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RE: HF No. 102, 2016/17 – Darryl Reemtsma v. City of Sioux Falls

Dear Mr. Bornitz and Ms. Geisler Holm:

This letter addresses the following submissions by the parties:

June 27, 2019	Employer/Self-Insurer's Motion to Dismiss for Lack of Prosecution, or in the Alternative, Motion for Summary Judgment
	Employer/Self-Insurer's Brief in Support of Motion
	Affidavit of Kristi Geisler Holm
July 25, 2019	Claimant's Brief in Opposition to Motion
	Affidavit of Michael Bornitz
August 13, 2019	Employer/Self-Insurer's Reply Brief in Support of Motion

In addition, a telephonic hearing was held August 29, 2019 before Joe Thronson, Administrative Law Judge, for further argument. Claimant was represented by Michael Bornitz and Employer/Self-Insurer was represented by Kristi Geisler Holm.

ISSUE PRESENTED: IS EMPLOYER/SELF-INSURER ENTITLED TO DISMISSAL FOR FAILURE TO PROSECUTE, OR ALTERNATIVELY, SUMMARY JUDGMENT AS A MATTER OF LAW?

FACTS

Claimant was employed by the City of Sioux Falls, South Dakota, as a patrol officer with the Sioux Falls Police Force. While on duty September 14, 2014, Claimant was involved in an accident when his motorcycle was hit by a third-party driver. Claimant suffered a severe compression fracture in his thoracic spine and a disc bulge in his lumbar spine. Claimant filed a tort action against the third-party tortfeasor as well as a workers' compensation claim. Employer/Self-Insurer treated the accident as compensable and began paying claimant benefits.

Claimant eventually settled his claim against the third-party driver and was paid underinsured benefits by his insurer. A portion of this settlement was used to reimburse Employer/Self-Insurer for benefits it had previously paid Claimant. Claimant was able to return to work with the Sioux Falls Police Department but was not able to serve as a patrol officer.

There has been no activity on this case since January 31, 2017, when Employer/Self-Insurer filed its answer to Claimant's petition for a hearing. In June 2019, the Department inquired as to the status of the case. As a result, Employer/Self-Insurer filed a petition to dismiss the case for lack of prosecution.

ANALYSIS

A. Failure to Prosecute

First, Employer/Self-Insurer argue that Claimant's failure to prosecute his workers compensation claim is without good cause. In support of this argument, Employer/Self-Insurer cites to ARSD 47:03:01:09 and SDCL 15-6-41(b). ARSD 47:03:01:09 provides "[w]ith prior written notice to counsel of record, the division may, upon its own motion or the motion of a defending party, dismiss any petition for want of prosecution if there has been no activity for at least one year, unless good cause is shown to the contrary. Dismissal under this section shall be with prejudice." Alternatively, SDCL 15-6-41(b) provides in relevant part:

> For failure of the plaintiff to prosecute or to comply with this chapter or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant… Unless the court in its order for dismissal otherwise specifies, a dismissal under this section and any dismissal not provided for in § 15-6-41, other than a dismissal for lack of jurisdiction, or for failure to join a party under § 15-6-19, operates as an adjudication upon the merits.

Our Supreme Court has previously held:

> [A] dismissal of an action for failure to prosecute is an extreme remedy and should be used only when there is an unreasonable and unexplained delay. An unreasonable and unexplained delay has been defined as an omission to do something "which the party might do and might reasonably be expected to do towards vindication or enforcement of his rights." … Finally, the dismissal of the cause of action for failure to prosecute should be granted when, after considering all the facts and circumstances of the case, the plaintiff can be charged with lack of due diligence in failing to proceed with reasonable promptitude.

White Eagle v. City of Fort Pierre, 2002 S.D. 68, ¶ 4, 647 N.W.2d 716, 718

Unlike SDCL 15-6-41(b) which grants the circuit court discretion in whether a dismissal is with or without prejudice, ARSD 47:03:01:09 gives the Department no such authority. The Department must consider whether failure of Claimant to move on his workers'

compensation case for over two years was unreasonable. Claimant contends that he wishes to expend the proceeds of his settlement before going forward with his workers' compensation claim. He argues that it is impossible to determine the full extent of his injuries at this time and that if he would require medical treatment after the proceeds of his settlement were exhausted, he would be prohibited from seeking workers' compensation benefits.

Employer/Self-Insurer counters that it should not be faced with the prospect of defending this case indefinitely to determine if Claimant will ever expend the proceeds of his settlement. It also points out that there is no reason that Claimant could not still pursue his workers compensation claim while utilizing his settlement.

The Department finds that under the circumstances of this case, Claimant's failure to pursue his workers compensation case was excusable. Claimant would derive no benefit from pursuing his workers compensation claim before his settlement was exhausted. SDCL 62-4-38 provides "in the event the injured employee recovers any like damages from such other person, the recovered damages shall be an offset against any workers' compensation which the employee would otherwise have been entitled to receive." Pursuing the workers compensation case would mean Claimant would be required to spend resources to establish benefits only to have those benefits deducted from his settlement. It would also require the Employer/Self-Insurer to pay benefits on the front end while seeking reimbursement from Claimant's settlement. Currently, Employer/Self-Insurer is not providing any benefits while Claimant relies on his third-

party settlement. Indeed, both parties acknowledge that Claimant may never expend his settlement in which case litigation over future benefits could become moot.

Claimant argues that Employer/Self-Insurer suffer no prejudice by holding this case in abeyance. Employer/Self-Insurer point out that it need not show prejudice as a prerequisite to dismissal. However, the Department may consider it as a factor. *Eischen v. Wayne Twp.,* 2008 S.D. 2, ¶ 26, 744 N.W.2d 788, 799 (citing *Moore v. Michelin Tire Co., Inc.,* 1999 SD 152, ¶ 52, 603 N.W.2d 513, 526). This is especially appropriate when Claimant has established good cause for not pursuing his petition for workers' compensation benefits.

Employer/Self-Insurer further argues that keeping this case open creates a financial burden which it should not be forced to bear. Apart from a letter sent to Claimant in 2017, it does not appear as though Employer/Self-Insurer has had to do anything to defend this case, and it may never be required to litigate this case. It is not clear what the costs would be to Employer/Self-Insurer to keep this case open but inactive. While there may be some cost to doing so, the negative consequences that outright dismissal would have on Claimant's future benefits outweigh such costs.

Employer/Self-Insurer also contend that it would be greatly prejudiced by the passage of time. In the event that it was asked to defend this case several years from now, it would lose valuable evidence or witness testimony. Specifically, should Clamant choose to pursue his case at some future date, Employer/Self-Insurer contends that it will have difficulty refuting Claimant's claim that the accident was a major contributing cause of his current condition. Claimant bears the burden of proof in a worker's compensation case. In a

workers' compensation dispute, a claimant must prove all elements necessary to qualify for compensation by a preponderance of the evidence.

Darling v. W. River Masonry, Inc., 2010 S.D. 4, ¶ 11, 777 N.W.2d 363, 367.

Before Claimant would be entitled to disability benefits, he would be required to prove that his accident was a major contributing cause of his condition. Any uncertainly created by the passage of time would also be borne by Claimant. In addition, the consequences of outright dismissal outweigh the prospect of some prejudice which may arise from Employer/Self-Insurer having to defend this case at a later time. *Moore v. Michelin Tire Co.,* 1999 S.D. 152, ¶ 52, 603 N.W.2d 513, 526.

The South Dakota Supreme Court has previously allowed the Department to retain continuing jurisdiction in a situation where Claimant was injured but continued to work. In *McClaflin v. John Morrell & Co.,* 2001 S.D. 86, 631 N.W.2d 180, the Court considered whether a claimant was entitled to odd-lot benefits despite continuing to work for employer. McClaflin was diagnosed with carpal tunnel syndrome as a result of his work. Employer paid for surgery and physical therapy for Claimant's injury and made accommodations for Claimant's return to work. Despite returning to work with Employer, Claimant filed a petition for hearing seeking odd-lot benefits. Claimant's vocational expert opined that Claimant was not employable in a competitive job market and that Employer had created a job for Claimant as a means to avoid paying permanent disability benefits. The Department granted Claimant disability benefits. Upon appeal, the circuit court affirmed the granting of benefits based on

the vocation expert's opinion that Claimant's current position was favored work and that Claimant was not employable in a competitive job market.

The Supreme Court reversed the circuit court's determination that Claimant met his burden of proving he was not employable in a competitive market. It declined to determine whether Claimant's position was favored employment. However, the Court also opined:

> [a]s it stands, Claimant cannot meet his initial burden because he is currently employed by Employer. As we are mindful that Employer could now fire Claimant without cause because South Dakota is an "at-will" jurisdiction, we direct the circuit court to retain jurisdiction over this matter should Claimant no longer work for Employer. If Claimant can show, once no longer employed by Employer, that he is obviously unemployable and Employer cannot meet its corresponding burden, then the circuit court should instruct Employer to pay Claimant odd-lot benefits.

Id. at ¶ 14.

The Court also recognized the two-year statute of limitations in workers' compensation cases:

> The circuit court's retention of jurisdiction over this matter in no way bars Claimant's ability to litigate his claim at a future date. Fundamental fairness requires jurisdiction of an action until the litigation is completely and finally determined.

Id, at ¶ 16.

In this case, as Claimant has continued to work, he is currently ineligible for permanent disability benefits. Claimant has not argued that the position he currently holds is favored work and there is no dispute that Claimant continues to earn a salary equal to what he would if he was still a patrol officer. However, Claimant's employment could change after he exhausts his settlement. If this were to happen, Claimant should be allowed the opportunity to argue his injury was a major contributing cause to his

condition and that he is unable to find suitable employment. Therefore, the Department is not dismissing for failure to prosecute.

B. Summary Judgment

In the alternative, Employer/Self-Insurer argues that there are no issues in contention and that it is entitled to summary judgment. The Department's authority to grant summary judgment is found at ARSD 47:03:01:08:

> [a] claimant or an employer or its insurer may, any time after expiration of 30 days from the filing of a petition, move with supporting affidavits for a summary judgment. The division shall grant the summary judgment immediately if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that *there is no genuine issue as to any material fact* and that the moving party is entitled to a judgment as a matter of law. (Emphasis added).

In this case, the issue of what benefits Claimant is entitled to is still in dispute. That Claimant has elected to utilize his settlement does not negate the possibility that he may be eligible for benefits. While Employer/Self-Insurer is entitled to reimbursement for any benefits it pays, this is a different issue from whether Claimant's accident is a major contributing cause of his disability. Therefore, the Employer/Self-Insurer has not shown there are no genuine issues as to any material fact and is not entitled to summary judgment.

CONCLUSION AND ORDER

Employer/Self-Insurer's motion to dismiss for lack of prosecution is DENIED. Employer/Self-Insurer's motion for summary judgment is DENIED. The Department

shall retain jurisdiction over this case in the event that Claimant exhausts his settlement and is not able to obtain permanent employment.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

/s/ Joe Thronson
Joe Thronson
Administrative Law Judge