STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. R-7405
Amanda Grant	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Cobbs Corner, Inc.	)	For: R. Tasha Wallis
	)	Commissioner
	)	
	)	Opinion No. 22A-02WC

RULING ON DEFENDANT'S MOTION TO AMEND ORDER

Defendant, by and through its attorneys, McCormick, Fitzpatrick, Kasper & Burchard, P.C., moves for an amendment of the Commissioner's Opinion No. 22-02WC dismissing Amanda Grant's claim without prejudice. Defendant argues that the claim should be dismissed with prejudice.

Defendant argues that the Department's earlier decisions in *Cox v. Staffing Network*, Opinion No. 9-95WC (April 20, 1995) and *Mullen v. Moran's Deli Mart*, Opinion No. 41-94WC (Aug. 4, 1994) serve as precedent for the conclusion that it is entitled to a dismissal with prejudice. Defendant also argues that if the Department does not dismiss with prejudice, Defendant will be unfairly prejudiced because a dismissal without prejudice "effectively leaves claimant's claim open in perpetuity."

Defendant grounded its original motion to dismiss on the Vermont Rules of Civil Procedure 37(d) and 41(b)(2). Even if the Department decided that applying those rules in this situation does not impede the informal nature of the proceedings under 21 V.S.A. § 604 and WC Rule 7.1000, the plain language of V.R.C.P. 37(d) and 41(b)(2) provides that any decision to dismiss a claim with or without prejudice is one within the court's discretion. As discussed in the Department's order in this case, V.R.C.P. 37(d) provides that a court *may* order sanctions (including dismissal) for failure of a party to attend a properly noticed deposition. V.R.C.P. 37(d) further provides that orders for sanctions should be made "in regard to the failure as are just." V.R.C.P. 41(b) provides for dismissal of an action on defendant's motion for failure of the plaintiff to prosecute, and the dismissal is an adjudication on the merits "unless the court in its order for dismissal otherwise specifies." Nothing in the Rules of Civil Procedure serves to entitle the defendant to a dismissal with prejudice. The Department, in exercising its discretion, specifically ordered that the dismissal of Ms. Grant's claim be without prejudice, and that order stands.

The Department believes it is under the duty to exercise its discretion after considering the totality of the circumstances in each case. Defendant correctly points out that the Department has dismissed a claim with prejudice on two prior occasions. *See Cox v. Staffing Network*, Opinion No. 9-95WC (April 20, 1995); *Mullen v. Moran's Deli Mart*, Opinion No. 41-94WC (Aug. 4, 1994). However, the Department rejects any contention that a defendant is automatically entitled to a dismissal with prejudice merely because it can demonstrate some similarities in its case to those in *Cox* or *Mullen*. Defendant asserts: "In [*Cox*], a claimant failed to appear at a single hearing, then failed to respond to a single motion to dismiss. As a result, the Department specifically and unequivocally stated that under those circumstances, a 'defendant is entitled to a dismissal with prejudice of the claimant's claim.'" Defendant's Memorandum in Support of Motion to Amend Order at 1. Defendant has misunderstood and misstates the Department's holding in that case by focusing solely on the claimant's failure to appear and not on all of the circumstances present in the case.

In *Cox*, the claimant failed to appear at the final hearing. The hearing officer reached the claimant by telephone and the claimant responded that he "forgot" about the hearing, and "conceded that was the only reason he did not appear." The claimant then offered no response to the defendant's motion to dismiss or to a written communication from the hearing officer with a deadline by which to respond. The Department noted that the claimant "failed, *without cause*, to appear at a scheduled final hearing for which the Claimant had received notice," or to respond to the defendant's motion to dismiss. (emphasis added). After taking all the circumstances into consideration, the Department stated: *"In this instance*, the Defendant is entitled to a dismissal with prejudice of the Claimant's claim." (emphasis added). In *Cox*, the Department had the benefit of having spoken to the claimant to determine whether the failure to appear was due to any inability or hardship, and concluded that it was not. Additionally, a scheduled final hearing—for which a defendant has to fully prepare its defense—is a different stage in the process from a discovery deposition.

In *Mullen*, the claimant was denied workers' compensation benefits and requested a hearing by filing a Notice and Application for Hearing (Form 6). He then failed to appear for a pre-trial conference, a prerequisite to the hearing he requested. WC Rule 7.1100. While it is true that the Department did dismiss that claim with prejudice after a certified letter sent to the claimant's last known address, return receipt requested, was unclaimed, the brief opinion does not indicate any criterion the Department used in deciding to dismiss with prejudice. To the extent that the *Mullen* opinion is inconsistent with this opinion, it is hereby overruled. "Discretion without a criterion for its exercise is authorization of arbitrariness." *Brown v. Allen*, 344 U.S. 443, 496 (1953). *See also Klein v. Klein*, 150 Vt. 466, 473 (1988).

The present case has some unusual circumstances. As noted in the Department's ruling, Claimant's counsel moved to withdraw from the case in August of 2001 and wrote that Ms. Grant had no objections to her withdrawal. That motion has not been granted because the requirements of WC Rule 5 have not been met, including that the attorney provide documentation addressing whether the client agrees to the withdrawal. Claimant's attorney has told the Department that she has been unsuccessful in establishing communication with her client. The Department has no way of knowing whether the Claimant has experienced some inability or hardship that has prevented her from contacting her attorney or attending depositions, whether the Claimant herself had actual notice of the depositions, or whether she is under a reasonable belief that she is still represented by her counsel of record. Because the depositions were properly noticed to Claimant's attorney of record, dismissal of the claim under the circumstances of this case is appropriate. *See* WC Rule 5.1200 ("Except as otherwise provided in these Rules, all notice given to or by an attorney of record for a party shall be considered in all respects as notice to or from that party.") However, it is the position of this Department that a dismissal with prejudice, without a determination that the Claimant's failure to appear for the scheduled depositions was without cause, is not warranted under the circumstances.

The Department rejects Defendant's argument that a dismissal without prejudice "effectively leaves claimant's claim open in perpetuity." The Department is not aware of any Vermont statutory or case law under which a claim filed and dismissed by the court without prejudice serves to toll a statute of limitations in perpetuity, nor has Defendant provided any authority to support this theory. Although the Vermont Supreme Court has not had occasion to address this issue, the Department adopts the reasoning articulated by the Supreme Court of Minnesota:

> When an employee files a claim petition, the statute of limitations is tolled during its pendency since the commencement of an action arrests the running of the applicable statute of limitations. However, if a claim is dismissed without a determination on the merits, the result is the same as if it had never been filed and the statute of limitations had never been tolled.

Demars v. Robinson King Floors, Inc., 256 N.W.2d 501, 505 (Minn. 1977) (citing *Holmgren v. Isaacson*, 116 N.W. 205 (Minn. 1908).

Therefore, Claimant is still subject to the workers' compensation statute of limitations, and the applicable statute is 21 V.S.A § 660:

> Want of or delay in giving notice, or in making a claim, shall not be a bar to proceedings under the provisions of this chapter, if it is shown that the employer, the employer's agent or representative, had knowledge of the accident or that the employer has not been prejudiced by the delay or want or notice. Proceedings to initiate a claim for benefits pursuant to this chapter may not be commenced after six years from the date of injury.

Should Claimant move to reinstate a claim within six years of the date of injury by filing a new Form 5, Defendant can renew its motion to dismiss with prejudice at that time.

For all the foregoing reasons, Defendant's motion to amend order is denied.

Dated at Montpelier, Vermont this 25th day of July, 2002.

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R. Tasha Wallis
Commissioner

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RULING ON DEFENDANT'S MOTIONS TO DISMISS

This action comes before the Department on the defense motion to dismiss, a motion that remains unopposed.

A review of the file indicates that claimant Amanda Grant filed a claim for an alleged work related injury on September 21, 2000. In response to the employer's denial of the claim, Ms. Grant, through her attorney Sandra M. Lee Esq., contested the denial on February 12, 2001. In August 2001, claimant's counsel moved to withdraw from the case, a motion that has not been granted because the requirements of WC Rule 5 have not yet been met. On September 28, 2001, Eric A. Johnson, Esq. entered a notice of appearance for the defense.

After an informal conference, the specialist handling this file determined not to issue an interim order. Therefore, the defendant has not been under any obligation to pay benefits in this case.

In January 2002, defense counsel filed a notice to depose the claimant, although he agreed to postpone that deposition at claimant's counsel's request. A second notice of deposition was then sent to claimant's counsel for a February 5, 2002 deposition. Claimant did not appear. On February 14, 2002, defendant moved to dismiss the claim in a motion that claimant did not oppose. However, the Director of Workers' Compensation denied the motion to dismiss because she found no statutory or regulatory language permitting dismissal.

Defense counsel then filed a third notice for the claimant's attendance at a deposition on March 15, 2002. Claimant did not appear. On April 4, 2002, the hearing officer gave claimant's counsel 10 days in which to reply to the motion to dismiss. No reply was ever received. Nor did claimant appear for the fourth, fifth or sixth notices to appear for deposition.

The defense now moves for an order to dismiss this action with prejudice, as the motions have never been opposed, the claimant refuses to prosecute her claim, and the action is causing the defendant substantial cost and prejudice. The "substantial cost" incurred by the defense is of its own making given the persistent unsuccessful attempts at noticing the claimant's deposition. With no obligation to pay, the defendant is not suffering prejudice at this time.

Claimant's failure to appear for deposition or in any other way to prosecute this claim is a basis to dismiss the action and remove this case from the hearing docket. However, the defendant argues that under V.R.C.P. 37 and V.R.C.P. 41, the dismissal must be with prejudice. V.R.C.P. 37 (d) provides that a court may order sanctions for a failure of a party to attend a properly noticed deposition. V.R.C.P. 41 (b) (2) provides for the dismissal of an action on motion by the defendant for failure of the plaintiff to prosecute. The effect of such dismissal is an adjudication on the merits, "unless the court in its order for dismissal otherwise specifies." Id.

The Vermont Rules of Civil Procedure are applicable to worker's compensation hearings only insofar as they do not impede the informal nature of the proceeding. 21 V.S.A.§ 604; WC Rule 7.1000. Although the civil rules permit involuntary dismissal of an action with prejudice at a court's discretion, there is nothing in the workers' compensation rules or opinions to suggest that such a severe measure would be appropriate in this forum. Nevertheless, should the claimant ever choose to pursue this claim, the passage of time and history of non cooperation will undoubtedly increase her burden.

WHEREFORE, the claim of Amanda Grant is hereby dismissed without prejudice and the case is removed from the formal hearing docket.

Dated at Montpelier, Vermont this 22nd day of May 2002.

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R. Tasha Wallis
Commissioner