

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F612867 (10/27/06)

KIM DAVID MORGAN, EMPLOYEE

CLAIMANT

AMERICAN RAILCAR INDUSTRIES, EMPLOYER

RESPONDENT

ZURICH AMERICAN INS. CO., CARRIER

RESPONDENT

OPINION FILED JUNE 2, 2008

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on May 30, 2008, at Jonesboro, Craighead County, Arkansas.

Claimant pro se.

Respondents represented by the HONORABLE ERIC NEWKIRK, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was scheduled in the above style claim on the issues of compensability of the claimant's claim for workers' compensation benefits and respondents' Motion to Dismiss For Want of Prosecution. On April 8, 2008, a pre-hearing was conducted in this claim, from which a Pre-hearing Order of the same date was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties contentions relative to the afore. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1.

The claimant failed to appear at the scheduled hearing. Further, it was disclosed that the claimant had failed to appear and participate during a scheduled May 9, 2008, deposition. In

accordance with the April 8, 2008, Pre-hearing Order and Hearing Notice, the hearing preceded on the Motion to Dismiss filed by respondents. Comprising the record in this claim, in addition to the Pre-hearing Order, are respondents Motion to Dismiss, Brief in Support of the Motion, the May 9, 2008, Certificate of Non-appearance, the April 9, 2008, notice to the claimant scheduling the May 9, 2008, deposition, the May 22, 2008, motion of respondents to dismiss the claim with prejudice; and a mailing from the claimant which was received by the Arkansas Workers' Compensation Commission on May 21, 2008,

DISCUSSION

Kim Morgan, the claimant, with a date of birth of May 21, 1959, commenced his employment with respondent-employer on April 3, 2006, as a welder. On October 27, 2006, while within the course and scope of his employment claimant sustained an injury when a steel bar fell and hit him in the head. On or about February 7, 2007, respondent filed a Form AR-2 denying the compensability of the claimant's claim. In addition to denying that the claimant sustained an injury at work or that he loss any compensable time from work, respondents asserted that the claimant tested positive for cocaine after the alleged injury.

Following the failure of an attempt to set up a mediation conference, the file was assigned to adjudication for a hearing on the claimant's claim. On February 22, 2007, the parties were forwarded pre-hearing questionnaires and a March 20, 2007, pre-hearing conference was scheduled. Prior to the scheduled March 20, 2007, pre-hearing conference claimant request and was granted a continuance of the pre-hearing conference as he gathered additional documentation and sought the services of an attorney. The pre-hearing conference was rescheduled for April 10, 2007.

Both parties submitted responsive filings to the pre-hearing questionnaire prior to the March 20, 2007, scheduled pre-hearing conference. Further, respondents prepared Interrogatories and mailed same to the claimant along with a medical release authorization. As noted above, the March 20, 2007, pre-hearing conference was continued at the claimant's request and rescheduled for April 10, 2007. The April 10, 2007, pre-hearing conference was rescheduled, when during the course of same claimant relayed that he had consulted with an Blytheville, Arkansas attorney to represent him.

The April 10, 2007, pre-hearing conference was rescheduled for April 24, 2007. A April 23, 2007, correspondence reflects that by agreement of the parties the April 24, 2007, pre-hearing conference was rescheduled for May 1, 2007. As of the May 1, 2007, date claimant had not secured the services of an attorney. Nevertheless, the May 1, 2007, pre-hearing conference proceeded as scheduled resulting in a May 1, 2007, Pre-hearing Order and Hearing Notice with a July 13, 2007, Blytheville hearing setting on the issue of compensability.

In a June 18, 2007, correspondence the parties were notified that the scheduled July 13, 2007, had been canceled. On June 13, 2007, respondents' attorney, in visiting with the claimant regarding discovery concurred in the continuance of the scheduled hearing in light of the claimant's expressed desire to continue seeking the services of an attorney to represent him in his claim. The June 18, 2007, notice canceling the July 13, 2007, hearing noted the afore as well as the fact that respondents were holding their discovery in abeyance. Further, the June 18, 2007, notice scheduled a follow-up pre-hearing conference in the claim for July 17, 2007.

The July 17, 2007, pre-hearing conference allowed the claimant approximately sixty (60) days to either secure the services of an attorney or proceed with the prosecution of his claim pro

se. In addition to confirming the afore, the July 17, 2007, correspondence noted the status of discovery and scheduled a September 11, 2007, follow-up pre-hearing conference. The scheduled September 11, 2007, pre-hearing conference was not accomplished due to an inability to reach the claimant at a viable telephone number. The file was returned to the Commission's general files section.

On March 17, 2008, respondents filed a Motion to Dismiss along with a Brief in Support of the Motion and accompanying exhibits. Notice of the afore was mailed to the claimant by certified mail - return receipt requested, soliciting a response to the Motion no later than April 3, 2008, and scheduling a April 8, 2008, pre-hearing conference. The April 8, 2008, pre-hearing conference resulted in the entry of a April 8, 2008, Pre-hearing Order and Hearing Notice setting a May 30, 2008, Jonesboro, Arkansas hearing on the issues of compensability and the Motion to Dismiss. The time, date and location of the scheduled May 30, 2008, hearing were all identified during the April 8, 2008, pre-hearing conference.

Respondents notified the Commission and the claimant of the identity of its witnesses in an April 9, 2008, correspondence. On May 21, 2008, the claimant forwarded the April 9, 2008, correspondence of respondents' attorney to the Commission. (CX. #2). In an April 9, 2008, correspondence to a West Memphis, Arkansas court reporter, which was copied to the claimant, respondents' attorney confirmed that the claimant's deposition was scheduled for May 9, 2008, at 11:00 a.m., at the Mississippi County Judge's office, 200 W. Walnut Street, Blytheville, Arkansas. (RX. #4). On May 9, 2008, the claimant failed to appear for the scheduled deposition. (RX. #2).

In correspondence to the Commission of May 22, 2008, respondents' attorney noted that

the claimant failed to show for the May 9, 2008, Blytheville deposition, and that the claimant had failed to answer the Interrogatories previously propounded upon him. In light of the claimant's failure to comply with the discovery request respondents requested dismissal of the claim with prejudice. Respondents noted that the claimant had not submitted any medical evidence in accordance with the April 8, 2008, Pre-hearing Order and Hearing Notice. Respondents requested reimbursement for any and all expenses and/or fees attributable to the claimant's deposition, to the extent that the claimant pursued his claim.

At the designated time of the May 30, 2008, scheduled hearing in this claim the docked was sounded, and the claimant failed to appear. Respondents were present, along with the witnesses previously identified in the April 9, 2008, correspondence.

The evidence preponderates that the claimant has been afforded ample opportunity to prosecute his claim for workers' compensation benefits growing out of the October 27, 2006, accident. Claimant was admonished regarding the necessity of completing the answers to the Interrogatories and furnishing to the respondents a executed medical release authorization. In addition to failing to comply with the afore, the claimant failed to attend a scheduled May 9, 2008, deposition. Finally, the claimant failed to appear for the scheduled May 30, 2008, contested hearing on the compensability of his claim and the respondents' Motion to Dismiss.

The claimant had sufficient actual notice of the scheduled May 30, 2008, Jonesboro, Arkansas hearing in his claim. While the claimant submitted on May 21, 2008, a copy of the April 9, 2008, correspondence of respondents identifying witnesses, to the Commission, he has not offered an explanation of his failure to attend the May 9, 2008, scheduled deposition. While the record reflects that accommodations have been extended to the claimant to allow for pursuit

of the October 27, 2006, claim, claimant has taken minimal efforts beyond the initial claim filing and the responsive filing of the Questionnaire.

Rule 099.13 of the Commission provides, in pertinent part:

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.

While the claimant was aware, pursuant to the April 8, 2008, Pre-hearing Order and Hearing Notice that his claim for workers' compensation benefits stood in jeopardy of being dismissed for want of prosecution, it was not until the May 22, 2008, correspondence did respondents request that the dismissal be with prejudice. Thought the afore was received by the Commission via facsimile on May 22, 2008, the same was not within ten (10) days of the scheduled May 30, 2008, contested hearing. Even had the afore document been provided to the claimant in the same manner, it would not have satisfied the ten (10) notice provided in Ark. Code Ann. §11-9-704 (b)(4)(A). Accordingly, the Motion to Dismiss With Prejudice filed herein by respondents is respectfully denied. Respondents' Motion to Dismiss for Want of Prosecution Without Prejudice is herein granted pursuant to Rule 099.13 of the Commission.

IT IS SO ORDERED.

Andrew L. Blood, ADMINISTRATIVE LAW JUDGE