

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NOs. F012139 & F301886

FREEDA EVANS, EMPLOYEE

CLAIMANT

BAXTER INTERNATIONAL, INC., EMPLOYER

RESPONDENT

**AMERICAN MFG. MUTUAL INSURANCE COMPANY,
CARRIER/TPA**

RESPONDENT

OPINION FILED NOVEMBER 13, 2007

Hearing before Administrative Law Judge O. Milton Fine II on September 5, 2007, in Mountain Home, Baxter County, Arkansas.

Claimant represented by Mr. Frederick S. "Rick" Spencer, Attorney at Law, Mountain Home, Arkansas.

Respondents represented by Mr. Tom Harper, Jr., Attorney at Law, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On September 5,, 2007, the above-captioned claim was heard in Mountain Home, Arkansas. A prehearing conference took place on April 30, 2007. A prehearing order entered that same day pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the order.

Stipulations

At the hearing, the parties discussed the stipulations set forth in Commission Exhibit 1. After adding the final stipulation at the hearing regarding controversion, they are the following six, which I accept:

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

2. The employee/employer/carrier relationship existed at all relevant times, including on or about April 29, 1999 and June of 2001.
3. The Claimant sustained a compensable injury to her right wrist/hand on April 29, 1999.
4. The Claimant's right hand/wrist injury of April 29, 1999 has been accepted as compensable and all benefits have been paid, including Dr. Heinzelmann's rating of nineteen percent (19%) to the right arm below the elbow.
5. On May 18, 2001, the Claimant's average weekly wage was \$490.00, which entitles the Claimant to compensable rates, if applicable, of \$327.00 and \$245.00.
6. Respondents have controverted all further benefits.

Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit 1. Claimant requested a clarification that all other issues were being reserved. The issues were thus as follows:

Claimant:

1. Whether the Claimant sustained a compensable injury to her right knee and leg.
2. Whether the Claimant is entitled to reasonable and necessary medical care.
3. The Claimant reserves all other issues.

Respondents:

1. Whether the Claimant sustained compensable injuries to her right knee and leg.
2. Whether the Claimant is entitled to reasonable and necessary medical care.
3. Whether the Claimant is entitled to attorney's fees.
4. The issue of permanency is reserved.
5. Whether sanctions are warranted under Ark. Code Ann. § 11-9-714 and 11-9-717.

Contentions

Claimant:

1. The Claimant contends that she sustained a compensable injury to her right knee and leg and is entitled to related benefits, including payment for her recent surgery to her right knee by Dr. Charles Varela.

Respondents:

1. Respondents deny that Claimant received an injury of any sort in June 2001 and further deny that Claimant is entitled to any compensation benefits from the incident of May 18, 2001.
2. Respondents also contend that this claim should be dismissed for want of prosecution, as elaborated in Respondents' Motion to Dismiss previously filed.
3. Respondents contend there are no constitutional issues for consideration.
4. Prior to receipt of the claim letter dated February 14, 2003, Baxter had no report, record, or notice of this alleged injury. However, on May 18, 2001,

Claimant reported an injury to both legs and back and was treated by the nurse for an abrasion to her right knee. There were no further complaints from the Claimant until April 12, 2002, at which time she requested a medical evaluation for problems she attributed to an incident on May 13, 2001. Baxter agreed to an evaluation of Claimant by Dr. Anthony McBride, who found no causal relationship between the Claimant's subjective complaints and an incident of May 18, 2001. The compensability of this alleged injury has been denied by Respondents and the claim is fully controverted.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports, documents, and other matters properly before the Commission; and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2002):

1. The Arkansas Workers' Compensation Commission has jurisdiction over these claims.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. The claims should be and are hereby dismissed *without prejudice* pursuant to AWCC R. 099.13 for want of prosecution.
4. Respondents did not present evidence or argument in support of their request for sanctions under Ark. Code Ann. §§ 11-9-714 and 11-9-717; hence, this is summarily denied.

5. The substantive issues litigated in the hearing are moot in light of the above finding and will not be addressed.

PRELIMINARY RULINGS

Motion to Dismiss

Procedural History. At the beginning of the hearing, Respondents's counsel argued in favor of their motion to dismiss, which was filed on September 28, 2006. Counsel contended that the instant "claim should be dismissed for want of prosecution because it just sat around and nothing happened until we initiated the action by filing the motion [to dismiss]." In response, Claimant's counsel asserted the following:

May it please the Commission, Your Honor, there is a real good reason for these workers' compensation claims taking the extent of time that was taken in this case. And the reason is that claimants do not have deposition, monies for depositions of doctors, and we have to, really, the only way we can get the evidence that the law requires, is to try to get the doctors to sign letters indicating their opinions. And this was the reason for the delay in prosecution.

The Commission files on these claims (the pertinent documents which I have blue-backed and referenced herein) reflect that Claimant's counsel on February 14, 2003 wrote the Commission that he was filing a claim on behalf of Claimant for a April 26, 1999 incident where Claimant's hand was crushed by gas cylinder bottles (Claim No. F012139) and an injury she allegedly sustained on or about June 2001 when a forklift ran into her and injured her right hand, leg and knee (Claim No. F301886). As part of that letter, Claimant served Respondents with discovery and requested a hearing "at the earliest convenience of the Commission" on, *inter alia*, temporary total disability, medical expenses and controversion.

On July 3, 2003, a prehearing order was entered by the previous ALJ that returned the files to the Commission's general files because Claimant's counsel represented that he was not ready for a hearing due to the incomplete discovery in the case. No further action was taken until Respondents filed a Motion to Dismiss for Want of Prosecution on May 26, 2004. Therein, Respondents argued that all benefits have been paid in connection with Claim No. F012139, which concerns the April 29, 1999 right hand/wrist injury, and that no further action had been taken in Claim No. F301886, which concerns the alleged injuries arising from the June 2001 forklift accident.

The previous ALJ wrote Claimant's counsel on June 3, 2004, and asked for a response to the motion to dismiss within 15 days. Counsel duly replied on June 17, 2004, stating: "[i]n response to your correspondence dated June 3, 2004, the claimant is requesting a hearing in regards to this matter. We are maintaining our position that this is a compensable injury." Respondents' counsel replied on June 9, 2004, maintaining that the claims should be dismissed because of Claimant's failure to take action in the 11 months since the files were returned to the Commission's general files.

The ALJ set a hearing on the motion to dismiss for August 4, 2004. However, Respondents' counsel moved for a continuance because of his scheduled presence out of state on that date. The hearing was rescheduled for October 6, 2004. Again, however, Respondents' counsel asked for a continuance. This time, the basis for his request was that he did not wish to journey to Mountain Home solely for a hearing on this motion. Because of his reticence in prosecuting his motion in a hearing, along with Claimant's expressed desire to proceed on a hearing on the merits and the then-recent ruling in *Dillard v. Benton Cty. Sheriff's Off.*, 87 Ark. App. 379, 192 S.W.3d 287 (2004), the previous ALJ

on October 1, 2004 notified the parties that the motion to dismiss would be held “in abeyance while we sort out how best to proceed.” A telephone conference with the parties was scheduled for October 21, 2004. The ALJ dictated a file memo on that conference, but sent no letter to the parties confirming the substance of the call.

Respondents’ attorney wrote the Commission on November 3, 2004 that the parties “are currently engaged in communication trying to work out an amicable resolution of this claim, but a final decision has not yet been reached.” On November 16, 2004, Claimant’s counsel wrote that his client decided not to settle. He asked that a hearing be set for March 2, 2005 regarding the June 2001 incident and that a change of physician order be allowed regarding the 1999 wrist injury. The previous ALJ on November 23, 2004, asked Respondents for a response. Respondents’ counsel on November 23, 2004 wrote that they agreed to both the hearing date and the change of physician.

In due course, the ALJ on December 1, 2004 issued a prehearing order scheduling the hearing for March 2, 2005. Respondents’ counsel on December 8, 2004 sent a letter outlining his understanding of the issue to be litigated at the hearing. The ALJ on December 13, 2004 asked Claimant to confirm whether he agreed that the only issue would be the compensability of the right leg/knee injury. No response thereto is in the file. Claimant’s counsel on January 23, 2005 wrote to request an extension of the February 2, 2005 evidentiary deadline. Respondents wrote to indicate that they did not object, but reiterated their understanding that the hearing would only concern the right knee and leg. The previous ALJ granted the parties’ request on January 26, 2005 and extended the deadline for exchanging documentary evidence to seven days prior to the hearing. He reiterated that it was his understanding that the sole issue at the hearing was to be the

compensability of the alleged right leg/knee injury in 2001 in Claim No. F301886. Respondents' counsel on February 9, 2005 again stated that he understood the sole issue to be litigated was the compensability of the alleged 2001 right knee/leg injury. Claimant's counsel on that same date requested that the Commission issue witness subpoenas to the forklift driver who allegedly struck the Claimant and to the nurse who was on duty at the time. Respondents on February 14, 2005 replied that it was not their intention to dispute whether the accident occurred, but only the presence of an injury resulting from the accident.

Claimant's counsel on February 17, 2005 wrote to the Commission that "I have contacted [Respondents' counsel] who has no objection to the continuance of the hearing set for March 2, 2005." The previous ALJ on February 18, 2005 wrote the parties and stated in pertinent part:

As per your agreement and discussions, the hearing scheduled for this case for March 2, 2005 is hereby canceled and this case is being returned to the Commission's general files pending resolution of your attempts to settle this matter.

Claimant on October 10, 2005 wrote the Commission and enclosed records related to treatment of Claimant's 1999 hand/wrist injury. In turn, Respondents sent their own reports in on October 19, 2005 regarding Claim No. F012139. On April 10, 2006, they reissued a check in the amount of \$7,684.17, representing payment for the 19 percent (19%) rating to her right hand assessed by Dr. Heinzelmann. The original was issued four years earlier, but apparently did not reach Claimant.

On September 21, 2006, Respondents filed another Motion to Dismiss for Want of Prosecution under AWCC R. 099.13. Therein, they contended that "[t]he last legal activity

on both claims occurred on February 18, 2005, when the claims were returned to the Commission's general files by [the prior ALJ]." On September 28, 2006, Claimant was notified that he had 15 days to respond. His counsel responded on October 9, 2006 by again requesting a hearing. Two days later, he wrote to state that the sole issue would be whether Claimant suffered a compensable right knee/leg injury on May 18, 2001. Respondents' counsel wrote on October 12, 2006 to request a hearing on the motion to dismiss. The prior ALJ set a telephone conference for November 13, 2006. That, in turn, led to a new round of prehearing questionnaires and, eventually, to a hearing on both the motion and on the merits of Claim No. F301886 on September 5, 2007.

Analysis. The Commission is authorized under Ark. Code Ann. § 11-9-205(a)(1)(A) (Repl. 2002) "[t]o make such rules and regulations as may be found necessary[.]" Under this authority, the Commission promulgated AWCC R. 099.13. *Dura Craft Boats, Inc. v. Daugherty*, 247 Ark. 125, 444 S.W.2d 562 (1969); *Johnson v. Triple T Foods*, 55 Ark. App. 83, 929 S.W.2d 730 (1996). *Contra Dillard, supra* ("Rule 13 . . . allows a dismissal . . . pursuant to Ark. Code Ann. § 11-9-702(b)(4), the portion of the statute relating to additional benefits"). This rule provides in relevant part:

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.

The evidence shows that Claimant has made three separate requests for a hearing on these claims. Twice, the files were returned to the Commission's general files. The first time, the 11-month period of inactivity led to the filing of the first motion to dismiss. Only Respondents' reluctance to appear at a hearing on their own motion kept it from being

litigated in 2004. When the claims were to be heard on March 2, 2005, the parties appeared to be headed for a hearing on the merits. Claimant even procured subpoenas for her witnesses from the Commission. But another continuance was requested, and the file returned to general files once again. This time, some reports were filed on Claim No. F012139, which concerns the 1999 wrist injury, during the period that file was in general files. But by all accounts there is no issue in that claim; it was accepted and all benefits, including the impairment rating assigned by Dr. Heinzelmann, was paid. The hearing has always to have been only on Claim No. F301886, concerning the 2001 forklift accident. But that file languished again in general files from February 18, 2005 to October 9, 2006, when Claimant once again requested a hearing in response to a motion to dismiss.

Claimant's only explanation for the 19-month gap in activity on the file was only that his client could not afford to depose her physicians and that it took that long to procure letters regarding their opinions. But neither Claimant nor Respondents has offered any such letters into evidence. In fact, there is a 20-month-plus gap in the records in evidence; from Claimant's last visit at the Mountain Home Medical Group on December 1, 2004 until her operative report by Dr. Charles Varela on August 10, 2006. Claimant has never indicated that the reason for the delay in prosecution was caused by her surgery. Since the surgery did not occur until a little over a month prior to the filing of the most recent motion to dismiss, such an argument would not be persuasive anyway.

As the Commission has held, "it is well established and commonly accepted that a person has an affirmative duty to diligently prosecute a case and that inactive and stale claims should not be allowed to remain and clutter an administrative tribunal's docket." *McAbee v. TCC Illinois/Polar Express*, Claim No. E214857 (Full Commission Opinion filed

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March 25, 1994). See *Johnson v. Triple T Foods, Inc.*, Claim No. E219745 (Full Commission Opinion filed March 23, 1994), *aff'd*, 55 Ark. App. 83, 929 S.W.2d 730 (1996).

For the foregoing reasons, dismissal of the instant claims are justified under Rule 13. That, however, 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." (citing *Professional Adjustment Bureau v. Strong*, 75 Ark. 249, 629 S.W.2d 284 (1982); *Hutchinson v. North Arkansas Foundry*, Claim No. D902143 (Full Commission Opinion filed October 23, 1991)). Based upon the facts here, and in light of the law, the dismissal of these claims should be *without prejudice*.

Request for Sanctions

Respondents listed as an issue for the hearing whether sanctions are warranted under Ark. Code Ann. §§ 11-9-714 and 11-9-717. However, no evidence or argument was presented in support of this. Hence, the request for sanctions is summarily denied.

CASE IN CHIEF

Because of the dismissal of the claims pursuant to AWCC 099.13, the substantive issues litigated in the hearing will not be addressed.

CONCLUSION

Respondent's motion to dismiss is granted. The instant claims are dismissed *without prejudice*. Respondents' request for sanctions is denied.

IT IS SO ORDERED.

Hon. O. Milton Fine II
Administrative Law Judge