

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. F300139**

**DAVID WALLACE, EMPLOYEE**

**CLAIMANT**

**DUNNRITE CONSTRUCTION, INC.,  
UNINSURED EMPLOYER**

**RESPONDENT**

**OPINION FILED MARCH 1, 2007**

Hearing before Administrative Law Judge O. Milton Fine II on December 6, 2006, in Mountain Home, Baxter County, Arkansas.

Claimant represented by Mr. Frederick S. Spencer, Attorney at Law, Mountain Home, Arkansas.

Respondents represented by Mr. Shawn A. Womack, Attorney at Law, Mountain Home, Arkansas.

**STATEMENT OF THE CASE**

On December 6, 2006, the above-captioned claim was heard in Mountain Home, Arkansas. A prehearing conference took place on May 22, 2006 before Administrative Law Judge Mark Churchwell. A June 1, 2006 Prehearing Order pursuant to that conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the Order.

**Stipulations**

At the hearing, the parties discussed the stipulation set forth in Commission Exhibit 1. Claimant and Respondents added an additional stipulation, resulting in the following two, which I accept:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. Respondent paid for a portion of Claimant's medical bills before electing not to pay anything further.

### Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit 1. With an amendment offered by Claimant and with the addition made by the administrative law judge, they are as follows:

1. Motion to dismiss claim by Respondent.
2. Compensability of injury to right knee.
3. Reasonable and necessary medical care in the form of an MRI by an orthopedic surgeon.
4. Whether Claimant is entitled to controverted attorney fees.

### Contentions

Claimant. The Claimant contends that he sustained a compensable injury on or about December 9, 2002 which arose out of the course and scope of his employment with the Respondent. The Claimant contends that he is entitled to all related workers' compensation benefits.

Respondents. Respondent disputes that Claimant was injured while working for Dunnrite Construction, Inc.

Respondent claims that Claimant was working a second job at the time of the claimed injury and the Claimant continued to work at said job during and after the time that he claims he was injured and unable to work.

Respondent contends that Claimant injured his knee prior to becoming an employee of Dunnrite Construction, Inc. and that Claimant has a history of pain and injury in his knee that were in no way caused by or during his employment at Dunnrite Construction, Inc.

Respondent denies that sheet rock was being hung on the date of the alleged injury as claimed by the Claimant.

Respondent claims that Claimant never reported any injury while at work and that it was only after he stopped showing up for work that he claimed he had been injured.

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

After reviewing the record as a whole, including medical reports, documents, and other matters properly before the Commission; and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, 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. The stipulations set forth above are reasonable and are hereby accepted.
3. The claim is dismissed without prejudice pursuant to AWCC R. 099.13.
4. Claimant's Motion to Recuse is denied.

### **PRELIMINARY RULINGS**

#### **Motion to Dismiss**

**Procedural History.** The Commission file on this claim (the pertinent documents which I have blue-backed and referenced herein) reflect that Claimant filed a Form AR-C

that was dated January 15, 2003. On February 3, 2003, counsel for Respondent wrote the Commission indicating that it was controverting the claim in its entirety. On February 10, 2003, a legal advisor for the Commission wrote to Claimant to inform him of Respondent's controversion and to advise him, *inter alia*, of his right to counsel and to a hearing on his claim. On April 8, 2003, Claimant's counsel wrote the Commission concerning his representation of Claimant and requesting a hearing on the instant claim. Enclosed was a new Form AR-C dated March 3, 2003. Administrative Law Judge William R. Daniels wrote the Claimant and Respondent on May 7, 2003, instructing them to file their prehearing questionnaires by June 6 and 13, 2003, respectively. Claimant's questionnaire was dated June 4, 2003 and was filed on June 6, 2003; Respondent's was dated June 10, 2003 and was filed on June 17, 2003. Administrative Law Judge Mark Churchwell scheduled a prehearing conference for September 4, 2003. That conference took place as scheduled. On December 5, 2003, following a subsequent conference, Judge Churchwell wrote the parties to indicate that because (1) the Claimant's deposition was rescheduled for January 19, 2004 and (2) Respondent was still awaiting answers to discovery, the claim was not ready to proceed to a hearing and the file was being returned to the Commission's general files.

The record reflects that the next action in the case is a letter from Respondent's counsel to the Clerk of the Commission dated March 10, 2006, which reads in pertinent part:

According to my records, and as confirmed by you in our conversation, the last activity in this case was a conference call between the Judge and the attorney's [sic] in this case on December 5, 2003. As I recall, opposing counsel was having difficulty locating the claimant and the case was moved to inactive status by agreement. However, it has now been inactive for over

27 months. Therefore, I am respectfully requesting that this case be dismissed with prejudice.

By letter on March 16, 2006, Judge Churchwell contacted Claimant's counsel to request a response to the motion to dismiss within 15 days. On March 27, 2006, Claimant's counsel wrote Judge Churchwell that in response to Respondent's motion, Claimant was requesting a hearing on his claim. Judge Churchwell on April 4, 2006 notified the parties that he was taking the motion to dismiss under advisement. He sent both of them a prehearing notice, a prehearing questionnaire notice, and a prehearing questionnaire; and he set a telephone conference for May 22, 2006.

On April 25, 2006, Claimant's counsel wrote that he had received no response to a "contact letter" he had sent to his client on March 28, 2006 to an address in Mountain Home. Counsel further stated that he was in the process of sending a second letter by certified mail and would conduct a "people search" if no response to the second letter was forthcoming. Further, counsel requested a 30-day extension, at the end of which he would file either the prehearing responses or a motion to withdraw from the case. In response, Judge Churchwell gave Claimant's counsel until June 1, 2006 to locate Claimant and file his prehearing responses or he would set a hearing on the motion to dismiss. Claimant's counsel wrote on May 12, 2006 that he had located Claimant at a post office box number in Mountain Home and had a cell phone number for him as well, and would be filing the prehearing responses.

Following a May 22 telephone conference with the parties, Judge Churchwell scheduled a hearing for October 4, 2006. On September 15, 2006, Respondent's counsel wrote Judge Churchwell to renew his motion to dismiss the claim with prejudice. Counsel

asserted that because of the delay, Respondent had lost contact with two witnesses, John Howard and Chris Armstrong, and that his attempts to locate them by mail, by calling every "John Howard" in the local telephone directory, and by going to Armstrong's last known place of residence, had not been not fruitful.

On September 21, 2006, Judge Churchwell wrote the parties to inform them that the October 4 hearing was being rescheduled for December 6, 2006. In the interim, Respondent's counsel was to again attempt to locate witnesses. If he was unsuccessful in doing so, Respondent's motion to dismiss would be heard at the hearing. Due to the transfer of Judge Churchwell to another district, this claim was transferred to the undersigned prior to the hearing.

Argument. At the December 6 hearing, Respondent did argue for his motion to dismiss, based upon AWCC R. 13 and the doctrine of laches. His counsel contended that despite calls to the witnesses' landlords and internet searches, they could not be located. He again argued that the delay by Claimant in proceeding with his claim to a hearing caused the loss of these witnesses and prejudiced Respondent.

Claimant's counsel admitted that Claimant's not keeping contact led to the delay, and that after many efforts by his office, they were finally successful in reaching Claimant and ascertained that he wanted to proceed with his claim. But he argued that this was not a basis for dismissal, and that Respondents could have preserved the testimony of Armstrong and Howard by deposing them. He asserted that Respondent's counsel did not accept his offer to use another search tool using Social Security numbers of Armstrong and Howard to locate them, and that Claimant was agreeable to the record being left open for depositions of these witnesses, if they could be found.

Respondent's counsel was skeptical that other means would be successful in reaching the witnesses, and asked that the Commission dismiss the claim with prejudice.

Testimony. Both parties put on testimonial evidence in the course of the hearing that was relevant to the motion to dismiss. Claimant testified that between the time of the alleged knee injury and the date of the hearing, he had lived in three different places. He stated that he did not have a cell phone during that time either. But he admitted: "I could have went by [his attorney's] office, but at the time, we did have a mailbox here in town. And I just never did contact him." Claimant testified that when he moved, he never went to the post office and filled out a change-of-address card. He stated that his counsel told him that the claim process sometimes takes up to three years, and for that reason he never bothered to contact his attorney until he moved back to Mountain Home, where his attorney's office is located. While Claimant had lived away from Mountain Home during a substantial portion of this 27 months, he testified that he continued to live in Northern Arkansas, first in Viola in Fulton County, and later in Calico Rock, and that a job he held during a portion of this period was for an employer located only three or four miles from Mountain Home.

Claimant's girlfriend, Colleen Wood, testified that she had been with Claimant since before the filing of the claim at issue. She stated that they obtained the post office box in Mountain Home around February 2005, and that she never advised Claimant not to contact his attorney or pursue his claim.

Respondent proffered (over the objections of Claimant) the testimony of Jeff Dunn, the owner of Respondent, concerning statements that Armstrong and Howard had made to Dunn. Purportedly, these witnesses have testimony concerning Claimant's presence

at the job site on the date at issue, and Armstrong had testimony concerning a statement made to him and his wife by Claimant concerning his alleged injury.

Law. As noted previously, Respondent has based his motion to dismiss on (1) laches and (2) AWCC R. 099.13. Laches may be entertained in the context of a workers' compensation claim in Arkansas. See, e.g., *Jones Truck Lines v. Pendergrass*, 90 Ark. App. 402, \_\_\_ S.W.3d \_\_\_ (2005)(Commission's decision that claim not barred by laches considered on merits); *Death & Perm. Total Disability Trust Fund v. Branum*, 82 Ark. App. 338, 107 S.W.3d 876 (2003). However, laches is an affirmative defense under Ark. R. Civ. P. 8(c). It is not a basis for a motion to dismiss a workers' compensation claim. It appears that such a motion can be brought only under Ark. Code Ann. § 11-9-702 (Repl. 2002) or Rule 13. See *Hooker v. E.C. Rowlett Const. Co. et al.*, AWCC No. F012906, Claim No. F012906 (Full Commission Opinion filed February 8, 2005)(motion can be made under § 11-9-702 or Rule 13, both of which require "lack of prosecution"; but Commission "reluctant" to apply Ark. R. Civ. P. 41 to allow nonsuit of claim). While the parties have stipulated that Respondent has paid some benefits, Respondent is not seeking a dismissal pursuant to § 11-9-702(d), which provides for dismissals of claims for additional compensation if no bona fide request for a hearing has been made within six months of the filing of the claim—and there is no indication from the record that such a motion would be well-founded.

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. 099.13. *Dura Craft Boats, Inc. v. Daugherty*, 247 Ark. 125, 444 S.W.2d 562 (1969); *Johnson v. Triple T Foods*, 55 Ark. App.

83, 929 S.W.2d 730 (1996). *Contra Dillard v. Benton Cty. Sheriff's Off.*, 87 Ark. App. 379, 192 S.W.3d 287 (2004) (“Rule 13 . . . allows a dismissal . . . pursuant to Ark. Code Ann. § 11-9-702(b)(4), the portion of the statute relating to additional benefits”). This rule 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.

The evidence adduced at the hearing and discussed above show that Claimant for well over two years failed to maintain contact with his attorney and to undertake any action whatsoever in furtherance of his claim, despite the fact that he still lived in the same area of the state. As the Commission has held, “it is well established and commonly accepted that a person has an affirmative duty to diligently prosecute a case and that inactive and stale claims should not be allowed to remain and clutter an administrative tribunal’s docket.” *McAbee v. TCC Illinois/Polar Express*, Claim No. E214857 (Full Commission Opinion filed March 25, 1994). See *Johnson v. Triple T Foods, Inc.*, Claim No. E219745 (Full Commission Opinion filed March 23, 1994), *aff’d*, 55 Ark. App. 83, 929 S.W.2d 730 (1996).

In support of the motion to dismiss, Respondent argues that it has been prejudiced because of the loss of contact with two witnesses—former employees—whose testimony would purportedly have supported Respondent’s contentions. Whether Chris Armstrong would have testified at the hearing along the lines of the proffered testimony from Jeff Dunn is unknown. Certainly, testimony concerning an admission from the Claimant concerning the cause of his injury would have some probative value. But where

Armstrong's testimony would unquestionably have been important lies in the fact that both Claimant and Respondent seem to agree that Armstrong has information bearing on what actually occurred on the date of the alleged injury. Claimant testified that Armstrong was present and working with him when the accident at issue allegedly occurred. In light of the fact that Respondent has contended that no drywall work even took place on that date at issue, Armstrong's testimony clearly would have benefitted one side or the other. While the undersigned has located no cases establishing that Rule 13 requires an affirmative showing of prejudice to the movant, such a showing certainly does not argue against the dismissal of the claim.

For the foregoing reasons, dismissal of the instant claim is justified under Rule 13. That, however, 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." (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 here, and in light of the law, the dismissal of this claim should be without prejudice.

Motion to Recuse

On June 30, 2006, Claimant filed a Motion to Recuse and a Brief in support thereof. Therein, he sought the recusal of Judge Churchwell and challenged, *inter alia*, the constitutionality of the Workers' Compensation Act as it provides for administrative adjudication of workers' compensation claims. On July 6, 2006, Judge Churchwell wrote the parties that he was denying the motion, and stated that he would state his reasons for doing so when rendering a decision on the merits of the claim. When Judge Churchwell changed to another district, Claimant did not renew his motion to seek the recusal of the undersigned. Hence, that portion of Claimant's motion will not be addressed. As for the balance of the motion, the Arkansas Court of Appeals soundly rejected the same arguments in *Long v. Wal-Mart Stores, Inc.*, \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (Ark. Ct. App. Feb. 21, 2007). Thus, his motion is meritless and is hereby denied.

**CASE IN CHIEF**

Because of the dismissal of the claim pursuant to AWCC 099.13, the substantive issues presented in the hearing will not be addressed.

**CONCLUSION**

Respondent's motion to dismiss is granted. The instant claim is dismissed without prejudice. Claimant's motion to recuse is denied.

**IT IS SO ORDERED.**

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Hon. O. Milton Fine II  
Administrative Law Judge