

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F608085

TAMMY J. BOESE, EMPLOYEE	CLAIMANT
UNITY ADULT DAY CARE, INC., EMPLOYER	RESPONDENT
FIRSTCOMP INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED JANUARY 28, 2008

Hearing before Administrative Law Judge O. Milton Fine II on January 16, 2008 in Conway, Faulkner County, Arkansas.

Claimant, *pro se*.

Respondents represented by Mr. William C. Frye, Attorney at Law, North Little Rock, Arkansas.

I. INTRODUCTION

This matter comes before the Commission on Respondent's motion to dismiss. A hearing on the motion was conducted on January 16, 2008, in Conway, Arkansas. The Claimant appeared *pro se*. Respondent was represented at the hearing by Mr. William C. Frye, Attorney at Law, of North Little Rock, Arkansas. Claimant testified at the hearing. The documentary record consists of Commission's Exhibit 1, comprised of eight pages of documents that detail the procedural history of the case relevant to the motion to dismiss and are discussed herein; and certain other documents detailing this history that are also discussed herein and have been blue-backed to the record.

II. EVIDENCE

Documents. Claimant's alleged date of injury was July 24, 2006. A First Report of Injury was filed on July 25, 2006. On August 8, 2006, Respondents filed

a Form AR-2, indicating their intent to controvert the claim on the basis that the employee was not performing employment services at the time of the injury. Claimant proceeded *pro se* on her claim and requested a hearing on October 11, 2006. A prehearing questionnaire notice was sent to her on October 31, 2006 at the address she had given the Commission, 18 Southfork Road, Apartment H, Vilonia, Arkansas 72173. However, it was re-mailed to Claimant's then-current address, 515 First Street, Conway, Arkansas 72032, on November 8, 2006. No completed questionnaire was forthcoming from Claimant. On November 30, 2006, I sent Claimant by certified mail, return receipt requested, a letter giving her ten days to file her questionnaire. She signed for the letter on December 5, 2006. However, she did not respond. For that reason, on December 12, 2006 I returned her file to the Commission's general files and notified her on that date by first class mail that I was taking this action. That letter was not returned undelivered to the Commission. By letter dated October 17, 2007 that was filed with the Commission on October 18, 2007, Respondents moved for dismissal of the instant claim pursuant to AWCC R. 13. On October 24, 2007, I sent Claimant a letter by certified mail, giving her 15 days to respond to the motion. She signed for the letter on October 27, 2007, but filed no response. The hearing notice on the motion to dismiss was sent by certified and first class mail to Claimant on November 8, 2007. She signed for the notice on November 10, 2007.

Testimony. When questioned by me (due to her *pro se* status), Claimant stated that her current mailing address is the one in Conway cited above. That

became her address in late July or early August of 2006, after the injury at issue occurred. The address in Vilonia cited above was her previous address.

Claimant testified that she did not receive the prehearing questionnaire and enclosure letter that have been blue-backed to the record. After being shown them, she denied ever seeing them before. She also denied ever receiving my December 12, 2006 letter, although she admitted that the address thereon was her correct one at the time. In fact, she stated that the only correspondence she ever received from my office was the notice of hearing on the motion to dismiss, which she received by both first class and certified mail.

However, when shown the certified mail receipts for the various items of correspondence, she identified them all as bearing her signature. While she testified that she would not have signed for something and not have read it, Claimant could not account for the discrepancy between her testimony that she had never seen the correspondence and the record showing that the letters were delivered to her. She also denied receiving a copy of Respondents' letter requesting that the claim be dismissed, although the letter reflects that Claimant was copied on it. When asked whether she had failed to prosecute her claim, Claimant disagreed, testifying that she had done so by requesting a hearing, but that she had not heard anything further.

When offered a chance to make a statement on her own behalf, Claimant stated that she might have received correspondence but not have understood it due to knee surgery she underwent because thereafter she was "highly drugged up [sic] with pain pills." However, she stated that she would have saved any such mail and

not have thrown it out. Moreover, the alleged surgery, according to Claimant, took place within “a couple of months” of her alleged injury in July 2006, which is not the time any of the above correspondence was sent.

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 has failed to prosecute her claim.
3. The parties were provided reasonable notice of the motion to dismiss and of the hearing thereon under AWCC R. 099.13.
4. Dismissal of this claim *without prejudice* is warranted under Rule 13.

III. DISCUSSION

AWCC R. 099.13 provides:

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, *inter alia*, Rule 13).

Based upon my review of the evidence, I find that the parties were provided reasonable notice of the motion to dismiss and the hearing thereon. Claimant appeared and admitted that she received the notice.

I also find that after Claimant has failed to prosecute her claim. The evidence shows that the prehearing questionnaire was sent to her at her then-current address on November 8, 2006. However, despite receiving a warning by the Commission on December 5, 2006 that she had to complete the questionnaire and return it by December 10, she did not. She was duly notified that her file was being returned to the Commission's general files on December 12, 2006. Respondents waited over ten months before moving to dismiss the claim. Again, despite being properly notified and being given an opportunity to respond, Claimant did not do so. I do not find credible Claimant's testimony that she did not receive the foregoing correspondence. Her own signature on the certified mail receipts, which she identified, show otherwise. Hence, dismissal of the claim for want of prosecution is called for.

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.

IV. CONCLUSION

The evidence adduced at the hearing, notice of which was provided to Claimant, clearly shows that she has failed to prosecute her claim. For that reason, Respondents' motion is well-founded and is hereby granted, dismissing this claim *without prejudice* pursuant to Rule 13.

IT IS SO ORDERED.

O. MILTON FINE II
Administrative Law Judge