

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F610957

DANIEL J. DALTON, EMPLOYEE	CLAIMANT
VAN HORN CONSTRUCTION, INC., EMPLOYER	RESPONDENT
AMERISURE MUTUAL INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED NOVEMBER 21, 2007

Hearing before Administrative Law Judge O. Milton Fine II on November 14, 2007 in Russellville, Pope County, Arkansas

Claimant, *pro se*, did not appear.

Respondents represented by Mr. Lee J. Muldrow, Attorney at Law, Little Rock, Arkansas.

BACKGROUND

This matter comes before the Commission on Respondents' motion to dismiss. A hearing on the motion was conducted on November 14, 2007, in Russellville, Arkansas. The Claimant, *pro se*, did not appear. Respondents were represented by Mr. Lee J. Muldrow, Attorney at Law, of Little Rock, Arkansas. No testimony was taken in the case. The record consists of Commission Exhibit 1, comprised of five pages, and Respondents' Exhibits 1 and 2, comprised of one page each.

On September 28, 2006, Claimant filed the instant claim, alleging that he suffered a work-related injury to his back on September 21, 2006. Respondents have controverted the claim in its entirety. Their counsel attempted without success to engage Claimant to begin the discovery process. Finally, on September 12,

2007, Respondents sent a letter to the Commission in which they moved to dismiss the claim under AWCC R. 099.13 and Ark. Code Ann. § 11-9-702(a)(4) (Repl. 2002). Claimant was copied on this correspondence. That same day, Respondents' counsel wrote Claimant, enclosing the motion and informing him that if he was going to pursue benefits, he would have to be deposed. However, Claimant did not respond to the letter.

On September 17, 2007, I wrote Claimant, informing him of the motion and advising him that he had 15 days in which to respond. The letter, which was sent by certified mail, was returned to the Commission unclaimed. On October 3, 2007, a notice of the November 14, 2007 hearing was sent to Claimant by certified and first-class mail. Again, certified mail was returned unclaimed. But the notice that was sent by first-class mail did not come back. On November 6, 2007, the parties were notified that the time of the scheduled hearing had been changed. This letter, sent to Claimant by first-class mail, did not return to the Commission.

Respondents' counsel asked that the claim be dismissed *without prejudice*.

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. No bona fide request for hearing has been made by the Claimant within the last six months.
3. The Claimant has failed to prosecute his claim.
4. Claimant was given reasonable notice of the motion to dismiss and the hearing thereon.
5. This claim should be, and hereby is, dismissed *without prejudice* pursuant to Ark. Code Ann. § 11-9-702(a)(4) (Repl. 2002) and AWCC R. 099.13.

DISCUSSION

Arkansas Code Annotated § 11-9-702(a)(4) 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 § 11-9-702(a)(4) and Rule 13).

The evidence adduced at the hearing clearly shows that Claimant has failed to make a bona fide hearing request within the requisite period and has failed to prosecute his claim. Hence, the claim is subject to dismissal. Respondents have asked that the dismissal be *without prejudice*. This comports with the law. *See Abo*

v. Kawneer Co., 2005 AWCC 226, Claim No. F404774 (Full Commission Opinion filed November 15, 2005)(“In numerous past decisions, this Commission and the Appellate Courts have expressed a preference for dismissals without prejudice.”) For the foregoing reasons, Respondents’ motion is well-founded and is hereby granted, dismissing this claim *without prejudice*.

IT IS SO ORDERED.

O. MILTON FINE II
Administrative Law Judge