

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F800395

JIMMY L. AKINS, EMPLOYEE

CLAIMANT

**SWIFT TRANSPORTATION CO., INC.,
EMPLOYER**

RESPONDENT

**ACE AMERICAN INSURANCE COMPANY,
CARRIER,**

RESPONDENT

OPINION FILED SEPTEMBER 10, 2008

Hearing before Administrative Law Judge O. Milton Fine II on September 9, 2008 in Little Rock, Pulaski County, Arkansas.

Claimant, *pro se*, did not appear.

Respondents represented by Mr. Michael C. Stiles, Attorney at Law, 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 9, 2008, in Little Rock, Arkansas. The Claimant, who is *pro se*, did not appear. Respondents were represented at the hearing by Mr. Michael C. Stiles, Attorney at Law, of Little Rock, Arkansas. No testimony was taken in the case. No exhibits were offered at the hearing. Without objection, I have blue-backed to the record documents from the Commission's file that detail the history of the claim.

On January 14, 2008, Claimant filed a Form AR-C with the Commission. Therein, he stated that he injured his back and shoulder in February 2007. Respondents, through counsel, notified the Commission on January 29, 2008 that they were controverting the case in its entirety on the ground that Claimant did not

sustain a compensable injury. In addition, they asserted that the proper jurisdiction of the claim should be in Tennessee.

The Legal Advisor call log for this claim reflects that on April 8, 2008, Claimant spoke with Ted Goodloe of the Legal Advisor Division and told Goodloe that he “wants to come in person and request a hearing.” However, the record does not reflect that the hearing request was ever made.

On July 14, 2008, Respondents filed a motion to dismiss the claim without prejudice and a brief in support thereof. Therein, they alleged that on March 5, 2008 they had propounded interrogatories and requested medical authorizations from Claimant. However, he failed to respond. They further asserted that Claimant has failed to take any action in furtherance of his claim since the filing of the Form AR-C. They asked for dismissal of the claim pursuant to AWCC R. 099.13 and Ark. Code Ann. § 11-9-702(a)(4) (Repl. 2002).

On July 18, 2008, I wrote the Claimant by certified mail, return receipt requested, advising him that he had 15 days to respond to the motion. Claimant apparently signed for the letter on July 22, 2008, but filed no response. Notice of the September 9, 2008 hearing was sent to the parties by certified mail, return receipt requested, on August 4, 2008. Respondents, through counsel, signed for the notice on August 5, 2008; Claimant signed for it on August 28, 2008. However, as stated above, he failed to appear for the hearing.

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 neglected to make a *bona fide* hearing request within six months of the filing of his claim and has failed to prosecute his claim.
3. Claimant and Respondents were provided reasonable notice of the motion to dismiss and of the hearing thereon.
4. Dismissal of this claim is thus warranted under Ark. Code Ann. § 11-9-702(a)(4) (Repl. 2002) and AWCC R. 099.13.

III. DISCUSSION

Arkansas Code Annotated § 11-9-702(a)(4) (Repl. 2002) provides:

If within six (6) months after the filing of a claim for compensation, no bona fide request for a hearing has been made with respect to the claim, the claim may, upon motion and after hearing, be dismissed without prejudice to the refiling of the claim within limitation periods specified in subdivisions (a)(1)-(3) of this section.

In addition, AWCC R. 099.13 reads:

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 these provisions).

As shown by the evidence, Claimant filed an initial claim for benefits on January 14, 2008, but failed to request a hearing within six months after that date. Thus, dismissal is warranted under § 11-9-702(a)(4). The record also shows that Claimant has failed to prosecute his claim, in that he has not responded to discovery or provided signed medical authorizations. I also find that reasonable notice of the motion to dismiss and of the September 9, 2008 hearing thereon was provided to the parties. Hence, dismissal of the instant claim is also 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)). Respondents at the hearing asked for a dismissal without prejudice. Based upon the foregoing, the dismissal of this claim should be *without prejudice*.

IT IS SO ORDERED.

O. MILTON FINE II
Administrative Law Judge