

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F703821

HELEN MARTZ-LESTER, EMPLOYEE	CLAIMANT
PINE LANE HEALTHCARE, EMPLOYER	RESPONDENT
WAUSAU INSURANCE COMPANIES	RESPONDENT

OPINION FILED APRIL 4, 2008

Hearing before Administrative Law Judge O. Milton Fine II on April 2, 2008 in Mountain Home, Baxter County, Arkansas.

Claimant, *pro se*, did not appear.

Respondent represented by Mr. James Arnold II, 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 April 2, 2008, in Conway, Arkansas. The Claimant, who is *pro se*, did not appear. The hearing did not get underway until after the scheduled time for it to begin had passed. Respondents were represented at the hearing by Mr. James Arnold II, Attorney at Law, of Fort Smith, Arkansas. No testimony was taken in the case. The record consists of 23 pages of documents from the Commission file, which I have blue-backed to the record, that detail the history of the case.

The instant claim concerns an alleged on-the-job injury that occurred on January 16, 2007, when according to Claimant, she contracted Methicillin-resistant Staphylococcus Aureus ("MRSA") on her left cheek from taking care of residents at Respondent Pine Lane. She filed a Form AR-C on April 17, 2007. On May 1, 2007,

Respondents notified the Commission of their intent to controvert the claim as not being work related. Claimant on May 7, 2007 requested a hearing on her claim. On May 31, 2007, I sent prehearing questionnaires to the parties and notified Claimant of her right to be represented by an attorney. She returned a completed questionnaire on June 14, 2007. Respondents filed their response on June 25, 2007. A prehearing conference was scheduled for August 27, 2007 at 11:00 a.m.

During that conference, Claimant informed me that she had retained David Ethredge to represent her. Respondents' counsel stated that when he deposed Claimant, Mr. Ethredge informed him that he might not continue to represent her. I terminated the conference and notified Mr. Ethredge that he had ten days to enter an appearance before the Commission. However, he did not respond. On September 11, 2007, Mr. Ethredge was contacted and stated that he no longer represented Claimant. I wrote Claimant to inform her of this and to give her 15 days to indicate whether she had obtained a new attorney or wished to proceed *pro se*. I instructed her that I would interpret a failure to respond in a timely fashion as a withdrawal of her hearing request. Because no response was forthcoming, on October 1, 2007, I notified Claimant that I was returning her file the Commission's general files.

On March 3, 2008, Respondents filed the instant motion, contending that this claim should be dismissed under AWCC R. 099.13 because over six months had elapsed without Claimant taking any action in pursuit of her claim. On March 6, 2008, I wrote Claimant that she had 15 days to respond to the motion. The return receipt shows that a "Earlene Monk" signed for the certified letter. Moreover, the

version of the letter that was sent by first-class mail was not returned to the Commission. Again, Claimant did not respond. The notice of the April 2, 2008 hearing was sent to the parties by certified and first-class mail on March 24, 2008. Again, "Earlene Monk" signed for the certified letter, and the one sent by first-class mail was not returned. As noted above, the hearing proceeded as scheduled without Claimant appearing. There, Respondents asked that the claim be dismissed without prejudice pursuant to Rule 13.

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 her claim.
3. Claimant and Respondents were provided reasonable notice of the motion to dismiss and of the hearing thereon.
4. Dismissal of the claim *without prejudice* is warranted under AWCC R. 099.13.

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 this provision). I find that, based upon the foregoing evidence, all parties were provided reasonable notice of the motion to dismiss and the hearing thereon.

Claimant has taken no action in pursuit of her claim since the prehearing conference of August 27, 2007. In fact, she has refused to respond to the Commission since then despite multiple attempts to communicate with her. Hence, Respondents' motion is well-founded, and dismissal of the instant claim is warranted 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 *Loosey*, the Arkansas Court of Appeals held that pursuant to AWCC R. 099.16, because the claim had been controverted before discovery was initiated, and because Ark. R. Civ. P. 37(b) provides that sanctions, up to and including dismissal of an action, is authorized for violation of discovery orders, dismissal of a workers' compensation claim *with prejudice* for failure to respond to interrogatories after being directed to do so by an administrative law judge was authorized. On the other hand, 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." (citing *Professional Adjustment Bureau v. Strong*, 75 Ark. 249, 629 S.W.2d 284 (1982)). In light of the foregoing, Respondents have correctly requested that the dismissal be without prejudice. This claim is thus dismissed *without prejudice*.

IT IS SO ORDERED.

O. MILTON FINE II
Administrative Law Judge