

T. P. v. S. D. Ireland Brothers (October 9, 2006)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Opinion No. 41-06WC

T. P.

By: Margaret A. Mangan
Hearing Officer

v.

S.D. Ireland Brothers

For: Patricia Moulton Powden
Commissioner

State File No. X- 53328

RULING ON DEFENSE MOTION TO DISMISS

Defendant S.D. Ireland Brothers moves to dismiss with prejudice claimant Terry Parmer workers' compensation claim pursuant to V.R.C.P. 37, 41, and 79.1 for failure to prosecute. In addition, defendant requests that claimant pay court reporter costs and attorney fees resulting from claimant's failure to appear at his scheduled deposition. Defendant has not presented sufficient evidence to support these requests.

Defendant filed a First Report of Injury on October 13, 2005. This report stated that claimant fell or slipped from a ladder or scaffolding on September 30, 2005, resulting in skin surface bruising and injury to the bone portion of the spine. The Department's file indicates that defendant's Workers' Compensation Insurance Carrier, Liberty Mutual Insurance Company (Liberty Mutual), paid Temporary Total Disability benefits and medical benefits to the claimant. Then, on November 15, 2005, Liberty Mutual filed a Form 2 denying "any ongoing indemnity benefits." Liberty Mutual also filed a Form 27 to discontinue TTD and medical benefits. On December 20, the Department wrote a letter to Liberty Mutual and claimant's attorney notifying them that the Form 27 was approved. This letter also informed the claimant of his right to contest this discontinuance. On February 10, 2006, the defendant moved to dismiss the claimant's claim with prejudice for failure to prosecute. On February 27, 2006 the Staff Attorney ruled that "a delay of years rather than months would be necessary to support dismissal of a claim due to claimant's failure to prosecute."

The following day, February 28, 2006, the claimant's attorney motioned to withdraw because he was unable to contact the claimant by telephone or in writing after repeated attempts. On March 6, 2006 the Department sent a certified letter to the claimant to notify him of the request to withdraw. On March 30, 2006 the postal service returned the certified letter to the Department because it remained unclaimed despite two separate notices to the claimant. The Department then sent another certified letter to the claimant, addressed to a slightly different address, to notify him of the request to withdraw. Again, the letter was returned to the Department because it had been unclaimed after two notices to the claimant. As a result, the Department granted the request to withdraw, and sent a letter to the claimant to notify him that he would be required to represent himself pro se.

Subsequently, on June 20, 2006, defendant noticed claimant's deposition. Claimant did not attend the deposition, resulting in this motion by defendant.

Vermont Rule of Civil Procedure 41(b)(2) states that an action may be dismissed where a plaintiff fails to prosecute or comply with the rules of civil procedure. However, the V.C.R.P. apply to workers' compensation hearings, only "insofar as they do not interfere with the informal nature of the proceedings." WC Rule 7.1000. To grant the defendant's motion to dismiss with prejudice would be the equivalent of adjudication on the merits. *Grant v. Cobbs Corner*, Op No. 22-02WC (2002) at 1.

The defendant's right to seek finality of a claim must be balanced with the claimant's right to seek the benefits to which he may be entitled. "[O]ur Supreme Court once stated, 'allowing a case to slumber on the docket for a period of five years indicates a lack of diligence warranting its dismissal...'" *Holmes v. Northeast Tool*, Op No. 26-05WC, at 1 (2005) (quoting *Capitol Savings Bank & Trust Co. v. E.W. Hammett*, 95 Vt. 47, 50 (1921)). Furthermore, 21 V.S.A. §§ 656, 660 prevent a claimant from commencing with any claim more than three years after the date of injury. This law shows that the Court and legislature have considered the rights of both parties and have indicated a timeframe to protect each party's interest. In other words, a claimant must fail to act for a number of years before his or her rights may be justly foreclosed. As such, less than a year of inaction does not yet warrant a dismissal for failure to prosecute.

This case is clearly distinguishable from *C.H. v. Schwan's Food*, Op. No. 40-06 (2006), a case dismissed more than two years after the First Report of Injury had been filed. In that case, the Claimant had actively participated in her case, and then failed to appear for a scheduled appointment, status conference and hearing. Prior to the dismissal, she had several telephone conversations with personnel in this Department.

Defendant's request to recoup expenses incurred in preparation for deposition in this case is also denied. Efforts to depose the claimant were undertaken by the defendant's own initiative at a time when it was not paying any benefits, rather than in response to any action taken by the claimant. Furthermore, because it was fully aware of the repeated unsuccessful attempts to contact the claimant, the defendant knew or should have known that the claimant could not be reached. As such, the defendant understood that there was a potential financial risk involved in attempting to notice the claimant's deposition.

Also, while it is clear that claimant has not initiated further action on this claim or acknowledged the correspondence sent from the defendant or the Department itself, the reason for this inaction is uncertain. It is possible that claimant's unresponsiveness and inactivity is intentional. However, it is also entirely possible that claimant is somehow incapacitated or otherwise legitimately unable to take further action at this time. To dismiss for failure to prosecute under these uncertain circumstances would be patently unfair to the claimant.

Therefore, for the foregoing reasons, the defendant's Motion to Dismiss this claim with prejudice is DENIED.

Dated at Montpelier, Vermont this 9th day of October 2006.

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