October 30, 2020

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Decision on Motion to Set Aside Default Judgment

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RE: HF No. 134, 2019/20 – Amy Toro v. G4S Compliance & Investigations, Inc. and New Hampshire Insurance Company

Dear Mr. Weidenaar and Mr. Larson,

Amy Toro (Claimant) submitted the Petition for Hearing in this matter on May 26, 2020. The Department of Labor & Regulation (Department) sent an acknowledgment of this Petition to Claimant and provided G4S Compliance & Investigations, Inc. and New Hampshire Insurance Company (Employer and Insurer) thirty days to submit a response. Employer and insurer did not respond to the Petition.

Claimant filed a Motion for Default Judgment on July 6, 2020. The Department provided Employer and Insurer until August 17, 2020 to submit resistance to the Motion for Default Judgment. Employer and Insurer did not respond to Claimant's Motion for Default Judgment within the timeframe provided by the Department. The Department granted the Motion for Default Judgment on August 28, 2020. Employer and Insurer submitted this Motion to Set Aside Default Judgment on September 21, 2020. Employer and Insurer's Motion and all responsive briefs have been considered in this letter decision.

The Department granted Claimant's Motion for Default Judgment due to Employer and Insurer's failure to respond to the Petition for hearing or submit a timely response to Claimant's Motion. Under ARSD 47:03:01:02.01**,** "[a]ny adverse party has

30 days after the date of the mailing of the notice to file a response." SDCL15-6-55(b) regarding default judgment provides:

> If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of this state.

While SDCL 15-6-55(b) provides guidance for entering a default judgment, SDCL15-6-55(c) provides the method for setting aside default. SDCL 15-6-55(c) states, "[f]or good cause shown the court may set aside a judgment by default in accordance with § 15-6-60(b)." SDCL 15-6-60(b) states, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
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> (1) Mistake, inadvertence, surprise, or excusable neglect;
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> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under § 15-6-59(b);
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> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
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> (4) The judgment is void;
>
> (5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (6) Any other reason justifying relief from the operation of the judgment.

A party moving to set aside a default judgment on the basis of excusable neglect must show both excusable neglect and a meritorious defense. *Action Carrier, Inc. v. United National Ins. Co.*, 2005 S.D. 57, ¶14. Employer and Insurer first argue that the Default Judgment should be set aside, because the failure to respond to Answer and Motion was the result of excusable neglect. Employer and Insurer argue that Insurer has managed several operational challenges related to the COVID-19 pandemic. These challenges included a global reduction in force, resulting in the shifting of claims among

the remaining adjusters. As a result of this shifting of claims, the individual responsible for this matter was processing an increased number of claims as well as being new to handling South Dakota claims and its workers' compensation system. The individual who processed the claim did not mark the received documents properly as time sensitive upon receipt. Insurer has stated it is investigating the situation to ensure it does not happen again.

The Department is persuaded that Employer and Insurer have shown that their failure to respond was due to excusable neglect. "Excusable neglect must be neglect of a nature that would cause a reasonably prudent person under similar circumstances to act similarly. The term excusable neglect has no fixed meaning and is to be interpreted liberally to insure that cases are heard and tried on the merits." *Estes v. Ashley Hosp., Inc*., 2004 S.D. 49, ¶13 (citations omitted). In this matter, Employer and Insurer's failure to respond was a result of adjustments made related to the COVID-19 pandemic. These adjustments were necessary for reasons beyond Employer and Insurer's control, and they are taking steps to ensure that similar issues related to responding to claims do not happen in the future. The Department agrees that the failure to respond was the result of excusable neglect.

Employer and Insurer further argue that it is appropriate to set aside the default judgment, because they have a meritorious defense to Claimant's Petition. To establish a meritorious defense "[t]he party seeking relief must present facts either by answer or affidavit from which it could be inferred that upon a trial he would be entitled to a judgment more favorable to himself than the judgment from which he is seeking relief. An applicant for relief from a judgment satisfies the meritorious defense requirement, however, if he makes only a prima facie showing. The rule does not intend that there should be two trials on the merits." *Smith v. Hermsen*, 1997 S.D. 138, ¶13, citing *Frieberg v. Frieberg*, 509 N.W.2d 415, 419(S.D. 1993). To establish prima facie grounds for a meritorious defense, Employer and Insurer have provided the independent medical examination report of Dr. Paul Cederberg, in which the doctor opines that Claimant suffers from preexisting degenerative disc disease of the lumbar spine and that Claimant has had a resolving cervical strain from the motor vehicle accident. The Department is persuaded that this information is sufficient to meet the prima facie requirements of a meritorious defense.

As required by SDCL 15-6-60(b) and *Action Carrier, Inc.*, Employer and Insurer have shown both excusable neglect and a meritorious defense. Therefore, Employer and Insurer's Motion to Set Aside Default Judgment is GRANTED.

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

Sincerely,

_____/S/_____
Michelle M. Faw
Administrative Law Judge