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RE: HF No. 117, 2016/17 – Jennifer Petersen v. Regional Health, Inc. and Hartford Insurance Company of the Midwest

Dear Mr. Lee and Ms. Van Anne:

This letter addresses the following submissions by the parties:

August 3, 2018	Claimant's Motion to Compel Discovery and Production of Documents
August 23, 2018	Employer/Insurer's Opposition to Motion
	Affidavit of Jennifer Van Anne
September 10, 2018	Claimant's Reply in Support of Motion

ISSUE PRESENTED: SHOULD THE DEPARTMENT COMPEL THE PRODUCTION OF CERTAIN DOCUMENTS WHICH EMPLOYER/INSURER SEEKS TO WITHHOLD?

FACTS

Claimant filed a petition for worker's compensation benefits March 2, 2017, alleging that she sustained a work-place injury while employed at Regional Health, Inc. Per the petition, Claimant alleges that on August 15, 2012, while working as a CNA, she injured her back assisting a coworker lift a patient. As part of discovery, Claimant sent

Employer/Insurer a request for various documents including Insurer's entire claim file on Claimant and the medical case manager file. Employer/Insurer resisted releasing these documents, arguing that they were protected by the work product doctrine. The Department opted to do an in-camera review of the documents to determine if any were subject to privilege.

The Department concluded its examination and informed the parties by e-mail that it considered the case management file to be protected by privilege in its entirety. With respect to Insurer's file, the Department found approximately 102 pages were discoverable and the remaining to be covered by privilege. The Department then held a telephonic hearing to discuss its preliminary ruling. At that hearing, Claimant objected to the Department's ruling and requested it reconsider. The Department allowed the parties to brief the issue of whether the files in question were protected as work product or any other privilege.

SHOULD THE DEPARTLMENT COMPEL THE PRODUCTION OF CERTAIN DOCUMENTS WHICH EMPLOYER/INSURER SEEKS TO WITHHOLD?

Analysis

A. Work Product Doctrine

South Dakota's version of the work product doctrine is codified at SDC 15-6-26(b)(3) which reads:

> 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.

In determining whether something is work product, the South Dakota Supreme Court has noted: “The test we apply for determining whether a document or tangible thing is attorney work product is whether ‘in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.” *Kaarup v. St. Paul Fire & Marine Ins. Co.,* 436 N.W.2d 17, 21 (S.D. 1989)(quoting 8 Fed. Prac. & Proc. Civ. § 2024, 198 (3d ed.)

Claimant argues that the documents in question do not fall under the work product doctrine because they were created in the ordinary course of business for a purpose other than litigation. To support her contention, Claimant cites a South Dakota Federal District Court opinion, *Lamar Advert. of S.D., Inc. v. Kay*, 267 F.R.D. 568 (D.S.D. 2010). In *Kay*, Defendants sought discovery of an insurer’s file to defend themselves in a tort case. Plaintiff’s asserted that the file was work product and therefore not discoverable. The court opined:

> An insurer assembles a claims file any time there is an accident involving one of its insureds, and the fact that an accident merely occurs or that an attorney later becomes involved in the insurer's ordinary course of business does not protect documents or activities from discovery. To the extent the information in [Plaintiff’s] file was created during factual investigation of the claim, the documents are not privileged. Where the purposes of factual investigation and clear trial preparation overlap, this court believes that the discoverability of the materials turns on whether the party seeking the material has established a substantial need to overcome the privilege.

Kay, 267 F.R.D. 568, at 578.

The court in *Kay* found that Plaintiff's file had been created before litigation commenced and therefore could not be considered work product and ordered its release. As in *Kay*, both Insurer's claims file and the case management file in this case were crated as soon as Claimant reported a work-related injury and before litigation commenced. Therefore, the files are not protected as work product per se. However, unlike the insurer's file in *Kay*, both files contain references to Claimant's pending workers compensation case. In order to gain access to those portions of these files, Claimant must demonstrate a substantial need for those materials. As with all workers compensation cases, here Claimant must prove that her injury arose out of her employment, and that the injury was a major contributing cause of her present condition. SDCL 62-1-1(7) (2018). Claimant has not shown that portion of either file designated work product is necessary to meet her burden of persuasion. The Department finds that both the claims file and the case management files are discoverable subject to redaction of those pages created for the purposes of litigation.

Within those pages of the claims file subject to discovery are several references to legal bills submitted by Insurer's attorneys. These references shall also be redacted from the pages.

In addition, a portion of the claims file contain reference to a third party private investigator who was hired by Employer/Insurer to conduct surveillance on Claimant. Regarding the admissibility to such evidence, the Supreme Court has noted "most jurisdictions hold both the existence and contents of surveillance tapes to be freely discoverable." *Lagge v. Corsica Co-Op*, 2004 S.D. 32, ¶ 23, 677 N.W.2d 569, 574. (internal citations omitted). However, the Court offered one caveat to releasing such

evidence: “In the event that a party is concerned that a claimant will conform their testimony to fit the videotape, the Department could allow an employer/insurer to depose the claimant prior to turning over the tape. Id, (citing *Shenk v. 575 Berger,* 86 Md.App. 498, 587 A.2d 551 (1991)).

In accordance with the Court’s proclamation in *Lagge*, Employer/Insurer may withhold the private investigators report, identified as pages CF 184-88 and 247-253, until after it has deposed Claimant.

B. Attorney Client Privilege

Employer/Insurer also claim that various communications found in the files are protected by attorney client privilege. South Dakota’s version of the attorney client privilege is codified at SDCL 19-19-502(b):

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
>
> (1) Between himself or his representative and his lawyer or his lawyer's representative;
>
> (2) Between his lawyer and the lawyer's representative;
>
> (3) By him or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
>
> (4) Between representatives of the client or between the client and a representative of the client; or
>
> (5) Among lawyers and their representatives representing the same client.

Various courts have recognized a near absolute safeguarding of communication between an attorney and his/her client. "An attorney's thoughts are inviolate, … and courts should proceed cautiously when requested to adopt a rule that would have an inhibitive effect on an attorney's freedom to express and record his mental impressions and opinions without fear of having these impressions and opinions used against the client." *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977). "Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Duplan Corp. v. Moulinage et Retorderie de Chavanoz,* 509 F.2d 730, 735 (4th Cir. 1974)(quoting *Hickman v. Taylor*, 329 U.S. 495, 511, 67 S. Ct. 385, 393, 91 L. Ed. 451 (1947)). This position has also been adopted by our Supreme Court.

Claimant argues that Insurer waived its attorney client privilege by including the nurse case manager in the communications because she is a third party not covered by the privilege. The nurse case manager is not an employee of Insurer but rather an independent contractor hired to coordinate Claimant's care.

The Eighth Circuit Court of Appeals considered a similar issue in *In re Bieter Co.,* 16 F.3d 929, 937–38 (8th Cir. 1994). The issue presented in *Bieter* was whether attorney client privilege precluded an independent consultant from turning over documents sought in a federal suit. A federal magistrate ordered the documents turned over, and the district court affirmed that decision. The Bieter Company then petitioned

the court of appeals for a writ of mandamus directing district court to vacate order compelling discovery of material allegedly protected by attorney-client privilege. The Court of Appeals granted the writ, reversing the magistrate's original order. It noted:

> The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 682, 66 L. Ed. 2d 584 (1981)(quoting *Trammel v. United States,* 445 U.S. 40, 51, 100 S.Ct. 906, 913, 63 L.Ed.2d 186 (1980)). Such information will, in the vast majority of cases, be available from the client or the client's employees, but there undoubtedly are situations, such as the one described by Dean Sexton, in which too narrow a definition of "representative of the client" will lead to attorneys not being able to confer confidentially with nonemployees who, due to their relationship to the client, possess the very sort of information that the privilege envisions flowing most freely. "[I]t is only natural that," just as "[m]iddle-level—and indeed lower-level—employees ... would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to ... actual or potential difficulties," *id.* at 391, so too would nonemployees who possess a "significant relationship to the [client] and the [client]'s involvement in the transaction that is the subject of legal services." John E. Sexton, *A Post*– Upjohn *Consideration of the Corporate Attorney–Client Privilege,* 57 N.Y.U.L.Rev. 443, 487 (1982).

Bieter, 16 F.3d, at 937–38.

The Colorado Supreme Court similarly was confronted with the question of whether communications between an independent contractor and the state DOC's legal counsel were covered by attorney client privilege in *All. Const. Sols., Inc. v. Dep't of Corr.,* 54 P.3d 861, 863 (Colo. 2002). The Colorado Supreme Court adopted the Eight Circuit's reasoning in *Bieter* and found that the privilege did protect communication between counsel and an independent contractor. The court further adopted a four-part test to determine whether attorney client privilege would protect attorney communications with a third party independent contractor. As a preliminary matter "the information-giver must be an employee, agent, or independent contractor with a significant relationship not only to the governmental entity but also to the transaction

that is the subject of the governmental entity's need for legal services." Id, at 869. Assuming that test is met, three more criteria must be satisfied:

> First, it must demonstrate that the communication was made for the purpose of seeking or providing legal assistance… Second, we hold that the entity must show that the subject matter of the communication was within the scope of the duties provided to the entity by its employee, agent, or independent contractor. Finally, we hold that an entity seeking to apply the privilege in the independent contractor context must show that the communication was treated as confidential and only disseminated to those persons with a specific need to know its contents.

Id, at 869–70.

Applying these criteria to this case, the Department finds that the attorney client privilege shields the communications between Insurer and its counsel found in the case management file. First, the case manager has a significant relationship to insurer as the entity designated to coordinating Claimant's care. Next, the communications in question were for the purpose of seeking legal assistance. Third, the subject of the communications was within the scope of the nurse case manager's duties because issue related to Insurer's defense were directly related to Claimant's treatment. Finally, the Department finds that the information contained within these communications were limited to a few key people. The Department notes that most of the e-mails were between Insurer and its attorneys and the nurse case manager was merely included on the conversation. However, including the manager on the e-mails was nevertheless necessary because she may have had knowledge which was essential to Insurer's defense in this case.

CONCLUSION AND ORDER

While neither the claims file nor the case management file is automatically covered by work product doctrine or attorney client privilege, larges sections of both fall into either of those categories. Claimant's motion to compel is GRANTED in part and DENIED in part. The Department orders that the following pages be turned over to Claimant:

Case file numbers CF 1-8, 10-11, 14-15, 17-27, 29-30, 33, 36-37, 39-40, 42-66, 69-101.

Nurse case file numbers NCF 619-633, 635-636, 641-642, 698, 701, 704.

It is further Ordered, Case file numbers CF 184-88, and 247-253 may be withheld until after Employer/Insurer has deposed Claimant. However, if Employer/Insurer has not disclosed its intention to depose Claimant by October 15th, 2018, it shall immediately disclose these pages to Claimant. This letter shall constitute the Department's order on this matter.

Sincerely,

/s/ Joe Thronson
Joe Thronson
Administrative Law Judge