September 8, 2009

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Letter Decision and Order

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RE: HF No. 94, 2008/09 – Bisrat Yetbarek v. Golden Rule Construction and Acuity insurance Company.

Dear Mr. Janklow and Mr. Larson:

Submissions:

This letter addresses the following submissions by the parties:

June 19, 2009	Claimant's Motion to Compel Request for Production of Documents (Second Set);
	Claimant's Brief in Support of Claimant's Motion for Summary Judgment on Issues Relating to Claims Claimant's Motion to Compel Request for Production of Documents (second set);
	Affidavit of A. Russell Janklow;
July 8, 2009	Employer and Insurer's Resistance to Claimant's Motion to Compel.

Background:

The facts of this case as reflected by the above submissions and documentation are as follows:

1. Bisrat Yetbarek (Claimant) suffered a work related injury to his left knee on November 15, 2007. At the time of this injury, Claimant was employed by Golden Rule Construction (Employer).

2. On November 15, 2007, Employer was insured by Acuity Insurance Company (Insurer) for purposes of workers' compensation.

3. Claimant had two surgeries on his left knee, one on November 20, 2007, and another on January 31, 2008. Claimant continued to complain of pain in his left knee for several months following his surgeries.

4. Claimant's physician released him to light duty work on March 17, 2008.

5. On July 30, 2008, Claimant's physician provided him with permanent work restrictions of no lifting of greater than fifty pounds, no scaffold, no stairs, and remain on level ground.

6. On October 20, 2008, Claimant's physician placed him at MMI. On October 27, 2008, Claimant's physician provided him with a 7% lower extremity impairment rating.

7. Employer and Insurer has accepted responsibility for the medical costs and 7% lower extremity impairment rating associated with Claimant's November 15, 2007 knee injury.

8. Employer and insurer have not accepted responsibility for back pain suffered by Claimant and dispute Claimant's contention tat he is permanently and totally disabled.

. ***Motion to Compel:***

During discovery, Claimant sought information obtained by the nurse case manager while monitoring Claimant's case. Claimant specifically asked for the following in its Request for Production (Second Set):

Request for Production No, 1:

> Please produce all documents, including but not limited to, notes, reports or any other documents of the nurse case manager, which detail questions or information from the Claimant to the nurse case manager or from the doctor to the nurse case manager, or any information obtained by the nurse case manager.

Employer and insurer gave the following response to Claimant request:

Response:

> Objection. This Request for Production is objected to on the grounds that it seeks documents protected by the work produce doctrine. The request is further objected to as it is irrelevant, overly burdensome and is vague and ambiguous. Without waiving said objections, the Department of Labor has repeatedly held the nurse case manager notes are not discoverable as they are work product. *See*

Kries v. American Food Group, HF No. 91, 2006/70. The Department has indicated that any reports or communications to and from the doctor are discoverable. I have reviewed the nurse case manager's file and there are not such documents therein. As such, there are no documents that are required to be produced under the South Dakota Rules of Civil Procedure.

The Claimant also provided a Vaughn Index of the nurse case manager file. That index indicates work produce as the privilege invoked for each document therein. The index describes most of the documents as emails to Sylvie Shebesta Acuity from Laura May Nurse Case Manager or emails to Laura May Nurse Case Manger from Sylvie Shebesta Acuity. One document is described as an email to Diane at Golden Rule Construction from Laura May Nurse Case Manager. One document is described as an email to Sylvie Shebesta from Tracy Sellers Corvel and one is described as an email to Sylvie Shebesta from Diane Leafstedt.

Claimant's motion to compel is governed by SDCL 1-16-9.2. That statute states:

> 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:
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> > 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.

The applicable test for determining whether a document falls within the work product doctrine is whether "in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation." Karrup v. St. Paul Fire ^ Marine Ins. Co., 436 NW2d 17, 21 (SD 1089). The determination of whether a document is work product should be made on a case by case basis. Airheart v. Chicago & North Western Tran Co., 128 FRD 669, 671 (DSD 1909)

Nurse case managers have a variety of duties. Some are medical in nature; others are administrative. These duties range far beyond preparing an insurer for litigation. Consequently, a nurse case manager's file may contain both documents prepared in anticipation of litigation and others that are not. "[M]ost cases hold that insurer investigations are presumptively in the ordinary course of business and not in anticipation of trial." Athey v. Farmers Ins, Grp.,1997 DSD 8, ¶9.

When Employer and Insurer claimed protection of the documents as work product, they became obligated to describe the nature of the documents 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 and Insurer failed to do so. The Employer and Insurer's Vaughn Index only state to whom and from whom the emails were sent. Such descriptions do not enable the Department of Labor to determine whether the documents were prepared in anticipation of trial.

In addition, the documents sought by Claimant are relevant. Claimant's request is not overbroad, vague or ambiguous. Therefore, the documents in question here are discoverable.

Order

In accordance with the above analysis, Claimant's Motion to Compel Production of Documents is granted. Employer and Insurer shall provide the documents requested within 30 days of this order. This letter shall constitute the Department's Order in this matter.

Sincerely,

/s/ Donald W. Hageman
Donald W. Hageman
Administrative Law Judge