

April 6, 2009

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Letter Decision and Order

J. G. Schultz
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Re: HF No. 31, 2008/09 – Tammy Lagler v. Menards, Inc. and Zurich American Insurance Co.

Dear Mr. Heidepriem and Mr. Schultz:

BACKGROUND

This letter addresses the following submissions by the parties and related facts:

1. Tammy Lagler (Claimant) served Claimant's Interrogatories and Request for Production of Documents upon Menards, Inc. and Zurich American Insurance Co. (Employer/Insurer).
2. Claimant filed Claimant's Motion to Compel Answers to Interrogatories and Request for Production of Documents of Employer/Insurer (First Set) dated December 3, 2008. Claimant's motion asked that the Department of Labor (Department) to compel Employer/Insurer to comply with Claimant's discovery requests and award her expenses and attorney's fees.
3. Employer/Insurer filed a Response to Motion to Compel dated December 30, 2008. Employer/Insurer's response indicated that unsigned Answers to Claimant's Interrogatories and Responses to Requests for Production of Documents had been provided to Claimant.
4. Employer/Insurer filed a Motion to Amend Joint Answer to Petition for Hearing and the Amended Joint Answer to Petition for Hearing dated December 31, 2008.
5. The Claimant sent a letter to the Department's Administrative Law Judge (ALJ) dated January 9, 2009, which indicated Claimant would not be

- providing any arguments resisting Employer/Insurer's Motion to Amend joint Answers to Petition for Hearing. Claimant also requested a telephonic status conference to discuss her Motion to Compel dated December 3, 2008. Claimant stated that Employer/Insurer's response to her interrogatories and request for production contained numerous objections which interfered with Claimant's ability to evaluate her case.
6. The ALJ initiated a telephonic status conference with the parties on February 9, 2009. After a brief discussion, the ALJ instructed Claimant to update her motion to compel within seven days and gave Employer/Insurer seven days to respond.
 7. In a letter dated February 20, 2009, Claimant requested responses to interrogatories 3, 6, 9, 10, 13, 33, 37, 38, 39, 45, 46, 50 and production of documents 2, 3, 4, 5, 6 and 7.
 8. Employer/Insurer filed Employer and Insurer's Response to Claimant's Motion to Compel Answers to Interrogatories and Request for Production of Documents and Motion for Protective Order dated March 13, 2009.
 9. Claimant filed Claimant's Brief in Support of Her Motion to Compel Employer/Insurer to Answer Interrogatories and to Produce Documents dated March 23, 2009. In her brief Claimant made arguments in support of interrogatories 9, 12, 37, 38, 39 and requests 3, 4, and 6.

CLAIMANT'S MOTION TO COMPEL ANSWERS TO INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS

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.

SDCL 15-6-26(a) provides the available discovery methods. That statute states:

SDCL 15-6-26(a). Parties may obtain discovery by one or more of the following methods:

Depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other

purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under § 15-6-26(c), the frequency of use of these methods is not limited.

SDCL 15-6-26(b) governs the scope of discovery, and provides:

- (1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
- (2) Insurance agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.
- (3) Trial preparation: materials. Subject to the provisions of subdivision (4) of this section, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (1) of this section and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including such other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the

required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of subdivision 15-6-37(a)(4) apply to award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

- (4) Trial preparation: experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
 - (A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.
 - (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (4)(C) of this section, concerning fees and expenses as the court may deem appropriate.
- (B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in § 15-6-35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.
- (C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (4)(A)(ii) and (4)(B) of this section; and (ii) with respect to discovery obtained under subdivision (4)(A)(ii) of this section the court may require, and with respect to discovery obtained under subdivision (4)(B) of this section the court shall require, the party seeking discovery to

pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

- (5) **Claims of Privilege or Protection of Trial Preparation Materials.** When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

The South Dakota Supreme Court has stated:

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 purpose of workers' compensation is to provide for employees who have lost their ability to earn because of an employment-related accident, casualty, or disease. Rawls v. Coleman-Frizzell, Inc., 2002 SD 130, ¶ 19, 653 N.W.2d 247, 252 (citing Sopko v. C & R Transfer).

Dudley v. Huizenga, 2003 SD 84, ¶ 11, 667 NW2d 644. 648.

In Claimant’s Brief in Support of Her Motion to Compel Employer and Insurer to Answer Interrogatories and to Producer Documents, she defends 5 interrogatories and 3 request for production. Those interrogatories and request for production will be addressed herein turn.

Interrogatory 9 and Request for Production 3 are related and are dealt with here together:

Interrogatory 9:

State whether Employer maintained a personnel file during the time Claimant was in its employ.

Answer:

Yes.

Request for Production 3:

Claimant's entire personnel file while employed by employer, including but not limited to, application for employment, contract for employment, job designation, notes, and time sheets, pay receipts of hours worked, and work schedules, sick leave and vacations, any and all written doctors' and chiropractors' excuses or writings given to the Employer for work missed or illnesses, and any and all records of injuries.

Answer:

OBJECTION: This request seeks information beyond the scope of the pleadings and is not reasonably calculated to lead to the discovery of additional evidence.

Employer/Insurer answered interrogatory 9. However, they resisted providing the personnel records to the Claimant. Claimant's personnel records are within the scope of discovery. The request for the personnel file is reasonably calculated to lead to the discovery of admissible evidence. Employer/Insurer's objection to Request for Production 3 is overruled.

Interrogatory 12 and Request for Production 4 are related and are dealt with here together:

Interrogatory 12:

State whether a First Report of Injury was filed for this Claimant regarding the injury or illness which was first treated on or about April 21, 2007.

Answer:

Yes.

Request for Production 4:

A copy of the Employer's First Report of Injury.

Answer:

OBJECTION: This request seeks information available by other means without undue hardship.

Employer/Insurer answered Interrogatory 12. However, they resisted providing the First Report of Injury to Claimant. This document is relevant and within the scope of discovery. Employer/Insurer's objection to Request for Production 4 is overruled.

Interrogatories 37, 38, 39 and Request for Production 6 are related and are dealt with here together:

Interrogatory 37:

Did Employer or provider conduct an investigation to determine whether the Claimant is entitled to vocational rehabilitation benefits pursuant to SDCL 62-4-5.1? If so State:

- a. The investigation that was conducted.
- b. The names and addresses of the persons involved in conducting the investigation.
- c. The inclusive dates of the investigation.
- d. The results of the investigation.

Answer:

OBJECTION: This interrogatory seeks to discover privileged information prepared in anticipation of litigation which is work product and beyond the scope of SDCL 15-6-26(b).

Interrogatory 38:

Has Employer or provider ever contracted with any vocational rehabilitation or employment agencies during the course of this workers' compensation claim? If so State:

- a. The name and address of rehabilitation or employment agency.
- b. The purpose for contracting with the agency.
- c. The fee/expense agreement with agency.
- d. Whether you will agree to produce Claimant with a complete copy of the rehabilitation or employment agency's file in this matter without a motion to produce.

Answer:

OBJECTION: This interrogatory seeks to discover privileged information prepared in anticipation of litigation which is work product and beyond the scope of SDCL 15-6-26(b).

Interrogatory 39:

Have received any report from an employment or rehabilitation expert regarding job placement or employability, or rehabilitation of Claimant? If so State:

- a. The names and address of such employment or rehabilitation expert.

- b. The date of the report
- c. Please furnish a copy of said report.

Answer:

OBJECTION: This interrogatory seeks to discover privileged information prepared in anticipation of litigation which is work product and beyond the scope of SDCL 15-6-26(b).

Request for Production 6:

Any and all vocational rehabilitation records and reports regarding Claimant in your possession, custody or control.

Answer:

OBJECTION: This interrogatory seeks to discover privileged information prepared in anticipation of litigation which is work product and beyond the scope of SDCL 15-6-26(b).

Interrogatories 37, 38, 39 and Request for Production 6, all seek various forms of rehabilitation and employment information concerning that Employer/Insurer has compiled about Claimant. Employer/Insurer argues that this information was prepared in anticipation of litigation.

When information is withheld for this reason, SDCL 15-6-26(b)(5) dictates that Employer/Insurer, "shall describe the nature of the documents, communications, or things not produced in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." Employer/Insurer failed to comply with this provision in this case. Consequently, it becomes more difficult to make a determination.

Nevertheless, it seems that a prudent business would maintain these types of records regarding injured employees in the routine course of business. Therefore, Employer/Insurer's objections to Interrogatories 37, 38, 39 and Request for Production are overruled.

Claimant's brief in support of her motion to compel, did not argue or challenge any of Employer/Insurer's other objections other than those discussed above. Therefore, Employer/insurer's remaining objections are sustained.

MOTION FOR PROTECTIVE ORDER

In light of the above rulings, a protective order should not be necessary in this case. Employer/Insurer's Motion for Protective Order is denied.

MOTION TO AMEND JOINT ANSWER TO PETITION FOR HEARING

Claimant made no arguments regarding Employer/Insurer's Motion to Amend Joint Answer to Petition for Hearing. Therefore, Employer/Insurer's motion is granted.

REQUEST FOR EXPENSES AND ATTORNEYS FEES

Claimant's request for expenses and attorney's fee is denied at this time.

ORDER

In accordance with the above analysis, Claimant's Motion to Compel Answers to Interrogatories and Request for Production of Documents is granted in part and denied in part. Employer/Insurer is directed to provide answers to Interrogatories 37, 38 and 39 and produce the documents requested in Requests for Production 3, 4 and 6 within 30 days of this order. Employer/Insurer's Motion to Amend Joint Answer to Petition for Hearing is granted. Employer/Insurer's Motion for Protective Order is denied. Claimant's request for expenses and attorney's fees is denied. This letter shall constitute the Department's Order in this matter.

Sincerely,

Donald W. Hageman
Administrative Law Judge