

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Matthew Brown

Opinion No. 04-22WC

v.

By: Stephen W. Brown  
Administrative Law Judge

Crash Palace, LLC

For: Michael A. Harrington  
Commissioner

State File No. MM-510

**ORDER OF DISMISSAL WITH PREJUDICE**

**APPEARANCES:**

Matthew Brown, *pro se*  
William J. Blake, Esq., for Defendant

**ISSUES PRESENTED:**

Should this claim be dismissed for failure to prosecute and comply with the scheduling order?  
If so, should such dismissal be with or without prejudice?

**EXHIBITS:**

Defendant's Exhibit A:	March 12, 2021 Scheduling Order
Defendant's Exhibit B:	March 16, 2021 Letter from Defendant's Attorney to Claimant
Defendant's Exhibit C:	July 2, 2021 Email from Defendant's Attorney to Department of Labor
Defendant's Exhibit D:	Multiple Emails Between Defendant's Attorney, Claimant, and Department of Labor, dated between July 1, 2021 and July 12, 2021
Defendant's Exhibit E:	July 16, 2021 Letter from Administrative Law Judge ("ALJ") Stephen W. Brown to Claimant and Defendant's Attorney
Defendant's Exhibit F:	July 23, 2021 Letter from ALJ Brown to Claimant and Defendant's Attorney
Defendant's Exhibit G:	Multiple Emails Between Defendant's Attorney, Claimant, and Department of Labor, dated July 23, 2021
Defendant's Exhibit H:	Multiple Emails Between Defendant's Attorney, Claimant, and Department of Labor, dated July 29, 2021

## **FINDINGS OF FACT:**

1. Claimant alleges that on or around December 6, 2019, he suffered a right radial stress fracture arising out of and in the course of his employment with Defendant. Defendant denied liability for this claim.
2. Following two informal conferences, the Department upheld Defendant's denial, and Claimant requested that this case be referred to the formal hearing docket. On December 15, 2020, the specialist referred this case to the formal hearing docket on the following issues:
  - a. Whether the Injured Worker suffered a repetitive right forearm injury arising out of and in the course of his employment.
  - b. If so, what benefits are due and payable to the Injured Worker?
3. Following that referral, the Department scheduled a telephonic pretrial conference with ALJ Brown on February 3, 2021. It provided the parties with written notice of that conference.
4. On February 3, 2021, ALJ Brown called Claimant at the scheduled time, and Claimant did not answer the telephone. The Department rescheduled that conference for March 12, 2021.
5. On March 12, 2021, ALJ Brown again called Claimant at the scheduled time. Claimant answered the telephone but declined to participate in the pretrial conference, stating that he was at work and could not talk. Because the pretrial conference was duly noticed and had previously been rescheduled due to Claimant's nonattendance, ALJ Brown conducted the pretrial conference with Defendant's attorney present.
6. Thereafter, the Department's Formal Hearing Docket Administrator mailed the parties a scheduling order providing for mediation to occur, and final disclosures to be filed, no later than September 6, 2021, and for a formal hearing to occur on October 5, 2021.
7. On March 16, 2021, Defendant's counsel sent a letter to Claimant suggesting two potential mediators for consideration and asking for Claimant's response. Defendant's attorney's letter stated that if Claimant had any questions, he could consult with an attorney of his choosing or contact the Department. Claimant did not respond to that letter.
8. On July 1, 2021, Defendant's attorney requested a status conference with ALJ Brown, expressing concerns that he was unable to comply with the scheduling order without Claimant's participation in selecting a mediator. A status conference was scheduled for July 15, 2021, and the Department emailed notice of that conference to the parties.
9. On July 15, 2021, ALJ Brown initiated that status conference by calling Claimant. Claimant answered the telephone but declined to participate in the conference. He

stated that he had an attorney but refused to identify that attorney by name and acknowledged that he had not yet signed any papers with his alleged attorney. He stated that his attorney would be in touch with the Department. ALJ Brown advised Claimant that if he had not formally retained an attorney and his attorney had not yet filed a Notice of Appearance with the Department, then Claimant was still unrepresented, and the status conference would go forward with or without his participation. Claimant replied, incorrectly, with words to the effect of, “that’s not how this works,” and hung up the telephone.

10. ALJ Brown continued the duly noticed conference with Defendant’s counsel. After summarizing Claimant’s communications described above, he allowed Defendant’s counsel to respond orally. Defendant’s counsel requested that the Department vacate the scheduling order and allow Defendant leave to file a motion to dismiss without prejudice within a specified time.
11. Instead, ALJ Brown allowed Claimant another chance to participate in this litigation and salvage his claim. In a letter dated July 16, 2021, ALJ Brown summarized the foregoing communications and ordered in relevant part as follows:

Upon consideration, I will provide Claimant with **one** more opportunity to participate in the previously scheduled status conference. Absent further order from the Department, that conference will take place on **Thursday July 23, 2021 at 10:00 AM**. Any party who is unavailable at that time may contact Sonja Darling and request that this conference be rescheduled. The parties shall be as flexible and accommodating as practicable with one another’s schedules if either party requests a different time or date. However, I will not allow this conference to be scheduled any later than **July 24, 2021**.

If Claimant fails to appear for this conference a second time, I will vacate the previously entered scheduling order and cancel the formal hearing in this case. Additionally, I will entertain any Motion to Dismiss that Defendant may file.

(See Defendant’s Exhibit E) (emphasis in original).

12. On July 23, 2021, a status conference was held. Claimant participated in that conference. ALJ Brown continued the previously scheduled formal hearing as well as the mediation and final disclosure deadlines. Following a discussion with the parties, he sent a letter enclosing the Department’s rules governing the formal hearing and mediation process. The formal hearing was rescheduled for March 8, 2022, with the new deadline for both mediation and final disclosures set for February 7, 2022.
13. On July 29, 2021, Defendant’s attorney sent Claimant a follow-up letter again asking for Claimant’s input regarding the selection of a mediator. Claimant never responded to that letter.

14. Defendant's counsel has not received any other communications from Claimant since the July 23, 2021 status conference.
15. No attorney has entered an appearance on Claimant's behalf, despite Claimant's July 15, 2021 assertion that his attorney would be in touch with the Department.
16. Defendant filed a Motion to Dismiss on November 18, 2021, based on Claimant's failure to prosecute this claim and participate in the litigation. More than sixty days have passed since Defendant filed its Motion to Dismiss, and Claimant has filed no response in opposition thereto. As such, I consider the Defendant's motion to be unopposed and all of its factual assertions uncontested.<sup>1</sup>
17. Defendant asserts, and Claimant has not denied, that Claimant has been "largely non-responsive and uncooperative" with defense counsel's requests to move this case forward and in participating in Department-ordered conferences and mediation. I find this characterization well-supported.

#### **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.
3. Whether to dismiss a case with or without prejudice is an exercise of discretion by the Commissioner after considering the totality of the circumstances in each case. *Batchelder v. Pompanoosuc Mills*, Opinion No. 35-02WC (August 6, 2002). In general, the Department strongly prefers resolving claims on substantive rather than procedural grounds. Thus, it has historically been reluctant to dismiss claims for procedural shortcomings; it liberally allows litigants opportunities to correct course.
4. Where the Department has dismissed claims for failure to prosecute, it has usually done so without prejudice unless the claimant's failure to prosecute is without cause. The Department also considers the prejudicial effect of a claimant's delay upon Defendant as a relevant factor. *See, e.g., Joseph Finch v. Huntington Services Corp.*, Opinion No. 01-19WC (January 7, 2019); *Grant v. Cobbs Corner, Inc.*, Opinion No. 22-02WC (May 22, 2002); *S.M. v. Cersosimo Lumber*, Opinion No. 27-06WC (June

---

<sup>1</sup> Although *pro se* litigants must "receive some leeway from the courts, they are still 'bound by the ordinary rules of civil procedure.'" *In re Hopkins Certificate of Compliance*, 2020 VT 47, ¶ 17. The Vermont Rules of Civil Procedure provide litigants with thirty days to respond to any written dispositive motion unless another time is ordered. V.R.C.P. 7(b)(4), incorporated by Workers' Compensation Rule 17.1100. Claimant has not responded to Defendant's Motion to Dismiss, and the time for him to do so has long passed. He has not denied any of Defendant's factual assertions, all of which have convincing evidentiary support.

12, 2006); *cf. also Parmer v. S.D. Ireland Bros.*, Opinion No. 41-06WC (October 9, 2006) (case not dismissed despite Claimant’s non-responsiveness where reasons for inaction were not clear).

5. In rare cases, however, the Department has dismissed claims with prejudice where the claimants have simply failed or refused to participate in the litigation process with no justification. *E.g.*, *Dawson v. Price Chopper*, Opinion No. 20-96WC (April 29, 1996) (“Where, as here, the claimant has been afforded every opportunity to pursue his claims and has declined to do so without any justification at some expense to the defendant, it is appropriate to dismiss the claims with prejudice.”); *Holmes v. Northeast Tool*, Opinion No. 26-05WC (April 27, 2005) (dismissing claim with prejudice where case had “slumbered” on the docket for multiple years with no action and no explanation for the delay); *Cox v. Staffing Network*, Opinion No. 09-95WC (April 20, 1995) (dismissing claim with prejudice where Claimant failed to appear for final hearing and failed to respond to defendant’s motion to dismiss).
6. On the surface, this case is atypical of those that the Department has dismissed with prejudice. It has only been pending on the formal hearing docket for approximately one year. It is scheduled for a formal hearing in approximately six weeks, and the mandatory mediation deadline is in approximately two weeks. No party has requested a waiver of mediation or a continuance of that deadline. However, Claimant has refused, without offering any justification, to respond to Defendant’s efforts to schedule a mediation. Due to that failure to communicate, the practical likelihood of the parties meeting the current mediation deadline of February 7, 2022 is near zero.
7. In most cases, that would not be enough to warrant dismissal, let alone a dismissal with prejudice. Indeed, the Department routinely continues matters and amends scheduling orders to afford the parties an opportunity to mediate.
8. However, this is not a case of mere laxity in prosecutorial efforts. Despite multiple “second” chances, Claimant has repeatedly demonstrated utter contempt toward the Department’s process and has continually ignored Defendant’s good faith efforts to comply with the Department’s scheduling order. There is no evidence that he has failed to receive the Department’s or Defendant’s communications. Nor is there any evidence of any meaningful barrier to his ability to respond or participate in this process. Moreover, he has not expressed any opposition to the dismissal of his claim.
9. This case is pending on the formal docket because of Claimant’s appeal, yet his conduct supports an inference of either misguided gamesmanship or complete apathy. Either way, I find that Defendant has suffered prejudice in the form of needlessly wasted time in its efforts to communicate with him. Dismissal for failure to prosecute is warranted.
10. Moreover, permitting Claimant to reopen this claim in the future in light of his antics to date would reward bad behavior, encourage abuse of the Department’s limited resources, needlessly burden Defendant with the prospect of having to re-defend a

claim that Claimant never seriously tried to prosecute in the first place, and fundamentally be a waste of time.

11. Under the unique circumstances of this case, I conclude that dismissal with prejudice is appropriate.

**ORDER:**

For the reasons stated above, Defendant's Motion to Dismiss is **GRANTED** and Claimant's claim is **DISMISSED WITH PREJUDICE**.

**DATED** at Montpelier, Vermont this 28th day of January 2022.

---

Michael A. Harrington  
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.