

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NOS. F507098 & F505293**

**KARON JOHNSON BART, EMPLOYEE**

**CLAIMANT**

**KIMBERLY-CLARK CORPORATION,  
SELF-INSURED EMPLOYER**

**RESPONDENT NO. 1**

**SECOND INJURY FUND**

**RESPONDENT NO. 2**

**OPINION FILED APRIL 3, 2008**

Hearing before Administrative Law Judge O. Milton Fine II on March 19, 2008 in Conway, Faulkner County, Arkansas.

Claimant, *pro se*, did not appear.

Respondent No. 1 represented by Mr. Jarrod Parrish, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2, represented by Ms. Judy Rudd, Attorney at Law, Little Rock, Arkansas, did not appear.

**I. BACKGROUND**

This matter comes before the Commission on Respondent No. 1's motion to dismiss. A hearing on the motion was conducted on March 19, 2008, in Conway, Arkansas. The Claimant, who is *pro se*, did not appear. The hearing did not get underway until an attempt was made to locate her in the courthouse. Respondent No. 1 was represented at the hearing by Mr. Jarrod Parrish, Attorney at Law, of Little Rock, Arkansas. No testimony was taken in the case. The record consists of Respondent No. 1 Exhibit 1, comprised of ten pages of documents that detail the history of the case; along with 35 pages of blue-backed documents from the Commission files on the claims.

The instant claims concern two separate alleged injuries. Through her then-attorney, Ms. Emily Paul, Claimant filed separate Forms AR-C on March 22, 2007, for these claims, contending that she sustained a neck injury on June 4, 2005 while dumping a bag of tampons (Claim No. F505293) and that she again injured her neck on July 12, 2005 while pulling an air hose.. By letter on August 6, 2007, Claimant requested a hearing on the claims. I sent prehearing questionnaires to Claimant and Respondent No. 1 on August 22, 2007. On September 14, 2007, I wrote Claimant that she had failed to file her questionnaire, and that if she did not comply within ten days, her inaction would be interpreted as a withdrawal of her hearing request. Because she failed to comply, on September 17, 2007 I returned her files to the Commission's general files.

On September 19, 2007, Respondent No. 1 wrote the Commission to ask that Claim No. F507098 be dismissed. By letter on October 1, 2007, I wrote Claimant and asked for a response concerning whether both of the above-captioned claims should be dismissed. Claimant responded on October 9, 2007, objecting to the motion as timely and stating that the Second Injury Fund should be joined as a respondent to the claims. In her questionnaire response filed the same day regarding both claims, Claimant listed the following issues to be tried:

1. Whether Claimant is entitled to additional permanent partial disability benefits due to the combined impairments from the injuries she suffered.
2. Whether Claimant is entitled to wage loss disability benefits.
3. Whether Claimant is entitled to a controverted attorney's fee

Respondent No. 1 only filed a questionnaire addressing Claim No. F507098. Respondent offered to stipulate to the compensability of the July 12, 2005 injury and that it had accepted and was paying toward a ten percent (10%) impairment rating assigned Claimant. Respondent Second Injury Fund accepted joinder by letter October 23, 2007. A prehearing conference was scheduled for November 26, 2007; however, this was later continued to January 14, 2008 at the request of the Second Injury Fund.

On November 26, 2007, Ms. Paul filed a motion asking for permission to withdraw from representation of Claimant. I entered an order (Respondent No. 1 Exhibit 1) granting this motion on November 27, 2007. By letter on November 28, 2007, I wrote Claimant to inform her of Ms. Paul's withdrawal and to advise me within 20 days whether she would seek other counsel or represent herself. No response was forthcoming, so pursuant to my earlier communication, on December 28, 2007 I notified Claimant that I was returning her files to the Commission's general files.

On January 2, 2008, Respondent No. 1 filed a motion for costs and fees. Therein, they alleged that Claimant's deposition had been scheduled prior to Ms. Paul's withdrawal for December 28, 2007 at 11:00 a.m., and that Claimant had been notified that the deposition would still take place as scheduled, but at a different location. They further alleged that Claimant failed to show for the deposition. By letter on January 8, 2008, I instructed Claimant that she had 20 days to respond to the motion. No response was forthcoming.

Notice of the setting of the hearing on the motion to dismiss both of the instant claims was sent to Claimant by first-class and certified mail on February 25, 2008. While she did not pick up the certified letter, the first-class letter was not returned to the Commission. As noted above, the hearing proceeded as scheduled without Claimant appearing. There, Respondent No. 1 asked that both claims be dismissed without prejudice pursuant to AWCC R. 099.13.

## **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 these claims.
2. Claimant has failed to prosecute her claims.
3. Claimant and Respondents were provided reasonable notice of the motion to dismiss and of the hearing thereon.
4. Dismissal of these claims *without prejudice* is warranted under AWCC R. 099.13.

## **III. DISCUSSION**

Under AWCC R. 099.13,

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

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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). I find that, based upon the foregoing evidence, all parties were provided reasonable notice of the motion to dismiss and the hearing thereon.

Claimant has taken no action in support of her claims since the withdrawal of her attorney on November 27, 2007. In fact, she has refused to respond in any way, shape or form both to the Commission and to Respondent No. 1 since then. Hence, dismissal of the instant claims are 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 *Loosey*, the Arkansas Court of Appeals held that pursuant to AWCC R. 099.16, 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. On the other hand, 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

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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)). While Respondent No. 1 has contended the Claimant failed to appear for her deposition, it has not asked for a dismissal *with prejudice*. The dismissal of this claim is thus *without prejudice*.

**IT IS SO ORDERED.**

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O. MILTON FINE II  
Administrative Law Judge