

May 8, 2020

Kirk Rallis
King Law Firm, PC
141 N. Main Ave. Ste 700
Sioux Falls, SD 57104

LETTER DECISION AND ORDER

Tracye Sherrill
Lynn, Jackson, Shultz, & Lebrun, PC
110 N. Minnesota Ave. Ste 400
Sioux Falls, SD 57104

RE: HF No. 95, 2017/18 – Mike Morgan v. Overweg Repair, LLC & SFM Mutual Ins.,
Co.

Dear Mr. Rallis and Ms. Sherrill-

This letter addresses the following submissions by the parties:

February 5, 2020 Employer/Insurer's Motion to Extend Deadlines for
Scheduling Order

February 10, 2020 Claimant's Motion to Extend Deadlines for Scheduling Order

PROCEDURAL HISTORY

Claimant filed a petition for hearing on March 20, 2018. Employer/Insurer filed its answer to the petition on April 20, 2018. After the parties submitted proposals for a scheduling order, the Department entered an order September 27, 2019. In February 2020, both parties filed motions to extend the scheduling order deadlines in the case but with different deadlines. The Department contacted the parties by e-mail and indicated its desire to find dates in between the dates proposed by the parties. Employer/Insurer indicated that it objected to some of Claimant's dates and the parties indicated that they wished to discuss the matter in a status conference. Due to a miscommunication, the

call did not take place. On May 5, 2020, the parties contacted the Department by e-mail inquiring about the status of the motion. The Department scheduled a telephonic hearing on May 8, 2020 to discuss the motion. Claimant renewed his motion to extend the deadlines. Employer/Insurer now objected to the deadlines arguing that the deadline for Claimant's expert disclosure had since passed.

ISSUE PRESENTED: SHOULD THE DEPARTMENT GRANT CLAIMANT'S MOTION TO EXTEND DEADLINES IN THE SCHEDULING ORDER EVEN THOUGH CLAIMANT'S EXPERT DISCLOSURE DEADLINE HAS PASSED?

ANALYSIS

The Department's authority to grant a continuance is governed by ARSD 47:03:01:12, which reads in relevant part: "The division shall issue the scheduling order as soon as practicable but no more than 120 days after the petition is filed, unless justice is served by issuing the order at a later date. A schedule may not be modified except by order of the Division of Labor and Management upon a showing of good cause. Although "good cause" is not defined anywhere in the administrative rules, the Department has relied on a four-part test adopted by the South Dakota Supreme Court:

(1) whether the delay resulting from the continuance will be prejudicial to the opposing party; (2) whether the continuance motion was motivated by procrastination, bad planning, dilatory tactics or bad faith on the part of the moving party or his counsel; (3) the prejudice caused to the moving party by the trial court's refusal to grant the continuance; and (4) whether there have been any prior continuances or delays.

Meadowland Apartments v. Schumacher, 2012 S.D. 30, ¶ 17, 813 N.W.2d 618, 623.

First, the Department finds that Employer/Insurer will suffer little prejudice by resetting the deadlines in the original scheduling order. Claimant has disclosed his expert witness, and there is nothing to indicate that Employer/Insurer will not have a full

opportunity to allow its expert to review and rebut this expert's opinion as to Claimant's condition.

Second, the Department finds that Claimant's reason for requesting an amendment to the current scheduling order was not motivated by bad faith, or dilatory tactics. Claimant argues that he was also involved in civil litigation in circuit court related to his workers compensation petition. That case took priority over Claimant's workers compensation case and missing the expert deadline in this case was justified. While Claimant did not disclose his expert by the deadline set by the scheduling order, he did eventually do so. Compare *Lagge v. Corsica Co-Op*, 2004 S.D. 32, 677 N.W.2d 569 (Exclusion of surveillance evidence was proper where insurer waited to disclose until right before the hearing.)

Third, while Employer/Insurer will suffer only minimal prejudice as a result of an amended scheduling order, the consequences to Claimant would be severe. If the deadlines are not extended, Claimant's expert will be stricken. Without a designated expert, it is highly unlikely Claimant would be able to meet his burden of proving each of the elements of his case. "In a worker's compensation case, the claimant has the burden of proving all the facts essential to compensation." *Westergren v. Baptist Hosp. of Winner*, 1996 S.D. 69, ¶ 10, 549 N.W.2d 390, 393 (citing *Day v. John Morrell & Co.*, 490 N.W.2d 720, 724 (S.D.1992)). "[T]he testimony of professionals is crucial in establishing this causal relationship because the field is one in which laymen ordinarily are unqualified to express an opinion." *Orth v. Stoebner & Permann Const., Inc.*, 2006 S.D. 99, ¶ 34, 724 N.W.2d 586, 592. (internal citations omitted).

Finally, the Department notes that this is technically Claimant's first request to amend the scheduling order.

CONCLUSION

Claimant's Motion to Extend Deadlines for the Scheduling Order is hereby GRANTED. The Department shall adopt the deadlines submitted by the Claimant. This letter shall constitute the order of the department on this matter.

Sincerely,

/s/ Joe Thronson
Joe Thronson
Administrative Law Judge