

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Tristan Blanchard

Opinion No. 09-24WC

v.

By: Stephen W. Brown
Administrative Law Judge

Adam Blanchard

For: Michael A. Harrington
Commissioner

State File No. YY-54938

ORDER OF DISMISSAL WITHOUT PREJUDICE

APPEARANCES:

Tristan Blanchard, *pro se*, Claimant
Erin J. Gilmore, 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: Email from Defendant's Counsel to Claimant dated April 15, 2024
Defendant's Exhibit B: Correspondence from Defendant's Counsel to Claimant dated March 21, 2024 enclosing Medical Authorization (Form 7)
Defendant's Exhibit C: Email from Defendant's Counsel to Claimant dated April 23, 2024 regarding mediation
Defendant's Exhibit D: Delivery Confirmation Receipt for Email dated April 23, 2024
Defendant's Exhibit E: Email from Defendant's Counsel to Claimant dated April 24, 2024
Defendant's Exhibit F: Correspondence from Defendant's Counsel to Claimant dated April 24, 2024 regarding Medical Authorization (Form 7)

FINDINGS OF FACT:

1. Claimant alleges, and Defendant denies, that on or about September 29, 2023, Claimant suffered a low back injury arising out of and in the course of his employment with Defendant.
2. The parties participated in an informal conference on January 22, 2024, after which the Department's specialist upheld Defendant's denial. Claimant appealed that decision to the formal hearing docket. Thereafter, Claimant's participation in this case appears to have ceased.

3. Claimant failed to attend a duly noticed pretrial conference with the Administrative Law Judge on March 14, 2024. That conference was then rescheduled and re-noticed for March 29, 2024. Claimant failed to attend that conference as well.
4. During the second pretrial conference, the Department issued deadlines for mediation and final disclosures and set a date for a formal hearing. It also set a deadline of April 29, 2024 for Defendant to file a Motion to Dismiss for Failure to Prosecute. The Department sent this order to Claimant by first class mail and email.
5. Prior to the April 29, 2024 Motion to Dismiss deadline, Defendant attempted to reach Claimant by email to schedule a mediation. Defendant's email tracking confirms that this email was delivered. However, Claimant did not respond. The mediation deadline, which was May 28, 2024, has now passed.
6. Additionally, Defendant sent Claimant a revised medical authorization form via email and regular mail multiple times in March and April 2024. Claimant did not return the Form 7 or otherwise respond to Defendant's communications.
7. None of the letters or emails that Defendant sent to Claimant were returned as undeliverable.
8. On April 29, 2024, Defendant filed a Motion to Dismiss this claim for failure to prosecute. The time for Claimant to respond has passed, and the Department has not received any response. As such, Defendant's Motion is unopposed.

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. Claimant failed to appear for two pretrial conferences and has not cooperated with Defendant’s counsel in complying with the deadlines set during the second of those conferences. Claimant has not provided the executed medical authorization that Defendant’s counsel requested and has not provided any reason for declining to do so. The Department has not received any communication from Claimant seeking to extend any of the deadlines, objecting to Defendant’s reasonable requests, or contesting the request to dismiss his claim.
8. Although this case has only been pending on the formal hearing docket for approximately five months, Claimant has been missing in action during that entire time. I conclude that he has failed to prosecute this claim and that under these circumstances it would be unfair to require Defendant to continue dedicating resources toward its defense.
9. 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**, and Claimant’s claim is **DISMISSED WITHOUT PREJUDICE**.

DATED at Montpelier, Vermont this 12 day of June 2024.

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.