

August 29, 2012

Michael M. Hickey
Bangs, McCullen, Butler, Foye & Simmons LLP
PO Box 2670
Rapid City, SD 57709-2670

Letter Decision and Order

Eric C. Blomfelt
Blomfelt Associates
1499 Blake St. #4H
Denver, CO 80202

RE: HF No. 121, 2010/11 – Darlene Verry v. Nash Finch Company and Truck Insurance Exchange.

Dear Mr. Hickey and Mr. Blomfelt:

Submissions

This letter addresses the following submissions by the parties:

June 11, 2012	[Employer and Insurer's] Motion to Dismiss for Lack of Prosecution; and
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July 6, 2012	[Claimant's] Letter Brief;
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Facts

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

1. On or about September 17, 1985, Darlene Verry ("Claimant") was involved in a work-related injury while employed by Nash Finch Company ("Employer").
2. During all times relevant in this case, Employer was insured by Truck Insurance Exchange ("Insurer") for purposes of workers' compensation.

3. On February 17, 2011, Claimant filed a Petition for Hearing seeking payment of medical injuries resulting from the 1985 injury.
4. Employer and Insurer timely filed an Answer to the Petition for Hearing.
5. Since that time, there has been no activity in this case by the Claimant.
6. On June 11, 2012, Employer and Insurer served their Motion to Dismiss for Lack of Prosecution.
7. Additional fact may be discussed in the analysis below.

Motion to Dismiss

Employer and Insurer seek dismissal of this case pursuant to ARSD 47:03:01:09. That administrative rule governs the Department's dismissal of cases for failure to prosecute. That provision states:

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.

ARSD 47:03:01:09.

ARSD 47:03:01:09's enactment was effective on June 24, 1990. The injury which is the basis of this action occurred on September 17, 1985. The South Dakota Supreme Court has consistently held that, "the law in effect at the time the employee is injured is what controls the rights and duties of the parties in workers' compensation cases." , Inc. Sopko v C& R Transfer Company, Inc., 2003 SD 69, ¶ 12, 665 NW2d 94, South Dakota Subsequent Injury Fund v. Heritage MutuaUns. Co., 2002 SD 34 , ¶ 64,1 N.W.2d 656,659; Homstake Mining Co., 2002 SD 46, , ¶ 21, 644 NW2d 612, 617; Faircloth v Raven Indus., Inc., 2000 SD 158, , ¶ 5, 620 NW2d 198, 200.

Our Court has also held that "proceedings under the Workers' Compensation Law ... are purely statutory, and the rights of the parties and the manner of procedure under the law must be determined by its provisions." Sopko, 2003 SD at ¶ 3, ,10, 665 NW2d at 667; Caldwell v John Morrell & Co., 489 NW2d 353, 364 (S.D. 1992).

At the time of Claimant's injury ARSD 47:03:01:09 had not yet been enacted. Consequently, the rule is not applicable in this case and Employer and Insurer's motion must be denied.

Order

For the reasons stated above, it is hereby, ordered that Employer and Insurer's Motion to Dismiss for Lack of Precession is denied. This letter shall constitute the order in this matter.

Sincerely,

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