FOR PUBLICATION

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

ROYAL CROWN INSURANCE CORPORATION , **Petitioner,** **v.** **DIRECTOR OF LABOR, GIL M. SAN NICOLAS, DOL SECRETARY, AND THE DEPARTMENT OF LABOR, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,** **Respondents.**	**Civil Action No. 10-0033** **Civil Action No. 10-0034** **Civil Action No. 10-0035** **ORDER DENYING MOTION TO DISMISS FOR FAILURE TO PROSECUTE**

I. INTRODUCTION

THIS MATTER came before the Court for a hearing on April 19, 2012, at 1:30 p.m. in Courtroom 223A. Joe Hill, Esq. represented Royal Crown Insurance Corporation ("Petitioner") and Meredith Callan, Esq. represented CNMI Department of Labor, et al. ("Respondents"). At the hearing the parties presented oral arguments regarding Respondents' motion to dismiss for failure to prosecute pursuant to NMI R. Civ. P. 41(b)(1). After considering the oral and written arguments of the parties, the Court **DENIES** Respondents' motion to dismiss.

II. PROCEDURAL BACKGROUND

The cases at issue are three of eight cases in which Petitioner sought judicial review in early 2010 of an order issued by the Secretary of Labor. The cases were grouped together for the sake of efficiency, as they are very similar to one another. Petitioner failed to file the required briefs for three of the eight consolidated cases in this matter (case numbers 10-0086, 10-0101, and 10-0136), which were due December 14, 2011. On or around December 20, 2011, Respondents reminded Petitioner the briefs were overdue. Petitioner disputed the due date and asked for a stipulation to extend the deadline. Respondents agreed; however, Petitioner never submitted the stipulation to the Court. On February 9, 2012, Respondents asked for an update on the cases as the briefs were overdue. Petitioner did not respond. On March 8, 2012, counsel for Petitioner moved this court for withdrawal as counsel. On March 12, 2012, the parties submitted on the briefs for all three of the instant cases. A date was set to hear Respondents' motion to dismiss which was filed March 12, 2012. Petitioner failed to oppose the motion. On October 26, 2012, counsel for Petitioner filed a proposed order granting leave to withdraw as counsel. This Court issued the order granting Petitioner's counsel leave for withdrawal as counsel on October 30, 2012.

III. DISCUSSION

Respondents claim that when considering a motion to dismiss for failure to prosecute pursuant to NMI R. Civ. P. 41(b)(1), a court considers five factors, according to *Wabol v. Villacrusis*, 2000 MP 18 ¶ 9. Respondents argue the following five factors all cut toward dismissal in this matter: (1) public interest in expeditious resolution of litigation, (2) the court's need to manage its docket, (3) prejudice to the appellee, (4) public policy favoring disposition of cases on their merits, and (5) availability of less drastic sanctions.

First, as to public interest in expeditious resolution of litigation, Respondents argue a finding of unreasonable delay gives rise to a presumption of injury to the defendants, which, if not rebutted, justifies dismissal. Respondents claim Petitioner's ignoring of deadlines, lack of communication, and lack of submitted stipulations were an unreasonable delay justifying dismissal.

Second, as to the court's need to manage its docket, Respondents claim this factor should be considered along with the first factor to determine if there is an unreasonable delay, and points to Petitioner's delay in resolving these cases since 2009.

Third, as to prejudice to the appellee, Respondents argue that while the failure to diligently prosecute is

sufficient by itself to justify dismissal, even in the absence of showing actual prejudice, the law presumes injury from unreasonable delay. Respondents argue Petitioner's failure to file reply briefs for three of the cases for almost three months kept the other cases from being argued, which constitutes prejudice.

Fourth, as to public policy favoring disposition of cases on their merits, Respondents assert the weakness of the remaining cases makes dismissal merciful rather than harsh, as the likelihood of success on the merits is not decisive. Respondents claim Petitioner unsuccessfully argued the merits of case 10-0102, and the Court dismissed it on December 20, 2011, upholding the order of the Secretary of Labor. Respondents argue it is presumable that the Court would similarly dismiss the other cases for the same reasons it gave for case 10-0102, as the submitted briefs on cases 10–0032[1], 10-0033, 10-0034, 10-0035, and 10-0102 all read alike.

Finally, as to the availability of less drastic sanctions, Respondents claim a court's warning of the possibility of dismissal for a party's lack of diligent prosecution can satisfy this element. Respondents claim the Court warned Petitioner of the possibility of dismissal in its Order Setting Status Conference dated August 2, 2011.

NMI R. Civ. P. 41(b)(1) reads: "For failure of the plaintiff to prosecute or comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against the defendant." NMI R. Civ. P. 41(b)(1). Upon a motion to dismiss for failure to prosecute, the Court considers the foregoing factors as cited by Respondents, found in *Wabol*, 2000 MP at ¶ 19. "Facts which do not amount to a clear record of delay [do] not warrant a dismissal and [where] lesser sanctions could have been employed. *Id.* While it is not required that every conceivable sanction be examined, other meaningful alternatives must be explored. *Id.* It is difficult to sustain a 41(b) dismissal where there is no indication that other alternative sanctions were weighed and found wanting. *Id.* (finding the lower court erred in failing to make findings of alternative sanctions prior to dismissing the case with prejudice and noting dismissal for failure to prosecute is the exception and not the rule). The failure to prosecute diligently, however, "is sufficient by itself to justify a dismissal, even in the absence of a showing of actual prejudice to the defendant from the failure." *Chong v. Kamoshita*, Civ. No. 91-0264 (NMI Super. Ct. April 30, 2004) (Order Granting Motion to Dismiss for Failure to Prosecute at 3) (citing *Morris v. Morgan Stanley & Co.*, 942 F.2d 648, 651 (9th Cir. 1991) (citations omitted). Here, an examination of the five factors set forth show

[1]This Court also dismissed this case on May 10, 2012, upholding the decision of the Secretary of Labor and finding unpersuasive any of the arguments set forth in support of the issues before the Court in that matter.

that a dismissal is not warranted.

A. PUBLIC INTEREST IN EXPEDITIOUS RESOLUTION OF LITIGATION AND DOCKET MANAGEMENT

"[T]he public's interest in expeditious resolution of litigation always favors dismissal." *Chong*, Civ. No. 91-0264 at 4 (quoting *Yourish v. California Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999). When dismissing a case for lack of prosecution, the Court is required to find a showing of unreasonable delay. *Tudela v. Miah*, Civ. No. 97-1149 (NMI Super. Ct. April 12, 2002) (Order Granting Defendants' Motion to Dismiss at 3) (citing *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986). "A finding of unreasonable delay gives rise to a presumption of injury to the defendants which will, in and of itself, justify dismissal if not rebutted." *Tudelah*, Civ. No. 97-1149 at 3 (finding four years and five months constituted an unreasonable delay). The Court also has an interest and an obligation to manage its docket.

In this case, Petitioner failed to file required briefs in three of the other consolidated cases, delaying the determination of other cases, including the three cases at issue. Within months, however, of determining the briefs were overdue, this Court held a status conference, wherein it was decided that the instant three cases would be submitted on their briefs. While perhaps the failure to file required briefs hindered significantly the three cases where the briefs were not filed, these cases were separated from the problematic cases within three months after the due date had passed for the other cases. The Court therefore finds the first two factors do not weigh in favor of dismissal.

B. PREJUDICE TO DEFENDANTS

A showing of prejudice requires the defendant to show the plaintiff's actions "interfered with defendant's ability to proceed to trial or interfered with the rightful decision of the case." *Chong*, Civ. No. 91-0264 at 4) (finding the length of the litigation from 1990 to 2003 was prejudicial as recalling specific details regarding a case becomes difficult and potential witnesses may become unavailable). "[T]he law presumes injury from unreasonable delay." *Tudela*, Civ. No. 97-1149 at 4. In *Chong*, the defendant incurred legal fee expenses and wasted time appearing at multiple conferences where the plaintiff failed to appear. Here, Petitioner missed three deadlines, the prejudice of which was remedied by separating these three cases from the problematic cases. *See Chong*, Civ. No. 91-0264 (quoting *Scarborough v. Eubanks*, 747 F.2d 871, 876 (3rd Cir. 1984) (finding prejudice includes "irremediable burdens or costs imposed on the opposing party."). Thus, Respondents have failed to

demonstrate prejudice.

C. CONSIDERATION OF LESS DRASTIC ALTERNATIVES

A court must reasonably explore possible and meaningful alternatives, although it is unnecessary to examine every single alternative before dismissing an action. *Chong*, Civ. No. 91-0264 at 5. "A court's warning of the possibility of dismissal for a party's lack of diligent prosecution can satisfy the 'consideration of alternatives' requirement." *Id.* (quoting *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992).

Respondents are correct that the Court did warn Petitioner of the possibility of dismissal in its December 20, 2011 procedural order. Although this alone can satisfy this requirement, the Court did consider, and implemented, the alternative of separating the instant cases from the other cases and deciding it would determine the cases based on the briefs, instead of waiting for the other cases to hold a hearing. This factor, therefore, does not cut in favor of dismissal.

D. PUBLIC POLICY FAVORING DISPOSITION ON THE MERITS

In determining whether to dismiss a case, a court weighs "the public policy favoring disposition of a case on its merits against plaintiff's delay and prejudice suffered by the defendant." *Tudela*, Civ. No. 97-1149 at 6. While the strength or weakness of a case may be a factor in determining whether dismissal would be harsh, "the likelihood of success on the merits is not decisive when considering a dismissal." *Id.* While Petitioner indeed ignored his responsibilities to prosecute this action by filing the required briefs, the Court has already established that Respondents have failed to demonstrate prejudice. Further, although it may be true that the likelihood of success on the merits may not weigh in favor of Petitioner, this factor is not decisive. The Court therefore finds this factor does not cut in favor of dismissal.

VI. CONCLUSION

For the foregoing reasons, the Court hereby **DENIES** Respondents' motion to dismiss pursuant to NMI R. Civ. P. 41(b) for failure to prosecute. A status conference is hereby set for July 11, 2013 at 1:30 p.m. in Courtroom 223A. The parties are ordered to appear.

So ORDERED this 26th day of June, 2013.

/ s /

David A. Wiseman, Associate Judge