

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F407686

JAMES WIGGINS, III, EMPLOYEE

CLAIMANT

GOOD HANDS PAINTERS ASSOCIATION,  
INC., EMPLOYER

RESPONDENT

FirstCOMP INSURANCE COMPANY,  
INSURANCE CARRIER/TPA

RESPONDENT

OPINION AND ORDER FILED FEBRUARY 17, 2005

Hearing before Chief Administrative Law Judge David Greenbaum on February 1, 2005, at Little Rock, Pulaski County, Arkansas.

Claimant represented by Ms. Sheila A. Campbell, Attorney-at-Law, Little Rock, Arkansas.

Respondents represented by Mr. William C. Frye, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted on February 1, 2005, to determine various issues set out further below.

A prehearing conference was conducted in this claim on December 8, 2004, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order. However, at the scheduled hearing, additional issues were raised for the first time which had not been raised during any prehearing procedures, and which resulted in alternative pleadings by the claimant. In addition, during the hearing, the claimant attempted to proffer an additional medical report which had not been timely filed, and to which respondents objected to the

introduction. Accordingly, the claimant then moved to dismiss his claim without prejudice which was also resisted by the respondents. The claimant's attorney agreed to be responsible for the cost of the court reporter as the result of the aborted hearing. As will be set out further below, it appears that the claimant was requesting a non-suit or dismissal of his claim without prejudice under the Arkansas Rules of Civil Procedure which this administrative law judge improperly granted. However, because what I, in essence did, was to grant a continuance of the hearing in order to allow the claimant an opportunity to submit the additional medical evidence, or alternatively seek relief in another forum against his insurance agent under an alleged error or omission by said agent, the request to continue the hearing rather than dismiss the claim is granted.

At the prehearing conference, it was stipulated that the claimant was the owner and also worked in the business known as Good Hands Painters Association, Inc., and that the respondent-insurance carrier had controverted this claim in its entirety.

At the prehearing conference, the parties agreed to litigate the following issues:

- 1) Whether the claimant was a covered employee under the workers' compensation insurance policy issued for the employer.
- 2) Compensability.
- 3) Associated benefits, if applicable.

Claimant contended, in summary, that he was both an employee and owner of the business and thus entitled to workers' compensation benefits. The claimant

contended that he sustained a compensable injury as the result of a specific incident identifiable in time and place of occurrence on June 7, 2004; that he was entitled to temporary total disability from the date of the injury and continuing through an undetermined date, maintaining that his healing period had not ended; that respondents should be held responsible for all outstanding medical treatment, together with continued, reasonably necessary medical treatment; and that a controverted attorney's fee should attach to any benefits awarded.

The respondents contended that the claimant had exempted himself from coverage and was, therefore, not a covered employee under its workers' compensation insurance policy. Alternatively, respondents maintained that the claimant did not sustain a compensable injury within the meaning of the Workers' Compensation Act.

At the hearing, and for the first time, the claimant contended, in the alternative, that he was not a covered employee and that the Commission did not have jurisdiction over this claim, pointing out that the claimant needed to pursue his claim in another venue while maintaining that the Circuit Court had concurrent jurisdiction with the Commission against McGehee Insurance Agency under its errors and omissions policy. (Tr.5-9)

During the presentation of the documentary evidence, the claimant attempted to introduce a report which did not comply with the Prehearing Order. Respondents objected to the introduction of the untimely, supplemental medical because it violated respondents' right of cross-examination specifically related to the issue of

compensability. Because this administrative law judge would only accept the untimely report as a proffer, the claimant's attorney moved to dismiss the claim without prejudice, apparently under A.R.C.P. 41.

The Full Workers' Compensation Commission has recently held that it is reluctant to apply A.R.C.P. 41 to workers' compensation claims. *Hooker vs. E.C. Rowlett Construction Co.*, WC F012906, Opinion Filed February 8, 2005.

It does not appear that this administrative law judge has statutory authority to order a non-suit or dismissal pursuant to A.R.C.P. 41. Further, this is not a claim which can properly be dismissed pursuant to Commission Rule 13 or Ark. Code Ann. §11-9-702 because the claimant has not failed to prosecute his claim. Rather, it appears that, in this claim, as in the *Hooker* case, the claimant's intent is to withdraw his request for a hearing.

Accordingly, I find that this case should be returned to the Commission's general files until, and unless, the claimant requests a hearing on the merits of his claim.

Additionally, the claimant is responsible for the court reporter's fees in appearing and transcribing the within proceeding.

All additional issues are, by necessity, reserved.

IT IS SO ORDERED.

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DAVID GREENBAUM  
Chief Administrative Law Judge