

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NOS. E910464, E913530 & E913531

JAMES M. LIAROMATIS, EMPLOYEE	CLAIMANT
BAXTER COUNTY REGIONAL HOSPITAL, EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, CARRIER/TPA	RESPONDENT

OPINION FILED MAY 7, 2007

Hearing before Administrative Law Judge O. Milton Fine II on April 13, 2007 in Mountain Home, Baxter County, Arkansas.

Claimant, *pro se* on Claims Nos. E913530 and E913531, did not appear.

Claimant represented by Mr. Frederick S. "Rick" Spencer, Attorney at Law, Mountain Home, Arkansas, on Claim No. E910464.

Respondents represented by Mr. Walter A. Murray, 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 April 13, 2007 in Mountain Home, Baxter County, Arkansas. The Claimant did not appear, despite the fact that he is *pro se* on Claim Nos. E913530 and E913531. He was represented by Mr. Frederick S. "Rick" Spencer of Mountain Home on Claim No. E910464. Respondents were represented by Mr. Walter A. Murray, Attorney at Law, of Little Rock, Arkansas.

At the hearing, to clarify the procedural history of the case, the undersigned admitted as Commission's Exhibit 1 the documents in the files that detail what has

transpired since Respondents filed their Motion to Dismiss on January 19, 2007. In addition, the undersigned has blue-backed certain other documents from the claim files that are pertinent to the matter at hand.

While these three (3) files are voluminous, a detailed history is not necessary for purposes of the motion to dismiss. With regard to Claim Nos. E913530 and E913531, Administrative Law Judge Mark Churchwell on August 8, 2005 wrote the parties, stating that the hearing he had scheduled for September 7, 2005 on the files was cancelled and that he was returning the files to the Commission's general files. He further stated that he would "not proceed on these claims without resolution of the appeal in Claim No. E910464." This other claim was litigated through the Arkansas Court of Appeals, which issued its mandate on June 13, 2006.

On September 19, 2006, Respondents wrote the Clerk of the Commission, asking for a hearing on Claim No. E910464 regarding the brief costs that the Arkansas Court of Appeals had directed Claimant to pay. The undersigned informed the parties on October 26, 2006 that a prehearing conference on this matter was scheduled for December 11, 2006. Following that conference, the undersigned sent a letter to the parties confirming the substance of the conference, that there was a need for a hearing on issues in addition to the brief cost matter remaining under Claim No. E910464. Prehearing questionnaires were also sent to the parties that day. Claimant was informed by letter on January 3, 2007, that if his past-due responses to the questionnaire were not received within ten (10)

days, the file would be returned to the Commission's general files. Because his responses were not forthcoming, on January 16 the file was returned to the Commission's general files.

On January 19, 2007, the undersigned set all three (3) of the above-captioned claims for a second prehearing conference on January 29. Also on January 19, Respondents filed a motion to dismiss Claim No. E910464 under AWCC R. 099.13 and Ark. Code Ann. § 11-9-702(d), contending that Claimant had failed to file a prehearing questionnaire response and to request a hearing within the previous six (6) months. Claimant filed his response to the prehearing questionnaire on January 22. Following the January 29 conference, the undersigned issued an order setting forth the stipulations, issues, and contentions of the parties and scheduling all three (3) claims for a hearing on the merits and on the motion dismiss for March 7, 2007.

Claimant's counsel on February 26 filed a motion to withdraw from all three (3) cases under Ark. R. Prof. Cond. 1.16, contending that Claimant had failed to keep in contact with him. In addition, counsel requested a continuance of the March 7 hearing. Respondents objected to the motion to withdraw and the continuance request, and stated that they were renewing their motion to dismiss. This request was captioned under Claim No. E910464 only. In response to this exchange, the undersigned informed the parties that the motion to withdraw was being taken under advisement, and that because of a discrepancy among the parties regarding which claims were to be heard, Claimant was directed to clarify within (10) days which

claim(s) he was requesting to be heard. Claimant's counsel advised that a hearing was only necessary on Claim Nos. E910530 and E910531.

On March 14, 2007, the undersigned issued an order granting Claimant's counsel's request to withdraw from Claim Nos. E910530 and E910531, but denying the request regarding E910464 because of the pending motion to dismiss. The order scheduled a hearing on the motion to dismiss for April 13, 2007. Respondent asked the Commission on March 19 that his motion to dismiss be extended to include all three (3) claims. By letter dated March 22, the undersigned wrote Claimant individually by certified and first-class mail to inform him that he should respond to Respondents' motion to dismiss within ten (10) days and appear at the April 13 hearing to respond regarding Claim Nos. E910530 and E910531. Both letters were returned, despite the fact that the address used for the letters was obtained from Claimant's counsel as being the most recent. As stated above, while both counsels appeared at the hearing, Claimant did not.

At the hearing, Respondents argued that Claim Nos. E910530 and E910531 had been on and off the Commission's docket a number of times, and asked that it be dismissed. As for Claim No. E910464, Respondents and Claimant's counsel agreed that the Commission probably lacked jurisdiction over the claim because it had been litigated through the Arkansas Court of Appeals, with Claimant losing on the compensability issue. See *Liaromatis v. Baxter Cty. Reg. Hosp.*, No. CA05-1096 (Ark. Ct. App. May 24, 2006)(unpublished). Claimant's counsel confirmed that there had been a problem with Claimant maintaining contact, to the extent that

Claimant's scheduled deposition had to be cancelled. He also confirmed that the address the Commission used to inform Claimant of the hearing should have been a good address for him. Respondents stated that Claim Nos. E910530 and E910531 were accepted as compensable and Claimant had requested additional benefits, leading to the motion to dismiss being brought under Ark. Code Ann. § 11-9-704(d).

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 these claims.
2. Claim No. E910464 came to an end some time ago; for that reason, the motion to dismiss is denied.
3. Claim Nos. E910530 and E910531 should be, and hereby are, dismissed without prejudice pursuant to AWCC R. 099.13.

DISCUSSION

Arkansas Code Annotated § 11-9-702(d) provides as follows:

If within six (6) months after the filing of a claim for additional compensation, no bona fide request for a hearing has been made with respect to the claim, the claim may, upon motion and after hearing, if necessary, be dismissed without prejudice to the refiling of the claim within the limitation period specified in subsection (b) of this section.

In addition, AWCC R. 099.13 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.

See generally Johnson v. Triple T Foods, 55 Ark. App. 83, 85, 929 S.W.2d 730 (1996).

As the parties agreed at the hearing, Claim No. E910464 was fully litigated to conclusion in May 2006, with the determination that the claim was not compensable. This is in contrast to the position given at the December 11, 2006 prehearing conference, when the undersigned was informed that additional issues remained to be litigated under the claim (in addition to the briefing costs matter). Irrespective of whether any issues remain, this claim came to an end some time ago, and nothing of it remains to dismiss. For that reason, the motion to dismiss is denied as to this claim.

As for Claim Nos. E910530 and E910531, it does not appear from a review of the evidence that there was a failure to request a hearing within the requisite period of time under § 11-9-702(d). But it is clear that Claimant has failed to prosecute these claims. He has neglected to stay in contact with anyone connected with this case or to take any steps to respond, in the face of entreaties from his former counsel and despite explicit instruction from the Commission. Consequently, the motion to dismiss will be granted with respect to these claims, but only under Rule 13.

That, however, leaves the question of whether the dismissals 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, supra*. 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 at hand, and in light of the law, the dismissal of Claim Nos. E910530 and E910531 should be without prejudice.

IT IS SO ORDERED.

O. MILTON FINE II
Administrative Law Judge