

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. E405149

VIRGIL C. "BUDDY" FURR, EMPLOYEE	CLAIMANT
BECHTEL POWER CORPORATION, EMPLOYER	RESPONDENT NO. 1
AIG CLAIM SERVICES, INC., CARRIER	RESPONDENT NO. 1
DEATH AND PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED AUGUST 11, 2008

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

Claimant represented by Ms. Laura McKinnon, Attorney at Law, Russellville, Arkansas.

Respondents No. 1 represented by Mr. Michael Alexander, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2, represented by Ms. Christy King, Attorney at Law, Little Rock, Arkansas, not participating.

I. BACKGROUND

This matter comes before the Commission on Respondents' motion to dismiss. A hearing on the motion was conducted on May 14, 2008, in Russellville, Arkansas. The Claimant, who is deceased, represented by Ms. Laura McKinnon, Attorney at Law, Russellville, Arkansas. Respondents No. 1 were represented at the hearing by Ms. Susan M. Fowler, Attorney at Law, of Little Rock, Arkansas. Respondent No. 2 did not participate in the hearing. No testimony was taken in the case, but counsels gave lengthy arguments and provided factual background. No exhibits were offered into evidence; however, without objection from any party I

have blue-backed to the record documents from the Commission's file that detail the history of the claim, along with the post-hearing briefs of counsel.

This claim is very complicated, and the procedural history is lengthy. But setting this out is necessary in order to understand how the parties reached this point and to assess the merits of the motion to dismiss.

Claimant filed a Form AR-C on June 30, 1994, contending that he was injured while working for Respondent Bechtel on September 13, 1993. Following a hearing, Administrative Law Judge Elizabeth Hogan issued an opinion on October 29, 1996 that contained the following findings of fact and conclusions of law:

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on September 13, 1993, at which time the claimant sustained a compensable injury at a compensation rate of \$252.30/\$189.23. Medical expenses and temporary total disability benefits from April 19, 1994 to March 1, 1996 have been paid.
2. The claimant has proven by a preponderance of the credible evidence of record there is a causal connection between his 1993 compensable injury and his subsequent surgery in 1995, based on Dr. Saer's testimony. The surgery was reasonable and necessary for treatment of the compensable injury. There is no evidence of an independent intervening cause.
3. Respondents are directed to pay all medical expenses associated with Dr. Saer's treatment within 30 days of receipt pursuant to Rule 30.
4. The claimant has proven by a preponderance of the credible evidence of record that he remains in his healing period and is totally unable to work, thereby entitling him to temporary total disability benefits, until the end of his healing period, a date yet to be determined, or until he is released by Dr. Saer to return to work.

5. This claim has been controverted and claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-716, §11-9-801, and WCC Rule 10. Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21, 1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992) (E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

Respondents No. 1 appealed this decision to the Full Commission; but the Commission, in an opinion filed on August 13, 1997, affirmed and adopted Judge Hogan's opinion. From there, Respondents No. 1 appealed to the Arkansas Court of Appeals; but the court affirmed the Commission in *Bechtel Power Corp. v. Furr*, No. CA 97-1419 (Ark. Ct. App. May 20, 1998)(unpublished).

Claimant requested another hearing, and it was conducted on October 26, 2001 before Administrative Law Judge C. Michael White. On March 11, 2002, Judge White issued an opinion containing the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties and set forth [below] are hereby accepted as fact.
 - a. The decisions previously filed by the Arkansas Court of Appeals, the Full Arkansas Workers' Compensation Commission, and Administrative Law Judge Elizabeth Hogan, are now final orders and *res judicata*.
 - b. The respondents have not paid any attorney's fees.
3. The preponderance of the evidence establishes that the claimant is permanently and totally disabled as a result of his compensable injury.

4. The respondents are entitled to a credit for an overpayment of benefits, in light of the finding that the claimant is permanently and totally disabled.
5. The claimant failed to prove by a preponderance of the evidence that any benefits previously awarded remain unpaid.
6. The respondents controverted the claimant's entitlement to compensation for a permanent and total disability and liability for a late payment penalty.

Both parties appealed portions of Judge White's decision to the Full Commission. In an opinion issued on January 28, 2003, the Commission issued its opinion. Therein, it affirmed that Claimant was permanently and totally disabled. However, the Commission reversed and remanded the balance of Judge White's decision, and gave the following instructions:

After the parties have developed an adequate record and in order to eliminate further piecemeal litigation, the Administrative Law Judge shall make additional findings including, but not necessarily limited to: (1) when the claimant's healing period ended; (2) whether the respondents are entitled to a credit for overpayment of any temporary disability benefits paid after April 1, 1997; (3) whether the claimant's attorney is entitled to a second attorney's fee regarding any period of temporary disability after April 1, 1997; (4) the claimant's attorney's appropriate fee on the claimant's permanent and total disability compensation awarded in the Administrative Law Judge's March 11, 2002 opinion and order which was admittedly controverted by the respondents; and (5) whether additional attorney's fees, interest, late payment penalties, or any type of contempt citation are appropriate for any period of non-payment or late payment of medical expenses, indemnity benefits, or attorney's fees that may have accrued to date.

Following the remand, a hearing was not scheduled to make the findings as directed above. In fact, the next major development in the claim did not occur until June 22, 2006, when Claimant notified the Commission by letter that he was making a statutory request for additional benefits pursuant to Ark. Code Ann. § 11-9-702.

However, he pointed out that he was not requesting a hearing at that time. That did not occur until September 11, 2006, when he asked for a priority prehearing telephone conference and hearing concerning the alleged denial of \$500.00 in medications by Respondents No. 1. Administrative Law Judge Mark Churchwell issued prehearing questionnaires to the parties on September 18, 2006. While the conference was pending, Judge Churchwell was assigned to another district and the instant claim was reassigned to me. For the next three months, conferences were scheduled and then re-scheduled due to attorney conflicts. A conference took place on February 26, 2007; but by agreement of the parties, another one was scheduled for April 9, 2007 and rescheduled for May 18, 2007. I asked that in the interim, the parties try to identify specifically which benefits have been accepted and which have been controverted. The parties complied with this request. During the conference, the parties agreed that the file should be returned to the Commission's general files to allow the parties time to undertake discovery and arrive at a better understanding of their areas of agreement and the areas that need to be tried.

At the hearing, the parties agreed that Claimant passed away on December 14, 2007. On February 21, 2008, the Commission received a letter from Respondents No. 1 that reads in pertinent part:

Respondents respectfully request that the captioned matter be dismissed. We ask that it be dismissed for failure to prosecute. In addition, we move that the case be dismissed due to the fact that the claimant is now deceased and as such there are no further issues that would be ripe for the commission to address.

Claimant's counsel on February 29, 2008 filed a response, in which she stated, *inter alia*, that an objection to dismissal was being lodged and that issues in the claim

remained for determination, and that she was “still owed the deposition of the adjustor.” Respondents No. 1 replied to the response on March 4, 2008, asserting that Claimant had failed to respond to their discovery by identifying what benefits or medical bills it was being alleged remained unpaid and by providing documentation of these benefits. Because of the length of time that had elapsed since the file was returned to the Commission’s general files and Claimant’s death, I determined that the motion to dismiss should be heard before the claim proceeded further.

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 died on December 14, 2007.
3. Respondents No. 1 have not proven that a workers’ compensation claim is subject to dismissal due to the death of the claimant.
4. The parties were provided reasonable notice of the motion to dismiss and of the hearing thereon.
5. Respondents No. 1 have not proven that Claimant has failed to prosecute his claim.
6. Dismissal of this claim is not warranted under AWCC R. 099.13.

III. DISCUSSION

Respondents No. 1 have argued that this claim is subject to dismissal because of Claimant's death. At the outset, I note that the sole bases for dismissal of a claim are found in AWCC R. 099.13 and Ark. Code Ann. § 11-9-702(a)(4) & (d) (Repl. 2002). Both sources focus on a failure to prosecute as the *sine qua non* for dismissal. *Cf. Hooker v. E.C. Rowlett Const. Co. et al.*, AWCC No. F012906, Claim No. F012906 (Full Commission Opinion filed February 8, 2005)(motion to dismiss can be made under § 11-9-702 or Rule 13, both of which require "lack of prosecution"; but Commission "reluctant" to apply Ark. R. Civ. P. 41 to allow non-suit of claim). Death of a claimant, in and of itself, is not a basis for dismissal of a workers' compensation claim under the law. Respondents No. 1, in contending that dismissal is warranted here because no legal basis exists for awarding benefits, is essentially asking for a summary judgment. But it is well established that summary judgments do not apply to workers' compensation cases. *See, e.g., Tracor/MBA v. Flowers*, 41 Ark. App. 186, 850 S.W.2d 30 (1993).

In their post-hearing briefs, counsels have addressed the legal significance of Claimant's death, and its impact on the entitlement of his estate to certain benefits. Those arguments should be reserved for a hearing on the merits.

Claimant has also argued for dismissal under AWCC R. 099.13. Rule 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)(discussing these provisions). I find that reasonable notice of the motion to dismiss and of the May 14, 2008 hearing thereon was provided to all parties.

In support of its assertion that Claimant has not prosecuted his claim, Respondents No. 1 contended that it propounded interrogatories and requests for production of documents to Claimant in July 2007, but they remain unanswered. Counsel at the hearing admitted that no motion to compel discovery has been filed. Claimant's counsel responded that she cannot respond until the adjustor has been deposed. But Respondents No. 1 have refused to make the adjustor available for deposition until the discovery responses have been provided. The two, to quote counsel for Respondents No. 1, have been "at loggerheads."

As the parties are aware, authority exists for the dismissal—*with prejudice*—of a claim due to the claimant's failure to comply with discovery after being directed to do so. *See Loosey v. Osmose Wood Preserving Co.*, 23 Ark. App. 137, 744 S.W.2d 402 (1988). But no motion to compel has been filed. Moreover, it appears that the blame for the discovery problems lies equally on both the Claimant and Respondents No. 1. Because of that, and because the Full Commission's remand has not yet been addressed, dismissal under Rule 13 is not warranted at this time.

However, it is inexcusable that this claim has not proceeded. It will proceed now. I have sent a letter to counsel contemporaneously with this opinion instructing how this will occur.

IV. CONCLUSION

Respondents No. 1 have not proven that Claimant has failed to prosecute his claim. Therefore, the motion to dismiss is hereby denied.

IT IS SO ORDERED.

O. MILTON FINE II
Administrative Law Judge