



**TENNESSEE BUREAU OF WORKERS' COMPENSATION  
IN THE COURT OF WORKERS' COMPENSATION CLAIMS  
AT KNOXVILLE**

<b>MISTI G. DAY,</b>	)	<b>Docket No. 2020-03-0939</b>
<b>Employee,</b>	)	
<b>v.</b>	)	
<b>GREAT SALONS OF KNOXVILLE,</b>	)	<b>State File No. 26014-2018</b>
<b>Employer,</b>	)	
<b>and</b>	)	
<b>HARTFORD FIRE INSURANCE</b>	)	<b>Judge Lisa A. Lowe</b>
<b>COMPANY,</b>	)	
<b>Carrier.</b>	)	

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**EXPEDITED HEARING ORDER  
GRANTING MEDICAL BENEFITS**

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This case came before the Court on October 20, 2020, for an Expedited Hearing. The issue is whether Ms. Day's claim for additional medical treatment is barred because she failed to refile within ninety days of dismissal of her claim without prejudice for failure to prosecute. For the reasons below, the Court holds Ms. Day's claim is not barred, and she is likely to prevail at a hearing on the merits regarding additional medical treatment.

**History of Claim**

Ms. Day worked as a stylist for Great Salons of Knoxville. On April 2, 2018, she hurt her back when she slipped on some hair and fell to the floor. Great Salons provided a panel of physicians. She received pain management from authorized physician Dr. Martha Smith.

Ms. Day sustained another injury on March 20, 2019, when she tripped over a co-worker's broom. Hartford merged the claims, and Ms. Day continued treatment with Dr. Smith, who ultimately referred her to a neurosurgeon.

Great Salons provided a panel of neurosurgeons, and Ms. Day selected Dr. David Hauge, who recommended surgery. Hartford submitted the recommendation to Utilization

Review. The Utilization Review provider approved the surgery, but Hartford did not authorize it.

Procedurally, Ms. Day filed her first Petition for Benefit Determination (PBD) on February 26, 2019, and the Mediating Specialist issued a Dispute Certification Notice. Ms. Day failed to file a request for hearing within sixty days of issuance of the Dispute Certification Notice, and the Court set a show-cause hearing.

At that hearing, Ms. Day said she did not file a request for hearing because Great Salons provided a panel, she made her selection, and was awaiting an appointment. The Court granted Ms. Day an extension to file a request for scheduling hearing and told her she could write on the request that she was receiving treatment and ask that the Court set her claim for a status hearing. The Court issued an order containing the extended deadline for Ms. Day to request a hearing. The order warned that failure to do so would result in dismissal of the case.

Ms. Day failed to file a request for a hearing, and on December 18, 2019, nine days after the deadline passed, the Court dismissed the case without prejudice. Great Salons continued to provide treatment to Ms. Day until March 2020. At that time, Great Salons denied further treatment, since she did not refile within ninety days of the dismissal order. Ms. Day then filed a second PBD on April 30, followed by requests for hearings on August 17 and 19.

### **Findings of Fact and Conclusions of Law**

At an Expedited Hearing, Ms. Day must show that she is likely to prevail at a hearing on the merits. *See* Tenn. Code Ann. § 50-6-239(d)(1) (2019); *McCord v. Advantage Human Resourcing*, 2015 TN Wrk. Comp. App. Bd. LEXIS 6, at \*7-8, 9 (Mar. 27, 2015). The Workers' Compensation Law requires an employer to furnish medical treatment made reasonably necessary by a work injury. Tenn. Code Ann. § 50-6-204(a)(1)(A).

Here, Great Salons agreed that Ms. Day needs surgery but argued she is barred from receiving it because she failed to refile within ninety days of the dismissal order without prejudice. The parties asserted this is a case of first impression.

Tennessee Code Annotated section 50-6-239(c)(3) states: "If a party who *has filed a request for hearing files a notice of nonsuit of the action*, either party shall have ninety (90) days from the date of the order of dismissal to institute an action for recovery of benefits under this chapter." (Emphasis added.) The Court concludes this statutory section does not apply because Ms. Day did not file a request for hearing and did not file a notice of nonsuit.

The Bureau's rules address the ninety-day rule similarly. Tennessee Compilation

Rules and Regulations 0800-02-21-.24(1) (August, 2019) states:

A party may move to voluntarily dismiss a petition for benefit determination no more than once after it is filed unless the employee was awarded temporary benefits through an interlocutory order or a motion for summary judgment is pending. If a party moves for voluntary dismissal and the order is entered, either party may file a new claim within ninety (90) days.

Again, the Court concludes this rule does not apply because Ms. Day did not voluntarily dismiss her claim.

Great Salons acknowledged that Ms. Day did not voluntarily dismiss or nonsuit her case. It argued that if Ms. Day were held to the ninety-day timeframe to refile had she nonsuited, then for policy reasons, she should be held to the same limitation when the Court dismissed her case failing to request a hearing. Holding otherwise would reward Ms. Day's failure to comply with the Bureau's rules.

The Court agrees that Ms. Day should have filed a request for hearing by the extended deadline. However, the Court must apply the statute, rules, and case law to the facts of each case. This Court cannot make policy; that role rests solely with the legislature.

Finally, Rule 41.02 of the Tennessee Rules of Civil Procedure (2020) addresses involuntary dismissals for failure to prosecute and/or comply with a court order. Section three of the rule states: "*Unless the court in its order for dismissal otherwise specifies*, a dismissal under this subdivision . . . operates as an adjudication upon the merits. (Emphasis added.) Here, the Court did "otherwise specify" by designating the dismissal without prejudice. Had the Court intended the dismissal to be an adjudication on the merits, it would have dismissed the case with prejudice.

Great Salons suggested that a case dismissed for failure to prosecute is considered an adjudication on the merits, citing *Lightfoot v. Xerox Bus. Servs.*, 2016 TN Wrk. Comp. App. Bd. LEXIS 43 (Sept. 12, 2016). However, *Lightfoot* is easily distinguishable, as it involved a dismissal for failure to prosecute *with prejudice* where the employee had an expedited hearing and at least two status conferences.

Here, Great Salon accepted compensability of this claim, provided treatment, and now seeks to avoid further benefits and deny Ms. Day a hearing on the merits because her attorney failed to file a request for hearing. The *Lightfoot* Court noted, "courts should not dismiss claims with prejudice when the fault for failing to prosecute the claim lies solely with the attorney." *Id.* at \*25.

After careful consideration, the Court holds that Ms. Day's claim is not barred for her failure to refile within ninety days of the dismissal without prejudice for failure to

prosecute.<sup>1</sup> Ms. Day filed her second PBD within one year of the last paid medical treatment; therefore, the Court deems it timely filed.<sup>2</sup> The Court further holds Ms. Day proved she is likely to prevail at a hearing on the merits regarding entitlement to additional treatment, as the authorized treating physician recommended surgery, and the UR provider approved the recommendation.

**IT IS, THEREFORE, ORDERED** as follows:

1. Great Salons of Knoxville or The Hartford Fire Insurance Company shall provide Ms. Day with medical treatment under Tennessee Code Annotated section 50-6-204, including but not limited to the recommended surgery.
2. This case is set for a Scheduling Hearing on February 23, 2021, at 10:00 a.m. Eastern Time. The parties must call 865-594-0109 or 855-383-0003 toll-free to participate. Failure to appear might result in a determination of the issues without the party's participation.
3. Unless interlocutory appeal of the Expedited Hearing Order is filed, compliance with this Order must occur no later than seven business days from the date of entry of this Order as required by Tennessee Code Annotated section 50-6-239(d)(3). The Insurer or Self-Insured Employer must submit confirmation of compliance with this Order to the Bureau by email to [WCCompliance.Program@tn.gov](mailto:WCCompliance.Program@tn.gov) no later than the seventh business day after entry of this Order. Failure to submit the necessary confirmation within the period of compliance may result in a penalty assessment for non-compliance. For questions regarding compliance, please contact the Workers' Compensation Compliance Unit by email at [WCCompliance.Program@tn.gov](mailto:WCCompliance.Program@tn.gov).

**ENTERED on October 23, 2020.**

*Lisa A. Lowe*  
\_\_\_\_\_  
**LISA A. LOWE, JUDGE**  
**Court of Workers' Compensation Claims**

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<sup>1</sup> Ms. Day raised the doctrine of equitable estoppel. Due to the Court's ruling that her claim is not barred, there is no need to address this argument.

<sup>2</sup> Because Ms. Day filed her second PBD within the statute of limitations, there is no need for the Court to address the savings statute. An action that is nonsuited and refiled within the statute of limitations is not "saved" by the savings statute; it is simply filed as any other case within the limitations period. *Balsinger v. Gass*, 379 S.W.2d 800, 805 (1964).

## **APPENDIX**

### **Exhibits:**

1. Affidavit of Misti G. Day, filed August 17, 2020
  - Email from Adjuster, dated November 22, 2019
  - Utilization Review Approval, dated March 24, 2020
2. First Report of Work Injury
3. Notice of Filing Medical Records and Table of Contents
  - Dr. M. Smith, Pain Consultants
  - Dr. D. Hauge, Neurosurgical Associates
4. November 4, 2019 Notice of Show Cause Hearing
5. November 4, 2019 Show Cause Order
6. November 18, 2019 Order Granting Extension
7. December 18, 2019 Order of Dismissal without Prejudice
8. January 27, 2020 Email from Attorney Ballard
9. January 28, 2020 Email from Attorney Inman
10. Panel of neurosurgeons (p.20 of pdf)
11. April 5, 2019 Physician's Return to Work Form (p. 16 of pdf)

### **Technical Record:**

1. Petition for Benefit Determination, filed February 26, 2019
2. Order of Dismissal without Prejudice
3. Petition for Benefit Determination, filed April 30, 2020
4. Dispute Certification Notice, filed August 7, 2020
5. Request for Expedited Hearing, filed August 17, 2020
6. Request for Expedited Hearing, filed August 19, 2020
7. Subpoenas
8. Employee's Prehearing Brief
9. Witness and Exhibit List Submitted by Employee
10. Notice of Filing of Medical Records and Table of Contents
11. Employer's Motion to Quash Employee's Subpoenas
12. Employer's Position Statement
13. Employer's Exhibit List
14. Objection to Motion to Quash Subpoenas
15. Order Denying Motion to Quash Subpoenas

**CERTIFICATE OF SERVICE**

I certify that a copy of the Order was sent as indicated on October 23, 2020.

Name	Certified Mail	Fax	Email	Service sent to:
Michael C. Inman, Employee's Attorney			X	Michael@inmanandstadler.com
Joseph Ballard, Employer's Attorney			X	jospeh.ballard@thehartford.com

  
\_\_\_\_\_  
**PENNY SHRUM**, Court Clerk  
**WC.CourtClerk@tn.gov**



### Expedited Hearing Order Right to Appeal:

If you disagree with this Expedited Hearing Order, you may appeal to the Workers' Compensation Appeals Board. To appeal an expedited hearing order, you must:

1. Complete the enclosed form entitled: "Notice of Appeal," and file the form with the Clerk of the Court of Workers' Compensation Claims *within seven business days* of the date the expedited hearing order was filed. When filing the Notice of Appeal, you must serve a copy upon all parties.
2. You must pay, via check, money order, or credit card, a **\$75.00 filing fee** *within ten calendar days* after filing of the Notice of Appeal. Payments can be made in-person at any Bureau office or by U.S. mail, hand-delivery, or other delivery service. In the alternative, you may file an Affidavit of Indigency (form available on the Bureau's website or any Bureau office) seeking a waiver of the fee. You must file the fully-completed Affidavit of Indigency *within ten calendar days* of filing the Notice of Appeal. **Failure to timely pay the filing fee or file the Affidavit of Indigency will result in dismissal of the appeal.**
3. You bear the responsibility of ensuring a complete record on appeal. You may request from the court clerk the audio recording of the hearing for a \$25.00 fee. If a transcript of the proceedings is to be filed, a licensed court reporter must prepare the transcript and file it with the court clerk *within ten business days* of the filing the Notice of Appeal. Alternatively, you may file a statement of the evidence prepared jointly by both parties *within ten business days* of the filing of the Notice of Appeal. The statement of the evidence must convey a complete and accurate account of the hearing. The Workers' Compensation Judge must approve the statement before the record is submitted to the Appeals Board. If the Appeals Board is called upon to review testimony or other proof concerning factual matters, the absence of a transcript or statement of the evidence can be a significant obstacle to meaningful appellate review.
4. If you wish to file a position statement, you must file it with the court clerk *within ten business days* after the deadline to file a transcript or statement of the evidence. The party opposing the appeal may file a response with the court clerk *within ten business days* after you file your position statement. All position statements should include: (1) a statement summarizing the facts of the case from the evidence admitted during the expedited hearing; (2) a statement summarizing the disposition of the case as a result of the expedited hearing; (3) a statement of the issue(s) presented for review; and (4) an argument, citing appropriate statutes, case law, or other authority.

***For self-represented litigants: Help from an Ombudsman is available at 800-332-2667.***



## NOTICE OF APPEAL

Tennessee Bureau of Workers' Compensation

[www.tn.gov/workforce/injuries-at-work/](http://www.tn.gov/workforce/injuries-at-work/)

wc.courtclerk@tn.gov | 1-800-332-2667

Docket No.: \_\_\_\_\_

State File No.: \_\_\_\_\_

Date of Injury: \_\_\_\_\_

\_\_\_\_\_  
Employee

v.

\_\_\_\_\_  
Employer

Notice is given that \_\_\_\_\_

*[List name(s) of all appealing party(ies). Use separate sheet if necessary.]*

appeals the following order(s) of the Tennessee Court of Workers' Compensation Claims to the Workers' Compensation Appeals Board (check one or more applicable boxes and include the date file-stamped on the first page of the order(s) being appealed):

☐ Expedited Hearing Order filed on \_\_\_\_\_ ☐ Motion Order filed on \_\_\_\_\_

☐ Compensation Order filed on \_\_\_\_\_ ☐ Other Order filed on \_\_\_\_\_

issued by Judge \_\_\_\_\_

### **Statement of the Issues on Appeal**

Provide a short and plain statement of the issues on appeal or basis for relief on appeal:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

### **Parties**

**Appellant(s)** (Requesting Party): \_\_\_\_\_ ☐ Employer ☐ Employee

Address: \_\_\_\_\_ Phone: \_\_\_\_\_

Email: \_\_\_\_\_

Attorney's Name: \_\_\_\_\_ BPR#: \_\_\_\_\_

Attorney's Email: \_\_\_\_\_ Phone: \_\_\_\_\_

Attorney's Address: \_\_\_\_\_

*\* Attach an additional sheet for each additional Appellant \**



Employee Name: \_\_\_\_\_ Docket No.: \_\_\_\_\_ Date of Inj.: \_\_\_\_\_

**Appellee(s) (Opposing Party):** \_\_\_\_\_ ☐ Employer ☐ Employee

Appellee's Address: \_\_\_\_\_ Phone: \_\_\_\_\_

Email: \_\_\_\_\_

Attorney's Name: \_\_\_\_\_ BPR#: \_\_\_\_\_

Attorney's Email: \_\_\_\_\_ Phone: \_\_\_\_\_

Attorney's Address: \_\_\_\_\_

*\* Attach an additional sheet for each additional Appellee \**

### **CERTIFICATE OF SERVICE**

I, \_\_\_\_\_, certify that I have forwarded a true and exact copy of this Notice of Appeal by First Class mail, postage prepaid, or in any manner as described in Tennessee Compilation Rules & Regulations, Chapter 0800-02-21, to all parties and/or their attorneys in this case on this the \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_.

\_\_\_\_\_  
*[Signature of appellant or attorney for appellant]*



**Tennessee Bureau of Workers' Compensation**  
**220 French Landing Drive, I-B**  
**Nashville, TN 37243-1002**  
**800-332-2667**

**AFFIDAVIT OF INDIGENCY**

I, \_\_\_\_\_, having been duly sworn according to law, make oath that because of my poverty, I am unable to bear the costs of this appeal and request that the filing fee to appeal be waived. The following facts support my poverty.

1. Full Name: \_\_\_\_\_ 2. Address: \_\_\_\_\_

3. Telephone Number: \_\_\_\_\_ 4. Date of Birth: \_\_\_\_\_

5. Names and Ages of All Dependents:

\_\_\_\_\_ Relationship: \_\_\_\_\_

\_\_\_\_\_ Relationship: \_\_\_\_\_

\_\_\_\_\_ Relationship: \_\_\_\_\_

\_\_\_\_\_ Relationship: \_\_\_\_\_

6. I am employed by: \_\_\_\_\_

My employer's address is: \_\_\_\_\_

My employer's phone number is: \_\_\_\_\_

7. My present monthly household income, after federal income and social security taxes are deducted, is:

\$ \_\_\_\_\_

8. I receive or expect to receive money from the following sources:

AFDC \$ \_\_\_\_\_ per month beginning \_\_\_\_\_

SSI \$ \_\_\_\_\_ per month beginning \_\_\_\_\_

Retirement \$ \_\_\_\_\_ per month beginning \_\_\_\_\_

Disability \$ \_\_\_\_\_ per month beginning \_\_\_\_\_

Unemployment \$ \_\_\_\_\_ per month beginning \_\_\_\_\_

Worker's Comp. \$ \_\_\_\_\_ per month beginning \_\_\_\_\_

Other \$ \_\_\_\_\_ per month beginning \_\_\_\_\_

9. My expenses are:

Rent/House Payment \$ _____ per month	Medical/Dental \$ _____ per month
Groceries \$ _____ per month	Telephone \$ _____ per month
Electricity \$ _____ per month	School Supplies \$ _____ per month
Water \$ _____ per month	Clothing \$ _____ per month
Gas \$ _____ per month	Child Care \$ _____ per month
Transportation \$ _____ per month	Child Support \$ _____ per month
Car \$ _____ per month	
Other \$ _____ per month (describe: _____)	

10. Assets:

Automobile	\$ _____	(FMV) _____
Checking/Savings Acct.	\$ _____	
House	\$ _____	(FMV) _____
Other	\$ _____	Describe: _____

11. My debts are:

Amount Owed	To Whom
_____	_____
_____	_____
_____	_____
_____	_____

I hereby declare under the penalty of perjury that the foregoing answers are true, correct, and complete and that I am financially unable to pay the costs of this appeal.

\_\_\_\_\_  
APPELLANT

Sworn and subscribed before me, a notary public, this

\_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires: \_\_\_\_\_