July 6th, 2017

A. Russell Janklow
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LETTER DECISION AND ORDER

Greg L. Peterson
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PO Box 970
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Re: Laurel Busch v. Dornbusch Agency, and Continental Western Insurance Company
HF No. 137, 2013/14

Dear Counselors:

This letter addresses the following submissions by the parties:

May 1st, 2017	Employer/Insurer's Motion to Dismiss
	Employer/Insurer's Brief in Support of Motion to Dismiss
	Affidavit of Greg L. Peterson
June 12th, 2017	Claimant's Brief in Resistance to Employer/Insurer's
	Motion to Dismiss
	Affidavit of A. Russell Janklow
June 26th, 2017	Employer/Insurer's Reply Brief in Support of Motion

ISSUE PRESENTED

Is Employer/Insurer entitled to dismissal of the above petition for lack of prosecution by Claimant?

FACTS

Claimant was injured while on the job June 19th, 2009. Employer/Insurer accepted the original injury as compensable. Claimant filed a petition for benefits March

14th, 2014. Employer/Insurer filed a response to said petition on April 4th, 2014. Over the next year and a half, the parties exchanged correspondence and pleadings regularly. However, this stopped in early 2016. Claimant's counsel sent an e-mail to Employer/Insurer's counsel February 2nd, 2016 indicating that Claimant wished to take depositions of Claimant's treating physicians. Employer/Insurer responded on the 17th and proposed that depositions be held in April. Claimant never confirmed and these depositions never occurred. Employer/Insurer followed up with an e-mail to Claimant on August 19th, 2016 inquiring about the status of the case and whether Claimant had qualified for Social Security disability benefits. Employer/Insurer against e-mailed Claimant September 15th to inquire about the status of the case to which Claimant's attorney indicated that Claimant was still waiting for a determination by the Social Security Administration (SSA). Claimant's SSA determination had been pending since October, 2014. The parties' last communication was a telephone conference held September 22nd, 2016 though no negotiations or resolution of the case was discussed.

ANALYSIS

Dismissal of an action for failure to prosecute is found under both the administrative code and South Dakota's codified laws. ARSD 47:03:01:09 provides:

> 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.

SDCL 15-11-11 is nearly identical in its language except that it also prefaces dismissal when there has been no activity "on the record". SDCL 15-11-11 clarifies:

> 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 counsel which justifiably result in delays in prosecution.

Here, it appears that Claimant has had no meaningful contact with Employer/Insurer since 2015. There is no indication in the record that any discovery, formal or informal, has occurred since then. Neither has there been any exchange of pleadings nor evidence of negotiations between the parties. The parties only had two documented contacts since that time. The first was an e mail from Claimant's counsel indicating a desire to take depositions of the treating physicians. The other was an e mail in September, 2016 in which Employer/Insurer requested an update on the progress of the case. Neither of these communications constitutes activity sufficient to demonstrate Claimant was moving forward on her petition.

Even if the communication between Claimant and Employer/Insurer constituted sufficient contact for purposes of ARSD 47:03:01:09 and SDCL 15-11-11, Claimant must still demonstrate that her delay was owing to good cause. The South Dakota Supreme Court has noted "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." *Opp v. Nieuwsma*, 458 N.W.2d 352, 356 (S.D. 1990)(quoting *Chicago and Northwestern Ry. Co. v. Bradbury,* 80 S.D. 610, 612–613, 129 N.W.2d 540, 542 (1964)).

Here, Claimant argues that she was justified in delaying this case by over a year solely because she was waiting for a disability determination from the Social Security Administration (SSA). Claimant cites *Vilhauer v. Dixie Bake Shop*, 453 N.W.2d 842,

846 (S.D. 1990), in support of this argument. However, *Vilhauer* does not support Claimant's argument for two reasons. First, while Claimant is correct that an SSA determination is admissible in a worker's compensation case, the Court in *Vilhauer* also recognized that such a determination was not binding. *Id*. Though an SSA determination may have bolstered Claimant's worker's compensation case, this alone would be insufficient for Claimant to meet her burden of proof in this case. Given that an SSA determination is supplemental at best, Claimant was not justified in delaying her case simply to obtain one.

Claimant argues that to proceed at this juncture would mean that her SSA denial would be used against her worker's compensation case. However, this argument is unpersuasive for the same reason. Just as a determination by the SSA of disability is not binding on the Department's determination, neither would the Department be bound by a denial of benefits form the SSA.

Second, *Vilhauer* is distinguishable from this case because the claimant in that case had already had an administrative hearing. On appeal to the circuit court, the claimant in *Vilhauer* sought to supplement the evidence with the SSA award of disability which had been determined in the interim. Here, Claimant has taken no steps in furtherance of her case while awaiting an SSA determination.

Claimant also argues that any prejudice to this point has only minimally inconvenienced Employer/Insurer. This may be true. However, prejudice, or lack thereof, is only one of the factors a court must consider whether a delay is necessary for dismissal. *Dakota Cheese, Inc. v. Taylor*, 525 N.W.2d 713, 715 (S.D. 1995). Even

though there has been very little prejudice to Employer/Insurer to this point, this alone does not justify delaying this case further.

ORDER

Accordingly, Employer/Insurer's motion to dismiss is GRANTED, and Petitioner's petition for worker's compensation benefits is dismissed with prejudice. This letter shall constitute the Department's Order in this matter.

Sincerely,

/s/ Joe Thronson
Joe Thronson
Administrative Law Judge