

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F605888

LEO HOWELL, EMPLOYEE

CLAIMANT

**CONTINENTAL EXPRESS, INC.,
EMPLOYER**

RESPONDENT NO. 1

**GIBRALTAR NATIONAL INS. CO.,
INSURANCE CARRIER/TPA**

RESPONDENT NO. 1

SECOND INJURY FUND

RESPONDENT NO. 2

OPINION FILED APRIL 22, 2008

Hearing conducted before Administrative Law Judge S. Dale Douthit on April 3, 2008, in Little Rock, Pulaski County, Arkansas.

The claimant and his attorney, Mr. H. Oscar Hirby, both failed to appear.

Respondent No. 1 was represented by Mr. Jarrod Parrish, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 was represented by Mr. David Pake, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine whether or not this claim should be dismissed for failure to prosecute pursuant to Dillard v. Benton County Sheriff's Office, 87 Ark. App. 379, 192 S.W.3d 287 (2004).

After review of the Commission's file, the full hearing, and a review of the hearing record, I find the motion should be granted.

STATEMENT OF THE CASE

The claimant initially filed a request for a hearing on July 18, 2006, with the Commission. Respondents filed a motion to dismiss for failure to prosecute on December 18, 2006. By letter dated January 5, 2007, claimant's attorney filed a response advising he was now attorney of record for the claimant and that discovery was ongoing. Therefore, respondents' motion to dismiss was denied and the claim was returned to general files. By letter dated April 26, 2007, claimant's counsel requested a hearing and a prehearing conference was held on July 12, 2007. A hearing was set for September 13, 2007, to determine compensability; however, prior to the September 13, 2007, scheduled hearing claimant's attorney requested a continuance and the hearing was rescheduled for October 10, 2007. By letter dated September 24, 2007, respondents' counsel requested a continuance. With no objection from the claimant, the October 10, 2007, hearing was taken off the Commission's docket and rescheduled for November 6, 2007. On October 30, 2007, claimant's attorney requested another continuance and, over the respondents' objection, was granted in order to allow claimant's counsel the opportunity to gather necessary medical records.

Respondent then filed a motion to dismiss for failure to prosecute on

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January 16, 2008, with a certificate of service to claimant's counsel. Claimant's counsel never responded to the motion to dismiss in writing. This administrative law judge sent the claimant a copy of respondents' motion to dismiss with a cover letter advising claimant to file a response within ten days. (R. Ex. 1). Still, with no response from the claimant, a hearing was set for April 3, 2008, at 10:15 a.m. and a notice of said hearing was sent to the claimant's counsel by certified mail. Respondent No. 2 advised by letter dated February 12, 2008, that they had no objection to Respondent No. 1's motion to dismiss and waived their appearance at the April 3, 2008, hearing. Proof of claimant's counsel's receipt of the certified notice of hearing was introduced into the hearing record on April 3, 2008 (Com. Ex. 1) and shows claimant's counsel received the certified notice on February 12, 2008. Both claimant's counsel and the claimant failed to appear at the scheduled hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A review of the evidence shows that claimant has had ample opportunity to pursue his case but he has failed to respond to written notices and failed to appear at the scheduled hearing.

There are two provisions for dismissal of claims:

A.C.A. § 11-9-702(a)(4):

If within six (6) months after the filing of a claim for compensation, no bona fide request for a hearing has been made with respect to the claim,

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the claim may, upon motion and after hearing, be dismissed without prejudice to the refiling of the claim within limitation periods specified in subdivisions (a)(1)-(3) of this section.

Rule 13:

The Commission may, in its discretion, postpone or recess hearings at the instance of either party or on its own motion. No case set for hearing shall be postponed except by approval of the Commission or Administrative Law Judge.

In the event neither party appears at the initial hearing, the case may be dismissed by the Commission or Administrative Law Judge, and such dismissal order will become final unless an appeal is timely taken therefrom or a proper motion to reopen is filed with the Commission within thirty (30) days from receipt of the order.

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. (Effective March 1, 1982)

After review, I make the following findings of fact:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The claimant has failed to prosecute his claim.
- 3) The claimant failed to appear at the initial hearing pursuant to Rule 13.

At the request of the respondents and after a full hearing, this case is hereby dismissed without prejudice for failure to prosecute pursuant to A.C.A. § 11-9-702 and Rule 99.13 of the Arkansas Workers' Compensation Commission.

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IT IS SO ORDERED.

S. DALE DOUTHIT
Administrative Law Judge

SDD/pjb