STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. P-25385
James Batchelder	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Pompanoosuc Mills	)	For: R. Tasha Wallis
	)	Commissioner
	)	
	)	Opinion No. 35-02WC

RULING ON DEFENDANT'S RENEWED MOTION TO DISMISS/MOTION TO RECONSIDER

On May 22, 2002, Defendant, by and through its attorneys, McCormick, Fitzpatrick, Kasper & Burchard, P.C., moved for a dismissal of James Batchelder's claim with prejudice. On June 10, 2002, the Director of Workers' Compensation, in response to Defendant's Motion to Dismiss, granted the motion and dismissed the claim without prejudice. Per Defendant's request, the matter was forwarded to the formal hearing docket. Defendant now renews its motion to dismiss with prejudice.

FACTS:

Claimant filed a Form 5, Employee's Notice of Injury and Claim for Compensation, received by the Department of Labor and Industry on September 20, 2000.

The employer's insurance carrier denied the claim, and claimant appealed on November 29, 2000.

On December 14, 2000 a workers' compensation specialist declined to direct the carrier to pay any benefits.

On February 27, 2001 Claimant's counsel wrote to Claimant notifying him he was closing his file, as he had not heard from Claimant.

On April 18, 2001, different counsel entered an appearance for Claimant.

On August 10, 2001, following an informal conference, the workers' compensation specialist declined to direct the carrier to pay any benefits, and the matter was referred to the formal hearing docket.

On March 6, 2002, Claimant's counsel filed a Request for Permission to Withdraw Pursuant to Workers' Compensation Rule 5. Claimant's counsel reported that he had been unsuccessful in numerous attempts to communicate with Claimant since November of 2001.

On April 22, 2002, the Director of Workers' Compensation granted counsel's request for withdrawal based on Claimant's failure to maintain contact with counsel and the Claimant's lack of response to the Department's inquiries.

Neither Claimant nor a new attorney has entered an appearance since the withdrawal of Claimant's former counsel, and Claimant has not responded to Departmental notices and correspondence in May and June 2002.

DISCUSSION AND CONCLUSIONS OF LAW:

Defendant grounded its original motion to dismiss on Vermont Rule of Civil Procedure 79.1(g). As it appears that the case has already been dismissed without prejudice by the Director of Workers' Compensation based on this Department's decision in *Grant v. Cobbs Corner, Inc*., 22-02WC (May 22, 2002), we do not need to decide whether strictly applying V.R.C.P. 79.1(g) impedes the informal nature of the workers' compensation proceedings. 21 V.S.A. § 604; WC Rule 7.1000. It should be noted however, that such a strict adherence to very technical rules may in some cases serve to impede the informality of the workers' compensation proceedings and the remedial purpose of the Act.

Even if the Department considered itself bound by V.R.C.P. 79.1(g) in this case, the plain language of that rule does not mandate a dismissal with prejudice. The Department recently held that 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. *Grant v. Cobbs Corner, Inc*., 22A-02WC (July 25, 2002), Ruling on Defendant's Motion to Amend Order [*Grant II*].

Defendant also argues in its earlier communications with the Department that the 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 is referred to *Grant II* for a full discussion of the precedential value of *Cox* and *Mullen*, but it bears repeating here that 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." A failure to appear at a final hearing is also a different stage in the process from a claimant failing to file a notice of appearance.

Other than the stage in the litigation process, the facts in the *Grant* case are very similar to the facts in the instant case. In both cases the attorney representing the claimant requested permission to withdraw from representation. In this case, the Director of Compensation determined that the Claimant's attorney showed good cause for the withdrawal because the attorney demonstrated that he had been unsuccessful in efforts to communicate with Claimant over several months. The Claimant also did not respond to the Department's attempts at communication.

Also, as in *Grant*, the Department has no way of knowing why the claimant failed to respond and failed to enter an appearance. As stated in *Grant II*, "it is the position of this Department that to dismiss with prejudice, thereby barring any claim by Claimant, without being able to determine whether the Claimant's failure to appear . . . was without cause, is not warranted under the circumstances." Because the Department cannot ascertain whether Claimant's failure to appear is without cause or due to some inability or hardship, I find under the circumstances that a dismissal without prejudice is the appropriate action.

As discussed in *Grant II*, a dismissal without prejudice does not toll the 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. *See Grant II* (rejecting the argument that a dismissal without prejudice "effectively leaves claimant's claim open in perpetuity").

For all the foregoing reasons the Motion to Dismiss with prejudice is denied. The Director's decision to grant the Motion to Dismiss without prejudice stands.

Dated at Montpelier, Vermont this 6th day of August 2002.

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R. Tasha Wallis
Commissioner