

January 25, 2019

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RE: HF No. 15, 2015/16 – Andrew B. Larsgaard v. CAJ Enterprises, Inc. d/b/a Dakota Homes and Auto Owners Insurance Company of Pittsburgh

Dear Mr. Weidenaar and Mr. Larson:

This letter addresses the following submissions by the parties:

October 30, 2018	Employer/Insurer's Motion for Summary Judgment
	Insurer's Brief in Support of Motion
	Affidavit of Brian Zielinski
December 3, 2018	Claimant's Brief in Resistance to Motion
	Affidavit of Bram Weidenaar
December 17, 2018	Insurer's Reply Brief in Support of Motion

ISSUE PRESENTED: IS EMPLOYER/INSURER ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW?

FACTS

Claimant filed a petition for hearing on July 29, 2015 alleging that he had suffered a work-related injury in February 2011. Employer/Insurer filed an answer to Claimant's petition July 29, 2015. The parties requested a scheduling order and the Department entered its order on November 23, 2015. At the request of the parties, the Department stayed its order, so the parties could mediate the case. After settlement negotiations were unsuccessful, the parties requested a new scheduling order. Per this second order, Claimant's deadline for designating an expert witness was July 31, 2018. After this date came and went, Employer/Insurer contacted Claimant to inquire about his expert. Claimant had previously indicated he considered using Dr. Christopher Janssen as his expert. However, due to a family medical emergency, Dr. Janssen was forced to take a leave of absence in September 2018. Employer/Insurer acknowledge that it became aware of Dr. Janssen's situation in October 2018.

ANALYSIS

Employer/Insurer argue that as Claimant has failed to formally designate an expert to opine that his injury was a major contributing cause of his current condition, he cannot meet his burden of persuasion. Claimant counters that Dr. Janssen's unavailability is beyond Claimant's control and that any prejudice caused to Employer/Insurer by a delay is minimal. "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.'" *White Eagle v. City of Fort Pierre*, 2002 S.D. 68, ¶ 11, 647 N.W.2d 716, 720 (quoting *Dakota Cheese, Inc. v. Taylor*, 525 N.W.2d 713, 717 (S.D. 1995)) (emphasis original). Employer/Insurer's

correspondence with Claimant indicates that it made several attempts to learn of Claimant's expert witness before and after the deadline had passed. It was not until October 2018 that Claimant informed Employer/Insurer of the issue with Dr. Janssen. Claimant did a poor job in communicating with Employer/Insurer. However, Dr. Janssen's unavailability is a matter beyond Claimant's control. In addition, Employer/Insurer has not demonstrated a further delay will be substantially prejudicial to its defense. Claimant acknowledges that Employer/Insurer is entitled to more time to prepare a response once Dr. Janssen's report is completed.

CONCLUSION AND ORDER

Employer/Insurer's motion for summary judgment is DENIED. The Department shall hold a telephonic status conference at a later date at which time Claimant shall provide an update on Dr. Janssen's status. If Dr. Janssen continues to be unavailable for the foreseeable future, Claimant may be required to present an alternate expert.

**SOUTH DAKOTA DEPARTMENT OF LABOR
& REGULATION**

/s/ Joe Thronson
Joe Thronson
Administrative Law Judge