

July 7, 2008

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James Abourezk
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RE: HF No. 92, 2003/04– Cheryl Tebben v. Gil Haugen Construction & General
Casualty Company

Dear Mr. Ashmore and Mr. Abourezk:

The Department is in receipt of Employer/Insurer's Motion to Quash Subpoena and for Protective Order as to Michael McKnight's File and Insurer's Claim File and Claimant's response thereto. The Subpoena Duces Tecum of Michael S. McKnight is for the production of "all correspondence, whether by email or regular mail, or memoranda of telephone calls," between McKnight and General Casualty and General Casualty's "entire" claim file.

Attorney Michael S. McKnight represented Insurer in the above-referenced matter from December 2003 to February 2007, during the litigation of Petitioner's claim for death benefits. The most recent proceeding in the matter was a rehearing before the Department of Labor, at which Petitioner prevailed. Following the decision of the Department, Petitioner filed a motion for attorney fees pursuant to SDCL 58-12-3, claiming that Insurer had vexatiously refused to pay benefits. Because McKnight was a potential witness as to the facts involved in Petitioner's underlying claim for death benefits, Insurer retained Daniel E. Ashmore to defend the SDCL 58-12-3 claim.

SDCL 19-13-3 defines "attorney-client privilege":

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (1) Between himself or his representative and his lawyer or his lawyer's representative;
- (2) Between his lawyer and the lawyer's representative;
- (3) By him or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (4) Between representatives of the client or between the client and a representative of the client; or
- (5) Among lawyers and their representatives representing the same client.

The fact that McKnight has knowledge of the facts involved in Petitioner's underlying claim does not create a waiver of either the attorney-client or work product privilege. Rather, McKnight has a duty under SDCL 16-18-18 and under Rule 1.6 of the South Dakota Rules of Professional Conduct to refuse to disclose confidential communications between him and Insurer.

Only a few exceptions to lawyer-client privilege exist, and those are specified by SDCL 19-13-5:

- (1) If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have know to be a crime or fraud;
- (2) As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transactions;
- (3) As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer;
- (4) As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;
- (5) As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

Petitioner has not met the burden to show that any of these exceptions apply to "all correspondence, whether by email or regular mail, or memoranda of telephone calls" between McKnight and General Casualty in this matter. Insurer has not waived the attorney-client privilege by asserting a defense of reliance on advice of counsel.

McKnight's file also contains attorney work product, to which Petitioner is not entitled. Petitioner has not made the proper showing required by SDCL 15-6-26(b)(3) to discover work-product.

Privilege also attaches to the communications between Employer and Insurer. Petitioner has not made the required showing under SDCL 15-6-26(b)(3) to discover privileged communications and documents.

Employer/Insurer's Motion to Quash is granted. Employer/Insurer's Motion for Protective order is denied at this time. Employer/Insurer's request that the Department direct Petitioner to state her claim with particularity is granted. SDCL 1-26-19.2 governs discovery in the administrative process.

Employer/Insurer shall submit an Order consistent with this letter decision.

Sincerely,

Heather E. Covey
Administrative Law Judge