COMMONWEALTH OF MASSCHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 28740-01**

Deborah Wilmore	Employee
The Pain Center	Third Party Claimant
Advanced Information Technologies	Employer
Merchants Insurance Group	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Carroll and Costigan)

APPEARANCES
Robert E. Cole, Esq., for the third party claimant
David G. Shay, Esq., for the insurer

FABRICANT, J. Where an administrative judge dismissed the claim of a third party medical provider (TPC[1]) without prejudice, and the insurer argues on appeal that the dismissal should have been with prejudice as a matter of law, we conclude that the judge did not abuse his discretion. We affirm the decision.

This third party claim for payment of medical bills was joined to the employee's claim for weekly compensation and medical benefits, apparently in the absence of the third party claimant. (Dec. 2-4.) The insurer, at the judge's direction, was charged with the responsibility of sending counsel for the provider (located in Philadelphia, PA) notice of the hearing. That notice, while sent, did not include any reference that the claim had been joined to the hearing on the employee's underlying claim against the insurer. (Dec. 5; Ins. Ex. 12.) On the day of the hearing, the employee and the insurer reported settlement of the claim-in-chief. The third party claim remained to be litigated, but the third party claimant and its counsel failed to appear at the hearing. The judge took the employee's testimony regarding the treatment provided by the third party

[1] The designation "TPC" coincidentally stands for "third party claimant" and "The Pain Center."

claimant. The insurer subsequently filed a motion to dismiss the third party claim for failure to prosecute. (Dec. 5.)

The insurer's written motion to dismiss the third party claim was forwarded to counsel for the TPC, who filed an opposition to that motion. While the judge did not find persuasive any of the reasons proffered by the TPC as to its failure to appear at hearing, his allowance of the insurer's motion to dismiss was *without prejudice* to the provider to refile its claim for payment. (Dec. 7.)

The insurer's argument is that the TPC failure to prosecute its claim equates to a waiver of its right to recovery for the treatments afforded to the employee. We conclude that, although the judge's dismissal of the claim appropriately might have been with prejudice, under the cirucumstances of this case, there was no abuse of discretion in his order that it be without prejudice.

The general rule is that "the allowance or denial of a motion to dismiss for failure to prosecute is discretionary." Arruda v. Cut Price Pools of Somerset, Inc., 14 Mass. Workers' Comp. Rep. 169, 170 (2000), citing Benjamin v. Walter E. Fernald State School, 9 Mass. Workers' Comp. Rep. 329 (1995). See L. Locke, Workmen's Compensation, § 487 (2nd ed. 1981); Bucchiere v. New England Tel. & Tel. Co., 396 Mass. 639, 641 (1986). Only in rare instances can it be ruled that there has been an abuse of discretion amounting to an error of law. Benjamin, supra. Moreover, " '[i]nvoluntary dismissal [with prejudice] is a drastic sanction which should be utilized only in extreme situations.' " Eddins v. F & T Corp. 7 Mass. Workers' Comp. Rep. 143, 145 (1993), quoting Monahan v. Washburn, 400 Mass. 126, 128-129 (1987). Furthermore, Mass. R. Civ. P. 41(b)(3) gives a judge the discretion to determine whether to dismiss with or without prejudice: "*Unless the court expressly states otherwis*e, the involuntary dismissal operates as an adjudication on the merits." Monahan, supra at 128 (emphasis added). In spite of the judge's findings on notice of the hearing to counsel for the TPC, we cannot say he abused his discretion in allowing the motion to dismiss without prejudice.

Citing Arruda, supra, the insurer argues that the TPC's failure to prosecute deprived the insurer of its right to a final decision on the merits. Because Arruda is factually distnguishable, we disagree. In Arruda, both the employee and insurer appealed the conference order of payment. The employee failed to appear at an impartial medical exam and status conference, despite being notified. The judge dismissed the employee's appeal of the conference order without prejudice. The reviewing board ordered dismissal *with* prejudice because dismissal without prejudice deprived the insurer of its statutory right to a full evidentiary hearing "established by its cross-appeal of the conference order." Id. at 171.[2]

The situation is not the same here. The insurer did not appeal the conference order awarding a closed period of benefits, as did the insurer in Arruda. Thus, we do not see any substantial prejudice to the insurer. It had no statutory right to a hearing addressing issues emanating from the conference order that it sought to adjudicate at hearing. Moreover, although counsel for the TPC received notice of the hearing, the notice did not state the third party claimant had been joined to the litigation between the employee and the insurer. Cf. 452 C.M.R 1.20 (joinder applicable to a "an insurer, employer or other person who may be liable for payment of compensation"). Finally, the judge's finding that counsel for the TPC neither appeared nor contacted the department regarding his failure to appear at the hearing is not supported by the record. In the transcript, the judge himself stated that he received a fax from counsel for the third party claimant that morning saying he was unable to appear because he had other matters pending in Pennsylvania. (Tr. 4-5.)

[2] Section 11A(2) of M. G. L. c. 152 provides, in pertinent part:

> The impartial medical examiner . . . shall examine the employee and make a report at least one week prior to the beginning of the hearing, which shall be sent to each party. No hearing shall be commenced sooner than one week after such report has been received by the parties.

Under the circumstances presented in this case, we cannot say that the judge's action in dismissing the claim without prejudice was arbitrary, capricious or contrary to law. G. L. c. 152, § 11C.

The decision is affirmed.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

Filed: **January 30, 2007**