

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F702791

JASON C. EARLS, EMPLOYEE

CLAIMANT

**A&K DRYWALL AND ACOUSTICAL, INC.,
EMPLOYER**

RESPONDENT

**HARTFORD FIRE INSURANCE COMPANY,
CARRIER,**

RESPONDENT

OPINION FILED JUNE 25, 2008

Hearing before Administrative Law Judge O. Milton Fine II on June 24, 2008 in Searcy, White County, Arkansas.

Claimant, *pro se*, did not appear.

Respondents represented by Mr. A. Gene Williams, 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 June 24, 2008, in Searcy, Arkansas. The Claimant, who is *pro se*, did not appear. Respondents were represented at the hearing by Mr. A. Gene Williams, Attorney at Law, of Little Rock, Arkansas. No testimony was taken in the case. The record consists of documents from the Commission's file, which I have blue-backed to the record, that detail the history of the claim.

According to the Form AR-1 filed on March 19, 2007, Claimant allegedly injured his left wrist when he slipped and attempted to catch himself by putting out his hand. Respondents initially accepted the claim and paid benefits, including temporary total and partial disability benefits. However, because he failed to

contact the employer or adjustor and failed to return to light duty, payments were suspended on May 18, 2007. He returned to work on May 29, 2007. Respondents notified the Commission on August 27, 2007 that they were controverting further benefits because Claimant allegedly suffered an intervening injury that worsened his condition.

By letter received on October 29, 2007, attorney Scott Hunter notified the Commission that he was representing Claimant and asked that the claim be referred to an administrative law judge for a hearing on Claimant's entitlement to additional benefits. No Form AR-C was ever filed in this case, however. I mailed prehearing questionnaires to the parties on November 1, 2007. Claimant, through counsel, returned his completed questionnaire in a timely fashion on November 19, 2007. Respondents followed suit on November 21, 2007. A prehearing conference took place on January 8, 2008. By agreement of the parties, another one was scheduled for March 3, 2008. On February 22, 2008, Respondents' counsel asked that the conference be taken off the schedule because Claimant had moved to Florida and the parties were attempting to negotiate a settlement. That same day, I wrote the parties that I would hold the file in my office for 21 days to allow them to submit a joint petition, and that I would return the file the Commission's general files if I did not receive it in that time frame.

However, on March 3, 2008, Claimant's counsel moved for permission to withdraw from the case. In support thereof, he stated, *inter alia*, that Claimant moved to the State of Florida and had become unresponsive to his requests for cooperation and assistance in prosecuting the instant claim. Because the 21 day-

period had not yet run, I denied the motion without prejudice under AWCC Advisory 2003-2 on March 5, 2008. After the expiration of the period on March 17, 2008 I returned the file to the Commission's general files and notified the parties of my action. Claimant's counsel on March 24, 2008 filed another motion to withdraw, which the Full Commission granted on April 14, 2008.

On April 22, 2008, Respondents through counsel moved for dismissal of the claim for lack of prosecution. On May 1, 2008, I wrote Claimant, now *pro se*, that he had 15 days to respond to the motion. The certified letter was returned unclaimed. The address on the correspondence is the sole address Claimant has provided to the Commission. On May 20, 2008, I again wrote Claimant at the above address to notify him of the hearing on the motion to dismiss; again, the certified mail was returned unclaimed. While Claimant on June 6, 2006 signed for the May 30, 2008 certified hearing notice, he did not appear at 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. While a Form AR-C has never been filed in connection with his matter, the October 29, 2007 letter by Claimant's then-counsel constitutes a claim for additional benefits.
3. Claimant has failed to prosecute his claim.
4. Claimant was provided reasonable notice of the motion to dismiss and of the hearing thereon.
5. Dismissal of this claim *without prejudice* is warranted under AWCC R. 099.13.

III. DISCUSSION

At the hearing, Respondents' counsel confirmed that the motion to dismiss is based solely on AWCC R. 099.13. This provision 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, *inter alia*, Rule 13).

My review of the Commission file does not indicate that a Form AR-C has not been filed in this case. That is the means for filing a "formal claim." See *Yearwood v. Wal-Mart Stores, Inc.*, 2003 AWCC 113, Claim No. F201311 (Full Commission Opinion filed June 17, 2003). See also *Sinclair v. Magnolia Hospital*, 1998 AWCC 409, Claim No. E703502 (Full Commission Opinion filed December 22,

1998)(a claim is “typically” filed *via* a Form AR-C). While a Form AR-1 was filed in this case, that does not suffice to instigate a claim. *Id.*

Other means exist to file a claim for additional benefits other than a Form AR-C. In *Downing v. Univ. of Ark.*, 1999 AWCC 75, Claim No. E209360 (Full Commission Opinion filed March 16, 1999), the Commission stated:

While it appears that no court has addressed the minimum requirements under Arkansas law to state an adequate "petition for review", in *Cook v. Southwestern Bell Telephone Company*, 21 Ark. App. 29, 727 S.W.2d 862 (1987) the Arkansas Court of Appeals discussed the minimum requirements necessary for correspondence to the Commission to constitute a claim for additional compensation for the purposes of tolling the applicable Statute of Limitations. In that case, the Court held that an attorney's correspondence notifying the Commission that he has been employed to assist a claimant in connection with unpaid benefits is sufficient to state a claim for additional compensation where the correspondence also lists the claimant's name, the employer's name and the WCC file number. *Id.*, See also, *Garrett v. Sears Roebuck and Company*, 43 Ark. App. 37, 858 S.W.2d 146 (1993). Moreover, we have interpreted *Cook* as requiring that correspondence intended as a claim for additional benefits (1) identify the claimant, (2) indicate that a compensable injury has occurred, and (3) convey the idea that compensation is expected.

(citations omitted). Based on *Cook, supra*, it is clear that the letter of Claimant's then-counsel on October 29, 2007 constitutes a claim for additional benefits.

Claimant has taken no action in furtherance of his claim since the January 8, 2008 prehearing conference. The evidence at bar clearly shows that he has failed to prosecute this claim, and that reasonable notice of the motion to dismiss and of the June 24, 2008 hearing thereon were provided to him. 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 *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)). Based upon the foregoing, the dismissal of this claim should be *without prejudice*.

IT IS SO ORDERED.

O. MILTON FINE II
Administrative Law Judge