

September 6, 2022

Scott Niles  
PO Box 155  
White Lake, SD 57383

***LETTER DECISION ON  
REQUEST TO STAY***

Tracye L. Sherrill  
Lynn, Jackson, Shultz & Lebrun, PC  
110 N. Minnesota Ave., Ste 400  
Sioux Falls, SD 57104

RE: HF No. 52, 2018/19 – Scott Niles v. IUOE Local 49 and SFM Mutual Insurance Company

Dear Mr. Niles and Ms. Sherrill:

This decision addresses Scott Niles' (Niles) request to stay this matter and its Scheduling Order until December. Employer and Insurer had an opportunity to respond to this request. All submissions have been considered.

**Background**

1. On November 13, 2017, Niles submitted a Petition for Hearing and a request for Mediation with the Department of Labor & Regulation (Department).
2. On January 8, 2018, an unsuccessful mediation was held between the parties.
3. On, January 10, 2019, Employer and Insurer served interrogatories upon Niles. Niles response to the interrogatories was incomplete.

4. On February 27, 2019, Employer and Insurer sent a letter to Niles explaining the requirement to properly answer discovery.
5. On April 22, 2019, Employer and Insurer filed a Motion to Compel answers to discovery.
6. On May 16, 2019, Employer and Insurer received some updated answers to the discovery request.
7. On June 12, 2019, a hearing was held on the Motion to Compel. Niles was directed by the Department to produce a list of his providers for the last ten years.
8. In July 2019, Employer and Insurer received information from Niles which allowed them to order his medical records.
9. On October 8, 2019, a telephonic hearing was held regarding the Independent Medical Examination (IME). At the hearing, Employer and Insurer stated they were waiting for the receipt of the remaining medical records.
10. On February 3, 2020, a telephonic hearing was held. Employer and Insurer stated they were searching for Independent Medical Examiner, but they had been unable to find an ear, nose, and throat (ENT) examiner in South Dakota.
11. On February 6, 2020, Employer and Insurer sent a letter to Niles notifying him an appointment had been scheduled for an IME. Niles expressed displeasure with the examiner and Employer and Insurer agreed to consider a different examiner. Niles provided recommendations, but Employer and Insurer did not agree with the suggestions.

12. On February 14, 2020, Employer and Insurer informed the Department they wished to locate a different neurologist/ENT specialist than those suggested by Niles.
13. On February 20, 2020, Employer and Insurer emailed Niles seeking his available dates for an IME.
14. On February 24, 2020, Niles emailed Employer and Insurer informing them he would not be available until the middle or end of April.
15. On April 9, 2020, Employer and Insurer emailed Niles asking for his available dates in May. Niles responded that he would not be available until the fall. Employer and Insurer responded and requested at least a three-week notice of when Niles might be available.
16. On October 2, 2020, Employer and Insurer emailed Niles requesting his availability for an IME. He responded that he was working in Murdo, South Dakota until March and would only have one week off at Christmas.
17. On October 26, 2020, a telephonic hearing was held.
18. On December 2, 2020, Employer and Insurer sent the Department and Niles an email regarding obtaining an IME as discussed at the October 26 hearing. The parties emailed back and forth. There was an additional telephonic hearing with the Department. Niles indicated he would make himself available on May 24, 2021.
19. On May 24, 2021, Niles underwent an IME.
20. On June 28, 2021, Niles was informed of the results of the IME and recommendations for treatment.

21. In December 2021, Niles started the approved treatment.
22. On March 28, 2022, Niles was placed at maximum medical improvement (MMI) and assigned no impairment rating.
23. On April 4, 2022, Employer and Insurer sent Niles a letter denying any further treatment.
24. On April 6, 2022, Niles requested a telephonic hearing with the Department.
25. On May 2, 2022, a telephonic status conference was held with the Department and the parties. The parties agreed to enter into a Scheduling Order. The Department sent both parties its Proposed Scheduling Order which requested proposed dates from the parties.
26. On May 31, 2022, Employer and Insurer submitted their proposed dates. Mr. Niles did not submit proposed dates.
27. On June 6, 2022, the Department issues its Scheduling Order and Notice of Telephonic Prehearing Conference.

Niles asserts that he believed that the matter was not moving forward because he is working in Wisconsin. However, during the May 2, 2022, telephonic conference, the parties agreed to enter into a Scheduling Order in an effort to move this matter forward to hearing. Employer and Insurer argue that Mr. Niles has repeatedly delayed this matter and the delays have cost them significant legal fees. The Department's authority to grant continuances is governed by ARSD 47:03:01:24 which states, "The department may grant continuances in its discretion." The South Dakota Supreme Court has provided four factors to establish whether a continuance is appropriate:

- (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.

The Department will consider each factor provided in the *Meadowland* test.

Employer and Insurer assert that they will suffer prejudice in both the expenditure of time and money. This matter has been going on for almost five years. Niles's medical expenses have totaled roughly \$4, 906. 96 and Employer and Insurer assert they have expended \$28, 895.64 in their defense of this matter as of August 18, 2022. Employer and Insurer have shown that they will suffer prejudice by delay and thus meet factor one of the *Meadowland* test.

Regarding factor four of the *Meadowland* test, there have been repeated delays in this matter. The Petition for Hearing was submitted in November of 2017 and has been ongoing for the last five years. At the beginning of the matter, Niles failed to fully and timely respond to interrogatories which required Employer and Insurer to go through a Motion to Compel. There was disagreement about the Independent Medical Examiner that resulted in delays to which both parties contributed. Employer and Insurer struggled to find an ENT they found suitable, and Niles was unhappy with their choices. Then between 2020 and 2021, once an examiner had been located, Niles was unavailable for his IME for over a year. Therefore, Niles' assertion that Employer and Insurer have had "plenty of" delays and so he should be allowed the same, is simply not supported by the record. The delays in this matter have been either due to his inaction

or unavailability or have been combined with Employer and Insurer's attempts to locate a specific examiner.

Regarding factor three, prejudice to Niles himself if he is not permitted a continuance, Niles has not provided an argument in support of the notion that he will be prejudiced by this extension. He asserts he needs medical care, he cannot access his mail because he is traveling for work, and he should receive the "couple mth [sic] delay, as they have had plenty of them." However, as the claimant, Niles is responsible for moving forward with his claim. His unavailability and inability to communicate by mail has repeatedly hindered the resolution of this matter. He filed this matter in 2017 and he has been in regular contact with both the opposing party and the Department. During the May 2, 2022, telephonic status conference he was informed about the requirements of a scheduling order and the need to move towards hearing. Niles asserts he is currently working in Wisconsin, he cannot accept email correspondence, and he is unable to retrieve his mail. Therefore, he claims he cannot proceed with this matter. Niles has not shown specific prejudice he will suffer if he is denied his continuance. However, even considering potential prejudice, this matter has been ongoing for five years, it is unreasonable to expect Employer and Insurer to litigate this matter indefinitely because Niles is unreachable for months at a time. Niles is the claimant in this matter, and it is therefore his responsibility to move the matter forward.

Finally, factor two questions the motivations of a continuance motion specifically whether it is motivated by procrastination, bad planning, dilatory tactics or bad faith. Niles was given an opportunity to provide proposed dates for the scheduling order, and he was told at the telephonic status conference that he would be given that opportunity.

He did not provide any proposed dates. The Department cannot conclude that Niles is intentionally acting in bad faith, procrastinating, or engaging in dilatory tactics. However, Niles has shown bad planning in regard to this matter with his previous unavailability and now again by being unavailable for the next five months. This matter cannot be brought to a resolution when the claimant is unreachable for large portions of any given year.

From its analysis of the factors of the *Meadowland* test, the Department is persuaded that a continuance until December would be inappropriate. The Department will allow for a 30-day extension of the scheduling order from the date of this decision.

The new dates will be as follows:

1. The deadline for Claimant to disclose and identify its expert(s), together with the expert's report is October 6, 2022;
2. The deadline for Employer/Insurer to disclose and identify its expert(s), together with the expert's report is November 17, 2022;
3. The deadline for filing discovery requests is December 19, 2022;
4. The deadline for completion of discovery is January 26, 2023; and
5. The deadline for filing prehearing motions is February 24, 2023

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