CIRCUIT COURT OF SOUTH DAKOTA
SIXTH JUDICIAL CIRCUIT
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May 13, 2009

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RE: Hughes Co. Civ. 09-67: Catherine Day Breitag v. Oahe, Inc. and Berkley Administrators

Catherine Day Breitag, Claimant, appeals an Order of the Department of Labor which dismissed Claimant's petition for lack of prosecution. The decision is affirmed.

BACKGROUND

Catherine Day Breitag, Claimant, filed a petition for benefits on 6 August 2004, as a result of Oahe, Inc., Employer, and Berkley Administrators, Insurer, denying the compensability of a PET scan. Employer/Insurer filed an answer to the petition on 31 August 2004. Claimant and Employer/Insurer eventually came to an agreement regarding the PET scan where Employer/Insurer would pay for a PET scan without agreeing that it was reasonable or medically necessary. Since the original filing of the Petition and Answer, all activity regarding this Petition has been initiated by the Department in the form of status reports.

In the summer of 2007, Employer/Insurer referred Claimant for an independent medical examination with Dr. Richard Farnham. Claimant's

appointment took place on 8 August 2007. On 7 September 2007, Employer/Insurer issued a denial of benefits letter, which stated:

> Based on the Independent Medical Examination of Dr. Farnham, BRAC is authorizing future treatment for the knees with Dr. Don Hartog. As to the date of this notice, BRAC will no longer cover treatment or medication for any other medical condition withour prior authorization.
>
> Because this letter constitutes a denial of certain benefits, you are hereby notified of your right to a hearing under 67-7-12. You have two years from the date of this letter to file a Petition for Hearing with the Division of Labor and Management. For further information, you may wish to contact the South Dakota Department of Labor at 605-773-3681.

R. at 36.

Claimant, because of her contention that Dr. Farnham did not provide an overall impairment rating, sought approval from Employer/Insurer to see Dr. MacRandall. Despite not yet being approved by Employer/Insurer, Claimant continued to see Dr. MacRandall. Employer/Insurer subsequently responded that it would not approve any appointment with Dr. MacRandall.

On the 2 January 2009, the Department contacted the parties regarding the status of the case. Claimant responded that to the effect of stating that Employer/Insurer had informed Claimant that she had two years to file a petition. On 13 January 2009 the Department entered an order which dismissed Claimant's 2004 Petition. In doing so, the Department noted: "[Claimant's] response indicates Claimant's prerogative to file a different petition for hearing in response to a subsequent denial issued by the Insurer on September 5, 2007." Thereafter, Claimant did file a petition for benefits 16 March 2009.

Claimant has also filed a notice of appeal as to the dismissal of Claimant's 2004 Petition. Claimant has raised one issue for review: Whether Claimant's Petition should have been dismissed pursuant to ARSD 47:03:01:09.

STANDARD OF REVIEW

The South Dakota Supreme Court has stated:

> In reviewing the trial court's denial of defendant's motion to dismiss, our inquiry is whether the circuit court abused its discretion. Duncan v. Pennington County Housing Authority, 382 N.W.2d 425, 426

> (S.D.1986). Although the power to dismiss for failure to prosecute is a discretionary power, it should be exercised cautiously and granted only in cases of an unreasonable and unexplained delay in prosecution. *Id.* at 427. "[W]e have observed that the 'mere passage of time is not the test....but whether, under all the facts and circumstances of the particular case, the plaintiff is chargeable with want of due diligence in failing to proceed with reasonable promptitude.' " *Id.*, quoting Chicago & North Western Ry. Co. v. Bradbury, 80 S.D. 610, 612-613, 129 N.W.2d 540, 542 (1964).

Holmoe v. Reuss, 403 N.W.2d 30, 31-31 (S.D. 1987).

The Department of Labor "has no more leeway in disposing of cases and in exercising discretion than circuit courts have." Dudley v. Huizenga, 2003 SD 84, ¶ 13, 667 N.W.2d 644, 649. As a result, this Court reviews the Department's dismissal under ARSD 47:03:01:09 under the aforementioned standard of review.

ANALYSIS

The Department's authority to dismiss for lack of prosecution is found in ARSD 47:03:01:09, which 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.

In the case at hand, it is apparent that the Department's order of dismissal was based on two factors. First, Claimant's petition has lain dormant for five years without justification to the Department. After reviewing the record, it seems fairly clear that the reason for this is that the underlying denial of a PET scan, which caused Claimant to file a petition, was later paid for by Employer/Insurer. As such, there is nothing to prosecute under the first petition. Second, the Department based its decision that Claimant had the ability to file a petition for the more recent denial of benefits. There is no dispute that 5 September 2007 denial of benefits stated: "You have two years from the date of this letter to file a Petition for Hearing with the Division of Labor and Management." Claimant contends that dismissal of the first petition is inappropriate because of this language found in Employer/Insurers' denial of benefits letter.

Claimant's reasoning is flawed for various reasons. First and foremost, the Department recognized that Claimant could, and likely was going to, file a second petition based on the 2007 denial of benefits. At this time, Claimant has in fact

filed a second petition. As such, the original petition is moot, considering that Claimant herself has admitted that the "issue [in question in the original petition] was later resolved by the parties." Claimant's Br. at 6. The Department in no way indicated that Claimant could not bring a petition for benefits based on Employer/Insurer's subsequent denial. Second, even if the Court were to disregard the fact that Claimant earlier petition is now moot, Claimant has not shown good cause for the lack prosecution in this case. It has been five years since the filing of Claimant's first petition. Lastly, the Court sees no adverse effect of dismissing the original appeal. It is undisputed that Claimant's second petition for benefits was proper based on the denial of benefits in 2007. Claimant has stated that all the other issues have been resolved. As such, the Court can find no "drastic consequences" which make this dismissal an abuse of discretion. *See, e.g.*, Vilhauer v. Dixie Bake Shop, 453 N.W.2d 842, 846 (S.D. 1990) (reasoning that the trial court did not abuse its discretion in refusing to grant a motion to dismiss for lack of prosecution because of the drastic consequences of such).

CONCLUSION

Consequently, the decision of the Department is affirmed.

Best Regards,

Mark Barnett

The Honorable Mark Barnett
Circuit Court Judge

STATE OF SOUTH DAKOTA)
)SS
COUNTY OF HUGHES)

IN CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT

CIV NO. 09-67

CATHERINE DAY BREITAG,

Claimant/Appellant,

vs.

OAHE, INC.,

Employer/Appellee,

and

BERKLEY ADMINISTRATORS,

Insurer/Appellee.

ORDER OF AFFIRMANCE

The above-entitled matter came on for consideration before this Court on Appeal. The Court heard oral argument on 12 May 2009 and on 13 May 2009 issued its Memorandum Decision. The Court, having considered the oral arguments of counsel, the record, the briefs of the parties and good cause appearing therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that the decision of the South Dakota Department of Labor dated 13 January 2009 is affirmed.

Dated this 13th day of May, 2009.

BY THE COURT:

The Honorable Mark Barnett
Circuit Court Judge

ATTEST:
Clerk of Courts

By:_____
Deputy Clerk
(SEAL)