July 17, 2008

LETTER DECISION AND ORDER

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RE: HF No. 142, 2006/07 – Jonnie Krause v. Sutton Bay Golf, L.L.C. and Midwest Family Mutual Insurance Company

Dear Mr. Simpson and Mr. Fritz:

Claimant filed a Motion to Compel Production of Surveillance Evidence on June 25, 2008. Employer/Insurer filed a Response to Claimant's Motion to Compel on June 27, 2008. Claimant provided his reply on July 1, 2008.

Claimant served his First Set of Interrogatories and Request for Production of Documents on May 4, 2007. Interrogatory 14 asked Employer to list and identify surveillance information. Request for Production 6 asked Employer to produce a complete copy of all tangible items identified in answer to Interrogatory 14.

Employer provided a signed copy of answers to Claimant's Interrogatories and Request for Production of Documents on or about May 30, 2007. Employer/Insurer objected to Interrogatory 14 based a privilege and protected work product objection and an objection that the information sought was vague and ambiguous. Claimant has asked the Department to compel Employer/Insurer to produce any surveillance footage taken of Claimant. In its Answer to Claimant's Interrogatory 14, Employer/Insurer objected to this request, arguing that the footage is work-product and privileged.

In its Response to Claimant's Motion to Compel, Employer/Insurer argued that Claimant has failed to make the showing required by SDCL 16-5-26(b)(3) in order to compel production of the surveillance video. Employer/Insurer argues that the surveillance has "not been shown

to any treating physician," and that "Claimant should be aware of [his] own activities without the production of the surveillance video." The South Dakota Supreme Court opined in Dudley v. Huizenga, 2003 SD 84, ¶11, 667 N.W.2d 644, 648, "Discovery rules are designed 'to compel the production of evidence and to promote, rather than stifle, the truth finding process." The workers' compensation system is designed to be essentially non-adversarial. Sowards v. Hills Materials Co., 521 N.W.2d 649 (S.D. 1994). Claimant's physical abilities are at issue. Any evidence of her physical abilities is certainly relevant and Claimant has substantial need of any surveillance materials in preparation of his case.

Employer/Insurer also argues that to allow discovery of any surveillance would act as "a strong disincentive to performing a thorough investigation" of a claim. The South Dakota Supreme Court in Lagge v. Corsica Co-op, 677 N.W.2d 569 (S.D. 2004), sanctioned the discovery of surveillance video, but only after the subject of the video had been deposed. The Department fails to see how allowing discovery of surveillance footage, after the subject of the surveillance has been deposed, acts as a disincentive to investigate a claim. Employer/Insurer is required to conduct an investigation under SDCL Title 62 and is afforded great latitude.

Employer/Insurer also argues that Claimant has failed to cite any Department decisions allowing discovery of surveillance video. Department decisions on motions, while potentially persuasive, are not considered controlling authority and are generally not "reported."

The Department hereby grants Claimant's Motion to Compel, however, Employer/Insurer may have the opportunity to depose Claimant regarding the surveillance before the surveillance is produced, unless Employer/Insurer deposed Claimant after the surveillance was taken. Employer/Insurer should have the opportunity to cross-examine Claimant regarding the Claimant's actions shown in the surveillance. The South Dakota Supreme Court has sanctioned this approach to the production of surveillance footage. See Lagge v. Corsica Co-op, 677 N.W.2d 569 (S.D. 2004). Employer/Insurer shall produce the surveillance within 20 days of this Letter Order or 20 days after receipt of the deposition transcript.

This letter shall constitute the Department's Order.

Sincerely,

Heather E. Covey
Administrative Law Judge