STATE OF RHODE ISLAND

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

FRANCISCO MAYIC	)	
	)	
VS.	)	W.C.C. No. 2018-06810
	)	
MULCH 'N MORE, INC.	)	

FINAL DECREE OF THE APPELLATE DIVISION

This matter came on to be heard by the Appellate Division upon the claim of appeal of the petitioner/employee and upon consideration thereof, the employee's claim of appeal is denied and dismissed, and it is

ORDERED, ADJUDGED, AND DECREED:

That the findings of fact and the orders contained in an Order of this Court entered on October 18, 2019 be, and they hereby are affirmed.

Entered as the final decree of this Court this 13th day of January 2023.

PER ORDER:

/s/ Nicholas DiFilippo
Administrator

ENTER:

/s/ Olsson, J.

/s/ Salem, J.

/s/ Cardoza, J.

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DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employee's appeal from the trial judge's decision and order denying the employee's motion to reopen this case and vacate the dismissal of his claim for trial for his failure to prosecute his original petition for compensation. The employee argued that his failure to appear for trial was due to his not receiving proper notification of the court dates and due to his inability to understand the notices that he did receive. After thorough review of the record and consideration of the respective arguments of the parties, we deny and dismiss the employee's claim of appeal and affirm the trial judge's decision and order denying the employee's motion.

The employee, Francisco Mayic,[1] was employed by Mulch 'N More, Inc., the employer, to perform general landscaping services. In the petition filed on November 7, 2018, the employee alleged that he was injured on September 22, 2018, when he fell approximately thirteen (13) feet from a loader machine while loading wood into a trailer. He claimed that he

[1] At times in the transcript of the hearing on the motion the employee is referred to as Francisco Mayic Mejia. This discrepancy was never explained.

suffered neck, lower back, thoracic spine, right shoulder, left knee, left foot, and right elbow injuries resulting in total and/or partial incapacity from September 23, 2018 and continuing.

The employee attended the pretrial conference held on December 3, 2018 with his attorney and a Spanish interpreter provided by the court. A pretrial order was entered on that date denying the employee's original petition. The employee filed a timely claim for trial. At the initial hearing of January 2, 2019, the court scheduled the trial to take place on January 31, 2019. When the employee failed to appear on that date, the parties were given a new trial date of February 22, 2019. On February 5, 2019, the employer filed a motion to dismiss the employee's claim for trial for failure timely prosecute this matter. On February 22, 2019, when the employee again did not appear, the trial judge heard and granted the employer's motion to dismiss the employee's claim for trial, thereby leaving intact the pretrial order which denied the employee's original petition.

On June 14, 2019, the employee, through a new attorney, filed a motion to reopen and vacate the trial judge's prior order dismissing his claim for trial. When the motion was reached for hearing on July 15, 2019, the employee stated—for the first time—that he did not understand the Spanish interpreter provided by the court, because the employee spoke a different dialect called K'iche'.[2] Given this new information, the trial judge continued the matter to August 22, 2019, allowing for the opportunity to secure a K'iche' interpreter.

At the August 22, 2019 hearing on his motion the employee, with the aid of a K'iche' interpreter, testified that after he was injured at work, he hired the Law Offices of Frank Orabona where he was represented by Attorney Christine Fitta. He agreed that he did appear in court one

[2] K'iche', formerly known as Quiché, is a Mayan language of Guatemala. Campbell, Lyle.–"K'iche' language". *Encyclopedia Britannica*, 30 Mar. 2016, https://www.britannica.com/topic/Kiche-language. Accessed 28 October 2021.

(1) time (the pretrial conference), but that on several other occasions he was supposed to appear before the court and failed to do so. The employee admitted that he received at least one (1) notice regarding a court appearance via voicemail, however, he stated that he did not know how to retrieve the message on his phone. Eventually, he contacted Ms. Fitta's office and was notified that his case was dismissed.

On cross-examination, the employee acknowledged that he attended the pretrial conference on December 3, 2018 and answered questions posed by the trial judge with the aid of a Spanish interpreter, but he asserted that he did not understand all the trial judge's questions. At the pretrial hearing the employee did not notify the trial judge that he did not understand the questions posed to him through the Spanish interpreter, and he never requested a K'iche' interpreter. The employee also testified that he spoke with Ms. Fitta following the pretrial conference, with the assistance of a friend acting as a Spanish interpreter. The employee did not tell his attorney that he had difficulty understanding everything being said to him. Moreover, the employee stated that when Ms. Fitta asked him if he was Spanish, he responded yes and never indicated to her that he spoke K'iche'. The employee acknowledged that he was aware that the voicemail he received was from his attorney, yet he did not listen to it for approximately a week as he did not know how to retrieve this message. He claimed that he never received any other communication via telephone or mail from Ms. Fitta or the court regarding his mandatory court appearances. He did indicate that any mail from the court or from his attorney may have been removed by someone who cleans the building he lives in. The employee disclosed that, when Ms. Fitta explained why his case was dismissed, he replied that the dismissal was his own fault.

Ms. Fitta testified that she was retained by the employee and continued to represent him up through the hearing before the court on February 22, 2019. She stated that all

communications between the employee and her office were always with the aid of a Spanish interpreter. Ms. Fitta related that she met with the employee and the interpreter after the December 3, 2018 pretrial conference and she explained why he was denied workers' compensation benefits and that he would have to testify at a court trial. During that conversation the employee never notified her that he did not understand the court's interpreter. Ms. Fitta also testified that, following her conversation with the employee on December 3, 2018, her office attempted to contact the employee approximately eight (8) times by either telephone and/or mail regarding the subsequent court dates on January 31, 2019 and February 22, 2019. When the employee failed to appear on both dates, the trial judge dismissed the claim for trial.

On cross-examination, Ms. Fitta testified that she kept contemporaneous notes and records documenting her contact with the employee and she explained each entry. Ms. Fitta met with the employee on December 3, 2018 after the pretrial hearing to discuss the travel of the case. On January 2, 2019, after the initial hearing, Ms. Fitta notified the employee via voicemail, through a Spanish-speaking individual in her office, of the January 31, 2019 trial date. On January 16, 2019, the employee contacted Ms. Fitta's office requesting a status. On January 17, 2019, Ms. Fitta instructed the Spanish interpreter in her office named Luz to contact the employee; Luz left a voicemail advising him that he was scheduled to testify in court on January 31, 2019 at 10:00 a.m. The employee failed to appear for his January 31, 2019 court date, and the trial judge scheduled a hearing on the employer's motion to dismiss for February 22, 2019.

On February 1, 2019, Luz, at Ms. Fitta's direction, notified the employee of his February 22, 2019 mandatory court appearance. On February 6, 2019, after receiving no communication from the employee, Ms. Fitta again instructed Luz to contact him regarding the February 22, 2019 hearing. Luz called the employee twice, once at 9:43 a.m. and again at 4:15 p.m., and left a

voicemail each time. Luz also left another voicemail for the employee on February 12, 2019, and she contacted Mr. Reis, the employee's authorized English-speaking point-of-contact, asking for assistance in locating the employee. Furthermore, on February 18, 2019, Ms. Fitta's office sent a letter written in Spanish to the employee's address notifying him of the upcoming hearing. Ms. Fitta also personally called Mr. Reis on February 21, 2019 and asked him if he had heard from the employee. Mr. Reis stated that he was trying to contact him, but the employee was not answering his phone. On that same day, Ms. Fitta also attempted to contact the employee, with the aid of a Spanish interpreter, but was again unsuccessful. When the employee failed to appear at the February 22, 2019 hearing, Ms. Fitta asked the court for one more trial date before the hearing on the employer's motion to dismiss. She wanted one last opportunity to try to speak with the employee, but that request was denied.

On February 25, 2019, the employee contacted Ms. Fitta's office, and agreed to meet on Friday, February 27, 2019 at 12:00 p.m., to discuss his case. The employee did not appear for the scheduled appointment. Ms. Fitta once again tried to contact the employee via telephone, but the employee did not answer his phone. On March 5, 2019, the employee walked into Ms. Fitta's office without an appointment. She discussed with him the possibility of reopening his case; however, the employee seemed uninterested in pursuing the matter further, stating "it's okay, 'it's all my fault,'" and, subsequently, ceased all contact with Ms. Fitta. Trial Tr. 37:10.

After reviewing the evidence, the trial judge denied the employee's motion to reopen the case and vacate his prior order of dismissal. He indicated that in cases where an employee fails to appear, the court tries to give as much deference as possible because communication issues sometimes arise. Here, the trial judge found that the employee had numerous opportunities to clear up any confusion with his attorney and to appear in court but failed to do so. Based on the

evidence, the judge determined there were several instances where the office of Attorneys Orabona and Fitta tried to contact the employee and provide him notice. The decision noted that the employee admitted that it was his fault that the case was dismissed, and there was no reason to dispute the employee's statement given the facts and evidence of the case. The judge stated that it is the client's duty to find out about their case and appear when it is heard. In this particular instance, he was not convinced that the employee had made a good faith effort to meet this obligation. Thus, the trial judge denied the employee's motion. The employee filed a timely claim of appeal from this decision.

In reviewing the trial judge's decision, the Appellate Division must bear in mind that the findings of fact made at the trial level are deemed final absent a determination that one (1) or more of those findings are clearly erroneous. R.I. Gen. Laws § 28-35-28(b). The appellate panel is precluded from engaging in a *de novo* review of the evidence and substituting our own judgment for that of the trial judge without first determining that the trial judge was clearly wrong. *Diocese of Providence v. Vaz*, 679 A.2d 879, 881 (R.I. 1996). Our standard of review is particularly deferential when the trial judge's findings are based on credibility determinations. Before conducting a *de novo* review of the record in such cases, the appellate panel must find that the trial judge "was clearly wrong either because the [judge] was obviously mistaken in his or her judgment of the credibility of the witnesses or overlooked or misconceived material evidence in arriving at the conclusion reached." *Mulcahey v. New England Newspapers*, 488 A.2d 681, 683 (R.I. 1985).

The present matter is before the panel on the employee's appeal from the trial judge's denial of the employee's motion to re-open the matter and vacate the order entered on March 12, 2019 which dismissed the employee's claim for trial for lack of prosecution. Similar to the

underlying motion to dismiss, the employee's motion to re-open and vacate the dismissal order is directed to the discretion of the trial judge and his decision on the motion will not be reversed absent a clear abuse of discretion. *See Hyszko v. Barbour*, 448 A.2d 723, 726 (R.I. 1982). After a thorough review of the record in this matter, we find that the trial judge did not abuse his discretion in denying the employee's motion.

In his reasons of appeal, the employee asserts that the trial judge's denial of the employee's motion to vacate was an error of law contrary to Chief Justice Paul J. Suttell's Executive Order No. 2012-05 (the Order),[3] and in turn, indirectly violated the Civil Rights Act of 1964.[4] Specifically, the employee alleges that the trial judge abused his discretion in denying the employee's motion to vacate the dismissal order because the employee's failure to appear was not only due to inadequate notification, but more importantly, the employee's inability to understand the notices he did receive given his limited English proficiency (LEP) status.

The employee testified that the only notification of a court hearing he received was a single voicemail notifying him of a required court appearance. Ms. Fitta, however, testified that her office contacted the employee twice prior to his January 31, 2019 trial date, each time

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[3] Supreme Court Executive Order No. 2012-05, which was enacted pursuant to the authority granted to the Chief Justice of the Rhode Island Supreme Court by Rhode Island General Laws § 8-15-2, addresses Language Services in the Courts and provides procedures for appointment of interpreters in court proceedings. The Executive Order states that limited English proficiency (LEP) persons "should have meaningful access to the courts in a language that they are able to understand, and in which they are able to be understood by the Court." The full text of the Order can be found on the Judiciary's website, www.courts.ri.gov.

[4] The enactment of Executive Order 2012-05 was a joint effort between the Rhode Island Judiciary and the United States Department of Justice to provide LEP individuals with qualified interpreters in all court proceedings at no charge. This combined effort resulted from an administrative complaint filed under Title VI of the Civil Rights Act of 1964 that was closed following the successful implementation of reforms by the Rhode Island Judiciary and the execution of a Voluntary Resolution Agreement on April 9, 2014. *See* Press Release, Department of Justice, Justice Department Closes Case After Rhode Island Judiciary Reforms Provide Equal Access for Individuals with Limited English Proficiency (Apr. 21, 2016), https://www.justice.gov/opa/pr/justice-department-closes-case-after-rhode-island-judiciary-reforms-provide-equal-access.

leaving a voicemail message in Spanish, and attempted to get in touch with the employee approximately eight (8) more times through voicemail or written notification regarding the employee's February 22, 2019 court appearance. Although the employee denies receiving almost all notifications, such denial does not *per se* constitute inadequate notice as the testimony of Ms. Fitta and the employee's appearance at subsequent hearings on the motion tend to refute his contention that he did not receive notices, or the notices were inadequate.

While the employee may not have known how to retrieve the voicemail he received, he was aware that it was from his attorney's office. Trial Tr. 19:5-22. He could have easily returned the call and received the necessary information. He was able to contact the law office previously on January 16, 2019 to request the status of his case. The employee chose not to return his attorney's call until after he retrieved the voicemail almost a week later, after the court hearing had already taken place. *See id.* Furthermore, the employee failed to provide a justifiable reason why he did not receive other notices, except for simply denying receipt. Mere denial, without more, fails to establish inadequate notification. *See Medeiros v. Warwick City Hall*, W.C.C. 92–09073 at *3-4 (App. Div. 1994) (holding the employee had adequate notice even where she denied receiving *any* notification where the only evidence was her testimony refuting that her counsel advised her of upcoming court dates, and that she was not responsible for the contents of a certified letter mailed to her address that was returned to the employee's attorney marked "refused").

Despite the lack of a K'iche' interpreter, the employee was aware of his obligation to appear for the pretrial conference at the court. He attended that hearing and subsequently participated in a courthouse meeting and an office consultation with Ms. Fitta. After the filing of the motion to reopen his petition, the employee appeared in court on the two (2) occasions when

that motion was addressed. There is no evidence that a K'iche' interpreter assisted the employee to understand any of these communications. At the first hearing on the motion to vacate, the employee began to testify with the aid of a Spanish interpreter as requested by the attorney and provided by the court, but after a few questions, the interpreter informed the court that the employee's Spanish was very limited and that he spoke K'iche'. The employee's current attorney stated on the record that he had never secured a K'iche' interpreter before. It is therefore apparent that the attorney and his office did not communicate with the employee in K'iche' and yet the employee appeared in court on both occasions regarding the motion to vacate. Considering these facts, we find that the employee had adequate notice of the previous court hearings that culminated in the dismissal of his claim for trial.

Pursuant to Workers' Compensation Court Rule of Practice 2.23(B), a court may, on its own motion or on motion of the respondent, dismiss any proceeding for lack of prosecution, and unless otherwise specified, a dismissal under this rule is with prejudice. *See* W.C.C. R.P. 2.23(B)(1)-(3). In considering the motion, a trial judge is obligated to balance conflicting interests. *Edwin T. Carty v. Labor Ready*, W.C.C. 99-00488 at *5 (App. Div. 2000) (citing *Hyszko*, 448 A.2d at 726). "On the one hand is the court's need to manage its docket, the public interest in the expeditious resolution of litigation, and the risk of prejudice to the defendants from delay. On the other hand, there is the desire to dispose of cases on their merits." *Hyszko* 448 A.2d at 726. Furthermore, when weighing these conflicting interests, the court "need not view the evidence in a light most favorable to the [employee]." *Bergeron v. Roszkowski*, 866 A.2d 1230, 1237 (R.I. 2005)(quoting *Harvey v. Town of Tiverton*, 764 A.2d 141, 143 (R.I. 2001)).

The employee argues that, given his LEP status, the trial judge acted in violation of the Supreme Court Executive Order by denying the motion to reopen and vacate the dismissal. He

urges the appellate panel to reverse the trial judge and allow the employee to go forward with his original petition. We disagree. Pursuant to provision (B) of the Order, the judicial officer must provide an interpreter for an LEP person. The trial judge adhered to said order as the employee was initially provided a Spanish interpreter and later a K'iche' interpreter as soon as the court was notified that the employee spoke K'iche'.

The employee answered questions before the court at his pretrial conference with the aid of a Spanish interpreter on December 3, 2018. While answering questions for the court, the employee never indicated that he had trouble understanding any of the trial judge's questions or that his preferred language was K'iche'. After the pretrial conference, the employee spoke with Ms. Fitta aided by a friend who spoke Spanish. During the conversation, the employee failed to notify his own attorney that he had trouble understanding the trial judge. When asked by Ms. Fitta if he was Spanish, the employee indicated that he was in fact Spanish. It was not until July 15, 2019, over seven (7) months after the employee's pretrial conference, that the court learned at the first hearing on the motion that he spoke K'iche'. At that time the trial judge continued the matter until a K'iche' interpreter was secured. The court adhered to the Order as the employee was provided with an interpreter at every stage of litigation. If the employee failed to understand any notifications received, statements made, or questions posed during the court hearings he attended, it was incumbent upon the employee or his attorney to notify the court of that fact. It was not the employee's status as an LEP person that led to the dismissal of his petition, but rather his own laxity in informing his attorneys and the court of his language difficulty and pursuing his case. This fact was acknowledged by the employee when he admitted to Ms. Fitta that it was his own fault his case was dismissed.

Furthermore, the employee's reliance on the terms of the Order and the Voluntary Resolution Agreement executed by the Rhode Island Supreme Court and the United States Department of Justice to vacate the dismissal of his claim for trial is misplaced. As stated by the Rhode Island Supreme Court recently in *Suncar v. Jordan Realty,* the Voluntary Resolution Agreement expired by its own terms in 2016. 276 A.3d 1274, 1278 (R.I. 2022). The Order also does not provide grounds for vacating the dismissal of the employee's claim for trial as it specifically states: "Nothing herein shall be construed to. . . provide any authority to alter, satisfy, or vacate any judgment or order." R.I. Supreme Court Executive Order 2012-05 § I(4)(b).

In conclusion, we find that the trial judge did not abuse his discretion in denying the employee's motion to vacate the order dismissing his claim for trial for lack of prosecution. The trial judge not only adhered to the Supreme Court's Order but provided the employee with multiple opportunities to have his case heard. At each of the scheduled hearing dates, both the employer and the employee's attorney were ready to move forward, but the employee failed to appear. "The primary responsibility for moving a case on for trial rests with the plaintiff and his or her attorneys, not the defendants or the trial court." *Hyszko*, 488 A.2d at 726. As stated by the trial judge, the employee is responsible to monitor their case and to appear in court when their case is scheduled to be heard. We agree with the trial judge that the employee failed to satisfy his burden to show that he met his obligation. Consequently, we find no abuse of discretion on the part of the trial judge and affirm his decision and order denying the employee's motion.

In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation

Court, a final decree, a proposed version of which is enclosed, shall be entered on January 13, 2023.

Salem, J. and Cardoza, J., concur.

ENTER:

/s/ Olsson, J.

/s/ Salem, J.

/s/ Cardoza, J.