

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F303726

KEVIN J. GAUER,EMPLOYEE	CLAIMANT
EATON CORPORATION,EMPLOYER	RESPONDENT
GALLAGHER BASSETT SERVICES,CARRIER	RESPONDENT

**OPINION FILED NOVEMBER 27,2007**

Hearing before ADMINISTRATIVE LAW JUDGE CHANDRA HICKS, on November 21, 2007, in Mountain Home, Baxter County, Arkansas.

The claimant is represented by the HONORABLE Frederick S. "Rick" Spencer, Attorney at Law, Mountain Home, Arkansas. After notifying the Commission, he failed to appear at the hearing.

The respondents were represented by the HONORABLE Cynthia Rogers, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held on November 21, 2007, to determine whether the above-referenced matter should be dismissed for failure to prosecute pursuant to Dillard v. Benton County Sheriff's Office, 87 Ark. App. 379, 192 S.W.3d 287(2004).

The record consists of the transcript of the November 21, 2007 hearing, and the exhibits contained therein. The Commission's file has been blue-backed and made Commission's Exhibit No. 2, as it is hereby incorporated by reference.

After consideration of the documentary exhibits, I find that the respondents' Motion to Dismiss should be granted.

**DISCUSSION**

The claimant sustained admittedly bilateral carpal tunnel syndrome and ulnar nerve injuries, on or about December 15, 2002, while working for the respondent-employer. The respondents paid

appropriate temporary total disability compensation and medical benefits for the claimant's compensable injuries. The respondent also accepted a 10% rating to the right upper extremity, and a 19% rating to the left upper extremity, as they have paid a total of \$13,532,81, in said benefits.

Subsequently, on December 6, 2005, the claimant filed a Form AR-C with the Commission, wherein he requested initial and additional benefits. The matter was referred to an Administrative Law Judge for adjudication. On January 20, 2006, the claimant filed a response to the Prehearing Questionnaire wherein he requested additional medical treatment for his compensable injuries. The respondents controverted this claim for additional benefits. A Prehearing Telephone Conference was scheduled in this matter for April 20, 2006.

At the time of the prehearing conference, the claimant's attorney requested a change of physician. Therefore, the filed was returned to the Clerk of the Commission, for reassignment to the Medical Cost Containment Division for consideration of the change of physician request.

An Order was entered by the Commission on December 15, 2006, granting the claimant a change of physician from Dr. Anthony McBride to Dr. Jeannie Anderson. In a letter dated December 22, 2006, the claimant's attorney advised the Commission that the claimant no longer wanted a change of physician. In an Order dated December 29, 2006, the Commission set aside the Change of Physician Order.

Since this time, there has been no further attempt by the claimant to pursue his claim. Therefore, on September 13, 2007, the respondents filed a Motion to Dismiss the case.

In a letter dated September 18, 2007, the Commission sent a Notice to the claimant's attorney and the claimant, wherein it advised them of the filing of the Motion to Dismiss by the respondents, and of a deadline for filing a response in the matter. The claimant's attorney subsequently requested a hearing on the motion.

In a letter dated November 20, 2007, the claimant's attorney advised the Commission that the claimant had no objection to the matter being dismissed, and that the claimant would not be attending the hearing.

A hearing was in fact held on November 21, 2007, on the respondents' Motion to Dismiss. The claimant and his attorney failed to appear at this hearing. However, the respondents' attorney did appear at the hearing.

#### **FINDINGS FACT AND CONCLUSIONS OF LAW**

A review of the evidence shows the claimant has had ample opportunity to pursue this case but has failed to do so, and he and his attorney also failed to appear at the scheduled hearing.

There are two provisions for dismissal of claims:

Ark. Code Ann. §11-9-702(a)(4):

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.

Rule 099.13:

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)

After review, I make the following findings of fact:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The claimant has had ample opportunity to pursue this case but no action has been taken by the claimant to prosecute his claim.
3. After giving notice to the Commission, the claimant and his attorney failed to appear at the November 21, 2007, hearing.
4. The claimant does not object to the case being dismissed.
5. That the respondents' Motion to Dismiss should be granted without prejudice pursuant to Rule 099.13.

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**ORDER**

Based on the foregoing Findings of Fact and Conclusions of Law, I

have no alternative, but to dismiss this claim in its entirety.  
Therefore, this case is hereby dismissed without prejudice for  
failure to prosecute pursuant to Commission Rule 099.13.

**IT IS SO ORDERED.**

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CHANDRA HICKS  
Administrative Law Judge