

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F613749

LARRY MCDONALD, EMPLOYEE

CLAIMANT

BEMIS COMPANY, INC., EMPLOYER

RESPONDENT NO. 1

**FIDELITY & GUARANTY INSURANCE COMPANY/
SEDGWICK CLAIMS MANAGEMENT SERVICES (TPA),
INSURANCE CARRIER**

RESPONDENT NO. 1

SECOND INJURY FUND

RESPONDENT NO. 2

OPINION AND ORDER OF DISMISSAL FILED APRIL 1, 2008

This matter comes before the Commission on the respondents' Motion to Dismiss. Claimant has failed to respond to the Motion and failed to appear at the hearing held on February 21, 2008.

PROCEDURAL HISTORY

The claimant sustained a compensable injury on November 3, 2006, and respondents paid benefits. By letter dated November 19, 2007, respondents notified the Special Funds Administrator of possible Second Injury Fund liability in this claim, with a copy being sent to the claimant, Larry McDonald. By letter dated December 6, 2007, the Fund acknowledged that it had been joined as a party in this claim. On December 13, 2007, the Fund received a handwritten letter from the claimant stating:

To whom it may concern: I, Larry McDonald, hereby wish to no longer pursue this Second Injury Fund any farther. I do relinquish all rights to money due me. Receiving any monies from workmans compensation will only hinder my Social Security benefits. On advice from a lawyer, Social Security will take all or most of any monies that I receive from workmans compensation.

Dec. 10, 2007
Larry McDonald

Based on this handwritten letter, the Fund requested, by letter dated December 17, 2007, that an order of dismissal with prejudice be entered on the claim. The parties were notified of the Fund's request by letter dated December 20, 2007, from this Administrative Law Judge. The claimant was given twenty (20) days to respond to the request for dismissal. The claimant was warned therein that failure to respond may result in a dismissal of his claim. No response thereto has been received from the claimant. By letter dated December 21, 2007, respondents No. 1 notified the Commission that they agree with dismissal of this claim only upon the condition that dismissal is "with prejudice." On November 19, 2007, respondents No. 1 propounded written discovery to the claimant. No responses were received as of the date of the hearing.

A Notice of Hearing on respondents' Motion to Dismiss was sent to the parties via certified mail and first-class mail on January 23, 2008, scheduling the matter for hearing on February 21, 2008. The Notice provided that "Failure to appear will result in dismissal of this claim." The Notice was received by the claimant as evidenced by the certified mail return receipt signed by the claimant dated January 25, 2008. The claimant failed to appear at the hearing scheduled on February 21, 2008. The claimant has filed no request for hearing within the last six (6) months.

DISCUSSION

Commission Rule 13 provides in relevant part as follows:

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.

In the instant case, the respondents seek a dismissal with prejudice for claimant's failure to prosecute his claim. Based on the substantial weight of the evidence, I find that claimant has failed to respond to discovery and prosecute his claim. Loosey v. Osmose Wood, 23 Ark. App. 137, 744 S.W.2d 402 (1988); Johnson v. Triple T Foods, 55 Ark. App. 83, 929 S.W.2d 730 (1996). I further find that claimant has had sufficient notice of these proceedings and opportunity to be heard but has failed to respond, appear, or otherwise be heard. A.C.A. §11-9-707.

Because the respondents have requested that this claim be dismissed, and because the claimant has failed to timely prosecute this claim, I find that pursuant to Commission Rule 13 and Ark. Code Ann. § 11-9-702(a)(4) and other appropriate authority, this claim should be, and hereby is, dismissed with prejudice.

IT IS SO ORDERED.

BARBARA WEBB
Administrative Law Judge