

Mr. John Fuller  
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Mr. Jeremy Nauman  
Attorney at Law  
PO Box 341  
Rapid City, SD 57709-0341

**LETTER DECISION and ORDER**

RE: HF No. 9, 2007/09

Dear Mr. Fuller and Mr. Naumann:

I am in receipt of Employer/Insurer's Motion to Dismiss for Failure to Prosecute, Claimant's response and Employer's reply.

In *Dudley v. Huizenga*, 2003 SD 84, the Supreme Court stated, "our workers' compensation laws and administrative rules are remedial in nature and should be liberally construed to achieve their purposes." Dismissal is an extreme remedy.

On April 27, 2007, Claimant filed a Petition for Hearing regarding a work-related incident on December 20, 2006. Employer denied the claim. Employer and Insurer filed an Answer on August 30, 2007. Claimant was deposed on December 17, 2008 by Employer and Insurer. On August 18, 2009, Employer and Insurer filed a Motion for Summary Judgment, which was subsequently denied by the Department on October 28, 2009.

A Scheduling Order was put into place on June 3, 2010, at the request of Employer and Insurer. Although given time to respond and propose time deadlines, Claimant did not propose any dates for this Scheduling Order, despite receiving the Department's letter requesting proposals from the parties. Claimant has not requested discovery from Employer and Insurer. Claimant did not indicate to Employer/Insurer who his expert witnesses were or who he planned to call as fact witnesses. Claimant has not filed anything with the Department since the Response to the Summary Judgment Motion.

A Prehearing Conference, as set by the Scheduling Order, took place on October 12, 2010 at 10 am CT. Claimant was unavailable by phone on that date. The Department rescheduled the Prehearing Conference to a time convenient for Claimant; November 1, 2010 at 4 pm CT. The Department attempted to contact the parties by phone on the date and time agreed upon by both parties. Claimant was not available and a phone

message was left for Claimant to return a call to the Department. Claimant returned a call to the Department at 5 pm CT and a conference was set up with Employer and Insurer. Claimant was sitting in the stands of a high school football game (albeit the state play-offs), completely unprepared to schedule a hearing on this matter. Claimant did not know who he was going to call as witness or what evidence he was going to present at hearing. Claimant is relying on all previous submissions made with his Petition for Hearing and his Response to the previous Motion for Summary Judgment.

Employer/Insurer filed a Motion to Dismiss on October 27, 2010. Claimant filed a response to that Motion on November 12, 2010. A Final Reply by Employer/Insurer was received on November 19, 2010.

ARSD 47:03:01:09 allows the Department discretion in dismissing a workers' compensation claim if there "has been no activity for at least one year, unless good cause is shown to the contrary." This administrative rule is a counterpart of SDCL 15-11-11.

SDCL 15-11-11 allows the trial court to dismiss unless the plaintiff shows good cause for the delay. 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. *Dakota Cheese Inc. v. Taylor*, 525 NW2d 713, 716 (SD 1995) (quoting *Holmoe v. Reuss*, 403 NW2d 30, 32 (SD 1987)). Our cases have found the following were insufficient evidence of good cause:

communication among a plaintiff and plaintiffs counsel, but not with opposing counsel, *Holmoe*, 403 NW2d at 32; letters and settlement activity between the parties two years prior to dismissal, *Id*; massive amount of documentation and investigation, *Dakota Cheese*, 525 NW2d at 716; plaintiffs failure to file a summons and complaint in circuit court fourteen months after being instructed to do so by the transferring small claims court, *Devitt*, 551 NW2d 298; the serious nature of injuries to plaintiff, *Annett v. American Honda Motor Co., Inc.*, 548 NW2d 798, 804 (SD 1995); difficulty in finding an expert witness and settlement activity which expired a year prior to dismissal, *Id*; and illness and death of defendants original counsel and further inaction by defendants counsels law firm, *Reed v. Heath*, 383 NW2d 873, 874 (SD 1986).

*Jenco, Inc. v. United Fire Group*, 2003 SD 79, 666 NW2d 763 (quoting *Swenson v. Sanborn County Farmers Union Oil Co.*, 1999 SD 61, 16, 594 NW2d 339, 344) (emphasis added).

SDCL 15-11-11 goes on: "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 counsels which justifiably result in delays in prosecution."

“[T]he mere passage of time is not the proper test to determine whether the delay in prosecution warrants dismissal.” *London v. Adams*, 1998 SD 41, 578 NW2d 145 (internal citations omitted). After the Motion for Summary Judgment was denied in October 2009, Claimant simply stopped his pursuit of this case as witnessed by his inactivity. If the record is an indication of the Claimant’s pursuit of the case, there was very little activity prior to the Motion for Summary Judgment. The most recent activity of Claimant in this matter was in late September or early October, 2010 when at the request of Employer/Insurer, Claimant sent in updated medical documents and a settlement demand. Employer/Insurer did not respond to the settlement demand. This informal settlement did not delay Claimant or the prosecution of his case.

Claimant, in his Response to this Motion, indicates that he would like a Hearing scheduled for this matter. Claimant has been unwilling to participate in or be available for any prehearing conference in this matter and therefore, a hearing cannot be scheduled. This is further evidence of Claimant’s failure to move this matter forward.

After considering all the facts and circumstances of this case, it is the Department’s Decision that Claimant failed to prosecute his case or move his case forward. For the foregoing reasons, and pursuant to ARSD 47:03:01:09, I am granting Employer/Insurer’s Motion to Dismiss for Lack of Prosecution. The dismissal is with prejudice. This Letter shall serve as the Department’s Order.

Dated this 22<sup>nd</sup> day of November, 2010,

BY THE DEPARTMENT,

          s/Catherine Duenwald/  
Catherine Duenwald  
Administrative Law Judge