

July 18, 2023

VIA EMAIL

Seamus Culhane
Turbak Law Office, PC
26 South Broadway, Suite 100
Watertown, SD 57201

DECISION ON MOTION TO DISMISS

J.G. Shultz
Woods, Fuller, Shultz & Smith, PC
PO Box 5027
Sioux Falls, SD 57117-5027

RE: HF No 53, 2019/20 – State Auto Insurance Companies v Aaron Hansen

Greetings:

This letter decision addresses Claimant's Motion to Dismiss. All responsive briefs have been considered. Aaron Hansen (Hansen) moves the Department of Labor & Regulation (Department) to dismiss State Auto Insurance Companies' (Insurer) Petition for Hearing due to failure to prosecute.

The matter arises from a motor vehicle accident that occurred on or about February 21, 2019. Hansen was driving a vehicle on the interstate when he was rear-ended by a semi-tractor and trailer. Eric Meyer (Meyer) was a passenger in the vehicle. At the time of the injury, Hansen was an employee of Meyer & Associates which was, at all times pertinent, covered for workers' compensation purposes by Insurer. Insurer's Petitions for Hearing for both Hansen's claim and Meyer's claim were received by the Department on November 12, 2019.

On October 15, 2020, Hansen and Meyer moved to consolidate their actions. The Department denied their motions on January 13, 2021. On November 10, 2021, the Department issued a decision on a motion to compel filed by both Meyer and Hansen in which it denied the motion to compel and also reasserted that the matters of Hansen and Meyer were to be addressed separately. Meyer appealed the decision in his matter. Hansen did not appeal. However, the discovery requests in dispute were related to both cases. Meyer prevailed on appeal. On October 14, 2022, the South Dakota Supreme Court (Court) denied Insurer's Petition for Discretionary Appeal.

Insurer asserts that it sought discovery in the Meyer litigation that is relevant to Hansen's case including recordings of telephone calls. Insurer further asserts that the Meyer discovery is related to the Hansen case, and on May 1, 2023, Insurer received discovery responses in the Meyer litigation that bears directly on this matter including 104 pages of Hansen's emails that are allegedly related to the request for communications between Hansen and Meyer on the date of the accident.

Hansen contends that Insurer argued against consolidating the matters by insisting that the discovery in Hansen's matter was nearly complete, and they could go forward with a hearing on his matter after his deposition. The deposition took place two years ago, but Insurer has not made an effort to move forward to a hearing. Hansen asserts he has been held in a position where he could be required to appear before the Department at any time, and he would suffer prejudice if his case were allowed to proceed after Insurer has failed to take action in over a year.

The Department has the discretion to dismiss a case for lack of prosecution pursuant to ARSD 47:03:01:09 which provides,

With prior written notice to counsel of record, the division may, upon its own motion or the motion of a defending party, dismiss any petition for want of prosecution if there has been no record of activity for at least one year, unless good cause is shown to the contrary. The "record" for purposes of establishing good cause shall include the following non-exhaustive list: settlement negotiations between the parties or their counsel, formal or informal discovery proceedings, the exchange of any pleadings, and written evidence of agreements between the parties or counsel which justifiably result in delays in prosecution. Dismissal under this section shall be without prejudice.

"ARSD 47:03:01:09 does not define activity, nor does the Rule include language requiring "record activity," as is the case under SDCL 15-11-11." *LaPlante v. GGNCS* *Madison, S. Dakota, LLC*, 2020 S.D. 13, ¶ 22, 941 N.W.2d 223, 230. The cases of Hansen and Meyer are separate matters. However, their claims arise from the same accident and therefore, discovery has, and will continue, to overlap in these matters. The production of Hansen's emails is an example of this overlap. While seeking discovery in Meyer's matter, information was produced relevant to Hansen's. Therefore, the Department concludes that the Motion to Compel filed by Insurer on March 29, 2023, in the Meyer litigation has resulted in activity in the Hansen litigation. For that reason, there has been activity in the Hansen matter within the last calendar year and dismissal is not appropriate.

Hansen's Motion to Dismiss is DENIED.

The parties shall consider this decision the order of the Department.

Sincerely,



Michelle M. Faw
Administrative Law Judge

MMF/das