

September 16, 2021

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RE: HF No. 154, 2016/17 – Wesley Knox v H&H Repair, Inc. and Farmer's Insurance Group/Truck Insurance Exchange

Dear Mr. Shultz and Mr. Anderson

The Department has received Farmer's Insurance Group/Truck Insurance Exchange's (Employer and Insurer) Motion to Dismiss for Want of Prosecution submitted on July 16, 2021. All responses have been considered.

Wesley Knox (Knox) submitted a Petition to the Department of Labor & Regulation (Department) on May 2, 2017. In his Petition, he claimed that on July 1, 2014, he suffered a cumulative trauma injury to his back because of his years working for Employer as a mechanic. At that time, Insurer authorized treatment for Knox's back condition and temporary total disability payments dating back to February 2, 2015.

On September 28, 2015, Dr. Bruce Elkins examined Knox. Dr. Elkins also reviewed Knox's medical records before issuing a medical report. Dr. Elkins opined that

Knox's back pain was caused by polyradiculoneuropathy and was not work-related. As a result of Dr. Elkins' report, Insurer denied Knox's claim on December 7, 2015.

The Department issued a Scheduling Order on April 26, 2019 with an Amended Scheduling Order entered on September 10, 2019. Following a stipulation by the parties, the Department issued an Order to Suspend Scheduling Order in April 2020. Employer and Insurer moved the Department to dismiss Knox's Petition for lack of prosecution on July 16, 2021.

Analysis

Employer and Insurer assert that there has been no activity on the record since April 16, 2020, and they seek dismissal of this case pursuant to 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 record of activity for at least one year, unless good cause is shown to the contrary. The "record" for purposes of establishing good cause shall include the following non-exhaustive list: 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. Dismissal under this section shall be without prejudice.

ARSD 47:03:01:09.

Knox argues that the parties had been aware that he required surgery that was likely to change his condition. Knox asserts that the parties agreed to suspend the scheduling order and that a new scheduling order would be entered when his condition could be determined. The surgery was delayed due to lack of Medicare or insurance coverage as well as COVID concerns. The surgery was finally performed on July 1, 2020. In June of 2018, Knox asked Insurer to clarify its denial, which it did on July 11, 2018, so that treatment under Medicare could resume. Knox asserts that the delay of

treatment also caused a delay in the claim. In addition to his attempts to complete the surgery and resolve Medicare issues, Knox also made efforts to acquire medical reports and opinions from Dr. Watt and Dr. Rasmussen. His efforts faced additional delays due to lack of response from the Spine Center/Black Hills Orthopedic. Knox's attorney produced records to Employer and Insurer by email on May 11, 2021, and the parties also engaged in a phone conference on April 28, 2021

Employer and Insurer argue that the issues Knox experienced do not excuse Knox's limited communication and that uncommunicated activities do not constitute record activity. They further argue that the issues occurred approximately three years ago, and they are not good cause to delay prosecution of the case. "Good cause has been interpreted to mean 'an agreement admissible under SDCL 16-18-11, fraud, accident, mistake, or some extraordinary circumstance for which the plaintiff is not responsible.'" *Lamar Advertising of S.D., Inc., v Heavy Constructors, Inc.*, 790 N.W.2d 45, 49, 2010 SD 77, ¶14, (citations omitted.) Employer and Insurer assert that the purpose of ARSD 47:03:01:09 is to ensure both parties are aware that the claimant is moving his claim forward.

ARSD 47:03:01:09 provides a short, non-exhaustive list of examples of what constitutes record activity. "[W]orkers' compensation administrative rules, like the statutes that the rules implement, are to be construed liberally in favor of the claimant." *LaPlante v. GGNCS Madison, South Dakota, LLC*, 2020 S.D. 13, ¶ 22, 941 N.W.2d at 230-31. The Department concludes that Knox's attempt to gather medical opinion and reports was an effort to move the matter along, and when liberally construing ARSD 47:03:01:09, the April 28, 2021 call and the May 11, 2021 email meet the requirement of

record activity. The South Dakota Supreme Court has provided the following guidelines when deciding whether to grant a motion to dismiss:

[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 rights.' Third, the mere passage of time is not the proper test to determine whether the delay in prosecution warrants dismissal. Fourth, the plaintiff has the burden to proceed with the action. The defendant need only meet the plaintiff step by step. Finally, the 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." *Id.* at ¶ 15.

The Department finds that the delay was not unexplained, and that Knox acted with due diligence. Therefore, dismissal would be inappropriate in this matter. Employer and Insurer's Motion to Dismiss for Want of Prosecution is DENIED.

Sincerely,



Michelle M. Faw
Administrative Law Judge