COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 035608-19**

Robert A. Blundell, III	Employee
YRC Inc. dba YRC Freight	Employer
Old Republic Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges O'Leary, Koziol and Fabiszewski)

The case was heard by Administrative Judge Dooling.

APPEARANCES
Michael F. Walsh Esq., for the employee on appeal
Brenda J. McNally, Esq., for the insurer at hearing and on appeal

O'LEARY, J. The insurer appeals from the judge's decision to dismiss the employee's claim without prejudice. On appeal, the insurer raises several arguments, including whether it was arbitrary or capricious, or contrary to law, for the judge to dismiss the employee's claim on a without-prejudice basis without balancing the employee's unreasonable conduct or delay against the prejudice the insurer would suffer from a without-prejudice dismissal. We find merit in the insurer's arguments and dismiss the employee's claim with prejudice. The facts pertinent to the issues addressed on appeal follow.

The employee filed a claim for benefits on January 16, 2020, seeking temporary total incapacity benefits under § 34 from the alleged date of injury, October 2, 2019, to date and continuing.[1] Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of the board file). The insurer issued a denial contesting, among other things, initial liability for the claim. Id. A conference pursuant to § 10A was originally scheduled for May 29, 2020, but was continued due to the employee's failure to attend two independent medical examinations on May 21, 2020,

[1] The employee was represented by counsel from the time of the filing of his claim until prior counsel's motion to withdraw was allowed on February 7, 2024.

and June 25, 2020. (Dec. 2.) The conference on the employee's claim was eventually held on August 13, 2020. (Dec. 2.) At the time of the conference, the insurer was ordered to pay the employee temporary total incapacity compensation under G.L. c.152, § 34, at the rate of $627.00 per week, based on an average weekly wage of $1,045.00 from October 2, 2019, to January 22, 2020, plus medical benefits under the provisions of G.L. c.152, § 30. Both parties appealed the conference order. (Dec. 2.)

Pursuant to § 11A, the employee was seen on December 2, 2020, by George P. Whitelaw, M.D. The matter was then scheduled for hearing on November 24, 2021, but was rescheduled to June 8, 2022. (Dec. 2.) Prior to the June 8, 2022, hearing, the employee's counsel filed a motion to withdraw as counsel, citing a breakdown in communication with the employee. (Dec. 2.) The case was scheduled for an in-person meeting on June 8, 2022, to discuss the grounds for the motion to withdraw. The employee was advised via email that his appearance at the June 8, 2022, in-person meeting was required. (Dec. 2; Ex. 1.) Counsel for the employee and counsel for the insurer appeared for the June 8, 2022, proceeding, but the employee did not. (Dec. 2.) Counsel's motion to withdraw was denied, and the matter was scheduled for a hearing on June 29, 2023, which was continued at the request of employee's counsel. A prehearing conference was held on June 23, 2023. The employee then filed a motion to open the medical record, which was allowed on July 5, 2023. On August 9, 2023, the insurer scheduled another independent medical examination. The employee did not appear for the examination. (Dec. 3; Ex. 2.)

On January 10, 2024, the employee's counsel emailed the judge indicating that he had not been able to contact the employee and was intending to renew his motion to withdraw as counsel. (Dec. 3; Ex. 6.) The matter was scheduled for a status conference on February 7, 2024. On February 1, 2024, employee's counsel notified the parties that the employee wanted to retain new counsel, Rizzo, supra, and the parties agreed to convert the February 7, 2024, status conference to a motion session on employee counsel's motion to withdraw as counsel. (Dec. 3.) The employee did not appear. The motion was allowed. (Dec. 3.) Later that same day, employee's now former counsel

notified the judge and the insurer's counsel that he spoke to the employee advising him that his appearance was required at the March 14, 2024, motion hearing, and that his address was 90 Alden Street, Malden, MA. (Dec. 3, Rizzo, supra.) Counsel for the insurer served its motion to dismiss via certified mail to the employee. (Dec. 3; Ex. 4.) The Insurer's motion to dismiss was delivered to the employee on February 16, 2024. (Dec 3; Ex. 5.) The employee did not appear on March 14, 2024, and made no attempt to contact the judge or insurer's counsel. (Dec. 4.) The insurer's motion requested dismissal of the employee's case, with prejudice, Rizzo, supra., a request the insurer reiterated on the record. (Motion Tr. 4, 9.)

The judge found that he could "…come to no other conclusion than to find that the [e]mployee has behaved in an unreasonable manner, and that grounds exist to allow the Insurer's motion to dismiss." (Dec. 4.) He allowed the insurer's motion to dismiss on the record (Motion Tr. 9-11) but, in his decision, he noted that he did so without prejudice. (Dec. 4-5.)

The insurer argues that it relied to its detriment, on the judge's allowance of its motion to dismiss at hearing, as it argued for dismissal with prejudice and would have objected at the time had counsel been aware of the distinction later made by the judge. The insurer argues further that the judge erred when he dismissed the claim without prejudice where the insurer denied liability, and that it had a statutory and constitutional right to a hearing *de novo* following its appeal of a conference order that ordered it to pay benefits to the employee.

The allowance or denial of a motion to dismiss for failure to prosecute is usually discretionary. Benjamin v. Walter E. Fernald State School, 9 Mass Workers' Comp. Rep. 321 (1995); See Bucchiere v. New England Tel. & Tel. Co., 396 Mass. 639, 641 (1986). The Supreme Judicial Court has defined abuse of discretion as "arbitrary determination, capricious disposition, or whimsical thinking," Davis v. Boston Elevated Railway Co., 235 Mass. 482, 496 (1920). Here, the decision to dismiss the employee's claim without prejudice overlooked the insurer's rights established by its appeal of the conference order. The insurer paid the benefits in conformity with the judge's conference order. Any

dismissal must recognize the standing and rights of both parties. See Arruda v. Cut Price Pools of Somerset, Inc., 14 Mass. Workers' Comp. Rep. 169 (2000). The dismissal without prejudice deprived the insurer of its statutory right to a hearing on appeal of the order which established its liability 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." Arruda, supra. As in Arruda, the judge's decision here leaves the insurer's appeal in limbo.

The employee did not appeal the hearing decision but argues as if he had.[2] The employee's brief relies on essentially the same arguments presented by the insurer, but contains some mischaracterizations of the record, stating in one instance: "The Administrative Judge allowed the Motion Hearing to proceed on the record ***despite the absence of the employee or his new counsel***." (Employee's Brief, 6, original emphasis), No attorney submitted an appearance until after the hearing decision issued. Rizzo, supra. In his discussion of notice requirements, the employee argues that the judge "…ignored the fact that the employee may not have received notice." (Employee's Brief, 13). The record reflects the number of times that notice was sent to the employee, culminating with an email from prior counsel stating the employee did receive notice of the hearings on two motions before the judge (for counsel to withdraw and the insurer's motion to dismiss with prejudice) and was aware that his presence was required.[3] Counsel for the insurer argued on the record that the motion to dismiss was mailed to the employee via certified mail, (Motion Tr. 8) and the judge admitted the U.S. Postal

[2] To date, the employee has not filed for leave to do so. G.L. c. 152, § 11C.

[3] An email from February 7, 2024, from employee's former counsel stated: "Good afternoon, I had a discussion with Mr. Blundell regarding this morning's motion and the motion on March 14, 2024. He has confirmed that he has received notice to me via text message."

Service Certified Mail Receipt and Tracking Delivery Confirmation as exhibits. (Dec. 1, Ex. 4 and 5.) In dismissing the claim, the judge found that the employee received adequate notice for the four prior IMEs and other scheduled court dates, including the Motion Hearing, and that there was convincing evidence to show he had intentionally failed to appear at those events.[4] The judge went on to find that the employee had "behaved in an unreasonable manner" and that grounds exist to allow the Insurer's motion to dismiss. (Dec. 4.) The judge's specific finding that the employee behaved in an unreasonable manner satisfied the high standard set forth to dismiss an employee's claim with prejudice. See Monahan v. Washburn, 400 Mass. 126, 128-129 (1987); and Sands v. M.B.T.A. 35 Mass. Workers' Comp. Rep. 167 (2021)(there must be convincing evidence of unreasonable conduct or delay to warrant involuntary dismissal).

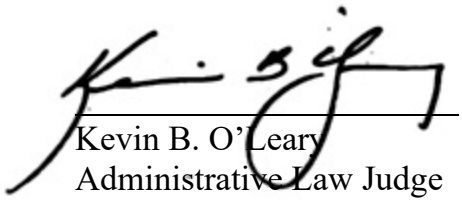
The judge's written decision is an almost verbatim recap of his comments and findings at the conclusion of the motion hearing where he allowed the insurer's motion, save for the fact that the written decision states the motion to dismiss is allowed *without* prejudice. By letter to the judge on April 11, 2024, the insurer sought clarification of the without prejudice ruling, and received a one-sentence reply email stating, simply, "The matter has been dismissed without prejudice." Rizzo, supra.

The insurer had a statutory right to a hearing. These rights were abrogated by the decision of the judge. The hearing under §11 is "*de novo*" and the establishment of liability for an injury and any payments made in conformity with the conference order are put in jeopardy when the hearing stage is reached. For the dismissal to be conclusive of the rights of both parties, the dismissal must be with prejudice. Arruda, supra.

Accordingly, we dismiss the employee's claim with prejudice.

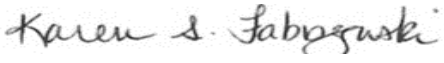
So ordered.

[4] "I find that the employee was given adequate notice not only of his previously scheduled IMEs to which he failed to appear, specifically the IMEs on May 21st, 2020, June 25th, 2020, July 1st, 2020, and August 9th, 2023, but I also find that the employee was in fact given notice for today's proceedings and that he has intentionally failed to appear." (03/14/24 Motion Hearing Tr. 10:5-11)



Kevin B. O'Leary
Administrative Law Judge

Catherine W. Koziol
Administrative Law Judge



Karen S. Fabiszewski
Administrative Law Judge

Filed: **January 6, 2025**