

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F300122

BOBBY LAMB, EMPLOYEE

CLAIMANT

**DOLLARWAY PUBLIC SCHOOLS, SELF-INSURED
EMPLOYER**

RESPONDENT

**RISK MANAGEMENT RESOURCES,
THIRD PARTY ADMINISTRATOR**

RESPONDENT

OPINION AND ORDER OF DISMISSAL WITHOUT PREJUDICE
FILED OCTOBER 3, 2006

This matter comes before the Commission on the respondents' Motion to Dismiss for Failure to Prosecute. The claimant is a teacher and allegedly sustained an injury to his right knee and partial hip injury on January 19, 2005, while breaking up a fight in his classroom. At the time, he did not file a worker's compensation claim. He subsequently filed a worker's compensation claim, i.e. claim no. F110789 alleging that he aggravated his right knee condition on September 5, 2001, while trying to break up a fight outside of the school. The claim on the September, 2001, incident was denied by Opinion dated March 14, 2006 by the Full Commission. On January 15, 2003, the claimant filed a workers' compensation claim herein in connection with the January 19, 2001 incident contending he injured his right knee, foot, and back. Since the filing of his claim in 2003, claimant has failed to take any action to pursue his claim. On May 5, 2006, the respondents filed a Motion to Dismiss for failure of the claimant to prosecute this claim. The Commission gave notice of the motion to the claimant by letter dated May 11, 2006, sent via certified mail and first-class mail. The letter was received by claimant as evidenced by the

registered mail return receipt signed by the claimant dated May 12, 2006. The claimant was warned therein that failure to respond may result in a dismissal of his claim. No response thereto has been received from the claimant. A Notice of Hearing on respondents' Motion to Dismiss was sent to the parties via certified mail and first-class mail on June 6, 2006, and received by claimant, as evidenced by the registered mail return receipt signed by the claimant dated June 7, 2006. The Notice provided that "Failure to appear will result in dismissal of this claim." The claimant failed to appear at the hearing scheduled on July 6, 2006. The claimant has filed no request for hearing within the last six (6) months.

Commission Rule 13 provides in relevant part as follows:

Upon meritorious application to the Commission from either party in an action pending before the Commission, requesting that the claim be dismissed for want of prosecution, the Commission may, upon reasonable notice to all parties, enter an order dismissing the claim for want of prosecution.

A dismissal without prejudice granted under Rule 13 is not a final order, is not appealable, and does not act as a statutory bar of a claim. *Sexton v. Atlas Carriers, Inc.*, A.W.C.C. E510879 (Oct. 13, 2003). It does not act as a denial of compensation, and the claimant may refile the claim once a justiciable issue has arisen. *Gore v. National Pizza Company*, A.W.C.C. E404917 (Feb. 7, 1997).

The respondents have requested that this case be dismissed with prejudice on the basis that claimant had not pursued his claim for three years, did not appear at the hearing, and was denied additional benefits for similar injuries arising from the September, 2001 work-related incident in the case previously litigated.

The Commission and the Arkansas Supreme Court have expressed a preference for dismissals without prejudice. *Laura Hutchinson v. North Arkansas Foundry*, Full Workers' Compensation Commission, Opinion filed October 23, 1991 (Claim No.D902143); *Richard Bice v. Bromley Auto Parts*, Full Workers' Compensation Commission, Opinion filed August 7, 1997 (Claim No E600073); *ABO v. Kawneer Company*, Full Workers' Compensation Commission, 2005 AWCC 226, Opinion filed November 5, 2005 (Claim No. F404774); *Professional Adjustment Bureau v. Strong*, 275 Ark. 249, 629 S.W.2d 284 (1982); *Cory v. Mark Twain Life Insurance Company*, 286 Ark. 20, 688 S.W.2d 934 (1985). However, the Commission does have the authority to dismiss a claim with prejudice without violating the claimant's due process right. *Loosey v. Osmose Wood Preserving Co.*, 23 Ark. App. 137, 744 S.W.2d 402 (1988). In the instant case, the respondents are seeking dismissal on the basis that claimant has failed to prosecute his claim and failed to appear. This case is distinguishable from the *Loosey* case where the claimant has failed to follow an Order of this Commission and dismissal was sought as a sanction as a result of a pattern of conduct. In addition, I find that it would not be proper for me to dismiss the case with prejudice on the speculation that claimant would not be successful in the outcome of this case in light of the decision in the other claim litigated.

Because the respondents have requested that this claim be dismissed, and because the claimant has failed to prosecute this claim, I find that pursuant to Commission Rule 13 and Ark. Code Ann. § 11-9-702(a)(4), this claim should be,

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and hereby is, dismissed without prejudice. This dismissal is limited to the claim filed in F300122 and does not apply to the claim filed in F110789.

IT IS SO ORDERED.

BARBARA WEBB
Administrative Law Judge