

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F400506

SMITH W. TOMPKINS, EMPLOYEE	CLAIMANT
COMQUEST, INC., EMPLOYER	RESPONDENT
COMMERCE & INDUSTRY INSURANCE COMPANY, INSURANCE CARRIER/TPA	RESPONDENT

OPINION AND ORDER FILED JULY 3, 2008

Hearing before Chief Administrative Law Judge David Greenbaum on June 26, 2008, at Little Rock, Pulaski County, Arkansas.

Claimant appearing, *pro se*.

Respondent represented by Ms. Melissa Wood, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted June 26, 2008, to consider respondent's Motion to Dismiss for want of prosecution.

The claim concerns an accident and injury occurring on December 5, 2003. The claim has been the subject of a prior hearing and has an extremely lengthy and unusual procedural history.

A previous hearing was conducted in this claim on February 23, 2005, before another Administrative Law Judge. The primary issue concerned compensability of a December 5, 2003, work-related incident. At the time of the hearing, the claimant was represented by an attorney. An Opinion and Order was filed by the Administrative Law Judge on April 5, 2005, at which time the following findings of fact and conclusions of law were entered:

**FINDINGS OF FACT
AND
CONCLUSIONS OF LAW**

1. There was a December 5, 2003, employer-employee relationship.
2. The compensation rate will be the maximum for a 2003 injury.
3. The claimant has proven by a preponderance of the evidence that he sustained a compensable right ankle injury arising out of his employment on December 5, 2003.
4. The respondents are responsible for all reasonable and necessary medical the claimant has pursued for treatment of the ankle injury.
5. The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable neck and back injury on December 5, 2003.
6. The claimant proved by a preponderance of the evidence that he sustained a temporary aggravation of his preexisting right shoulder condition and is entitled to medical benefits from April 5, 2004 through September 17, 2004.
7. The claimant has proven by a preponderance of the evidence that he remained in his healing period and did not return to work because of his compensable ankle injury from December 6, 2003 through December 19, 2003.
8. The claimant has failed to prove by a preponderance of the evidence that he remained in his healing period and totally unable to work because of his shoulder condition from December 6, 2003, through a date to be determined.

The claimant filed an appeal of the Administrative Law Judge decision. By Opinion filed January 30, 2006, the Full Commission affirmed in part, and reversed in part the decision of the Administrative Law Judge. Following a *de novo* review, the Full Commission found that the claimant established that the treatment received after September 17, 2004, specifically including the claimant's shoulder surgery was for treatment of injuries sustained in the compensable, December 5, 2003, injury.

Accordingly, the Commission found respondents obligated to provide the claimant with appropriate medical and disability benefits for a shoulder injury. The Administrative Law Judge decision was reversed as to the claimant's shoulder injury and associated benefits while affirming the remaining findings. The Commission found that the claimant was entitled to receive temporary total disability benefits beginning December 5, 2003, through a date yet to be determined.

Respondents then filed an appeal of the Full Commission opinion to the Arkansas Court of Appeals. In a mandate filed November 28, 2006, the Court of Appeals affirmed the decision of the Full Workers' Compensation Commission. Accordingly, the Full Commission Opinion is now a final decision and the law of the case.

A procedural history following the Court of Appeals' decision is warranted. On January 11, 2007, claimant's attorney filed a motion to withdraw. By letter dated January 19, 2007, the claimant requested a hearing for additional benefits. In said letter, the claimant advised that he no longer needed the services of his former attorney. In addition, the claimant requested assistance from the Commission's Legal Advisor Division. Finally, the claimant specifically requested a late payment penalty of the prior Award. On February 1, 2007, the Full Commission entered an Order permitting claimant's attorney to withdraw. Apparently, because the claimant was acting *pro se*, the claim was then assigned to the Legal Advisor Division pursuant to the claimant's request for a hearing without any tangible result. No

further action was taken until the claim was reassigned to the Adjudication Division on August 17, 2007. However, I feel compelled to point out that respondents filed a Commission Form AR-4 on June 21, 2007, which reflected it paid forty-seven (47) weeks of temporary total disability in the amount of \$17,325.00. The Commission file reflects that the AR-4 was not accepted. Specifically, in a letter dated July 3, 2007, to the claims representative, the Office Services Division of the Commission advised that the data in the "Disability Information" section did not match the AR-4 statement. Respondents were granted thirty (30) days to submit corrected information in order to properly process the claim, which, to date, has apparently never been submitted.

On August 17, 2007, the claim was reassigned to the Administrative Law Judge that originally heard the claim. The claim was then, in turn, assigned to the Legal Advisor Division for possible mediation. Following failed attempt at either a legal advisor conference and/or mediation conference, the claim was again reassigned to the Administrative Law Judge on September 11, 2007. The Administrative Law Judge encouraged the claimant to seek the services of an attorney. On October 26, 2007, the Administrative Law Judge returned the claim to the Commission's general files because of the claimant's apparent failure to respond to prior correspondence. On November 1, 2007, respondents filed a Motion to Dismiss with the Administrative Law Judge who, in turn, properly forwarded the Motion to the Commission's Clerk which was filed on November 5,

2007. The claim was again reassigned to the Administrative Law Judge on November 7, 2007, at which time prehearing questionnaires were sent to both parties. Neither party responded to the prehearing questionnaire which prompted the Administrative Law Judge to issue an Order filed December 5, 2007, admonishing the claimant that his claim might be dismissed for failure to submit prehearing information filings, and further admonishing respondents that failure to submit prehearing information filings might preclude its offering additional evidence or asserting certain defenses. Respondents submitted prehearing information filings on December 12, 2007. Respondents identified numerous issues, including claimant's request for additional medical treatment, additional temporary total disability, change of physician, as well as the penalty previously requested by the claimant. Again, claimant failed to submit prehearing information filings. On January 11, 2008, the Administrative Law Judge scheduled a hearing for February 6, 2008, on respondents' Motion to Dismiss. Although it is not clearly documented, the hearing scheduled for February 6, 2008, was cancelled as reflected by a March 20, 2008, letter from respondents to the Administrative Law Judge, as well as a series of electronic messages. The claim was ultimately returned to the Commission's general files on May 27, 2008. On May 29, 2008, respondents filed a renewed Motion to dismiss the claim for want of prosecution. On June 4, 2008, a hearing was scheduled for June 26, 2008. The subject of the hearing was respondents' Motion to Dismiss.

The claimant appeared at the June 26, 2008, hearing and objected to the dismissal of his claim. When questioned concerning his failure and/or refusal to respond to prior requests from the Administrative Law Judge, the claimant maintained that he did not receive the prior notices. The claimant asserted that he had been underpaid and did not receive the benefits previously awarded. Claimant further maintained that he had incurred out-of-pocket medical and travel expenses. Respondents contended that additional medicals and travel expenses had never been submitted for payment. Respondents indicated that it was unaware of the communication from the Full Commission to the claims adjustor concerning possible errors in the Commission Form AR-4. Respondents requested that the claimant be assessed costs which may be joined as an issue at future proceedings. Respondents also requested that the claim be scheduled for an immediate prehearing conference to narrow the issues and schedule the claim for a formal hearing.

Based upon the foregoing, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The Full Commission decision filed January 30, 2006, and affirmed by the Arkansas Court of Appeals, mandate issued November 26, 2006, is now a final decision and the law of the case.

3. The claimant has filed a timely request for additional benefits.
4. Respondents' Motion to Dismiss for want of prosecution should be, and it is, hereby denied.
5. At the request of both parties, an immediate prehearing conference should be scheduled in order to narrow the issues, obtain the contentions of the respective parties, and schedule the claim for a formal hearing.

DISCUSSION

A hearing was scheduled in this claim on June 26, 2008, to determine whether this claim should be dismissed for want of prosecution pursuant to *Dillard v. Benton County Sheriff's Office*, 87 Ark. App. 379, ___ S.W.3d. ___ (2004). After full consideration of the facts, issues, and the law, together with a review of the record, the Commission's file, and all other matters properly before the Commission, together with the claimant's objection thereto, I find that respondents' Motion to Dismiss should be, and it is, hereby denied.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge