

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F508939

DANNY SMITH, EMPLOYEE

CLAIMANT

PARKER TIRE SERVICE, INC., EMPLOYER

RESPONDENT

**SOUTHERN GUARANTY INSURANCE
COMPANY, INSURANCE CARRIER,
CROCKETT ADJUSTMENT, TPA**

RESPONDENT

OPINION FILED MAY 1, 2006

Hearing before Administrative Law Judge Barbara W. Webb on April 27, 2006, in Little Rock, Pulaski County, Arkansas.

Claimant, *pro se*, failing to appear.

Respondents represented by Mr. Andrew M. Ivey, Attorney at Law, on behalf of the Roberts Law Firm, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted April 27, 2006, to determine whether this claim should be dismissed for want of prosecution pursuant to Rule 13 of the Rules of the Arkansas Workers' Compensation Commission.

The immediate claim concerns an alleged injury occurring on or about August 17, 2005. Respondents have controverted this claim in its entirety. A discussion of the procedural history of this claim is warranted.

This claim was initiated through the filing of a Commission Form AR-C dated August 22, 2005, and received on August 24, 2005. The claim was filed by attorney Mike J. Etoch, Jr. In response, respondents filed a Commission Form AR-2, controverting the claim. Thereafter, claimant's attorney, by letter dated September 12, 2005, requested a hearing. The claim was then assigned to Administrative Law Judge Cynthia Rogers. Prehearing Questionnaires were sent to both parties on September 16, 2005. Prehearing information filings were submitted by both parties.

Thereafter, a prehearing conference notice was sent on October 17, 2005, scheduling a teleconference on November 14, 2005. Prior to the scheduled prehearing conference, claimant's attorney filed a petition to withdraw, pointing out that he had no communications with the claimant since August 22, 2005, the date he was hired to represent the claimant in this matter. An Order was filed November 9, 2005, by the Administrative Law Judge, relieving Mr. Etoch as attorney for the claimant. In addition, the prehearing conference scheduled for November 14, 2005, was cancelled and the claim returned to the Commission's general files. On November 18, 2005, respondents, by and through its attorney, filed a motion to Dismiss, Brief in Support of Motion to Dismiss, and a precedent for an Order of Dismissal in this matter. A copy of the pleadings were sent to the *pro se* claimant. By letter dated November 28, 2005, the Administrative Law Judge, again, advised the claimant that a Motion to Dismiss for lack of prosecution had been filed and gave the claimant twenty (20) days to respond to the Motion. On November 29, 2005, respondents requested that, if the claimant did not respond within twenty (20) days, that a hearing on respondents' dismissal motion be scheduled in Helena, Arkansas, at the earliest opportunity. No response was received from the claimant. A Notice of Hearing was sent on December 27, 2005, scheduling the claim for a hearing on Friday, January 20, 2006, in Helena, Arkansas. The subject of the hearing concerned respondents' Motion to Dismiss. The notice was sent certified mail – return receipt requested.

As noted above, the claimant failed to appear at the scheduled hearing. Respondents appeared and renewed its Motion to Dismiss for want of prosecution pursuant to Commission Rule 13. Respondents offered documentary evidence in support of its Motion.

An Opinion was filed January 25, 2006, by Chief Administrative Law Judge David Greenbaum denying the Motion to Dismiss on the basis that it was premature under Ark. Code Ann. § 11-9-702(a)(4), i.e. less than six (6) months after the date of the claim.

On March 1, 2006, the respondents renewed their Motion to Dismiss contending that claimant had not requested a hearing within six (6) months of the filing of the claim and failed to respond to discovery.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Worker's Compensation Commission has jurisdiction over this claim.

2. The claimant filed a claim for workers' compensation benefits alleging an August 17, 2005, right shoulder injury through the filing of a Commission Form AR-C on or about August 22, 2005.

3. Claimant's attorney requested a hearing on September 12, 2005, which initiated the prehearing process. No hearing has been scheduled on the merits of this claim. Claimant's attorney withdrew the hearing request on November 7, 2005, and has since been relieved as attorney of record by Order of this Commission filed November 9, 2005.

4. Claimant has failed to respond to written discovery within the time prescribed by law.

5. That more than six (6) months has passed since the filing of the claim for benefits and claimant has failed to take any steps toward the prosecution of his claim and has failed to cooperate with discovery.

DISCUSSION

Commission Rule 099.13 is set out in its entirety below:

HEARINGS BEFORE COMMISSION AND ADMINISTRATIVE LAW JUDGES

The Commission may, in its discretion, postpone or recess hearings at the instance of either party or on its own motion. No case set for hearing shall be postponed except by approval of the Commission or Administrative Law Judge.

In the event neither party appears at the initial hearing, the case may be dismissed by the Commission or Administrative Law Judge, and such dismissal order will become final unless an appeal is timely taken therefrom or a proper motion to reopen is filed with the Commission within thirty (30) days from receipt of the order.

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. (Effective March 1, 1982)

Ark. Code Ann. § 11-9-702(a)(4) (Repl. 2002) provides:

If, within six (6) months after the filing of a claim for compensation, no bona fide request for a hearing has been made with respect to the claim, the claim may, upon motion and after hearing, be dismissed without prejudice to the refiling of the claim within limitation periods specified in sub-division (a)(1) – (30) of this section.

No hearing has ever been scheduled on the merits of this claim. Although a claim was initiated by claimant's attorney, no action was pending before the Commission as contemplated by Rule 13.

Notices sent by this Commission advising the claimant of the pending Motion to Dismiss were sent both certified mail, as well as first-class mail. All return receipts on the certified mail were returned and marked "Unclaimed." Apparently, the first-class mail has not been returned, to date.

Ark. Code Ann. § 11-9-702(a)(4) provides for dismissals without prejudice to the refiling of a claim within the statutory limitations in the event no *bona fide* request for a hearing is made within six (6) months after the filing of a claim for compensation. Admittedly, claimant's former attorney requested a hearing after respondents controverted compensability. Thereafter, claimant's attorney lost all communication with his client. The attorney requested, and received, an Order relieving him as attorney of record.

No hearing has been scheduled on the merits of this claim. No action was pending when the respondents' motion was filed. Respondents have renewed its

Motion following the passage of the statutory period of time and evidence warrants dismissal of the case at this time. Accordingly, respondents' Motion is hereby respectfully granted and this claim is hereby dismissed without prejudice for want of prosecution, pursuant to Rule 13 of the Rules of the Arkansas Workers' Compensation Commission and Ark. Code Ann. § 11-9-702(a)(4) (Repl. 2002).

IT IS SO ORDERED.

BARBARA W. WEBB
Administrative Law Judge