

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F702983

RAY SNEED, EMPLOYEE

CLAIMANT

CITY MOTORS, INC., EMPLOYER

RESPONDENT

FIRSTCOMP INSURANCE COMPANY, CARRIER

RESPONDENT

OPINION FILED NOVEMBER 16, 2007

Hearing before Administrative Law Judge O. Milton Fine II on November 13, 2007 in Little Rock, Pulaski County, Arkansas.

Claimant, *pro se*, did not appear.

Respondents represented by Mr. Andy Caldwell, Attorney at Law, Little Rock, Arkansas.

I. BACKGROUND

This matter comes before the Commission on Respondents' Motion to Dismiss or in the Alternative Motion for Sanctions. A hearing on the motion was conducted on November 13, 2007, in Little Rock, Arkansas. The Claimant, who is *pro se*, did not appear. Respondents were represented at the hearing by Mr. Andy Caldwell, Attorney at Law, of Little Rock, Arkansas. No testimony was taken in the case. The record consists of Commission Exhibit 1, consisting of four pages, and Respondents' Exhibit 1, consisting of 18 pages, which detail the background of this motion as set forth below.

On or about April 13, 2007, Respondents propounded to Claimant interrogatories and requests for production of documents. However, no response from Claimant was forthcoming. Claimant's attorney was suspended from the practice of law. I notified Claimant of this occurrence on May 14, 2007, and asked

that he advise me within 20 days whether he wished to proceed pro se or obtain other counsel. Because Claimant did not respond, the file was returned to the Commission's general files on June 8, 2007. This correspondence has been blue-backed to the record.

On June 8, 2007, Respondents' counsel wrote Claimant directly to explain that his discovery responses had been due 30 days after he received them and that if Claimant did not respond within ten days, he would ask the Commission to compel that he respond. Claimant still did not respond. Respondents on June 22, 2007 filed a motion to compel discovery. On June 29, 2007, I wrote Claimant and directed that he respond in writing to the motion within 15 days. I warned him that failure to respond would result in the entering of a motion to compel. This letter was sent by first-class mail, and was not returned to the Commission. However, Claimant again filed no response. Therefore, on July 17, 2007, I entered an order compelling discovery, which provided that Claimant's responses were due within 30 days. This order was served upon him by certified and first-class mail. While the certified letter was returned to the Commission because it was not picked up and signed for, the letter sent first class mail was not returned. Again, however, Claimant did not respond to the discovery.

On August 21, 2007, Respondents filed the instant motion, asking that Claimant be sanctioned for his conduct under Ark. R. Civ. P. 37 and AWCC R. 099.16. On September 4, 2007, I sent a letter to Claimant by first-class and certified mail, asking that he supply a response to the motion within 15 days. As before, the certified letter was returned to the Commission undelivered, but the first-

class letter was not returned. Claimant was notified of the hearing on Respondents' motion by certified and first-class mail. Again, while the first-class letter apparently reached its destination, Claimant did not sign for and pick up the certified letter.

As noted above, Claimant, while duly notified of the hearing, failed to appear. The record notes that at the scheduled time for the hearing, I attempted without success to locate Claimant in the hallway outside the hearing room. Respondents' counsel appeared and presented argument in support of his motion.

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 to dismiss and of the November 13, 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

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. It is apparent from the record that Claimant has ignored the Commission repeatedly on this matter, refusing to justify his refusal to respond to discovery, or even to defend against the instant motion despite the fact that he was properly served with notice thereof. Dismissal of this claim *with prejudice* is clearly warranted here.

IV. CONCLUSION

Respondents' motion to dismiss is hereby granted. The claim is dismissed *with prejudice*.

IT IS SO ORDERED.

O. MILTON FINE II
Administrative Law Judge