COMMONWEALTH OF MASSACHSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 004623-12**

Edrena D. Sands	Employee
M.B.T.A.	Employer
M.B.T.A.	Self-Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Fabricant and Koziol)

This case was heard by Administrative Judge Fitzgerald.

APPEARANCES
Edrena D. Sands, pro se
Paul A. Brien, Esq., for the self-insurer

CALLIOTTE, J. The employee appeals from a decision dismissing her case with prejudice for failure to prosecute her claim. For the following reasons, we reverse the decision and recommit the case to the judge to conduct a further hearing.

The employee, a bus driver, sustained a work-related injury on March 1, 2012. She claimed injury to several body parts, including her right hand and wrist. Prior to filing the claim at issue here, the employee had received closed periods of §§ 34 and 35 benefits via a conference order and two § 19 agreements. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2016)(reviewing board may take judicial notice of documents in board file). On January 19, 2016, the employee, through her then-attorney, filed the claim which is the subject of this appeal, seeking § 34 benefits from November 24, 2015, to date and continuing. At a conference on May 17, 2016, the judge ordered the self-insurer to pay § 34 benefits from January 12, 2016, to April 12, 2016, and § 35 benefits from April 13, 2016, to June 13, 2016. Both parties appealed. (Dec. 2.)

There followed almost three years of continuances and status conferences, occasioned by the requests of "the parties," the self-insurer or the employee. All requests were allowed by the judge. (Dec. 2-3.)

On April 16, 2019, the now pro se employee and self-insurer's counsel appeared for hearing. The judge determined that the employee was not prepared to go forward and rescheduled the hearing for July 19, 2019. The hearing was then rescheduled two more times, apparently by the Department; the second time was due to the relocation of the offices. The case ultimately came on for hearing on September 13, 2019. The employee did not appear. The judge allowed the self-insurer's oral motion to dismiss the case with prejudice. (Dec. 3-4.)

The judge issued her decision on September 20, 2019, detailing the proceedings on and after April 16, 2019, and her reasons for allowing the dismissal:

> Although the record was opened [on April 16, 2019], it became clear early on that the Employee was not prepared to proceed and as such, the hearing was adjourned in order to give the Employee further time to prepare. [Tr. 1 at 4] The Hearing was scheduled for July 19, 2019 and then rescheduled to July 31, 2019. Due to the relocation of the Department, the Hearing was rescheduled to September 13, 2019. An email was sent to the Employee on June 5, 2019 confirming this rescheduling and informing the Employee that my office would follow-up with her with the Department's new address. On June 10, 2019, my office emailed and sent by regular mail the new notice with the Department's new address. It was further noted on that notice that there would be no further continuances granted and that all parties were to be present and ready to proceed. On September 13, 2019, the date of the scheduled Hearing, the Employee did not appear to proceed with her claim. The Employee did not call or email the Self-Insurer's attorney, my assistant, me or the front desk of the Department on that date.
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> After waiting approximately two hours for the Employee to appear, the record was opened and Self-Insurer's counsel made an oral motion to dismiss the Employee's claim with prejudice for lack of prosecution. [Tr.2 at 3.] The record closed September 13, 2019.

(Dec. 3-4; footnotes omitted.) The judge concluded:

> Based on the foregoing subsidiary findings of fact, I find that the Hearing on cross-appeals was allowed an abundance of continuances and the Employee has failed to prosecute her claim. I therefore allow the Self-Insurer's Motion to Dismiss with Prejudice.

(Dec. 4.)

Prior to the expiration of the thirty-day appeal period, the employee contacted the judge's office via email on October 2, 2019, requesting that the date for the hearing be rescheduled. She explained,

> I . . . filed a 110 form to add [an] injury date [of] November 23, 2015 to the current case. We were told at the conciliation that this date would be added to the case. After the move to the Lafayette building I received two more dates and when I called to question the two dates[,] September 13, 2019 and October 7, 2019[,] I was told that date for September 13 was pushed back to October 7, 2019 by someone at DIA information office and that a lot of dates have been postponed due to the move to the new building. Can you reschedule the date for this hearing.

Rizzo, supra. The employee's email was apparently referring to a new claim for a date of injury of November 23, 2015, which she had filed, as a pro se claimant, on or about April 22, 2019. In that claim, she alleged injury to both hands, her low back and neck, which occurred when, "While turning wheel bus became unmanageable to drive." The new claim was assigned a board number of 9237-19, and a conciliation was held on June 3, 2019. On the conciliation cover sheet in OnBase, there is a handwritten note "4623-12 – case group," which is the board number of the case at issue in this appeal. On August 2, 2019, a notice was issued scheduling a conference for September 9, 2019 (a few days before the hearing in board no. 4623-12). The same judge was assigned to preside over the conference on the new claim. Less than a week later, on August 8, 2019, another notice issued rescheduling that conference to October 7, 2019. Rizzo, supra.

On October 3, 2019, the judge's office responded to the employee's first email, stating that her request to reschedule the hearing could not be granted, as the hearing decision had already issued, and that her only recourse was to file an appeal to the reviewing board. The e-mail further stated that the employee was expected to be present at the conference on October 7, 2019, pertaining to the new claim she had filed, board no. 9237-19. Rizzo, supra. On October 8, 2019, the employee wrote to the judge--this time including self-insurer's counsel--reiterating the reasons she had not been present at the hearing on September 13, 2019, and again requesting that the judge "suspend the appeals process and [] grant a rescheduling of hearing." On October 10, 2019, the judge

responded to the employee, stating that she was unable to suspend the appeals process or reschedule the hearing, and that the employee's recourse was to appeal the hearing decision. Rizzo, supra. Accordingly, the employee filed an appeal on October 16, 2019. Id.

In her appeal, the employee requests that her case "be reopened for consideration based on extenuating circumstances." (Employee br. 1.) She alleges that, in dismissing her case for failure to prosecute, the judge failed to consider her reasons for missing the September 13, 2019, hearing. These reasons included confusion that resulted when she received several notices that the hearing in the instant case was postponed due to the changing public opening dates for the new DIA offices, along with overlapping notices to appear in her newly filed claim (board no. 9237-19). She maintains that, at the conciliation of her new claim on June 3, 2019, she was told that her two cases would be combined. When she continued to receive separate dates for proceedings for her two claims, she attempted to reach someone at the DIA, and was finally told by a receptionist, that she should disregard the previous notices and that everything would be grouped together on the latest date on which a proceeding was scheduled, October 7, 2019. (Employee br. 3-4.) She further states that it was not until after she filed an appeal and appeared at a post-transcript conference that she was given a DIA login to access her files. (Employee br. 4.) The employee contends that the judge's dismissal of her case due to the fact that the judge had "allowed an abundance of continuances" (Dec. 4), should not be held against her "based on my disability, opposing counsel conflict, good faith attempts to meet a settlement, and change of location confusion." (Employee br. 3.)

The self-insurer argues that the judge has broad discretion in the conduct of hearings, and it is entirely within her discretion to dismiss a claim for lack of prosecution under appropriate circumstances. Arruda v. Cut Price Tools of Somerset, 14 Mass. Workers' Comp. Rep. 169 (2000). Any other action would have deprived the self-insurer of its right to a full evidentiary hearing. The self-insurer maintains the employee has offered no reasonable basis for not attending the hearing, and that the "drop dead date"

for the hearing was clearly discussed at the first day of hearing, April 16, 2019. The self-insurer points out that the judge was extremely patient with the employee and took extra measures once she was no longer represented by counsel to ensure that all communication was received by the employee at her email address.[1]

While we understand the judge's frustration with the case, we nonetheless agree with the employee that dismissal of her case with prejudice was arbitrary and capricious and contrary to law. It is true that "[t]he allowance or denial of a motion to dismiss for failure to prosecute is committed to the judge's sound discretion," and will only be overturned if there has been an " 'abuse of discretion amounting to [an] error of law.' " Bucchiere v. New England Tel. & Tel. Co., 396 Mass. 639, 641 (1986)(court upheld dismissal for want of prosecution where six and one-half years elapsed without any affirmative prosecutorial activity). However,

> *Involuntary dismissal is a drastic sanction which should be utilized only in extreme situations*. As a minimal requirement, there must be convincing evidence of unreasonable conduct or delay. A judge should also give sufficient consideration to the prejudice that the movant would incur if the motion were denied, and whether there are more suitable, alternative penalties. Concern for the avoidance of a congested calendar must not come at the expense of justice. The law strongly favors a trial on the merits of a claim.

Monahan v. Washburn, 400 Mass. 126, 128-129 (1987)(emphasis added)(court reversed judgment of dismissal with prejudice as "erroneously Draconian" where, after judge had granted several continuances at parties' request, motion judge refused to grant plaintiff's motion for continuance based on illness). As we stated in Benjamin v. Walter Fernald State School, 9 Mass. Workers' Comp. Rep. 321 (1995), Monahan instructs against involuntary dismissal with prejudice which, due to its finality, is likely to prejudice a litigant's potential future rights, and requires the judge to balance any unreasonable delay by the employee against the prejudice to the insurer if the motion to dismiss is denied,

[1] The self-insurer does not challenge the employee's allegation that she had no access to her board files until after the post-transcript conference following her appeal.

and to consider whether there are more suitable alternative penalties. Monahan, supra at 325; Monsini v. Roseland Nursery, 28 Mass. Workers' Comp. Rep. 27, 30 (2014); see Foley v. Walsh, 33 Mass. App. Ct. 937 (1992)(where no indication in record judge performed a balancing test or that the defendant produced any evidence of prejudice, judge erred in allowing motion to dismiss for lack of prosecution). Here, the judge's finding that the employee was granted "an abundance of continuances" does not support the minimal requirement for dismissal with prejudice – a finding of unreasonable conduct or delay by the employee. Nor does it indicate that she performed a balancing test or considered other alternatives to dismissal with prejudice. Moreover, the judge's allowance of the self-insurer's motion for dismissal, without giving the employee notice and an opportunity to respond, and without considering her emails requesting rehearing or reconsideration, all sent prior to the expiration of the appeal period and prior to an appeal being taken, was an abuse of discretion, amounting to an error of law.

We first address the employee's argument that the fact that "an abundance of continuances" was allowed should not be held against her and does not support dismissal of her claim with prejudice. The judge's findings clearly indicate that the continuance requests were often made jointly by "the parties," and sometimes by the insurer or the employee. (Dec. 2-3.) The reasons varied: the parties were trying to resolve the case, the employee could not appear for medical reasons, self-insurer counsel had a conflict, self-insurer counsel did not want to mediate the case, the employee had discharged her attorney and retained new counsel, and the employee had discharged the new attorney and was going to proceed pro se. Id. The continuance requests certainly could not all be attributed to the employee, and the judge apparently found the requests legitimate because she granted them all. Id. Moreover, the judge's findings do not indicate that the employee either failed to appear or otherwise engaged in unreasonable conduct or delay during the life of this case. Cf. Humphrey v. Lynn Porsche Audi, 1 Mass. Workers' Comp. Rep. 298 (1988)(where claimant failed to appear at hearing at least six times, reviewing board upheld judge's dismissal of claim with prejudice).

With respect to the April 16, 2019, hearing, when the record was opened and then the case was continued, the judge made no findings indicating the employee behaved unreasonably or intended to abandon her claim. The employee was present, but, in an attempt to clarify the period for which the employee was claiming benefits, the judge took the discussion off the record and then rescheduled the case, without the employee saying a word on the record. (4/16/19 Tr. 3-4.) She found that, "the Employee was not prepared to proceed," and a continuance would "give the Employee further time to prepare." (Dec. 3.) On the record before us, however, we cannot say that the employee, whether prepared or not, did not intend to proceed. In fact, up until the September 13, 2019, hearing date, the employee had been present and involved in her case, as recounted in the judge's decision.

On that date, the employee admittedly failed to appear. The judge found that the employee did not attempt to call or email her, her assistant, anyone else at the DIA, or the self-insurer's attorney. (Dec. 3.) However, we observe that neither the judge's office nor the self-insurer's counsel attempted to contact the employee, who had previously always been present or requested a continuance herself or through her attorneys. Rather, the self-insurer made an *oral* motion to dismiss the case *with* prejudice, which the judge allowed, without giving the employee notice or an opportunity to respond. The first notice the employee received that the self-insurer had even moved for dismissal was in the hearing decision itself, and, by then, the dismissal was a *fait accompli*. We have repeatedly stated:

> A judge must be vigilant in assuring that the parties are timely apprised of all rulings to which they might respond, and a judge must consistently provide the parties with a reasonable opportunity to respond to any material change in circumstances. When such vigilance does not prevail, due process violations frequently—if not necessarily—result.

Mayo v. Save on Wall Co., 19 Mass. Workers' Comp. Rep. 1, 4-5 (2005). Although Mayo and its progeny deal primarily with the judge's failure to apprise the parties of the allowance of motions admitting or excluding medical evidence, we think the principle is

also applicable to motions to dismiss a claim. See Haley's Case. 356 Mass. 678 (1970)(constitutional due process requirements apply to board hearings).

The better practice, in accord with due process requirements and as reflected by the rules in other administrative settings and the courts,[2] would have been for the judge to give the employee notice and an opportunity to respond before ruling on the motion to dismiss, as we have done on at least some occasions. See Wilmore v. The Pain Center, 21 Mass. Workers' Comp. Rep. 3 (2007)(when third party claimant's counsel failed to appear at hearing, judge ultimately dismissed third party claim without prejudice, but only after forwarding insurer's written motion to dismiss claim to third party counsel, and considering third party's opposition to the dismissal motion); see also Humphrey, supra(after employee had requested six continuances or that the case be removed from the hearing docket, judge took insurer's motion to dismiss for failure to prosecute under advisement, instructed claimant's counsel to take certain actions, and continued the hearing; when claimant's counsel had not followed judge's instructions and was unprepared to go forward, the judge dismissed the case for failure to prosecute, and reviewing board upheld dismissal). Particularly because the employee here was pro se,

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[2] The employee cites 801 Code Mass. Regs. 1.02(10)(d), of the Standard Adjudicatory Rules of Practice and Procedure, promulgated pursuant to M.G.L. c. 30A, in support of her position. (Employee br. 3.) Although not applicable to hearings before the board, see G.L. c. 31, § 1(2), this regulation offers guidance regarding how involuntary dismissals are to be accomplished in other administrative tribunals. It requires that, before dismissing a case, a judge must provide notice to the party failing to appear, informing them that they have ten days to file a motion for a rescheduled hearing. If the judge grants the motion, and the party fails to appear at the rescheduled hearing, only then shall the appeal be dismissed, and such dismissal shall contain an explanation of the manner in which dismissals may be vacated. See also 801CMR 1.01(7)(g)2, Failure to Prosecute or Defend, which provides for similar notice to be given to a party facing dismissal, with an opportunity to respond within ten days.

Also in accord with the Adjudicatory Rules is Mass. R. Civ. P. 41(b)(2), which addresses involuntary dismissals on a motion brought by the defendant. It provides, in relevant part, "On motion of the defendant, *with notice*, the court may, in its discretion, dismiss any action for failure of the plaintiff to prosecute. . . . Id. (Emphasis added.) Although board procedure is not governed by the Rules of Civil Procedure, they may "provide instruction by analogy." Merlini v. Consulate General of Canada, 26 Mass. Workers' Cop. Rep. 195, 205 n.15 (2012); Stacey v. North Shore Children's Hosp., 8 Mass. Workers' Comp. Rep. 365, 369 n.2 (1996).

and, until recently had been represented by counsel,[3] we think it was incumbent on the judge to ensure that she was given notice of the self-insurer's motion to dismiss and an opportunity to respond to it before extinguishing her statutory rights to a hearing on her claim. [4]

The above errors were compounded by the judge's failure to respond appropriately to what should have been considered a timely motion for rehearing and reconsideration of the hearing decision - the employee's e-mails of October 3, and October 8, 2019, explaining why she failed to appear at the hearing on September 13, 2019, and requesting that the judge "suspend the appeals process and [] grant a rescheduling of hearing." Rizzo, supra. While not a formal motion for a rehearing or reconsideration of the hearing decision, these emails were drafted by a lay person, and should have been treated as such. The judge clearly had authority to rule on the employee's requests, and should have done so. See Jussaume v. City of Lowell, 34 Mass. Workers' Comp. Rep. ___ (December 29, 2020)(judge was authorized to rule on the employee's motion and should have done so, because the motion was filed within the appeal period to the reviewing board and prior to

[3] We note that the employee had discharged her second attorney near the end of January 2019. The hearing scheduled March 7, 2019 was rescheduled to April 16, 2019, because "Parties unable to attend." The employee had also moved and provided the judge's office with her new address on or about March 5, 2019. Rizzo, supra.

[4] The only case cited by the self-insurer, Arruda, supra, is distinguishable both factually and legally. In Arruda, the employee failed to attend the § 11A exam, without excuse. Thus, the judge had no authority to hear the claim. After unsuccessfully attempting to reach her client in writing four times, the employee's attorney filed a motion to withdraw as counsel. When the employee failed to appear at the status conference, despite adequate notice, the insurer and employer moved for dismissal for failure to prosecute. The judge allowed the motion without prejudice. On appeal by the insurer, we held dismissing the case without prejudice deprived the insurer of its statutory right to hearing, established by its cross-appeal.

Here, the judge's dismissal of the employee's claim with prejudice was not supported by her findings, for the reasons discussed infra. The judge had the authority to hear the case, but, by dismissing the case with prejudice without giving the employee notice or an opportunity to explain her absence, abrogated *the employee's* right to a hearing. Because we are recommitting the case for the judge to conduct a hearing, the self-insurer's statutory right to a hearing is preserved.

any appeal being filed). Instead, she informed the employee that she had no authority to suspend the appeals process or reschedule the hearing, and that the employee's recourse was to appeal the decision. Rizzo, supra. (October 10, 2019, e-mail from judge to employee.) This was clear error. Both of the employee's e-mails were sent well within the appeal period. Her stated reasons for missing the hearing were set forth in those emails. While we do not have the authority to make credibility determinations, we note that the employee's reasons are supported by the fact the DIA was moving at that time, by the Department's rescheduling of several of her proceedings, and by a notation on a conciliation cover sheet for her new 2015 claim, board no. 9237-19, saying "4623-12 – case group," which was the board number of the case before the judge.[5] At a minimum, the judge should have considered the employee's reasons for failing to appear and ruled on her request for a rehearing or reconsideration.

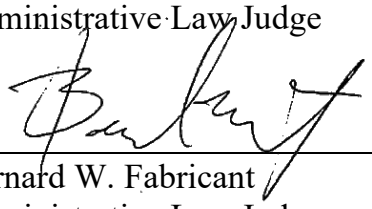
However, we need not recommit the case for the judge to rule on the employee's "motion." Because the judge failed to support her decision to dismiss the employee's claim with prejudice with adequate findings and erred by failing to give the employee notice and an opportunity to respond to the self-insurer's motion to dismiss, we think that "justice and equity are best served by giving this claimant her day in court." Walsh v. General Electric, 4 Mass. Workers' Comp. Rep. 54 (1990)(even though judge did not act arbitrarily or capriciously in declining to postpone hearing where claimant did not appear, reviewing board concluded that her failure to appear was due to circumstances beyond her control, and directed case be assigned for hearing). See also McCormick v. Avco Systems Division, 1 Mass. Workers' Comp. Rep. 188 (1987)(weighing the frustration of the judge against denying the employee an opportunity to be heard on the merits, reviewing board determined decision denying and dismissing employee's claims must be

[5] We also note that the board file for her new claim, Board no. 9237-19, contains documents which belong in the original claim file, Board no. 4623-12, Rizzo, supra, and that the employee's attorney for her new claim filed his appearance under the incorrect board number, further complicating the record. (PTC Record Tr. 2-3.) On November 15, 2021, a conference was held on the new claim, Board no. 9237-19, and, on November 17, 2021, a denial was issued. Rizzo, supra.

set aside and hearing held). Accordingly, we reverse the decision and recommit the case for the judge to conduct a hearing on the merits.

So ordered.

Carol Calliotte
Administrative Law Judge



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