

March 8, 2021

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Thomas J. Von Wald
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RE: HF No. 3, 2016/17 – Joshua J. Brewer v. Tectum Holdings, Inc. d/b/a Truxedo and
Berkshire Hathaway Homestate Insurance Company

Dear Ms. Christensen and Mr. Von Wald:

This letter addresses Joshua J. Brewer's (Claimant) Motion to Amend Scheduling Order and all responsive briefs. Claimant suffered a work-related injury on September 22, 2015 while working for Tectum Holdings which does business as Truxedo (Employer.) Employer was at all times pertinent insured for workers' compensation purposes by Berkshire Hathaway Homestate Insurance Company (Insurer). Claimant's initial complaint was low back pain. Claimant has received treatment which included surgery to his SI joints. Employer and Insurer admit that Claimant suffered a work injury on September 22, 2015, but they deny the nature and extent of the injury. Claimant filed a Petition for Hearing with the Department of Labor & Regulation (Department) on July 1, 2016. Employer and Insurer Answered the Petition on August 10, 2016. Claimant has

been represented by an attorney since September 7, 2016. Written discovery was exchanged in 2016 and updated in 2017. Employer and Insurer deposed Claimant on November 6, 2017. Claimant continued to treat from November 2017 through January 2019. The parties discussed possible settlement at that time, but otherwise, there has been little activity on the matter.

On January 23, 2019, Employer and Insurer requested the Department enter a scheduling order. The parties chose to continue settlement negotiations instead of proceeding with the scheduling order, therefore, no order was entered at that time. Claimant attended an independent medical examination (IME) on August 12, 2019 at the request of Employer and Insurer. There was no further record activity in 2019.

Employer and Insurer reached out to Claimant regarding possible settlement in early 2020. A mediation was scheduled in August 26, 2020. The matter was not resolved during the mediation. The parties attended a telephonic conference call with the Department on December 7, 2020 to discuss the status of the matter and set scheduling order dates. The Department sent out its Scheduling Order on December 7, 2020 which included the dates the parties agreed upon.

On January 15, 2021, Claimant requested Employer and Insurer agree to extend the scheduling order deadlines to accommodate Claimant's attorney's work schedule and allow a new attorney to appear for Claimant. Claimant asked the Department for a 45-to-90-day extension of the scheduling order deadlines. Employer and Insurer agreed to a 60-day extension of the deadlines. The Department granted the 60-day extension request. On February 16, 2021, Claimant filed this Motion to amend the scheduling order and extend the expert deadlines an additional 45 days.

Claimant has moved for an amended scheduling order. Claimant has new counsel, and he asserts he is not able to comply with the expert disclosure deadline currently set for March 23, 2021.

The Department's authority to implement a scheduling order is provided by ARSD 47:03:01:02 which provides, "[a] schedule may not be modified except by order of the Division of Labor and Management upon a showing of good cause." The Department has the authority to grant continuances as provided by ARSD 47:03:01:24 which states, "[t]he department may grant continuances in its discretion." The South Dakota Supreme Court (Court) has provided a four-part test to guide in the granting of continuances.

(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 SD 30, ¶17, 813 N.W. 2d 618, 623.

Parts one and three of the *Schumacher* Test regard prejudice to the parties. The potential sources of prejudice against Employer and Insurer are the challenges of deposing the experts due to the difficulty in scheduling expert depositions and that if claimant were successful at hearing, he would then have the opportunity to claim additional interest on his past due benefits which Employer and Insurer would be required to pay. Claimant argues that he is able to choose his representation and he

should not be prejudiced for acting in his own best interest by changing attorneys.

Claimant asserts he would be prejudiced if his new attorney is not provided the time needed to acclimate to the case and seek expert opinion.

Part two and part four of the *Schumacher* Test concern the request for extension and the motivations for a continuance. Little has been done on this matter over the course of the last five years. Claimant answered Employer and Insurer's written discovery and provided supplementary response in March of 2017. There has been no further supplementary response. Although the parties agreed on the deadlines set in January of 2021, Claimant requested to extend them only a month later. The deadlines were set with the anticipation that Claimant would be acquiring new representation, and therefore, it appears to have been bad planning for Claimant to fail to present potential dates that accurately considered the requirements of that new representation. Claimant asserts that the COVID-19 pandemic has affected administrative functions of both law practices and doctors' offices, and it is due to these extraordinary circumstances that he must request an extension. Claimant further argues that he is actively in the process of obtaining expert opinions at this time and will provide the opinion forthwith to Employer and Insurer.

The Department finds that the potential prejudice to Claimant is greater than it would be to Employer and Insurer. The Court has held that "[a party] is entitled as a matter of right to a reasonable opportunity to secure evidence on his behalf." *Tosh v. Schwab*, 2007 S.D. 132, ¶25, 743 N.W.2d 422, 430. While it appears that it was bad planning for Claimant to agree to the dates, the first request for extension was for a range between forty-five and 90 days. Claimant had anticipated needing more time.

However, Employer and Insurer agreed to 60 and the Department granted the request for that number of days. Additionally, the Department is aware that the COVID-19 pandemic has made anticipating scheduling needs regarding medical discovery very difficult. Therefore, it is not unreasonable that Claimant was unable to be certain how much time he would need. The Department also finds it significant that Claimant is actively seeking expert opinions at this time, and the request for extension does not appear merely to be an attempt to postpone the gathering of medical opinions or to simply drag out this matter out unnecessarily. For these reasons, the Department is persuaded that it is appropriate to grant Claimant's motion for the extension.

Order:

In accordance with the conclusions above, Claimant's Motion to Amend Scheduling Order is GRANTED.

It is hereby ORDERED that the Scheduling Order be Amended to reflect the following deadlines-

1. The deadline for Claimant to disclose and identify its expert(s), together with the expert's report is May 3, 2021;
2. The deadline for Employer/Insurer to disclose and identify its expert(s), together with the expert's report is June 28, 2021;
3. The deadline for filing discovery requests is July 19, 2021;
4. The deadline for completion of discovery is August 9, 2021; and
5. The deadline for filing prehearing motions is August 30, 2021 .

The telephonic prehearing conference in this proceeding is rescheduled for September 13, 2021, commencing at 10:00 am CT.

This letter shall constitute the Department's order in this matter.

Sincerely,

A handwritten signature in blue ink that reads "Michelle Faw". The signature is written in a cursive, flowing style.

Michelle M. Faw
Administrative Law Judge

MMF/das

Enclosure