March 23, 2016

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Re: HF No. 176, 2014/15 – Little v Probuild Co LLC & Liberty Mutual Ins., Motion to Compel Letter Decision and Order

Counsel:

Claimant filed a Motion to Compel Discovery dated November 5, 2015, to which Employer/Insurer responded on December 17, 2015. Claimant replied to that response on January 22, 2016. As ALJ Donald Hageman was assigned to the case and has since retired, I will address the issues in the Motion, leaving to another day the matter of which ALJ will assume responsibility for bringing the case to its conclusion.

The parties have asserted the following facts in their submissions:

1. On January 23, 2012, while Claimant was the employee of Employer, he fell off a ladder and injured his low back. Employer/Insurer agrees Claimant suffered a compensable injury to his back on that date.

2. Claimant underwent surgery after this injury, paid for by Insurer. He received temporary total disability benefits and permanent partial disability benefits based on an impairment rating of 5 % impairment of the whole person on October 29, 2012.

3. On the date of his impairment rating, Claimant was released to work without restrictions. Roughly two weeks later, Claimant relocated to Arizona.

4. On October 15, 2014, Claimant contacted Insurer to advise he had been receiving medical treatment while in Arizona, and requested the bills be paid. Insurer asserts he had not received written approval for changing his authorized physician. In addition, there is no indication that his South Dakota physicians referred him to his Arizona doctors.

5. Claimant had back surgeries on December 2, 2014 and January 16, 2015, performed by Arizona doctors, and is unable to work pursuant to his doctors' instructions.

6. Claimant asserts he has not reached maximum medical improvement and has not been given permanent work restrictions. He claims entitlement to temporary total disability benefits going back to October, 2014.

7. Claimant asserts his treating surgeon has opined the 2012 injury is a major contributing cause for his current condition.

8. Claimant asserts, given his present condition, he is unable to return to any occupation.

9. Employer/Insurer asserts Claimant in not entitled to medical reimbursement after having moved to Arizona, as he failed to obtain written approval for changing his medical practitioner.

10. Employer/Insurer asserts Claimant engaged in employment after his claimed injury which independently contributed to his current condition, treatment, impairment or disability, if any, and denies his injury remains a major contributing cause for his present condition.

11. Claimant submitted a Petition for Hearing with the Department on April 21, 2015, received and filed on April 24, 2015.

12. Employer/Insurer asserts it has previously disclosed all medical records in its claim file, along with some documents, correspondence and Department filings.

Additional facts may be discussed in the analysis below.

Claimant's Motion seeks production of Employer/Insurer's entire claim file prior to April 21, 2015. Employer/Insurer objects to disclosing claim file documents prior to October 29, 2012, arguing that such documents are irrelevant to the issues of whether Claimant obtained authorization for changing doctors when he moved to Arizona, or whether his current medical condition remains related to his work injury. Employer/Insurer argues subsequent claim file notes are either irrelevant or work product, but produced claim file notes for the period from October 29, 2012 to April 21, 2015 with redactions for portions it considered protected by

work product, attorney-client communications, trade secrets or confidential commercial information.

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."

The issues in this case are whether Claimant's condition, impairment, and disability were caused by his 2012 work injury; his entitlement to temporary total disability benefits at any time after October 29, 2012, with the associated question of whether he reached maximum medical improvement on or after that date; his entitlement to medical benefits at any time after October 29, 2012; his entitlement to additional indemnity benefits such as permanent partial disability, rehabilitation, or permanent total disability; and whether his medical treatment after October 29, 2012 was authorized under SDCL 62-4-43. Any facts that tend to prove or disprove these questions are admissible at hearing.

It is enough to observe, as the Department did in Dudash v City of Rapid City, HF No. 181, 2012/13, 2013 WL 6211247, at 4 (SD Department of Labor and Regulation, November 14, 2013), that Insurer likely relied on all information in the claims file, whether before or after October 29, 2012, in deciding to accept or deny responsibility for Claimant's benefits beginning in 2014. It is therefore relevant and discoverable, if not protected from disclosure by a privilege.

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.

This letter shall constitute the order in this matter.

Sincerely,

James E. Marsh
Director