COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 020603-08**
James J. Monsini	Employee
Roseland Nursery	Employer
Massachusetts Retail Merchant's SIG	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Levine and Harpin)

The case was heard by Administrative Judge Vendetti.

APPEARANCES
Mark Azar, Esq., for the employee
Linda Oliveira, Esq., for the insurer

FABRICANT, J. The insurer appeals from an administrative judge's hearing decision dismissing the employee's claim, without prejudice, after employee's counsel failed to appear at the scheduled hearing. For the reasons that follow, we recommit the case for further findings.

This claim came before the administrative judge for hearing following cross appeals of the June 23, 2011 § 10A conference order awarding ongoing § 35 benefits.[1] (Dec. 2.) It is undisputed that the parties were provided proper notice that the hearing was scheduled for 9:15 a.m. on December 6, 2012. (Dec. 2.) It is also undisputed that the insurer's attorney and the employee both appeared at the appointed time, but the employee's attorney did not appear, advising the board that he had a conflict.[2] (Dec. 2).

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[1] Liability had been established when the insurer withdrew its appeal of a previous conference order. (Insurer br. 1.)

[2] On December 5, 2012, the day before the scheduled hearing, the employee's attorney sent an email to the judge requesting a continuance, citing an unspecified conflict. The insurer objected to this request, also via email, noting the employee and his attorney previously failed to appear at status conferences scheduled on March 6, 2012, and March

Following an analysis distinguishing this case from Arruda v. Cut Price Pools of Somerset, Inc., 14 Mass. Worker's Comp. Rep. 169 (2000), the judge dismissed this case without prejudice. Reasoning that the attorney's absence was the sole reason the employee was unprepared to present his claim at hearing, the judge found that it would be fair to dismiss the employee's appeal without prejudice.[3] (Dec. 3.)

The insurer asserts that because it filed an appeal from the conference order, paid for "numerous appearances by its counsel at proceedings before the Department where neither the employee nor the employee's counsel appeared," and "expended both time and expense to prepare for the Hearing," (Insurer br. 5), it suffered significant prejudice to its right to defend the claim. The insurer therefore argues that, pursuant to Arruda, its right to a hearing has been abrogated "by the employee's and his counsel's failure to appear and/or be prepared to go forward with the hearing," (Insurer br. 5), and the dismissal must be with prejudice, as a "dismissal without prejudice . . . would allow the employee to reinstate the claim for retroactive benefits." (Id.) Were we to accept this argument, the judge's discretion would be curtailed, with the result that all dismissals would have to be with prejudice whenever an insurer appeals an order. We do not read Arruda in so limited a fashion.

14, 2012. The judge's responding email denied the employee's request and stated that the hearing would "proceed tomorrow as scheduled." Employee's counsel responded that he "will not be able to make it there until 11:30 the earliest." We take judicial notice of the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

[3] The employee has highlighted facts in his brief which would be relevant if the underlying dismissal were challenged. However, there is no argument made that the employee's claim was not properly dismissed. In fact, the employee specifically argues that the judge "used appropriate discretion in dismissing the [e]mployee's claim without prejudice." (Employee br. 5.) Therefore, the only issue before us is the "without prejudice" designation of that dismissal. (See Employee br. 5.)

Arruda addresses the consequences to the insurer of the employee's failure to prosecute:

> Benefits have been paid here in conformity with a conference order and cross appeals have been taken. Any dismissal must recognize the standing and rights of both parties.
>
> In these circumstances, the dismissal without prejudice deprived the insurer of its statutory right to a hearing on appeal of the order to pay weekly benefits. General Laws c. 152, § 10A(3), provides that, "[a]ny party aggrieved by an order of an administrative judge shall have [the right] to file an appeal for a Hearing pursuant to §11." (emphasis added). See Taylor's Case, 44 Mass. App. Ct. 495 (1998). This language is mandatory, not precatory. The dismissal without prejudice deprived the insurer of access to the full evidentiary hearing which is afforded under the Act as of right.
>
> The judge's decision leaves the insurer's appeal in limbo.

Id. at 171.

Few actions taken by a judge are more subject to the exercise of discretion than the dismissal of an action. Quinlan v. Norwell Networks, Inc., 25 Mass. Workers' Comp. Rep. 127, 128 (2011). In Monahan v. Washburn, 400 Mass. 126, 128 (1987), the Supreme Judicial Court noted that "Involuntary dismissal is a drastic sanction which should be utilized only in extreme situations." The factors which must be considered before resorting to a dismissal are 1) whether there is convincing evidence of unreasonable conduct or delay; 2) whether the party seeking dismissal would suffer prejudice if its motion was denied; and 3) whether there are more suitable, alternative penalties. Id. at 128-129. See Benjamin v. Fernald State School, 9 Mass. Workers' Comp. Rep. 321, 324-325 (1995)(Reviewing Board follows Monahan in the workers' compensation context); The additional decision on whether to dismiss a case with or without prejudice is similarly committed to a judge's discretion. Wilmore v. The Pain Ctr., 21 Mass.

Workers' Comp. Rep. 3, 5 (2007). Prejudice to the insurer is but one of the three factors to be considered; it is not, as the insurer contends, conclusive on the issue.

The judge in the present case made findings in accord with the Monahan factors. She found the "the employee was unable to prosecute his claim for a reason not strictly within his control." (Dec. 3.) She took into account that the failure to prosecute the claim on the day of the hearing was due to the absence of the employee's counsel, not the appearing employee. (Dec. 3.) In doing so, she considered the attorney's conduct and whether it constituted "unreasonable conduct or delay," and whether the employee was implicated in that conduct. Mikulka v. Patch, 65 Mass App. Ct. 1119 (Memorandum and Order, Pursuant to Rule 1:28, 2006). She found the employee lacked culpability for his attorney's failure to appear. She also considered the alternative of a continuance as sought by the employee's counsel in his e-mail, but rejected it.[4]

Unfortunately, the judge failed to make specific findings on whether the dismissal prejudiced the insurer, and to what extent, noting only that although an appeal was pending, "it would be fair to dismiss the employee's appeal . . . without prejudice." (Dec. 3.) Pardee v. Savoy Staffing Solutions, 74 Mass.App.Ct. 1111 (Memorandum and Order Pursuant to Rule 1:28, 2009)(prejudice to an insurer must be considered in the alternative sanction of a without prejudice dismissal).

Our cases demonstrate that the reviewing board will defer to a judge's discretion in dismissing a case, reversing only when "it is so arbitrary, capricious, whimsical or idiosyncratic that it constitutes an abuse of discretion."[5] Monahan,

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[4] See note 2.

[5] In Wilmore, supra, at 5, we upheld a without prejudice dismissal, where the insurer did not appeal a conference order of a closed period of benefits; thus, it had no statutory right to a hearing and suffered no substantial prejudice. However, we noted that "although the judge's dismissal of the claim appropriately might have been with prejudice, under the circumstances of this case, there was no abuse of discretion . . ." Id., at 4. In Quinlan v. Norwell Networks, Inc., 25 Mass. Workers' Comp. Rep. 127 (2011), we upheld a with

supra, at 128. See also Pardee, supra, citing Benjamin, supra, at 322, citing in turn Bucchiere v. N. E. Tel. & Tel. Co., 396 Mass. 639, 641-642 (1986). However, in order to fully determine whether the judge properly exercised her discretion, there must be specific findings on the record whether the insurer would suffer substantial prejudice due to a without prejudice dismissal. The parties were denied the opportunity to present evidence on this specific issue, leaving the judge without evidence upon which she could make appropriate findings.[6]

Accordingly, we recommit this case for further findings on the issue whether the insurer would suffer substantial prejudice resulting from a dismissal of the employee's claim without prejudice.

So ordered.

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prejudice dismissal, recognizing the judge's inherent discretion, and finding that "there is ample evidence of prejudice [to the insurer and judicial resources] which would result from a dismissal without prejudice." And in Pileeki v. Jerry Constr. Co., 25 Mass. Workers' Comp Rep. 21 (2011), we reversed a dismissal with prejudice, ruling that the judge had failed to make findings on the employee's claim, that his failure to appear at a §11A examination and ongoing inability to testify were due to a medical condition.

[6] Following a brief procedural preamble, the entire hearing transcript is as follows:

> THE JUDGE: Both parties appealed the conference order in a timely manner, and those appeals bring the parties before me today for a de novo hearing.
>
> They – employee's counsel was advised that this hearing was going to go forward today and was advised to appear. He has not appeared.
>
> And Ms. Oliveira, I'll entertain a motion to dismiss if you wish to present one?
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> MS. OLIVEIRA: Yes, Your (sic.) Honor. The insurer would like to submit a motion to dismiss.
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> THE JUDGE: I'm going to grant your motion to dismiss this matter. And thank you very much.
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> And this hearing is concluded.
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> (Whereupon, the hearing was concluded.)

(Tr. 3.)

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Bernard W. Fabricant
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

LEVINE, J. (concurring)

I agree that, under these circumstances, it is appropriate to recommit this case. However, I view the result in Arruda as turning on the loss to the insurer of its due process rights by a dismissal without prejudice.

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Frederick E. Levine
Administrative Law Judge

Filed: **March 20, 2014**