September 17, 2015

Bram Weidenaar
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Letter Decision and Order

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RE: HF No. 111, 2013/14 – Paul E. George v. Trail King West Plant-2016-11 and American Zurich Insurance Company

Dear Mr. Weidenaar and Ms. Holm:

Submissions

This letter addresses the following submissions by the parties:

July 14, 2015	[Employer and Insurer's] Motion to Dismiss for Lack of Prosecution;
	[Employer and Insurer's] Brief in Support of Motion to Dismiss for Lack of Prosecution;
	Affidavit of Kristi Geisler Holm;
August 13, 2015	Claimant's Brief in Opposition to Employer and Insurer's Motion to Dismiss;
	Affidavit of Bram Weidenaar; and
August 28, 2015	[Employer and Insurer's] Brief in Support of Motion to Dismiss for Lack of Prosecution.

Facts

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

1. Paul E. George (Claimant) filed a Petition for Hearing dated January 31, 2014, with the South Dakota Department of Labor & Regulation. In that petition, Claimant alleges that he is entitled to Workers' Compensation benefits resulting from a work-related injury suffered on or about December 7, 2011, while in the course and scope of his employment.
2. Trail King West Plant-2016-11 (Employer) and American Zurich Insurance Company (Insurer) filed an answer with the Department dated March 7, 2014.
3. Employer and Insurer served discovery requests on Claimant.
4. Claimant responded to Employer and Insurer's discovery requests on March 26, 2014, and supplemented those responses on April 8, 2014, with additional medical records.
5. On April 14, 2014, Employer and Insurer received a letter from counsel for Claimant, returning a requested medical release.
6. The medical records Claimant produced indicated that Claimant was still receiving medical treatment.
7. Between April 14, 2014, through July 13, 2015, there was not correspondence or communication between the parties. There was no discovery served, no pleadings filed or exchanged and no settlement negotiations conducted.
8. On July 13, 2015, counsel for Claimant filed a Notice of Appearance to reflect that the name of the law firm he worked with had recently changed.
9. On July 14, 2015, Employer and Insurer filed a Motion to Dismiss.
10. Additional facts may be discussed during the analysis below.

Motion to Dismiss

In its Motion to Dismiss, Employer and Insurer ask the Department of Labor & Regulation to dismiss this case with prejudice because Claimant has failed to prosecute the matter in a timely manner. Employer and Insurer's motion is governed by ARSD 47:03:01:09. That administrative rule states:

> ARSD 47: 03:01:09. With 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.

This regulation mirrors the rule used in circuit court which is codified at SDCL 15-11-11. The provision states in part:

> SDCL 15-11-11. The court may dismiss any civil case for want of prosecution upon written notice to counsel of record where the record reflects that there has been no activity for one year, unless good cause is shown to the contrary. The term "record," for purposes of establishing good cause, shall include, but not by way of limitation, settlement negotiations between the parties or their counsel, formal or informal discovery proceedings, the exchange of any pleadings, and written evidence of agreements between the parties or counsel which justifiably result in delays in prosecution

The South Dakota Supreme Court has discussed dismissals on these grounds at length. "[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." (citations omitted). Dakota Cheese, Inc. v. Taylor, 525 NW2d 713, 715 (SD 1995). "[T]he plaintiff has the burden to proceed with the action." (citations Omitted). Id. at 715-716. "The defendant need only meet the plaintiff step by step." (citations omitted). Id. at 716. "D]ismissal of the cause of action for failure to prosecute should be granted when, after considering all the facts and circumstances of the particular case, the plaintiff can be charged with lack of due diligence in failing to proceed with reasonable promptitude." (citations omitted). Id.

There are two requirements that must be met in order to dismiss for failure to prosecute. First, there has been no activity for at least on year. Second, there is no showing of good cause which excuses the inactivity.

Claimant argues that counsel filed a Notice of Appearance on July 13, 2015, and must be considered "activity" for the purposes ARSD 47:03:01:09. However, the Notice of Appearance was simply to advise that Claimant's counsel's law firm changed names. Claimant has not changed attorneys. The filing of the Notice of Appearance did nothing to advance this workers' compensation case; it was simply a routine filing. I do not consider the filing of the Notice of Appearance to be actively prosecuting this case.

In this case, there was no substantive communication or activity on the part of Claimant for a period of nearly 15 months. There was no further communication from Claimant after a letter on April 14, 2014, until July 13, 2015, when Claimant's counsel filed a Notice of Appearance. During that time there were no negotiations between the parties, no formal or informal discovery proceedings, no exchange of any pleadings, and no written evidence of agreements between the parties which justifiably result in delays in prosecution.

Claimant next argues that he has good cause for the lack of activity in this case. Claimant argues that he proceeded with the promptness and due diligence given his circumstances. In the course of pursuing medical treatment, Claimant moved to Indiana for personal reasons and then needed to reestablish his network of healthcare providers. Employer and Insurer received no communication from Claimant and were unaware that these things were going on. The Supreme Court has held that "good

cause for delay requires 'contact with the opposing party *and* some form of excusable conduct or happening which arises other than by negligence or inattention to pleading deadlines.'" White Eagle v. City of Ft. Pierre, 647 N.W.2d 716, 718-19 (S.D. 2002) (quoting Dakota Cheese, Inc., 525 N.W.2d at 717) (emphasis in original). The fact that Claimant may have continued to communicate with his attorney in preparing Claimant's case does not excuse their failure to communicate those efforts to Employer and Insurer. Communication between a plaintiff and his attorney is not good cause for delay. Holmoe v. Reuss, 403 N.W.2d 30, 32 (S.D. 1987).

These facts indicate a lack of due diligence by Claimant. The record reflects that no activity took place from April 14, 2014, until July 13, 2015, a period of approximately 15 months, and good cause has not been shown to excuse the inactivity. Consequently Employer and Insurer's Motion to Dismiss was justified.

Order

For the reasons stated above, it is hereby, ordered that Employer and Insurer's Motion to Dismiss is granted. This case is dismissed with prejudice. This letter shall constitute the order in this matter.

Sincerely,

/s/ Sarah E. Harris
Sarah E. Harris
Administrative Law Judge