

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F209049

RICHARD K. WHITE, EMPLOYEE	CLAIMANT
AMERICAN FUEL CELL & COATED FABRICS, EMPLOYER	RESPONDENT
ZENITH INSURANCE CO., CARRIER	RESPONDENT

OPINION AND ORDER OF DISMISSAL WITH PREJUDICE
FILED ON SEPTEMBER 17, 2007

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Magnolia, Columbia County, Arkansas.

The claimant was PRO SE and did not appear.

The respondent was represented by HONORABLE MATT MAULDIN, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

This matter comes on for consideration of a motion to dismiss for want of prosecution filed by the respondents on October 31, 2006. For purposes of this Order, the record shall consist of the transcript of a hearing conducted July 12, 2007, and all documentary exhibits contained therein.

HISTORY

Mr. White sustained a work-related left knee injury on April 17, 2002. Dr. Kenneth Gati performed knee surgery in May of 2002. Mr. White's healing period ended on November 19, 2002. Attorney Floyd Thomas presented a claim for permanent and total disability before Administrative Law Judge Andrew Blood. Judge Blood found in a decision filed

on November 18, 2003, that Mr. White failed to prove that he has been rendered permanently and totally disabled as a result of his work-related left knee injury.

Attorney Thomas did not file an appeal of Judge Blood's decision. Mr. Thomas filed a motion with the Commission to withdraw as Mr. White's counsel on or about August 19, 2005. The Full Commission granted Mr. Thomas' request to withdraw on September 8, 2005.

Mr. White filed a pro se appeal of Judge Blood's November 18, 2003, decision on or about September 16, 2005. The Full Commission filed a decision on November 30, 2005, finding that Mr. White's appeal was untimely and must therefore be dismissed. Mr. White appealed that dismissal, and the Arkansas Court of Appeals issued a mandate dismissing Mr. White's appeal before the Court of Appeals on September 13, 2006.

Mr. Mauldin filed his motion to dismiss currently pending before the Commission on October 31, 2006. Mr. White notified me by letter dated November 15, 2006, that he objects to the motion to dismiss his case. As is my standard procedure, based on Mr. White's objection to a dismissal, I took the motion to dismiss under advisement and mailed the parties prehearing questionnaires to complete. Mr. White's response to the prehearing questionnaire

indicated that he requested a hearing because "WCC dismissal of the claim should be reversed...." (Comm. Exh. 1 p. 53)

Since I obviously do not have authority to reverse the prior Full Commission or the prior Court of Appeals' decisions dismissing Mr. White's untimely appeal of Administrative Law Judge Blood's denial of his claim for permanent and total disability, pursuant to Arkansas Code Annotated § 11-9-704(a)(3), I began to conduct telephone conferences intended to define any hearing issues remaining in this claim.

During a February 12, 2007, telephone conference, I scheduled a second conference for March 12, 2007, to provide Mr. White 30 additional days to seek the services of an attorney before proceeding with either the motion to dismiss or a hearing on a claim for additional benefits.

During the telephone conference on March 12, 2007, I identified the issues for a hearing and set this case for a third telephone conference for June 4, 2007, following Mr. White's scheduled deposition on April 12, 2007. (Comm. Exh. 1 p. 16-20) However, we conducted a third telephone conference on April 11, 2007, and set this matter for a fourth conference on April 20, 2007, when Mr. White advised me on April 11, 2007, that he felt too ill from a diabetes flare-up to attend his scheduled deposition on April 12,

2007. (Comm. Exh. 13) In the fourth telephone conference held on April 20, 2007, Mr. White advised me that he felt better, but he nevertheless refused to reschedule his cancelled deposition. Consistent with my April 11, 2007, letter and with our discussions on April 20, 2007, documented in my April 23, 2007, letter, I then set this matter for a fifth telephone conference on June 4, 2007, to determine a mutually agreeable date and time for a hearing in Magnolia on the respondents' pending motion to dismiss. (Comm. Exh. 1 p. 9-10)

When I attempted to telephone the parties on June 4, 2007, for the scheduled conference, Mr. White was not home. His wife telephoned my assistant later in the morning to advise us that she was cancelling my scheduled telephone conference. Mr. White again did not answer the telephone when I called a second time on June 4, 2007. (Comm. Exh. 1 p. 4) I therefore mailed the parties a letter on June 8, 2007, setting the respondents' pending motion to dismiss for a hearing on July 12, 2007, in Magnolia. (Comm. Exh. 1 p. 4)

On July 11, 2007, Mrs. White contacted my assistant to advise that Mr. White would be too ill from stress and diabetes to attend the hearing on July 12, 2007. Mrs. White also advised that Mr. White was still seeking an attorney. (Comm. Exh. 1 p. 2) Prior to attempting a sixth telephone

conference on July 11, 2007, I reviewed all of the documents that I introduced as Commission Exhibit 1 at the July 12, 2007, hearing.

During the July 11, 2007, telephone conference, I denied Mr. and Mrs. White's request that I cancel the scheduled July 12, 2007, hearing. (Comm. Exh. 2)

Mr. White did not appear at the July 12, 2007, hearing in Magnolia.¹ Mr. Mauldin requested that I dismiss this case with prejudice in light of Mr. White's continued inaction and continued delay. (T. 9)

**1. Grounds For Denying A Continuance Request
On July 11, 2007**

I indicated at the July 12, 2007, hearing that I would state my grounds for denying the July 11, 2007, continuance request when I prepared this written decision.

After reviewing the prior course of action of the parties and discussing the continuance request with the parties on July 11, 2007, I did not find persuasive Mrs. White's comments to my assistant that Mr. White's health would prevent him from attending a hearing, nor did I find persuasive the Whites' statements to me that this file is being reviewed by an attorney and I should cancel the

¹ The hearing transcript cover page incorrectly states that the hearing took place in El Dorado. I conducted the hearing in the third floor courtroom at the Columbia County Courthouse in Magnolia as indicated in my scheduling letter dated June 8, 2007.

hearing.

With regard to the prospect of continuing the hearing as an attorney assessed this case, no attorney has ever contacted the Commission seeking additional time to review this case. In addition, I questioned both Mr. and Mrs. White repeatedly on the telephone on July 11, 2007, and neither could provide me the name of any attorney or any law firm reviewing this claim on Mr. White's behalf.

With regard to Mr. White's health, I cancelled his deposition scheduled for April 12, 2007, because of his health complaints. I did not find his July 11, 2007, health complaints credible in light of his refusal to reschedule a deposition in a conference on April 20, 2007, when he advised his health had improved.

Because Mr. White did not persuade me on July 11, 2007, that an attorney was reviewing his file or that his health would temporarily prevent him from attending a hearing on July 12, 2007, Mr. White failed to provide good cause for cancelling the scheduled hearing on July 11, 2007.

2. Motion To Dismiss

Commission Rule 099.013 provides in part that "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 Commission has the authority under Rule 099.13 to dismiss a claim without prejudice or to dismiss the claim with prejudice when the circumstances are appropriate. Johnson v. Triple T Foods, 55 Ark. App. 83, 929 S.W.2d 730 (1996).

In addition, Commission Rule 099.16 provides in part that "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 relating to civil actions in the Chancery and Circuit Courts of this State, unless the parties agree otherwise."

Depositions upon oral examination are governed by Arkansas Rule of Civil Procedure 30. The attendance of a witness at a deposition may be compelled by subpoena as provided in Arkansas Rule of Civil Procedure 45. However, Rule 30(a) provides that a subpoena is not necessary if the witness is a party. Under Arkansas Rule of Civil Procedure 37(b)(2) and (d), if a party fails to obey an order to appear at his own deposition, the Court before which the matter is pending may enter such orders as are just, including but not limited to dismissing the action. Because the Commission has adopted the Rules of Civil Procedure for discovery matters, the Commission has authority to issue

sanctions provided for in Rule 37(b). Loosey v. Osmose Wood Preserving Co., 23 Ark. App. 137, 744 S.W.2d 402 (1988).

In the present case, I find that a dismissal with prejudice is appropriate for essentially identical reasons applied by the Commission in both Johnson and in Loosey. In the present case, as in Loosey, Mr. White has refused to comply with the respondents' right to conduct legitimate discovery; and more specifically, he refused my request to reschedule his deposition during a telephone conference set for that purpose on April 20, 2007. Once I advised Mr. White on April 20, 2007, that the respondents had a right to take his deposition and that his refusal to set a deposition date would require me to set this claim for a hearing on the pending motion to dismiss, Mr. White advised me that he would re-file his claim if I dismissed it. In Johnson, the claimant's attorney displayed a strikingly similar attitude toward possible dismissal, resulting in a dismissal by the Commission with prejudice.

In summary, Mr. White initially asserted an intention to prosecute his claim. However, after multiple telephone conferences, he ultimately refused to participate in a deposition required by this administrative law judge and then showed no concern over the possibility of a claim dismissal for his refusal to reschedule his deposition. I

find that the appropriate relief for the respondents following this course of conduct is a dismissal of Mr. White's claim with prejudice.

Consequently, for all of the reasons discussed herein, this case is hereby dismissed with prejudice to any re-filing at a later date.

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge