August 10th, 2018

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LETTER DECISION AND ORDER

Robert Tryznka
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RE: HF No. 39, 2014/15 – Donald Wehrer v. Qwest Corporation and Insurance Company of the State of Pennsylvania

Dear Ms. Van Anne and Mr. Tryznka:

This letter addresses the following submissions by the parties:

July 6, 2018	Claimant's Motion to Strike Expert Report
	Affidavit of Robert Tryznka
July 26, 2018	Employer and Insurer's Opposition to Claimant's Motion and Motion to Extend Deadlines
	Affidavit of Jennifer Van Anne
August 6, 2018	Claimant's Response to Employer and Insurer's Opposition and Motion to Extend Deadlines

FACTS AND PROCEDURAL HISTORY

Claimant, Donald Wehrer, filed a petition seeking workers compensation benefits on March 14, 2014. The petition alleged Mr. Wehrer was injured on January 21, 2011 while performing his duties to Employer. The parties attempted to mediate the claim,

but on June 23, 2014, Director James Marsh sent the parties a letter indicating that the scheduled mediation was postponed indefinitely for additional fact-finding. The record does not contain any evidence that the mediation was rescheduled. A second petition was filed September 17, 2014, alleging Claimant suffered another injury on May 17, 2012, while completing a functional capacities exam. The petitioners were later consolidated into one amended petition.

The Department's file contains no activity between 2015, when it signed an order consolidating the two petitions into a single case, and October 2017, when Claimant requested the Department enter a scheduling order in the matter. The Department's order, dated set a deadline of April 2, 2018, for Insurer to disclose its experts and provide reports. Insurer filed its notice to designate Dr. Cederberg as its expert. Though, Insurer also indicated that it wished to supplement Dr. Cederberg's original IME with an updated one. Dr. Cederberg initially reviewed Claimant's medical records since 2011. However, Insurer later opted to have Dr. Cederberg examine Claimant again in person.

ISSUE PRESENTED: SHOULD THE DEPARTMENT EXCLUDE INSURER'S UPDATED IME BECAUSE IT WAS NOT SUBMITTED BY THE DEADLINE SET IN THE DEPARTMENT'S SCHEDULING ORDER?

Analysis

Our Supreme Court has adopted a four-part test to determine whether or not a continuance is warranted in a case. Those factors are:

> (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 here adopts its reasoning from *Schumacher*.

1. Prejudice to Claimant

Claimant argues that another examination by Dr. Cederberg would delay this case by several months because Dr. Cederberg must have time to complete his report and Claimant must in turn have time to analyze it and formulate a counter argument. The Department notes that Claimant alleges his original injury occurred in 2011. Claimant did not file a petition for 3 years. From that point, this case has progressed slowly; with another three years elapsing since the original petition. Claimant fails to demonstrate how he will be prejudiced by approximately six more months.

The Department is further persuaded that any prejudice suffered by Claimant by amending the scheduling order will be minimal because no hearing has yet been set. In *Tosh v. Schwab*, 2007 S.D. 132, 743 N.W.2d 422, our Supreme Court considered whether a non-moving party would suffer significant prejudice from a continuance. *Tosh* involved a plaintiff who sued a police investigator for intentional infliction of emotional distress based on the latter's investigation of Mr. Tosh as a suspect in a kidnapping and rape case. After the trial court excluded the plaintiff's expert witness on Daubert grounds, Mr. Tosh promptly moved to amend the scheduling order to seek a new expert. The circuit court denied his motion, but on appeal, the Court opined that Mr. Tosh should have had the opportunity to seek another expert witness reasoning that the defendants would suffer little prejudice as a result:

> Thereafter, Tosh promptly moved to amend the scheduling order to permit the identification of a new expert. At this point, there would have been no delay or prejudice to the officers because the trial date had not yet been scheduled.

Tosh v. Schwab, 2007 S.D. 132, ¶ 26, 743 N.W.2d 422, 430

2. Was Insurer motivated by Delay, Bad Faith, or Bad Planning?

"[A] continuance may properly be denied when the party had ample time for preparation or the request for a continuance was not made until the last minute." *State v. Moeller,* 2000 SD 122, ¶ 7, 616 N.W.2d 424, 431. The South Dakota Supreme Court considered whether the Department was justified in excluding evidence offered by an Insurer in *Lagge v. Corsica Co-Op*, 2004 S.D. 32, 677 N.W.2d 569. In *Lagge*, the defendant insurer sought to introduce evidence collected from a private investigation of the claimant that indicated that his injury did not preclude him from working. The Department refused to admit the evidence because neither the tapes nor the witness had been listed in the prehearing order. The Department awarded the claimant permanent disability benefits and the insurer appealed to the circuit court, and then to the Supreme Court. In upholding the Department's original ruling, the Supreme Court noted:

> Finally, we note that Co-op and Travelers had almost a year from the time of the Prehearing Order to the time of the hearing itself in which they could have made a motion to the Department to amend the Prehearing Order to include the private investigators and videotapes.

Lagge v. Corsica Co-Op, 2004 S.D. 32, ¶ 24, 677 N.W.2d 569, 575

This case is distinguishable from *Lagge*. First, while the defendant in Lagge had ample time to disclose the results of its investigation after a prehearing order had been issued, no prehearing order has been entered here. There was no indication that

Insurer expected this case to proceed to a hearing prior to Claimant's October 2017 request for a scheduling order. It also appears by the e-mail correspondence between the parties that Dr. Cederberg may not have had access to all of Claimant's medical records by the deadline. Insurer cannot be charged with delaying the proceedings unnecessarily when Dr. Cederberg did not have Claimant's entire file. Neither is Dr. Cederberg's availability a matter within Insurer's control. The evidence indicates that Insurer made every effort to update its IME as soon as Claimant requested a scheduling order. The Department finds that Insurer's failure to submit Dr. Cederberg's addendum was not motivated by bad faith or poor planning.

3. Prejudice to Insurer by striking Dr. Cederberg's updated IME

Regarding whether or not exclusion is a proper remedy, the Supreme Court has noted "[t]he severity of the sanction must be tempered with consideration of the equities. Less drastic alternatives should be employed before sanctions are imposed which hinder a party's day in court and thus defeat the very objective of the litigation, namely to seek the truth from those who have knowledge of the facts." *Haberer v. Radio Shack, a Div. of Tandy Corp.*, 1996 S.D. 130, ¶ 22, 555 N.W.2d 606, 611 (Quoting *Magbuhat v. Kovarik*, 382 N.W.2d 43, 45 (S.D. 1986)). "However, [a party] is entitled as a matter of right to a reasonable opportunity to secure evidence on his behalf." (Citations omitted). "If it appears that due diligence has failed to procure it, and where a manifest injustice results from denial of the continuance, the trial court's action should be set aside." *Tosh, at* ¶ 25.

In this case, there is no evidence that Insurer failed to act in due diligence when requesting Dr. Cederberg update his IME. If the Department granted Claimant's motion

to strike, Insurer would be forced to rely on Dr. Cederberg's original IME from 2011. Such a drastic measure could severely prejudice Insurer's ability to defend itself against Claimant's petition.

4. Previous delays

This case has been pending for several years. The original request for mediation was stayed in June 2014 for more fact finding. There is no indication of whether this was at the request of Claimant or Insurer. Neither is there any indication of why this case has languished for so long. However, regardless of the reasons, Claimant has not shown that any of the delay in this case can be attributed to Insurer.

CONCLUSION AND ORDER

For the reasons set forth above, Claimant's motion to strike Dr. Cederberg's updated IME is DENIED. Insurer's Motion to Extend Deadlines is GRANTED. The Department hereby adopts Insurer's proposed deadlines. This letter shall constitute the Department's order in this matter.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

/s/ Joe Thronson
Joe Thronson
Administrative Law Judge