

November 17th, 2017

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LETTER DECISION AND ORDER

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Re: John Pentecost v. Rex Stores Corporation, n/k/a Rex American Resources Corporation and Liberty Mutual Fire Insurance Company HF No. 99, 2013/14

Dear Counselors:

This letter addresses the following submissions by the parties:

September 7 th , 2017	Claimant's Motion to Reset Deadlines and Amend Scheduling Order Claimant's Brief in Support of Motion Affidavit of Michael J. Simpson
October 17 th , 2017	Employer/Insurer's Brief in Opposition to Motion to Reset Deadlines and Amend Scheduling Order Affidavit of Cassidy M. Stalley Affidavit of Kayla Tinker
October 27 th , 2017	Employer/Insurer's Reply Brief in Opposition to Motion

A telephonic hearing was held for oral arguments on November 7, 2017 before Joe Thronson, Administrative Law Judge for the South Dakota Department of Labor and Regulation, Division of Labor and Management.

ISSUE PRESENTED

Does good cause exist to grant Claimant's request for a fourth modification of the Department's Scheduling Order?

FACTS

Claimant, John Pentecost, was injured on December 14, 2008 while employed by Employer, Rex Stores. Employer treated Claimant's injury as compensable and paid Claimant's medical expenses and temporary benefits.

On 2012, Claimant was charged with burglary and eventually sentenced to six years in the South Dakota Penitentiary. Claimant filed a petition with the Department seeking permanent benefits on January 10, 2014. In April, Claimant's attorney requested that the matter be put on hold while Claimant was incarcerated. Employer/Insurer agreed to this request. In total, Employer/Insurer agreed to three separate continuances. In December, 2016, Employer/Insurer moved to revoke its earlier agreement to hold these proceedings in abeyance. Claimant again requested that the proceedings be put on hold until he was released from prison. Claimant is scheduled to be released from prison in January, 2018. At this time, Claimant will have served his entire six year sentence and will not be subject to parole.¹ Employer/Insurer refused Claimant's request for a forth continuance and pressed for a scheduling order. During a prehearing conference on August 7, 2017, the Department granted Claimant permission to formally request a modification of the scheduling order in writing. At this time, Claimant has missed several deadlines set by the January 25, 2017 scheduling order.

¹ Claimant was released on parole in 2014 but returned to custody after only a brief time for a parole violation.

ANALYSIS

First, Employer/Insurer argues that Claimant is without good cause to request a modification of the scheduling order. “Good cause for delay requires ‘contact with the opposing party *and* some form of excusable conduct or happening which arises other than by negligence or inattention to pleading deadlines.’ ” *White Eagle v. City of Fort Pierre*, 2002 S.D. 68, ¶ 11, 647 N.W.2d 716, 720 (quoting *Dakota Cheese, Inc. v. Taylor*, 525 N.W.2d 713, 717 (S.D. 1995)) (emphasis original).

It is undisputed that the four year delay in this case has been owing to Claimant’s incarceration at the Mike Durfee State Prison. During that time, Claimant kept in regular contact with Employer/Insurer regarding his need to put these proceedings on hold. Claimant bears responsibility for his confinement and any consequences which arise as a result. The Department has previously held that “[g]enerally speaking, incarceration is not an excuse for a court to grant a continuance.” *Re: Ronald Mestas v. Millenium Recycling, Inc. and Midwest Mut.*, HF No. 6, 2011/12, 2012 WL 2588696, at *1 (S.D. Dept.Lab. June 26, 2012). However, it is also significant that Employer/Insurer agreed to three continuances in this case. It was not until December, 2016, approximately thirteen months before Claimant’s “flat date”, that Employer/Insurer sought to revoke its prior agreement. Employer/Insurer waived any objection that it may have had to delaying these proceedings from January, 2014, until December, 2016. The only issue is whether, under the facts and circumstances of this case, Claimant is justified in

requesting a fourth continuance until such time as Claimant will be released in January, 2018.

At the time Claimant requested Employer/Insurer agree to another modification, Claimant had approximately 13 months until his release. Unlike in *Mestas, supra*, in which claimant's release was dependent upon being granted parole, here Claimant will have completed his sentence, making his release all but certain. The fact that Claimant's release is not subject to the granting of parole, Claimant was justified in requesting this continuance so as to remove any barriers to receiving care that he may have encountered as a result of his incarceration.

Next, Employer/Insurer contends that a delay will cause it undue prejudice because the passage of time renders evidence in this case stale. The Department is not persuaded by this argument. Employer/Insurer could have raised this issue at any time during which it agreed to continue these proceedings. Having failed to do so, Employer/Insurer fails to explain how the evidence is only now in danger of going stale.

Employer/Insurer also points out that Claimant has failed to request medical treatment for his injury while incarcerated. Claimant counters that medical treatment has not been available to him while he was in prison. Whether treatment was lacking or Claimant simply did not seek it out is unclear at this point. However, a delay in these proceedings does not simply resolve this issue. Claimant still bears the burden of proving all essential elements of his case. *Orth v. Stoebner & Permann Const., Inc.*, 2006 S.D. 99, ¶ 35, 724 N.W.2d 586, 593. Going forward, Claimant must still address why he did not receive treatment while in prison.

Employer/Insurer alleges that Claimant filed a petition for the sole purpose of meeting the statute of limitations even though no issue in controversy existed. This argument is without merit. In order to file a petition, Claimant must only include the information specified by ARSD 47:03:01:02. Our procedures allow for a defending party to dispense with a case which lacks merit. First, ARSD 47:03:01:08 provides:

A claimant or an employer or its insurer may, anytime after expiration of 30 days from the filing of a petition, move with supporting affidavits for a summary judgment. The division shall grant the summary judgment immediately if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Employer/Insurer has to this point not filed for summary judgment, however, nothing would prevent Employer/Insurer from doing so in the future should it feel such a motion warranted.

Finally, Employer/Insurer argues that public policy requires that Claimant's request for a modification be denied. The Department acknowledges that a public policy exists which dictates that proceedings are adjudicated as quickly as possible. However, there also exists the policy "to compensate an employee and dependents for the loss of income-earning ability where the loss is caused by injury, disability or death due to an employment-related accident, casualty or disease." *Thomas v. Custer State Hosp.*, 511 N.W.2d 576, 579 (S.D. 1994) (citing *Caldwell v. John Morrell & Co.*, 489 N.W.2d 353, 357 (S.D.1992)). Here, the short delay a modification will cause does not outweigh the need for Claimant to have the opportunity to seek redress for his claim.

Given Employer/insurer's agreements to continue these proceedings thus far, the Department finds that Claimant has good cause to request one more modification of the scheduling order in this case until after Claimant was released from prison. However, Claimant cannot delay his case indefinitely. This shall be the Department's final modification of this scheduling order.

ORDER

Claimant's motion to reset the scheduling order is GRANTED. The Department shall adopt Claimant's proposed updated scheduling order.

Sincerely,

/s/ Joe Thronson

Joe Thronson

Administrative Law Judge