August 2, 2016

David S. Barari
Goodsell Quinn LLP
P.O. Box 9249
Rapid City, SD 57709

Jason Groves
Groves Law Office
4440 West Glen Place
Rapid City, SD 57702

Letter Decision and Order

Richard L. Travis
Adam Hoier
May & Johnson PC
P.O. Box 88738
South Dakota, SD 57109-1005

RE: HF No. 141, 2013/14 – David W. Wetch v. Midcontinent Media, Inc., and Crum & Forster Commercial Inc.

Dear Counsel:

Claimant filed a Motion to Compel Discovery dated March 10, 2016, to which Employer/Insurer responded on April 12, 2016. Claimant additionally filed a Second Motion for Partial Summary Judgment and Request for Expedited Resolution on May 3, 2016, to which Employer/Insurer responded on June 1, 2016.

The relevant record consists of the following:

1. My Letter Decision and Order of January 28, 2016, in which it was concluded the doctrine of res judicata bars Employer/Insurer from denying benefits regardless of the results of Dr. Wojciehoski's IME, the rights of the parties being dictated by their 1994 agreement; that medical care determined to be reasonable and appropriate prior to that agreement is compensable; that Employer/Insurer is responsible for all medical care and treatment approved by Dr. Wojciehoski; that Employer/Insurer is responsible for all medical necessities Claimant's treating physician, Dr.

Goodhope, considered work-related; that only Dr. Goodhope could answer the question of what treatment is related or unrelated to Claimant's work injury, unless a change of condition was demonstrated; and Employer/Insurer is required to use the reopening process in SDCL 62-7-33 and show a change in Claimant's condition to end or diminish medical benefits.

2. Claimant served discovery on Employer/Insurer May 1, 2014, consisting of Claimant's First Set of Requests for Production of Documents.

3. Employer/Insurer responded to Claimant's request until September 19, 2014, with a privilege log.

4. Claimant asked Employer/Insurer to supplement their discovery responses on February 1, 2016.

5. Counsel discussed timing for the supplementation on February 17, 2016; Claimant's counsel requested the discovery be provided by March 4, 2016.

6. Employer/Insurer has not supplemented its responses.

7. There is a gap in Employer/Insurer's adjuster activity logs and its privilege log from June 8, 2004 to July 14, 2011. Employer/Insurer has made no claim of privilege, provided documentation, or explained this omission.

8. As of April 15, 2016, Employer/Insurer's counsel represented that they were in the process of reviewing their files to determine whether there is additional information to provide beyond what was produced in September, 2014, subject to privilege against disclosure.

9. Employer/Insurer has agreed to produce the information requested in Claimant's Request for Production 1, 3, and 4, but has not done so.

10. Though it considers such information irrelevant, Employer/Insurer has agreed to produce its "reserve information" as identified in its privilege log, but has not done so.

11. Employer/Insurer has agreed to produce their claims notes/adjuster activity log, with privileged information redacted.

12. Claimant was scheduled for treatment at the Rehab Doctors in Rapid City on February 10 and April 12, 2016, as prescribed by Dr. Goodhope.

13. Dr. Goodhope sent records to Employer/Insurer in January, 2016 in support of his referral. In November, 2015, he had referred Claimant to

Dr. Lawlor at Rehab Doctors for treatment of back pain, leg issues, and for evaluation for injections.

14. On January 13, 2016, Employer/Insurer requested documentation from Rapid City Medical Center regarding Dr. Goodhope's referral to the Rehab Doctors.

15. Rapid City Medical Center responded to Employer/Insurer's request the same day.

16. By April 28, 2016 email, Employer/Insurer authorized Claimant's referral to the Rehab Doctors.

17. By May 11, 2016 email, Employer/Insurer authorized Claimant's treatment with the Rehab Doctors in connection with pain and grinding in his neck.

Additional facts may be discussed in the analysis below.

Analysis:

Discovery in South Dakota workers' compensation cases is governed by SDCL 1-26-19.2: "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."

Discovery rules are designed "to compel the production of evidence and to promote, rather than stifle, the truth finding process." Magbuhat v. Kovarik, 382 N.W.2d 43, 45 (S.D.1986) (citing Chittenden & Eastman Co. v. Smith, 286 N.W.2d 314, 316 (S.D.1979)).

The South Dakota Supreme Court discussed the relevancy of documents in discovery requests in Kaarup v. St. Paul Fire and Marine Ins. Co., 436 N.W.2d 17, 20 (S.D. 1989). "The proper standard for ruling on a discovery motion is whether the information sought is 'relevant to the subject matter involved in the pending action ....' SDCL 15-6-26(b)(1). This phraseology implies a broad construction of 'relevancy' at the discovery stage because one of the purposes of discovery is to examine information that may lead to admissible evidence at trial."

Whether a document or tangible thing is attorney work product depends on 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." Tebben v Gil Haugan

Construction, Inc., 2007 SD 18, ¶ 28, 729 N.W.2d 166, 174, quoting Kaarup v. St. Paul Fire & Marine Ins. Co., 436 N.W.2d 17, 21 (S.D. 1989). SDCL 15-6-26(b)(3) (work product is defined as "documents and tangible things … prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative").

Given the liberality connected with interpreting workers' compensation laws, and the purpose of those laws to expeditiously provide appropriate benefits to injured workers, the Department has previously held in the context of workers' compensation disputes a potential for litigation only exists after sufficient facts are uncovered in the investigation "to throw the compensability of the claim in doubt." Dudash, supra.

The submissions of the parties thus far are insufficient to establish whether the work product, attorney-client, trade secrets or confidential commercial information privileges apply. An in camera review will therefore be conducted to determine what portions of the redacted information in the claims files, if any, should be disclosed to Claimant. In the event additional information need be disclosed, the Department will provide copies to Insurer; the Department will not require any previously undisclosed information to be provided to Claimant until at least ten business days after Department informs Employer/Insurer of the information it will require to be disclosed.

In accordance with the decision above, Employer/Insurer is hereby ordered to provide its claim file information in its entirety to the Department for in camera review; Employer/Insurer shall have twenty days from its receipt of this letter to do so, but additional time will be allowed if necessary. Insurer has provided its Privilege Log; if it desires to explain its reasoning for exclusion further, it should do so by submitting its arguments along with the previously redacted documents. In the event additional information need be disclosed, the Department will provide copies of the documents it proposes to provide to Insurer; the Insurer shall have ten business days from its receipt of those documents to take such actions in response as it deems appropriate before the information is to be provided to Claimant.

As was discussed in my January, 2016 decision, Employer/Insurer is obligated under its agreement to provide necessary care. Whether the treatment recommended by Dr. Goodhope at the Rehab Doctors is reasonable treatment made necessary by his work injury was resolved in the previous summary judgment letter decision and order. Employer/Insurer did not pursue a reopening of Claimant's claim under SDCL 62-7-33, the procedure prescribed in *Hayes v Rosenbaum Signs,* 2014 S.D. 64, ¶29, 853 N.W.2d 878, 886 for addressing such issues; instead it did nothing, authorizing this treatment only after three additional months of delays, and now argues Claimant's motion in that regard is moot.

A claim will be considered moot where there has been a change of circumstances or the occurrence of an event by which the actual controversy ceases and it becomes impossible to grant effectual relief. A judgment rendered on the underlying issue will have no practical legal effect upon the existing controversy. *Sullivan v Sullivan,* 2009 SD 27, ¶11, 764 N.W.2d 895, 899.

There are exceptions to the mootness rule, however, which allow a full determination of the case. Claimant raises the "capable of repetition, yet evading review" exception. Two conditions must be met for this exception to apply: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again. A theoretical possibility of repetition will not constitute an exception to the mootness doctrine: there must be a reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party. *Sullivan,* 2009 SD 27, ¶12-13, 764 N.W.2d at 899-900.

This is the first instance in which Employer/Insurer has delayed approval of the care of Claimant needs, albeit without apparent justification. In this instance, the recognized exceptions to mootness do not appear to have occurred. That is not to say, however, that repeated instances of such behavior cannot be viewed differently. Claimant's Motion for Partial Summary Judgment is therefore dismissed, but the department will retain continuing jurisdiction over Claimant's medical claim to ensure treatment consistent with its previous orders in this matter is provided.

In addition, Claimant may submit a petition for the necessary costs of these motions per ARSD 47:03:01:16.

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

Sincerely,

/s/ Sarah E. Harris
Sarah E. Harris
Administrative Law Judge