

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E303340

CAROL B. MELBOURNE, EMPLOYEE

CLAIMANT

MARION COUNTY NURSING HOME,
EMPLOYER, UNINSURED

RESPONDENT

OPINION FILED JANUARY 18, 2008

Hearing before ADMINISTRATIVE LAW JUDGE CHANDRA HICKS, on January 16, 2008, in Mountain Home, Baxter County, Arkansas.

Claimant represented by THE HONORABLE FREDERICK S. "RICK," SPENCER, Attorney at Law, MOUNTAIN HOME, Arkansas.

Respondent represented by THE HONORABLE MICHAEL E. KELLY, Attorney at Law, Yellville, Arkansas.

STATEMENT OF THE CASE

A hearing was held on January 16, 2008, to determine whether the above-referenced matter 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).

The record consists of the transcript of the January 16, 2008 hearing. The Commission's file along with a copy of an affidavit of Mr. Bill Dearmore's, dated May 10, 1995, were all made a Commission's Exhibit, as these have been blue-backed and are hereby incorporated only by reference in the hearing transcript.

The following witness testified at the hearing: Ms. Shirley Luna, a representative from the claimant's attorney's office.

DISCUSSION

The claimant filed an A-7 Form alleging a specific incident injury to her spine while working for the respondent on January 18, 1993, after lifting a patient.

On October 19, 2007, the respondent's attorney filed a Motion to Dismiss with the Commission for lack of prosecution, with a certificate of service to the claimant's attorney.

In support of its Motion to Dismiss, the respondent stated in pertinent part, the following:

1. That this involves a claim filed March 8, 1993.
2. That the respondent filed Affidavits asserting the defense of Marion County Hospital Association v. Mary Lamphier, 15 Ark. App. 14, 688 S.W. 2d 322, (1985), which concluded that the respondent was exempt from coverage of the Workers' Compensation rules.
3. That the attorney for the claimant and the attorney for the respondent agreed that the case would be held in abeyance pending a final resolution of a similar case in Barnes v. Marion County Nursing Home, WCC# E219108 and E219109.
4. That as noted in his letter of May 28, 1997, to Administrative Law Judge Linda K. Marshall, the Barnes v. Marion Hospital Association case was dismissed.
5. That there has been no subjective action taken on this case since 1997, and pursuant to the Marion County Association v. Mary Lamphier case, the same should be dismissed.

6. That further, the case should be dismissed for failure to prosecute the same.

7. That the Administrative Law Judge, Linda K. Marshall, indicated that the Barnes v. Marion County Nursing Home decision would be precedential, as would be more evident from a copy of the letter attached marked Exhibit "A".

A second notice was sent by the Commission on November 6, 2007, to the claimant's attorney advising of the pending Motion and of a deadline for filing a response to this Notice. To date, there has been no reply to this Notice from the claimant's attorney.

On January 2, 2008, the Commission mailed a hearing notice to the claimant and her attorney, advising them of a hearing on the respondent's Motion to Dismiss.

On January 16, 2008, a hearing was in fact held on the respondent's Motion to Dismiss. The respondent appeared at the hearing through its attorney. The claimant and her attorney both failed to appear at said hearing. However, a representative from the claimant's attorney's office appeared at the hearing and gave testimony concerning the inability of her office to locate the claimant. She specifically testified that the last contact the claimant had with her office was in 1996. Ms. Luna further testified that according to her records, the last activity on the claim occurred in 2002.

A review of the evidence shows the claimant has had ample

opportunity to pursue this case but has failed to respond to written notices and failed to appear at the scheduled hearing.

Therefore, after consideration of the evidence presented, I find the respondent's Motion to be well taken. Pursuant to the provisions of Ark. Code Ann. § 11-9-702 and Commission's Rule 099.13, this claim for initial benefits should be dismissed without prejudice to the refiling within the applicable time period.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The claimant has had ample opportunity to pursue this case but no action has been taken by the claimant in furtherance of her claim. The claimant has failed to respond to written notices and failed to appear at the scheduled hearing.
3. That the respondent's Motion to Dismiss should be granted without prejudice pursuant to Commission's Rule 099.13 and Ark. Code Ann. § 11-9-702.

ORDER

Based upon my foregoing Findings of Fact and Conclusions of Law, I have no alternative but to dismiss this claim in its entirety. As a result, this case is hereby dismissed without prejudice for failure to prosecute pursuant to Rule 099.13 and Ark. Code Ann. § 11-9-702 to the refiling within the applicable time period.

IT IS SO ORDERED.

CHANDRA HICKS
Administrative Law Judge