October 23, 2019

Brad J. Lee
Beardsley, Jensen & Lee Prof. LLC
P.O. Box 9579
Rapid City, SD 57709

Letter Decision and Order on Motion to Compel

Kristi Geisler Holm
Davenport, Evans, Hurwitz & Smith, LLP
P.O. Box 1030
Sioux Falls, SD 57101-1030

RE: HF No. 58, 2018/19 – Shannon Hillock v. David M. Dorsett Healthcare and Liberty Mutual Fire Insurance Company

Dear Mr. Lee and Ms. Holm:

The Department of Labor and Regulation (Department) has received Claimant's Motion to Compel Discovery and Production of Documents and the Employer and Insurer's Response. All submissions have been taken under consideration.

Shannon Hillock (Claimant) has moved the Department to compel the production of the Insurer's claim file and the nurse case manager file. David M. Dorsett Healthcare and Liberty Mutual Fire Insurance Company (Employer/Insurer) have argued that these documents are irrelevant and unnecessary to Claimant's claims, and are otherwise protected from discovery as work product and as material protected by attorney-client privilege.

Employer/Insurer argue that the requested files are irrelevant and unnecessary. They assert that the primary point of issue between the parties is whether the September 29, 2018 fall and its effects are causally related to Claimant's initial May 14, 2018 work injury. Therefore, the question is whether Claimant's work injury is and remains a major contributing cause of her current condition and need for treatment. Employer/Insurer state that all applicable benefits were paid prior to a fall Claimant had after leaving employment with employer, and as there was no dispute between the parties during the time frame, none of the claim file or case management file prior to September 29, 2018 is relevant.

Employer/Insurer have relied on the recent Department decision in *Hveem v. Integrity Management Consulting Services, LLC and Firstcomp Insurance Co,* 2018 WL 6247147. In that case, Hveem filed a motion to compel the deposition of a claim adjuster employed by Firstcomp Insurance. Hveem outlined a series of questions intended to be asked during the deposition. Integrity Management Consulting Services, LLC and Firstcomp Insurance Co. moved for a protective order to prevent Hveem from seeking the information and argued that the information was irrelevant. The Department concluded the information sought by Hveem was not relevant and would not reasonably prove an element of the case. Hveem appealed and the Circuit Court remanded the decision to the Department to reconsider whether the deposition of Firstcomp Insurance's claim adjuster could lead to any discoverable evidence. Upon remand, the Department determined that considering the specific questions that Hveem intended to pose during deposition, it was unlikely to result in discoverable evidence regarding the issues of causation or major contributing cause of Hveem's current condition.

Hveem is distinguishable from the present issue. In this matter, Claimant is not requesting to ask specific questions of an individual but is instead seeking files that kept in the usual course of processing workers' compensation claims. Claimant argues that these files may contain evidence that can support her injury and version of events and are a record of statements and requests made to the adjusters.

The Court has stated, "one of the purposes of discovery is to examine information that may lead to admissible evidence at trial." *Kaarup v. St. Paul Fire & Marine Ins. Co.*, 436 N.W.2d 17, 21 (S.D. 1989) at 1. SDCL §15-6-26 states, in pertinent part, "[i]t 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." Claimant argues that the information in the files will provide relevant information related to her condition before the fall and whether the work-related injury is a major contributing cause of her injuries. Claimant also argues that the claims notes are a contemporaneous recording of statements claimant made and the progress of her medical care which can be used to support her claims. The Department is persuaded that information in the files could lead the discovery of admissible evidence and are generally relevant to this matter.

Employer/Insurer argue that the files are protected under work product doctrine. Claimant asserts that these files do not fall under work product privilege, because they were created in the usual course of business and not in anticipation of litigation. Work product doctrine is defined in SDCL 15-6-26(b)(3) which states, in pertinent part:

> 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.

Insurer creates claim files in the usual course of processing a claim. The nurse case manager's file is also kept as part of the standard processing of an employee's claim. The files are discoverable unless they fall under an exception. The documents in the file would fall under the work product privilege exception if they were specifically produced in anticipation of litigation. The South Dakota Supreme court has established the test to determine work product as "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." *Kaarup* at 8. The time when an Employer and Insurer could have reasonably anticipated litigation varies case by case. The Department has previously stated, "the date of the Petition for Hearing may be a factor if the privilege claimed was for work product created in anticipation of litigation." *Andrews v. Ridco, Inc. & Twin City Fire Ins.,* 2010 WL 1607705, at 6 (S.D. Dept. Lab. Apr. 9, 2010). Therefore, the filing of the Petition is not a hardline rule for when a party could have anticipated litigation, but it is a factor to be considered.

Employer/Insurer argue that they anticipated litigation prior to Claimant filing her Petition for Hearing on December 17, 2018. Employer/Insurer received a letter from Claimant on November 1, 2018 which threatened litigation. They further argue that they anticipated litigation much earlier due to the nature of the circumstances of the claim itself. This includes disagreement on causation and the work-relatedness of the purported second injury which occurred on September 29, 2018, two months after Claimant was no longer employed by Employer. The Department agrees that the letter sent from Claimant's attorney on November 1, 2018 was enough to alert Employer/Insurer to pending litigation, and therefore, documents and records put in the insurer's file or nurse case manager's file following that date fall under work product. The Department is not persuaded that the second injury was enough to have led Employer/Insurer reasonably anticipate litigation. Workers compensation and the area of insurance in general is frequently contentious. Disagreement does not necessarily mean there will be litigation. However, the withheld documents dated prior to November 1, 2018 from these files may yet be privileged under work product doctrine if they contain, as SDCL 15-6-26(b)(3) states, "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

Employer/Insurer also argue that attorney-client privilege applies to the withheld documents. Attorney-client privilege is codified in SDCL 19-19-502. This privilege does not require the anticipation of litigation, but instead, applies to confidential communications between attorneys and their clients who seek legal advice. Documents in the files that qualify as communications by Employer/Insurer to seek legal advice from their attorneys is protected and not discoverable.

The pre-November 1 withheld files may be discoverable unless they fall under the work product or attorney-client privilege exceptions. In instances of disputed documents, the Court has held, “the preferred procedure for handling privilege issues is to allow for an in camera review of the documents[.]” *Andrews v. Ridco, Inc. & Twin City Fire Ins.* 863 N.W.2d 540, S.D. 2015 citing *DM & E*, 2009 S.D. 69*,* ¶ ¶55-56, 771 N.W.2d at 638. To discern whether these exceptions apply, it is necessary for the Department to conduct an *in camera* of the withheld files. A copy of the index and those items to which the Insurer objects shall be provided to the Department of Labor for an *in camera* review of those documents and later determination.

Order:

In accordance with the decisions above, the Employer/Insurer shall provide to the Department the withheld files. The Department will conduct an *in camera* review of the documents. The Department will then inform Employer/Insurer which, if any, documents are to be released. Employer/Insurer will have an opportunity to object. Once any objections have been resolved, any documents still to be released will be provided to Claimant. Employer/ Insurer shall mail a copy of the documents to be reviewed *in camera*, along with the Index, to the Department by November 29, 2019. The Department will then conduct the *in camera* review.

The Parties will consider this letter to be the Order of the Department.

Dated this _______ day of October, 2019.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

____

Michelle M. Faw
Administrative Law Judge