

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. F608359**

<b>PAUL LOVELL, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>OZARK TIMBER TREATING, INC., EMPLOYER</b>	<b>RESPONDENT</b>
<b>CINCINNATI INDEMNITY COMPANY, CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED OCTOBER 12, 2007**

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

Claimant, *pro se*, did not appear.

Respondents represented by Ms. Cynthia E. Rogers, Attorney at Law, North 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 *pro se*, did not appear. Respondents were represented at the hearing by Ms. Cynthia Rogers, Attorney at Law, of North Little Rock, Arkansas. No testimony was taken in the case. The record consists of Commission's Exhibit 1, comprised of five (5) pages of documents that detail the history of the case after the motion to dismiss was filed, along with the Form AR-C, the motion to dismiss, correspondence from the Commission dated March 2, April 17, and May 21, 2007, and the Claimant's and Respondents' prehearing questionnaires, all which I have blue-backed.

The instant claim concerns an alleged injury to the Claimant's right left leg, ankle and foot on July 14, 2006. On August 1, 2006, Claimant filed a claim for

benefits. Respondents controverted the claim based upon Claimant's refusal to submit to a drug test. Claimant listed his address as 644 Highway 254, Leslie, Arkansas 72645, and his prehearing questionnaire was successfully sent to him at that address. He filed the completed questionnaire February 21, 2007. Respondents' completed questionnaire was filed on March 1, 2007. A prehearing telephone conference was scheduled for April 16, 2007 at 1:30 p.m., and Claimant was sent notification of this by mail at the above address. At the appointed time, I attempted to contact Claimant at the number he had provided the Commission. However, I was not able to reach him. That day, I sent him a letter to the parties advising them that the conference was rescheduled for May 21, 2007 at 9:30 a.m. I warned Claimant that if he was not available for the conference, I would assume that he had withdrawn his request for a hearing and would return his file to the Commission's general files. On May 21, 2007, I again was not able to reach Claimant. For that reason, on that date I wrote Claimant that I was returning his file to the Commission's general files. That same day, Respondents wrote the Commission that because of Claimant's failure to make himself available for two prehearing telephone conferences, they were moving to dismiss the claim under AWCC R. 099.13. I sent Claimant a letter by certified mail on May 23, 2007, advising him that he had fifteen (15) days to respond to the motion. The letter was returned to the Commission undelivered. However, none of the previous correspondence, sent by first-class mail, was returned.

The hearing on the motion to dismiss was originally scheduled for July 16, 2007. Claimant was given notice of the hearing by certified mail. However, this

was also returned, undelivered, to the Commission. The hearing was rescheduled for September 18, 2007 at 12:00 p.m. Notice of the hearing was sent to Claimant by first-class mail, and was not returned to the Commission.

Claimant failed to appear at the September 18 hearing. Respondents' attorney appeared and presented argument along the lines of the motion to dismiss.

## **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 his 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 AWCC R. 099.13.

## **III. DISCUSSION**

AWCC R. 099.13 provides:

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).

Claimant without cause failed to make himself available for two prehearing conferences. Moreover, he has failed to communicate with the Commission since filing his prehearing questionnaire. While he has failed to sign for and pick up certified letters sent to him by the Commission, the fact that the notice sent to him by first-class mail of the hearing was not returned indicates that the address used is still a good one. The evidence at bar clearly shows that Claimant has failed to prosecute his claim, and that reasonable notice of the motion to dismiss and of the September 18, 2007 hearing thereon was provided to him. Hence, dismissal of the instant claim is justified under 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*.

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**IT IS SO ORDERED.**

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O. MILTON FINE II  
Administrative Law Judge