April 9, 2009

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Letter Decision and Order

Kristi Geisler Holm
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PO Box 1030
Sioux Falls, SD 57101-1030

Re: HF No. 37, 2007/08 – Horacio Diaz-Reyes aka Luis Pineda v. Mossberg Sanitation, Inc. and Travelers Indemnity Co. of CT

Dear Mr. Bonynge and Ms. Geisler Holm:

SUBMISSIONS

This letter addresses the following submissions by the parties:

February 18, 2009	[Employer and Insurer's] Motion for Summary Judgment.
February 18, 2009	Brief in Support of [Employer and Insurer's] Motion for Summary Judgment.
March 17, 2009	[Claimant's] Brief in Opposition to Motion for Summary Judgment.
March 17, 2009	Affidavit Opposing Motion for Summary Judgment.
March 24, 2009	Reply Brief in Support of [Employer and Insurer's] Motion for Summary Judgment.

FACTS

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

1. Horacio Diaz-Reyes aka Luis Pineda (Claimant) suffered an injury on August 29, 2006, while working for Mossberg Sanitation, Inc. (Employer) in Huron, South Dakota.
2. Travelers Indemnity Co. of CT (Insurer) provided Employer with workers' compensation coverage at the time of Claimant's injury.
3. Employer and Insurer accepted responsibility for a puncture wound to Claimant's abdomen which occurred during the August 29, 2009, accident. However, Employer and Insurer resisted responsibility for Claimant's lower back pain which Claimant alleges, also occurred during the incident.
4. Claimant filed a Petition for Hearing on September 24, 2007, seeking redress for both the puncture wound and lower back injuries.
5. With input from both parties, the Department of Labor entered a Scheduling Order on October 27, 2008. The Scheduling Order required the Claimant to disclose and identify his expert(s) and their reports by January 19, 2009.
6. To date, Claimant's attorney has failed to disclose and identify his expert(s) and their reports.
7. Employer and Insurer filed a motion for summary judgment on February 18, 2009. Employer and Insurer contend that they are entitled to summary judgment. They argue that Claimant has failed to meet his burden to show that the August 29, 2006, accident was the major contributing cause of his lower back injury.
8. In his response, Claimant asks that Employer and Insurer's Motion for Summary Judgment be held in abeyance to provide him with an opportunity to disclose and identify an expert and evidence to support the contentions made in his Petition for Hearing.
9. Claimant's attorney stated in Affidavit Opposing Motion for Summary Judgment dated March 24, 2009, that Claimant had a doctor's appointment on March 26, 2009.

MOTION FOR SUMMARY JUDGMENT

ARSD 47:03:01:08 governs the Department of Labor's authority to grant summary judgment:

> A claimant or an employer or its insurer may, anytime 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.

The party seeking summary judgment bears the burden of demonstrating the lack of any genuine issue of material fact, and all reasonable inferences from the facts are viewed in the light most favorable to the non-moving party. *Railsback v. Mid-Century Ins. Co.*2005 SD 64, ¶6, 680 N.W.2d 652, 654.

Employer and Insurer argue that, "there is no genuine issue as to any material fact" because Claimant failed to identify a medical expert who can support Claimant's case, prior to the deadline set in the Department's Scheduling Order. Consequently, Employer and Insurer are, "entitled to a judgment as a matter of law" because Claimant is now unable to meet his burden to show that his lower back pain is caused by the September 29, 2009, injury.

On the other hand, Claimant contends that he can meet his burden of proof if he is granted time to identify the necessary expert. The question then posed is, whether Claimant should be denied the opportunity to proceed with his case on the merits because his attorney failed to meet the deadline set to identify his experts.

DUDLEY V. HUIZENGA

The South Dakota Supreme Court considered a similar question in Dudley v. Huizenga, 2003 SD 84, 667 NW2d 644. In that workers' compensation case, the claimant's attorney missed a stipulated deadline for disclosing experts. The Department of Labor granted the employer and insurer's motion to strike the claimant's expert witness and the employer and insurer's motion for summary judgment.

The Court found that the sanction imposed by the Department in that case was an abuse of discretion. The Court justified this determination, stating:

> Courts are reluctant to uphold dismissals merely to sanction errant attorneys. Buck v. United States Dep't of Agric. Farmers Home Admin., 960 F2d 603, 608 (6thCir 1992). A dismissal should only be resorted to when the "failure to comply has been due to ... willfulness, bad faith, or any fault of petitioner." Chittenden & Eastman Co., 286 NW2d at 316 (citations omitted). When considering a discovery violation, the severity of the sanction must be tempered with a consideration of the equities. Id. at 316-17. Less drastic alternatives should usually be employed before imposing the severest sanction. Judges must balance the policy of giving parties their "day in court against the policies of preventing undue delay, avoiding court congestion, and preserving respect for court procedures." Onkka v. Herman, 1997 WL 1037762 (DNeb 1997) (quoting Tyler v. Iowa State Trooper Badge No. 297, 158 FRD 632, 637 (NDIowa 1994)). In deciding the appropriate sanction to be imposed, the court should consider the purposes to be served by the sanction. Resolution Trust Corp. v. Williams, 162 FRD 654, 660 (DKan 1995). An ALJ has a duty to

> keep things moving, but moving toward a fair result on the merits, if possible. As this Court has noted, the clearing of calendars and the expeditious dispatch of cases are secondary concerns. Chicago & N. W. Ry. Co. v. Bradbury, 80 SD 610, 612, 129 NW2d 540, 542 (1964).

Dudley v. Huizenga, 2003 SD 84, ¶ 14, 667 NW2d 644, 649.

The Court then set out the factors to be considered before imposing sanctions for discovery violations. Those factors include:

> (1) whether the party's failure to cooperate in discovery was attributable to willfulness, bad faith, or the fault of the client; (2) whether the adversary was prejudiced by the party's failure to cooperate in discovery; (3) whether there is a need for deterrence in a particular sort of noncompliance; (4) whether the party was warned that failure to cooperate could lead to dismissal; and (5) whether less drastic sanctions can be imposed before dismissal.

(Internal citations omitted) Id. at ¶ 15.

In this case, there is no appearance of willfulness, bad faith or fault on the part of the Claimant. There was no warning given to Claimant that his case may be dismissed. Employer and Insurer have not been prejudiced by Claimant's attorney's actions. Therefore, Employer and Insurer's Motion for Summary Judgment will not be granted at this time.

ORDER

For the reasons discussed above it is ordered that; (1) Employer and Insurer's Motion for Summary Judgment will be held in abeyance pending the disclosure, if any, of Claimant's expert(s). (2) The scheduling order in this matter is amended as follows: (a) The Claimant shall disclose and identify his expert(s), together with the expert's report within 45 days of the receipt of this order. (b) The parties shall have 30 days following Claimant's disclosure to serve discovery requests. (c) The deadline for completing discovery shall be 30 days after the discovery was served. (3) The Claimant is hereby warned that Employer and insurer's Motion for Summary Judgment may be granted if Claimant fails to disclose and identify his expert(s) as directed above. This letter shall constitute the order in this matter

Sincerely,

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Donald W. Hageman
Administrative Law Judge