January 8, 2020

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DECISION AND ORDER

Thomas J. Von Wald
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RE: HF No. 37, 2016/17 – Cindy Whitcomb v. The Evangelical Lutheran Good Samaritan Society d/b/a Good Samaritan Society-Sioux Falls Village and Sentry Insurance, A Mutual Company

Dear Ms. Brahms and Mr. Von Wald:

This letter addresses the following submissions by the parties:

November 22, 2019	Employer/Insurer's Motion for IME and to Extend Expert Deadlines
	Affidavit of Thomas Von Wald
December 4, 2019	Claimant's Objection to Motion for IME and to Extend Deadlines
	Affidavit of Laura Brahms
December 10, 2019	Employer/Insurer's Reply to Claimant's Objection

QUESTIONS PRESENTED:

IS EMPLOYER ENTITLED TO AMEND THE SCHEDULING ORDER TO ALLOW FOR A REVISED IME?

FACTS AND PROCEDURAL HISTORY

Claimant, Cindy Whitcomb, was injured while working for Employer on May 29, 2016. Employer/Insurer initially treated Claimant's injury as compensable. On August 4, 2016, Claimant underwent an independent medical examination (IME) from Dr. Paul Cederberg. Cedarberg opined that Claimant's shoulder injury was work-related, but that her complaints of hand and knee pain were not. Based on this opinion, Employer/Insurer denied benefits for those injuries.

Claimant filed a motion for a hearing on September 6, 2016. The Department entered a scheduling order on November 28, 2016. Per the order, Employer/Insurer's deadline to disclose experts was March 24, 2017. Claimant originally noticed depositions for two of her treating physicians. However, these depositions were cancelled because Claimant continued to treat for her injuries. In addition, the parties attempted to negotiate a settlement in this case beginning in March of 2019.

Attempts to settle the case were unsuccessful and Claimant contacted the Department to hold a prehearing conference, which was held September 2019. At that time, the Department set a hearing for January 22, 2020. In October 2019, Employer/Insurer informed Claimant that it intended to seek a second IME from Dr. Scott McPherson on December 5, 2019. Claimant objected to this exam since the time for expert disclosure has already passed. Because of her objection, Claimant did not attend the newly scheduled IME. Employer/Insurer then filed this motion to extend the expert filing deadlines and to compel Claimant to attend a new IME.

ANALYSIS

The Department is authorized to enter a scheduling order in workers compensation cases pursuant to ARSD 47:03:01:12. This rule states in relevant part: "A schedule may not be modified except by order of the Division of Labor and Management upon a showing of good cause." When considering what constitutes good cause to deviate from a scheduling order the Department adopted a four-part test use by the South Dakota Supreme Court in *Schumacher*:

> (1) whether the delay resulting from the continuance will be prejudicial to the opposing party; (2) whether the continuance motion was motivated by procrastination, bad planning, dilatory tactics or bad faith on the part of the moving party or his counsel; (3) the prejudice caused to the moving party by the trial court's refusal to grant the continuance; and (4) whether there have been any prior continuances or delays.

Meadowland Apartments v. Schumacher, 2012 S.D. 30, ¶ 17, 813 N.W.2d 618, 623.

1. Prejudice to Claimant

Claimant argues that she will suffer prejudice by extending the expert deadline. Claimant contends that allowing Employer/Insurer an extension will require her to schedule additional depositions to allow her experts to examine and offer a response to the IME. This would almost certainly force the Department to postpone the hearing.

The Department considered a similar request for an updated IME in *Donald Wehrer*, No. HF No. 39, 2014/15, 2018 WL 4258955, (S.D. Dept. Lab. Aug. 10, 2018). In that case, the Department granted the employer/insurer's motion to amend the scheduling order. Citing *Tosh v. Schwab*, 2007 S.D. 132, 743 N.W.2d 422, it reasoned in part that since no hearing had yet been set in that case, the claimant would suffer

little prejudice by amending the scheduling order to allow the insurer to request a second IME.

Unlike in *Wehrer*, a hearing has been set in this case. As Claimant has prepared for the upcoming hearing, amending the scheduling order and thereby delaying this hearing will cause Claimant considerably more prejudice than that in either *Tosh* or *Wehrer*. Delaying the hearing to allow an updated IME would require Claimant to depose her experts again regarding a new IME, thus requiring her to expend more time and resources to prepare for a hearing.

2. Reason for Request

In *Lagge v. Corsica Co-Op*, 2004 S.D. 32, 677 N.W.2d 569, the Supreme Court upheld the exclusion of surveillance conducted by the insurer showing that claimant was performing work duties despite claiming he was permanently disabled. The insurer in that case attempted to introduce the evidence after the dates noted in the scheduling order. In agreeing that the Department's original exclusion was proper, the court noted:

> Co-op and Travelers had almost a year from the time of the Prehearing Order to the time of the hearing itself in which they could have made a motion to the Department to amend the Prehearing Order to include the private investigators and videotapes.

Id. at ¶ 24.

In this case, nearly three years have elapsed between the time that the Department issued a scheduling order in November 2016 and when Claimant contacted the Department in September 2019 requesting a hearing date. Employer/Insurer did not disclose its desire for a second IME to Claimant until October 2019, only weeks after a telephonic hearing before the Department. While it may be true that Dr. McPherson

only recently become available for IME's, there is no indication that Dr. Cederberg was unable to complete another during this time frame. Employer/Insurer offers no explanation as to why it did not elicit an updated IME from Dr. Cederberg prior to the September 2019 prehearing conference.

3. Prejudice to Insurer

Dr. Cederberg first conducted an IME of Claimant in 2016. Since that time, Claimant has continued to treat for her injuries. Employer/Insurer argue that it would be unfairly prejudiced by proceeding to a hearing without a new IME. Similar to this case, the Department considered the effect of requiring insurer to rely on an original IME in *Werher*. There, the Department determined that relying on an old IME would be severely detrimental to the insurer's ability to defend itself because Dr. Cederberg had not been able to review all of the claimant's medical records. That is not the case here. At the telephonic hearing, Employer/insurer acknowledged that Dr. Cederberg had reviewed Claimant's medical treatment since the initial IME and was able to give a professional opinion on this treatment. While Employer/Insurer will suffer prejudice without a recent IME, it cannot be said that it is completely unprepared to proceed. Given that its failure to request a new IME until after a hearing date was set, any disadvantage it may suffer is due to its own inactivity. "[A] continuance may properly be denied when the party had ample time for preparation or the request for a continuance was not made until the last minute." *State v. Moeller,* 2000 SD 122, ¶ 7, 616 N.W.2d 424, 431.

In addition, a dispute arose as to whether Claimant is required to submit to a second IME under SDCL 62-7-1. Claimant argues that she is not required to submit to

a second IME since Employer/insurer has denied payment of benefits. Conversely, Employer/Insurer argues that SDCL 62-7-1 implicitly requires her to submit whenever there is a possibility that benefits will be paid. Since the Department has determined that Employer/insurer is not entitled to amend the expert deadline, this issue is moot, and the Department will not offer an opinion.

CONCLUSION

While neither party has previously requested a continuance in this case, the weight of the evidence supports moving forward with this case. A delay this late in the proceedings would cause substantial prejudice to Claimant since a hearing has been set. While Employer/Insurer may suffer some prejudice without an updated IME, it acknowledges that Dr. Cederberg has reviewed Claimant's medical records since the original IME. In addition, whatever prejudice that Employer/Insurer did suffer was due to its own inaction. Employer/Insurer's Motion to Extend the Expert Deadline and for another IME is DENIED. This letter shall constitute the Department's opinion on this matter.

Sincerely,

/s/ Joe Thronson
Joe Thronson
Administrative Law Judge