

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Amber Hannan

Opinion No. 07-23WC

v.

By: Stephen W. Brown
Administrative Law Judge

Westminster Cracker Company, Inc.

For: Michael A. Harrington
Commissioner

State File No. RR-52972

ORDER OF DISMISSAL WITHOUT PREJUDICE

APPEARANCES:

Brendan P. Donahue, Esq., for Claimant
Jennifer K. Moore, Esq., for Defendant

ISSUES PRESENTED:

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

EXHIBITS:

Defendant's Exhibit A:	Employer First Report of Injury (Form 1)
Defendant's Exhibit B:	Denial of Workers' Compensation Benefits (Form 2)
Defendant's Exhibit C:	Notice and Application for Hearing (Form 6)
Defendant's Exhibit D:	December 8, 2021 Email from Department's Specialist
Defendant's Exhibit E:	December 15, 2021 Letter from Defendant's Counsel
Defendant's Exhibit F:	January 20, 2022 Email Chain
Defendant's Exhibit G:	March 31, 2022 Letter from Claimant's Counsel
Defendant's Exhibit H:	April 12, 2022 Email and April 28, 2022 Referral Memorandum
Defendant's Exhibit I:	June 7, 2022 Scheduling Order

FINDINGS OF FACT:

1. Claimant alleges that she was injured at work on September 15, 2021.
2. On September 22, 2021, Defendant filed a denial of this claim in its entirety based on a lack of evidence that Claimant sustained an injury that arose out of and during the course of her employment, and also based on Claimant's failure to provide a medical authorization (Form 7).
3. Claimant appealed Defendant's denial on November 12, 2021, but did not provide a medical authorization with her appeal.

4. On December 8, 2021, the parties participated in an informal conference, which concluded with a plan for a second conference the following month to allow the parties an opportunity to obtain relevant medical evidence.
5. On December 15, 2021, Defendant's counsel sent a medical authorization form (Form 7) to Claimant's counsel for Claimant's signature.
6. On January 20, 2022, the Department's specialist canceled the second informal conference, which had been scheduled for January 24, 2022, because Claimant had not returned a signed medical authorization.
7. On March 31, 2022, Claimant's counsel provided the Department and defense counsel with a limited set of then-available medical records and requested a direct referral to the formal hearing docket. Defendant opposed the referral.
8. On April 12, 2022, the Department's specialist upheld Defendant's denial and referred the claim to the formal hearing docket over Defendant's objection.
9. At a pretrial conference on June 7, 2022, Claimant's counsel indicated that he had been experiencing difficulty making contact with his client. Defendant opposed scheduling a formal hearing, noting that Claimant had still not produced a signed medical authorization. Instead of scheduling a formal hearing, the Department scheduled a status conference to allow Claimant's counsel an opportunity to reestablish contact and obtain a medical authorization form. That status conference was subsequently cancelled based on Defendant's filing of the instant motion.
10. After the filing of the instant motion, Claimant's counsel indicated that he still had not been able to contact Claimant and had no authority to oppose the motion. To date, Claimant has not responded to Defendant's motion and there is no evidence that Claimant has ever returned the requested medical authorization form.

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) (dismissed without prejudice where claim sat inactive for 16 months at the informal level and then 13 more months at the formal hearing level); *Grant v. Cobbs Corner, Inc.*, Opinion No. 22-02WC (May 22, 2002); *S.M. v. Cersosimo Lumber*, Opinion No. 27-06WC (June 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., Brown v. Crash Palace, LLC*, Opinion No. 04-22WC (January 28, 2022) ("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."); *see also Dawson v. Price Chopper*, Opinion No. 20-96WC (April 29, 1996); *Holmes v. Northeast Tool*, Opinion No. 26-05WC (April 27, 2005); *Cox v. Staffing Network*, Opinion No. 09-95WC (April 20, 1995).
6. In addition to dismissal for failure to prosecute a claim, the Department's rules also expressly permit dismissal without prejudice where a claimant fails or refuses, without good cause, to execute a medical authorization (Form 7) upon request. *See Workers' Compensation Rule 3.2130.*
7. In this case, Claimant has failed to return a medical authorization form, despite Defendant's request, for approximately seventeen months. Claimant has failed to offer any explanation of good cause for this failure. This case has also been inactive on the formal hearing docket for over nine months, during which time Claimant's counsel has been unable to establish contact with her. Under these circumstances, I conclude that it would be unfair to require Defendant to continue devoting resources to defending this case given Claimant's apparent inability or lack of interest in pursuing it.
8. Importantly, however, the reasons for Claimant's nonresponsiveness are not clear, and there is no evidence of bad faith, gamesmanship, or other aggravating factors that have justified dismissal with prejudice in other cases. *Cf. contra Brown, supra.* Accordingly, I conclude that dismissal without prejudice is the proper remedy in this case.

ORDER:

For the reasons stated above, Defendant's Motion to Dismiss is **GRANTED IN PART AND DENIED IN PART**; Claimant's claim is **DISMISSED WITHOUT PREJUDICE**.

DATED at Montpelier, Vermont this 10th day of March 2023.

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.