February 26, 2010

Brad Hopper
322 South Holly Avenue
Sioux Falls, SD 57104

Letter Decision and Order

Charles A. Larson
Boyce, Greenfield, Pashby & Welk, LLP
PO Box 5015
Sioux Falls, SD 57117-5015

RE: HF No. 79, 2007/08 – Brad Hopper v. Steve Alverson Masonry Construction Company and Acuity Insurance Company.

Dear Mr. Hickey, Mr. McKnight and Mr. Larson:

Submissions

This letter addresses the following submissions by the parties:

November 30, 2009	[Employer and Insurer's] Motion to Dismiss;
	[Employer and Insurer's] Brief in Support of Motion to Dismiss;
	Affidavit of Charles A. Larson;
December 23, 2009 (Date stamped)	Claimant's letter; and
January 22, 2010	[Employer and Insurer's] Brief in Reply to Claimant's Resistance to Motion to Dismiss.

Facts

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

1. Brad Hopper (Claimant) filed a Petition for Hearing dated December 10, 2007 with the South Dakota Department of Labor.
2. Steve Alverson Masonry Construction Company (Employer) and Acuity Insurance Company (Insurer) filed an answer with the Department dated January 4, 2008.
3. Employer and Insurer served discovery on Claimant on January 4, 2008.
4. On April 9, 2008, Employer and Insurer's attorney sent a letter to Claimant asking about Claimant's response to the discovery which was then overdue.
5. On April 30, 2008 Employer and Insurer's attorney sent Claimant a second authorization for the release of Claimant's medical information and asked about taking Claimant's deposition.
6. On May 7, 2008, Claimant left a message for Employer and insurer's attorney stating that Employer and Insurer had all the information they needed and that he would not sign the authorization.
7. On May 8, 2008, Employer and Insurer sent Claimant a letter which explained that they needed Claimant's medical records after December 27, 2005.
8. On May 9, 2008 Employer and Insurer's attorney had a phone conversation with Claimant in which it was explained why Employer and Insurer needed Claimant's updated medical records. Claimant indicted that he would provide the information.
9. On May 29, 2008, Employer and Insurer's attorney sent Claimant a letter containing another authorization and asked Claimant to sign and return it.
10. On June 12, 2008, Employer and Insurer's attorney sent Claimant more authorizations and stated that a motion to compel would be filed with the Department if he did not provide a signed authorization by June 28, 2008.
11. On June 13, 2008, Claimant called Employer and Insurer's attorney and informed him that he would not sign the authorization because it was not specific to his back. Employer and insurer's attorney told Claimant that the medical providers would not sort those records related to his back from the rest of his records. Claimant acknowledged that the medical providers probably would not sort the records and indicated that he would sign and return an authorization.
12. On September 5, 2008, Employer and insurer's attorney wrote Claimant indicating that they had received most of the records and asked about scheduling Claimant's deposition.
13. On October 16, 2008, Employer and Insurer served a second set of discovery on Claimant. Claimant provided hand written answers to the discovery on November 14, 2008.
14. On November 14, 2008, Employer and Insurer's attorney wrote Claimant seeking clarification of a couple of Claimant's hand written answers

15. On November 14, 2008, Employer and Insurer's attorney wrote the administrative law judge asking him to refrain from acting on Employer and Insurer's motion to compel pending receipt of the remaining medical records.

16. On November 18, 2008, the administrative law judge wrote the parties stating that he would refrain from acting on the motion to compel.

17. Between November 18, 2008 and November 30, 2009, there was not correspondence or communication between the parties. There was no discovery served, no pleadings filed or exchanged and no settlement negotiations conducted.

18. Additional facts may be discussed during the analysis below.

Motion to Dismiss

In its Motion to Dismiss, Employer and Insurer ask the Department of Labor to dismiss this case with prejudiced because Claimant has failed to prosecute this matter without good cause. Employer and Insurer's motion is governed by ARSD 47:03:01:09. That administrative rule states:

> ARSD 47: 03:01:09. 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 activity for at least one year, unless good cause is shown to the contrary. Dismissal under this section shall be with prejudice.

This regulation mirrors the rule used in circuit court which is codified at SDCL 15-11-11. The provision states in part:

> SDCL 15-11-11. The court may dismiss any civil case for want of prosecution upon written notice to counsel of record where the record reflects that there has been no activity for one year, unless good cause is shown to the contrary. The term "record," for purposes of establishing good cause, shall include, but not by way of limitation, 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

The South Dakota Supreme Court has discussed dismissals on these grounds at length. "[A] dismissal of an action for failure to prosecute is an extreme remedy and should be used only when there is an unreasonable and unexplained delay." (citations omitted). Dakota Cheese, Inc. v. Taylor, 525 NW2d 713, 715 (SD 1995. "[T]he plaintiff has the burden to proceed with the action." (citations Omitted). Id. at 715-716. "The defendant need only meet the plaintiff step by step." (citations omitted). Id. at 716. "D]ismissal of the cause of action for failure to prosecute should be granted when, after considering all the facts and circumstances of the particular case, the plaintiff can be

charged with lack of due diligence in failing to proceed with reasonable promptitude." (citations omitted). Id.

In this case, there was no communication or activity on the part of Claimant for over a year. There were no negotiations. No discovery either formal or informal. No pleadings. All attempts to communication made by Employer and Insurer were ignored. There was also no explanation made by the Claimant for the delay. These facts indicate a lack of due diligence by Claimant. Consequently Employer and Insurer's Motion to Dismiss was justified.

Order

For the reasons stated above, it is hereby, ordered that Employer and Insurer's Motion to Dismiss is granted. This case is dismissed with prejudice. This letter shall constitute the order in this matter.

Sincerely,

__/s/ Donald W. Hageman____
Donald W. Hageman
Administrative Law Judge