

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F606148

**WILLENE GILBERT, WIDOW OF
MORRIS GILBERT (DEC'D), EMPLOYEE**

CLAIMANT

BEN E. KEITH CO., INC., EMPLOYER

RESPONDENT

**OLD REPUBLIC INSURANCE CO.,
CARRIER/TPA**

RESPONDENT1

OPINION AND ORDER FILED JUNE 5, 2008

Hearing before Chief Administrative Law Judge David Greenbaum on June 2, 2008 in Little Rock, Pulaski County, Arkansas.

Claimant represented by Honorable Bennie O'Neil, Attorney at Law, North Little Rock, Arkansas.

Respondents represented by Honorable Walter A. Murray, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted on June 2, 2008 to determine whether this claim should be dismissed for want of prosecution pursuant to Ark. Code Ann. § 11-9-702 and Commission Rule 099.13.

This claim concerns an accident resulting in the death of Morris Gilbert on May 25, 2006. Respondents have controverted the claim in its entirety. Based upon its investigation, respondents deny compensability due to a 0.05 blood alcohol test maintaining that the decedent's death was substantially occasioned by the use of alcohol. Although respondents have at all times denied the claim based upon an intoxication defense, at the June 2, 2008 hearing, respondents further asserted that

even if compensability was overcome, the widow, and claimant herein, was not wholly and actually dependent upon the decedent at the time of his death.

A procedural history of the claim is warranted. A Commission Form AR-C was filed on June 19, 2006 by the claimant, requesting dependency death benefits. Respondents had previously filed a Commission Form AR-2, the Employer's Intent to Accept or Controvert the Claim, without taking a position pending receipt of a medical report and final police report. Respondents filed a supplemental Form AR-2 on June 27, 2006 controverting the claim based upon the blood alcohol test. No further action was taken by either party until respondents filed a Motion to Dismiss For Want of Prosecution on November 6, 2007. The claim was assigned for adjudication on November 7, 2007. The claimant was granted twenty (20) days to respond to the Motion to Dismiss. Contemporaneous with the assignment of the claim on the motion, the claimant, by and through her attorney, filed a response to the Motion to Dismiss For Want of Prosecution, objecting to the dismissal. The claimant stated that she was in the process of attempting to locate a toxicologist to testify concerning the impact, if any, of any alcohol in the decedent's blood at the time of death. Claimant pointed out that locating an expert witness required time and expense and requested six months to one year to develop the evidence, if any, that would assist the claimant in prevailing in this death claim. Accordingly, an Order was filed November 13, 2007 denying respondents' Motion to Dismiss.

On November 21, 2007, the claim was reassigned, apparently in error, based upon receipt of a November 12, 2007 letter received by the Clerk of the Commission on November 15, 2007 requesting that a hearing be scheduled six

months from the hearing request to see if the claimant could meet her burden of proof in this claim. Prehearing questionnaires were sent to both parties on November 21, 2007, as well as preliminary notices inquiring whether the parties would agree to voluntary mediation, which both parties declined. The claim was returned to the Commission's general files on December 17, 2007. After the claim was returned to general files, respondents filed responses to the questionnaire, contending that the decedent's accident was caused by alcohol consumption. At that point, apparently the claimant's deposition had already been taken. However, no allegation concerning the issue of dependency was raised prior to the within hearing. No further action was taken by the claimant. By motion dated May 6, 2008 and filed May 9, 2008, respondents moved that the claim be dismissed for want of prosecution. The claim was then reassigned to this Administrative Law Judge. A Notice of Hearing was sent May 15, 2008, scheduling the claim for a hearing on the pending motion.

Both the claimant and her attorney appeared at the June 2, 2008 hearing. The claimant asserted that to date she had been unable to obtain the funds necessary to hire an expert witness in an effort to rebut the presumption created by the Act. The claimant respectfully asked for additional time before scheduling a hearing on the merits. Respondents graciously agreed to allow the claimant additional time to secure her own expert witness. Alternatively, the claimant will be required to either go forward with a hearing on the merits based upon cross examination of respondents' witnesses or the claim may be dismissed for want of prosecution.

In view of the foregoing, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The decedent, Morris Gilbert, was involved in a fatal motor vehicle accident on May 25, 2006.
3. Respondents have controverted compensability of this claim in its entirety.
4. Respondents have controverted the dependency of the widow, maintaining that she was not wholly and actually dependant upon the decedent.

DISCUSSION

Rather than conduct a further analysis of the record in this cause, suffice it to say that to date the claimant has failed and/or refused to prosecute her claim. A hearing was scheduled at respondents' request pursuant to the decision in *Dillard v. Benton County Sheriff's Office*, 87 Ark. App. 379, ____ S.W.3d ____ (2004). During the hearing, respondents agreed to give the claimant additional time to develop the expert testimony.

The following is to be completed prior to a hearing:

- A The claimant is granted additional time to fully develop the medical evidence. Claimant has ninety (90) days to obtain an "expert report." Respondents' motion is held in abeyance pending further development of the evidence.
- B The claimant is to file a comprehensive set of responses to the prehearing questionnaire addressing both the compensability issue as well as the

- dependency issue. Respondents are to file supplemental responses addressing the dependency issue.
- C All issues, including but not limited to, respondents' motion to dismiss are specifically reserved pending further proceedings.

ORDER

After full consideration of the facts, issues, and the law, and with notice of the hearing having been received by all parties, it is hereby determined that respondent's motion should, and it is, hereby denied. All issues relevant to this claim have been specifically reserved and will be revisited at a prehearing conference to be scheduled by agreement of the parties in either September or October, 2008.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge