

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F703691

STACY GENTRY, EMPLOYEE	CLAIMANT
ARKANSAS OIL FIELD SERVICES, INC., EMPLOYER	RESPONDENT
COMMERCE & INDUSTRY INSURANCE COMPANY, C/O AIG CLAIMS SERVICE, CARRIER/TPA	RESPONDENT

OPINION FILED MAY 27, 2008

Hearing before Administrative Law Judge O. Milton Fine II on May 21, 2008 in Conway, Faulkner County, Arkansas.

Claimant represented by Mr. Steven McNeely, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Ms. Melissa Wood, Attorney at Law, Little Rock, Arkansas.

I. BACKGROUND

This matter comes before the Commission on Respondents' motion to dismiss. The record consists of the following: Commission Exhibit 1, the March 31, 2008 prehearing order; Claimant's Exhibit 1, a one-page letter from a paralegal for Respondents' counsel setting Claimant's deposition for April 14, 2008 at 2:00 p.m.; Claimant's Exhibit 2, a two-page document consisting of the subpoena for Claimant's witness Jim Haines and the enclosure letter; and Claimant's Exhibit 3, a two-page document consisting of the subpoena for Claimant's witness Andy Haines and the enclosure letter. Also, the enclosure letter accompanying the prehearing order sent by the Commission to Claimant by first class mail on March 31, 2008 has been blue-backed to the record.

This matter was set for hearing on the merits of the claim for May 21, 2008, at 9:00 a.m. at the Faulkner County Courthouse in Conway, Arkansas. The following issues were to have been litigated:

1. Whether Claimant sustained a compensable injury.
2. Whether Claimant's injury was substantially occasioned by his use of drugs or alcohol.
3. Whether Claimant is entitled to temporary total disability benefits from April 8, 2007 to November 1, 2007.
4. Whether Claimant is entitled to temporary partial disability benefits from November 1, 2007 to a date yet to be determined.
5. Whether Claimant is entitled to payment of medical expenses, including surgery performed by Dr. McCarron.
6. Whether Claimant is entitled to payment of out-of-pocket expenses.
7. Whether Claimant is entitled to a controverted attorney's fee.

Claimant was to testify. However, at the appointed time for the hearing, he did not appear. I opened the record to make note of his failure to appear and to hear from counsel. Claimant's counsel stated that despite the fact that the prehearing order and the subpoena setting the hearing time for 9:00 a.m., his client mistakenly thought it was 2:00 p.m. Counsel could not explain why the misunderstanding occurred, but surmised that it was because his deposition had occurred a few weeks earlier at that particular time (which Claimant's Exhibit 1 reflects). Claimant informed his counsel by phone that he could not make it for the hearing. Counsel also stated that his two other witnesses, Jim and Andy Haines, were also not

present. He did not know why they did not appear. Claimant's Exhibits 2 and 3 reflect that counsel informed them of the correct time and location of the hearing.

Claimant's counsel requested a continuance. Respondents' counsel objected, noting that they were ready to proceed, and moved for a dismissal of the claim pursuant to A.W.C.C. R. 099.13. Counsel also asked that Respondents be awarded attorney's fees and costs.

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 his claim.
3. Claimant was provided reasonable notice of the May 21, 2008 hearing, at which the motion to dismiss was heard.
4. Dismissal of this claim *without prejudice* is warranted under AWCC R. 099.13.
5. Respondents' motion for attorney's fees and costs is denied.

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, *inter alia*, Rule 13).

As shown by the evidence, Claimant without good cause failed to appear at the merits hearing on this claim, where he was to have testified. He received reasonable notice of this hearing both from the Commission and from his attorney. He was unready, without justification, to litigate his claim. The evidence thus shows that Claimant has failed to prosecute his claim, and that reasonable notice of the proceeding was 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, this claim should be and is hereby dismissed *without prejudice*.

As for Respondents' motion for attorney's fees and costs for preparing for the hearing, it is hereby denied.

IT IS SO ORDERED.

O. MILTON FINE II
Administrative Law Judge