

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. F613935**

<b>CHRISTOPH BUNTING, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>SFI OF ARKANSAS, LLC, EMPLOYER</b>	<b>RESPONDENTS</b>
<b>TRAVELERS INDEMNITY CO. OF AMERICA, C/O ST. PAUL TRAVELERS, CARRIER</b>	<b>RESPONDENTS</b>

**OPINION FILED APRIL 4, 2008**

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

Claimant represented by Mr. George S. Ivory, Jr., Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. James Arnold II, Attorney at Law, Fort Smith, Arkansas.

**I. BACKGROUND**

This matter comes before the Commission on Respondents' motion to dismiss. A hearing on the motion was conducted on March 19, 2008, in Conway, Arkansas. The Claimant, who did not personally appear, was represented at the hearing by Mr. George S. Ivory, Jr., of Little Rock, Arkansas. The hearing did not get underway until an attempt was made to locate Claimant in the courthouse. Respondents were represented at the hearing by Mr. James Arnold II, Attorney at Law, of Fort Smith, Arkansas. No testimony was taken in the case. The record consists of 26 pages of documents from the Commission file that detail the history of the case and have been blue-backed to the record.

The instant claim concerns an alleged work-related incident on December 14, 2006, when Claimant caught his right hand in a roller. He claimed injuries to his

hand and wrist as a result. On February 7, 2007, After initially accepting the claim as compensable and paying benefits, Respondents notified the Commission of their intent to controvert the claim on the basis that Claimant had a positive drug screen after the accident. By letter on March 22, 2007, Claimant requested a hearing “as soon as possible.” Prehearing questionnaire notices were sent to the parties on March 29, 2007. Claimant’s response filed March 27, 2007 listed the following issues for determination:

1. Whether Claimant is entitled to temporary total disability benefits.
2. Whether Claimant is entitled to medical payments.
3. Whether Claimant sustained a compensable injury.
4. Whether Claimant is entitled to a controverted attorney’s fee.
5. Whether Claimant is entitled to permanent disability benefits.
6. Whether Claimant is entitled to vocational rehabilitation benefits.

Respondents filed their questionnaire response on June 1, 2007. On June 5, 2007, I notified the parties that a prehearing conference would be held on July 16, 2007 at 1:30 p.m.

However, on July 5, 2007 Mr. Ivory filed a motion seeking to withdraw from representing Claimant. The prehearing conference was thus cancelled. In an order entered on August 6, 2007, I denied the motion to withdraw because it did not address one elements required by AWCC Advisory 2003-2--specifically, the question of the papers and property in the hands of Mr. Ivory to which Claimant would be entitled. The motion was not renewed. On August 20, 2007, I informed the parties that unless I heard otherwise within ten days, I would assume that

Claimant had withdrawn his hearing request. Because no response was forthcoming, on September 4, 2007 I returned his file to the Commission's general files and notified the parties of this action.

Respondents filed a Motion to Dismiss for Lack of Prosecution on January 7, 2008. Therein, they argued that dismissal of the claim was warranted under AWCC R. 099.13 due to Claimant's failure to take action in pursuit of his claim for over six months. On January 14, 2008, I informed Claimant that he had ten days to respond to the motion. No response was filed. On January 25, 2008, I sent notice to the parties by certified and first-class mail of the March 19, 2008 hearing. The return receipt shows that Mr. Ivory's office signed for the letter.

At the hearing, Claimant's counsel stated that he had notified his client about the hearing, but surmised that it was not his wish to attend. He also represented that Claimant had no objection to a dismissal of the claim without prejudice. Respondents' counsel stated that they were only seeking a dismissal without prejudice.

## **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 claims.
2. Claimant 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 the claim *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 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 his claim for nearly one year—since the filing of his prehearing questionnaire response on March 27, 2007. Hence, dismissal of the instant claim is 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 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 have requested a dismissal without prejudice, with concurrence of Claimant. The dismissal of this claim is thus *without prejudice*.

**IT IS SO ORDERED.**

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O. MILTON FINE II  
Administrative Law Judge