May 8, 2012

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LETTER DECISION

Kristi Geisler Holm
Davenport, Evans, Hurwitz & Smith LLP
PO Box 1030
Sioux Falls, SD 57101-1030

RE: HF No. 48, 2008/09 – John Ray Palmer v. Waste Connections, Inc. and ESIS

Dear Mr. Palmer and Ms. Holm:

I am in receipt of Employer/ Insurer's Motion to Dismiss or in the Alternative, for Summary Judgment in the above-referenced matter. I have also received Claimant's Brief in Resistance to Motion to Dismiss and Motion for Summary Employer/Insurer's Reply Brief in Support of Motion to Dismiss or in the Alternative for Summary Judgment. I have carefully considered each of these submissions in addressing the Motions.

Employer/Insurer requests that this matter be dismissed pursuant to ARSD 47:03:01:09, 47:03:01:05.02, 47:03:01:16, SDCL 15-6-37(b) and SDCL 15-6-41(b) for lack of prosecution and failure to comply with the Department's Scheduling Order and Order Compelling Release of Medical Report. Alternatively, pursuant to ARSD 47:03:01:08, Employer/Insurer request the Department enter summary judgment in its favor on the basis and grounds that no genuine issue of material fact exist and it is entitled to judgment as a matter of law.

Claimant suffered an injury at work on September 19, 2005. Dr. Brett Lawlor, Claimant's treating physician placed Claimant at maximum medical improvement and assigned a 5% impairment rating on June 27, 2006. Employer/Insurer paid benefits consistent with the 5% impairment rating and denied his claim for any further benefits. Claimant filed a petition for hearing on June 17, 2008; Claimant was not represented by counsel. Employer/Insurer filed its answer on November 7, 2008. While not constituting record activity, there were several instances of correspondence between the Claimant and Employer/Insurer. On November 8, 2010, a telephonic status conference was held and

a proposed scheduling order was issued to move the matter forward. On November 10, 2010, the Department received Employer/Insurer's Motion to Dismiss. Claimant indicated in his response that he had obtained legal counsel and was in the process of obtaining a new impairment rating from Dr. Heloise Westbrook. The Department declined to dismiss the matter at that time and on December 3, 2010, the Department issued a Scheduling Order to keep the matter moving forward in a timely manner.

The Scheduling Order required Claimant to disclose experts and their reports by January 3, 2011. On December 30, 2010, Claimant filed a Disclosure of Expert Witnesses and Motion for Extension of Time to Disclose to Disclose the report and impairment rating from Dr. Westbrook because the exam was not scheduled to take place until January 14, 2011. The extension of time was granted for the limited purpose of obtaining the impairment rating and report from Dr. Westbrook.

When Dr. Westbrook's report was not disclosed in a timely manner, the Employer/Insurer requested that the Department establish a firm deadline for disclosure. The Department entered an Order Compelling Release of Medical Report directing that the report be produced to counsel for Claimant and Employer/Insurer by September 12, 2011. Dr. Westbrook's report was not ultimately disclosed to Employer/Insurer until September 20, 2011. Dr. Westbrook ultimately concluded that Claimant had a 5% whole person impairment. This was the same impairment rating that had been issued by Dr. Lawlor five years earlier and for which Employer/Insurer had paid Claimant.

Employer/Insurer has filed the present Motion arguing that there has been no record activity initiated by the Claimant since his response to the last Motion to Dismiss over two years ago, with the exception of his filing the expert witness disclosure. Employer/Insurer further argue that no issues remain for hearing because Claimant's own expert does not support his claim for additional permanency benefits as she assigned the exact same rating on which benefits have already been paid. Employer/ Insurer argues that Claimant has again failed to prosecute his claim, has not complied with the Department's Orders and additionally has failed to provide medical testimony to support his claim for additional benefits.

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.

With regard to activity, the Supreme Court has held, "[o]ur focus has always been on whether proof of activity was presented. The activity alleged must be verifiable in the record before us, regardless of whether the activity was in the form of formal motions or informal discovery." *White Eagle v. City of Fort Pierre*, 2002 SD 68 ¶8, 647 NW2d 716.

In this case there has been no activity of record made by the Claimant since resisting the Motion to Dismiss in November 2010 and requesting an extension to disclose experts on December 30, 2010.

Claimant must show that there has been good cause for the lack of activity to avoid dismissal. The Supreme Court has held,

> [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 ¶4 (internal citations omitted).

In Claimant's brief in resistance to Employer/Insurer's Motion, Claimant has failed to provide any extraordinary circumstances for which he is not responsible to show good cause for not moving forward to bring this matter to hearing. Claimant's arguments focus on the medical records of various physicians and argues that the impairment rating of even his own expert must be wrong. The fact that Claimant has been unable to find an expert opinion favorable to his case does not constitute good cause.

Claimant has failed to take any action as reflected by the record to advance this workers' compensation case since December 2010, in fact the only record activity at all was initiated by the Employer/Insurer to compel the production of Dr. Westbrook's expert reports. Claimant has also failed to show good cause to avoid dismissal.

Pursuant to ARSD 47:03:01:09 Dismissal for want of prosecution is warranted at this time. Employer/Insurer's Motion to Dismiss is hereby granted. Employer/Insurer shall submit an Order consistent with this decision.

Sincerely,

/s/ *Taya M. Runyan*

Taya M. Runyan
Administrative Law Judge