

The Low Burden of Proof in Order to Restore a Dismissed Case

In *Robin Williams vs. Ready Pac*, an unpublished Superior Court decision from January 23, 2015, the Appellate Division once again established the very low burden of proof a petitioner has in order to re-open a claim that has been dismissed due to lack of prosecution. In this case, the petitioner sustained two injuries to her left shoulder in May 2006 and eventually received an award of 10 percent of partial total for those injuries on August 11, 2008. Just before the statute of limitations for re-opening her case, the petitioner filed an Application for Review in August 2010. The employer scheduled an expert evaluation for the petitioner on August 25, 2011. She failed to appear for the examination. A few days later, on September 2, 2011, the petitioner was murdered.

The employer filed a Motion to Dismiss which was granted on September 24, 2012. In support of the petitioner's Motion to Restore, counsel for the estate presented and argued that two letters had been sent; one to the petitioner's last address and one to the employer. In reversing the decision of the Judge, the Appellate Division noted that the petitioner's standard of proof for restoration is simply to prove "good cause" and that good cause has been interpreted as "a substantial reason that affords legal excuse for the default." Good cause is not concerned with the merits of the claim alone, but with the excuse for the delay. Unfortunately, the Court relied upon the 1959 decision of *Nemeth vs. Otis Elevator* which is apparently still good law. In *Nemeth*, the Affidavit in support of the Motion to Restore did not have "one word of explanation for the failure to prosecute, the acquiescence in the dismissal, or in the delay in making Application to Re-Open." When compared to that extremely low standard, the petitioner's death in this case was a far more compelling reason to allow for the restoration of the claim.

This decision follows closely on the heels of the unpublished November 2014 decision of *Raul Planes vs. Village Townhouse* where the petitioner's claim was also dismissed for Lack of Prosecution as was the petitioner's appeal to vacate the dismissal. Once again, the Court relied upon the very low burden of proof required by Section 54 of the statute allowing for the matter to be re-opened for "good cause shown." The *Raul* matter was permitted to be restored even though more than one year had passed since the date of dismissal based upon extenuating circumstances, including the petitioner's delayed surgery due to diabetes.

Employers must be aware that a matter might be re-opened if sufficient cause is shown and there is a low burden of proof on the part of a plaintiff in these situations.

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