this case, 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.

Unlike rules of civil procedure, the Department of Labor is bound by statutory rules of evidence. SDCL 1-26-19. The second statute relied on by Employer and Insurer, SDCL 19-12-10, is a rule of evidence.

SDCL 19-12-10 states the following:

> Evidence of:
>
> (1) Furnishing or offering or promising to furnish; or
>
> (2) Accepting or offering or promising to accept,
>
> a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This section does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This section also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay or proving an effort to obstruct a criminal investigation or prosecution.

[emphasis added].

While discussing the rule imposed by SDCL 19-12-10, the South Dakota Supreme Court stated, "[o]ne basis for this rule is the public policy of encouraging settlement." Vivian Scott Trust v. Parker, 2004 SD 105, ¶13, 687 NW2d 731, 735. Compromise settlements are no less favored in workers compensation cases. Negotiated settlements are frequently more beneficial to the parties than confronting the expense and uncertainty of litigation.

In this case, there is no question that the majority of the paragraphs in Claimant's Petition for Hearing that Employer and Insurer are asking the Department to strike allege conduct and statements made during negotiations. Consequently, evidence introduced to prove these assertions is inadmissible and the pleadings set forth in paragraphs 16, 17, 18 19and 21 are "impertinent" as provided in SDCL 15-6-12 (f). Under these circumstances, it is appropriate for the Department to observe SDCL 15-6-12 (f) and strike these paragraphs.

Despite this conclusion, Claimant can still pursue her charge of vexatious litigation. Evidence misconduct may be elicited by examining Employer and Insurer's conduct during its investigation of Claimant's injury and handling of her claims.

Paragraphs 20 and 22 allege that Employer and Insurer failed to respond to Claimant's inquiries and failed to provide reasons for denying Claimant's disability benefits. As

written, these pleadings make assertions of Employer and Insurer's conduct which are not necessarily tied to the parties' negotiations. Therefore, these paragraphs are not barred by SDCL 19-12-10.

However, these paragraphs are somewhat redundant. The distinction between the paragraphs is that paragraph 20 contains a general statement while paragraph 22 makes a more specific statement. These paragraphs could be consolidated The Claimant is free to consolidate these paragraphs or "clean them up" as she may choose.

Order

In accordance with the above analysis, Employer and Insurer's Motion to Strike is granted in part and denied in part. Paragraphs 16, 17, 18, 19 and 21 are hereby struck from Claimant's Petition for Hearing. Within 20 days from the receipt of this order, Claimant is granted leave to amend her Petition for Hearing to consolidate or cleanup paragraphs 20 and 22 as she deem appropriate. The Employer and Insurer may then answer the Petition for Hearing in due course. This letter shall constitute the order in this matter.

Sincerely,

_____
Donald W. Hageman
Administrative Law Judge