

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Jenna Scarpinato

Opinion No. 09-09WC

v.

By: Jane Gomez-Dimotsis
Hearing Officer

Jan Co., Inc.

For: Patricia Moulton Powden
Commissioner

State File No. AA-50598

RULING ON MOTION TO DISMISS

ATTORNEYS:

Jenna Scarpinato, *Pro Se*
Craig S. Matanle, Esq. for Defendant

ISSUE:

Should Claimant's claim be dismissed for failure to prosecute?

FINDINGS OF FACT:

1. On the date of Claimant's injury, July 8, 2008, Claimant was a part-time employee for Defendant, Burger King/Jan Co., Inc. and Defendant was an employer within the meaning of the Workers' Compensation Act. Judicial notice is taken of all forms and correspondence contained in the Department's files relating to this claim.
2. There is documentation that Claimant sprained or strained her left foot at work. However, no physician took her out of work. Over a month after the injury Claimant's physician indicated Claimant was capable of working but needed a fifteen minute break after every two hours of standing. Defendant filed a Form 2 Denial of Benefits on July 17, 2008.
3. The contested issue in the case involves Claimant's efforts or lack of effort to return to work. Defendant contends it repeatedly provided Claimant with opportunities to return to work but Claimant failed to follow through on any of them.
4. A pre-trial conference was scheduled for November 10, 2008. Claimant failed to appear by phone. The conference was rescheduled for January 5, 2009. Claimant was notified by certified mail of the rescheduled date, but again she failed to appear by phone. Claimant also failed to provide a pre-trial statement of issues and notice of witnesses.

5. Defendant's counsel repeatedly tried to set up Claimant's deposition, but without success. Some correspondence sent to her was by registered mail and the rest by telephone. Ultimately Defendant noticed Claimant's deposition for February 3, 2009.
6. On January 29, 2009 Defendant's counsel did call Claimant and spoke to her. She told him she had received notice of the deposition but that she could not attend that day. She promised to call him the following day with dates and times for her deposition. Claimant never called defense counsel again.
7. The hearing officer scheduled another status conference for February 25, 2009 with notice to the Claimant sent by certified mail. Claimant again failed to appear by telephone. A lengthy telephone message was left on Claimant's phone informing her that she was at risk of having her case dismissed unless she called the Department of Labor. Claimant still has not contacted the Department.
8. The final hearing was set and noticed for March 19, 2009 in hopes that Claimant would appear. She did not.

CONCLUSIONS OF LAW:

1. Under V.R.C.P. 41(b)(2) by motion of the defendant, a case may be dismissed for failure of the claimant to prosecute. This rule applies to workers' compensation cases by virtue of Workers' Compensation Rule 7.1000, which provides that the rules of civil procedure apply generally to all hearings under 21 V.S.A. §663. Similar cases have been dismissed by the Commissioner. *See, e.g., Grant v. Cobbs Corner, Inc.*, Opinion No. 22-02WC (May 22, 2002) (claim dismissed without prejudice due to Claimant's failure to appear for deposition and prosecute claim); *Cox v. Staffing Network*, Opinion No. 9-95WC (April 20, 1995) (claim dismissed with prejudice after Claimant failed to appear at formal hearing).
2. In the present case, the Department has allowed Claimant multiple opportunities to pursue her claim. However, Claimant has failed at every juncture to even contact the Department. Under these circumstances, to dismiss her claim without prejudice is appropriate.¹

¹ Since the statute of limitations has failed to run, Claimant can refile the claim if there is no prejudice to Defendant. *See Grant. v. Cobb's Corner*, Opinion No. 22A-02WC (July 25, 2002).

ORDER:

Based on the foregoing findings of facts and conclusions of law Claimant's claim is hereby **DISMISSED WITHOUT PREJUDICE**.

DATED at Montpelier, Vermont this 1st day of April 2009.

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.