December 1, 2020

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LETTER DECISION ON
MOTION FOR PROTECTIVE ORDER

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RE: HF No. 124, 2018/19 – Randy Peters v. Reede Construction, Inc. and Twin City Fire Insurance Company

Dear Mr. Lee and Ms. Wosje:

This letter decision will address Employer and Insurer's Motion for Protective Order. All submissions and supporting documents have been considered.

On September 3, 2020, Peters served Claimant's Second Request for Production of Documents. Claimant's counsel requested to take the depositions of the construction manager, the concrete superintendent for Reede Construction, and the "safety person/director in charge." Peters had not made prior requests to depose any of the representatives or employees of Employer who had been identified in discovery.

Employer and Insurer have moved the Department of Labor & Regulation (Department) for a protective order pursuant to SDCL 15-6-26(c) on the grounds that Claimant's Second Request for Production of Documents and request for deposition of Employer representatives or employees are untimely under the Scheduling Order, which set the deadline of discovery for July 20, 2020. Pursuant to SDCL 15-6-26(c), the Department is permitted to grant a protective order upon a showing of good cause. "Good cause is established on a showing that disclosure will work a clearly defined and serious injury." *Bertelson v. Allstate Ins. Co.*, 2011 S.D. 13, ¶57, 796 N.W.2d 685, 794 (citation omitted).

Peters requests the Department deny the Motion for Protective Order and allow him to conduct the discovery necessary to address the willful misconduct defense

related to the use of the haul road. Peters argues that Employer and Insurer's sole basis for denying this claim was his positive drug screen. When Employer and Insurer answered Claimant's first discovery requests, they provided the positive drug test as the reason for the denial. The usage of the haul road was not specifically stated as a defense until July 20, 2020, the date the discovery deadline expired. Peters argues that the reason the discovery requests at issue were not made earlier is because Employer and Insurer had not claimed Peters committed willful misconduct by driving on the haul road. Peters argues that Employer and Insurer did not allege that the requested discovery would constitute a clearly defined and serious injury as required by *Bartelson*. "The injury must be shown with specificity." *Id*. "Broad allegations of harm will not suffice." *Id*. Peters further asserts that he would be severely prejudiced if he were not allowed to conduct discovery regarding the willful misconduct defense based on use of the haul road.

Employer and Insurer argue that Peters was put on notice on December 9, 2019, by Employer and Insurer's Answers to Claimant's First Set of Interrogatories that stated that they would contend that Claimant made certain admissions and statements about the route he took the evening of the accident. In the Answers, Employer and Insurer specifically mentioned statements made regarding the route Claimant took. Employer and Insurer also assert that many of the questions asked of Claimant at his deposition were related to his choice of route. Employer and Insurer further assert that the injury or harm to them if they must respond to discovery past the deadline is the lateness itself.

"Discovery rules are designed 'to compel the production of evidence and to promote, rather than stifle, the truth finding process.'" *Dudley v. Huizenga*, 2003 SD 84, ¶11, 667 N.W. 2d 644, 648. Scheduling orders in workers' compensation are governed by ARSD 47:03:01:12 which provides in pertinent part, "[a] schedule may not be modified except by order of the Division of Labor and Management upon a showing of good cause." The Department agrees that Employer and Insurer have not shown with good cause that going forward with the depositions and requests for documents would result in a clearly defined and serious injury. Further, SDCL 15-6-8(b)states, "[a] party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies." The Department is not

persuaded that Employer and Insurer's Answers to Claimant's First Set of Interrogatories and line of questioning at deposition were clear enough to provide notice of the haul road usage defense, because Employer and Insurer's assertion of the willful misconduct defense specifically regarding the use of the haul road was not stated in plain terms.

Therefore, it is reasonable that Peters did not understand the need for further discovery regarding the willful misconduct defense related to the use of the haul road until he received Employer and Insurer's Answer to Interrogatories on July 20, 2020, the date the discovery deadline expired. The Department further agrees that allowing discovery to continue is appropriate in this case because without the discovery he seeks, Peters would not be able to respond at hearing to the evidence provided by Employer and Insurer. As a result, Claimant would be unfairly prejudiced.

Order:

In accordance with the conclusions above, Employer and Insurer's Motion for Protective Order is DENIED; and

This letter shall constitute the Department's order in this matter.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

_____/S/_____
Michelle M. Faw
Administrative Law Judge