

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F603545

TARRYL F. BRADLEY, EMPLOYEE	CLAIMANT
FIRESTONE TUBE COMPANY, EMPLOYER	RESPONDENT NO. 1
OLD REPUBLIC INSURANCE COMPANY, CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED JUNE 12, 2008

Hearing before Administrative Law Judge O. Milton Fine II on May 14, 2008 in Russellville, Pope County, Arkansas.

Claimant, *pro se*.

Respondents represented by Ms. Betty J. Hardy, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 was excused from participation.

I. BACKGROUND

This matter comes before the Commission on the motion to dismiss by Respondents No. 1. A hearing on the motion was conducted on May 14, 2008 in Searcy, Arkansas. The Claimant appeared *pro se*. Respondents No. 1 were represented at the hearing by Ms. Betty J. Hardy, Attorney at Law, of Little Rock, Arkansas. Respondent No. 2 was excused from participation at the hearing. Claimant testified at the hearing. No exhibits were admitted into evidence. Without objection by the parties, I have blue-backed to the record documents from the Commission's file that detail the history of the claim.

Claimant's allegedly injured his left shoulder on April 13, 2005. At the time his claim was filed, he was *pro se*. On April 4, 2006, he filed a Form AR-C, in which he

stated that he was injured when he lifted some "heavy tube" and felt pain in his left shoulder. He asserted that he reported to his supervisor, was referred to a physician, and that the doctor gave him a permanent restriction of no lifting over 30 pounds overhead. Claimant alleged that the problem in his left shoulder and neck area remained. Respondents No. 1 accepted it as a medical-only claim. They filed a Form AR-1 on April 19, 2006, and a Form AR-2 on April 20, 2006.

On May 23, 2006, Claimant sent a letter to the Commission, requesting a hearing on the issues of his entitlement to lost wages, rehabilitation, and medical mileage. Because Respondents No. 1 refused to mediate or participate in a legal advisor conference, the file was transferred to Administrative Law Judge Mark Churchwell to hold a hearing. Judge Churchwell issued prehearing questionnaires to the parties on June 29, 2006. Respondents No. 1 filed their questionnaire response on July 28, 2006. Claimant filed his response on July 31, 2006. Judge Churchwell scheduled a prehearing telephone conference for September 18, 2006. At the conference, Claimant reported that he was still seeking to retain an attorney to represent him. For that reason, Judge Churchwell informed the parties that he would hold the file in his office for 60 days to allow that to occur.

I assumed Judge Churchwell's District 3 position. On November 20, 2006, I received a communication from Claimant that he was still attempting to retain counsel. For that reason, I determined that he was not ready to proceed to a hearing, and returned the file to the Commission's general files.

Respondents No. 1 filed their first motion to dismiss on March 2, 2007. On March 6, 2007, I advised Claimant that he had ten days to respond to the motion.

He retained an attorney, who filed an amended Form AR-C on March 14, 2007, and stated that she was representing Claimant and was requesting a hearing. I took the motion to dismiss under advisement, and sent prehearing questionnaires again to the parties on March 19, 2007. Claimant filed his prehearing response on April 4, 2007. Respondents No. 1 filed theirs on April 10, 2007. A prehearing conference was scheduled for May 14, 2007. However, Claimant withdrew his hearing request and asked that his file be transferred to the Medical Cost Containment Division for a change of physician. This was granted on May 2, 2007, and the prehearing conference was cancelled. While Respondents No. 1 objected to the change of physician request, it was granted on June 5, 2007, changing Claimant's physician from Dr. Ben Kriesel to Dr. Derek Lewis.

On September 28, 2007, Respondents No. 1 renewed their motion to dismiss, alleging that Claimant failed to respond to discovery. Claimant was advised on October 4, 2007 that he had 10 days to respond to the motion. On October 29, 2007, Claimant's counsel filed a motion to withdraw from representation of him. Counsel also objected to the dismissal on behalf of Claimant. On November 5, 2007, I granted the motion to withdraw, and on November 6 informed the (again) *pro se* Claimant that he had ten days to respond to the motion to dismiss. Respondents No. 1 on November 27, 2007 served notice that they were joining the Second Injury Fund as a party to the claim. On December 4, 2007, Claimant responded, objecting to the dismissal and again requesting a hearing. Based on this, on December 4, 2007, I notified the parties that I was again taking the motion to dismiss under advisement. Prehearing questionnaires were again distributed. The Second Injury

Fund accepted joinder, so a questionnaire was sent to SIF as well. While SIF and Respondents No. 1 filed their responses in a timely manner, Claimant's was not forthcoming. On December 28, 2007, I wrote to inform him that he had ten days to respond. Because Claimant did not reply, on January 8, 2008, I notified the parties that the file was being sent to the Commission's general files.

On March 11, 2008, Respondents No. 1 filed a Second Renewed Motion to Dismiss. Therein, they requested that the claim be dismissed under Ark. Code Ann. § 11-9-702(d) and AWCC R. 099.13. I sent Claimant a certified letter on March 17, 2008, giving him 15 days to respond to the motion. Claimant responded on March 31, 2008, objecting to the dismissal and again requesting a hearing. On April 4, 2008, notice was sent to the parties by certified mail, setting the instant hearing for May 14, 2008. Claimant, by "Tina Bradley" signed for Claimant's letter on April 11, 2008.

Claimant testified at the hearing. When questioned by me, he stated that his address in the records of the Commission was correct. He testified that obtaining a change of physician was the idea of his counsel, and that he has been engaged in getting an impairment rating. When asked whether he had failed to respond to discovery, he stated that he had completed everything sent to him and had forwarded it to his counsel, but that she had misplaced it. He asserted, in turn, that Respondents No. 1 had not responded to his discovery. Claimant also stated that he needs an attorney to proceed.

Counsel for Respondent No. 1 stated that she sent discovery responses to Claimant's counsel on May 16, 2007. Regardless of whether he provided discovery

responses to counsel, Respondents No. 1 put forth the position that they never received them. Counsel further stated that she reminded Claimant's counsel on June 26, 2007 about discovery, but received no response.

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. Because Claimant requested a hearing within six months of filing his claim, dismissal is not warranted under Ark. Code Ann. § 11-9-702(d).
3. Claimant has not failed to prosecute his claim.
4. Dismissal of this claim is not warranted under AWCC R. 099.13; however, a hearing on the merits of the claim shall be expedited, and discovery shall be completed within 45 days of the date of this opinion.

III. DISCUSSION

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

If within six (6) months after the filing of a claim for additional compensation, no bona fide request for a hearing has been made with respect to the claim, the claim may, upon motion and after hearing, if necessary, be dismissed without prejudice to the refiling of the claim within limitation periods specified in subsection (b) 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).

The record reflects that Claimant filed a hearing request well within six months after he filed this claim. Hence, dismissal under § 11-9-702(d) is not warranted.

As to Rule 13, I do not find at this point that Claimant has failed to prosecute his claim. Certainly, lulls in the timeline of this claim are present. But these appear to have been primarily due to Claimant's problems with his former counsel, or his being unready to proceed without counsel. Dismissal under this provision is likewise not warranted.

However, Claimant has now had ample time to retain counsel. This claim should proceed to a hearing as soon as possible. For that reason, a prehearing conference will hereby be scheduled as soon as possible. At that conference, the proposed stipulations, issues and contentions from the most recent set of questionnaire responses will be discussed and incorporated into a prehearing order, and a hearing date and time will be set so as to expedite resolution of this matter. The parties shall complete discovery within 45 days of the date of this opinion.

IT IS SO ORDERED.

O. MILTON FINE II
Administrative Law Judge