

April 24, 2014

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**Letter Decision and Order**

Charles A. Larson  
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Sioux Falls, SD 57117-5015

RE: HF No. 69, 2009/10 – John J. Anderson v. Global Polymer Industries, Inc. and The Cincinnati Insurance Companies dba The Cincinnati Insurance Company

Dear Mr. Schumacher and Mr. Larson:

***Submissions***

This letter addresses the following submissions by the parties:

- |                   |                                                                                                                 |
|-------------------|-----------------------------------------------------------------------------------------------------------------|
| February 26, 2014 | Employer and Insurer's Motion to Dismiss for Failure to Prosecute;                                              |
|                   | Employer and Insurer's Brief in Support of Motion to Dismiss for Failure to Prosecute;                          |
|                   | Affidavit of Charles A. Larson in Support of Employer and Insurer's Motion to Dismiss for Failure to Prosecute; |
| April 1, 2014     | [Claimant's] Brief in Opposition to Employer and Insurer's Motion to Dismiss for Failure to Prosecute;          |
|                   | Affidavit of Gary W. Schumacher; and                                                                            |
| April 14, 2014    | Employer and Insurer's Reply Brief in Support of Motion to Dismiss for Failure to Prosecute.                    |

## **Facts**

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

1. John Anderson (Anderson) was an employee of Global Polymer Industries, Inc. (Global) on September 7, 2003, when he suffered a work injury.
2. Global and its insurer, The Cincinnati Insurance Companies dba The Cincinnati Insurance Company (Cincinnati) initially paid some workers' compensation benefits to Anderson. However, Global and Cincinnati denied further coverage of the claim on October 17, 2007.
3. Anderson filed a Petition for Hearing on October 16, 2009.
4. Global and Cincinnati served discovery on Anderson which was ultimately answered after a motion to compel was filed by Global and Cincinnati.
5. Global and Cincinnati deposed Anderson on August 11, 2011.
6. Anderson has conducted no discovery in this case.
7. Global and Cincinnati filed a motion for summary judgment on December 2, 2011. The Department denied that motion on February 15, 2012.
8. Following the Department's decision on the motion for summary judgment, there was no record activity in this case until December 31, 2012, when Anderson's attorney sent a letter to Global and Cincinnati's attorney asking about the potential for mediation.
9. Global and Cincinnati's attorney responded on January 3, 2013, indicating that Anderson needed to submit a reasonable demand before they would agree to mediation.
10. A follow up letter was sent by Global and Cincinnati's attorney on January 28, 2013, as no response had been forthcoming from Anderson's attorney.
11. A second follow up letter was sent on February 14, 2013, asking if Claimant was still interested in resolving the case and inquiring as to the demand status.
12. Anderson's attorney responded in a letter dated February 25, 2013, that he was going to speak to his client and would provide a demand. The February 25, 2013, letter was the last communication Global and Cincinnati's attorney received from Anderson or his attorney.

13. Global and Cincinnati filed a motion to dismiss for failure to prosecute, dated February 26, 2014, with the Department.
14. After receiving Global and Cincinnati's motion to dismiss, Anderson's attorney made correspondence, related to this case, available to Global and Cincinnati's attorney and has since made it available to the Department along with Anderson's opposition to the motion. That correspondence includes letters sent between Anderson's attorney; the Mayo Clinic and six physicians, between January 16, 2014 and February 27, 2014.

***Motion to Dismiss for Failure to Prosecute:***

Global and Cincinnati's motion to dismiss for failure to prosecute is governed by ARSD 47:03:01:09. That rule states:

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.

ARSD 47:03:01:09. This regulation is discretionary. While it authorizes the Department to dismiss cases in certain instances, it does not require it to do so. When considering whether to utilize such authority the South Dakota Supreme Court has stated:

[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. An unreasonable and unexplained delay has been defined as an omission to do something "which the party might do and might reasonably be expected to do towards vindication or enforcement of his right." ... [T]he mere passage of time is not the proper test to determine whether the delay in prosecution warrants dismissal.... [T]he plaintiff has the burden to proceed with the action. The defendant need only meet the plaintiff step by step. Finally, dismissal of the cause of action for failure to prosecute should be granted when, after considering all the facts and circumstances of the case, the plaintiff can be charged with lack of due diligence in failing to proceed with reasonable promptitude.

Swenson v. Sanborn Co. Farmers Union Oil Co., 1999 S.D. 61, ¶ 10, 594 N.W.2d 339. (internal citations omitted).

In this case, the Department cannot say that Anderson did not act with due diligence. From January 16, 2014 through February 27, 2014, Anderson was actively engaged in attempting to find expert opinions. Most of this time period falls with the one year period set by the regulation. While the Department concedes that Anderson could have and perhaps should have done a better job in communicating to Global and Cincinnati about the progress he was making in moving the case toward litigation, the case was

not stalled. Anderson could have been more aggressive at an earlier stage in the case, nonetheless, he was attempting to move the case forward within the period set forth in the administrative rule.

***Order***

Under these circumstances, the Department will not dismiss this case. It is hereby, ordered that Employer and Insurer's Motion to Dismiss for Failure to Prosecute is denied. This letter shall constitute the order in this matter.

Sincerely,

/s/ Donald W. Hageman

Donald W. Hageman  
Administrative Law Judge