

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. F609617**

<b>JOSEPH L. MASON, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>AID TEMPORARY SERVICES, EMPLOYER</b>	<b>RESPONDENT</b>
<b>AMERICAN HOME ASSURANCE CO., CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED OCTOBER 26, 2007**

Hearing before Administrative Law Judge O. Milton Fine II on October 2, 2007 in Batesville, Independence County, Arkansas.

Claimant, *pro se*, did not appear.

Respondents represented by Mr. Glenn Lovett, Jr., Attorney at Law, Jonesboro, Arkansas.

**I. BACKGROUND**

This matter comes before the Commission on Respondents' motion for sanctions. A hearing on the motion was conducted on October 2, 2007, in Batesville, Arkansas. The Claimant, who is *pro se*, did not appear. Respondents were represented at the hearing by Mr. Glenn Lovett, Jr., Attorney at Law, of Jonesboro, Arkansas. No testimony was taken in the case. The record consists of Commission Exhibit 1, comprised of two pages, and Respondents' Exhibits 1 through 5, comprised of 20 pages.

The instant claim concerns an alleged fall suffered by Claimant on August 21, 2006 that Respondents contend was ideopathic. On September 14, 2006, Respondents through their counsel notified Claimant that they were controverting his claim in its entirety. This letter has been blue-backed to the record in this case. On September 25, 2006, counsel sent to Claimant interrogatories and requests for

production of documents, along with an authorization to disclose health information for him to sign. See Respondents' Exhibits 1-2. No response was forthcoming. On May 8, 2007, a prehearing conference was held between the parties and the previously assigned administrative law judge. That day, the ALJ wrote the parties. The letter, which has been blue-backed to the record in this case, instructed Claimant to answer the outstanding discovery. On May 9, 2007, Respondents' counsel sent Claimant a letter that explained his obligation to answer and also contained sample interrogatories and requests for production and sample answers thereto to give Claimant some instructions on what was being requested. See Respondents' Exhibit 3. Counsel sent another reminder by letter on May 19, 2007, which has been blue-backed to the record. Again, Claimant did not respond. Respondents' counsel on June 14, 2007, wrote the Commission (and copied Claimant on the letter, which has been blue-backed to the record) to again state that Claimant had not responded to the discovery. On June 18, 2007, Respondents filed a motion to compel discovery. By letter on June 20, 2007, which has been blue-backed to the record, I gave Claimant an opportunity to respond to the motion within 15 days. However, he did not respond. On July 12, 2007, I issued an order directing Claimant to answer the discovery within 15 days. I wrote that failure "to adequately obey the terms of" the order could result in the imposition of sanctions. See Respondents' Exhibit 4. However, Claimant again failed to answer the discovery. On August 6, 2007, Respondents filed the instant motion for sanctions, asking that the instant claim be dismissed with prejudice due to Claimant's failure to comply with the order to compel. See Respondents' Exhibit 5. On August 10,

2007, I requested that Claimant supply a response to the motion within ten days. This letter has also been blue-backed to the record. Again, no response was forthcoming. As reflected in Commission Exhibit 1, Claimant was notified of the October 2, 2007 hearing through an amended notice dated August 27, 2007. The certified notice was signed for on August 28, 2007.

As related at the hearing, at 8:45 a.m. on October 2, 2007, I received a phone call from my assistant. Claimant's wife had just contacted her and related that Claimant has taken a new job and had left for the job the previous evening and would not be attending the hearing. His spouse requested a continuance. Due to the lateness of the request, the fact that Claimant was apparently aware of the conflict earlier but made no effort to promptly notify the Commission, and the fact that the court reporter, opposing counsel and me were already *en route* to Batesville for the hearing, the request was denied. At the hearing, Respondents' counsel objected to the continuance.

## **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, 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 this claim.

2. Claimant has willfully and repeatedly failed without justification to respond to Respondents' discovery, even in the face of an order to compel discovery from the Commission.
3. Claimant was provided reasonable notice of the motion for sanctions and of the October 2, 2007 hearing thereon.
4. Dismissal of this claim *with prejudice* is warranted under Ark. Code Ann. § 11-9-702(a)(4) (Supp. 2007) due to Claimant's conduct.

### **III. DISCUSSION**

As recounted above, Claimant had ample notice of the October 2, 2007 hearing on the motion for sanctions. His last-minute continuance request described above was properly denied. Apparently, he was aware of the scheduling conflict posed by his new job at least the day before the hearing, but did not make a more prompt request. Lack of diligence is a factor to consider in denying a continuance request. *Dunaway v. Garland County Fair*, \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (Ark. Ct. App. Dec. 20, 2006); *Morris v. Cullipher*, 306 Ark.646, 816 S.W.2d 878 (1991). It is not reasonable to wait and make such a request when the hearing is less than two hours away and the other hearing participants are *en route* thereto.

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. 099.16. *Loosey v. Osmose Wood Preserving Co.*, 23 Ark. App. 137, 744 S.W.2d 402 (1988). This rule provides in pertinent part:

Depositions may be taken and discovery had by any party after the claim has been controverted in accordance with the statutory provisions and rule of civil procedure related to civil actions in the Chancery and Circuit Courts of this State, unless the parties agree otherwise.

In *Loosey, supra*, the Arkansas Court of Appeals held that pursuant to Rule 16, because the claim had been controverted before discovery was initiated, and because Ark. R. Civ. P. 37(b) provides that sanctions, up to and including dismissal of an action, is authorized for violation of discovery orders, dismissal of a workers' compensation claim with prejudice for failure to respond to interrogatories after being directed to do so by an administrative law judge was authorized.

The evidence at bar clearly shows that Claimant repeatedly and willfully refused to respond to Respondents' proper discovery requests without justification, even after the Commission issued an order directing him to respond. 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)). However, based upon the facts here, and in light of *Loosey*, a departure from the general course is called for. Dismissal of this claim *with prejudice* is clearly warranted here.

#### **IV. CONCLUSION**

Claimant's continuance request is hereby denied. The motion for sanctions is hereby granted. The claim is dismissed *with prejudice*.

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**IT IS SO ORDERED.**

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O. MILTON FINE II  
Administrative Law Judge