

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Joseph Finch

Opinion No. 01-19WC

v.

By: Beth A. DeBernardi, Esq.
Administrative Law Judge

Huntington Services Corp.

For: Lindsay H. Kurrle
Commissioner

State File No. EE-62084

RULING ON DEFENDANT'S RENEWED MOTION TO DISMISS

APPEARANCES:

Kelly Massicotte, Esq., for Claimant
J. Justin Sluka, Esq., for Defendant

ISSUE PRESENTED:

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

FINDINGS OF FACT:

1. At all relevant times, Claimant was an employee and Defendant was his employer as those terms are defined in the Vermont Workers' Compensation Act.
2. I take judicial notice of all forms and correspondence in the Department's file relating to this claim.
3. Claimant has an accepted claim for a back injury sustained at work in March 2013. Several years later, a treating physician diagnosed him with complex regional pain syndrome (CRPS) in his left upper extremity. The contested issues are whether he is entitled to any permanent partial disability benefits for his work injury and whether his diagnosis of CRPS is causally related to his work injury. These issues were referred to the formal docket on November 30, 2017.

Procedural History

4. In July 2013 Claimant began a work hardening program, from which he was dismissed in September 2013. Treating physiatrist John Johansson, DO, placed him at end medical result at that time. In October 2013 occupational medicine physician William Boucher, MD, performed an independent medical examination. He too placed Claimant at end medical result, with no work-related permanent impairment.
5. In September 2013 the Department approved the discontinuance of Claimant's temporary disability benefits based on non-compliance with his medical treatment

plan. Defendant also filed a notice of intent to discontinue temporary disability benefits based on Dr. Johansson's finding of end medical result as an additional basis for discontinuance.

6. In November 2013 Defendant filed a notice of intent to discontinue medical benefits based on Dr. Boucher's opinion that no further work-related medical treatment was necessary. The Department approved that discontinuance in December 2013.
7. Although Claimant's medical benefits ceased, his treatment with multiple providers for various medical issues continued.¹ In 2014 he sought an interim order for physical therapy, but the Department's specialist declined to issue one. The interim order request was the only activity on Claimant's claim in 2014.
8. In January 2015 Claimant's counsel emailed Defendant that her client was adamant that his medical condition was work-related and that he would pursue his claim further. After that email, Claimant and his counsel stopped communicating with Defendant and the Department for 16 months. Claimant did not challenge the termination of his benefits or seek additional benefits during that 16-month period.
9. In May 2016 Claimant's counsel produced a set of medical records to Defendant. In November 2016 she provided Defendant with an independent medical examination report from occupational medicine physician George White, MD. Dr. White found that Claimant was at end medical result, with an eight percent permanent impairment. In April 2017 Claimant filed a Notice and Application for Hearing (Form 6) seeking to relate his CRPS diagnosis to work and seeking permanent partial disability benefits.
10. The Department's specialist held informal conferences on May 11, 2017, November 21, 2017 and November 30, 2017, after which she referred the case to the formal docket on two issues. *See Finding of Fact No. 3 supra*. She did not order the payment of any benefits on an interim basis.
11. In October 2017 Defendant requested an updated Medical Authorization (Form 7), and Claimant's counsel agreed to provide one. According to Defendant, Claimant never provided the updated authorization. *Defendant's Motion to Dismiss for Failure to Prosecute (Defendant's Motion)*, at 5.
12. The Department scheduled a pretrial conference at the formal level for January 29, 2018. Shortly before that date, Claimant's counsel informed the Department that she could not proceed because she had been unable to contact her client for over two months, despite her attempts to reach him by mail, telephone and email. She represented that he was homeless and also faced other social barriers that made staying in touch difficult. The pretrial conference was therefore postponed.

¹ Claimant's counsel represents that he attended more than four dozen medical appointments between the fall of 2013 and April 2017. *Plaintiff's Response to Defendant's Motion to Dismiss (Claimant's Response)*, at 5.

13. On March 30, 2018, Defendant filed a motion to dismiss for failure to prosecute. Defendant contended that the case had then been pending for five years, with extended delays for various reasons all attributable to Claimant.
14. On April 30, 2018, Claimant filed a response to Defendant's motion. Claimant's counsel acknowledged that pre-trial activities at the formal level had been suspended due to Claimant's lack of participation, but she noted that his mental health, physical problems, and homelessness more than likely play a role in his social isolation and lack of contact with [his counsel]. See *Claimant's Response*, at 1. Counsel further urged that, if the claim were to be dismissed, the dismissal be *without prejudice*, in light of the remedial purpose of the Vermont workers' compensation scheme and Claimant's social barriers.
15. On May 2, 2018, Claimant's counsel reported that she had reestablished contact with him. The parties participated in a status conference with the Department on May 21, 2018, at which they both indicated a desire to settle the claim without mediation.
16. The Department set another status conference for June 29, 2018, but it was cancelled at the parties' request. In August 2018 the parties declined an offer of another status conference.
17. On November 14, 2018, Defendant renewed its motion to dismiss, noting, "Another seven and a half months have passed since filing the Motion [to Dismiss,] and Defendant is unaware of any communication from the Claimant since June 18, 2018." See *Defendant's Renewed Motion*, at 1. On December 17, 2018, Claimant's counsel filed a response to the renewed motion, reiterating the position she took in her original response.
18. This case was referred to the formal hearing docket 13 months ago. During that time the case has made no progress. The parties have not engaged in productive settlement discussions. The Department has not been able to issue a discovery schedule or set a formal hearing date. As a result, Defendant has filed two motions to dismiss. I find that the delay at the formal level is entirely attributable to Claimant's failure to actively pursue his claim.

CONCLUSIONS OF LAW:

1. The Vermont Rules of Civil Procedure apply to workers' compensation proceedings insofar as they do not defeat the informal nature of the proceedings. *Workers' Compensation Rule 17.1100*.
2. V.R.C.P. 41(b)(2) provides that, upon motion of the defendant, a case may be dismissed for failure of the claimant to prosecute. V.R.C.P. 41(b)(3) provides in pertinent part that, unless the court otherwise specifies in its dismissal order, such a dismissal shall be an adjudication on the merits.

Appropriateness of Dismissal

3. At the informal level, there was a period of 16 months during which Claimant was not prosecuting his claim. Finding of Fact No. 8 *supra*. Thereafter, he produced medical records and filed a Notice and Application for Hearing. Accordingly, although there was a 16-month hiatus at the informal level, he eventually resumed his claim. I therefore conclude that his failure to prosecute the claim at the informal level for 16 months, by itself, does not warrant dismissal.
4. The formal level is a different situation, however. Claimant has failed to prosecute his claim for virtually the entire time the claim has been at the formal level, a period of 13 months and counting. Finding of Fact Nos. 10 through 16 *supra*. As a result, the claim is at a standstill. In light of the prior 16-month period of inaction and the current 13-month period of inaction, I conclude that Claimant has failed to prosecute his claim and that dismissal under V.R.C.P. 41(b)(2) is warranted.

Nature of Dismissal

5. Defendant contends that dismissal should be with prejudice because the claim has been pending for over five years, during which, for significant periods of time, Claimant has not actively pursued it. It further alleges significant prejudice resulting from its inability to evaluate Claimant's complex medical issues "in real-time." *Defendant's Motion*, at 8.
6. Claimant's counsel acknowledges that she is not in contact with her client and that activity on the formal docket is consequently "suspended." *Claimant's Response*, at 1. She contends that any dismissal should be without prejudice, given the remedial purpose of the workers' compensation statute and her client's barriers to engagement, including homelessness and mental health issues.
7. Generally the Department dismisses claims without prejudice unless the claimant's failure to prosecute is without cause. For example, in *Grant v. Cobbs Corner, Inc.*, Opinion No. 22-02WC (May 22, 2002), the defendant noticed the claimant's deposition six times, and she failed to appear every time. The defendant moved to dismiss the claim with prejudice, citing her failure to prosecute and the substantial cost and prejudice to itself. The Commissioner agreed that the claimant's failure to prosecute warranted dismissal, but she noted that the defendant was not under any then-current obligation to pay benefits and therefore did not suffer prejudice. Accordingly, she dismissed the claim without prejudice.
8. Following the above ruling, the defendant in *Grant* moved to amend the dismissal order, arguing that the claim should be dismissed *with* prejudice. *Grant v. Cobbs Corner, Inc.*, Opinion No. 22A-02WC (July 25, 2002). In denying the motion to amend, the Commissioner noted that the plain language of V.R.C.P. 41(b)(2) provides that any decision to dismiss a claim, with or without prejudice, is within her discretion. In exercising that discretion, she found it appropriate to consider the "totality of the circumstances in each case." *Id.*, at 2. The defendant relied on *Cox v. Staffing*

Network, Opinion No. 9-95WC (April 20, 1995), to support its request for dismissal with prejudice, but the Commissioner distinguished the *Cox* case. In *Cox*, the claim was dismissed with prejudice after the claimant failed to attend the formal hearing. There was no hardship, inability or other good cause associated with his failure to attend; he simply forgot to come. Dismissal with prejudice was therefore appropriate. In contrast, the reason for the claimant's failure to prosecute in *Grant* was unknown. Therefore, the Commissioner in *Grant* declined to amend the order, allowing dismissal without prejudice to stand. *Grant, supra* at 3. See also *Batchelder v. Pompanoosuc Mills*, Opinion No. 35-02WC (August 6, 2002) (dismissal without prejudice because claimant's reasons for failing to communicate were unknown); *S.M. v. Cersosimo Lumber*, Opinion No. 27-06WC (June 12, 2006) (dismissal without prejudice based on communication failure); *Parmer v. S.D. Ireland Bros.*, Opinion No. 41-06WC (October 9, 2006) (dismissal with prejudice would be "patently unfair" when the reason for claimant's failure to attend his deposition was unclear).

9. Defendant here alleges that Claimant's failure to prosecute caused prejudice to its defense because it was not able to evaluate his complex medical issues in "real time" during the informal level hiatus. Although Claimant was not actively pursuing his claim for 16 months, Defendant was on notice of his intent to do so and could have evaluated the medical claim during that time. See Finding of Fact No. 8 *supra*. Further, Defendant has not explained how evaluating Claimant's medical issues at a later date would prejudice its position. Accordingly, I find that minimal prejudice resulted from those circumstances. More broadly, whenever a defendant has potential exposure in a claim, with no way to manage the risk due to the claimant's failure to prosecute, there is presumably some level of prejudice. However, that level of prejudice is insufficient here to warrant dismissal of Claimant's claim with prejudice.
10. Finally, Defendant cites *Holmes v. Northeast Tool*, Opinion No. 26-05WC (April 27, 2005), for the proposition that a case should be dismissed with prejudice when a claimant has allowed it to "slumber" on the docket for too long. The claim in that case was on the docket for fourteen years. During that time, it was dormant for two separate four-year periods during which the claimant failed to prosecute his claim. The Commissioner wrote that it was "incumbent on the claimant to act" and dismissed his claim with prejudice. However, the *Holmes* case is distinguishable in several important respects. First, the claimant in *Holmes* allowed his claim to "slumber" for a total of eight years. Here, Claimant took no action on his claim for one 16-month period and one 13-month period, significantly less time than the claimant in *Holmes*. Further, Claimant here faces certain barriers including homelessness and mental health issues that likely contributed to his lack of prosecution. No such issues were apparent in *Holmes*. I thus find Defendant's reliance on *Holmes* to be unpersuasive.

Conclusion

11. Claimant has failed to prosecute his claim here, so dismissal is warranted. However, Defendant is not under any present obligation to pay benefits, nor has it been otherwise significantly prejudiced. Further, Claimant suffers from significant social

barriers that likely contributed to his failure to timely prosecute his claim. Accordingly, I conclude that it is appropriate to dismiss this claim without prejudice.

ORDER:

Claimant's claim is hereby **DISMISSED WITHOUT PREJUDICE**.

DATED at Montpelier, Vermont this 7th day of January 2019.

Lindsay H. Kurrle
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.