SOUTH DAKOTA
DEPT. OF LABOR
& REGULATION

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March 17, 2022

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RE: HF No. 99, 2020/21 – Jeffrey Bankston v DemKota Beef and Sedgwick

Greetings:

The Department of Labor & Regulation (Department) received Jeff Bankston's (Bankston) Motion to Compel Discovery and Production of Documents on December 27, 2022. All responsive briefs have been considered.

This matter stems from an injury Bankston sustained while working for Employer on July 20, 2020. DemKota Beef and Sedgwick (Employer and Insurer) paid benefits for Bankston. On May 24, 2021, Employer alleged that Bankston had violated the company's code of conduct and harassment policies, and Bankston was discharged from his employment. As justification for the discharge, Employer asserted that there were numerous complaints and video footage of Bankston's alleged policy violations. Bankston has not received any compensation, including total temporary disability payments, since his termination.

Pursuant to SDCL 15-6-37, Bankston has moved the Department to compel the production of all video footage and all written statements/complaints from his co-workers and supervisors regarding his alleged willful misconduct. Bankston claims he has been unable to secure a bona fide job offer that he is physically capable of performing and which is considered suitable, substantial, and gainful employment. He asserts that the injury he sustained while working for Employer has caused him to require continuing rehabilitation before he can secure appropriate employment. Bankston further asserts that whether his discharge was "justifiable" is relevant to this matter. He argues that the requested materials are discoverable because they affect his continued workers' compensation benefits. Bankston has also requested attorney's fees regarding his attempt to discover the requested materials.

Employer and Insurer argue that since they have not asserted an affirmative defense of willful misconduct in this matter, the requested materials are not relevant. Additionally, SDCL 62-4-37 provides that no compensation may be allowable for an injury or death due to an employee's willful misconduct, and it does not refer to the termination of employment due to misconduct.

The South Dakota Supreme Court has held that "[d]iscovery rules are designed "to compel the production of evidence and to promote, rather than stifle, the truth finding process." *Dudley v. Huizenga*, 2003 SD 84, ¶11, 667 N.W.2d 644, 648 (citations omitted). SDCL 15-6-26(b)(1) provides,

> 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.

The Department's authority to compel discovery is provided under SDCL 15-6-37 which states, in pertinent part,

> If a deponent fails to answer a question propounded or submitted under § 15-6-30 or 15-6-31, or a corporation or other entity fails to make a designation under subdivision 15-6-30(b)(6) or § 15-6-31(a), or, a party fails to answer an interrogatory submitted under § 15-6-33, or if a party in response to a request for inspection submitted under § 15-6-34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action.

As directed by statute, the parties have conferred in good faith to resolve their issues without Department intervention.

Bankston has asserted that whether his termination was justified is relevant to this matter. However, the workers' compensation hearing process is not the appropriate forum to establish whether Bankston's termination for cause was justified. The Department's authority related to workers' compensation hearings is "purely statutory, and the rights of the parties and the manner of procedure under the law must be determined by its provisions." *May v. Spearfish Pellet Co., LLC*, 2021 S.D. 48, ¶ 10, 963 N.W.2d 761, 764. Bankston has brought the case *Wellman v. Schad Excavation LLC*, in support of his claim of relevance. However, the South Dakota Supreme Court in *Wellman* did not analyze whether the claimant had been justifiably terminated. The

matter before the Court was "[w]hether a claimant is entitled to temporary partial disability benefits even though he was terminated for cause and did not seek other employment[.]" *Wellman*, 2009 S.D. 46, ¶ 10, 768 N.W.2d 149, 152. The Court concluded that "termination for cause does not automatically preclude a claimant from receiving TPD benefits he would otherwise be awarded. However, in order to receive such an award, the claimant bears the burden of proving loss of income or ability to earn an income attributable to the work-related disability." *Id* at ¶17. Therefore, Bankston does not need to prove the cause of his termination was justified, but he must prove that his loss of ability to earn an income is a result of his work-related injury.

Bankston has also referred to a grievance case in support of his claim that the Department has jurisdiction to consider whether this employment for alleged misconduct was justified. The Department's grievance appeal process only applies to public employees. SDCL 3-18-1.1. provides,

> The term "grievance" as used in this chapter means a complaint by a public employee or group of public employees based upon an alleged violation, misinterpretation, or inequitable application of any existing agreements, contracts, ordinances, policies, or rules of the government of the State of South Dakota or the government of any one or more of the political subdivisions thereof, or of the public schools, or any authority, commission, or board, or any other branch of the public service, as they apply to the conditions of employment. Negotiations for, or a disagreement over, a nonexisting agreement, contract, ordinance, policy, or rule is not a "grievance" and is not subject to this section.

Thus, the Department's authority to consider termination under grievance does not apply in this matter because Bankston was not a public employee.

Bankston has also asserted that Employer and Insurer have already conceded that the materials are discoverable in their Answers to Interrogatories. In his argument,

Bankston claims that Employer and Insurer have stated that the evidence is not "currently discoverable" and the evidence "will be timely produced after Claimant's deposition has been taken and prior to hearing" and thus, they have agreed to produce the material. This argument misstates Employer and Insurer's Answer. The pertinent interrogatory and answer are presented here in their entirety:

> 25. Have any photographs, videotapes, charts or diagrams relating to this claim or the subject incident been taken or made? If so, please describe:
>
> a. The date taken or made;
> b. The contents; and
> c. The person having current custody or control.
>
> OBJECTIONS: Employer and Insurer object to this interrogatory to the extent that it seeks the mental impressions and work product of counsel, or otherwise seeks materials protected by the work product privilege and constitutes materials developed specifically in anticipation of litigation. Employer and Insurer further object to this interrogatory to the extent the existence of any surveillance materials is not currently discoverable. *See Dargachew v. Volzke*, No. CIV 11-1900, 2012 WL 10647101, at *3 (S.D. Cir. Ct. 2012).
>
> ANSWER: Subject to and without waiving the foregoing objections, Employer and Insurer are not aware of any photographs of the incident on July 20, 2020. Employer and Insurer further state that, any surveillance intended to be used at any hearing in this case will be timely produced after Claimant's deposition has been taken and prior to hearing.

The full language reveals that Employer and Insurer did not agree to produce the requested materials. They objected by asserting that the materials were not discoverable but agreed to produce any surveillance "intended to be used at hearing."

In summary, whether Bankston was justifiably terminated is not a matter for the Department in a workers' compensation petition. The requested materials are not relevant nor are they reasonably calculated to lead to the discovery of admissible evidence. Therefore, Bankston's Motion to Compel Discovery is DENIED. Bankston's request for attorney's fees related to this motion is also DENIED.

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

Sincerely,

Michelle M. Faw
Administrative Law Judge