Holmes v. Northeast Tool (April 27, 2005)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Kurt Holmes	)	Opinion No. 26-05WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Northeast Tool	)	For: J. Stephen Monahan[1]
	)	General Counsel
	)	
	)	State File No. D-17480

Motion submitted on the record without a hearing

Thomas Ryan Paul, Esq., represents the Claimant in this matter; Wesley Lawrence, Esq. represents the Defendant

RULING ON DEFENSE MOTION TO DISMISS

Defendant moves to dismiss Kurt Holmes's worker's compensation claim for a 1991 work related injury because of the claimant's failure to prosecute. Specifically, it notes that claimant took no action between the end of 1994 and 1999 and between 2000 and 2004.

The instant motion is a request for reconsideration of a previous Department decision to dismiss the case without prejudice.

Background

Northeast Tool Division (Northeast) filed a First Report of Injury for this claimant in March 1991 for a shoulder injury. Shortly afterwards, Northeast closed its Vermont plant and claimant began working in farming.

In a letter filed with this department on May 15, 1991, Alexsis, on behalf of Northeast, accepted the claim.

The Department's file includes medical records for treatment of the shoulder from the date of injury to December 1993. The employer paid for that medical treatment.

[1] The current Commissioner recused herself from this case because she had issued a ruling at the informal level in her previous capacity as Deputy.

In February 1994 claimant filed a Notice and Application for Hearing, on a form indicating he was seeking temporary total disability, permanent partial, and medical benefits for "right shoulder: torn rotator cuff and subacromial bursitis." An informal conference was held during which it was clear that the parties disagreed on the need for surgery.

In a letter from this Department dated December 14, 1994, the parties were informed that if they could not agree on a third opinion, the Department could order one. The parties were asked to respond to the suggestion about a third opinion, although no response was received until March 1999 when claimant's attorney asked that the Department make a determination about a third opinion.

In October 1999 Dr. Gennaro did an IME for the defendant, concluding that it was unlikely that claimant's shoulder problems were causally related to his 1991 work related injury, that the proposed surgery was unlikely to help, and that there was "insufficient evidence to warrant permanency." The report was forwarded to claimant's counsel with a denial to pay medical benefits.

In October 2000 counsel for claimant submitted a settlement demand to defense counsel for payment of medical expenses and permanency, but never received a response.

In March 2004 claimant wrote to the department. Soon afterwards, his attorney asked for additional time to respond.

In September 2004 defendant moved to dismiss this action with prejudice. The Department granted the motion to dismiss, but without prejudice.

On November 8, 2004, claimant filed a Notice and Application for Hearing challenging the Department's dismissal.

CONCLUSIONS OF LAW:

The Vermont Rules of Civil Procedure apply to worker's compensation hearings, insofar as they do not interfere with the informal nature of the proceedings. WC Rule 7.1000. A little used rule in the workers' compensation context, applicable here, provides for dismissal of a case for failure to prosecute. V.R.C.P. 41(b)(2) and (3). The defense argues that application of this rule is warranted by the claimant's failure to pursue this claim.

Indeed, this case involves two separate four-year periods when claimant failed to prosecute. In each instance, it seemed as though progress was being made and was then suspended for reasons that remain unknown. But regardless, it was incumbent on the claimant to act.

Claimant argues that a defendant would be rewarded for failing to respond to a settlement demand if the motion to dismiss is granted. On the contrary, the burden has been on the claimant to prove his case in the face of a denial to pay for surgery, a burden he abandoned when he failed to act.

It is difficult to state how much is too much time for a case to linger, although our Supreme Court once stated, "[a]llowing a case to slumber on the docket for a period of five years indicates a lack of diligence warranting its dismissal…." *Capital Savings Bank & Trust Company v E.W. Hammett*, 95 Vt. 47, 50 (1921) (although delay open to explanation). No acceptable explanation for allowing this case to "slumber" has been offered here. Although either the department or the defendant could have taken action to move the case along, it was the claimant who had that obligation, but failed to do so.

Therefore, dismissal with prejudice is warranted because this ruling operates as a judgment on the merits. V.R.C.P. 41(b)(3).

ORDER:

The defense motion to dismiss this case with prejudice is hereby GRANTED.

Dated at Montpelier, Vermont this 27th day of April 2005.

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J. Stephen Monahan, Esq.
General Counsel

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.