

S. H. v. Athena's Healing Arts LLC

(August 23, 2007)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

S. H.

Opinion No. 25-07WC

v.

By: Jane Dimotsis, Hearing Officer
Renee Mobbs, Law Clerk

Athena's Healing Arts, LLC

For: Patricia Moulton Powden
Commissioner

State File No. X-61522

RULING ON DEFENDANT'S MOTION TO DISMISS

On July 27, 2007, Defendant moved to dismiss Claimant's case pursuant to V.R.C.P. 41(b)(2). Defendant asserts that Claimant's case should be dismissed with prejudice for her failure to: (i) provide Defendant with a Form 7 Medical Authorization; (ii) clarify what benefits she is claiming; (iii) attend a scheduled Independent Medical Evaluation; and (iv) advise the Department whether she wishes to reschedule a pre-trial conference or withdraw her appeal to the formal hearing docket.

To date, Claimant has not responded to Defendant's filing.

Workers' Compensation Rule 7.1000 states that "[t]he Vermont Rules of Civil Procedure ... shall . . . apply to all [formal Workers' Compensation] hearings . . . insofar as they do not defeat the informal nature of the hearing[s]."

V.R.C.P. 41(b)(2) provides that "a defendant may move for dismissal of an action or of any claim against the defendant" if "the plaintiff [fails] to prosecute." V.R.C.P. 41 (b) (3) states that "[u]nless the . . . order for dismissal otherwise specifies, a dismissal under . . . subdivision (b) . . . operates as an adjudication upon the merits."

Defendant cites four reasons why Claimant's case should be dismissed. Of these four reasons, the second and third do not warrant dismissal.

First, Defendant's assertion that Claimant's case should be dismissed because she failed to clarify what benefits she is seeking has no legal basis. If Defendant's assertion is based upon V.R.C.P. 12(b)(6) (failure to state a claim upon which relief can be granted), the Department will not "dismiss a cause of action for failure to state a claim upon which relief may be granted unless it appears, beyond doubt, that no circumstances or facts exist which could prove entitlement to relief. This type of motion is not favored and rarely granted." *See Walker v. Johnson Fuel Service*, Opinion No. 07D-99WC (citing *Ass'n of Haystack Prop. Owners, Inc. v. Sprague*, 145 Vt. 443 (1985)). Further, if Defendant's assertion is based upon V.R.C.P. 56(c) (summary judgment), the Department will only award "summary judgment . . . if [the moving party] can demonstrate that there is no genuine issue as to any material fact and [that] it is entitled to judgment as a matter of law. . . . [Also,] the nonmoving party receives the benefit of all reasonable doubts and inferences." *Walker*, Opinion No 07D-99WC (citing *Samplid Enter., Inc. v. First Vermont Bank*, 165 Vt. 22 (1996); also citing *Murray v. White*, 155 Vt. 621 (1991)). Finally, "the [Workers'] Compensation Act, having benevolent objectives, is remedial in nature and must be given a liberal construction; no injured employee should be excluded unless the law clearly intends such an exclusion or termination of benefits." *See Montgomery v. Brinver Corp.*, 142 Vt. 461, 463 (1983).

Next, Claimant's failure to attend the scheduled IME only warrants assessment of all or part of the cost of the missed examination, and not dismissal of her claim. *See* Rule 14.7000.

However, Defendant's first and fourth arguments above do support dismissal of Claimant's case.

First, Claimant's failure to provide Defendant with a Form 7 Medical Authorization warrants dismissal of her claim. Indeed, Rule 3.0830 allows "a claim [to be] dismissed without prejudice if a claimant fails or refuses, without good cause, to provide a medical authorization upon request." On June 28, 2007, Defendant sent a letter to Judy Barone, Esq. (Claimant's then attorney) requesting a medical authorization from the Claimant. Since Ms. Barone did not file her Motion to Withdraw as Claimant's attorney until July 6, 2007, the Department assumes she sent the medical authorization to the Claimant for her signature. However, the Claimant never sent a signed medical authorization to the Defendant; further, the Claimant never explained to the Department or to the Defendant why she failed to do so. Therefore, the Department finds that the Claimant failed, without good cause, to provide a medical authorization upon request. Since the medical authorization sought by the Defendant would generate evidence relevant to the claim, and since the Claimant has not shown good cause for her failure to sign the medical release, her claim can be dismissed without prejudice. *See Woznek v. Champlain College*, Opinion No. 49D-95WC.

Claimant's failure to respond to Department correspondence could also warrant dismissal of her claim. Indeed, in *Cox v. Staffing Network*, Opinion No. 9-95WC, the Claimant's case was dismissed with prejudice because the Claimant failed to attend the final hearing and failed to respond to the Defendant's Motion to Dismiss. Further, in *Gursky v. Pizzagalli Construction*, Opinion No. 47-95WC, the Claimant's case was dismissed without prejudice, despite the fact that the Claimant frequently contacted and attended hearings at the Department, because the Claimant failed to produce medical records supporting his claim. Finally, in *E.C. v. Reel Hospitality, LLC*, Opinion No. 17-07WC, the Claimant's case was dismissed without prejudice because the Claimant failed to respond to Department correspondence and failed to attend the status conference and hearing on his claim. In the case at hand, the Department indefinitely continued the pre-trial conference scheduled for July 16, 2007 due to Ms. Barone's withdrawal as Claimant's attorney. However, a condition of the continuance was that the Claimant contact the Department by July 25, 2007 to advise whether she wanted to reschedule the pre-trial conference or withdraw her appeal to the formal hearing docket. The Claimant never responded to the Department's request and no further conferences were scheduled. Further, the Claimant has not replied to the Defendant's Motion to Dismiss. Thus, based on the above-cited Department case law, Claimant's case can be dismissed without prejudice.

ORDER

While the Department is loathe to dismiss claims, especially those of *pro se* claimants, unless all parties have been given a full and fair hearing on the matter, the Claimant's conduct in this case dictates that her claim be dismissed. See *Gursky*, Opinion No. 47-95WC. Therefore, the Defendant's Motion to Dismiss is granted; however, the dismissal is without prejudice.

DATED at Montpelier, Vermont this 23rd day of August 2007.

Patricia Moulton Powden
Commissioner

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.