

Harris v. Navistar (Apr. 29, 1996)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Steven Harris) File #: G-19746
) By: Barbara H. Alsop
) Hearing Officer
) For: Mary S. Hooper
Navistar) Commissioner
)
) Opinion #: 21-96WC

APPEARANCES

Paul S. Dannenberg, Esq., for the claimant
Keith J. Kasper, Esq., for the defendant

- 1. On August 25, 1995, a pretrial conference was held in this case, at which time the only issues identified for hearing were the compensability of the claim, and the claimant's entitlement to a short period of past due temporary total disability benefits. After a continuance of the first scheduled hearing date, the matter was assigned for hearing on December 29, 1995.*
- 2. On December 15, 1995, the parties were notified that the hearing in this matter would be held on March 26, 1996, and that no further continuances would be granted. This order was in response to a request for a continuance from the claimant "in order [for him] to have time to undergo therapy from a new therapist, and to determine if there is any permanency or any permanent disability in this matter related to Mr. Harris' stress claim against NAV."*
- 3. On March 19, 1996, the claimant again moved for a continuance, stating "[t]he reason for this request is that my client has requested this continuance in order to have further time to undergo therapy from a new therapist, and to determine if there is any permanency or any permanent disability in this matter related to Mr. Harris' stress claim against NAV. He has recently moved to Rochester, N.Y." This motion was denied, based on the similarity of the request with the one previously granted, the no further continuance order, and the objection of the defendant as a crucial witness*

had already purchased an unrefundable airline ticket to attend the hearing.

4. Because of some safety concerns as raised by the attorneys in this case, the Department arranged for security to be present, supplied by the Washington County Sheriff's Department at the expense of \$51.00.

5. On March 25, 1996, at around 4:00 p.m., the claimant telephoned the Department, reiterating the request for a continuance. He was instructed to contact his attorney. A

telephone conference between the attorneys and the hearing officer thereafter

resulted in the confirmation that a continuance had not been granted.

6. On March 26, 1996, the hearing was called to order and the claimant did not appear. At his attorney's request, and over the defendant's objection, the claimant's depositions were admitted into evidence. The claimant then called Dr. Candido, the claimant's prior psychologist, as a witness. Dr. Candido declined to testify as he had not been released to do so. He had previously had a release for communications with the claimant's attorney, but

that release had been withdrawn by the claimant on October 11, 1995.

After

an inquiry about the claimant's competence to withdraw his release, Dr. Candido was convinced that the withdrawal of the release was at least as competent as the release itself.

7. The claimant has never signed a release as required by Rule 3(d) of the Workers' Compensation and Occupational Disease Rules. Without that release,

there was no basis for requiring the testimony of Dr. Candido. Therefore, the defendant then moved to dismiss the claim pursuant to Rule 3(d)(4).

8. The defendant has also moved for costs in the amount of \$609.20, which

represent the expenses related to the appearance of Mr. R.S. Daniels, an out-of-state witness for the defense. The expenses include airfare, housing, meals and automobile costs, and are reasonable.

9. The defendant has moved to be awarded costs prior to the reinstatement

of the claimant's request for benefits arising out of this claim.

DISCUSSION

1. A claimant who seeks to avail himself of the benefits of the Workers'

Compensation Act is bound by the terms of that Act and the regulations promulgated by the Department for the enforcement of that Act.

2. *Rule 3(d)(4) states: "With the commissioner's approval, benefits may be suspended or a claim may be dismissed without prejudice if a claimant fails or refuses, without good cause, to provide a medical authorization upon request."*

3. *Rule 7(c) states: "Continuances will be granted by the commissioner or the commissioner's designee only for extraordinary circumstances, or where all parties stipulate in writing to a continuance and the stipulation is approved by the commissioner or the commissioner's designee."*

4. *The defendant's failure to appear on the date of hearing is sufficient to justify dismissal of this claim. He had adequate notice of the hearing date, as well as the denial of his motion for a continuance.*

5. *Compounding these failures of the claimant is his withdrawal of the one release he apparently gave in this matter. The hearing officer, over strenuous objection, had permitted the claimant's attorney to proceed with the claimant's deposition testimony as the basis for this claim. The inability of the attorney then to obtain the testimony of the one medical witness necessary to support the claimant's position prevented even the truncated hearing from progressing.*

6. *The claimant's abuse of the processes established in this case caused both the Department and the defendant to expend funds to ensure that the case proceeded properly for those parties. The defendant in good faith arranged for the appearance of an out-of-state fact witness, and had already procured his appearance prior to the claimant's eleventh hour, unsuccessful request for a continuance. The Department, based on representations of counsel in this matter, had procured security for the premises to prevent any untoward occurrences in this case. Each of these expenses will be required again, should the claimant avail himself of the right to reinstate his claim.*

7. *In Brown v. Tranquility Nursing Home, State File M-8621 (as reported in Fox), costs were awarded against a claimant for failure to prosecute a claim in a timely and reasonable manner. The claimant has produced no contrary authority, and costs are therefore to be awarded in this matter, but only in the event that the claimant seeks to reinstate his claim.*

8. *The claimant, through counsel, has cited a number of decisions from other jurisdictions for principles that, quite simply, are inapposite here. The claimant ignores the clear mandate of Rule 3(d)(4), which expressly authorizes a dismissal without prejudice in these circumstances.*

ORDER

THEREFORE, based on the foregoing, Steven Harris' claim against Navistar is hereby dismissed without prejudice, and cannot be reinstated without the signing of an approved medical release, the payment to the defendant of \$609.20 and the payment to the Department of \$51.00.

DATED at Montpelier, Vermont, this _____ day of April 1996.

*Mary S. Hooper
Commissioner*