April 9, 2010

Mark Allen Koehn
Attorney at Law
PO Box 9655
Rapid City, SD 57709-9655

Letter Decision and Order

Richard L. Travis
May & Johnson, PC
PO Box 88738
Sioux Falls, SD 57109-8738

RE: HF No. 141, 2006/07 – Timothy Andrews v. Ridco, Inc. and Twin City Fire Insurance, Hartford Accident and Indemnity Company and Intracorp.

Dear Mr. Koehn and Mr. Travis:

Submissions:

This letter addresses the following submissions by the parties:

August 11, 2009	Claimant's Motion for Summary Judgment Re: TTD Withheld Between 4/28/05 and 7/5/05 and Brief in Support Thereof;
	Statement of Undisputed Material Facts:
September 29, 2009	Claimant's Motion to Compel Discovery Responses;
	Claimant's Motion to Compel Production of The Hartford's Complete Claim File. Objections to Privilege Claims;
	[Claimant's] Motion for Scheduling Hearing;
November 16, 2009	[Claimant's] Motion for Bifurcation;
November 17, 2009	[Claimant's] Motion to Compel Date for Deposition of Nicole Heglin;

December 3, 2009	Claimant's Supplemental Brief Re: (1) Motion for Summary Judgment Re: TTD Withheld Between 4/28/05 and 7/5/05; (2) Motion to Compel Production of The Hartford's Complete Claim File. Objections to Privilege Claims; (3) Motion to Compel Discovery Responses to Claimant's Pending Discovery Requests; (4) Claimant's Motion for Order Re: Nicole Heglin's Availability for Deposition; and (5) Claimant's Motion for Bifurcation, Scheduling Order, and Final Hearing Date;
December 15, 2009	Response of Ridco, Inc. and Twin City Fire Insurance Company to Claimant's Motion for Bifurcation;
	Response of Ridco, Inc. and Twin City Fire Insurance Company to Claimant's Motion to Compel;
	Response of Ridco, Inc. and Twin City Fire Insurance Company to Motion to Compel Production of The Hartford's Complete Claim File; Objections to Privilege Claims;
	Response of Ridco, Inc. and Twin City Fire Insurance Company to Motion to Compel Date for Deposition of Nicole Heglin;
December 19, 2009	Claimant's Brief in Response to Defendants' 12/15/09 Responses;
December 23, 2009	Employer and Insurer's Brief in Opposition to Claimant's Motion for Summary Judgment Re: TTD Benefits Withheld Between 4/28/05 and 7/5/05;
	Employer and Insurer's Response to Claimant's Statement of Undisputed Facts;
	Affidavit of Richard L. Travis;
December 28, 2009	Employer and Insurer's Supplemental Brief in Opposition to Claimant's Motion for Summary Judgment Re: TTD Benefits Withheld Between 4/28/05 and 7/5/05;
	Supplemental Affidavit of Richard L. Travis;
December 31, 2009	Claimant's Brief In Reply to Defendants' 12/23/09 Brief in Opposition to Claimant's Motion for Summary Judgment Re: TTD Benefits Withheld Between 4/28/05 and 7/5/05; and

January 4, 2009	Claimant's Brief In Reply to Defendants' 12/28/09 Brief in Opposition to Claimant's Motion for Summary Judgment Re: TTD Benefits Withheld Between 4/28/05 and 7/5/05.

Facts:

The facts of this case as reflected by the above submissions and documentation are as follows:

1. Timothy Andrews (Claimant) was injured on Friday, March 4, 2005. Claimant alleges that the injury was work-related.

2. On March 4, 2005, Claimant was employed by Ridco, Inc. (Employer) who was insured by Twin City Fire Insurance Company, Hartford Accident and Indemnity Company (Insurer).

3. On March 7, 2005, Claimant went to the Medical Arts Clinic, where he was seen by Jeanie M. Lembke, M.D. Claimant complained of pain in his neck, right shoulder and wrist. Lembke excused Claimant from two days of work.

4. Dr. Lembke referred Claimant to Clark C. Duchene, M.D., of Black Hills Orthopedic & Spine, who saw Claimant on March 21, 2005.

5. On March 21, 2005, Dr. Duchene prescribed physical therapy for Claimant to instruct him on a home exercise program and informed Claimant that he could continue to see a chiropractor if he found such treatment to be beneficial.

6. Dr. Duchene made a no work recommendations for Claimant and did not schedule a follow-up appointment. However, Duchene agreed to see Claimant on an "as needed basis".

7. Claimant saw chiropractor, Patrick Clinch, D.C., later that same day, March 21, 2005, and continued to treat with him in connection with his March 4, 2005 injuries.

8. On March 21, 2005, Dr. Clinch made a return to work recommendation that stated "[p]atient is totally incapable at this time. Patient will be re-evaluated on 04-04-05."

9. On April 4, 2005, Dr. Clinch made a return to work recommendation which restricted Claimant to "Sedentary Work - patient may not use hands for repetitive work."

10. On April 6, 2005, Ballard also requested by letter that Dr. Clinch provide her with medical records "from the date of injury, 03/10/05 to present."

11. On April 18, 2005, Dr. Clinch made a return to work recommendation which restricted Claimant to "Sedentary Work - patient may not use hands for repetitive work."

12. Insurer paid temporary total disability benefits (TTD) to Claimant for the period of March 10, 2005 through April 28, 2005. On April 28, 2005, Insurer terminated Claimant's TTD.

13. On May 2, 2005, Claimant was released to work by Dr. Clinch but was limited to light work with no use of his hands for repetitive grasping, manipulation, or "[p]ushing & [p]ulling."

14. On May 2, 2005, an Intracorp case manager sent a letter to Dale Anderson, M.D., seeking to schedule an appointment for a "second opinion with option to treat".

15. When Claimant was informed that an appointment had been set with Dr. Dale Anderson, Claimant informed Ballard that he had a personal conflict with Anderson.

16. On May 12, 2005, Ballard contacted Black Hills Orthopedic & Spine, scheduling Claimant to be seen by Dr. Duchene on May 19, 2005.

17. On May 13, 2005, case manager, Klara Parks reviewed medical records from Andrews' March 21, 2005, appointment with Dr. Duchene and after discussing the matter with Ballard, recommended canceling the appointment with Dr. Duchene in favor of an appointment with a physiatrist.

18. On May 16, 2005, Intracorp received permission from Heglin to cancel the appointment with Dr. Duchene and schedule an appointment with a physiatrist. Later that day, an appointment was made for Andrews to be seen on May 27, 2005, with Brett Lawlor, M.D., of the Rehab Doctors.

19. On May 16, 2005, Dr. Clinch made a return to work recommendation which restricted Claimant to "Sedentary Work - patient may not use hands for repetitive work." This recommendation did not change over the course of Claimant's next three visits to Dr. Clinch.

20. On April 18, 2005, Dr. Clinch made a return to work recommendation which restricted Claimant to "Sedentary Work - patient may not use hands for repetitive work."

21. After examining Claimant on June 8, 2005, Dr. Lawlor ordered additional studies for June 22, 2005, and a follow-up for June 24, 2005. Dr. Lawlor also noted that "[i]n the interim, we will have him remain off work and will reevaluate after his studies."

22. Following a set of EMG's administered at Dr. Lawler's office on June 22, 2005, Dr. Lawlor modified Claimant s' work recommendations imposing restrictions which included "a maximum lift of 10 pounds. He needs to change position from sitting to standing and walking every 30 minutes as necessary and limit cervical flexion and overhead activity to an occasional basis."

23. The last work restriction issued by Dr. Clinch, dated July 1, 2005, allowed light work but specifically recommended no repetitive use of his hands whatsoever.

24. Claimant did not report to work for a job sorting boxes because he concluded that Dr. Clinch's work restrictions precluded him from sorting boxes.

25. Andrews was terminated by his employer on or about July 5, 2005, for refusing to report to work for a job sorting boxes.

26. Claimant filed a Petition for Hearing on March 21, 2007. In his Petition, Claimant seeks attorney's fees as authorized by SDCL 58-12-3.

27. On July 28, 2009, the Department of Labor granted Claimant's Motion for Partial Summary Judgment. The Department also granted Claimant's Motion to Compel the Production of Insurer's Claim File.

28. Additional facts may be discussed in the analysis below.

Motion for Summary Judgment:

Claimant filed a Motion for Summary Judgment Re: TTD Benefits Withheld Between 04/28/05 and 07/05/05. ARSD 47:03:01:08 governs the Department of Labor's authority to grant summary judgment. That regulation provides

> ARSD 47:03:01:08. A claimant or an employer or its insurer may, anytime after expiration of 30 days from the filing of a petition, move with supporting affidavits for a summary judgment. The division shall grant the summary judgment immediately if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The party seeking summary judgment bears the burden of demonstrating the lack of any genuine issue of material fact, and all reasonable inferences from the facts are viewed in the light most favorable to the non-moving party. *Railsback v. Mid-Century Ins. Co.*2005 SD 64, ¶6, 680 N.W.2d 652, 654.

It is settled law that the claimant is required to prove the essential elements of her claim by preponderance of the evidence. Johnson v. Albertson's, 2000 SD 47, 610 NW 2d

449. To qualify for TTD, Claimant must show that his work-related injuries rendered him incapable of performing his job duties during the time period in question. See, SDCL 62-4.

Dr. Lawlor removed Claimant from work during the period of June 8, 2005 through June 22, 2005 pending the results of some tests that he had ordered. During this period of time, Claimant clearly qualifies for TTD. Accordingly, Employer and insurer have indicated that they will pay Claimant TTD and interest during that time period.

During the April 28, 2005 through June 7, 2005 time period, Claimant was released to work with restrictions. On April 18, 2005, Dr. Clinch's work recommendation noted, "Sedentary Work - patient may not use hands for repetitive work. On May 2, 2005, Dr. Clinch's work recommendation changed only slightly. It noted, "Light Work - patient may not use hands for repetitive work. On May 16, 2005, Dr. Clinch's work recommendations and restrictions remained the same.

Work restrictions alone do not show that Claimant was incapable of working. Claimant must also shows that Employer had no work available that fell within Claimant's work restrictions. Claimant has not made that showing. Therefore, he has failed to show entitlement as a matter of law to TTD during the April 28, 2005 through June7, 2005 time period.

Analysis of the June 23, 2005 through July 5, 2005 time period yields the same results. On June 22, 2005, Dr. Lawlor released Claimant back to work with restrictions. Claimant was limited to a 10 pound lift and was instructed to change position from sitting to standing and walking every 30 minutes as necessary and limit cervical flexion and overhead activity to an occasional basis. However, Claimant has failed to demonstrate that work under those restrictions was unavailable. Consequently, Claimant is also not entitled to TTD during the June 23 2005 through July 5, 2005 time period.

Motion to Compel Discovery Responses:

Claimant has filed a Motion to Compel Discovery Responses. Discovery in South Dakota workers' compensation cases is governed by SDCL 1-16-9.2. That statute states: specifically governs discovery and provides:

> SDCL 1-16-19.2. Each agency and the officers thereof charged with the duty to administer the laws and rules of the agency shall have power to cause the deposition of witnesses residing within or without the state or absent therefrom to be taken or other discovery procedure to be conducted upon notice to the interested person, if any, in like manner that depositions or witnesses are taken or other discovery procedure is to be conducted in civil actions pending in circuit court in any matter concerning contested cases.

On August 21, 2009, Claimant served Claimant's Fourth Request for Admissions and Fourth Request for Production of Documents. Employer and Insurer objected to the discovery. Employer and Insurer argue that the discovery seeks information related to a SDCL 58-12-3 claim for attorney's fees. Such claims allege that Insurer's denial of benefits are "vexatious or without reasonable cause". Employer and Insurer assert that the "vexatious or without reasonable cause" issue is not yet before the Department.

SDCL 58-12-3.1 states:

> The determination of entitlement to an allowance of attorney fees as costs and the amount thereof under § 58-12-3 shall be made by the court or the Department of Labor at a separate hearing of record subsequent to the entry of a judgment or award in favor of the person making claim against the insurance company, and, if an allowance is made, the amount thereof shall be inserted in or added to the judgment or award. Such a hearing shall be afforded upon the request of the claimant made within ten days after entry of the judgment or award.

This statures sets out two prerequisites to pursuing a SDCL 58-12-3 claim for attorney's fees. First, there must be an entry of a judgment or award in favor of the party making the claim. Second, the claim must be made within ten days after the entry of the judgment or award. Here, the July 28, 2009 decision of the Department fulfills the first requirement of the statute and Claimant's request for attorney's fees fulfills the second.

While most parties may wait to pursue an SDCL 58-12-3 claim until all issues have been resolved, the Claimant is nonetheless free to do so at this time. More importantly, there is nothing to preclude the Claimant from seeking information via discovery regarding this issue. Consequently, Employer and Insurer must respond to this discovery.

Motion to Compel Production of Complete Claims File:

On April 3, 2009, Claimant filed a Motion to Compel seeking Insurer's claim file in this case. On July 28, 2009, the Department of Labor issued a Letter Decision and Order granting Claimant's request. Claimant now asks the Department to order Insurer to provide the complete claim file alleging that Insurer has withheld several items from that file. Insurer state that all documents contained in the have been provided as ordered and that it will disclose to Claimant any additional documents that it may discover in the future.

In essence, Claimant asks that the Department re-order the disclosure of documents that it has previously ordered disclosed. SDCL 15-6-26(Employer) governs supplemental discovery responses. That statute states:

> SDCL 15-6-26(e). A party who has responded to a request for discovery with a response that was complete when made is under a duty to supplement or correct

the response to include information thereafter acquired if ordered by the court or in the following circumstances:

> (1) A party is under a duty to supplement at appropriate intervals the party's response to a discovery request authorized under subdivision (a) if the party learns that in some material respect the response is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert, the duty extends to information contained in any expert report, discovery response concerning expert's opinions and any deposition of the expert.
>
> (2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.
>
> (3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

The Department ordered the production of the claim file in its July 28, 2009 Letter Decision and Order. SDCL 15-6-26(e) imposes a duty on Insurer to furnish Claimant with any documents it has not already provided. Insurer has agreed to furnish any documents that it my find in the future. Under these circumstances there is no need to re-order Insurer to produce documents in the claim file.

In conjunction with the Department's July 28, 2009, order, the Department instructed Insurer to create an index of the claims file that identified any items within that file to which the Insurer objected and instructed Insurer to specify the privilege asserted. The Insurer complied with the instructions indicating several items were protected by the attorney-client privilege. After reviewing these items, the Department affirmed Insurer's claim of privilege for these items in a later determination.

Claimant now asks that the Department reconsider that determination. Claimant argues that it is entitled to any communications between Claimant and its attorney prior to the Petition for Hearing. Claimant also argues that it is entitled to communications in which Insurer's attorney assumed the role of claims adjuster.

First, the date of the Petition for Hearing may be a factor if the privilege claimed was for work product created in anticipation of litigation. However, the date of the Petition for Hearing does not limit the attorney-client privilege. Insurer is entitled to seek confidential legal advice at any time, before, during and after litigation. Sometimes the best advice an attorney can give a client is how to avoid future litigation.

Second, there is nothing in the record in this case to indicate that Insurer's attorney acted as a claims adjustor. Claimant cites Dakota, Minnesota & Eastern Railroad Corp. v. Acuity, 2009 SD 69, as its authority. In that case, Acuity turned over the entire claims process to the attorney. That is not the case here. There is no evidence in this record to suggest that Insurer's attorney has provided any service other than legal. Therefore, the Department will not order the disclosure of those communications here.

Motion for Bifurcation:

Claimant has filed a Motion for bifurcation in this case. He asks that the issues regarding the payment of past medical treatment, payment of continued medical treatment and past weekly disability payments be separated for purposes of hearing from the issues involving permanent total disability and/or payment of rehabilitation benefits.

Claimant wants to move the first three issues stated above quickly to hearing. Claimant argues that the legal standards provided by SDCL 15-6-42(b) have been met. Employer and Insurer disagree. SDCL 15-6-42(b) states:

> SDCL15-6-42(b). The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the state or federal Constitution or as given by a statute.

The moving party bears the burden of showing that bifurcation is warranted. See, Landstom v. Shaver, 1997 SD 25, ¶ 28, 56 NW2d 1, 6. SDCL 15-6-42(b) grants the trial court the discretion to bifurcate a case if the action is "in the furtherance of convenience or to avoid prejudice or when separate trials will be conducive to expediation and economy." Id**.** at ¶ 24, 5.

The Department agrees with Employer and Insurer that none of these factors are present in this case. While the parties may need to consult with a vocational expert for the permanent total disability and/or rehabilitation befits issues, there is no reason that all the issues cannot proceed to hearing in an expeditious manner. Bifurcation is not justified at this point in these proceedings

Motion to Compel Date for Deposition of Nicole Heglin:

Claimant has moved to compel a date for the deposition of Nicole Heglin. Insurer argues that this deposition, like the request for discovery responses above, is primarily intended to gather information for Claimant's "vexatious or without reasonable cause" claim.

If so, the analysis here is the same as it was for that issue above. Claimant is free to pursue the "vexatious or without reasonable cause" claim and is entitled to depose Heglin. Insurer must make Heglin available for deposition.

Motions for Scheduling Order and to Set a Hearing Date:

Claimant has moved the Department to issue a new scheduling order and set a hearing date. These requests will be handled separately from this decision.

Order:

In accordance with the discussion above, Claimant's Motion for Summary Judgment Re: TTD Withheld Between 4/28/05 and 7/5/05 is denied except for those benefits agreed to be paid by Insurer from June 8, 2005 through June 22, 2005. Claimant's Motion to Compel Discovery Responses is granted. Claimant's Motion to Compel Production of The Hartford's Complete Claim File is denied. Claimant's Motion for Bifurcation is denied. Claimant's Motion to Compel Date for Deposition of Nicole Heglin is granted. This letter shall constitute the Department's Order in this matter

Sincerely,

__/S/ Donald W. Hageman_____
Donald W. Hageman
Administrative Law Judge