

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F700170

MARJORIE ARNSDORFF, EMPLOYEE	CLAIMANT
PEARSON LEARNING GROUP, EMPLOYER	RESPONDENT
FIDELITY & GUARANTY INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED OCTOBER 12, 2007

Hearing before Administrative Law Judge O. Milton Fine II on September 18, 2007 in Harrison, Boone County, Arkansas.

Claimant, represented by Ms. Jenni Cook, did not appear.

Respondents represented by Mr. Michael N. Harry, Attorney at Law, Little Rock, Arkansas.

I. BACKGROUND

This matter comes before the Commission on Respondents' motion to dismiss. A hearing on the motion was conducted on September 18, 2007, in Harrison, Arkansas. The Claimant, who is represented by Ms. Jenni Cook, did not appear. Respondents were represented at the hearing by Mr. Michael N. Harry, Attorney at Law, of Little Rock, Arkansas. No testimony was taken in the case. The record consists of Respondents' Exhibit 1, comprised of twenty-six (26) pages of documents that detail the history of the case.

The instant claim concerns an alleged injury to the Claimant's right shoulder/upper arm on April 11, 2006. On September 19, 2006, Claimant filed a claim for benefits. Respondents controverted the claim in its entirety, and on November 7, 2006, propounded interrogatories to Claimant and sent proposed

medical release authorizations. However, Claimant failed to respond to the discovery, despite a faxed reminder by Respondents on January 16, 2007.

On July 17, 2007, Respondents filed a Motion to Dismiss Without Prejudice and a brief in support thereof. Therein, Respondents asked that the claim be dismissed without prejudice pursuant to Ark. Code Ann. § 11-9-702(a)(4) and AWCC R. 099.13. On July 19, 2007, I sent a letter to Claimant's counsel, advising that Claimant had ten (10) days to respond to the motion. However, no response was forthcoming. Notice was served on the parties of the scheduled September 18 hearing. On September 12, 2007, Claimant's counsel wrote a letter to me (which is part of Respondents' Exhibit 1) that reads in pertinent part:

I have communicated with my client concerning the hearing on the Motion to Dismiss scheduled for September 18, 2007, in the above-referenced matter, and she advises that she no longer desires to pursue a claim with the Workers' Compensation Commission, and is perfectly agreeable to the claim being dismissed. Consequently we will have no objection to this matter being dismissed.

I have spoken with David C. Jones [also counsel for Respondents] concerning this matter and advised him of our position. It is my understanding from that conversation that due to our position, neither I nor my client, will be required to appear on September 18. If this is incorrect, please do not hesitate to contact me immediately to so advise.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, to include documents and other matters properly before the Commission, the following findings of fact and conclusions of law are hereby made in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2002):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. Claimant has failed to prosecute her claim.
3. Claimant was provided reasonable notice of the motion to dismiss and of the hearing thereon.
4. Dismissal of this claim *without prejudice* is warranted under Ark. Code Ann. § 11-9-702(a)(4) (Repl. 2002) and AWCC R. 099.13.

III. DISCUSSION

Arkansas Code Annotated § 11-9-702(a)(4) (Repl. 2002) provides as follows:

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 subdivisions (a)(1)-(3) of this section.

In addition, AWCC R. 099.13 reads:

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.

See generally Johnson v. Triple T Foods, 55 Ark. App. 83, 85, 929 S.W.2d 730 (1996)(discussing, *inter alia*, Rule 13).

While Claimant communicated that she did not object to a dismissal, that is not tantamount to seeking a non-suit of her claim. In any case, the Commission has been reluctant to grant non-suits on the basis that § 11-9-702(a)(4) and Rule 13 require a failure to prosecute as a prerequisite to dismissal. *See Hooker v. E.C.*

Rowlett Const. Co., 2005 AWCC 20, Claim No. F012906 (Full Commission Opinion filed February 8, 2005). However, with regard to Respondents' motion, the evidence at bar clearly shows that Claimant has failed to prosecute her claim, and that reasonable notice of the motion to dismiss and of the September 18, 2007 hearing thereon was provided to her. Hence, dismissal of the instant claim is justified under § 11-9-702(a)(4) and Rule 13.

That leaves the question of whether the dismissal should be with or without prejudice. The Commission possesses the authority to dismiss claims with prejudice. *Loosey v. Osmose Wood Preserving Co.*, 23 Ark. App. 137, 744 S.W.2d 402 (1988). This includes claims dismissed under Rule 13. *Johnson*, 55 Ark. App. 83, 929 S.W.2d 730. In *Abo v. Kawneer Co.*, 2005 AWCC 226, Claim No. F404774 (Full Commission Opinion filed November 15, 2005), the Commission wrote: "In numerous past decisions, this Commission and the Appellate Courts have expressed a preference for dismissals *without prejudice*." (emphasis added)(citing *Professional Adjustment Bureau v. Strong*, 75 Ark. 249, 629 S.W.2d 284 (1982)). Based upon the facts here, and in light of the law, the dismissal of this claim should be *without prejudice*.

IT IS SO ORDERED.

O. MILTON FINE II
Administrative Law Judge